

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO..... OF 2009

(Arising out of S.L.P.(Cr1.)No. 7644 of 2008)

Pooja Batra

.... Appellant(s)

Versus

Union of India & Ors.

.... Respondent(s)

J U D G M E N T

P. Sathasivam, J.

- 1) Leave granted.
- 2) This appeal is directed against the judgment dated 05.09.2008 passed by the High Court of Delhi in W.P. (Cr1.) No. 782 of 2008 which was filed by Pooja Batra wife of Deepak Kumar @ Deepak Batra detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as “the COFEPOSA Act”) praying for issuance of a writ of Habeas Corpus to release the detenu

i.e. her husband from detention. The High Court, by the said judgment, dismissed the writ petition with costs of Rs.50,000/- on her and directed the department to initiate criminal proceedings against the detenu under Sections 199, 420, 468 and 471 of the Indian Penal Code in exercise of its power under Section 482 of the Code of Criminal Procedure.

3) The case of the department is as follows:

(a) The Detaining Authority has issued the detention order dated 05.12.2007 against Shri Deepak Kumar @ Deepak Batra, the husband of the appellant herein on the basis of the facts and documents put up before them and after satisfying with the facts on records that the detenu has propensity and potentiality to indulge in smuggling activities in future. The detenu is the mastermind for import of the goods covered under Bill of Entry No. 589144 dated 25.04.2007. The goods covered under abovementioned Bill of Entry were not only mis-declared in respect of quantity but also there were certain goods which were concealed in the container. The value of such mis-declared/smuggled goods as calculated comes to Rs.87,07,220/- and attracting duty has worked out to

Rs. 30 lacs approximately. The detenu had indulged in repeated offences since 2006 as he was not the actual owner of the Importer Exporter Code, (in short “IEC”). The grounds are based on the eight Bills of Entry which were filed by the detenu through his Customs House Agent, (in short “CHA”) and also on the basis of the statements tendered by Shri Naveen Kumar, an employee of CHA. Eight Bills of Entry have been filed by the CHA in the name of firm provided by the detenu. The detenu also provided the photocopy of the IEC. Shri Naveen Kumar also identified the earlier signatures of the detenu on the authorization letter dated 20.08.2007 given by the detenu. Shri Naveen Kumar confirmed the relationship between the last consignment and the earlier eight consignments imported by the detenu. The detenu had fraudulently used IEC No. and PAN No. of M/s Om Prakash Deepak Kumar. The actual owner of the IEC was not aware of the fact that his IEC is being misused by the detenu since 2006 and thorough investigation conducted by the Customs Authorities has revealed that in the past also eight such Bills of Entry were filed by the same CHA on the directions of the

detenu and the goods were cleared and handed over to the detenu. The Detaining Authority has issued the detention order after satisfying with the facts and circumstances of the case and material available on record.

(b) Ms. Pooja Batra, wife of Deepak Batra has filed Writ Petition (Crl.) No. 782 of 2008 before the High Court of Delhi for quashing the detention order bearing No. F.N.673/06/2007-CUS/VIII dated 5th December, 2007 issued by the Joint Secretary (COFEPOSA), Ministry of Finance, Department of Revenue under Section 3 of the COFEPOSA Act. Before the High Court, various contentions such as non-application of mind on the part of the Detaining Authority, consideration of irrelevant material, reliance on extraneous material, non-supply of relevant and relied on materials, delay in passing detention order and delay in disposal of representation etc were raised. The High Court, by the impugned order dated 05.09.2008, dismissed her writ petition. Questioning the same, she filed the present appeal by way of special leave petition.

4) Heard Mr. R.S. Sodhi, learned senior counsel for the appellant and Mrs. K. Amreshwari, learned senior counsel for the respondents.

5) Mr. R.S. Sodhi, learned senior counsel for the appellant after taking us through the grounds of detention order, impugned order of the High Court dismissing the writ petition of the appellant and all other connected materials contended that

- (a) The detention order is liable to be quashed on the ground of non-application of mind and non-supply of materials relied on and acted upon by the Detaining Authority while passing the detention order.
- (b) The Detaining Authority relied on extraneous and irrelevant materials.
- (c) The offences alleged are not “smuggling” under the Customs Act, hence, there is no question of violation of any Act including the Customs Act, therefore, detention under COFEPOSA Act is not sustainable.
- (d) Delay in passing the detention order as well as in disposal of the representation of the detenu.

6) On the other hand, Mrs. K. Amreshwari, learned senior counsel for the Union of India and their officials, by taking us through the grounds of detention and the counter affidavit filed by the Department, submitted that the detention order was passed on the basis of the relevant materials and after subjective satisfaction by the Detaining Authority. She further submitted that there is no illegality or violation of any of the statutory provision including that of Article 22(5) of the Constitution of India and prayed for dismissal of the appeal.

7) For convenience, first let us consider whether there is any delay in passing the detention order and delay in disposal of the representation. (a) Regarding delay in passing detention order, the alleged violation relates to Bill of Entry No. 589144 dated 25.04.2007, the detention order was passed on 05.12.2007. After the seizure of the goods from the container covered under Bill of Entry No. 589144 dated 25.04.2007, nobody appeared before the authorities to get the goods cleared till 23.07.2007. The detenu himself appeared before Customs Authorities for the first time on 03.08.2007. His statement under Section 108 of the Customs Act was recorded

and he was arrested on 04.08.2007. It was explained that in the light of the fact that earlier also similar eight consignments were got cleared by the detenu, the investigation relied on the statement of witness as if he is the actual owner of the proprietary concern, the statement of the clearing agent and his nominee were recorded and it was only on 29.10.2007 the sponsoring authority recommended to the COFEPOSA Department for consideration of the matter to pass detention order against the detenu. All those actions, various orders/proceedings were mentioned in seriatim both in the grounds of detention, and in the counter affidavit filed by the very same authority. We have carefully gone through the same and find no merit in the contention. On the other hand, we are satisfied that there is proximity to the alleged offence and the detention order. In our view, there was no undue delay so as to snap the link between the incident and the alleged potentiality of the detenu in indulging in smuggling activity. Hence, we reject the said contention.

(b) Coming to the contention relating to delay in disposal of the representation, it is true that whenever a representation is

made either by the representative of the detenu or by the detenu himself, it is incumbent on the part of the named authority to consider, dispose of the same and pass appropriate orders and communicate it without any unreasonable delay. However, it depends upon the facts and circumstances of each case. In the instant case, the detenu has taken the plea that he made a representation to the Secretary, Government of India as suggested in the detention order on 13.06.2008 which was received by the Suptd. of Jail on 16.06.2008, and on the very same day it was forwarded to COFEPOSA Department. It is the contention of the counsel for the appellant that though the representation was sent to the COFEPOSA Department on 16.06.2008 itself and the fact that the Jail and COFEPOSA Department both located in Delhi yet it took time for more than ten days to respond in obtaining the comments from the sponsoring authority and get the same disposed of which is fatal and accordingly the detention order deserves to be quashed. As against the said detention, in the counter affidavit, it is clarified that the representation was received by them on 20.06.2008. The

specific assertion made in the counter affidavit has not been refuted by the detenu in his rejoinder. On the same day, i.e., 20.06.2008 itself, it was sent to the sponsoring authority, i.e. Customs Authority, who sent their comments on 27.6.2008. The comments on the said representation were sent to the COFEPOSA department on 27.06.2008, 28/29.06.2008 were holidays being Saturday and Sunday and on the next day i.e. 30.06.2008, the representation of the detenu was considered by the competent officer of the COFEPOSA department and the same was rejected. The rejection order was communicated to the detenu on 01.07.2008 and received by him on 02.07.2008. In the light of the details furnished in the counter affidavit, we do not find any substance in the contention and satisfy that there was any delay much more than the bare minimum time required to obtain the comments of the sponsoring authority accordingly, we reject the said contention also.

8) Let us consider the main contention, namely, non-application of mind on the part of the Detaining Authority and consideration of extraneous and irrelevant materials. This

issue covers all the rest of the contentions raised by the learned senior counsel for the appellant. Mr. R.S. Sodhi, learned senior counsel, submitted that though the detention order was passed on 05.12.2007 after seizure of the goods contained in Bill of Entry No. 589144 dated 25.04.2007, the Detaining Authority relying on the eight Bills of Entry/Consignments which related to earlier years and on the assumption that the detenu misused CHA and IEC passed the detention order. According to him, those eight consignments were cleared by the Customs authorities after proper verification, hence the same cannot be a subject matter for detaining the detenu under COFEPOSA Act. No doubt, Mrs. K. Amreshwari, learned senior counsel for the Department contended that except the goods seized from the container covered under Bill of Entry No. 589144 dated 25.04.2007, the authorities have not based reliance on any other instance. She also contended that even solitary instance is sufficient to clamp the detention order if the Detaining Authority is satisfied with the materials placed before it. There is no dispute that even for a solitary instance if sufficient materials

are available and if the Detaining Authority is subjectively satisfied that the detenu is indulging in smuggling activities which is detrimental to the interest of the Department, the detention order can be clamped. However, perusal of the grounds of detention order dated 05.12.2007 as well as the counter affidavit sworn to by the Joint Secretary to the Govt. of India, Ministry of Finance, Department of Revenue dated 12.12.2008 amply demonstrate that the Detaining Authority has based its conclusion not only with reference to Bill of Entry No. 589144 dated 25.04.2007 but also relating to eight Bills of Entry/Consignments cleared earlier. The detention order, Annexure P-2, is available at page 97 of the paper book. In the order apart from narration of various materials as to the seizure of goods dated 25.04.2007 the Detaining Authority has adverted to and relied upon the clearance of eight consignments. In paragraph 18 of the detention order, there is a specific reference to those facts which reads as under:

“M/s P.P. Datta, Wg. Cdr. (Retd.), the CHA vide their letter dated 9.9.2007 submitted photocopies of bills of entry No. 530534 dated 28.8.2006 No. 538152 dated 25.9.2006 No. 543052 dated 16.10.2006, No. 548191 dated 7.11.2006, No. 554135 dated 1.12.2006, No. 558417 dated 20.12.2006, No. 559159 dated

23.12.2006 and No. 562725 dated 9.1.2007 (total 8 (eight) bills of entry). It was observed that in all the said bills of entry the importers were M/s Om Prakash Deepak Kumar and the items imported were Hinges, Scrubber, Telescopic Channels from M/s Mount Overseas (HK) Ltd. and M/s PIT Industries (Hong Kong).”

The same particulars were reiterated in paragraph 22. In paragraph 23, it is stated that enquiries are being conducted at overseas to find out the description of goods declared at port of export, details of payment and the value declared at port of export in respect to the goods already stands cleared under the aforesaid eight Bills of Entry. In paragraph 26, Detaining Authority has asserted that the detention order was passed “after taking into consideration the foregoing facts and materials on record” and concluded that “satisfied that you ought to be detained under the COFEPOSA Act, 1974 with a view to preventing you from smuggling goods in future.” In paragraph 29, the Detaining Authority once again reiterated that the clearance of goods on the basis of eight Bills of Entry, and finally in paragraph 32, the Detaining Authority has concluded thus:

“While passing the detention order under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, I have referred to and relied upon the documents mentioned in the enclosed list.” (Emphasis supplied)

“The enclosed list” mentioned in paragraph 32 is available as Annexure P-4 at page 143 of the paper book. S.No. 33 of Annexure P-4 specifically refers “Request for overseas inquiry in respect of eight consignments claimed to be cleared by M/s Om Prakash Deepak Kumar”. As rightly contended, paragraph 32, makes it clear that the Detaining Authority had not only referred to eight Bills of Entry but also relied upon those documents in respect of eight consignments. It is not in dispute that those eight Bills of Entry/consignments were cleared by M/s Om Prakash Deepak Kumar after verification and on the orders of the Department. Though, learned senior counsel for the Department submitted that out of eight consignments only five of the 10% of the checking of goods alone were verified by the Department, the fact remains that firstly nothing prevented the concerned officer from verifying the entire consignment as it was done in the case of Bill of Entry No. 589144 dated 25.04.2007 and secondly there was a

valid order for clearance by the officer concerned. No doubt, the department is free to reopen the issue but the fact remains that on the date of passing the detention order it was only at the stage of notice and no final decision/conclusion was taken for violation of the provisions of the Customs Act. In such circumstances, reliance on those materials which is evident from paragraph 32 read with S.No. 33 of Annexure P-4 clearly demonstrate that Detaining Authority has considered irrelevant materials while formulating the grounds of detention. As pointed out above though the counsel for the respondents submitted that the Detaining Authority has considered only in respect of Bill of Entry No. 589144 dated 25.04.2007 for passing detention order, it is clear that apart from the reference in the detention order itself about the eight consignments, paragraph 5(1) of the counter affidavit clearly shows that the Detaining Authority had relied on eight Bills of Entry while arriving subjective satisfaction. Though, learned senior counsel for the respondents, in the course of arguments, submitted that whatever said in the counter affidavit may be eschewed, in view of the fact that the very

same person who signed the detention order has also signed the counter affidavit before this Court, the contents therein cannot be lightly ignored as claimed. On the other hand, the details mentioned in the detention order as well as in the counter affidavit clearly demonstrate that in addition to the Bill of Entry dated 25.04.2007 the Detaining Authority heavily relied on eight Bill of Entries/consignments and satisfying that he will continue to indulge in smuggling activities which will be detrimental to the department passed the impugned detention order.

9) We have already pointed out that the authorities are free to reopen the case in respect of import of eight consignments/Bill of Entries which is said to have been taken place prior to the Bill of Entry dated 25.04.2007. However, even according to the department, those consignments were cleared under proper orders by the authority concerned. It is also not in dispute that on the date of the passing of the detention order the authorities have issued notice calling for certain details in respect of import of those eight consignments. In other words, the said issue has not

concluded and no adverse finding against him is passed on the date of the passing of the detention order. In such circumstances, we are of the view that 'inconclusive state of investigation' cannot legitimately help the authorities to pass an order of detention against the detenu on the perfunctory and inchoate material relied upon. It is useful to refer a decision of this Court in **Chowdarapu Raghunandan vs. State of Tamil Nadu and others**, 2002 (3) SCC 754. After finding that on the date of passing of the detention order investigation in respect of certain other alleged violations is still pending to ascertain the involvement and role of persons concerned and noting that apart from the absence of any positive or concrete materials to connect the baggage in question with the petitioner therein, the nature of stand disclosed in counter affidavit filed on behalf of the first respondent does not really help the authority to prove that the said material and such vitally relevant aspect was either adverted to or really considered before passing the order of detention and taking note of the fact that the detention order suffers the vice of the total non-application of mind to a relevant and vital material

touching question of the culpability as well as the necessity to order the detention of the petitioner, quashed the same and allowed the writ petition. It is settled law that Courts exercising powers of judicial review do not consider the challenge to an order of detention as if on an appeal, re-appreciating the materials, yet since an order of detention in prison involves the fundamental rights of citizens, freedom of movement and pursuit of normal life and liberty, no absolute immunity can be claimed by the authorities as to the decision arrived and it is open to the Courts to see whether there has been due and proper application of mind and that all the relevant and vital materials for the purpose have been noticed, adverted to and considered. If we consider the case on hand on the above principles, though, the Detaining Authority has relied on the import of eight consignments, the fact remains that the goods were cleared after passing appropriate orders by the authorities and any event on the date of passing of detention order it was at the stage of notice calling for reopening the issue hence the same cannot be a valid material for passing an order of detention against the detenu. In fact,

while determining the subjective satisfaction the Detaining Authority had said that enquiries are pending on all those documents placed on record and relied upon by them. Use of incomplete material which is either pending or inconclusive cannot be a basis for detention order. In the recent judgment **Kothari Filaments & Anr. vs. Commissioner of Customs (Port), Kolkata and Ors.** JT 2009 (1) SC 516, this Court has held that if any enquiry is inconclusive pending consideration the same cannot be the basis for passing an order against the person concerned. Therefore, the eight consignments/Bill of Entries relied upon by the Detaining Authority become irrelevant and conclusion on extraneous material cannot be sustained.

10) Learned senior counsel for the appellant has also pointed out that all the materials which were relied on and actually considered in the grounds of detention have not been supplied to detenu. We have already pointed out that both in the grounds of detention as well as counter affidavit filed in support of the said order the Detaining Authority has reiterated all those documents including the import of eight

consignments were relied on in more than one place while passing the order of detention. In fact, the Detaining Authority has adverted to the statement of Deepak Kumar and mentioned that he had seen his signature in his statement recorded on 03.08.2007 as well as on letter dated 02.08.2007 and agreed that signature of Deepak Kumar on the declaration and authorization letter do not tally with his signature on the statement dated 03.08.2007 and letter dated 02.08.2007 and concluded that both the formats do not tally.

11) It is also relevant to refer the definition of “smuggling” in Section 2(39) of the Customs Act, 1962 which reads as under:

“”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;”

Section 111 of the Customs Act, 1962 deals with confiscation of improperly imported goods which reads as thus:-

“111. Confiscation of improperly imported goods, etc.—

The following goods brought from a place outside India shall be liable to confiscation:--

- (a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of section 7 for the unloading of such goods;

- (b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;
- (c) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;
- (d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;
- (e) any dutiable or prohibited goods found concealed in any manner in any conveyance;
- (f) any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;
- (g) any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45;
- (h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34;
- (i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;
- (j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;
- (k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;

(l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;

(n) any dutiable or prohibited goods transited with or without transshipment or attempted to be so transited in contravention of the provisions of Chapter VIII;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.”

This Section refers to goods brought from a place outside India shall be liable to confiscation. Unless there is proper enquiry and arrive at a conclusion in terms of Section 111 or Section 113 it cannot be concluded that smuggling had taken place. There is nothing in the order of detention which would indicate that any of the said earlier imports were effected in contravention of any of the provisions of the Customs act,

1962, or that they could have been regarded as having been smuggled into the country within the meaning of Section 2(39) of the said Act. Except notice for reopening the order clearing eight consignments prior to Bills of Entry dated 25.04.2007, there is no adjudication and final order by the authority concerned. In other words, the reference to alleged violation of the Customs Act in respect of import of eight consignments which was only at the pre-mature stage and considering extraneous materials, which are inconclusive cannot be a valid ground for clamping detention under COFEPOSA Act. Inasmuch as, the Detaining Authority has extensively relied upon the allegations that the detenu was involved in the import of eight consignments through M/s P.P. Dutta, reliance on those irrelevant material vitiates the detention order. This is more so as the said alleged earlier imports, apparently constitute the main basis for the opinion formed by the Detaining Authority that the detenu had the propensity and potentiality to indulge in smuggling activities in future.

12) As already discussed, even based on one incident the Detaining Authority is free to take appropriate action

including detaining him under COFEPOSA Act. The Detaining Authority has referred to the violation in respect of importable goods covered under Bill of Entry No. 589144 dated 25.04.2007. In an appropriate case, an inference could legitimately be drawn even from a single incident of smuggling that the person may indulge in smuggling activities, however, for that purpose antecedents and nature of the activities already carried out by a person are required to be taken into consideration for reaching justifiable satisfaction that the person was engaged in smuggling and that with a view to prevent, it was necessary to detain him. If there is no adequate material for arriving at such a conclusion based on solitary incident the Court is required and is bound to protect him in view of the personal liberty which is guaranteed under the Constitution of India. Further subjective satisfaction of the authority under the law is not absolute and should not be unreasonable. In the matter of preventive detention, what is required to be seen is that it could reasonably be said to indicate any organized act or manifestation of organized activity or give room for an inference that the detenu would

continue to indulge in similar prejudicial activity warranting or necessitating the detention of the person to ensure that he does not repeat this activity in future. In other words, while a single act of smuggling can also constitute the basis for issuing an order of detention under the COFEPOSA Act, highest standards of proof are required to exist. In the absence of any specific and authenticated material to indicate that he had the propensity and potentiality to continue to indulge in such activities in future, the mere fact that on one occasion person smuggled goods into the country would not constitute a legitimate basis for detaining him under the COFEPOSA Act. This can be gathered from the past or future activities of the said person. In the case on hand, we have already pointed out that there were no such past activities as could lead to a reasonable conclusion that he possesses the propensity or the potentiality to indulge in smuggling activities in future, to prevent which it is necessary to detain him. At present there is nothing in the order of detention which would indicate that any of the said earlier imports was effective in contravention of any of the provisions of the Customs Act,

1962 or that they could have been regarded as having been smuggled into the country within the meaning of Section 2(39) of the said Act. In such a case, as held by this Court in **Chowdarapu Raghunandan (supra)**, the invocation of the COFEPOSA Act against such a person would not be justified.

13) Apart from these aspects, it is unfortunate that the High Court while considering the *Habeas Corpus* writ petition filed under Article 226 of the Constitution of India by the wife of the detenu challenging the order of detention on various grounds, on going through the materials of the department as if as an Appellate Court relying on Section 482 Code of Criminal Procedure directed the Commissioner of Customs, ICD, Tughlakabad, to lodge a report with the police station, Tughlakabad within a period of 15 days along with the complete set of relevant documents to enable them to register a case under Sections 199, 420, 468 and 471 of the Indian Penal Code against the detenu. The said direction is not warranted considering the fact that issue before the High Court was about the validity of the detention order and the curtailment of the personal liberty of the detenu and nothing

more. We are of the view that the High court is not justified in issuing such direction and awarding exemplary cost of Rs. 50,000/- payable to the sponsoring authority.

14) In the light of the above discussion and for the reasons stated above the impugned order of the High Court dated 05.09.2008 in W.P. (CrI.) 782/2008 is set aside, consequently the detention order bearing F.N. No. 673/06/07-CUS/VIII dated 05.12.2007 issued by Joint Secretary (COFEPOSA), Ministry of Finance, Department of Revenue is quashed. The detenu-husband of the appellant viz., Deepak Kumar @ Deepak Batra is ordered to set at liberty forthwith if he is not required in any other case. Appeal is allowed.

.....J.
(DALVEER BHANDARI)

.....J.
(P. SATHASIVAM)

New Delhi;
March 27, 2009.

