

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : COFEPOSA

W.P.(CRL.)680/2008

Date of Hearing : 30th July, 2008

Date of Decision : 5th August, 2008

RAJ KUMAR

....Petitioner

Through Mr. Pradeep Jain with
Mr. A. Samad and Mr. Y.R. Sharma, Advs.

-versus-

UOI and ORS.

..Respondent

Through Mr. K.K. Sharma, Adv.

CORAM:

HON'BLE MR. JUSTICE VIKRAMAJIT SEN

HON'BLE MR. JUSTICE V.K. SHALI

VIKRAMAJIT SEN, J.

1. The Petitioner challenges the preventive detention of his brother, Dharmender Jhethwani, son of Late Asa Ram, under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA"). The said impugned Order is dated 18.2.2008 and is accompanied by the "Grounds" of even date on which the said Order is predicated.

2. Briefly stated, the Detenu had reported at the Red Channel of Customs, Delhi at 2330 hours on 17th October, 2007 and had declared the total value of goods sought to be imported by him as his baggage at Rupees Sixty Thousand. Since the conduct of the Detenu was found to be suspicious by the officers of the Customs Department, an inspection was carried out of the three checked-in- baggages and two hand-baggages carried by the

Petitioner/Detenu. It is not in dispute that the items and quantities declared by the Petitioner/Detenu in the Embarkation Form were found drastically less than what was actually contained in the baggage. The Customs Department assessed the duty at Rupees Nine Lac Eighty Thousand and Fifty Only instead of Rupees Sixty Thousand mentioned by the Detenu. The Department took note of the fact that between the period August, 2004 and October, 2007 (that is a period of three years and two months) the Detenu had made as many as fifty-one journeys, of very short duration, to Thailand and two journeys to Hong Kong. Mr. Jain, learned counsel for the Detenu, has conceded that the Detenu made his livelihood by purchasing goods abroad and thereafter importing them into India in his personal baggage. He has however argued that this is a legitimate livelihood since imports can be freely made on payment of the duty attracted against such importation.

3. It has been vehemently contended on behalf of the Detenu that the procedure adopted by the Department was not in consonance with law. We may only record that the Detenu was unable to produce any document evidencing the price actually paid by him either before the Department or in these proceedings. Furthermore, as already mentioned above, the declaration made by the Detenu was incorrect inasmuch as the quantity of items mentioned by him were much less than what was contained in his baggage; and items such as fifty metres of suit length and fifty pieces of processors were not mentioned at all. In these proceedings we are not concerned with the quantum of duty quantified by the Department as that can be assailed in proceedings specifically provided for that purpose.

4. Where there has been a substantial mis-declaration, Section 111(l) of the Customs Act, 1962 (for short “Customs Act”) which deals with confiscation of improperly imported goods renders goods liable for confiscation if they are not included or are in excess of those included in the entry made under the Act, or in the case of baggage, in the declaration made under Section 77 thereof. It seems to us that Mr. Jain is not correct in drawing our attention to Section 111 (m) of the Customs Act which speaks of the valuation of imported goods.

5. The next contention is that the Department had made a wrong inference from the fifty-three journeys of the Detenu. The contention is that as per the information received by the Department from the Commissioner of Customs, Kolkata, Redemption Fee and Penalty was imposed with regard to only two journeys, and in respect of nine successive journeys between

10.12.2005 and 18.12.2006, no case was made out against the Detenu. This argument is a double- edged weapon in our opinion. Keeping the nature of the Detenu's business in mind and the relatively small amount of duty paid by him, and nil duty paid in respect of nine journeys, prima facie his activities can be seen as suspicious and of a smuggling nature. At the same time, preventive detention based on suspicion alone may not meet the tests laid down in this context.

6. It has also been contended by Mr. Jain that the Grounds of Detention are verbatim the same as the Complaint filed before the ACMM, New Delhi which is indicative of the fact that the conduct of the Department is malicious and calculated to harass the Detenu. We find no merit in this submission. An analogy cannot be drawn between this factor and instances where the Order of the Detaining Authority is verbatim that of the Sponsoring Authority.

7. Mr. Jain has also contended that there is no likelihood of the Detenu being enlarged on bail and that successive applications have been rejected since he was taken into custody on 18.10.2007, under Section 132/135(1)(a) of the Customs Act. Reliance has been placed on the following observations that are to be found in Rajesh Gulati "vs- Govt. of NCT of Delhi, (2002) 7 SCC 129: It cannot be overemphasized that the object of detention under the Act is not to punish but to prevent the commission of certain offences. Section 3(1) of the Act allows the detention of a person only if the appropriate detaining authority is satisfied that with a view to preventing such person from carrying on any of the offensive activities enumerated therein, it is necessary to detain such person. The satisfaction of the detaining authority is not a subjective one based on the detaining authority's emotions, beliefs or prejudices. There must be a real likelihood of the person being able to indulge in such activities, the inference of such likelihood being drawn from objective data. In this case, the detaining authority's satisfaction consisted of two parts-one: that the appellant was likely to be released on bail and two: that after he was so released the appellant would indulge in smuggling activities. The detaining authority noted that the appellant was in custody when the order of detention was passed. But the detaining authority said that "bail is normally granted in such cases". When in fact the five applications filed by the appellant for bail had been rejected by the Courts (indicating that this was not a 'normal' case), on what material did not detaining authority conclude that there was "imminent possibility" that the appellant would come out on bail" The fact that the appellant was subsequently released on

bail by the High Court not have been foretold. As matters in fact stood when the order of detention was passed, the 'normal' rule of release on bail had not been followed by the courts and it could not have been relied on by the detaining authority to be satisfied that the appellant would be released on bail. [See: in this context *Ramesh Yadav v. District Magistrate*, AIR 1986 SC 315. Assuming that by some method of prescience the detaining authority foresaw the order of bail which was granted to the appellant on his sixth application, the question still remained, would the appellant again resort to smuggling goods into the country” It was not the detaining authority's case that the appellant was a die-hard smuggler. In fact in the impugned detention order, the detaining authority noted that: “Though Shri Deepak Dhembala, the proprietor of M/s. B.D. Denim had denied any association in that case, yet from the statement of Shri Rajesh Gulati i.e. you it is clearly evident that Shri Dhembala was the brain behind the smuggling of mobile phones through your help and he was arranging for your ticket and other expenses for executing the process of smuggling of mobile phones in clandestine manner”. This case is of no advantage to the Detenu as the factual matrix is dissimilar on essentials. Moreover, if the Detenu is so fatalistically certain of the inevitability of not being enlarged on bail, he should welcome that the period of detention runs its course while he is in incarceration in the pending prosecution under Sections 132/135 of the Customs Act.

8. It is next contended that legally unexcusable and uncondonable delay in passing the impugned Order has occurred. It has already been noted that the Detenu was taken into custody by the Customs Department on 18.10.2007. Judicial Remand was applied for and ordered by the ACMM, New Delhi on the application of the Customs Department on 19.10.2007. It is trite that the importer or passenger, as the case may be, whose valuation of the imported goods has not been accepted by the Customs Department, would not automatically or invariably be prosecuted under Section 132/135 of the Customs Act. Requisite mens rea would have to be evident to justify prosecution. We do not intend to make any observations so far as the pending prosecution is concerned. We have mentioned it only for the reason that the entire conspectus of facts would have had to be taken note of in order to arrive at the decision to prosecute him. Everyday scores of passengers pay duty as per the valuation and assessment of the Department even though they may not agree with it. Prosecution of each one of them would result in the travesty of the law.

9. Returning to the facts of the case in hand it appears to us that the relevant material was already available with the Respondents on 18.10.2007. The only investigation or inquiry was restricted to the calling for a Report from the Department in Kolkata on 25.10.2007; the Report was received on 1.11.2007. Furthermore, it is undisputable that prosecution under the Customs Act is not synonymous with preventive detention. Having said that it is well-nigh impossible to conceive of circumstances where preventive detention may be justified even though prosecution is not intended or recommended. The proposal for the detention of the Detenu appears to have been finalised on 10.1.2008.

10. The impugned Detention Order has been passed two months after the initiation of prosecution on 15.12.2007, on which date investigation must be deemed to have been completed. We have to consider whether the passage of two months thereafter would constitute delay as it would vitiate the impugned Detention Order. It is trite that the decision to detain a citizen would not be sustainable if it does not manifest urgency and imminence since the vital links between an action of the Detenu and the decision to detain him would almost invariably stand snapped.

11. In these circumstances, we find that there is uncondonable delay in the passing of the impugned Order, the vital links necessitating preventive detention having snapped in the interregnum. Reference to the following passage from Kundanbhai Dulabhai Shaikh “vs- Distt. Magistrate, Ahmedabad, AIR 1996 SC 2998 would be advantageous to adumbrate the need for expeditious action: Turning now to the main question relating to the early disposal of the representation, we may immediately observe that this Court, in a large number of cases, has already laid down the principle in clear and specific terms that the representation has to be disposed of at the earliest and if there has been any delay in the disposal of the representation, the reasons for the delay must be indicated to the Court or else the unexplained delay or unsatisfactory explanation in the disposal of the representation would fatally affect the order of detention and in that situation, continued detention would become bad. This has been the consistent view of this Court all along from its decision in *Sk. Abdul Karim v. State of West Bengal*, (1969) 1 SCC 433 : (AIR 1969 SC 1028); *In re: Durga Show*, (1970) 3 SCC 696 : *Jaynarayan Sukul v. State of West Bengal* (1970) 1 SCC 219 : (AIR 1970 SC 675); *Shaik Hanif v. State of West Bengal*, (1974) 1 SCC 637 : (AIR 1974 SC 679); *Raisuddin @ Babu Tamchi v. State of U.P.*, (1983) 4 SCC 537 : (AIR 1984 SC 46); *Frances Coralie*

Mullin v. W.C. Khambra, (1980) 2 SCC 275 : (AIR 1980 SC 849); Mohinuddin alias Moin Master v. District Magistrate, Beed, (1987) 4 SCC 58 : (AIR 1987 SC 1977); Rama Dhondu Borade v. V.K. Saraf, Commr. of Police, (1989) 3 SCC 173 : (AIR 1989 SC 1861); Aslam Ahmed Zaire Ahmed Shaik v. Union of India, (1989) 3 SCC 277 : (AIR 1989 SC 1403); Mahesh Kumar Chauhan alias Banti v. Union of India, (1990) 3 SCC 148 : (AIR 1990 SC 1455), right upto its reiteration in Gazi Khan alias Chotia v. State of Rajasthan, (1990) 3 SCC 459 : (AIR 1990 SC 1361).

12. Regretfully the views of the Apex Court remain unheeded in the Administration. Keeping the plethora of precedents of the Hon'ble Supreme Court in perspective, we are constrained to record our displeasure with the impugned decision of the Detaining Authority. The time is not too distant when the decision or conduct of the Detaining Authorities is seen as so deliberately contumacious as to require the initiation of contempt of Court proceedings.

13. There is one further factor for which no answer has been furnished by the Customs Department. A Representation was made by the Detenu on 11.3.2008 and a Reference to the Advisory Board was made on 24.3.2008. However, the Representation dated 11.3.2008 came to be disposed of by the Joint Secretary (COFEPOSA), that is, Detaining Authority by Memorandum dated 27.3.2008 and by the Special Secretary and Director General, Central Economic Intelligence Bureau, Ministry of Finance, Department of Revenue, New Delhi on 28.3.2008 i.e. after the matter was forwarded to the Advisory Board. It is in this regard that Mr. Jain places reliance on the observations of the Constitution Bench to be found in Jayanarayan Sukul "vs- State of West Bengal, 1970 (1) SCC 219 wherein their Lordships concisely and unambiguously opined that " "the appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the Detenu's representation to the Advisory Board". Mr. Sharma, learned counsel for the Respondent, has submitted that the making of the Reference to the Advisory Board has been circumscribed by the statute, that is, five weeks from the date of the Detention Order and hence could not be delayed or postponed after the disposal of the Representation of the Detenu. That may well be so but this fact does not justify non-compliance with another imperative, namely, disposal of the Representations made by the Detenu.

14. The provisions for filing of the representation by the Detenu are not based on Rules and Regulations. They are also not based only on a statute. Article 21 of the Constitution guarantees that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 22(5) of the Constitution prescribes that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of forwarding a representation against the order. Failure to prescribe the precise schedule of time is conspicuous by its absence but it has to be “as soon as may be.” There is, however, plenitude of precedents on the time within which the grounds on which the order has been made must be communicated to the Detenu. The following Table would illustrate that the urgency has been seen in terms of a couple of days only:

SR.	NO.	PETITIONER/DETENU	DATE OF SERVICE OF BARE GROUNDS	DATE OF SERVICE OF RELIED UPON DOCUMENTS	TIME GAP (NO. OF DAYS)	QUASHED OR REVOKED BY COURT OR CENTRAL GOVERNMENT
1.	VIRENDRA SINGH	VS-UIO	1.11.80	5.11.80	4 DAYS	SUPREME COURT
2.	LAXMAN HARWANI		28.11.80	3.12.80	5 DAYS	BOMBAY HC
3.	SUMAN B. SOMANI		31.8.88	1.9.88	1 DAY	BOMBAY HC
4.	Haji HOHD.	USMAN BHATI	24.11.95	29.11.95	5 DAYS	BOMBAY HC
5.	THAKURDAS U.	KAMRA	27.6.95	30.6.95	3 DAYS	BOMBAY HC
6.	SANJAY U.	MAHATRE	27.12.95	30.12.95	3 DAYS	BOMBAY HC
7.	SHASHI GOYAL		21.2.06	24.2.06	3 DAYS	DELHI HC
8.	UIO Vs.	SHASHI GOYAL	21.2.06	24.2.06	3 DAYS	SUPREME COURT
9.	GURBAX @ SAM	BIRYANI	28.5.88	30.5.88	2 DAYS	CENTRAL GOVERNMENT

15. In T.A. Abdul Rahman -vs- State of Kerala, (1989) 4 SCC 741 = AIR 1990 SC 225 the Supreme Court opined that “when there is unsatisfactory and unexplained delay between the date of detention and the date of securing arrest of the Detenu such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the Detenu with a view to preventing him from acting in a prejudicial manner”. These observations have been extracted and reiterated in Rajinder Arora -vs- Union of India, AIR 2006 SC 1719: 2006(4) SCC 796. This kind of delay has been found to be fatal in P.M. Hari Kumar -vs- Union of India, (1995) 5 SCC 691 and SMF Sultan Abdul Kader -vs- Jt. Secy. to Govt. of India, (1998) 8 SCC 343. A complete analysis of the law is available in the

decision of the Division Bench of this Court in Dalbir Singh -vs- Union of India, 1995 I AD (Delhi) 1169 which deals with the circumstances that can be considered as constituting delay both in the passing of the Detention Order as well as its execution. 16. It appears to us that the law has not undergone any appreciable change as is evident from a reading of Rajinder Arora, Vinod K. Chawla -vs- Union of India, (2006) 7 SCC 337 and Sheetal Manoj Gore -vs- State of Maharashtra, (2006) 7 SCC 560. We are fortified in our understanding from a perusal of the following extracts from Adishwar Jain “vs- Union of India, (2006) 11 SCC 339: 14. The question came up for consideration recently in Rajinder Arora v. Union of India, (2006) 4 SCC 796 wherein it has been held: “20. Furthermore no explanation whatsoever has been offered by the Respondent as to why the order of detention has been issued after such a long time. The said question has also not been examined by the authorities before issuing the order of detention. 21. The question as regard delay in issuing the order of detention has been held to be a valid ground for quashing an order of detention by this Court in T.A. Abdul Rahman v. State of Kerala, (1989) 4 SCC 741 stating: “10. The conspectus of the above decisions can be summarised thus: The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case. 11. Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the Detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the Detenu with a view to preventing him from acting in a prejudicial manner”. 22. The delay caused in this case in issuing the order of detention has not

been explained. In fact, no reason in that behalf whatsoever has been assigned at all”.

15. Delay, as is well known, at both stages has to be explained. The court is required to consider the question having regard to the overall picture. We may notice that in *Sk. Serajul v. State of West Bengal*, (1975) 2 SCC 78 this Court opined: “There was thus delay at both stages and this delay, unless satisfactorily explained, would throw considerable doubt on the genuineness of the subjective satisfaction of the District Magistrate, Burdwan recited in the order of detention. It would be reasonable to assume that if the District Magistrate of Burdwan was really and genuinely satisfied after proper application of mind to the materials before him that it was necessary to detain the petitioner with a view to preventing him from acting in a prejudicial manner, he would have acted with greater promptitude both in making the order of detention as also in securing the arrest of the petitioner, and the petitioner would not have been allowed to remain at large for such a long period of time to carry on his nefarious activities.”

16. In *Abdul Salam v. Union of India*, (1990) 3 SCC 15 whereupon the learned Additional Solicitor General has placed strong reliance, this Court found that there had been potentiality or likelihood of prejudicial activities and, thus, mere delay, as long as it is explained, the court may not strike down the detention.

17. It is of importance to note that the Supreme Court has, on several occasions, laid down a period which is much shorter than that provided in Section 3(3) of COFEPOSA. This statute lays down that for the purposes of Clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention. We see no reason why very period prescribed for compliance of both the actions envisaged in Article 22 of the Constitution should similarly hold with full force for all other attendant actions. In the present case the Detenu was served with the impugned Order on 19.2.2008 from which date his detention on a preventive platform had commenced. It is not extraordinary or unreasonable to expect the Respondents to anticipate the filing of a Representation by the Detenu, which, in the present case, was served on the Respondents on 11.3.2008. Its disposal cannot be left to the

whims and convenience of the Respondents, especially since it is a preventive and not a punitive detention that is being dealt with. We find no reason why the requisite decision was not taken on the representation "as soon as may be but ordinarily not later than five days". The unsatisfactory and legally unacceptable reason which has been proffered is forthcoming, however that the Respondents were concentrating on making the Reference to the Advisory Board within the statutory period of five weeks. The Respondents are clearly mistaken and misdirected in doing so. They should have instead concentrated first on disposing of the Representation of the Detenu.

18. It is manifestly evident that the difference between preventive and punitive detention has escaped the comprehension of the Respondents since their manner of dealing with the issue shows that they discern no distinction so far as the punitive and preventive detention is concerned. The remedy with respect to punitive detention will ordinarily lie in a Court of law. The Constitution, however, provides in Article 22(5) for the remedy of the redressal of the detenu's grievance, in the first instance by the filing of a representation. This is plainly not a punctilio or an idle formality. Each and every citizen of India, including high and senior Government officials, must respect and comply with the spirit of the Constitution. Therefore, as and when a representation is received from a Detenu it must immediately be cogitated upon and decided. It is only thereafter that any further step towards legalising the preventive detention can be taken. It would be most unreasonable to contend that the decision to proceed to the next step viz. Reference to the Advisory Board can be taken without first deciding whether there is any strength in the representation of the Detenu. The officers and officials of the Government are expected to reverse or amend their decisions if just cause is shown in the Representation for doing so. The Reference to the Advisory Board made on 24.3.2008, keeping the Detenu's representation pending, smacks of a mindless and mechanical process of decision making. We are in no manner of doubt that wherever and whenever the legality and appropriateness of preventive detention is to be considered, the highest standards of free, frank and forthright thinking is to be expected of the officer concerned. Presumption that a representation is meritless cannot be drawn. In fact this is what is presumed if and when a Reference to the Advisory Board is made even before a representation is dealt with and finally disposed of. That is why the Apex Court has ordained in *Sukul* that the representation must be decided before sending the case to the Advisory

Board. The Respondents action in deciding the subject Representation after the Reference was made is legally indefensible.

19. Before parting we will once again reproduce the following passage of Union of India “vs- Yumnam Anand M. Alias Bocha Alias Kora Alias Suraj, (2007) 10 SCC 190, which is a reiteration of similar observations made on many previous occasions, in the hope that the Respondents will wake up to the need to comply with the Constitution. “In case of preventive detention no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. (See R. v. Halliday and Kubic Darusz v. Union of India.) But at the same time, a person’s greatest of human freedoms i.e. personal liberty is deprived, and, therefore, the laws of preventive detention are strictly construed, and a meticulous compliance with the procedural safeguard, however technical, is mandatory. The compulsions of the primordial need to maintain order in society, without which enjoyment of all rights, including the right of personal liberty would lose all their meanings, are the true justifications for the laws of preventive detention. This jurisdiction has been described as a “jurisdiction of suspicion”, and the compulsions to preserve the values of freedom of a democratic society and social order sometimes merit the curtailment of the individual liberty. (See Ayya v. State of U.P.) To lose our country by a scrupulous adherence to the written law, said Thomas Jefferson, would be to lose the law, absurdly sacrificing the end to the means. No law is an end itself and the curtailment of liberty for reasons of State’s security and national economic discipline as a necessary evil has to be administered under strict constitutional restrictions. No carte blanche is given to any organ of the State to be the sole arbiter in such matters.”

20. For these reasons the impugned Detention Order is quashed. The Detenu is directed to be released forthwith if not required in any other case of punitive or preventive detention. Since the Respondents have turned a deaf ear to and a closed or obdurate comprehension of the numerous decisions of the Hon’ble Supreme Court, as well as High Courts across our country, we impose costs against the Respondents and in favour of the Petitioner quantified at Rs.5,000/-.

21. The writ petition is allowed in these terms.

Sd/-
(VIKRAMAJIT SEN)
JUDGE

Sd/-
(V.K. SHALI)
JUDGE