SUPREME COURT OF INDIA

Baby Devassy Chully @ Bobby

Vs.

Union of India

Crl.A.No.866 of 2008

(P. Sathasivam and Ranjan Gogoi JJ.)

12.10.2012

JUDGMENT

P.SATHASIVAM,J.

1. This appeal is directed against the final judgment and order dated 16.03.2006 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 1500 of 2005 whereby the High Court dismissed the petition filed by the appellant herein.

2. Brief facts:

(a) According to the appellant, the Directorate of Revenue Intelligence (DRI), Mumbai Zonal Unit, Mumbai, received an intelligence that one sea-faring vessel by name M.T. AL SHAHABA (a motor tanker) carrying approximately 700 metric tons (MT) of Diesel Oil of foreign origin is arriving into Indian Customs Waters on or around 20th or 21st December, 2004 and the said diesel oil would be smuggled into India. The officers of the DRI, Mumbai, therefore, kept surveillance in that area and on 21.12.2004, the officers spotted the said vessel. They noticed two self propelled barges and two dumb barges each towed by a tow boat were around the said vessel. They also noticed that pipes were attached from the said vessel to the barges and oil was being pumped into the barges from the vessel. The officers of the DRI boarded the said vessel and took control of the same. The vessel and barges were found to be of Mumbai coast within the Indian territorial waters. When the officers made enquiry with the Captain of the vessel - Fouad Ahmed Al Manie, he informed that the vessel

was carrying High Speed Diesel (HSD) from Muscat. The Captain was not holding any legal documents for import of the said diesel oil into India. The Captain informed the officers that he has already discharged around 250 MTs of oil from the vessel into three barges before they boarded the vessel. The officers, therefore, brought the said vessel and barges to the P and V Anchorage of Port Trust, Mumbai. Two independent panchas were brought and detailed inventory was prepared and after conducting search of the said vessel and barges, panchnamas were drawn. The officers of the DRI seized the said diesel oil weighing about 770 MTs, worth Rs. 2 crores, under the Customs Act, 1962.

(b) During the course of investigation, the officers came to know the name of the appellant-detenu and one Chand as the persons behind the said smuggling. On 22/23.12.2004, the statement of the Captain of the vessel was recorded wherein he stated that he was asked by his master to take the vessel to the Indian Coast and to deliver the consignment to one Bobby-the detenu in India. On the same day, the statement of Sayyed Hussain Madar @ Chand was also recorded wherein he, inter alia, stated that he was to purchase the said Diesel Oil brought by Bobby in India and sell the same.

(c) During the course of follow-up action of the said seizure of the vessel, the officers of the DRI, Mumbai seized about 5.127 MTs of previously smuggled diesel oil stored in two barges at Reti Bunder, Belapur and arrested Chand, Captain Fouad Ahmed Al Manie, Shaikh Ahmedali, Murugan Murugeshan and Sadiq Anwar under Section 104 of the Customs Act, 1962 on 23.12.2004 and were produced before the Addl. CMM, Esplanade, Mumbai on 24.12.2004 and were later released on bail on 09.02.2005. However, subsequently, all of them retracted their statements. On 04.03.2005, residential premises of the appellant-Bobby were searched and finally he was traced on 14.03.2005. On the same day, he moved an anticipatory bail application in the Sessions Court, Mumbai which was rejected on 24.03.2005. On 24.03.2005, the statement of Bobby was recorded under Section 108 of the Customs Act, 1962. On the basis of his statement, the officers arrested the appellant on 25.03.2005. On 12.04.2005, he was granted bail by the Addl. CMM, Mumbai but he did not avail of the same. On 03.05.2005, the Joint Secretary to the Government of India, after considering the appellant's high propensity and potentiality to indulge in prejudicial activities and with a view to prevent him from abetting the smuggling of goods in future, passed the detention order against him under Section 3(1) of the Conservation of Foreign Exchange and Prevention of

Smuggling Activities Act, 1974 (hereinafter referred to as "the COFEPOSA Act").

(d) Being aggrieved by the said order, on 02.06.2005, the appellant filed Criminal Writ Petition No. 1500 of 2005 before the Bombay High Court. The High Court, finding no substance in the writ petition, by impugned judgment dated 16.03.2006, dismissed the same.

(e) Aggrieved by the said judgment, the appellant has filed this appeal by way of special leave before this Court. On 09.05.2008, leave was granted.

3. Heard Mr. K.K. Mani, learned counsel for the appellant, Mr. K. Swami, learned counsel for respondent Nos. 1 2 and Ms. Asha Gopalan Nair, learned counsel for Respondent No.4-State.

4. Mr. K.K. Mani, learned counsel for the appellant, after taking us through the detention order dated 03.05.2005 and the grounds of detention as well as the impugned order of the High Court dismissing the writ petition raised the following contentions:

(i) inasmuch as on the date of passing of the detention order, i.e., 03.05.2005, the appellant was in jail, in that event there is no compelling necessity to detain him under the provisions of the COFEPOSA Act;

(ii) the Detaining Authority failed to take note of relevant aspect, i.e., the detenu was in custody, hence, the Detention Order is liable to be quashed on the ground of non-application of mind; and

(iii) the Detaining Authority relied upon the retraction statement of co-accused without adverting to their confessional statement which vitiates the detention order.

5. Mr. K. Swami, learned counsel for respondent Nos. 1 2-Detaining Authority, submitted as under:-

(i) taking note of prejudicial activities and with a view to prevent the appellant from involving/abetting the smuggling of goods, the Detaining Authority rightly invoked the provisions of the COFEPOSA Act;

(ii) all the procedural safeguards have been strictly adhered to by the Detaining Authority; and

(iii) all the points raised by the learned counsel for the appellant before this Court had already been considered and negatived by the High Court, hence, there is no ground for interference.

6. We have carefully considered the rival contentions, perused the detention order, grounds of detention and all the connected materials.

7. At the foremost, Mr. K.K. Mani, learned counsel for the appellant pressed into service the decision of this Court in Rekha vs. State of Tamil Nadu Through Secretary to Government and Anr., (2011) 5 SCC 244. He very much relied on paragraph 29 of the said decision which reads as under:

> "29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal."

We are conscious of the fact that the right to liberty is guaranteed by Article 21 of the Constitution of India. At the same time, Article 22(3)(b) of the Constitution permits preventive detention. Keeping the above principles in mind, let us consider whether the impugned detention order is sustainable in law or not.

8. In a series of decisions, this Court has held that it is the subjective satisfaction of the Detaining Authority whether a person has to be detained for a particular period of time or not. In the impugned grounds of detention, the Detaining Authority has narrated all the reasons for passing the detention order detaining the appellant with a view to prevent him from abetting the smuggling of goods in future. 9) With regard to non-application of mind, Mr. K.K. Mani, learned counsel for the appellant pointed out that on the date of passing of the detention order, i.e., 03.05.2005, the detenu was in prison though he was granted bail on 12.04.2005, he

had not availed the same and continued in prison on the date of order. According to him, this aspect was not reflected in the detention order which, according to him, vitiates the detention on the principle of non-application of mind. It is true that though the detenu was granted bail on 12.04.2005, for the reasons best known to him, he did not avail such benefit and continued to be in jail on the date of the detention, i.e., 03.05.2005. It is true that this aspect has not been mentioned in the detention order, however, on the other hand, it is not in dispute that the grounds of detention which forms part of the Detention Order dated 03.05.2005 clearly mention the details about the bail order dated 12.04.2005 and non-availing of the same on the date of detention order, i.e., 03.05.2005. In this regard, learned counsel for the appellant relied on a decision of this Court in Ors., (1986) 4 SCC 416 wherein the contention of the petitioner therein was that the order of preventive detention could only be justified against a person in detention if the Detaining Authority was satisfied that his release from detention was imminent and the order of detention was necessary for putting him back in jail. He also contented that the service of order of detention on the petitioner while he was in jail was futile and useless since such an order had no application under Section 3(2) of the National Security Act, 1980. While considering the said claim, this Court, in paragraph 7, held as under:

> "7. It is well settled in our constitutional framework that the power of directing preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of the facts necessitating preventive custody of a person for social defence. If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised……."

10. It is clear that if a person concerned is in custody and there is no imminent possibility of his being released, the rule is that the power of preventive detention should not be exercised. In the case on hand, it is not in dispute that on 12.04.2005 itself, the competent Court has granted bail but the appellant did not avail such benefit. In other words, on the date of the detention order, i.e., 03.05.2005, by virtue of the order granting bail even on 12.04.2005, it would be possible for the detenu to come out without any difficulty. In such circumstances, while reiterating the principle of this Court enunciated in the above decision and in view of the fact that the detenu was having the order of bail in his hand, it is presumed that at any moment, it would be possible for him to come out and indulge in prejudicial activities, hence, the said decision is not helpful to the case of the appellant. In

view of the above circumstances and of the fact that the Detaining Authority was aware of the grant of bail and clearly stated the same in the grounds of detention, we reject the contra arguments made by the learned counsel for the appellant. On the other hand, we hold that the Detaining Authority was conscious of all relevant aspects and passed the impugned order of detention in order to prevent the appellant from abetting the smuggling of goods in future.

11. For the same reason, the other contention, namely, that no compelling necessity to pass the order of detention is to be rejected. As a matter of fact, learned counsel for the Detaining Authority took us through various grounds/details/materials adverted to in the impugned order and we are satisfied that it cannot be claimed that there was no compelling necessity to pass the order of detention. We have already pointed out that it is the subjective satisfaction of the Detaining Authority whether the order of detention is to be invoked or not. Accordingly, we reject the above contention also.

12. The next contention, namely, the Detaining Authority relied on the retraction statement of co-accused without looking into their confession, it is argued by the learned counsel for the appellant that without adverting to confessional statement of the co-accused, reliance based upon the retraction statement is not maintainable. It is true that in paragraph 10 of the grounds of detention, the Detaining Authority has stated as under:-

> "Chand, Capt. Fouad Ahmed and Sadruddin B. Khan have retracted their statements after arrest before the Magistrate. However, a rebuttal to these retractions was filed before the Magistrate. No correspondence has been received from the said persons or the Advocate's on the rebuttal filed by DRI."

> It is equally true that there is no reference to confessional statement of the co-accused. As rightly pointed out by the learned counsel for respondent Nos. 1 2 that what the Detaining Authority has stated in paragraph 10, extracted above, is only mere reference or narration of fact for completion of the proceedings. In other words, we are satisfied that it is not relied upon statement/document as claimed by the learned counsel for the appellant. No doubt, by drawing our attention to the decision in Ors., (2000) 7 SCC 148, Mr. K.K. Mani, learned counsel for the appellant contended that both the confessional and retraction statements ought to have been placed and furnished to the appellant. In the said decision, this Court has held that the confessional statement and the retraction statement both constituting a

composite relevant fact should have been placed. It was further held that if any one of the two documents alone is placed, without the other, it would affect the subjective satisfaction of the Detaining Authority. Therefore, it was held that non-placement of the retraction affects the subjective satisfaction of the Detaining Authority. There is no quarrel as to the proposition, in fact, the sponsoring authority has to place all the relevant documents before the Detaining Authority. We reiterate that all the documents which are relevant, which have bearing on the issue, which are likely to affect the mind of the Detaining Authority should be placed before it. Further, a document which has no link with the issue cannot be construed as relevant. In the case on hand, we have already observed that what the Detaining Authority has stated in paragraph 10 of the grounds is only a mere reference and no reliance can be based on the same. However, it is not in dispute that the appellant-detenu was supplied even the retraction statement referred to in paragraph 10 along with the grounds of detention. In such circumstance, this contention is also rejected.

13. Learned counsel appearing for respondent Nos. 1 2 has brought to our notice that on earlier occasion, i.e., 27.02.2006, the present appellant challenged the very same detention order by way of filing a writ petition being W.P.(Crl.) No. D-5620 of 2006 under Article 32 of the Constitution before this Court. By order dated 06.03.2006, this Court dismissed the said petition, hence, according to the learned counsel for the respondents, the appellant is debarred from filing the present appeal against the dismissal of the writ petition by the High Court of Bombay. Similar issue was considered by this Court relating to filing of Habeas Corpus petition under Article 32 of the Constitution of India in Ors. (1981) 2 SCC 436 wherein this Court held in paragraph 10 as under:

> "10. ……………….The doctrine of finality of judgment or the principles of res judicata are founded on the basic principle that where a Court of competent jurisdiction has decided an issue, the same ought not allowed to be agitated again and again. Such a doctrine would be wholly inapplicable to cases where the two forums have separate and independent jurisdictions. In the instant case, the High Court decided the petition of the detenu under Article 226 which was a discretionary jurisdiction whereas the jurisdiction to grant relief in a petition under Article 32 filed in the Supreme Court is guaranteed by the Constitution and once the court finds that there has been a violation of Article 22(5) of the Constitution, then it has no discretion in the matter but is bound to grant the relief to the detenu by setting aside the order of detention. The doctrine of res judicata or the principles of finality of

judgment cannot be allowed to whittle down or override the express constitutional mandate to the Supreme Court enshrined in Article 32 of the Constitution. In a recent decision in the case of Santosh Anand v. Union of India, (1981) 2 SCC 420 this Court has pointed out that the concept of liberty has now been widened by Maneka Gandhi case (1978) 1 SCC 248 where Article 21 as construed by this Court has added new dimensions to the various features and concepts of liberty as enshrined in Articles 21 and 22 of the Constitution. For these reasons, therefore, we overruled the preliminary objection taken by the respondents."

In view of the same and in the light of the additional grounds raised and also of the fact that the issue relates to personal liberty of a citizen, we reject the objection of the respondents and hold that the present appeal cannot be dismissed on the grounds of res judicata.

14. Before winding up, it is our duty to refer one factual aspect pointed out by the learned counsel for the appellant. It is seen that immediately after passing of the detention order on 03.05.2005, a writ petition under Article 226 of the Constitution of India was filed before the High Court of Bombay on 02.06.2005. It is the claim of the appellant that after hearing all the parties, the High Court reserved its orders on 24.10.2005 and according to the learned counsel for the appellant, the High Court pronounced its orders only on 16.03.2006, i.e., nearly after a period of 5 months. He pointed out that because of the same, the detenu could not know the fate of his petition for a period of 5 months when the detention period was for one year.

15. By this appeal, we remind all the High Courts that in a matter of this nature affecting the personal liberty of a citizen, it is the duty of the Courts to take all endeavours and efforts for an early decision. In the case on hand, we feel that keeping the writ petition pending after hearing the parties and compelling the detenu to wait for 5 months to know the result of his petition, cannot be accepted. We request all the High Courts to give priority for the disposal of the matters relating to personal liberty of a citizen, particularly, when the detention period is for one year or less than a year and, more so, after hearing the parties, the decision must be known to the affected party without unreasonable delay.

16. In the light of the above discussion, we are unable to accept any of the contentions raised by the appellant. Consequently, the appeal fails and the same is dismissed.