N. K. Bapna

Vs

Union of India and Others

Special Leave Petition (Civil) No. 5781 of 1992

(Yogeshwar Dayal, S. Ranganathan, V. Ramaswami-II JJ)

14.05.1992

JUDGMENT

S. RANGANATHAN, J. –

1. The petitioner is the managing director of M/s. E.A.P. Industries Ltd., engaged in the business of manufacture and production of plastic compounds, plastic films and sheets and plastic chemicals. The petitioner says that it came to his knowledge that an order has been passed on 1st January, 1992, directing his detention under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'the Act') - with a view to preventing him from abetting the smuggling of goods. A copy, purporting to be a copy of the said order, has been placed on record, though it is not quite clear how the petitioner came by it. Thereupon, he filed a writ petition in the Calcutta High Court for an injunction restraining the concerned authorities from detaining him in pursuance of the above order. This writ petition as well as an appeal therefrom have been dismissed; hence the present special leave petition.

2. According to the petitioner, the detention order has been issued in consequence of certain proceedings which had been initiated against him by the customs officials. He says that the company imported 267.782 metric tons of Ethyle Hexanol (EHA). This consignment was unloaded at Kandla Port and 24 tankers thereof were transported to bounded warehouses after assessment to duty in October-November, 1989. Out of the chemicals thus kept in the bounded warehouse, the company cleared 175 metric tons between December, 1989, and October, 1990, on payment of duty. The company also imported 204 M.T. of P.V.C. resin from France on May 2, 1990. This consignment was unloaded at Calcutta port and was cleared for bonded warehousing. Out of this, 75 metric tons of P.V.C. resin were cleared by the company after payment of duty on September 7, 1990, September 17, 1990, and November 8, 1990, under the supervision of the customs officials. According to the petitioner, the warehouses were kept under lock and key and the key was in the custody of the Customs officials.

3. Sometime in September, 1991, the Customs officials discovered a shortage of 93.975 metric tons of P.V.C. resin and a similar shortage also in the stock of EHA kept in the warehouse. Certain enquiries and proceedings ensued and the petitioner says that in the course of these enquiries, he came to know that an order of detention had been passed against him under the Act. Without waiting for the order and the grounds of detention being served on him, the petitioner filed a writ petition challenging the order of detention.

4. It is now well settled that, even in a case of preventive detention, it is not necessary for the proposed detenu to wait till a detention order is served upon him before challenging the detention

order. It is true that the Constitution of India which permits preventive detention requires the detaining authorities to serve the grounds of detention within a prescribed period after the detention order is served on the detenu. It does not envisage any disclosure of the grounds of the detention prior to the service of the detention order on the detenu. To apprise the detenu in advance of the grounds on which he is proposed to be detained may well frustrate the very purpose of the law. On the other hand, to insist that no order of detention can be challenged until actual detention in pursuance thereof takes place might irretrievably prejudice the rights of the proposed detenu in certain situations. Thus, the conflicting claims of the State and the fundamental right of a citizen need to be reconciled and the limitations, if any, precisely enunciated. This has been done by the done by the recent decision of this court in Additional Secretary to the Government of India v. Smt. Alka Subhash Gadia (1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301 : (1991) 1 JT (SC) 549). The real question of law that fell for consideration before the court in that case was whether the detenu or any one on his behalf is entitled to challenge the detention order without the detenu submitting or surrendering to it and, if so, in what type of cases. As a corollary to this question, the incidental question that had to be answered was whether the detenu or the petitioner on his behalf, is entitled to the detention order and the grounds on which the detention order is made before the detenu submits to the order. The first question was answered by saying that the courts have power to interfere even before the detention order is served or the detention is effected but that such power will be exercised sparingly and in exceptional cases of the type enunciated therein. The court observed :

> "It is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds, or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question."

On the second question, the court had this to say :

> "In view of the discussion aforesaid, the answer to this question has to be firmly in the negative for various reasons. In the first instance, as stated earlier, the Constitution and the valid law made thereunder do not make any provision for the same. On the other hand, they permit the arrest and detention of a person without furnishing to the detenu the order and the grounds thereof in advance. Secondly, when the order and the grounds are served and the detenu is in a position to make out prima facie the limited grounds on which they can be successfully challenged, the courts, as pointed out earlier, have power even to grant bail to the detenu pending the final herring of his petition. Alternatively, as stated earlier, the court can and does hear such petition expeditiously to give the necessary relief to the detenu. Thirdly, in the rare cases where the detenu, before being served with them, learns of the detention order and the grounds on which it is made, and satisfies the court of their

> existence by proper affirmation, the court does not decline to entertain the writ petition even at the pre-executive stage, of course, on the very limited grounds stated above. The court no doubt even in such cases is not obliged to interfere with the impugned order at that stage and may insist that the detenu should first submit to it. It will, however, depend on the facts of each case. The decisions and the orders cited above show that in some genuine cases, the courts have exercised their powers at the pre-execution stage, though such cases have been rare. This only emphasises the fact that the courts have power to interfere with the detention orders even at the pre-execution stage but they are not obliged to do so nor will it be proper for them to do so save in exceptional cases. Much less can a detenu claim such exercise of power as a matter of right. The discretion is of the court and it has to be exercised judicially on well settled principles."

5. In the present case, the authorities did not file any counter-affidavit affirming or denying the facts mentioned in the writ petition nor did they come forward to disclose or even indicate the grounds of the proposed detention, if any. The learned single judge in the High Court dismissed the writ petition on the short ground that, on the facts disclosed in the petition, the present case prima facie fell within the scope of the expression 'smuggling' as defined in the Act. The Division Bench came to the conclusion that the circumstances referred to in the petition were not sufficient to constitute 'smuggling'. Nevertheless, the court took the view that, without the grounds of detention, it ill not be proper for courts to go into the validity or otherwise of the order of detention or make any pronouncement that the impugned order has not been passed under the Act under which it is proposed to have been passed or that it was passed with a wrong purpose or was passed on vague, extraneous or irrelevant grounds.

6. We have heard Shri Ashoke Sen, learned counsel for the petitioner, and Sri Subba Rao, learned counsel for the respondent at considerable length. Shri Ashoke Sen contends that the Division Bench of the High Court, having accepted the petitioner's contention that his activities do not constitute 'smuggling' ought to have straightaway quashed the detention order. He points out that the goods in question had been assessed to customs duty by the authorities and an order for their clearance from the customs area had been made on the execution of a bond for the due payment of the duty. Referring to the definitions of 'smuggling' in various dictionaries and decisions, he contends that it is ridiculous to suggest that the petitioner is guilty of 'smuggling' or the abetment thereof. Prima facie, one would agree that there is considerable force in this contention of learned counsel for the petitioner that there cannot be any smuggling of goods which have been openly imported, declared to the customs authorities and cleared by them, after being assessed to duty. However, we cannot go by the dictionary meaning of the world as the Act has a definition clause which adopts, for the word, the same meaning which it has in section 2(39) of the Customs Act. Section 2(39) of the Customs Act, defines 'smuggling' thus :

> "'Smuggling', in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113."

Section 111 declares, inter alia, that the following goods will be liable to confiscation :

> "(i) [A]ny dutiable goods removed or attempted to be removed from a warehouse without the permission of the proper office or contrary to the terms of such permission."

and section 2(43) of the said Act contains a definition of 'warehouse' which reads :

> "'Warehouse' means a public warehouse appointed under section 57 or a private warehouse licensed under section 58."

7. It is clear even from the facts disclosed in the petition that the case of the authorities may be that the petitioner has abetted the removal of the imported goods from the bonded warehouse without the permission of the proper officer. Of course, there can be no smuggling if the goods had been removed from the warehouse not by the petitioner but by the customs authorities or somebody else as suggested by the petitioner. But that will be a question of fact and one has to assume, for the purposes of the present argument, that the goods are alleged to have been removed by the petitioner or the company from the warehouse without the permission of the proper officer. In such a situation, a simple reading of the relevant sections is sufficient to say prima facie that, in the present case, there has smuggling by the company, and an abetment of smuggling by the petitioner. It is difficult to say on the broad conspectus of facts and the special definition clauses in the relevant statutes that the proposed detention in this case is totally outside the provisions of the statute. If there is, prima facie, smuggling or abetment of smuggling, it is open to the competent authorities to issue a detention order which may be challenged later on the merits on any grounds that may be available but it cannot be said that the action is flagrantly in violation of the statute or that the order is one not made under the provision of the statute under which it has been purportedly issued.

8. Realising the direct impact of the relevant statutory provisions on the sparse facts stated by the petitioner, Shri. Ashoke Sen has elaborated his contentions before us which have found favour with the Division Bench of the High Court to demonstrate that the facts alleged do not bring the present case within the statutory provisions. According to him, section 111(i) comes into operation only in a case where no duty has been assessed on goods and the goods are allowed to be deposited in a warehouse under the provisions of section 49 of the Customs Act pending clearance from customs. He submits that, in such a case, the removal of goods without the permission of the statutory authorities would amount to smuggling because, in such a case, the process of import is not complete. Also in such a case, the goods would clearly have escaped duty because the provisions of section 72 are not made applicable to a case where the goods are warehoused under section 49. In such a case, Shri Ashoke Sen says that the statutory concept of smuggling would squarely apply but, he says that it cannot have any application to a case where the goods are cleared from the customs area with the permission of the customs authorities. In this type of case, the process of import is complete : vide, Deputy Commissioner of Commercial Taxes v. Caltex (India) Ltd., (AIR 1962 MAD 298; (1962) 12 STC 163 : 75 MLW 115) and, there can be no smuggling thereafter. Even if the goods are clandestinely removed from the bonded warehouse, there is no escapement of duty since the duty is adequately safeguarded by a bond for double the amount of duty with which the goods are chargeable. The only remedy of the Department is such cases is the recovery of the duties etc., under section 72 and no confiscation of the goods is permissible in such cases. Indeed, there can be no confiscation of the goods is once they are cleared from the customs area under section 47, vide Union of India v. Jain Shudh Vanaspati Ltd. ((1992) 3 SCC 510 : (1992) 1 Scale 34 : AIR 1992 SC 572) affirming Jain Shudh Vanaspati Ltd. v. Union of India ((1982) 10 ELT 43 (Del)). In the light of these concepts, he urges that the scope of section 111(i) should be restricted to goods which are dutiable and in respect of which no duty has been assessed their removal from a warehouse where they are lodged pending assessment of duty.

9. We are of the opinion that, interesting as these arguments are, they cannot be accepted. The interpretation sought to be placed by counsel on the provision contained in Section 111(i) is unduly

narrow and imports, into the clear language, thereof, words that are not there. There is no justification to restrict "dutiable goods" to "dutiable goods not yet assessed to duty". The suggestion that "warehouse" referred to in the clause should be understood to mean a warehouse to which goods are removed under section 49 but not one to which goods are taken in pursuance of section 59 is without basis and ignores the wide definition of that expression set out in section 2(43) of the Customs Act.

10. Sri Sen has urged three considerations in support of his plea to limit the scope of section 111(i) as urged by him. The first is that the operation of 'import' is concluded once the goods are assessed to customs duty and cleared from the customs area and the concept of 'smuggling' can have no meaning in respect of such goods thereafter. This is not quite correct. Even the general concept of smuggling contains two elements : one, the bringing into India of goods the import of which is prohibited; and two, the bringing, into the country's trade stream, of goods the import of which is permitted without paying the customs duties with which they are chargeable. In our view, the second eventuality can occur not only where there is a clandestine import evading the assessment of duty but also where there is a clandestine removal without payment of the assessed duty. In a case where the goods are warehoused under section 49 and they are clandestinely removed, there would be 'smuggling' as the duties payable thereon have been evaded altogether. But even in a case where the goods are assessed to duty and allowed to be warehoused under section 59, clandestine removal can result in loss of duty. No doubt, there is a provision in section 72 for collection of the duty and forfeiture of the bond furnished to secure due payment of duty but these may not always be an adequate over to the Revenue if the goods are spirited away without permission. The mere fact that the goods have been ostensibly cleared, after assessment of duty, to a warehouse does not preclude the applicability of the concept of smuggling even in such a case. In a sense, import may be said to be complete for certain purposes say, sales tax purposes as in Dy. C. C. T. v. Caltex (India) Ltd., (AIR 1962 Mad 298; (1962) 13 STC 163 : 75 MLW 115) on their clearance after assessment of duties at the customs barrier but it is not complete in a real sense. Even the warehouse to which the goods are permitted to be removed under section 59 is a premises under the lock and key of the customs authorities and is, in a sense, an extension of the customs area. Goods can be cleared therefrom for home consumption or exportation only after payment of duties. Till that is done, there is always the risk of loss to the State of the duties payable. So, import cannot be said to be complete till then from the point of view with which we are concerned. There is no reason why we should read down section 111(i) which only recognises this position.

11. The second point made by Sri Sen is that, where goods are removed from a warehouse in which they are lodged under section 59 without the permission of the concerned authorities, the only consequence that can follow is action under section 72. According to him, in such cases, there can be no levy of penalty under section 125 and the goods removed without permission are not liable to confiscation. He urges that a provision for the contravention of which there can be no penalty or confiscation should not be so read as justifying the draconian remedy of preventive detention. In support of his contentions on this part of the case, learned counsel strongly relied on the decision of this court in Shewpujanrai Indrasanrai Ltd. v. Collector of Customs ((1959) SCR 821 : AIR 1958 SC 845 : 1958 Cri LJ 1355). We are unable to see any force in this contention. The consequences which follow on a particular act or omission will depend on the statutory provisions in question. It may be that the petitioner's act in the present can may not have attracted section 125 as it stood earlier but will now attract a penalty in view of section 125(2) inserted w.e.f. December 27, 1985. It may also attract section 72 but this cannot, however, be decisive of the interpretation of section 111(i). In the decision referred to by counsel which arose under the Sea Customs Act, 1878, smuggled goods were confiscated and, in addition, the smuggler was called upon to pay the duties

on the goods. The court held that the question of a levy of import duties did not arise as there was no statutory provision covering the facts of that case enabling such levy. This decision is no authority for the proposition that section 111(i) is inapplicable to a case to which section 72 is applicable. Even if one assumes that section 72 will not applicable where the goods are confiscated, the position only comes to this, that the authorities have to choose, having regard to all the circumstances, between confiscating the goods on the one hand or collecting the duties payable thereon on the other. Having regard to the language of section 111(i), it is not possible to agree with counsel that, in such a case, the goods are not liable to confiscation merely because an alternative recourse to section 72 is available to them.

12. The third point made by Shri Sen is that, once goods are cleared by the customs authorities, they are not liable to confiscation unless the order granting clearance is reversed in appropriate proceedings. He places reliance for this proposition on Union of India v. Jain Shudh Vanaspati ((1992) 3 SCC 510 : (1992) 1 Scale 34 : AIR 1992 SC 572) affirming the decision of the Delhi High Court in Jain Shudh Vanaspati Ltd. v. Union of India ((1982) 10 ELT 43 (Del)) (to which one of us was a party). There was some discussion before us on whether this court has confirmed the decision of the High Court on the above point or left it open in para 4 of the judgment. We do not think that it is necessary for us to enter into this controversy. That was a case where the goods had been completely cleared accepting the plea of the importer that their import was not prohibited. The High Court held that so long as this acceptance stood, the goods were not liable to confiscation. We are here concerned with the question whether the goods are liable to confiscation under section 111(i) and this question has to be answered in the affirmative in view of the language of the section. The conclusion here that the goods are liable to confiscation does not go behind or ignore the effect of the order of clearance as in that case. It accepts the fact of clearance and proceeds on the footing that the goods, rightly cleared under section 59, have been clandestinely removed from the warehouse within the meaning of section 59. The decision cited by learned counsel is, therefore, of no assistance to him.

13. The upshot of the above discussion is that, on the conspectus of facts placed before the court and referred to earlier, the activity of the company would amount to smuggling and that of the petitioner to abetment of smuggling, if they had removed, or caused or abetted the removal of the goods from the bonded warehouse without the permission of the concerned authorities. The order of detention proposed cannot be said to proceed on a basis totally extraneous to the provisions of the Act and cannot be described as an order not made under the Act under which it is purportedly made nor can it be said that the grounds of detention are vague, irrelevant or extraneous to the purpose or provisions of the Act.

14. In the result, we uphold the orders of the High Court dismissing the writ petition though we do not uphold the reasoning of the Division Bench. The special leave petition is, accordingly, dismissed but with no order regarding costs.

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