(1996) 08 BOM CK 0061

Bombay High Court

Case No: Criminal Writ Petition No. 1277 of 1995

Vijayraj Jivraj Solanki		APPELLANT
	Vs	
Union of India and others		RESPONDENT

Date of Decision: Aug. 10, 1996

Acts Referred:

- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Section 3

Citation: (1996) 98 BOMLR 811 : (1996) CriLJ 3957 : (1997) 1 MhLj 454

Hon'ble Judges: D.K. Deshmukh, J; A.V. Savant, J

Bench: Division Bench

Advocate: M.G. Karmali and Smt. A.M.Z. Ansari, for the Appellant; R.M. Agarwal and Smt. V.K. Tahilramani, for the Respondent

Judgement

A.V. Savant, J.
Heard all the learned Counsels.

2. The petition is filed by Vijayraj Solanki, cousin of the detenu Kaluram Danaji Prajapati. The detenu has been detained under the order dated 15th November, 1995 passed by the second respondent Joint Secretary to the Government of India in exercise of his powers u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short COFEPOSA Act). The order of detention says that with a view to preventing the said Kaluram Danaji Prajapati from engaging in keeping smuggled goods as well as dealing in smuggled goods otherwise than by engaging in transporting or concealing smuggled goods in future it was necessary to make the order of detention. The grounds on which the order of detention was passed were furnished alongwith the order of detention. Both the order and grounds were served on 20th November, 1995 alongwith the list of documents. Briefly stated the facts are as under :

3. On specific information the officers of Head Quarters Intelligence Unit-II Customs (Prev). Commissionerate, Bombay intercepted one Farook Ibrahim Desai and his minor son Naveed Desai on the domestic Airport, Mumbai on 11th October, 1995 when they were about to board the Jet Airways flight to Ahmedabad which was to depart at 05.50 hours. At the customs office the baggage of the said passenger Farook Desai was examined. Foreign currency equivalent to Rs. 1.61 crores was recovered. It was seized. The electoral identity card of Farook Desai was also seized. Farook Desai disclosed that the foreign exchange was collected from one Bombay party at the behest of his brother Aminbhai at Dubai towards the sale proceeds of smuggled gold which was supplied by Aminbhai. On 11th October, 1995 itself the premises of M/s. Crystal Electronics at Lamington Road were searched. Indian currency of Rs. 9.50 crores was seized. The detenu Kaluram Danaji Prajapati is the partner of M/s. Crystal Electronics. The statement of the detenu was recorded initially on 14th October, 1995 and then on 17th October, 1995. The statement of another person Limbaram Devashi who was the detenu in Writ Petition No. 1276 of 1995 was also recorded on 11th October, and 12th October, 1995. we have earlier in the day, allowed the said petition filed on behalf of Limbaram Devashi and set aside his detention. The statement of the present detenu Kaluram Prajapati was recorded initially on 14th October, 1995 and then on 17th October, 1995. The detenu was arrested on 14th October 1995 and was released on bail on 27th October 1995. In the mean while he had filed his retraction on 19th October, 1995. In the above background the order of detention was issued on 15th October, 1995 and as stated earlier, it was served on the detenu alongwith the grounds and documents on 20th November, 1995.

4. It is not necessary to set out any further facts since the petitioner is entitled to succeed on a short point raised by Shri Karmali on behalf of the petitioner. It is contended by Shri Karmali that in the grounds of detention there is a reference to the fact that the detenu was earlier arrested on 9th February, 1991 when 20 silver ingots of foreign origin totally valued at Rs. 44,00,000/- (Rupees fourty four lakhs) were recovered from him by the officers of Marine and Preventing Wing, Bombay. A fine of Rs. 25,000/- was imposed on the detenu and he was detained under the COFEPOSA Act, 1974 under order dated 20th January, 1921 for one year. There is a reference to this fact in para 8 of the grounds of detention and again in para 10 of the said grounds. The concluding portion of para 10 of the grounds read as under :

"In this case you were also detained under COFEPOSA Act 1974 vide Govt. of Maharashtra''s COFEPOSA detention order D.O. No. SPL 3(A)/PSA 0191/290 dated 20-1-92 for one year. I am satisfied you are habitually indulging in keeping smuggled goods as well as dealing in smuggled goods."

5. What Shri Karmali complains is that it was wholly impermissible for the detaining authority to have made a reference and taken into account the fact of recovery of 20 silver ingots on 9th February, 1991 on the basis of which the earlier order of

detention was made on 20th January, 1992 under the COFEPOSA Act, for the simple reason that the said order of detention was set aside by this Court in Writ Petition No. 358 of 1992 decided on 25th August, 1992, the copy of the said decision is annexed to this petition at Exh. D which shows that this Court came to the conclusion that there was total non-application of mind on the part of the detaining authority in passing the earlier order of detention dated 20th January, 1992. In para 6 of its judgment dated 25th August, 1992 in Criminal Writ Petition No. 358 of 1992, this Court has observed as under :-

"6. These documents clearly display the non-application of mind on the part of the Detaining Authority. It is a very callous exercise of his valuable powers of detention. The order of Detention is, therefore, malafide and ab initio void. The order of Detention is evidently vitiated by such a non application of mind and has to be set aside."

6. Shri Karmali''s grievance is that the subjective satisfaction recorded to the effect that it was necessary to detain the detenu under the COFEPOSA Act with a view to preventing him from engaging in keeping smuggled goods as well as dealing in smuggled goods other than by engaging in transporting or concealing the smuggled goods in future is based upon the facts mentioned earlier in para 10 of the grounds of detention, that the detenu was habitually indulging in keeping smuggled goods as well as dealing in smuggled goods. This conclusion flows from the facts referred earlier including the fact of the order of detention dated 20th January, 1992 that was passed earlier after the incident of 9th February, 1991 of the seizure of silver ingots. Obviously the detaining authority has not considered the judgment delivered by this Court on 25th August, 1992, in Criminal Writ Petition No. 358 of 1992 setting aside the said order of detention. Hence, it is contended by Shri Karmali that the order of detention is ex-facie illegal and liable to be struck down.

7. Shri Agarwal on behalf of respondent Nos. 1 and 2 has invited our attention to the affidavit filed by the second respondent Shri K. L. Verma, the concerned Joint Secretary who is the detaining authority. He has stated in para 4 of his affidavit as under :

"4. It is submitted that the earlier detention order dated 20-1-1992 was set aside on 25-8-92 in relation to his past involvement on certain grounds. However, the said detention order came to be mentioned in para 10 of the Order by way of a fact and in these premises, it cannot be said that on account of the same, having been placed, the present order of detention would stand vitiated. Thus there is no merit in this contention of the petitioner."

In short Counsel contended that the reference to the earlier order of detention was by way of a matter of fact and in these premises it cannot be said that on account of the same the present detention order would stand vitiated.

8. It is difficult to appreciate the stand taken by the detaining authority. There was never any doubt that the earlier order of detention was set aside by this Court as far back as on 25th August, 1992. We have already reproduced above the observations in para 6 of the judgment of this Court while setting aside the earlier order of detention. It is well settled by series of decisions of the Supreme Court that when a reference is made to an earlier order of detention which had been set aside the subsequent order of detention which is based upon such a fact of earlier detention is itself vitiated. We may make a brief reference only to a few decisions on the point.

9. In Chhagan Bhagwan Kahar Vs. N.L. Kalna and Others, , the earlier order of detention passed under Sec. 3(2) of Gujarat Prevention of Anti-Social Activities Act, 1985 was set aside by the High Court on 3rd August 1987 and the detenu was ordered to be released forthwith. A subsequent order of detention was passed under the same law on 26th October, 1988 and in the grounds a reference was made not only to the fact of the earlier order of detention dated 2nd January, 1987 but also to the fact that the High Court had set aside the said detention order on 3rd August, 1987. It was stated that in passing the second order of detention, the detaining authority had taken into consideration the previous grounds of detention also to establish that the petitioner was engaged in bootlegging activities since long. The High Court observed in para 12 of the judgment at page 1238 as under :

"12. It emerges from the above authoritative judicial pronouncements that even if the order of detention comes to an end either by revocation or by expiry of the period of detention there must be fresh facts for passing a subsequent order. A fortiori when a detention order is quashed by the Court issuing a high prerogative writ like the habeas corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the Court strikes down an earlier order by issuing rule it nullifies the entire order."

10. In Ramesh Vs. State of Gujarat and Others, , similar question arose. The earlier order of detention was passed on 1st July, 1987 u/s 3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985. That order was passed on the basis of two criminal cases which formed the basic materials alongwith others for reaching the subjective satisfaction recorded in the earlier order of detention dated 1st July, 1987. That order of detention was set aside by the High Court on 4th April, 1988. While passing the second order of detention on 27th February, 1989 the detaining authority gave a list of four cases in the grounds of detention for drawing the subjective satisfaction. The first two out of these four cases were the very same which was the basis of the first order of detention dated 1st July, 1987, which, as stated earlier, was set aside by the High Court on 4th April, 1988. Striking down the order of detention, the Supreme Court observed in para 10 of the judgment at page 1883 as under :

"10. On a careful scrutiny of the grounds of detention, we unreservedly hold that the detaining authority has taken into consideration the two criminal cases mentioned under Sr. Nos. 1 and 2 of the table which were the materials in the earlier order of detention that had been quashed and that it cannot be said that those two cases are mentioned only for a limited purpose of showing the antecedents of the detenu."

Thereafter in para 11 of the judgment, the Supreme Court referred to the ratio of its earlier decision in Chhagan Bhagwan Kahar Vs. N.L. Kalna and Others, and said that the said ratio squarely applied to the facts of the present case and the impugned order was liable to be quashed and set aside.

11. In Jahangirkhan Fazalkhan Pathan Vs. Police Commissioner, Ahmedabad and Another, the Supreme Court again considered a similar question and it was held that the order of detention cannot be made after considering the previous grounds of detention when the same had been quashed by the Court and if such previous grounds of detention are taken into consideration while forming the subjective satisfaction by the detaining authority in making the order of detention, the order of detention will be vitiated. It was held that it was of no consequence if the further fresh facts disclosed in the ground of impugned detention order had been considered. A reference was made to the earlier decision in Chhagan Bhagwan Kahar Vs. N.L. Kalna and Others, and it was observed in para 5 of the decision at page 1815 as under :

"5. The most important question that poses itself for consideration in this case is whether the detaining authority while considering the fresh facts disclosed in the grounds of detention has taken into consideration the earlier two detention orders one of 1985 under the National Security Act and the other of 1986 under the PASA Act in forming his subjective satisfaction that the detenu in spite of the passing of the earlier two detention orders has been persistently indulging in his anti-social activities and as such in preventing such criminal activities which posed a threat to the maintenance of public order the impugned order of detention has been made by him. It is now well settled by the decisions of this Court while considering the scope of S. 15 of PASA Act that the modification and revocation of detention order by the State Government shall not bar making of another detention order on fresh facts when the period of detention has come to an end either by revocation or by expiry of the period of detention. Reference may be made in this connection to the decisions of this Court in Abdul Latif Abdul Wahab Sheikh Vs. B.K. Jha and another, and in Chhagan Bhagwan Kahar Vs. N.L. Kalna and Others, . It is therefore clear that an order of detention cannot be made after considering the previous grounds of detention when the same had been quashed by the Court, and if such previous grounds of detention are taken into consideration while forming the subjective satisfaction by the detaining authority in making a detention order the order of detention will be vitiated. It is of consequence if the further fresh facts disclosed in the grounds of the impugned detention order have been considered."

12. In view of the above, we have no hesitation in holding that in passing the impugned order of detention, the detaining authority could not have relied upon the fact that the earlier order of detention had been passed on 20th January, 1992 when infact that order of detention was set aside by this Court on 25th August, 1992. Surprisingly, there is no reference whatsoever to the fact that the High Court had set aside the order of detention on 25th August, 1992. In our view, since the order of detention was set aside by this Court, it ceased to exist and it was impermissible for the detaining authority to refer to such a fact which was non-est in the eyes of law. Infact, in Chhagan Bhagwan Kahar Vs. N.L. Kalna and Others, the detaining authority had also referred to the fact that the earlier order of detention was set aside by the High Court and the detenu was released from detention but had proceeded to observe that the proceedings taken against the detenu had no effect on him and after his release he had continued his activities. What is worse in the case before us is that there is not even a whisper of the judgment of the High Court delivered as far back as on 25th August, 1992 setting aside the order of detention dated 20th January, 1992 and in recording the satisfaction that the detenu was habitually indulging in keeping as well as dealing in smuggled goods. The detaining authority has relied upon the earlier detention order dated 20th January, 1992.

13. In view of the ratio of the decision of the Supreme Court referred to above, we are of the view that the order of detention is liable to be set aside. Accordingly, we set aside the order of detention and direct that the detenu be released forthwith unless he is required to be detained under some other order.

14. Rule is made absolute as above.

15. Order accordingly.