IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present:
The Hon'ble Justice Debangsu Basak
And
The Hon'ble Justice Md. Shabbar Rashidi

WPA (H) 53 of 2024
Sarfaraz Alam

Vs.

Union of India and Ors.

For the Petitioner	: Mr. Milon Mukherjee, Sr. Adv. Mr. Biswajit Manna, Adv. Mr. Arijit Chakraborty, Adv.
For the Respondent Nos. 1 and 2	: Mr. Anirban Mitra, Adv. Mr. Pradyut Saha, Adv.
For the Respondent Nos. 3, 4 and 5	: Mr. Kaushik Dey, Adv. Mr. Tapan Bhanja, Adv.
Hearing Concluded on	: August 20, 2024
Judgement on	: September 04, 2024

DEBANGSU BASAK, J.:-

1. Petitioner has assailed the order of detention dated September 3, 2023 as also the order dated September 11, 2023 passed by the Central Government.

2. Learned Senior Advocate appearing for the writ petitioner has contended that, the authorities did not consider all the representations made on behalf of the detenu.

Moreover, the authorities had taken extraneous materials on consideration while deciding on the issue of detention of the detenu.

3. Learned Senior Advocate appearing for the writ petitioner has drawn the attention of the Court to the order of detention dated September 5, 2023. He has contended that, the order of detention dated September 5, 2023 suffers from the vice of non-application of mind. In support of such contention, he has relied upon Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA).

4. Learned Senior Advocate appearing for the writ petition has contended that, on March 26, 2023, four persons were arrested. On their statement, allegedly certain recoveries had been made. Allegedly such four persons had implicated the detenu.

5. Learned Senior Advocate appearing for the writ petitioner has contended that, the detenu was arrested on May 21, 2023 under the Customs Act, 1962. Since the Directorate of Revenue Intelligence (DRI) had failed to submit chargesheet within the stipulated time, the detenu was granted statutory bail by the jurisdictional Court. He has contended that, since, Directorate of Revenue Intelligence (DRI) could not file a chargesheet, implicating the detenu, within the stipulated period, it has to be construed that, there does not exist any material for the purpose of continuing of the detention of the detenu.

6. Learned Senior Advocate appearing for the writ petitioner has contended that, allegations, made as against the detenu taken at its highest relates to one incident. One isolated incident does not give rise to a cause of action to keep the detenu in detention under the provisions of the COFEPOSA particularly when such detenu was granted bail under the Customs Act, 1962.

7. Learned Senior advocate appearing for the writ petitioner has contended that, there is no live link between the order of the detention of the crime alleged vis-à-vis the detenu. He has drawn the attention of the Court to the order dated September 5, 2023 which according to him, purports to contain the ground for detention. He has contended that, such order does not make out any ground for containing the detention.

8. Learned Senior Advocate appearing for the writ petitioner has drawn the attention of the Court to the writing dated November 7, 2023 and contended that, a representation dated March 11, 2022 is alleged to be considered by the authorities, whereas, the appellant was arrested on May 21, 2023. The four other persons on the basis of whose statement, the detenu was proceeded against had been arrested on March 26, 2023. Moreover, the enclosure of Annexure I to IV to the writing dated November 7, 2023 were not made available on the record.

9. Learned Senior advocate appearing for the writ petitioner has relied upon ***1980 Volume 4 Supreme Court Cases 531 (Smt. Icchu Devi Choraria vs. Union of India), 2018 Volume 12 Supreme Court Cases 150 (Sama Aruna vs. State of Telengana), 2020 Volume 16 Supreme Court Cases 127 (Ankit Ashok Jalan vs. Union of India)***, ***2021 Volume 20 Supreme Court Cases 98 (Sarbjeet Singh Mokha vs. District Magistrate, Jabbalpur & Ors.)***, ***1980 Volume 4 Supreme Court Cases 531 (Smt. Icchu Debi Choraria vs. Unionr of India)*** and ***2023 Volume 9 Supreme Court Cases 633 (Shaikh Nazneen vs. State of Telangana)*** in support of his contentions.

10. Learned advocate appearing for the Directorate of Revenue Intelligence (DRI) has contended that, ground of bail in the criminal proceedings or even an acquittal therein is of no consequence. He has relied upon ***1975 Volume 3 Supreme Court Cases 198 (Haradhan Saha vs. State of West Bengal and Others)*** in this regard.

11. Learned advocate appearing for the Directorate of Revenue Intelligence (DRI) has relied upon a bunch of documents which were submitted before the Central Advisory Board. He has pointed out that, the Central Advisory Board is constituted by three Hon'ble Judges of the High Court. He has referred to the decision of the Central Advisory Board and submitted that, such decision cannot be said to be perverse and therefore, does not call for any interference.

12. Learned advocate appearing for the Directorate of Revenue Intelligence (DRI) has drawn the attention of the Court to the various materials which was placed before the Central Advisory Board. He has submitted that, the detenu was engaged in the business of smuggling of gold from Dubai. Detenu had used the mechanism of concealing the smuggled gold in manufacturing equipment in order to avoid detection at the port of entry. He has pointed out that the material discovered by the Directorate of Revenue Intelligence (DRI) in course of investigation has implicated the detenu. He has contended that, the detenu needs to be placed in detention in order to break the chain. Detention of the detenu had been made in the best interest of the country.

13. In support of his contentions, learned advocate appearing for Directorate of Revenue Intelligence (DRI) has relied upon ***2003 Volume 8 Supreme Court Cases 342 (Union of India vs. Paul Manickam and Another)***, ***1981 Volume 4 Supreme Court Cases 647 (Hemlata Kantilal Shah vs. State of Maharashtra and Another)***, ***2019 Volume 20 Supreme Court Cases 609 (Union of India Joint Secretary (COFEPOSA), Government of India, Ministry of Finance vs. Dimple Happy Dhakad)***, ***2020 Volume 16 Supreme Court Cases 185 (Union of India vs. Ankit Ashok Jalan)***, ***1975 Volume 2 Supreme Court Cases 81 (Khudiram Das vs. State of West Bengal and Others)*** and ***2009 Volume 15 Supreme Court Cases 333 (State of Tamil Nadu and Ors. vs. Abdullah Kadher Batcha and Ors.)***.

14. Learned advocate appearing for the Union of India has submitted that, the writing dated November 7, 2023 contains a bona fide typographical error when it refers to a representation dated March 11, 2022. He has submitted that, the representation made by the detenu was considered. He has referred to the original 5 containing the writing dated November 7, 2023 along with all annexures referred to in the first page of such writing. He has adopted the contentions and submissions advanced on behalf of the DRI.

15. Four persons had been intercepted by Directorate of Revenue of Intelligence (DRI) Officers acting on specific intelligence, from the parking area located just opposite Gate No. 3 and 3A of Netaji Subhash Chandra Bose International Airport, Calcutta.

16. All the four intercepted persons had recorded statements where they stated that, on March 26, 2023 they went to the Calcutta Airport for verifying as to whether any of the carriers engaged by the syndicate that they were working for arrived from Dubai with smuggled gold in their possession or not. They had stated that they were deployed by the detenu. They had described the modus operandi in details in their statements. One of the intercepted persons namely, Md. Asif was the driver of the detenu. He had stated that he kept smuggled goods belonging to the detenu in his flat. His flat had been searched on March 26, 2023 when a jute bag containing two rechargeable LED lantern and two Air Impact

Wrench each of disproportionate weight were recovered. Such bag with the contents were taken to DRI Office and opened in presence of the four intercepted persons and wife of one of them. After dismantling the three electrical appliances a total of 8,832.140 gram of gold in primary forms of different shapes and sizes valued at Rs. 5,30,81,161/- had been recovered. Moreover, unaccounted Indian currency to the tune of Rs. 1,94,40,000/- and 2 gold biscuits with the inscription impost on them of 200 grams, one gold chain of 24 carats purity weighing 9.810 grams few assorted studded gold jewellery of purity of 18, 20 and 22 carat, weighing 951.430 grams, foreign currency notes of different countries and of different denominations of Rs. 6,50,111 had been seized. None of the intercepted persons could produce any document in support of legal acquisition, possession, storing and/or dealing with the recovered goods.

17. The four intercepted persons had stated that, the recovered gold was of foreign origin and smuggled into Kolkata. All the four intercepted persons had acknowledged in their individual statements that, they were a part of a team involved in smuggling and that, the detenu was the key person who controlled them and the smuggling racket.

18. The detenu had evaded summons for a considerable point of time. DRI had arrested him on May 21, 2023. Detenu had been issued summons under Section 108 of the Customs Act, 1962 on the spot and brought to the DRI office for questioning. On search, four mobile phones containing incriminating evidence relating to ongoing investigation had been seized for him.

19. Statement of the detenu had been recorded under Section 108 of the Customs Act, 1962 in the intervening night of May 21, 2023 and May 22, 2023 wherein, detenu acknowledged his involvement in the smuggling activity. He had stated that, on an average, 3 to 4 consignments of gold was being smuggled into India in a week and that the quantity of the smuggled gold varied from time to time. He had described the modus operandi of the smuggling as also his role in the smuggling racket.

20. Detenu had recorded statements on June 15, 2023, June 22, 2023 and July 31, 2023 amongst others. Various incriminating materials had been recovered from the possession of the detenu at his flat.

21. Detenu had been arrested on May 22, 2023 under Section 104 of the Customs Act, 1962 for having committed a crime punishable under section 135 thereof. Detenu had been granted statutory bail on July 20, 2023.

22. Detenu had been detained under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 on September 19, 2023. Detaining authority had passed an order dated September 5, 2023 after recording a subjective satisfaction that the detenu was a professional, seasoned and habitual smuggler of foreign origin gold and has been smuggling different sensitive and high-value items from abroad. Detention order had been served upon the detenu on September 20, 2023 along with the grounds of detention, the documents relied upon by the Detaining Authority. Detenu had been made aware of his right of making a representation to the central government. However, detenu had refused to accept the documents and a writing dated September 20, 2023 was drawn up with regard thereto.

23. By a reference dated October 20, 2023 the central government had sought opinions of the Advisory Board in respect of the detenu. Detenu had made a representation dated October 27, 2023 to the Advisory Board. Advisory Board had heard the detenu on November 14, 2023 when, the detenu made a representation for deferring the hearing. On the request of the counsel for the detenu, the Advisory Board had deferred the hearing to November 15, 2023.

24. On November 15, 2023, detenu had filed a detailed representation before the Advisory Board essentially reiterating his earlier stand.

25. Advisory Board by a detailed order dated November 20, 2023 had opined that, the order of detention passed by the Detaining Authority on the basis of the material which was present before it, did not call for any interference.

26. ***Icchu Devi Choraria (supra)*** has held that, the burden of showing that the detention is in accordance with the procedure established by law is always on the detaining authority in view of the clear and explicit terms of Article 21 of the Constitution.

27. ***Sama Aruna (supra)*** has observed that, while revealing the detention order, a Court does not substitute its judgement for the decision of the executive. Nonetheless the Court has a duty to enquire that the decision of the executive is made upon relevant matters.

28. ***Ankit Ashok Jalan (supra)*** has laid down the broad principles to be followed with regard to representation of a detenu. It has stated four broad principles. Firstly, the appropriate authority is required to give an opportunity to detenu to make a representation and to consider such representation expeditiously. Secondly, the consideration of the representation of the detenu by the appropriate authority has to be independent of any action of the Advisory Board including the consideration of the representation of the detenu by the Advisory Board. Thirdly there should not be any delay in the matter of consideration. Fourthly, the appropriate government has to exercise its opinion on the representation before sending the case along with the representation of the detenu to the Advisory Board.

29. In the facts and circumstances of the present case, writ petitioner has not been able to establish that any of the four broad principles laid down have been violated.

30. ***Sarbjeet Singh Mokha (supra)*** has dealt with a detention under the National Security Act, 1980 and reiterated the principles required to be followed in consideration of the representation made by the detenu.

31. ***Ameena Begum (supra)*** has held that, although, circumstances may make it necessary for ordering preventive detention without trial, it would be perfectly legitimate if applicable statutory provisions and rules are observed in such cases. In case of any doubt as to strict observance thereof, that doubt must be resolved in favour of the detenu. There is no doubt that the provisions of the statute was followed in the detention of the detenu in the present case.

32. ***Shaikh Nazneen (supra)*** has held that, powers of preventive detention are to be exercised in exceptional situation and must not be exercised in a routine manner. It has made such observation in the context of Act 1 of 1986 of the State of Telengana. The Act of 1986 has permitted preventive detention of a "goonda" as defined in section 2 (g) of the Act of 1986 with a view to prevent him from acting in any manner prejudicial to the maintenance of public order. Therefore, in such context, it has been held that, unless the government is justified in holding that the act of the detenu is prejudicial to the maintenance of public order, the preventive detention would be bad.

33. ***Haradhan Saha (supra)*** has held that, the pendency of prosecution is no bar to an order of preventive detention. Similarly, an order of preventive detention is not also a bar to prosecution.

34. ***Radhakrishnan Prabhakaran (supra)*** has dealt with the scope of judicial review of an order of detention passed under the provisions of the COFEPOSA. It has held that, it is not for the Court to substitute the satisfaction but scrutinise the order to ascertain whether the detaining authority had really arrived at the satisfaction that the detenu has to be preventively detained in public interest. It has also observed that, all documents mentioned in the order need not be supplied. It has clarified that, copies of only such of those documents as have been relied upon by the detaining authority for reaching the satisfaction that preventive detention of the detenu is necessary shall be supplied to the detenu.

35. ***Paul Manickam and another (supra)*** has observed that, appropriate government is enjoyed with an obligation to accord the detenu the earliest opportunity to make a representation and to consider such representation speedily. The representation is to be considered in its right perspective keeping in view the fact that the detention of the detenu is based on subjective satisfaction of the authority concerned.

36. ***Hemlata Kantilal Shah (supra)*** has held that, when an order of detention together with the grounds of detention is served on a detenu, the detenu is not entitled to know which part or parts of the grounds was or were taken into consideration and which not.

37. ***Dimple Happy Dhakad (supra)*** has held that, a detention order can be passed even if the detenu is already in jail or custody or when bail application of such detenu is pending or allowed.

38. ***Khudiram Das (supra)*** has noticed that, the nature of proceedings in respect of preventive detention allows subjective satisfaction. It has also noted that, since subjective satisfaction being a condition precedent for the exercise of power conferred on the executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority and if not, the exercise of power would be bad.

39. ***Abdullah Kadher Batcha and another (supra)*** has held that, it is the duty of the Court to see whether the non-supply of any document is in any way prejudicial to the case of the detenu on not. It has held that, primarily, copies which form the ground for detention are to be supplied and non-supply thereof could prejudice the detenu. However, documents which are merely referred to for the purpose of narration of facts in that sense cannot be termed to be documents without the supply of which the detenu is prejudiced.

40. ***J Abdul Hakeem (supra)*** has held that, a detenu has a right to be supplied with the material documents on which reliance was placed by the detaining authority for passing the detention order. However, detention order will not be vitiated due to non-supply of documents which although referred to in the order but were not relied upon by the detaining authority performing its opinion or was made a basis for passing the order.

41. Excepting bald allegations of extraneous materials being taken into consideration to pass the order of detention and upholding it, our attention has not been drawn to any document which has been relied upon in the order of detention and not supplied to the detenu.

42. The representation made by the detenu had been considered and dealt with within a reasonable period of time. Typographical error appearing in the consideration order has been highlighted as a material error vitiating the decision. In the facts and circumstances of the present case, the original file had been produced pursuant to the order of the Court. The consideration order of the representation does contain a bona fide typographical error and the same cannot be said to prejudicially affects the detenu.

43. The order of detention dated September 5, 2023 cannot be said to be suffering from the vice of nonapplication of mind. Materials had been taken into consideration for passing the order of detention. Substantial materials such as statements recorded under Section 108 of the Customs Act, 1962, seizure of incriminating materials, recovery of gold, Indian and foreign currencies incriminating the detenu and making out a case for an order of detention passed under the COFEPOSA, exist which allows a plausible view of an order of detention to be passed under the provisions of the COFEPOSA.

44. Materials which have been produced before us establish a live link between the detenu and the order of detention passed against him. As has been noted above, gold of foreign origin, Indian and foreign currencies, amongst others, have been seized on statements under Section 108 of the Customs Act, 1962 being recorded. Such statements have also incriminated the detenu.

45. In such circumstances, there is no merit in the present writ petition.

46. WPA (H) 53 of 2024 is dismissed without any orders to cost.

[DEBANGSU BASAK, J.]

47. I agree.

[MD. SHABBAR RASHIDI, J.]