

* **HIGH COURT OF DELHI : NEW DELHI**

Judgment delivered on: 02.02.2011

+ **WP (Crl) No. 1662 of 2010**

Varun Gupta Petitioner

Versus

Union of India & Ors. Respondents

And

+ **WP (Crl) No. 1664 of 2010**

Ram Kishan Das Petitioner

Versus

Union of India & Ors. Respondents

Advocates who appeared in this case :-

For The Petitioners : Mr D.C. Mathur, Sr. Advocate
Mr G.L. Rawal, Sr. Advocate with
Mr Mohit Mathur, Mr P.S. Singal and
Mr Madhukar Pandey, Advocates

For The Respondents : Mr A. S. Chandhiok, ASG with
Mr Pawan Narang, Mr P.S. Parmar and
Mr Kishan Pratap Singh for UOI.
Ms Meera Bhatia, additional standing
counsel for State.

Coram:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

BADAR DURREZ AHMED, J. (ORAL)

1. These writ petitions are being disposed of by a common judgment inasmuch as they raise virtually identical issues and are also connected on the basis of facts. In W.P.(Crl) 1662/2010 filed by Varun Gupta, an additional point has been taken with regard to the detention order having been passed and sought to be executed against a wrong person. Apart from that all the other pleas, taken in the two writ petitions, are identical. For the purpose of convenience, we shall refer to the facts and circumstances in the writ petition filed by Varun Gupta. We again point out that all the issues, raised in W.P.(Crl) 1662/2010 filed by Varun Gupta, except the issue with regard to the detention order being sought to be executed against a wrong person, have been raised in the case of the petitioner Ram Kishan Das (W.P.(Crl) 1664/2010).

2. The learned counsel for the petitioners submitted that the impugned detention orders which are both dated 20.09.2010 are liable to be quashed even at the pre-execution stage because they fall within the five instances mentioned in **Additional Secretary, Govt. of India v. Alka Subhash Gadia: 1992 Supp. (1) SCC 496**. In the first instance, it has been submitted that the detention orders, passed under Section 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (hereinafter referred to as “COFEPOSA Act”), are bad because the only instance referred to in the detention orders is of alleged smuggling. According to the learned counsel for the petitioners, smuggling by itself, unless and until it is coupled with the element of

conservation or augmentation of foreign exchange, cannot be a ground for passing a detention order under the COFEPOSA Act. Thus, according to the learned counsel for the petitioners, the detention orders would be open to challenge even at the pre-execution stage as it fell within the first instance mentioned in **Alka Subhash Gadia** (supra) which is to the effect that the impugned order is not passed under the Act under which it is purported to have been passed.

3. The next plea taken by the learned counsel for the petitioner in the case of petitioner Varun Gupta is that the detention order was passed against a wrong person. The learned counsel referred to the detention order passed in the case of Varun Gupta which reads as under:

“Whereas, I, Smt. Rasheda Hussain, Joint Secretary to the Government of India, specially empowered under section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (as amended), am satisfied with respect to the person known as Shri Varun Gupta @ Varun @ Sumit Saluja, S/o Shri Surinder Kumar @ Surinder Kumar Gupta, R/o FD-41(SF), Vishaka Enclave, Pitampura, Delhi that with a view to preventing him from engaging in further smuggling goods in future, it is necessary to make the following order:

Now, therefore, in exercise of the powers conferred by Section 3(1) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (as amended), I direct that the said Sh. Varun Gupta, be detained and kept in custody in the Central Tihar Jail, Delhi.”

4. Reading the said detention order, the learned counsel submitted that in the first paragraph, the detenu's name has been given as “Shri Varun Gupta @ Varun @ Sumit Saluja, S/o Shri Surinder Kumar @ Surinder Kumar Gupta, R/o FD-41 (SF), Vishaka Enclave, Pitampura,

Delhi.” He submitted that Varun Gupta and Sumit Saluja are two different and distinct persons. In fact Sumit Saluja is another co-detenu in this case in respect of whom a separate detention order had been passed. Thus, according to the learned counsel for the petitioner, the present detention order is sought to be passed against a wrong person and therefore, the same is liable to be quashed.

5. The third plea taken by the counsel for the petitioners is that the entire issue had been investigated thoroughly by the CBI and the CBI had filed a chargesheet on 30.11.2010 in which the present petitioners – Varun Gupta and Ram Kishan Das – have not been shown as accused. The learned counsel for the petitioners pointed out that the present detention orders are sought to be linked with the raid conducted on 27.10.2009 at the International Container Division, Loni, Ghaziabad, UP, where several containers were seized. The seizure was made on the allegation of an attempt at improper export of those goods in contravention of the DGFT Notification No.55 (RE-2008/2004-2009) dated 05.11.2008 issued by the Director General of Foreign Trade whereby export of Non-Basmati Rice was prohibited. The goods which were seized were alleged to be Non-Basmati Rice which were allegedly sought to be exported as Basmati Rice. The learned counsel for the petitioners submitted that assuming these facts to be true, there was only a violation of the prohibitory notification issued by the Director General of Foreign Trade and there was a mis-declaration in the sense of mis-description of goods but not in the value thereof. As certain public

officers were allegedly involved, the CBI took up investigation under the Prevention of Corruption Act, 1988 and while investigating the same as well as offences under Sections 132 and 135 of the Customs Act, the said investigating agency did not find anything incriminating in so far as the present petitioners are concerned and, therefore, they were not listed as accused in the chargesheet.

6. The learned counsel for the petitioners also submitted that no action whatsoever has been taken by the Director General of Foreign Trade, which is the agency responsible for ensuring compliance with its notification, against the petitioners. The learned counsel for the petitioners placed strong reliance on the decision of the Supreme Court in the case of **Rajinder Arora v. Union of India and Others**: (2006) 4 SCC 796. Referring to paragraphs 10 and 11 and several other portions of the said decision, the learned counsel for the petitioners made three contentions. The first was that the case of **Rajinder Arora** (supra) was also one concerning a challenge at the pre-execution stage and the second was that in that case also the Director General of Foreign Trade was involved and the Supreme Court had observed that there has been a long delay in the passing of the detention order. Thirdly, it was contended that no prosecution had been initiated by the Director General of Foreign Trade.

7. Referring to paragraph 25 of the said decision, it was contended that the fact situation, which arose in **Rajinder Arora** (supra), was such that instances 3 and 4 of **Alka Subhash Gadia** (supra) were

attracted and therefore, the Supreme Court quashed the detention order. According to the learned counsel for the petitioners, the fact situation in the present petitions is similar to those pertaining in **Rajinder Arora** (supra) and consequently, the detention orders are also liable to be quashed.

8. Lastly, it was contended on behalf of the petitioners that the delay in passing the detention orders would also vitiate the same. According to the learned counsel, raid was conducted on ICD, Loni, Ghaziabad, UP as far back as on 27.10.2009 but the detention order was passed almost a year later on 29.09.2010. This delay of about eleven months is unexplained, according to the learned counsel for the petitioners, and is, therefore, fatal to the detention order.

9. We have also heard Mr Chandhiok, learned ASG, appearing on behalf of the respondent. He controverted all the pleas taken by the learned counsel for the petitioners. In so far as the plea that smuggling alone is not sufficient for issuance of a detention order under COFEPOSA Act, the learned counsel, Mr Chandhiok, submitted that a bare reading of Section 3 of the COFEPOSA Act would make it clear that smuggling activities and the activities concerning conservation and augmentation of foreign exchange are disjunctive. Therefore, the plea taken by the petitioners would not be tenable. As regards the plea that the detention order in the case of Varun Gupta has been issued against a wrong person, Mr Chandhiok referred to the detention order, which has already been set out above, and submitted that although one of the aliases of Varun Gupta

in the first paragraph of the detention order has been shown to be Sumit Saluja, that is only a typographical error and the other particulars such as parentage and residence certainly pertain to Varun Gupta himself. Even the second paragraph by virtue of which Varun Gupta is sought to be detained refers only to Varun Gupta and there is no reference to Sumit Saluja. Thus, according to Mr Chandhiok, this is not a case of a detention order being sought to be executed against a wrong person.

10. Mr Chandhiok also submitted on the strength of the Constitution Bench decision in the case of **Haradhan Saha v. The State of West Bengal and Ors. : (1975) 3 SCC 198** that the investigation conducted by the CBI and the purported fact that the present petitioners are not shown as accused in the chargesheet submitted by the CBI would be of no consequence. He submitted that similarly, the fact that no action has yet been taken by the Director General of Foreign Trade would also be of no consequence. However, it was pointed out that while the CBI has filed the chargesheet in which the present petitioners have not been shown as accused, a complaint has been filed by the Directorate of Revenue Intelligence, which is the sponsoring agency in this case. The complaint has been filed after obtaining the requisite sanction from the Commissioner of Customs under Section 137 of the Customs Act and in the said complaint the present petitioners along with others have been specifically named as accused.

11. As regards the plea of delay, Mr Chandhiok submitted that it is not a case of unexplained delay. He referred to the counter affidavit

submitted on behalf of the respondents to explain that the manner in which the period of eleven months elapsed before the detention order was issued. Consequently, it was urged on behalf of the respondents that the detention order cannot be quashed at the pre-execution stage as none of the aspects dealt with in **Alka Subhash Gadia** (supra) are attracted in the present case and the delay also has been satisfactorily explained.

12. Taking up the first point, that is, with regard to smuggling alone not being sufficient for issuance of a detention order under Section 3 of the COFEPOSA Act, it would be necessary to refer to sub-section (1) thereof, which reads as under:

“3. Power to make orders detaining certain persons.

– (1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from-

- (i) smuggling goods, or
- (ii) abetting the smuggling of goods, or
- (iii) engaging in transporting or concealing or keeping smuggled goods, or
- (iv) dealing in, smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or
- (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,

It is necessary so to do, make an order directing that such person be detained.”

13. A plain reading of the aforesaid provision makes it clear that a detention order can be passed if the detaining authority is satisfied with

respect to any person (including a foreigner), that with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from, inter alia, smuggling goods. It is apparent that the aspects of conservation or augmentation of foreign exchange are distinct and separate from the question of smuggling goods as mentioned in Section 3(1)(i) of COFEPOSA Act. There are other instances for which a detention order can be passed and those are for preventing activities such as abetting the smuggling of goods, engaging in transporting or concealing or keeping smuggled goods, dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or harbouring persons engaged in smuggling goods, or in abetting the smuggling of goods. None of the activities which pertain to smuggling of goods, abetting in the smuggling of goods, transporting or concealing or keeping smuggled goods, dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping of the smuggled goods, or harbouring persons engaged in smuggling goods necessarily involve any element of conservation or augmentation of foreign exchange for the purposes of invoking the powers of detention. A reference can be made to the Supreme Court decision in the case of **Union of India and Another v. Venkateshan S. and Another: 2002 (5) SCC 285** (paragraph 9) wherein it has been clearly indicated that:-

“The COFEPOSA Act contemplates two situations for exercise of power of preventive detention – (a) to prevent violation of foreign exchange regulations; and (b) to prevent smuggling activities.”

14. We are of the view that when a detention order is passed with a view to preventing a person from smuggling goods, it is not at all necessary that there must also be an element of conservation or augmentation of foreign exchange. It is possible that a particular case may involve both the element of smuggling as well as the foreign exchange element but it is not at all necessary that both should be present. Therefore, the plea advanced by the learned counsel for the petitioners is not acceptable to us.

15. With regard to the plea that, in the case of Varun Gupta, the detention order is sought to be executed against a wrong person, we find ourselves to be in agreement, once again, with the submissions advanced by Mr Chandhiok. The detention order which we have set out in the earlier part of this judgment, comprises of two paragraphs. In the first paragraph, there is reference to Varun Gupta along with his so-called aliases Varun and Sumit Saluja. However, immediately thereafter, it is followed by his parentage wherein he has been shown as son of Shri Surinder Kumar @ Surinder Kumar Gupta and he has been shown to be a resident of FD-41 (SF), Vishaka Enclave, Pitampura, Delhi. The entire description pinpoints the present petitioner Varun Gupta except the portion where Sumit Saluja has been indicated. It is clear that Sumit Saluja is not the son of Sh. Surinder Kumar nor does he reside at the said address. It is Varun Gupta who is the son of Sh. Surinder Kumar and who resides at the above address. The explanation given in the additional counter affidavit filed on behalf of the respondents 1 and 2 is that the first

name, his first alias, father's name and residential address of the proposed detenu have been correctly given. It is only the second alias, that is, "@ Sumit Saluja" which is incorrect and that is an inadvertent typographical/computer error.

16. We also note that the second paragraph of the detention order which is the operative part thereof has only reference to "the said Sh. Varun Gupta". Therefore, the detention order is sought to be executed in respect of Varun Gupta who is the person for whom the detention order was passed. Consequently, it cannot be said that the detention order is sought to be executed against a wrong person.

17. We also find that the plea that as CBI has given a virtual clean chit to the petitioners and therefore, instance (iii) of the five instances given in **Alka Subhash Gadia** (supra) is invoked, is not tenable. Section 3(1) of the COFEPOSA Act has already been extracted above. We have seen that it also refers to the word "smuggling". The same has been defined in Section 2(e) of the COFEPOSA Act in the following manner:

"2(e) – "smuggling" has the same meaning as in clause (39) of section 2 of the Customs Act, 1962 (52 of 1962), and all its grammatical variations cognate expressions shall be construed accordingly;"

The Customs Act, 1962 defines smuggling in Section 2(39) as under:

2(39). "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."

Going by the definition given in the Customs Act, smuggling relates to any act or omission which would render the goods liable for confiscation under Section 111 or Section 113. Section 111 is applicable in the case

of improper importation and Section 113 applies with regard to improper exports. It has been alleged on behalf of the respondents that Section 113(d) and (i) would clearly apply inasmuch as the goods in question, namely, Non-Basmati Rice were alleged to be exported as Basmati Rice when there was a clear prohibition in respect of export of Non-Basmati Rice. Not only is there a clear mis-description but also a violation of the prohibitory order passed by virtue of the said DGFT notification. Thus, the goods were liable for confiscation and therefore, by virtue of Section 2(39) of the said Act, the same would amount to smuggling. Therefore, going back to the definition of smuggling given in the COFEPOSA Act in Section 2(e), the activity of attempting to export Non-Basmati Rice as Basmati Rice would have to be regarded as smuggling, provided, of course, that the facts as alleged by the respondents are taken to be true. There is one thing, however, that we must note and that is that the expression “smuggling” as appearing in the COFEPOSA Act is not limited to the word “smuggling” as defined in the Customs Act but is also extended to all its grammatical variations and cognate expressions which have to be construed accordingly. Apart from this, it is also clear on plain reading of Section 3(1) of the COFEPOSA Act that a detention order can be passed not only for the purpose of preventing a person from smuggling goods but also for other related activities such as harbouring persons engaged in smuggling goods or in abetting the smuggling of goods. This clearly demonstrates that even though there may or may not be a prosecution for smuggling under the Customs Act, there could still be

circumstances and situations which could necessitate a detention order under Section 3(1) of the COFEPOSA Act. In this regard, reference ought to be made to the following observations of a Constitution Bench of the Supreme Court in the case of Haradhan Saha (supra):

“32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention, may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

18. It is clear from the above observations that an order of preventive detention can be made with or without any prosecution and in anticipation or after discharge or even acquittal. This being the case, the fact that the petitioners have not been shown as accused in the CBI chargesheet would not come in the way of passing a detention order, provided the circumstances so warrant. Of course, in the present case, there is the added fact that the Directorate of Revenue Intelligence which is the sponsoring authority has filed a complaint under Sections 132/135 of the Customs Act after taking the sanction of the appropriate authority under Section 137 thereof, in which the petitioners have been clearly shown as accused. Of course, this complaint has been filed subsequent to the passing of the detention order and also subsequent to the filing of the present writ petitions.

19. Considering the aforesaid circumstances, we are of the view that just because the CBI has not shown the petitioners as accused in the chargesheet filed by them, and just because the Directorate General of Foreign Trade has not yet taken any steps for the alleged violation of its notification, would not be ground enough, at the pre-execution stage, for challenging the detention order. We may point out at this juncture, that even the chargesheet was subsequent to the passing of the detention order as well as to the filing of the present writ petitions.

20. The other aspect which remains to be considered is the question of delay. The plea has been set up in ground 'D' in Varun Gupta's petition in the following manner:

“D. BECAUSE the petitioner/detenu says and submits that though the alleged incident took place on 27.10.2009, when the seizure of the impugned containers of non Basmati Rice was allegedly made, but the impugned order was not passed till 20/09/2010. It is submitted that long and undue delay in passing the impugned detention order casts doubts on the subjective satisfaction of the detaining authority to detain the petitioner preventively. Therefore, on this ground alone the impugned detention order is liable to be quashed.”

21. This has been replied to by the respondents in their replies to grounds 'D', 'E' and 'F' as under:

“D. That the submissions made in this Ground are untenable and misconceived and hence denied. That in reply to the submissions made in these Grounds it is submitted that the purpose of passing of detention order under COFEPOSA Act 1974 is to prevent the detenu from indulging in prejudicial activity in future. It is reiterated that the Petitioner has the propensity and potentiality of indulging in prejudicial activities in future also and it is also in public and national interest that the detention order was passed against the Petitioner to prevent him from indulging in unlawful, illegal activities

in future. After getting sufficient evidences against the petitioner during investigation and examining the entire illegal activities (since involved) a Detention order was issued on 20.09.2010 against the Petitioner. Hence there was no delay in passing of order. It is further submitted that all relevant material was taken into consideration by the detaining authority.

E. That the submissions made in this Ground are misconceived and hence denied. It is submitted that only after examining the proposal and documents placed before the detaining Authority, considering the potentiality and propensity of the Petitioner to indulge in prejudicial activities in future, detention order was passed to prevent him from smuggling goods in future. Moreover nexus between M/s Aross International, M/s Avon Exports, M/s Bishan Saroop Ram Kishan Agro Pvt. Ltd., S/Shri Surinder Singh, Gian Chand, Ram Kishan Dass, Varun Gupta, Sumeet Saluja & Ribu Kurian Ninan have been established not only on the basis of statements of Shri Vikas Verma, Branch Manager of CHA firm M/s DLC Forwarders Pvt. Ltd., but also on the basis of several other facts viz. letter datd 19.09.2008 of M/s Bishan Saroop Ram Kishan Agro Pvt. Ltd. (BSRK), addressed to Assistant Commissioner of Central Excise, Delhi wherein M/s BSRK have certified that they are doing the job work or M/s Aross International and that they (M/s BSRK) have no objection if they (M/s Aross International) take the self-sealing permission for export in our godown premises, statements of Shri Ribu Kurian Ninan (partner of M/s Avon Exports), wherein he has stated that on the directions of Shri Gian Chand, Shri Varun Gupta used to give documents pertaining to M/s Aross International, letter dated 20.04.2010 of Shri Surinder Singh (proprietor of M/s Aross International) wherein he has clearly informed that the name of his firm and the entire deal of exports in the name of his firm were used/done by M/s Bishan Saroop Ram Kishan Agro Pvt. Ltd, run and managed by Shri Ram Kishan Dass, Shri Gian Chand and their other employees and that the blank letter heads of M/s Aross International, other blank papers and signed cheque books of the account of M/s Aross International were obtained by M/s BSRK for carrying on their export smoothly and that he (Surinder Singh) was mere commission agent in this case, also during the course of search at the office premises of M/s Bishan Saroop Ram Kishan Dass Agro Pvt. Ltd. hard-

disc of the computer installed in the office of M/s Bishan Saroop Ram Kishan Dass Agro Pvt. Ltd. was recovered and on going through the contents of the hard-disc, self sealing certificate dated 22/10/2009 of M/s Aross International signed by Shri Surinder Singh for containers bearing numbers UACU3011330 and UACU3627898 (both the containers have been seized by DRI as they were found to contain non-basmati rice), invoice no. AI/023/09-10 Dt. 14.10.2009 and packing list for the said invoice of M/s Avon Exports was found in the Invoices Folder. Thus from the above it is clear that the role of the petitioner was one of the main organizer/kingpin/financer of well organized syndicate involved in smuggling of prohibited non-Basmati Rice.

F. That the submissions made in this Ground are wrong and denied. It is submitted that Shri Varun Gupta was given several summons for his appearance on 25.11.2009, 27.11.2009, 17.12.2009, 08.01.2010, 17.02.2010, 18.02.2010, 03.06.2010 & 06.07.2010 before the Sponsoring Authority but he never appeared for tendering his statement in the said case on one pretext or the other.....”

22. From the reply filed on behalf of the respondents, it is apparent that the period of 11 months which passed between the raid and the detention order cannot be said to be an unexplained delay on the part of the respondents. The respondents had issued summons to the petitioners to appear till as late as 06.07.2010 in the case of Varun Gupta and 05.07.2010 in the case of Ram Kishan Das. But they failed to appear. It is only then that the detention order was passed on 20.09.2010. Therefore, at this pre-execution stage, taking a prima facie view of the matter, we are not in agreement with the submissions made by the learned counsel for the petitioners that there was a delay in passing the detention order much less any unexplained delay. Consequently, this contention of the petitioners is also not tenable.

23. We find that a Full Bench of this Court in the case of **Mansukh Chhagan Lal Bhatt v. Union of India and others: 1995 Crl L.J. 1097**, held that mere delay did not amount to the detention order having been passed for a wrongful purpose or for a collateral purpose. This observation was made in the context that delay in the passing of a detention order would fall within instances (iii) and (iv) of **Alka Subhash Gadia** (supra) which was strongly relied upon by the learned counsel for the petitioners. However, we note that the said decision would be of no help to the present petitioners inasmuch as in paragraph 14 thereof itself, there is a clear observation that the delay was unexplained. In the present case, we have, however, found that, firstly, there was no delay and that the entire period of 11 months has been, prima facie, satisfactorily explained.

24. In view of the foregoing, we do not find any merit in the petitions at this pre-execution stage. We make it clear that we have considered these writ petitions only from the standpoint of the submissions of the learned counsel for the petitioners that their cases fall within the five instances in **Alka Subhash Gadia** (supra). The writ petitions are dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

MANMOHAN SINGH, J

FEBRUARY 02, 2011

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