

(1982) 06 BOM CK 0025

Bombay High Court

Case No: Writ Petition No. 46 of 1982

Shobha Remesh Parekh (Smt.)

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision: June 16, 1982

Acts Referred:

- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Section 2, 3(1)
- Customs Act, 1962 - Section 111, 123, 2(39)

Citation: (1982) 1 BomCR 669

Hon'ble Judges: M.S. Jamdar, J; D.M. Rege, J

Bench: Division Bench

Advocate: C.B. Shah and M.C. Karmali, for the Appellant; M.R. Kotwal, for the Respondent

Judgement

D.M. Rege, J.

This is a petition for Habeas Corpus by the wife of a detenu who has been detained under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (hereinafter called COFEPOSA Act).

2. The detenu is carrying on business as a professional photographs and sells photographic equipments to his customers. On 7th November, 1981 he was served with an order of detention dated 4th November, 1981 by the Government of Maharashtra alleging that with a view to preventing him from smuggling goods, abetting the smuggling of goods and engaged in concealing and keeping smuggled goods, it was necessary to detain the detenu u/s 3(1) of COFEPOSA Act, 1974 (52 of 1974). On the same day i.e. on 7th November, 1981 he was served with another order directing him to be detained for one week in Bombay Central Prison and thereafter at Nasik Road Central Prison, Nasik. On the same day he was also served with the grounds of detention.

3. The detenu's representation to the State Government dated 18-12-1982 was rejected on 2-1-1982 and that to the Central Government was rejected on 24-12-1981. Hence this petition.

4. As is apparent from the grounds of detention (Annexure "D" to the petition), the order of detention was based on an incident, when during the search of the detenu's flat by the Custom Officers on 7-9-1981 various types of luxury goods such as cameras, projectors, photographic colour films, wrist watches, etc. of foreign origin and silver bars weighing 12.004 kgs. of the total market value of Rs. 249631 were seized. The Detaining Authority on the basis of the statement made by the detenu on 17th and 18th September, 1981 and of the detenu's brother one Hemant dated 7-9-1981 alleged that the said goods were smuggled goods and the detenu was illegally acquiring, storing and disposing of goods of contraband nature. The detenu in his statement recorded on 17th and 18th September, 1981 had, inter alia, stated that he was doing the business of purchasing foreign goods and selling them at a profit and that some of the goods were purchased by him from passengers and some were brought by the members of his family. The detenu's brother had in his statement inter alia recorded on 7-9-1981 stated that the detenu was dealing in sale and purchase of foreign goods.

5. In this petition, the petitioner has challenged the detention order on several grounds. The learned Counsel for the petitioner, has however, rested his attack only on the following grounds, viz. :---

(a) grounds (ii) to (iv) concerning out of the seized items, item of goods mentioned in Annexure "H" to the petition, of the market value of Rs. 1,32,141/- as admitted not covered by Chapter IV-A and section 123 of the Customs Act;

(b) ground (v) concerning a projector and (c) newly added grounds (xiii) covering a camera of Rs. 1500/- MV and a taper recorder of Rs. 6000/- MV, respectively.

The contention of the learned Counsel for the petitioner was that the goods concerned under the said grounds which were of the approximate market value of Rs. 1,45,500/-, were either not smuggled goods or that there was no material before the Detaining Authority to hold that they were smuggled and, therefore, there being a total non-application of mind by the Detaining Authority in passing the order of detention on the basis that the detenu had smuggled goods or abetted in smuggling of goods of the value of Rs. 2,49,637, the order was vitiated.

6. It is now well settled that non-application of mind of the Detaining Authority to facts in respect of which it was required to be satisfied would vitiate the subjective satisfaction of the Detaining Authority in passing the order (See [Khudiram Das Vs. The State of West Bengal and Others](#),

7. Supreme Court in its decision in the case of [Dwarika Prasad Sahu Vs. The State of Bihar and Others](#), has held :---

"Even if one of the grounds or reasons which led to the subjective satisfaction of the Detaining Authority is non-existent or misconceived or irrelevant, the order of detention would be invalid and it would not avail the Detaining Authority to contend that the other grounds or reasons are good and do not suffer from any such infirmity, because, it can never be predicted as to whether the detention order would have been made at all even in the absence of non-existent or irrelevant grounds."

8. Affidavits-in-reply have been filed by the Detaining Authority as well as by the Customs Officer. Petitioner has also furnished to the Court certain complication of documents.

9. Firstly, dealing with the goods covered under Annexure H to the petition of the approximate market value of Rs. 1,32,141/- forming part of grounds (ii) to (iv) of the petition it is not disputed that the said goods are neither covered under Chapter IVA or section 123 of the Customs Act so that the burden of proving that the said goods were smuggled good was on the department.

10. The Detaining Authority in its affidavit-in-reply does not dispute the facts that the goods mentioned in Annexure "H" to the petition which were seized from the detenu's house did not fall under Chapter IVA or section 123 of the Customs Act and that it was necessary to prove that they were smuggled goods. It cannot be disputed that such a burden lay on the department. The Customs Officer had in his affidavit stated that if the Customs Authorities established that the goods were smuggled goods they were liable to confiscation.

11. The only basis on which the Detaining Authority had holding the said goods to be smuggled goods was that the detenu in his statement recorded by the Customs Officer on 17th and 18th September, 1981 had stated that he had purchased goods of foreign origin from different passengers from time to time without any covering documents and intended to sell the same for profits. Apart from this reasoning of the Detaining Authority his affidavit does not give any other reason for drawing the said inference.

12. It is difficult to see how only on the said statement of the detenu that he was purchasing goods of foreign origin a legal inference could be drawn that the said goods were smuggled.

13. The learned Public Prosecutor by referring to the definition of "smuggling" as mentioned u/s 2(e) of the said COPEPOSA Act read with section 2(39) of the Customs Act and the provision of section 111(0) of the Customs Act and Clause (11) of the Import Control Order has contended that the goods of foreign origin were smuggled goods.

14. The provisions of Clause 11 of Import Control Order shows that the goods of foreign origin would not make the goods smuggled goods subject to certain

conditions. Burden of proving that those conditions do not exist in the case of concerned goods would lie on the department. Without there being any material to hold so, mere fact that the goods were of foreign origin would not make the goods smuggled goods. In our view, therefore, the legal inference drawn by the Detaining Authority that the goods in Annexure "H" were smuggled goods was without any basis and shown non-application of mind.

15. Ground (v) of the petition relates to an item of a projector of the value of Rs. 6000/- (Annexure I to the petition). It is not disputed that in respect of the said projector, the detenu had produced before the Customs Officer a cash memo bearing No. 15152 dated 30-7-1981 and that the said receipt was not placed before the Detaining Authority. It is not disputed that the said receipt was material document in considering whether the said projector was smuggled or not.

16. The Detaining Authority in his affidavit-in-reply while dealing with the said contention has accepted the fact that the detenu had given a cash memo to the Customs Officer. However, he has stated that while passing the order of detention he had considered the said memo bearing No. 15152 dated 30th July, 1981 in respect of one projector. According to him since the detenu had in his statement dated 18-9-1981 spoken about production of the cash memo and that it was shown to the Detaining Authority before passing the order he was aware of the production of the cash memo. He however has denied the contention that by virtue of non-production of the said cash memo before him before passing the order of detention had not impaired his subjective satisfaction. The said explanation of the Detaining Authority cannot be accepted. Firstly, the said cash memo was a material document concerning the said projector. Admittedly the said document was not placed before the Detaining Authority and he could not be said to have known its contents and, therefore, considered the same. A mere knowledge that the detenu in his statement had referred to the said document could not amount to consideration thereof by the Detaining Authority. It is also clear that non-consideration of the said document has shown non-application of mind on the part of the Detaining Authority affecting his subjective satisfaction, for if he had really considered the said cash memo, he would not have included the said projector in the goods which he held smuggled goods. The contention of the learned Counsel for the petitioner as regards non-application of mind by the Detaining Authority in respect of the said projector has to be sustained.

17. The next contention in Ground (xiii) of the petition concerns a camera of CIF value of Rs 500/- and market value Rs 1500/- being Item No. 39 to Annexure A to the seizure Panchnama. Ground (xiv) concerns Stereo Cassette Recorder of CIF value Rs. 2000/- and market value Rs. 6000/- being Item No. 18 to Annexure A to desire Panchnama. The petitioner in his statement had claimed that the said two items belonging to some one else and not to him and that they were given to him for repairs. It is not disputed that in pursuance of the letters written by the Customs

Officers these persons had produced the receipts concerning the said goods before the Customs Officer. Admittedly the customs Authority had not forwarded the said receipts to the Detaining Authority nor copies thereof were given to the detenu who was unaware of the same till after making his representation to the Board. It cannot be disputed that the said receipts were material documents concerning the question whether the said goods were smuggled.

18. So far as the camera was concerned, the Detaining Authority has in his affidavit-in-reply admitted that the letter by the owner of the camera dated 6th October, 1969 and photo copy of the receipt dated 1-9-1976 in favour of one Abdul were not placed before him when he passed the said order of detention and that in respect of the said camera the detenu in his statement dated 7-9-1981 u/s 108 of the said Act had specifically stated that the said camera belonged to one Shailesh while the letter from Surendra Shah to the Customs Officer showed that the camera belonging to him. In spite of the said admission, the Detaining Authority in his affidavit has gone to contend :---

"I further say that this letter is concerned with only one item of seized goods valued at Rs. 1500/- out of the seized goods of foreign origin which are totally valued at Rs. 2,17,011/-. In view of this and in view of the fact that I have taken into consideration the explanation in respect of the said camera even if the above letter was placed before me while passing the order of detention my subjective satisfaction would not have been adversely affected."

19. The same is the case as regards the other item viz. tape recorder while admitting that the letter dated 21-9-1981 of Shri Shah, the report dated 21-9-1980 and the letter dated 26-4-1981 from M/s Bennet & Company were not placed before the Detaining Authority, the Detaining Authority in this affidavit has gone as to state :

"I say that the said letter dated 21-10-1981 is in respect of one item of Stereo Cassette Recorder valued at Rs. 6000/- while the total value of the foreign goods seized from the detenu is Rs. 2,17,011/-. In view of this and in view of the fact that I had taken into consideration the detenu's explanation in respect of the said stereo recorder, even if the said letters and the bill were placed before me while considering the case of the detenu they could not have affected my subjective satisfaction adversely."

20. It cannot be disputed that the receipts and correspondence in respect of the said two items of goods were material documents for considering whether the said two items were smuggled goods. The fact that the said documents were not placed before the Detaining Authority, that therefore, he had no knowledge of the contents thereof and were not considered by him were admitted by the Detaining Authority in his affidavit. The contention of the Detaining Authority that even then it had not affected his subjective satisfaction has no substance, for if the said documents had been taken into consideration, the said items as in other cases could not have been

included in the alleged smuggled goods as being of the total value of Rs. 2,49,637/-.

21. The learned Public Prosecutor has contended that the value of the said projector, camera and the tape recorder as compared to the total value of other goods being very small, it could not be said that the subjective satisfaction of the Detaining Authority was or could have been in any manner affected thereby. That contention again has no substance. Firstly factually that contention is to correct, for as stated above, the total value of goods covered under Grounds (ii) to (iv) and Grounds (v), (xiii) and (xiv) of the petition comes to over Rs. 1,40,000/- which in proposition to the total value of the goods alleged to be smuggled goods viz. Rs. 2,49,637/- cannot be considered to be small. Secondly, the grounds of detention disclose that the allegation is the only one of having smuggled goods of the total value of Rs. 2,49,637/- and not item-wise. The question of proper application of mind by the Detaining Authority cannot be considered by bisecting the order as being good in part and bad in part. In any event, in this case, as pointed out above, application of mind by the Detaining Authority as regards the goods valued at Rs. 1,40,000/- which was more than half the value of the goods alleged to be smuggled does not appear to be proper. In our view, therefore, under the circumstances of this case the subjective satisfaction of the Detaining Authority was vitiated.

22. The result, therefore, is that the rule is made absolute in terms of prayer (a). Detenu to be set at liberty forthwith, if not required in any other proceedings. Writ to be directed to the Superintendent, Bombay Central Prison.

Detenu set at liberty.