

CASE NO.:
Appeal (crl.) 1126 of 2001

PETITIONER:
GURDEV SINGH

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT: 05/11/2001

BENCH:
D.P. Mohapatra & Shivaraj V. Patil

JUDGMENT:

D.P. MOHAPATRA, J.

Leave is granted.

This appeal, filed by special leave, by Gurdev Singh father of the detenu Swarn Singh Sandhu, is directed against the judgment and order dated 1.12.2000 of the Delhi High Court in Criminal Writ Petition No.352 of 2000, Gurdev Singh vs. Union of India & Ors., dismissing the writ petition.

At the commencement of hearing of the case Shri V.A.Mohta, learned senior counsel appearing for the appellant submitted that though the detenu has already undergone the period of detention this Court may decide the legality and validity of the Detention Order since the appellant apprehends that certain further actions may be taken on the basis of the order of detention which has spent its force by afflux of time.

In pursuance of the detention order passed by the Joint Secretary to the Govt. of India in the Ministry of Finance (Department of Revenue) on 2nd March, 2000 in exercise of the power under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 as amended, (hereinafter referred to as the COFEPOSA Act); Swarn Singh Sandhu was detained and kept in custody in Central Prison, Nasik. In compliance with the provisions of Section 3(3) of the COFEPOSA Act read with Clause (5) of Article 22 of the Constitution of India the grounds of detention dated 2nd March, 2000 along with the documents mentioned and relied upon therein were communicated to the detenu. On receipt of the detention order and the grounds of detention, the detenu addressed representations to the Central Government on 5.4.2000 which were rejected on 11.4.2000. This was followed by the writ petition filed on behalf of the detenu in the Delhi High Court which was dismissed by its judgment and order dated 1.12.2000. The said judgment/order is under challenge in

this appeal.

In the grounds of detention covering 35 pages the detaining authority has set out in detail the informations received from different quarters regarding misuse of the facilities provided under the Export Incentive Scheme introduced by the Govt. of India, Ministry of Commerce, called Duty Entitlement Pass Book (DEPB) scheme as a part of the Export-Import Policy for the period 1997-2002. The objective of the scheme was to neutralize the incidence of basic customs duty on the import content of the export product. The scheme provided for credit of duty calculated by taking into account the duty payable on the deemed import content used in the manufacture of the export product. Under the scheme, an exporter is eligible to claim credit at a specified percentage of FOB value of exports. The credit is made available against the products exported as per the rates specified in this behalf by the Director General of Foreign Trade (DGFT). Under the scheme all items except those appearing in the negative list of imports are allowed to be imported without payment of customs duty against the credit available under a DEPB. The procedure specified for issue of DEPB scrips entails submission of an application to the DGFT by the exporter along with the original EP (Export Promotion) copy of the shipping bill against which the exports have actually been effected and a certificate of realisation of export proceeds (BRC) from the respective banks.

In paragraph 3 of the grounds of detention it is stated by the detaining authority that an intelligence was received by the officers of the Directorate of Vigilance, Mumbai, indicating that certain persons/firms are misusing the DEPB scheme by manipulating/forging the particulars of the shipping bills and obtaining the DEPB benefit from the office of the Joint DGFT, Mumbai. Initially, three such firms namely, (i) M/s.Samarth Enterprises, (ii) M/s.Sharp Medicals, (iii) M/s.Pragati Sales Corporation were identified. Further investigation made after search of the premises of these firms revealed that one more company, namely Knomo Exports Ltd. (later changed to M/s.KEL Exports Ltd.) was also related to exports made by the said three firms. The detenu was a Director of Knomo Exports Ltd. (renamed as M/s.KEL Exports Ltd.). It was further stated in the grounds of detention that investigations revealed that the aforementioned three firms have claimed the benefit of DEPB scheme against exports of various bulk consignments of drugs covered by 32 shipping bills. These exports were made from the port of Mumbai. The total FOB value of the bulk drugs shown to have been exported under these 32 shipping bills amounted to Rs.29,14,59,690.00 and the said amount was adjusted against the advance remittances received by M/s.Knomo Exports Ltd. It was stated in the grounds that all the 32 bank certificates of export realisation show that the total foreign exchange equivalent to total FOB value has been shown to have been received by M/s.Knomo Exports Ltd. and the detenu had signed as Director on all these certificates. The said certificates signed by the detenu were submitted to the office of the Joint DGFT along with the copies of the DEPB shipping bills and accordingly DEPB scrips were issued in the name of exporters on record. The papers submitted to Custom House, Mumbai for verification and release of DEPB scrips revealed that one Prashant D.Divekar had signed as Proprietor for all the three aforesaid export firms, whereas the entire foreign exchange remittance of these exports had been received by

M/s.Knomo Exports Ltd. It was stated in paragraph 5 of the grounds of detention that on detailed examination and verification of the 32 shipping bills against which DEPB scrips were obtained by the detenu revealed that the particulars in the shipping bills had been manipulated in respect of value, quantity and also in respect of names of the manufacturing companies of the drugs. The values have been inflated by forging the original entries in the shipping bills including the signatures of the concerned officers as evident from the documents (i) to (xi) described in the said paragraph. The said documents included the statement dated 30.8.1999 of the concerned appraiser Shri M.K.Srivastava who was shown to have finally assessed the 32 shipping bills; the fax letter dated 2.11.1999 from the Asst.Commissioner, Central Excise, Shimla; Forensic examination report of Central Forensic Laboratories, CBI, New Delhi dated 15.12.1999 relating to sample shipping bills of M/s.Empire Exports and M/s.Sharp Medicals. In paragraph 6 of the grounds of detention, the detaining authority set out in detail various steps taken by the officers of the Customs Department to ascertain the truth or otherwise of the allegations of organised activities of the detenu, Ajay Vyas and some others in taking advantage of the benefit of neutralization of customs duty on imports by using large number of forged and manipulated shipping bills and altering the description of the goods and inflating its quantity and value. In the averments made in several paragraphs of the grounds of detention, the detaining authority has given the results of the investigations made by the department at different stages; statements of different persons involved in the case recorded under Section 108 of the Customs Act, 1962; the steps taken for prosecuting the detenu and his associate Ajay Vyas under the provisions of the Customs Act; the unsuccessful attempts made by the detenu and his associate to get bail; the order of conditional bail granted to the detenu and his attempt to leave Mumbai for Delhi violating the condition in the bail order.

In the grounds of detention the detaining authority has also set out in detail the organised move made by the detenu and his associates to secure similar benefits of the customs duty in respect of 58 forged and manipulated shipping bills showing export of garments from Nhava Sheva port in Gujarat. The FOB value of the 58 shipping bills was around 30 crores and this amount was also adjusted against the advance remittances received by M/s.Knomo Exports Ltd. (later renamed as M/s.KEL Exports Ltd.) All the related bank certificates of export realisation show that the total foreign exchange equivalent of the cumulative FOB value has been shown to have been received by erstwhile company M/s.Knomo Exports Ltd. and the detenu has signed as Director of M/s.KEL Exports Ltd. on these certificates.

From the narration of facts in the grounds of detention, it is clear that the detaining authority has not only taken note of the allegations made against the detenu; the materials collected by the investigating agency of the department against him but has also taken note of the reply given by the detenu at different stages denying the allegations and levelling counter allegations against the officers of the department to implicate him.

In paragraphs 40 and 41 of the grounds of detention, the detaining authority has stated :

40. While arriving at the subjective satisfaction in your case I have also taken into consideration the allegations made and pleas taken in various representations/replies made on your behalf and on behalf of Shri Ajay Vyas. However, in view of the materials placed before me, I do not find any merit in these representations/replies and I accordingly reject them.

41. Out of the DEPB scrips obtained by you against the said exports in the name of M/s.Prism Exports A/c M/s KEL Exports Ltd., on the basis of manipulations and fraud as explained above, duty credit against four DEPB scrips have been utilised for clearance of four consignments of imported goods without payment of duty to the extent of Rs.53.3 lakhs approx. These four consignments were cleared in the name of (i) M/s.Calyx Chem. & Pharmaceuticals Pvt. Ltd., Mumbai (ii) M/s.Mangalam Cement, Rajasthan, (iii)M/s.Krishna Gargi Pvt. Ltd., Dadras (and also Mumbai) and (iv) M/s.Enpro Speciality Chemicals Ankaleshwar, has directly resulted into evasion of import duty for imports made against them.

In paragraph 43, the detaining authority has concluded: Taking into consideration the foregoing facts and the material on record, I am reasonably satisfied that your activities amount to smuggling of goods as defined in Section 2(39) of the Customs Act, 1962 and as adopted in the COFEPOSA Act, 1974 Section 2(e) thereof since your acts and omissions have rendered the goods involved liable to confiscation under Section 111 and 113 of the Customs Act, 1962 read inter alia with Rule 11 and Rule 14 of Foreign Trade (Regulation) Rule, 1993, framed under Foreign Trade (Development and Regulation) Act, 1992.

In para 44 of the ground of detention, the detaining authority stated that in view of the facts mentioned in the foregoing paragraphs, he had no hesitation in arriving at the conclusion that the detenu had been engaged in smuggling goods. Considering the nature and gravity of the offence and the well organised manner in which the prejudicial activities had been indulged in by the detenu, his role therein as well as his dubious conduct as brought out in the statements in the grounds, all of which reflect his high potentiality and propensity to indulge in such prejudicial activities in future, the authority was fully satisfied that there was need to prevent the detenu from indulging in such prejudicial activities in future by a detention order under the COFEPOSA Act, 1974.

The main thrust of the arguments advanced by Shri V..A. Mohta, learned senior counsel appearing for the appellant was that the order of detention was vitiated by non-consideration of relevant materials by the detaining authority and non-application of mind and the High Court erred in confirming such illegal and invalid order of detention.

Elucidating his contention the learned senior counsel submitted that the detaining authority has not verified the copies of the shipping bills submitted to different authorities in course of the transactions of export to ascertain whether the allegations of forgery and manipulation of the shipping bills levelled against the detenu were true or not. It was the further submission of Shri V.A. Mohta that since the detaining authority has referred to 90 shipping bills relating to exports from the Port at Mumbai and Nhava Sheva Port in Gujarat sending a few samples to the forensic experts and arriving at a subjective satisfaction that the signatures of the Asst. Commissioner of the Customs Department and other officers borne on the shipping bills were forged suffers from non-application of mind to the matter.

Per contra, Shri Mukul Rohtagi, learned Additional Solicitor General appearing for the respondents contended that in the grounds of detention communicated to the detenu the detaining authority has described in great detail the nature of organised activities in which the detenu and his associates were involved; and the manner in which they have reaped the benefit by avoiding customs duty to the tune of lakhs of rupees by using the forged and manipulated shipping bills. In such a case it is not necessary for the detaining authority to send each and every shipping bill to the forensic expert for examination for arriving at a subjective satisfaction whether the detenu should be detained under the provisions of COFEPOSA Act. The further contention raised by Shri Mukul Rohtagi is that the detaining authority has taken into consideration all the relevant materials placed before him including the statements made by the detenu and his associates; has considered all the relevant materials and has arrived at a subjective satisfaction about the necessity of detaining the detenu under the COFEPOSA Act in a fair and proper manner. It is the contention of Sri Mukul Rohtagi that the order of detention warrants no interference by this Court.

In the case of A.Sowkath Ali vs. Union of India & Ors., (2000) 7 SCC 148, this Court considered the contention raised on behalf of the detenu that the detention order was vitiated as sponsoring authority placed the confessional statements of P & I before the detaining authority but did not place their retractions from the said confession. This Court held :

The sponsoring authority should place all the relevant documents before the detaining authority. It should not withhold any such document based on its own opinion. All documents, which are relevant, which have bearing on the issue, which are likely to affect the mind of the detaining authority should be placed before it. Of course a document which has no link with the issue cannot be construed as relevant.

Considering the facts and circumstances of the case, this Court held :

.The confessional statement and the retraction, both constituting a composite relevant fact should have been placed. If any one of the two documents alone is

placed without the other, it would affect the subjective satisfaction of the detaining authority. Therefore, non-placement of the retraction affects the subjective satisfaction of the detaining authority.

In Union of India & Ors. Vs. Arvind Shergill & Anr., (2000) 7 SCC 601, this Court, taking an exception to the approach of the High Court in deciding the writ petition filed on behalf of the detenu under Section 3 of the COFEPOSA Act, 1974 held :

The High Court has virtually decided the matter as if it was sitting in appeal on the order passed by the detaining authority. The action by way of preventive detention is largely based on suspicion and the court is not an appropriate forum to investigate the question whether the circumstances of suspicion exist warranting the restraint on a person. The language of Section 3 clearly indicates that the responsibility for making a detention order rests upon the detaining authority which alone is entrusted with the duty in that regard and it will be a serious derogation from that responsibility if the court substitutes its judgment for the satisfaction of that authority on an investigation undertaken regarding sufficiency of the materials on which such satisfaction was grounded. The court can only examine the grounds disclosed by the Government in order to see whether they are relevant to the object which the legislation in view, that is, to prevent the detenu from engaging in smuggling activity. The said satisfaction is subjective in nature and such a satisfaction, if based on relevant grounds, cannot be stated to be invalid. The authorities concerned have to take note of the various facts including the fact that this was a solitary incident in the case of the detenu and that he had been granted bail earlier in respect of which the application for cancellation of the same was made but was rejected by the Court. In this case, there has been due application of mind by the authority concerned to that aspect of the matter as we have indicated in the course of narration of facts. Therefore, the view taken by the High Court in the circumstances of the case cannot be sustained.
(Emphasis supplied)

In the case of Ahmed Nassar vs. State of Tamil Nadu & Ors., (1999) 8 SCC 473, this Court, taking a similar view, held :

Every conceivable material which is relevant and vital which may have a bearing on the issue should be placed before the detaining authority. The sponsoring authority should not keep it back, based on his interpretation that it would not be of any help to a prospective detenu. The decision is not to be made by the sponsoring authority. The law on this subject is well settled; a detention order vitiates if any relevant document is not placed before the detaining authority which reasonably could affect his decision.

(Emphasis supplied)

In the case of Sanjay Kumar Aggarwal vs. Union of India & Ors., (1990) 3 SCC 309, this Court, referring to the grounds of detention, held:

It can therefore be seen that the detaining authority has considered the allegations that the detenu was manhandled etc. At any rate, the detaining authority has clearly noted that the detenu has retracted from the alleged statement, therefore it cannot be said that there is non-application of mind in this regard, namely, in considering the representation

This Court repelled the contention of non-application of mind by the detaining authority. Relying on the averments made in the counter affidavit, this Court observed :
The next submission of the learned counsel is that the detaining authority has not applied his mind properly in rejecting the representation made by the detenu.

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It can therefore be seen that the detaining authority has considered the allegations that the detenu was manhandled etc. At any rate, the detaining authority has clearly noted that the detenu has retracted from the alleged statement, therefore it cannot be said that there is non-application of mind in this regard, namely, in considering the representation. The same principles applies to the Advisory Board also. According to the submissions of the learned counsel, these documents were not placed before the Advisory Board in its meeting on September 18, 1989. Whatever statement was made by the petitioners on June 22, 1989 prior to the detention and the grounds clearly disclose that there was retraction. It must also be noted in this context that in the grounds in paragraph 10 also it is

mentioned that a telegram was received on June 9, 1989 alleging about the wrongful arrest and extraction of the statements and the detaining authority has also taken note of the allegations made against the DRI officers which were found to be false and baseless. The same material was there before the Advisory Board. Therefore there is no force in this submission.

In the case of Ashadevi wife of Gopal Ghermal Mehta (Detenu) v. K.Shivraj, Addl. Chief Secretary to the Govt. of Gujarat & Anr., (1979) 1 SCC 222, this Court held that :

The principle that could be clearly deduced from the above observations is that If material or vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order are not placed before or are not considered by the detaining authority, it would vitiate its subjective satisfaction rendering the detention order illegal. After all the detaining authority must exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to the scope and purpose of the statute vitiates the subjective satisfaction and renders the detention order invalid then failure to take into consideration the most material or vital facts likely to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and invalidate the detention order.

In the case of Ayya alias Ayub v. State of U.P. & Anr., (1989) 1 SCC 374, this Court held :

What weight the contents and assertions in the telegram should carry is an altogether a different matter. It is not disputed that the telegram was not placed before and considered by the detaining authority. There would be vitiation of the detention on grounds of non-application of mind if a piece of evidence, which was relevant though not binding, had not been considered at all. If a piece of evidence which might reasonably have affected the decision whether or not to pass an order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention. The detaining authority might very well have come to the same conclusion after considering this material; but in the facts of the case the omission to consider the material assumes materiality.

(Emphasis supplied)

Testing the case at hand on the touchstone of the principles laid down in the decisions noted above, we find that the subjective satisfaction arrived at by the Detaining Authority in the case is based on consideration of all the relevant materials placed before it by the sponsoring authority. It is not the case of the appellant that the sponsoring authority did not place before the detaining authority any material in its possession which is relevant and material for the purpose and such material, if considered by the detaining authority, might have resulted in taking a different view in the matter. All that is contended on behalf of the detenu is that the detaining authority should have taken further steps before being satisfied that a case for detention under the COFEPOSA Act has been made out against the detenu. Whether the detention order suffers from non-application of mind by the detaining authority is not a matter to be examined according to any straight-jacket formula or set principles. It depends on the facts and circumstances of the case, the nature of the activities alleged against the detenu, the materials collected in support of such allegations, the propensity and potentiality of the detenu in indulging in such activities, etc. The Act does not lay down any set parameters for arriving at the subjective satisfaction by the detaining authority. Keeping in view the purpose for which the enactment is made and the purpose it is intended to achieve, the Parliament in its wisdom, has not laid down any set standards for the detaining authority to decide whether an order of detention should be passed against a person. The matter is left to the subjective satisfaction of the competent authority.

Learned senior counsel Sri V.A.Mohta raised another contention that the detenu had annexed to his representation certain document written in Urdu language; the detaining authority did not take any step for translation of the said document into English, and therefore, the said material could not be considered by the authority concerned while disposing of the representation. The contention raised by Sri Mohta can not be accepted. The judgment of the High Court does not show that such a contention was raised before the Court when the case was argued. Further, our attention has not been drawn to any material to show that the document in question was not translated into English, or whether the authority concerned had not perused the contents of the document. There is also no material to show that the detenu had sought the help of the authorities to get the document in question translated into English since that was a piece of material which was relied upon by him in support of the representation.

On the facts and circumstances of the case, it is our considered view that the contention raised on behalf of the detenu that the order of detention was vitiated due to non-application of mind of the detaining authority, cannot be accepted. The High Court committed no error in declining to interfere with the detention order and in dismissing the writ petition.

Therefore, the appeal, being devoid of merit, is dismissed.

J.
(D.P.Mohapatra)

J.
(Shivaraj V. Patil)

November 5, 2001

JUDIS