K.P.M. BASHEER ETC. A

v.

STATE OF KARNATAKA AND ANR. ETC.

FEBRUARY 28, 1992

[S. RATNAVEL PANDIAN, KULDIP SINGH AND R.M. SAHAI, JJ.] B

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 :

Section 3(1)—Detention Order—Undue and unreasonable delay in execution—Maintainability. C

The appellant, on 12.11.1990, was found carrying two gold pellets with foreign markings each weighing ten tolas, without any valid permit. The order of detention under S.3(1) of the conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 was passed on 7.1.1991. The detention order was served on him on 28.6.1991. D

The Writ Petition challenging the detention order, *inter alia*, on the ground of undue and reasonable delay in its execution was dismissed by the High Court. E

The detenu filed the appeal by special leave against the High Court's order as also the writ petition under Article 32 of the Constitution before this Court.

Allowing the appeal and disposing of the writ petition, this Court, F

HELD: 1.1 The order of detention cannot be sustained since the 'live and proximate link' between the grounds of detention and the purpose of detention is snapped on account of the undue and unreasonable delay in securing the appellant/detenu and detaining him. The order of detention is liable to be set aside on this ground alone. [p. 1080A-B] G

1.2 Though the two gold pellets (the contrabands) were seized from the appellant on 12.11.1990, the order of detention was passed on 7.1.1991, and the detention order was executed after a period of 5 months and 11 days. {pp. 1078F; 1079G-H; 1080A] H

2.1 No sufficient cause is shown for not taking any action under s.7 of the COFEPOSA Act. The explanation – that though COFEPOSA section in the office of the Collectorate of Customs requested the State Government on 19.4.1991 to initiate action under s.7(1) (b) of the Act it was not done so because the seizing unit was asked to make one more attempt to trace out the appellant – is not satisfactory and reasonable one. [pp. 1078G-H; 1079A-B]

2.2 No serious and sincere effort was taken by the arresting officers: There was only exchange of correspondence between the Department and the arresting officers. It is incomprehensible as to why no effort was made to secure the appellant/detenu during the two days, namely, on 6th and 20th Feb. 91, when he appeared before the Assistant Collector of Customs. [pp. 1079F-G]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 144 of 1992.

From the Judgement and Order dated 27.9.1991 of the Karnataka High Court in W.P. No. 113 of 1991.

WITH

Writ Petition (Crl.) No. 1394 of 1991.

C.S. Vaidyanathan and P.K. Manohar for the Appellant.

K.T.S. Tulsi, Addl. Solicitor General, P. Parmeswaran, A.K. Srivastava, M. Veerappa and Kh. Nobin Singh (For the State of Karnataka) for the Respondents.

The Judgment of the Court was delivered by

S. RATNAVEL PANDIAN, J. Leave granted.

The appellant/petitioner K.P.M. Basheer by the above appeal is challenging the correctness and legality of the order dated 27th September 1991 made by the High Court of Karnataka dismissing the Writ Petition filed by the appellant challenging the legality and validity of the order of detention dated 7.1.1991 passed by the State of Karnataka. The first respondent in the appeal, namely, the State of Karnataka in exercise of the powers conferred by the Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (hereinafter

referred to as 'the Act') passed the impugned detention order on 7th January 1991 with a view to preventing him from engaging in keeping and transporting smuggled goods falling within the mischief of Section 3(1)(iii) of the Act. The appellant was directed to be detained and kept in the custody of the central prison, Banglore.

The brief facts of the case which led to the passing of the impugned order can be summarised as follows:

On 12.11.1990 the Superintendent of Central Excise on information interrogated the appellant at the Balgaum bus stand on his arrival from Bombay in the presence of some panchas and recovered two gold pellets with foreign markings each weighing ten tolas, wrapped in a paper packet from his front side right watch pocket of his pant. The appellant was not having any valid permit and also was not able to give any satisfactory explanation for possessing the gold pellets. Therefore, the Superintendent entertaining a reasonable belief that they were smuggled gold pellets recorded the statement of the appellant. The State Government on the information passed on by the sponsoring authority passed the impugned order on 7.1.1991 on being subjectively satisfied of the necessity of passing the impugned order on the materials placed before it. The detention order was served on the detenu only on 28.6.1991 from which date onwards he has been detained. Challenging the detention order, the petitioner filed a Writ Petition No. 113/91 before the High Court of Karnataka and raised several contentions; those being (1) the order of detention is based on a solitary incident; (2) there has been an undue and prolonged delay in serving the order on the detenu; and (3) the materials placed before the detaining authority were not sufficient for drawing the requisite satisfaction for passing the impugned order. The High Court rejected all those contentions and dismissed the Writ Petition. Hence this appeal.

Before this Court the petitioner has filed a separate Writ Petition under Article 32 of the Constitution of India raising certain additional grounds. Those grounds are: (1) The detenu made a request to the detaining authority to forward a copy of his representation to the Central Government and that the detaining authority has not forwarded the same to the Central Government as requested by him. Even assuming that it has been forwarded, his representation has not been disposed of in time and as such there is violation of Article 22(5) of the Constitution of India.

A (2) The normal criminal process which would be adequate to take care of the possession of the gold has not been followed; and (3) The first respondent in the Writ Petition (Union of India) has failed in its duty to inform the petitioner regarding the Government instruction issued to the sponsoring agencies not to make an order of detention in cases where the value of the smuggled goods is less than Rs.1 lakh.

B

In the Writ Petition both the State Government as well as the Central Government have filed their counter affidavits refuting all the additional grounds.

C Before scrutinising the additional grounds raised in the Writ Petition, we shall now examine the contentions raised in the appeal and find out whether the order of the High Court warrants interference.

Mr. C.S. Vaidyanathan, the learned counsel appearing on behalf of the appellant contends that the delay of more than five months in executing D the order of detention is not only an inordinate and unreasonable one but also stands un-explained and on that ground the High Court ought to have set aside the order of detention. According to him, the High Court has not gone deep into that question but summarily disposed of the same holding "The explanation offered by the 1st respondent, in para 9 of the statement of objection is quite acceptable."

E

Of course, this contention has not been specifically taken in the Memorandum of Appeal, but there can be no bar to advance a legal argument in a case of this nature and especially when such a contention has been raised before the High Court. We went through the explanation F given in para 9 of the counter affidavit filed on behalf of the first respondent by the then Commissioner and Secretary to Gevernment, Home Department. It is not denied that the detention order was executed after a period of 5 months and 11 days. What the first respondent states is that various efforts were taken to trace the detenu at Tellicherry at the address given in the grounds of detention as well as in the Bombay address, but he G could not be secured. Further it has been stated that though the arresting officers attempted to secure him at the Court of Chief Judicial Magistrate at Belgaum on 6.3.91, 28.3.91 and 14.5.91 on which dates the criminal case as against him stood posted before that court, the officers could not do so as the appellant did not appear before the court for hearing. Further it is H mentioned that though COFEPOSA Section in the office of the Collec-

torate of Customs requested the State Government on 19.4.91 to initiate action under Section 7(1)(b) of the Act it was not done so because the seizing unit was asked to make one more attempt to trace out and detain the appellant. This explanation is not a satisfactory and reasonable one for the following reasons :

(1) No sufficient cause is shown for not taking any action under Section 7 of the Act.

(2) It appears from the paragraph 9 of the counter that the officers came to know of the correct address of the appellant at Bombay, but they could not trace him. It may be pointed out that the Bombay address at which place the appellant detenu was attempted to be secured is not given in the counter. Had it been given, the Court would have been in a position to verify the averments made in the grounds of detention stating that the address at Bombay given by the appellant was a fictitious one.

In paragraph 17 of the Writ Petition filed before the High Court, the appellant has asserted that he appeared before the Asstt. Collector of Customs, Marine Lines, Bombay on 6.2.91 and 20.2.91 but no attempt was made to arrest and detain him. This specific averment is not all denied in the counter. This indicates that the arresting officers did not take any real and genuine effort to secure and detain the appellant. The explanation now offered stating that the appellant was fugitive, eluding the dragnet of the detention order cannot be accepted, because during the alleged period of search he has appeared before the Assistant Collector of Customs, Bombay on two occasions during Feb. 1991, that is after passing of the detention order.

All the above points show that no serious and sincere effort appears to have been taken by the arresting officers and that there was only exchange of correspondence between the Department and the arresting officers. It is incomprehensible as to why no effort has been made to secure the appellant/detenu during the two days, namely, on 6th and 20th February when he appeared before the Assistant Collector of Customs. No supporting affidavits or documents are filed to substantiate the averments made in the counter. Incidentally, it may be mentioned that though the two gold pellets (the contrabands) were seized from the appellant on

A 12.11.90 the authorities concerned passed these orders only on 7.1.1991, i.e. nearly after two months.

Under these circumstances, we are of the view that the order of detention cannot be sustained since the 'live and proximate link' between the grounds of detention and the purpose of detention is snapped on
B account of the undue and unreasonable delay in securing the appellant/detenu and detaining him. As we have now come to the conclusion that the order of detention is liable to be set aside on this ground alone, we are not dealing with other contentions raised in the Memorandum of Appeal as well as in the Writ Petition.

C Hence for the reasons stated above we allow the appeal, set aside the order of the High Court and quash the impugned detention order and direct the detenu to be set at liberty forthwith. In view of the order in this present appeal, no order is necessary in the Writ Petition.

R.P. Appeal allowed.