

MADHU GARG  
v.  
UNION OF INDIA AND ANR.

SEPTEMBER 21, 2004

[N. SANTOSH HEGDE AND S.B. SINHA, JJ.]

*Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974—Section 3(1)—Detention under—On grounds of misdeclaration of export consignment and over-invoicing of goods—Misdeclaration not proved by report of chemical analysis of goods—Detention upheld by High Court—On appeal, held: Detention on first ground was without there being adequate material—The entire order of detention stands vitiated in law as one of the grounds was found to be based on irrelevant materials.*

Husband of appellant (detenu), his brother and their manager were detained under Section 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 on the grounds that (1) the export consignment was misdeclared stating it to be alloy steel forging (machined) although actually the same was metal scrap and (2) the goods were over invoiced. Allegations were based on self-inculpatory statements. However, the same was retracted later. Central Advisory Board Approved the detention orders of the detenu and his brother, but detention of their manager was not approved. Writ petitions against the detention order were dismissed. A show cause notice was served upon detenu wherein it was stated that report of chemical analysis by CRCL showed that the alleged samples were made up of alloy steel.

In appeal to this Court, appellant contended that the detention order was not sustainable in view of the averments in the show cause notice that goods were made up of alloy steel.

Allowing the appeals, the Court

**HELD:** 1. A bare perusal of the averments in the show cause notice do not leave any manner of doubt whatsoever that upon chemical analysis of materials, it was found that the samples were made up of alloy steel. It has not been disputed that the alleged goods which are

**A** subject matter of the export were seized in presence of the detenu and were sent for chemical analysis before CRCL. The subject matter of the consignment, therefore, was not scrap metal. Had the detaining Authority waited for the results of the said chemical analysis before issuing the impugned order of detention, the first ground stated therein could not have been made a basis therefor. The order of detention was passed in haste without there being adequate materials. [586-B-D]

**B**

**C** 2. Even though over invoicing of the goods is the subject matter of the adjudication proceedings, but when one of the grounds of detention is found to be based on irrelevant materials not germane for passing the order of detention, the entire order of detention shall stand vitiated in law. [586-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 821 of 2004.

**D** From the Judgment and Order dated 6.4.2004 of the Punjab and Haryana High Court in Crl. W.P. No. 1397 of 2003.

WITH

**E** Crl. A. No. 822 of 2004.

Gopal Subramaniam, Vikram Chaudhary, Rakesh Dahiya, Ms. Madhusmita Bora, Nikhil Jain, Mahabir Singh and C.D. Singh for the Appellants.

**F** T. S. Doabia, Manish Sharma, Arun K. Sinha and Rakesh Singh, Manoj Saxena, S. K. Mitra and Ms. Naresh Bakshi for the Respondents.

The Judgment of the Court was delivered by

**G** **S.B. SINHA, J :** These appeals arising out of the judgments and orders dated 04.04.2004 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Writ Petition Nos.1397 and 1432 of 2003 involving similar questions of law and fact were taken up for hearing together and are being disposed of by this common judgment. However, the factual matrix of the matter is being noticed from Criminal Appeal No. 821 of 2004.

**H**

The Appellant is the wife of the detenu Vinod Kumar Garg who was detained by an order dated 20th October, 2003 passed by the Joint Secretary to the Government of India, Ministry of Revenue, New Delhi purported to be under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short 'the COFEPOSA Act').

The grounds of detention indicate that the said order of detention was passed primarily on two allegations, viz.:

- (a) the export consignment was misdeclared stating it to be alloy steel forging (machined) although actually the same was a metal scrap; and
- (b) the goods were over invoiced as the value thereof was declared by the exporter to be Rs. 170-175 per kg instead and place of its actual value being only Rs. 4-5 per kg.

The allegations in support of the said grounds of detention were primarily based on the self-inculpatory statement of the detenu recorded by the Directorate of Revenue Intelligence purported to be in terms of Section 108 of the Customs Act. The said statements, however, were retracted by the detenu before the learned ACMM on or about 26th August, 2003.

The learned ACMM in his order dated 20th August, 2003 also recorded the statement that the detenu had made his statement involuntarily and had also been tortured. It was directed:

"At the request of accused it is directed to the I.O. Sh. Mukesh Gaur to allow the accused person to talk to their family members on STD/ Telephone. Accused have also stated that at this moment their advocates are not present hence they may be remanded to J.C. till morning so that they can take the services of their advocates.

"I have gone through the file, produced before me by the I.O. S.S.P. made a request for 14 days J.C. of both the accused. However after considering all the statements made before me by the accused persons, they have been remanded till 2 p.m. on 26/8/2003 in J.C. with the directions to produce both the accused in the court bw 2 p.m. to 4 p.m."

A Along with the said Vinod Kumar Garg, orders of detention were also passed against his brother Narsi Dass Garg and their manager, Mudit Kumar Tiwari. However, when the matter was placed before the Central Advisory Board in terms of Sub-section (3) of Section 8 of the COFEPOSA Act, the Board although approved the order of detention of Vinod Kumar Garg and Narsi Dass Garg, the detention of Mudit Kumar Tiwari was not approved.

B Questioning the said order of detention, the Appellant herein as also the aforementioned Narsi Dass Garg filed two writ petitions before the Punjab and Haryana High Court. Both the petitions were dismissed by reason of the impugned order. Hence this appeal.

C Mr. Gopal Subramaniam, learned senior counsel appearing on behalf of the Appellant had raised a number of contentions in support of this appeal. The learned counsel would firstly submit that from the averments made in the show-cause notice dated 20th August, 2004 issued by the Authorities upon the detenu it would be evident that the goods of the exporter were made up of alloy steel and in that view of the matter the order of detention cannot be sustained only on the basis of his purported self-inculpatory statement recorded by the official of Directorate of Revenue Intelligence under Section 108 of the Customs Act.

D  
E The learned counsel would further submit that keeping in view of the fact that the self-inculpatory statement has been retracted, the same could not have been the basis for issuing the order of detention.

F Mr. Subramaniam would contend that having regard to the fact that the grounds of detention both in relation to the detenu as also his brother Narsi Dass Garg being the verbatim copy of each other, non-application of mind on the part of the detaining authority is apparent. In any event, as the relevant documents relating to the duty drawback cash incentive scheme and particularly the reply of the detenu forming part of adjudication proceedings were not placed before the detaining authority, the impugned order of detention is vitiated in law.

G Mudit Kumar Tiwari who had also been detained on the ground of hatching a conspiracy with the detenu and his brother but the order of detention against him having been revoked, there is absolutely no reason, Mr. Subramaniam would contend, as to why the detaining authority had not  
H revoked the order of detention passed against the detenu.

It was also contended that no purported illegal activity at the hands of the detenu in future is possible as he had already surrendered his 'exporter importer code' before the authorities incapacitating himself from doing export import business.

Mr. T.S. Doabia, learned senior counsel appearing on behalf of the Respondents, however, supported the order of detention.

In view of the fact that we find force in the first contention of Mr. Subramaniam, it may not be necessary for us to advert to the other submissions advanced by the learned counsel.

It is not in dispute that one of the allegations made against the detenu in the grounds of detention was that he had exported consignment upon misdeclaration to the effect that alloy steel forging (machined) was being exported whereas actually the same was metal scrap.

However, it is not denied that the detenu had been served with a show-cause notice dated 20th August, 2004 by the Directorate of Revenue Intelligence, New Delhi; the paragraph 48 whereof reads as under:

"48. Two samples drawn from the seized export consignment of M/s National Steel Products Co. were sent to CRCL, New Delhi for chemical analysis. CRCL, vide its test report No. 35-Chem/Cus/2002/CL/197-198 DRI dated 23.10.2003, informed that the samples were made up of alloy steel. The test report, however, could not throw any light as to whether the goods were forgings (machined), as declared by the exporter."

In the said notice, the detenu had been asked to show cause *inter alia* on the following terms:

"58(i) M/s National Steel Products Co, New Delhi exported the goods by willfully mis-stating/misdeclaring the FOB value as Rs. 7,60,88,864 (the details of which are given in Annexure-A annexed to this Show Cause Notice) and by suppressing the actual value with a *malafide* intention to defraud the Government by fraudulently claiming/ availing undue DEPB credits to the tune of Rs. 1,70,01,015. Misdeclaration in value has, therefore, rendered the exported goods liable to confiscation under section 113(d) and 113(i) of the Customs

A Act, 1962 read with section 50(1) of the Customs Act, 1962 as well as Rules 11 and 14 of the Foreign Trade (Regulation) Rules, 1993.”

B A bare perusal of the aforementioned averments in the said notice do not leave any manner of doubt whatsoever that upon chemical analysis of materials, it was found that the samples were made up of alloy steel. It has not been disputed before us that that the alleged goods which are subject matter of the export were seized in presence of the detenu and were sent for chemical analysis before CRCL. Upon obtaining a report dated 23.10.2003, it appears, that the samples were made up of alloy steel although the test report could not throw any light as to whether the goods were alloy steel forging (machined), as declared by the exporter. The subject matter of the consignment, therefore, was not scrap metal. Had the detaining authority waited for the results of the said chemical analysis before issuing the impugned order of detention, the first ground stated therein could not have been made a basis therefor.

D The order of detention, therefore, in our considered opinion, was passed in haste without there being adequate materials.

E Mr. Doabia, however, contended that the allegation against the detenu as regard over invoicing of the goods is the subject matter of the adjudication proceedings. That may be so but it is now well-settled that when one of the grounds of detention is found to be based on irrelevant materials not germane for passing the order of detention, the entire order of detention shall stand vitiated in law.

F For the aforementioned reasons, we are of the opinion that the impugned orders of detention cannot be sustained which are set aside accordingly. These appeals are allowed with aforementioned observations. No costs.

K.K.T.

Appeals allowed.