**IN THE HIGH COURT OF DELHI AT NEW DELHI**

SUBJECT : COFEPOSA Act

Date of decision : 2nd January, 2007

W.P.(Crl.) No. 566 of 2005

Rajeev Verma …Petitioner

throughMr. Ram Jethmalani, Senior Advocate with Mr. R.M. Bagai, Mr. Anish Dhingra and Mr. Nishant Gupta, Advocates

Versus

Union of India & Ors. …Respondents

Through Mr. P.P. Malhotra, Additional Solicitor General with Ms. Barkha Babbar, Mr. Satish Aggarwala, Advocates

Coram :

Hon'ble Mr. Justice Manmohan Sarin
Hon'ble Ms. Justice Manju Goel

Manmohan Sarin, J.

1.Petitioner, by this writ petition seeks quashing of the detention order No.673/13/2004/CUS-VIII dated 7.10.2004 passed by respondent No.2 under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the "COFEPOSA Act"). It is claimed that the detention order is the result of malafide exercise of powers for a collateral purpose. The Detention Order is vitiated by delays, arbitrariness and other illegalities. It violates the provisions of Articles 14 and 21 of the Constitution of India. Petitioner admits that he has so far not allowed the detention order to be served on him. The order is sought to be challenged at the pre-execution stage itself. Proceedings have also been initiated under Section 7 of the COFEPOSA Act before the Additional Chief Metropolitan Magistrate. In the said

proceedings, petitioner had initially been granted interim protection for the purpose of presenting himself before the Trial Court. The Commissioner of Central Excise (Adjudication) vide order dated 31.5.2006, has imposed a penalty to the tune of Rs.50 lacs and proceedings under Section 80/81 of Cr.PC were initiated for the petitioner being declared a Proclaimed Offender.

2.Petitioner's case is that primarily, the detention order is passed for a wrong purpose inasmuch as the acts alleged against the detenu do not constitute a valid ground of detention under the COFEPOSA Act. The belated passing of the detention order, it is alleged, further demonstrates that the purpose is not preventive detention but punitive. Petitioner also assails the delay in passing of the detention order inasmuch as the premises of the petitioner were raided on 15.10.2003 and the order of detention was passed on 7.10.2004. The transactions in question are of the year 1998 and thereafter.

3.Petitioner had moved an application bearing Crl.M.No. 7537/2005 for urging additional grounds in the writ petition. Petitioner having obtained a copy of the detention order, sought to assail the same on various other grounds as could be gathered from the Detention Order. Respondents filed a reply to the said application submitting that the detenu had been evading the execution of the detention order and had sought to challenge it at the pre-execution stage on the limited grounds available and detailed consideration of the case at pre-execution stage was not required. Without prejudice, reply to the additional grounds was also filed.

4.Mr. Ram Jethmalani, Senior Advocate, on behalf of the petitioner, submitted that the impugned order was liable to be set aside on the short ground that there was no infarction of Section 113(i) of the Customs Act even if the allegations in the Show Cause Notice were taken to be true. He submits that it is not the case of the respondents that the goods were not exported or had not left the Indian shores or that the moneys as payable under the LCs have not been realized. Counsel submitted that the case against the petitioner finally boils down to the allegation that in the shipping bills, for the goods exported, the port of discharge has been shown as Moscow while in the corresponding bill of lading or the Airway bill, the port of discharge had been shown as Helsinki, Kotka etc. in Finland. Learned counsel contended that the Detaining Authority had grossly misunderstood facts, misread the documents and shown total ignorance of T.I.R. Carnet existing between Indian and Russia in reaching a conclusion that there was a

material mis-declaration within the meaning of Section 113 of the Customs Act. Learned counsel submitted that the Section does not penalize any and every mis-declaration or incorrect statement in the shipping bill. It only refers to those statements that relate to material particulars. Material particulars are those that are highly relevant to the object of the provision. Counsel submitted that there was no export duty on the goods exported. The law relating to admissibility of drawback is well settled. The exporter is entitled to claim drawback on the imported content of the goods which are exported and on which customs duty has been paid. Drawback becomes admissible when the goods are cleared by the proper officer for export and loaded for shipment. The drawback would become recoverable from the exporter only if the declared price of the goods is not received in India. In the instant case, the same is not in question. Accordingly, he urged, it would be wholly irrelevant for purposes of a claim of drawback whether the goods had been exported to Moscow directly or had been sent through Finland. Reliance was also placed by the counsel on "Jute Investment Company Vs. S.K. Srivastava" reported at 77 Calcutta Weekly Notes page 501 to urge that destination was not a material particular and hence, the alleged wrong declaration, if any, would be of no consequence. Petitioner had initially also attempted to urge that goods which have already left India, would not be export goods within the ambit of Section 113 of Customs Act, 1962. However, in view of the subsequent Full Bench decision of the Calcutta High Court in "M/s. Euresian Equipments and Chemicals Ltd. & Ors. Vs. The Collector of Customs & Ors." reported at AIR 1980 Calcutta 188, this plea was not pressed.

5.Elaborating his submissions, Mr. Jethmalani submitted that goods were sent to Helsinki, Finland since Moscow was land-locked and had no port. The goods were transported to Moscow from Helsinki and the goods had eventually reached Moscow routed through Helsinki as confirmed by the Russian Custom Authorities. He submits that the respondents have been wrongfully contending that one of the Firms namely Europa Torg did not even exist, which has been found to be untrue. He maintained that the ultimate destination of goods was Russia and the transportation through Helsinki, Kotka was for convenience and in accordance with well accepted trade practice. He submitted that goods reached the ultimate destination in Russia. However, respondents cannot shift the onus of proving that all the goods reached Russia on the petitioner, while invoking COFEPOSA. Explaining the instances given by the respondents where goods consigned by air vide flight to Moscow had been sent further to Helsinki, the counsel

sought to explain that these had been shipped on a direct flight to Moscow and then airlifted to Helsinki so that they could be shipped along with the major quantity of goods being shipped from Helsinki. The respondents were seeking to project this as an instance of goods being really intended for Helsinki. Summing up his arguments, Mr. Jethmalani submitted that orders had been placed through the Russian Bank, which after due compliance of procedure and receipt of documents from the Indian exporters, issued the Letter of Credit. Payment having been realized, it was no longer an issue. Mr. Jethmalani further urged that under the Indo-Soviet Rupee Payment Debts Scheme, there was no provision requiring that the goods exported had to be utilized and consumed in Russia itself. It was open for any of the Russian importers to have transhipped the goods to any other destination. The question of receipt of payment in foreign exchange as alleged, is wholly irrelevant to the case. Mr. Jethmalani further reiterated that Moscow being a land-locked city, the petitioner had resorted to shipment to Helsinki wherein most of the goods were sent by ship and it had been transported in bonded trucks to Moscow under the Multi-modal transport scheme. Even with regard to the goods that were airlifted to Helsinki via Moscow, petitioner had offered a reasonable explanation of doing so since these were to be transported from Helsinki to Moscow along with other shipments. Lastly, it was submitted that the respondents cannot shift the onus of establishing that all the goods had reached Moscow and upon the alleged failure to discharge the same, can not invoke the stringent preventive detention law.

6.Comprehensive affidavits have been filed by the petitioner as well as respondents duly supported with various documents. These inter alia relate to shipment of goods, transportation, their ultimate destination, declarations in the shipping bills and the bill of lading etc. Petitioner does not dispute that the various consignments have been shipped to Finland (Helsinki) but that it was on account of Moscow being a land-locked city and Helsinki in Finland being a convenient port. Further, the plea that the goods reached Moscow finally, is sought to be disputed by the respondents. It is neither necessary nor possible to go into these disputed questions of fact in this writ petition.

7.Let us briefly notice the case of the respondents as is sought to be made out on the basis of the submissions and written additional submissions as filed.
Referring to the preamble of the COFEPOSA Act being one to provide for preventive detention in certain cases for the purposes of conservation and

augmentation of foreign exchange and prevention of smuggling activities and for matter connected therewith, respondents submitted that the exports were purportedly made to Russia under the Rupee Payment Scheme and the payments were realized by the petitioner from RBI through banking channels in Indian Rupee. Investigations made in the case showed that the goods in question did not reach Russia. Payment in Indian currency was permissible only if the goods were exported to Russia. Consequently, payment for these goods should have been received in foreign exchange and not in Indian Rupee. This, it was urged, consequently affected the augmentation of India's foreign exchange. We may notice at this stage that the impugned order is not based on the ground of prejudicially affecting the augmentation of foreign exchange and to this extent, respondents would thus, have to make good the detention independently of this plea.

The exports to Russia under the State Credit Scheme provid for repayment of debt by the Indian Government through export of goods to be specified by Russia. The export of goods is confined to Russia only under the terms of the scheme. Regarding the working of scheme, it is stated that the Russian Government being interested in foreign exchange, had auctioned the Indian Rupee Debt to private operators, who paid the foreign exchange mainly in Dollars and these operators then looked for their Indian counterparts, who were to export the goods to Russia. The Russian operators opened the LCs in the designated bank in favour of the Indian exporters. Respondents contend that the benefits under the Scheme are available only if the goods reached Russia and not to any third country. In case violation of the provisions of the Scheme, the Indian exporter becomes ineligible not only for availment of any benefits under the said scheme but the export benefits availed on such exports would also become inadmissible/recoverable. In this background, it is contended that the mis-declaration of the port of discharge/destination and non-arrival of goods in Russian Federation is a critical and material violation amounting to smuggling, which renders the goods liable to confiscation under Section 113(i) of the Customs Act. Respondents claim that statements of various employees of the petitioner have revealed that petitioner had been sending money to Russia through Hawala and all the affairs at the Russian end were being managed and manipulated by petitioner's brother. The money so sent was laundered and received back through LCs masquerading as export proceedings of the goods claimed to have been exported to Russia to claim duty drawback DEPB while had the exports been made to any third country, the same would have earned the benefit of draw back, no doubt, but additionally, India would have also got foreign exchange. It is respondent's claim that by mis-

declaring the country of destination as Russia, the buyers in Russia, who were managed/manipulated by the brother of the petitioner, also got the LCs at discounted prices in auctions by the Russian Government for importing goods from India under Repayment of State Credit Scheme. Respondents contend that there is sufficient evidence on record to demonstrate that the goods did not reach Russian Federation. It is contended that the drawback DEPB became unavailable firstly because of non-arrival of goods in Russia, a crucial and critical condition for eligibility for export benefit under the scheme and secondly, the proceeds received clearly became unrelatable to the exported goods and were not in the currency in which they should have been received. Respondents claim that in some shipping bills, Moscow was shown as port of discharge as well as port of destination. However, the consignments covered against these shipping bills were discharged at Kotka/Helsinki in Finland and not in Russia. Respondents have produced charts showing details of 166 shipping bills showing the duty draw back being availed of to the tune of Rs.4,36,65,220/-. It is also claimed that consignees in some cases were either non-existent or had no import-export operations. Further, as per the bill of lading, carrier's responsibility ceased at Kotka and Helsinki and transportation to Moscow was on consignee's risk, cost and responsibility. It is not necessary to go further in detail of the various shipping bills and the facts and circumstances mentioned except to notice that the respondents claim that as per the Show Cause Notice issued to the petitioner, number of shipping bills involving duty draw back are to the tune of Rs.20,67,07,565/- . The sample cases where the shipping bill showed port of discharge as Moscow with the corresponding bill of lading/airway bill as Kotka/Helsinki are reproduced below:

Sl.
No.
shipping bill No.
shipping bill date
bill of lading No.
bill of lading date
Port of discharge declared in shipping bill
Port of discharge declared in bill of lading
Drawback availed
DEPB availed
1
1298787
05.04.03

NWD0020766
22.04.03
Moscow
Bremerhaven

242832.9
2
1298793
05.04.03
NWD0020659
17.04.03
Moscow
Bremerhaven

240087.7
3
1299340
08.04.03
NWD0020768
22.04.03
Moscow
Bremerhaven
157500

4
1299339
05.04.03
NWD0020767
22.04.03
Moscow
Bremerhaven

584965.6
5
6321251
24.01.02
555-2074-2256
11.03.02 (29.01.02)
Moscow
Helsinki

258471

6
6321252
24.01.02

Moscow

3590.35
7
1291252
03.03.02
NWD0019910
25.03.03
Moscow
Bremerhaven
70000

8.Let us in the above context examine the petitioner's contention that there is no violation of Section 113 of the Customs Act and the respondents' action would not fall within the ambit of definition of smuggling as given in Section 2(39) of the Customs Act. Under Section 113(i) of the Customs Act, any dutiable or prohibited good or goods entered for exportation under claim for drawback which do not correspond in any material particular with the entry made under the Act or the provisions of this Act or in case of baggage with the declaration made under Section 77, shall be liable for confiscation. "Entry" in relation to goods is defined under sub-clause (16) of Section 2 of Customs Act as entry made in the bill of entry, shipping bill or bill of export and includes in the case of goods imported or to be exported by post the entry referred to in section 82 or entry made under regulations made under section 84. The exporter is required by virtue of Section 50(2) of Customs Act, while presenting a shipping bill or a bill of export to subscribe to a declaration as to the truth of its content. It is the respondents' case that the petitioner made the wrong declaration in the shipping bills and the bill of lading, which amounted to mis-declaration in respect of "material particular" and has accordingly rendered the goods liable for confiscation under Section 113(i) of the Customs Act. Respondents contend that the

petitioner submitted shipping bills with the entry "port of discharge" as Moscow while the corresponding bill of lading and airway bills proved that the actual port of discharge was Kotka/Helsinki in Finland and Bremerhaven in Germany.

9.Respondents also contend that the petitioner submitted shipping bills with false entries regarding export to consignees, who did not exist or had made no import export business. The details and statements of various concerned persons were reproduced in the show cause notice in para 5.1 at page 113 of the paper book. Respondents further contend that the goods exported by the petitioner were highly over-invoiced. In the aforesaid facts, it is urged that the goods exported by the petitioner are rendered liable for confiscation under Section 113(i) of Customs Act, 1962 and the activities of the petitioner amounted to smuggling and attracted provisions of Section 2(39) of the Customs Act, 1962. It is contended that the actions also violate various guidelines issued by RBI and petitioner had also violated provisions of Customs Act, Exim Policy, Foreign Trade Development and Regulation Act, 1992, Foreign Trade (Regulations) Rules, 1993 etc.

10.Let us consider the petitioner's explanation regarding shipment of some air consignments to Moscow and airlifting them to Helsinki from Moscow as having been necessitated to ship the said consignments together with other major consignments from Helsinki. The respondents have cited these as clearly demonstrative of the ultimate destination of the goods being Helsinki and not Moscow. Petitioner's explanation that these consignments were to be joined with other and hence, were first shipped to Moscow and then from there to Helsinki, does not inspire confidence as the number of consignments itself was about 79 packages or so and hence, it cannot be said to be a case of an odd-lot consignment. Mr. Malhotra submitted that there were ports such as Leningrad available within the Russian Federation and the petitioner's plea of shipments being made to Helsinki on account of Moscow being landlocked was a ruse.

11.Mr. P.P. Malhotra, learned Additional Solicitor General, on behalf of the respondents, urged that in the instant case, the wrong declaration with regard to the port of destination was a material mis-declaration. The exports were under the Repayment of State Credit Scheme and under the provisions of para 4 of the said scheme the goods could be exported only to Russia. Para 6 of the scheme is reproduced for facility of reference:

"Funds from repayment of state credits are to be utilized for export of goods to Russian Federation only. No third country exports are permitted to be financed out of funds from such repayments of state credits."

12.The benefit under the scheme is available only if the goods are exported to Russia and not to any third country. Mr. Malhotra contended that if there was any violation of the provisions of the said scheme, the Indian exporter becomes ineligible not only for availment of any benefits under the said scheme but the export benefits availed of on such exports also become inadmissible/revocable. Therefore, mis-declaration of the port of discharge (destination) and non-arrival of goods in Russian Federation was a major, indeed critical, violation amounting to smuggling rendering goods liable to confiscation under Section 113(i) of the Customs Act.

13.Having heard learned counsel for the parties and having noted the respective contentions as above and having gone through the pleadings on record as also the record produced, we find merit in the contention of the respondents that the mis-declaration or wrong declaration of the port of discharge in the shipping bill and the bill of lading in the present case, considering the exports being under the Repayment of State Credit Scheme and its provision would fall within the category of mis-declaration with regard to a material particular within the meaning of Section 113(i) of Customs Act and would be actionable.

14.We are, thus, of the view that the present case cannot be said to be one falling within the five situations outlined in the case of "Additional Secretary, Government of India Vs. Alka Subhash Gadia" reported at 1992 Suppl.(1) SCC 496 where challenge at the pre-execution stage is permissible. The five situations are being reproduced herein for the facility of reference:

(i)That the impugned order is not passed under the Act under which it is purported to have been passed;

(ii)That it is sought to be executed against a wrong person;

(iii)That it is passed for a wrong purpose;

(iv)That it is passed on vague, extraneous and irrelevant grounds;

(v)That the authority which passed it had no authority to do so."

15.We are prima facie of the view that in the aforesaid facts and circumstances, the subjective satisfaction reached by the detaining authority was based on sufficient and cogent material and the same cannot be said to be based on extraneous or irrelevant considerations. The nature and gravity

of the charges, the role of the petitioner as well as his past conduct and statement of various employees of the petitioner were all considered. The case does not appear to be falling in the categories where pre-execution challenge to the Detention Order ought to be permissible. The Supreme Court after a comprehensive review of the case law and noticing the principles laid down in Alka Subhash Gadia's case (supra), also referred to "Sayed Taher Bawamiya Vs. Joint Secretary to the Government of India & Ors." Reported at 2000 (8) SCC 630 wherein it was held that the Court in Alka Gadia's case (supra) was also concerned with the matter where the detention order had not been served but the High Court had entertained the petition under Article 226 of the Constitution of India. The Court held that equitable jurisdiction under Article 226 and Article 32, which is discretionary in nature, would not be exercised in a case where the proposed detenu successfully evades the service of the order. If in every case the detenu is permitted to challenge and seek the stay of the operation of the order before its execution, the very purpose of the order and the law under which it is made, will be frustrated since the orders are in operation for a limited period. The Court, however, noted that the courts have necessary power in appropriate cases to interfere with the detention order at the pre-execution stage but the scope of interference is very limited. It was held that the courts would interfere at the pre-execution stage with detention orders only after they were satisfied of the existence of the five situations enumerated earlier. In the instant case, it is the petitioner's own contention that he has not allowed the detention order to be served on him. There have been adjudication proceedings where a fine has been imposed. Petitioner has also been declared a Proclaimed Offender and as noted earlier, it cannot be said that the respondents do not have a prima facie case or that the grounds set up by them are wholly irrelevant or extraneous.

16.Coming to the question of delay, some delay is inherent in the very nature of enforcement of a law relating to preventive detention like the COFEPOSA Act between the prejudicial activities complained of and making of an order of detention. When a person is detected in the act of smuggling, thorough investigation into all the facets is required to be undertaken with a view to determine the identity of all the persons engaged in these operations, which have a deleterious affect on the national economy. The clandestine manner in which such operations are carried out makes investigation and collection of evidence, time consuming. To quote from the decision in "Rajendra Kumar Natvarlal Shah Vs. State of Gujarat" reported at (1988) 3 SCC 153, the Supreme Court held as follows:

"Quite obviously, in cases of mere delay in making of an order of detention under a law like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering who, owing to their large resources and influence have been posing a serious threat to the economy and thereby to the security of the nation, the courts should not merely on account of delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such view would not be warranted unless the court finds that the grounds are 'stale' or illusory or that there is no real nexus between the grounds and the impugned order of detention."

17.Further, in these circumstances, the detention order cannot be said to be vitiated by any extraordinary delay. Further, reliance placed on the judgment in "Rajinder Arora Vs. Union of India" reported at 2006(4) SCC 796 would not advance the petitioner's case as in the said case, the appellant had been arrested and remained in judicial remand for 60 days, yet no prosecution was launched against him. The detention order was passed after 10 months without any explanation for delay. In the present case, it is the petitioner, who has, to put in his own words, "not allowed the order to be served". The delay entailed in passing of the order considering the nature of investigation and quantum of evidence required to be collected from different locations cannot be said to be such so as to vitiate the detention order. This, in any case, is not a fit case to be entertained in the exercise of equitable and discretionary jurisdiction under Article 226 for interference at the pre execution stage.

18.In view of the foregoing discussion, the writ petition has no merit and is dismissed.

Sd/-
Manmohan Sarin, J.

Sd/-
Manju Goel, J.