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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(CRL) 1843/2019 & CRL.M.A. 13377/2019**

RAMANPREET KAUR

..... Petitioner

Through: Mr. Rakesh Tiku, Senior Advocate
with Mr. Raghav Parwatiyar,
Mr. Rohit Bhalla and Mr. Lokesh
Bhardwaj, Advocates.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Ajay Digpaul, CGSC and
Mr. Aaryan Verma, Advocate for
UOI.

Reserved on: 19th November, 2019

Date of Decision: 29th November, 2019

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CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:

1. Present petition has been filed by the sister of the detainee – Ramanpreet Kaur seeking release of her detained brother – Gagan Jot Singh. The petitioner prays for an issuance of a writ in the nature of certiorari to quash Detention Order dated 11th March, 2019 passed against the detainee under Section 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as COFEPOSA) by respondent No.2 as well as order dated 07th June, 2019 passed under Section 8(f) of COFEPOSA whereby the Central

Government had confirmed the Detention Order dated 11th March, 2019.

ARGUMENTS ON BEHALF OF THE PETITIONER

2. Mr. Rakesh Tiku, learned senior counsel for the petitioner stated that the alleged recoveries in the present case had been falsely attributed to the detainee inasmuch as the concerned officer had illegally clubbed all the recoveries made from four different passengers and attributed the same to the detainee. He also pointed out that since the drones had been recovered from three checked-in bags having no luggage tags, implantation of the same could not be ruled out.

3. Learned senior counsel for the petitioner submitted that COFEPOSA had been wrongly invoked in the present case. In support of his submission, he relied upon the notification F.No.671/14/2012 Cus. VIII dated 3rd August, 2012 passed by Ministry of Finance, Department of Revenue wherein it has been stated that COFEPOSA cannot be invoked until the attempted duty evasion is Rs. 50 lakhs or the value of the goods is Rs. 2 crores. He emphasized that the value of the recovered goods in the present case had been exaggerated and the market value of the same was much less than Rs. 50 lakhs. He stated that even if the value attributed by the respondents is to be believed at Rs.1.09 crores, the same falls short of the prescribed amount in the aforementioned Notification.

4. Learned senior counsel for the petitioner further contended that since the passports of the detainee and his family members were already in the possession of Custom Department, there was no possibility of the detainee committing an offence of smuggling. In support of his contention, he relied upon the Supreme Court judgment in *Moulana Shamshunnisa*

vs Additional Chief Secretary and Others (2010) 15 SCC 72, wherein it has been held as under:-

“8. In Rajesh Gulati case [(2002) 7 SCC 129 : 2002 SCC (Cri) 1627] the question that came to be canvassed on behalf of the detenu was that as his passport continued to be in the possession of the Customs Authorities, there was no question of the appellant travelling abroad or indulging in any smuggling activity. This plea was accepted by this Court by observing that it was not the case of the detaining authority at any stage that the detenu would be able to continue with his smuggling activities within India, though he could not go abroad his passport having been seized. It was observed thus:

“15. ... The conclusion that despite the absence of his passport the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation on the part of the detaining authority. These findings are sufficient to invalidate the impugned detention order and it is not necessary to consider the other issues raised by the appellant.”

9. This opinion has been further fortified by this Court in Gimik Piotr case [(2010) 1 SCC 609 : (2010) 1 SCC (Cri) 864] . In SCC para 32, it has been held as under:

“32. In the present case, the detention order was passed under Section 3(1)(i) of COFEPOSA. The Customs Department has retained the passport of detenu. The likelihood of the appellant indulging in smuggling activities was effectively foreclosed. As observed by this Court in Rajesh Gulati case [(2002) 7 SCC 129 : 2002 SCC (Cri) 1627] , that the contention that despite the absence of a passport, the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation.”

And again in SCC para 35: (Gimik Piotr case [(2010) 1 SCC 609 : (2010) 1 SCC (Cri) 864] ,

“35. In our considered view, the submission of the learned counsel for the appellant requires to be accepted. In the instant case as the facts reveal that there was no pressing need to curtail the liberty of a person by passing a preventive detention order. Foreign currency cannot be smuggled as the person cannot move out of the country on account of his passport being impounded. Merely because a person cannot otherwise survive in the country, is no basis to conclude that a person will again resort to smuggling activities, or abetting such activities by staying in the country. There is higher standard of proof required in these circumstances involving the life and liberty of a person. The material provided by the respondents is not enough to justify the curtailment of the liberty of the appellant under an order of preventive detention in the facts and circumstances of the case.”

5. Learned senior counsel for the petitioner submitted that the impugned detention order was illegal as the ordinary criminal law was sufficient to deal with the case of the detainee. He emphasised that the impugned detention order should not have been passed as the detainee was already in custody and there was no likelihood of him being released inasmuch as three of his bail applications had already been dismissed. In support of his submission, he relied upon the following judgments of the Supreme Court:-

A. ***Rekha vs State of Tamil Nadu (2011) 5 SCC 244*** wherein it has been held as under:

“30. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal.....

33. No doubt it has been held in the Constitution Bench decision in *Haradhan Saha* case [(1975) 3 SCC 198 : 1974 SCC (Cri) 816] that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution (which we have already explained). Article 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him an opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (the Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.”

B. *Rajesh Gulati vs. Govt. of NCT of Delhi & Anr.*, (2002) 7 SCC 129 wherein it has been held as under:

“13. 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 the 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 could 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 [(1985) 4 SCC 232 : 1985 SCC (Cri) 514 : AIR 1986 SC 315] , AIR at p. 316.)”

6. In view of the foregoing, he prayed that the impugned detention order dated 11th March, 2019 and the impugned order dated 7th June, 2019 confirming the said detention order, be quashed.

ARGUMENTS ON BEHALF OF THE RESPONDENTS

7. *Per contra*, Mr. Ajay Digpaul, learned counsel for the Respondent Nos. 1 & 2 vehemently denied that the alleged recoveries had been wrongly attributed to the detainee. He stated that specific intelligence had been received by the Assistant Commissioner, Green Channel, Shift-D through an informer on the intervening night of 1st and 2nd February, 2019, which had been recorded in DRI-I, regarding the smuggling of drones, gold, cigarettes etc. in commercial quantity by six passengers from two different flights i.e. 9W 507 and KU 381. He pointed out that acting upon the said information, the detainee and his partner/co-accused – Mr. Gurpreet Singh were intercepted at gate No. 5 of the arrival hall of the IGI Airport, Delhi by the Customs and DRI officers and during their baggage search, commercial quantity of the following items were recovered:-

- a. Foreign origin drones
- b. Camera
- c. Camera lenses
- d. Cigarettes

- e. Sony PS-4
- f. Apple MacBook Pro
- g. Chivas Regal Whiskey bottles

8. He further stated that during the *panchnama* proceedings dated 2nd February, 2019 the detainee and his partner were asked whether anyone else was coming to India with similar kind of contraband items, to which they had stated that four other passengers namely Mr. Harmeet Singh (brother of the detainee), Mr. Sumit Varma, Mr. Sourabh Chopra and Mr. Amarjeet Singh were coming from Dubai via connecting flight KU 381 from Kuwait to Delhi.

9. Mr. Ajay Digpaul stated that four aforementioned passengers had been intercepted on the same day as the detainee and foreign origin cigarettes in commercial quantity were recovered from them. He stated that in their voluntary statements under Section 108 Customs Act, the aforementioned four persons had stated that the detainee was the owner of the goods recovered from them and they had been carrying the said goods on the instructions of the detainee in lieu of money. He pointed out that even in their second statement, Mr. Sourabh Chopra, Mr. Sumit Varma, Mr. Amarjeet Singh and co-accused/partner of the detainee – Mr. Gurpreet Singh had reiterated that the detainee was the owner of the goods recovered from them.

10. He also pointed out that the recovered goods could not have been for personal use as they were in commercial quantity and the recovered drones had a range of about eight kilometres.

11. Learned counsel for the Respondent Nos. 1 & 2 stated that the passport of the detainee had not been seized by the Custom Department as contended by the counsel for the petitioner. He further stated that the passports of the detainee and his associates had been returned after the *panchnama* proceeding on 2nd February, 2019 and after their arrest on 3rd February, 2019, the said passports had been kept in '*jamatalashi*' along with other articles. He pointed out that the passports could be released against an order of the concerned Court and four other accused persons had already collected their passports.

12. Learned counsel for the Respondent Nos. 1 & 2 submitted that the notification F.No.671/14/2012 Cus. VIII dated 3rd August, 2012 passed by Ministry of Finance, Department of Revenue was no bar to apprehend the detainee as the detainee was a kingpin and a repeat offender and consequently, he would fall under clause 'a' of the exceptions mentioned in the notification. He pointed out that as mentioned in the counter-affidavit filed on behalf of the Respondent Nos. 1 and 2, the detainee had been involved in four cases prior to his detention and the present case was his fifth offence.

13. In view of the aforesaid, he stated that the Detaining Authority had issued a legally tenable impugned detention order after due consideration and proper appreciation of the facts.

COURT'S REASONING

THE CONTENTION OF THE PETITIONER THAT THE CUSTOM OFFICERS HAD ILLEGALLY CLUBBED ALL THE RECOVERIES TO EXAGGERATE THE VALUE OF THE GOODS IS CONTRARY TO FACTS AS OWNERSHIP OF THE RECOVERED GOODS HAD BEEN

ATTRIBUTED TO THE DETENUE ON THE BASIS OF THE VOLUNTARY STATEMENTS MADE BY OTHER ACCUSED PERSONS NAMELY MR. HARMEET SINGH (BROTHER OF THE DETENUE), MR. SUMIT VARMA, MR. SOURABH CHOPRA, MR. AMARJEET SINGH AND CO-ACCUSED/PARTNER OF THE DETENUE – MR. GURPREET SINGH.

14. Having heard the learned counsel for the parties and having perused the record, this Court is of the view that the ownership of the recovered goods had been attributed to the detainee on the basis of the voluntary statements made by other accused persons namely Mr. Harmeet Singh (brother of the detainee), Mr. Sumit Varma, Mr. Sourabh Chopra, Mr. Amarjeet Singh and co-accused/partner of the detainee – Mr. Gurpreet Singh. Perusal of the voluntary statements made by them under Section 108 of the Customs Act shows that they had been carrying the recovered goods on the instructions of the detainee and he was in fact, the real owner of all the goods recovered. Consequently, the contention of the petitioner that the Custom officers had illegally clubbed all the recoveries to exaggerate the value of the goods is contrary to facts.

SINCE THE DETENUE WAS A 'KINGPIN' AND A 'REPEAT OFFENDER' THE PRESENT CASE SQUARELY FALLS UNDER CLAUSE 'a' OF THE EXCEPTIONS PROVIDED UNDER THE NOTIFICATION DATED 3rd AUGUST, 2012 PASSED BY MINISTRY OF FINANCE, DEPARTMENT OF REVENUE AND CONSEQUENTLY, THE SAID NOTIFICATION DID NOT PROHIBIT/RESTRAIN THE RESPONDENTS FROM DETAINING THE DETENUE.

15. This Court is also in agreement with the submission of the learned counsel for the Respondent Nos. 1 and 2 that since the detainee had been repeatedly indulging in acts of smuggling, as mentioned in the counter-affidavit filed on behalf of the Respondent Nos. 1 and 2, the notification

F.No.671/14/2012 Cus. VIII dated 3rd August, 2012 passed by Ministry of Finance, Department of Revenue did not prohibit/restrain the respondents from detaining the detainee. The details of the four cases in which the detainee had been involved prior to the impugned detention order being passed, as mentioned in the counter-affidavit filed on behalf of the Respondent Nos. 1 and 2, are reproduced hereinbelow:-

“a) On 03.09.2016, Directorate of Revenue Intelligence (Hqrs), New Delhi had arrested the accused Shri Harmeet Singh, S/o Shri Jagpal Singh, who is the brother of Shri Gagan Jot Singh, in a case of smuggling foreign currency out of India equivalent to Rs. 1.86 crores (approx.). Shri Gagan Jot Singh could not be arrested in this case as he remained underground for a considerable period. However, he was a co-noticee in the case. The case has since been adjudicated vide O-I-O No. 157/Dr.Amandeep Singh/ADC/2018 issued under C. No. VIII (AP) 10/P&I/Adj/34/2017 dated 31.03.2018 wherein, the seized foreign currency has been absolutely confiscated and penalty amounting to Rs. 37,32,450/- each has been imposed upon Shri Harmeet Singh and Shri Gagan Jot Singh.

b) On 13.05.2018, Jaipur Airport Customs had booked a case of smuggling of foreign currency amounting to Rs. 1.26 lakhs along with cigarettes valued at Rs. 17.21 lakhs against three persons who were carriers. They admitted that Shri. Gagan Jot Singh was the mastermind and their handler.

c) Shri Gagan Jot Singh has also committed a green channel violation in which 8 Canon Cameras and 11 Canon Lens had been seized on 12.09.2018 at IGI Airport.

d) On 29/30.11.2018, Shri Gagan Jot Singh has committed a Green Channel violation in which 108 cartons of cigarettes had been seized at IGI Airport.”

(emphasis supplied)

16. In view of the above orders of confiscation and penalty, this Court is of the opinion that the present case squarely falls under clause ‘a’ of the exceptions provided under the notification as the detenue was a ‘kingpin’ and a ‘repeat offender’ and according to the material placed on record, it was the fifth offence of smuggling in which the detenue had been found involved. The relevant portion of the said notification is reproduced hereinbelow:-

“...This value threshold would not apply in the following categories:-

a) cases involving kingpins, organizers, financiers and repeat offenders.....”

(emphasis supplied)

THE FACT THAT THE DETENUE WAS A KINGPIN AND A REPEAT OFFENDER AND HAD INDULGED IN SMUGGLING PRIOR TO THE IMPUGNED DETENTION ORDER BEING PASSED AGAINST HIM PROVES THAT HE HAD THE PROPENSITY AND POTENTIALITY TO CONTINUE WITH SUCH ACTS AND/OR FINANCE OTHER PERSONS TO DO SUCH ACTS IN FUTURE.

17. The fact that the detenue was a kingpin and a repeat offender and had indulged in smuggling activities prior to the impugned detention order being passed against him proves that he had the propensity and potentiality to continue with such acts and/or finance other persons to commit such acts in future.

THE LIKELIHOOD OF THE DETENUE INDULGING IN SMUGGLING ACTIVITIES WAS NOT EFFECTIVELY FORECLOSED BY DEPOSIT OF HIS PASSPORT AS THE DETENUE NEED NOT TRAVEL OUTSIDE INDIA TO COMMIT AN OFFENCE OF SMUGGLING AS HE WAS A KINGPIN WHO HAD MULTIPLE ASSOCIATES WHO HAD BEEN

SMUGGLING GOODS INTO INDIA AT HIS BEHEST. ACCORDINGLY, THE JUDGMENT IN MOULANA SHAMSHUNNISA (SUPRA) IS OF NO HELP TO THE PETITIONER.

18. Further, this Court is of the view that the passport of the detainee had not been seized as contended by the learned senior counsel for the petitioner. Perusal of the *panchnama* proceedings dated 2nd February, 2019 reveals that while certain goods were seized, the passport of the detainee had been returned to him. There is nothing on record to suggest that the Custom Department had seized the passport of the detainee. In fact, the learned counsel for the Respondent Nos. 1 and 2 had pointed out that the passport of the detainee along with other articles was kept in '*jamatalashi*' upon his arrest on 3rd February, 2019 and the same was available for release upon following the due procedure. The fact that the detainee had not sought for the release of his passport cannot be misconstrued as a seizure by the Custom Department.

19. In any event, there is evidence to show that the detainee need not travel outside India to commit an offence of smuggling as he was a kingpin who had multiple associates who had been smuggling goods into India at his behest. Keeping in view his past conduct, there seems to be every likelihood of him indulging in the activities of smuggling. Consequently, the likelihood of the detainee indulging in smuggling activities was not effectively foreclosed by deposit of his passport and accordingly, the judgment in *Moulana Shamshunnisa* (supra) is of no help to the petitioner.

SUBMISSION OF LEARNED SENIOR COUNSEL FOR THE PETITIONER THAT ORDINARY LAW WAS SUFFICIENT TO DEAL WITH THE PRESENT CASE AND THE IMPUGNED DETENTION ORDER SHOULD NOT HAVE BEEN PASSED AS THE DETENUE WAS ALREADY IN CUSTODY IS UNTENABLE IN LAW.

20. It is pertinent to mention that an order of preventive detention is distinct from any action taken under criminal law. The Supreme Court in ***Union of India v. Paul Manickam, (2003) 8 SCC 342***, on this aspect, has held as under:-

“ 7.Preventive detention is an anticipatory measure and does not relate to an offence while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the executive is convinced on the materials available and placed before it that such detention is necessary in order to prevent the person detained from acting in a matter prejudicial to certain objects which are specified by the law. The action of the executive in detaining a person being only precautionary, the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct, the failure to conform to which alone should lead to detention.....”

(emphasis supplied)

21. Consequently, ordinary law was insufficient to deal with the present case and the judgment in ***Rekha vs State of Tamil Nadu*** (supra) is not applicable to the present case.

22. This Court is further of the view that the submission of learned senior counsel for the petitioner that the impugned detention order should not have been passed as the detenue was already in custody is untenable in law. The Supreme Court in a recent judgment in ***Union of India vs. Ankit***

Ashok Jalan, Criminal Appeal No.1746 of 2019 decided on **22nd November, 2019** has held as under:-

“8.4.It is also required to be noted that even after considering the decision of this Court in the case of Rekha (supra), which has been heavily relied upon by the learned counsel appearing on behalf of the detenus, in the case of Dimpy Happy Dhakad (supra), this Court has observed that even if a person is in judicial custody, he can be put on a preventive detention provided there must be an application of mind by the Detaining Authority that (i) the order of detention validly can be passed against a person in custody and for that purpose it is necessary that the grounds of detention must show whether the Detaining Authority was aware of the fact that the detenu was already in custody; (ii) that the Detaining Authority must be further satisfied that the detenu is likely to be released from custody and the nature of activities of the detenu indicate that if he is released, he is likely to indulge in such prejudicial activities and therefore, it is necessary to detain him in order to prevent him from engaging in such activities; and (iii) the satisfaction of the Detaining Authority that the detenu is already in custody and is likely to be released on bail and on being released, he is likely to indulge in the same prejudicial activities with the subjective satisfaction of the Detaining Authority.

8.5 In the case of Kamarunnissa (supra), this Court concluded as under:

“(1) A detention order can validly be passed even in the case of a person who is already in custody. In such a case, it must appear from the grounds that the authority was aware that the detenu was already in custody.

(2) When such awareness is there then it should further appear from the grounds that there was enough material necessitating the detention of the person in custody. This aspect depends upon various considerations and facts and circumstances of each case. If there is a possibility of his being released and on being

so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order. The order cannot be quashed on the ground that the proper course for the authority was to oppose the bail and that if bail is granted notwithstanding such opposition the same can be questioned before a higher court.

(3) If the detenu has moved for bail then the application and the order thereon refusing bail even if not placed before the detaining authority it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction being impaired does not arise as long as the detaining authority was aware of the fact that the detenu was in actual custody.

(4) Accordingly the non-supply of the copies of bail application or the order refusing bail to the detenu cannot affect the detenu's right of being afforded a reasonable opportunity guaranteed under Article 22(5) when it is clear that the authority has not relied or referred to the same.

(5) When the detaining authority has merely referred to them in the narration of events and has not relied upon them, failure to supply bail application and order refusing bail will not cause any prejudice to the detenu in making an effective representation. Only when the detaining authority has not only referred to but also relied upon them in arriving at the necessary satisfaction then failure to supply these documents, may, in certain cases depending upon the facts and circumstances amount to violation of Article 22(5) of the Constitution of India. Whether in a given case the detaining authority has casually or passingly referred to these documents or also relied upon them depends upon the facts and the grounds, which aspect can be examined by the Court.

(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu.”

(emphasis supplied)

23. This Court also finds that the bail applications preferred by the detenu were a part of the relied upon documents of the detention order and in the grounds of detention, the Detaining Authority had noted that even though the detenu was in judicial custody, yet there was an immediate possibility of him being released on bail and continuing with illegal acts of smuggling. The same proves that the detaining authority had justifiable reasons to pass the impugned detention order to prevent the detenu from indulging in illegal acts.

24. It is pertinent to mention that the ‘satisfaction’ of the detaining authority is ‘subjective’ in nature and the Court cannot interfere with the order of detention by substituting its opinion for the subjective satisfaction of the detaining authority [See: ***Union of India and Anr. Vs. Dimple Happy Dhakad, 2019 SCC OnLine SC 875***].

CONCLUSION

25. In view of the abovementioned facts and material on record, this Court is of the view that the Detaining Authority committed no error in passing the impugned detention order against the detenu. The impugned order had been passed against the detenu after due consideration of the evidence, which clearly shows that the detenu had been involved in

smuggling of commercial quantities of drones, prohibited cigarettes, electronic items etc. into India and had an inclination to indulge in such activities had he not been prevented from doing so.

26. Since there is no cogent reason to interfere with the satisfaction of the detaining authority, the impugned detention order dated 11th March, 2019 and the impugned order dated 7th June, 2019, confirming the said detention order, are upheld.

27. Consequently, the present petition and pending application being bereft of merit are dismissed.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

NOVEMBER 29, 2019

rn/js