

CASE NO.:
Appeal (crl.) 866 of 2002

PETITIONER:
RAJESH GULATI

Vs.

RESPONDENT:
GOVT. OF N.C.T. OF DELHI & ANR.

DATE OF JUDGMENT: 29/08/2002

BENCH:
RUMA PAL & ARIJIT PASAYAT.

JUDGMENT:

RUMA PAL, J.

Leave granted.

The appellant has challenged his detention pursuant to an order dated 28th September 2001 passed under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the 'Act').

Prior to his detention under the impugned order, the appellant has been arrested on 5th July 2001 by the Customs officers at the Indira Gandhi International Airport, New Delhi on the allegation that he had smuggled 40 mobile telephones. The mobile phones were found hidden in a microwave oven. The microwave oven as well as the mobile telephones were seized and the collective value of the seized goods has been stated by the respondents to be Rs.5,16,000/-

At the time of his arrest, the appellant handed over his passport to the customs authorities. In the appellant's statement under Section 108 of the Customs Act, 1962, it was stated by the appellant that the appellant was an employee of M/s B.D. Denim. The appellant had also stated that he had made six trips to Dubai between 30th May 2000 to 3rd July 2001 at the instance of the proprietor of M/s B.D. Denim and that except for the first occasion, the appellant had, on the instructions of and as arranged by the proprietor of M/s B.D. Denim, brought into India various household items including mobile phones.

The proprietor of M/s B. D. Denim in his statement under Section 108 of the Customs Act, however, denied that he had any business relationship with the appellant and also denied that he had any knowledge of the appellant's trips to Dubai.

After his arrest on 5th July 2001, the appellant was produced before the Court of the Metropolitan Magistrate and was remanded to judicial custody till 19th July 2001. On the date of his arrest the appellant retracted his statement made under Section 108 before the Magistrate and alleged that the statement has been forcibly taken by the Custom officers after beating him. The appellant thereafter made

five applications for grant of bail which were rejected by the Court on 16th July, 6th August, 18th August, 6th September and 17th September 2001. In the meantime on 3rd September, 2001 a complaint was lodged by the Customs Department against the appellant for offences punishable under Section 132 and 135(1)(a) of the Customs Act, 1962. The Metropolitan Magistrate took cognizance of the same and the proceedings are pending. The appellant was ultimately granted bail on 29th October 2001 by the Delhi High Court. However, prior to this date, on 28th September 2001 the impugned order was passed under the Act and served on the appellant in jail where the appellant still is.

The appellant claims that he had sent a detailed retraction of his statement as recorded on 5th July 2001 to the Finance Minister and the Chief Commissioner (Customs). He also made a representation on 17th October 2001 to the detaining authority in which he has challenged the order of detention. The representation was rejected by the respondent No. 1 by an order dated 29th October 2001 and the detention order was confirmed for a period of one year from 29th September, 2001.

The appellant then filed a writ application under Article 226 of the Constitution of India before the High Court challenging his detention. The High Court dismissed the writ application on 8th May 2002. The decision of the High Court has been impugned before us.

In the impugned order of detention, after recording the facts as narrated earlier, it was stated:

"The Lt. Governor of the National Capital Territory of Delhi is aware that you are in judicial custody. Lt. Governor is also aware that your bail applications have been rejected but nothing prevents you from filing bail applications in various courts and bail is normally granted in such cases hence there is imminent possibility that you will come out on bail. The Lt. Governor is satisfied that if you come out on bail you are likely to indulge in the smuggling activities, in future. Keeping in view your modus operandi to smuggle goods, the Lt. Governor of the National Capital Territory of Delhi is satisfied that unless prevented you will continue to indulge in smuggling activities once you are released.

On the basis of the foregoing facts and circumstances the Lt. Governor of the National Capital Territory of Delhi has no hesitation in arriving at the conclusion that you have the inclination and propensity for indulging in smuggling activities in an organised and clandestine manner and unless prevented you are likely to indulge in the smuggling activities in future. The Lt. Governor is aware that the prosecution proceedings have already been initiated against you under the Customs Act, 1962 and adjudication proceedings under the Customs Act, 1962 are likely to be initiated against you. Your passport is with the customs department but you are likely to travel clandestinely for the purpose of smuggling, hence the Lt. Governor of the National Capital Territory of Delhi is satisfied that it is necessary to detain you under the provisions

of the Conservation of the Foreign Exchange and Prevention of the Smuggling Activities Act, 1974 with a view to preventing you from smuggling goods in future."

Learned counsel appearing on behalf of the appellant has impugned the order of detention on several grounds. For the purpose of this judgment, it is sufficient to note two of the main submissions:

(i) In view of the fact that several applications for bail filed by the appellant had been repeatedly rejected, the satisfaction of the Lt. Governor that "bail is normally granted in such cases hence there is possibility that you will come out on bail" was unreasonable, based on no material and showed a complete non application of mind;

(ii) The passport of the appellant continued to be held by the Customs authorities and that, therefore, there was no question of the appellant travelling out of the country or indulging in smuggling goods;

The respondents have countered these submissions and submitted that the apprehension that the appellant would be released on bail was substantiated by the fact that he was in fact directed to be released on bail after the impugned detention order was passed. It was further submitted that the appellant had indulged in smuggling activities on five separate occasions within a short span of time including the last and the detaining authority had ample material to hold that the appellant would continue with smuggling activities on his release.

We are of the view that the High Court erred in accepting the respondents' submissions and rejecting the appellant's writ application. This Court has repeatedly held that the law permitting preventive detention must be meticulously followed both substantively and procedurally by the detaining authority. [See: *Icchu Devi Choraria v. Union of India* : AIR 1980 SC 1983; *Vijay Narain Singh v. State of Bihar* : AIR 1984 SC 1334, 1345; *Hem Lall Bhandari v. State of Sikkim* : AIR 1987 SC 762, 766; *Ayya @ Ayub v. State of U.P.* : AIR 1989 SC 364, 367]. The facts of this case show a breach of both.

It cannot be over emphasized 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 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 : AIR 1986 SC 315, 316)

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".

In other words according to the detaining authority the prime mover for the smuggling activity was the proprietor of M/s. B.D. Denim. The appellant at the worst was a pawn in the hands of another. The likelihood of the appellant indulging in smuggling activities by the appellant was in any case effectively foreclosed by the retention of his passport by the customs department. The detaining authority noted that the appellant's passport was with the customs department and yet he said " but you are likely to travel clandestinely for the purpose of smuggling". Now none of the instances of smuggling by the appellant as stated in the impugned detention order describe the appellant as having travelled without a passport for the purpose of smuggling. 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.

The appeal is accordingly allowed and the decision of the High Court is set aside. The impugned order of detention is quashed and the appellant is directed to be released forthwith.