

Anil Kshetarpal, J

Dated: November 19, 2019

Appellant Rep by: Mr Jagmohan Bansal, Adv.

Respondent Rep by: Mr Sunish Bindlish, Adv. assisted by Mr Namish Jain, Adv.

COFEPOSA - The petitioner's spouse was working at the Amritsar airport in the Fire Services - He was detained by the Customs authorities on allegations of having indulged in smuggling gold by taking benefit of his position at the airport - The petitioner's spouse was also found to have constructed a hotel, for which he had been unable to explain the source of funding - Besides, the petitioner's son had been apprehended with foreign currency in his possession - It was alleged that the petitioner's spouse had masterminded the entire network and on his instruction, other persons were also indulging in smuggling - It was found that about 4Kg of Gold was smuggled in this manner, which was also established through recovery of a bill of export showing that consignment of 1Kg of Gold from Dubai airport was issued in the name of the petitioner's son - The present petition assailed the order passed by the Competent Authority u/s 3 of the COFEPOSA.

Held: Perusal of the order shows that the competent authority had concluded that the petitioner's spouse had a general habit and propensity to indulge in fraudulent activities through smuggling of goods, abetting smuggling, engaging in transporting or concealing or keeping smuggled goods and also harboring persons engaged in smuggling at the cost of the Government's revenue - The petitioner's spouse was also found to have provided lodging for other offenders at Dubai and in his own hotel - Thus it is seen that the authority passed the detention order after providing various reasons for arriving at such conclusion - It is seen that the not only the detaining authority but also the Advisory Board formed an opinion that there is sufficient cause to detain the petitioner's spouse and the same is affirmed by the Central Govt - Hence the court finds no grounds for interference within its limited jurisdiction of judicial review: HC

Writ petition dismissed/In favor of Revenue

JUDGEMENT

Per: Anil Kshetarpal:

By filing petition under Article 226 of the Constitution of India, correctness of order dated 30.04.2019 passed by the competent authority under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short 'COFEPOSA'), has been challenged.

At the outset, it is apt to notice that Article 22 of the Constitution of India, which is one of the fundamental right, deals with the aforesaid subject. Sub Articles 5, 6 and 7 of Article 22 enables the Government to make law providing for preventive detention. In accordance with the aforesaid enabling power, the Union of India has enacted the COFEPOSA. Section 3 of the COFEPOSA enables the competent authority to pass an order of preventive detention, which is extracted as under:-

"3. Power to make orders detaining certain persons.

(1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from-

(i) smuggling goods, or

(ii) abetting the smuggling of goods, or

(iii) engaging in transporting or concealing or keeping smuggled goods, or

(iv) dealing in, smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,

It is necessary so to do, make an order directing that such person be detained:

Provided that no order of detention shall be made on any of the grounds specified in this sub-section on which an order of detention may be made under section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 or under Section 3 of the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988.

(2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order. (3) For the purposes of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing not later than fifteen days, from the date of detention."

This Court has heard learned counsel for the parties at length and with their able assistance gone through the paper book.

Learned counsel appearing for the petitioner has submitted that husband of the petitioner was picked up from the hotel and there is no recovery from him. He further submitted that once the petitioner has been suspended from the Airport duty, therefore, there is no use of continuing with the preventive detention. He further submitted that the detention order is discriminatory, as no proceedings have been initiated against Rakesh Rai, Narayan Sharma and Sahib Singh.

On the other hand, learned counsel appearing for the Union of India, has defended the order passed by referring in detail to the impugned order passed by the competent authority. He further informed the

Court that the representation made on behalf of husband of the petitioner was placed before the Advisory Board, which also formed an opinion that there are sufficient grounds for continuing detention of the husband of the petitioner. The Central Government has also considered the report of the Advisory Board and other material on record and confirmed the aforesaid detention order.

From the facts available on the file, it is apparent that husband of the petitioner was working at Sri Guru Ram Dass Ji International Airport, Amritsar as Assistant Manager (Fire Services). The detention order further records that from the statements recorded under Section 108 of the Customs Act, 1962, it has been found that husband of the petitioner had indulged in smuggling of the gold. For that purpose taking benefit of his position at the Airport, husband of the petitioner smuggled out the gold from the Airport in his own vehicle. The authority has also found that husband of petitioner has failed to explain construction and source of funding of Restaurant-cum- Hotel i.e. 'No Escape'. It has also been noticed that son of the petitioner was also apprehended with foreign currency. Further, it has also been noticed that petitioner is the brain behind the entire network and it is on his instruction, the other persons were smuggling of the gold. It has been noticed that 4 kgm gold has been smuggled in the same manner. The detaining authority has also recovered a bill of export which prima facie establishes that the consignment of 1 KG gold from Dubai Airport issued in the name of son of the petitioner.

This Court under Article 226 of the Constitution of India has a power of judicial review. The jurisdiction which this Court exercises in exercise of its power under Article 226, judicial review is limited. Against such orders, the High Court or the Supreme Court does not have power similar to appellate court. The normal rule is that when an isolated offence or isolated offences is/are committed, the accused is to be prosecuted. However, law of preventive detention enables the competent authority to detain a particular offender in order to disable/prevent him to repeat offences. For that purpose, it is obligatory for the detaining authority to comply with the provisions of Article 22(5) of the Constitution of India. While exercising powers of judicial review, the Court has to see as to whether the requirement under Article 22(4) have been complied with by the detaining authority or not and once the Court comes to a conclusion that the detaining authority has complied with the requirement, the Court normally would not interfere. The detention order is passed on the subjective satisfaction of detaining authority.

In view thereof, question which arises before this Court is whether this Court should interfere or not?

Learned counsel for the petitioner failed to point out or draw attention of the Court to any substantive error in the procedure followed which may attract violation of Article 22 of the Constitution of India.

As far as argument of learned counsel for the petitioner that the husband of the petitioner was picked up from the Hotel and there is no recovery, it may be noticed that preventive detention is not for the purpose of recovery. The detaining authority has considered the material available to it and thereafter, passed the order. Even statement of the husband of petitioner has also been recorded, which is admissible under Section 108 of the Customs Act, 1962.

From the reading of the order, the competent authority found from examination of material available that husband of the petitioner has a general habit and propensity to indulge in fraudulent activities by way of smuggling of goods, abetting of the smuggling of goods, engaging in transporting or concealing or keeping smuggled goods and harbouring persons engaged in smuggling at the cost of government

revenue. From the reading of the order, it has further been noticed that husband of the petitioner not only manages and issues instructions for stay of the other offenders at Dubai but also ensures that they stay in his hotel i.e. 'No Escape'.

In view thereof there is no substance in the first submission.

Second submission of learned counsel is that once the husband of the petitioner has been placed under suspension then there is no use of continuing with the detention order.

This Court has considered the submission, however, finds it to be without substance. No doubt, at the time when the detention order was passed, one of the consideration was that the petitioner is employed as Assistant Manager (Fire) at the Airport, however that was not the only ground on which order of detention was passed. The detaining authority has passed detailed order providing various grounds for detention.

Last argument of learned counsel that the order is discriminatory is also to be noticed and rejected, because it is the subjective satisfaction of the detaining authority, which has to take a call on the basis of material available on the file. The satisfaction, as noticed, has to be of the detaining authority and in this case not only the detaining authority but even the Advisory Board constituted has formed an opinion that there is sufficient cause for detaining husband of the petitioner which has been affirmed by the Central Government.

Keeping in view the aforesaid facts, this Court does not find any ground to interfere within its limited jurisdiction of judicial review. Hence the present criminal writ petition is dismissed.