

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **W.P. (CRL.) 940/2013**
+ **Date of Decision: 30th October, 2013**

ANIL KUMAR AGGARWAL **Petitioner**
! Through: Mr. Vikram Chaudhri, Mr.
Pradeep Jain, Mr. Hari Har Guin
& Mr. Abhas Mishra, Advocates

versus

\$ **UOI & ANR.** **Respondents**
Through: Mr. Ruchir Mishra, Mr. Mukesh
Kumar Tiwari & Mr. Ramneek
Mishra, Advocates

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**
HON'BLE MR. JUSTICE V.P. VAISH

JUDGMENT

P.K. BHASIN, J:

The petitioner, by means of this writ petition, challenges the detention order dated 23.09.2009 issued by Ms. Rasheda Hussain, Joint Secretary to the Government of India in exercise of the powers under Section 3(1) of the Conservation of Foreign Exchange and Prevention of

Smuggling Activities Act,1974(hereinafter referred to as 'COFEPOSA Act') pursuant to which his brother Sh. Raj Kumar Aggarwal has been detained and kept in custody I Central Jail, Tihar, New Delhi. The petitioner's brother Sh. Raj Kumar Aggarwal(hereinafter referred to as 'the detenu') has been in preventive detention since 08.05.2013.

2. Prior to the filing of the present *habeas corpus* petition the detenu himself had also filed a writ petition(being Crl.W.P.No1787/2009) challenging the detention order dated 23.09.2009 at pre-execution stage but the same was dismissed by a Division Bench of this Court vide judgment dated 18.03.2010. That judgment was then challenged by the detenu before the Hon'ble Supreme Court by filing a Special Leave Petition(being SLP(Crl.) No. 2698/2010) but there also he could not succeed in getting the detention order quashed at pre-execution stage. He was, however, permitted by the Hon'ble Supreme Court to challenge the detention order on all the grounds after the execution of the detention order and so that Special Leave Petition came to withdrawn by the detenu on 13.07.2010. During the pendency of that SLP the detenu had also filed a writ petition(being W.P.(CRL.) NO. 65/2010)

under Article 32 of the Constitution of India in the Supreme Court challenging the constitutional validity of some part of Section 3(1) of the COFEPOSA Act but finally that petition was also rejected on 02.07.2012.

3. The detenue, whose arrest had been stayed by the Division Bench of this Court during the pendency of his pre-execution stage writ and which stay was continued by the Supreme Court in the SLP as well as in the writ petition under Art. 32, was then arrested on 08.05.2013 after the rejection of his writ petition on 02.07.2012. Then the present *habeas corpus* writ petition was filed by the brother of the detenue for his release. During the pendency of this writ petition the Advisory Board had confirmed the detention order and then challenge to that decision was also added in the writ petition by way of amendment.

4. The facts leading to the issuance of the impugned detention order as noticed by the Division Bench of this Court in the pre-detention writ petition of the detenue are as under:-

"One Ambika Electronics, engaged in the business of mobile phones, belongs to Anil Kumar Aggarwal, who is detenu's brother. On 17.02.2009, premises of the said firm at 136, M.C.D. Market, Karol Bagh, New Delhi and other premises, viz., residence of Anil Kumar Aggarwal, that of detenu at Pitam Pura,' New Delhi, shop premises of M/s. Bhagwati Electronics situated at 135, Municipal Market, Karol Bagh, New Delhi belonging to Kapil Jindal were raided by the office of the Directorate of Enforcement, New Delhi. Indian currency amounting to Rs.8,00,000/- approximately was recovered and some documents were also seized by the Enforcement Authorities, who took into custody the detenu's passport as well. The detenu was also taken away by the official to their office at Jamnagar House, Akbar Road, New Delhi in the intervening night between 17.02.2009 and 18.02.2009 where he was interrogated. His statements were obtained, though it is claimed that it was done by exercising threat, pressure and coercion and that on the very next day, i.e., 19.02.2009, the detenu made retraction of the said statement. Thereafter, he was summoned on various occasions. However, because of his illness, he was unable to travel much. The detenu ultimately appeared on 15.05.2009 when his signatures were purportedly taken on certain blank papers. On 18.05.2009, he moved an application for release of the Indian currency seized on 17.02.2009. By this application, he categorically averred that the amount in question was duly accounted for in the books of accounts and he is not involved in any contravention or violation under the FEMA. On 25.05.2009, he also moved the application for release of passport seized by the officials of the Directorate of Enforcement. Reply dated 08.09.2009 was received by him stating that the matter regarding seized currency/documents would be decided after completion of investigation against the detenu.

3. It so happened that on 17.02.2009, residential premises of Sh. Anil Kumar Aggarwal at Pitam Pura, New Delhi were also searched and Indian currency amounting to Rs.8,00,000/- along with certain documents were taken into possession by the Enforcement Directorate. He was also issued summons

under Section 37 of FEMA pursuant to which he attended the office on 20.04.2009. On 18.05.2009, Anil Kumar Aggarwal moved the application for release of his Indian currency with the averments that the said amount is duly accounted for in his books of accounts and there is no violation or, contravention under FEMA. He was also given reply dated 08.09.2009 that the matter regarding seized currency would be decided after completion of investigation into the matter. The petitioner maintains that the detenu has nothing to do with the affairs of Anil Kumar Aggarwal. In the premises of M/s. Bhagwati Electronics, searched by the Directorate, Indian Currency, this letter was recovered. Kapil Jindal was also taken to the office around 1.00 a.m. in the intervening night of 17.02.2009 and 18.02.2009 and his statement was recorded. However, he also retracted his statement on 19.02.2009 alleging that it was involuntarily statement and was obtained under threat and coercion. He also asked for return of his currency and was given the same reply, viz., the matter regarding seized currency would be decided after the completion of investigation.

4. Upon coming to know of the proposal to detain the detenu, a number of representations were made categorically highlighting that he is not engaged in any transaction which may attract contravention under the provisions of FEMA and the Indian currency/amount seized is duly accounted for in the books of accounts. The detenu also categorically averred that he is merely engaged in the business of sale and purchase of mobile phones in India and is not engaged in import of any products. The competent authority still went ahead and passed the impugned detention order on 23.09.2009.....

5. The detention order dated 23rd September, 2009 reads as under:-

“No.673/02/2009-Cus. VIII
Government of India

Ministry of Finance
Department of Revenue
Central Economic Intelligence Bureau
COFEPOSA Unit

Dated 23rd September, 2009

Whereas, I, Smt. Rasheda Hussain, Joint Secretary to the Government of India, specially empowered under Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (as amended), am satisfied with respect to the person known as Shri Raj Kumar Aggarwal @ Munna, R/o SU-184, G.F. Near Park Citi Hotel Pitampura, New Delhi that with a view to preventing him from acting in any manner prejudicial to the conservation and augmentation of foreign exchange in future, it is necessary to make the following order:-

Now, therefore, in exercise of the powers conferred by Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (as amended), I direct that the said Shri Raj Kumar Aggarwal @ Munna, be detained and kept in custody in the Central Jail, Tihar, New Delhi.

Sd/-

(Rasheda Hussain)

Joint Secretary to the Government of India"

6. The detention order was sought to be quashed by the petitioner on many grounds but in our view this writ petition deserves to be allowed on one ground alone and that ground is the delay in its execution. Mr. Vikram Chaudhary, learned counsel for the petitioner had submitted that though all the litigation at the pre-execution stage was over with the dismissal of the writ petition filed by the detinue in the Supreme Court

challenging the vires of some part of Section 3 of COFEPOSA Act on 02.07.2012 and there was no stay of arrest of the detainee in operation thereafter but the detainee was arrested only on 08.05.2013 and there is no explanation for that huge delay. Consequently, the detention order becomes liable to be quashed on this ground alone. In support of this submission reliance was placed on a recent decision of the Hon'ble Supreme Court in "Saeed Zakir Hussain Malik vs State of Maharashtra & Ors.", (2012) 8 Supreme Court Cases 233 .

7. Regarding the delay in the execution of the detention order the petitioner had pleaded in para no. 5(K) of the writ petition as under:

"5(K) Because it is an admitted fact on record that the Detenue has been attending to his routine business activities but none had ever come to serve the order of detention even after the rejection of the Writ Petition at pre-detention stage, wherein, stay was operating till 2.7.2012. During the course of his business activities, the Detenue even had a quarrel with one Sachin Mittal a neighbour which led the Detenue to file a complaint before the Station House Officer, Police Station Karol Bagh, New Delhi on 26.3.2013. It is a matter of record that with the intervention of the police, the matter was patched up between the Detenue and his neighbour and a compromise was duly drawn and endorsed by the police authorities. Furthermore, no action whatsoever has been initiated by the respondents either under Section 7(1)(b) or 7(1)(a) of COFEPOSA as per the knowledge of the Detenue. In these circumstances, the delay in execution of the impugned order of detention is fatal and further

continued detention is wholly non-est, reducing the necessity to detain to be a mere pretence and sham exercise.”

8. The reply of the detaining authority to this ground of challenge in the detailed counter-affidavit dated 11th July, 2013 was as under:

“5(K) In reply to ground K, it is submitted that the Detenue concealed himself after rejection of his writ petition (WP(Crl.) No. 65/2010) by the Hon’ble Supreme Court on 2.7.2012. Detenue did not show streak of being law abiding citizen by way of surrendering in wake of pending detention order against him, especially in wake of the orders passed in the WP (Crl.) 65/2010 and the SLP (Crl.) No.2698/2010. No comments can be offered as to the narrated quarrel of Detenue with one Sachin Mittal, his filing of complaint before the SHO, PS Karol Bagh, and the compromise thereof endorsed by the Police authorities are nothing to do with the execution of detention order. As brought out, periodic discreet enquiries were conducted by the officials of department to trace the Detenue on 10.07.2012, 22.07.2012, 09.08.2012, 16.08.2012, 24.08.2012, 28.09.2012, 18.10.2012, 27.10.2012, periodically thereafter, 06.02.2013, 20.03.2013 & 15.04.2012. Enquiry reports dated 22.07.2012, 17.08.2012, 30.10.2012, 23.01.2013, 06.02.2013, 20.03.2013 & 15.04.2013 in this regard are on records of department. Besides, Police Report of P.S. Maurya Enclave, dated 15.03.2013, also clearly brings out that all along the Detenue was concealing himself to avoid execution of Detention Order until he was apprehended on 08.05.2013. Therefore, the Detenue was avoiding service of Detention Order until he was apprehended. Due publication had also been taken out in this matter in December 2009 directing him to appeal before the Commissioner of Police.

Therefore, it was clear that the delay in execution of detention order is attributable to the Detenue himself and he cannot be allowed to take advantage of his own wrong.”

9. The detaining authority had also pleaded in the counter-affidavit as under:

“3(ii).....After dismissal of the W.P. (Crl.) 65/2010, as above, the detenue did not choose to surrender and rather absconded, until he was apprehended on 08.05.2013. In view of the aforesaid submission, the ground raised under this para is devoid of any merit as live and proximate link was very much existing on the date of passing of detention order.

4.27. In reply to this Para 4.27 it is submitted that it is falsely put forth on behalf of Detenue that after rejection of his W.P. (Crl.) 65/2010 by the Hon’ble Supreme Court and stay having ceased to operate after 02.07.2012, Detenue was attending to his routine business activities but none had ever come to serve detention order. The correct fact is that the Detenue concealed himself to avoid execution of Detention Order upon him.....”

10. From the aforesaid paras extracted from the counter affidavit of the detaining authority it is clear that no serious steps were taken by them to ensure the arrest of the detenue. Merely claiming that periodic discreet enquiries were made by the officials to trace out the detenue is the *ipse dixit* of the respondents and is no explanation worth the name for the delay in the execution of the detention order. Even though many dates were given in the counter affidavit when enquiries were allegedly made to trace out the detenue but alongwith the counter-affidavit dated 11.07.2013 the respondents had placed on record copy of only one report dated 15.03.2013 of the

police official from Maurya Enclave police station to the effect that the detainee was not available at his two given addresses when he had gone there that day to execute the detention order. It is also significant to note that prior to the filing of counter-affidavit dated 11.07.2013 another affidavit of another Joint Secretary to the Government of India was also filed but in that affidavit it was not claimed that discreet enquiries were made about the whereabouts of the detainee and in fact it was pleaded at that time that the detainee should have himself surrendered after the dismissal of his writ petition by the Supreme Court. In the subsequent affidavit filed on behalf of the respondents it was claimed that discreet enquiries were made on many dates. If that was also correct then these facts should have been pleaded in the first affidavit. There is in any case no reason or justification forthcoming as to why proceedings under Section 7(1)(a) and (b) of the COFEPOSA Act for getting the detainee declared an absconder and getting his properties attached, as provided under Sections 82 and 83 of the Code of Criminal Procedure, 1973 and also why proceedings for the prosecution of the detainee under Section 7(1)(b) were not got initiated if actually the executing authority was finding it difficult to ensure that the detainee surfaces. Learned counsel

for the respondents drew our attention to the observations made by the Supreme Court while dismissing the detainee's writ petition filed for getting a declaration that some part of Section 3 of the COFEPOSA Act was ultra vires the Constitution to the effect that at the pre-execution stage the detainee was evading his arrest. However, we are not aware as to what material had been placed before the Supreme Court to show that the detainee during that period was evading his arrest. There was in any case stay against his arrest in operation during the pendency of the writ petition in this Court and then when the matter was pending in the Supreme Court. As noticed already, after pre-execution stage there was no hindrance against his arrest, the long delay in arresting the detainee has remained totally unexplained. In one of the judgments referred to by the Supreme Court in Saeed Zakir's case(supra) even 40 days unexplained delay in the execution of the detention order was considered sufficient to quash the detention order. Here the detention order was executed after almost a year of the idmissal

11. Now, we would like to refer to some of the paras from the decision of the Supreme Court in Saeed Zakir's case(supra) cited

by the learned counsel for the petitioner in which the detention order was quashed because the authorities had failed to justify the delay of fourteen and a half months delay in the execution of the detention order. This is how the Supreme Court had dealt with the aspect of delay in execution of the detention order while quashing the detention order:

“Contentions of the appellant:

5.(a) Though the detention order was passed on 14.11.2006 and the detenu was available on the address known to the authorities, the authorities have chosen to execute the order only on 01.02.2008. Pursuant to the same, there was an inordinate and unreasonable delay of 14½ months in executing the detention order which vitiates the detention itself;

[illegible]

Contentions of the respondent-State:

6.(a) Since the detenu was absconding, in spite of repeated attempts by the Executing Authority for executing the detention order, all the efforts were in vain as the detenu had rendered himself non-traceable.

(b) The delay has been properly explained by filing an affidavit not only by the Detaining Authority but also by the Executing Authority.

(c) After realizing that the detenu has absconded an action was also taken under Section 7(1)(b) and additionally under Section 7(1)(a) of COFEPOSA that the detenu did not comply with the same. It is pointed out that once appropriate action has been taken under Section 7(1)(a)(b) of COFEPOSA, the burden shifts on the detenu.

[illegible]

10. In P.M. Hari Kumar vs. Union of India and Others, (1995) 5 SCC 691, which is almost similar to the case on hand, the only reason for delay in execution of the detention order was that the

detenu was absconding and they could not serve the detention order on him because of his own fault. Rejecting the said contention, this Court held:

“13. If the respondents were really sincere and anxious to serve the order of detention without any delay it was expected of them, in the fitness of things, to approach the High Court or, at least, the Court which initially granted the bail for its cancellation as, according to their own showing, the petitioner had violated the conditions imposed, and thereby enforce his appearance or production as the case might be. Surprisingly, however, no such steps were taken and instead thereof it is now claimed that a communication was sent to his residence which was returned undelivered. Apart from the fact that no such communication has been produced before us in support of such claim, it has not been stated that any follow-up action was taken till 3-8-1990, when Section 7 of the Act was invoked. Similarly inexplicable is the respondents' failure to insist upon the personal presence of the petitioner in the criminal case (CC No. 2 of 1993) filed at the instance of the Customs Authorities, more so when the carriage of its proceeding was with them and the order of detention was passed at their instance. On the contrary, he was allowed to remain absent, which necessarily raises the inference that the Customs Authorities did not oppose his prayer, much less bring to the notice of the Court about the order of detention passed against the detenu.”

After finding that the respondent-authorities did not make sincere and earnest efforts and take urgent and effective steps which were available to them to serve the order of detention on the petitioner therein, this Court quashed the order of detention holding that the unusual delay in serving the order of detention has not been properly and satisfactorily explained.

11. [*In Sultan Abdul Kader vs. Govt. of India \(1998\) 8 SCC 343*](#) the order of detention was passed on 14.03.1996 but the detenu was detained only on 07.08.1997. After finding that no serious efforts were made by the police authorities to apprehend the detenu and the Joint Secretary himself had not made any efforts to find out from the police authorities as to why they were not able to apprehend the detenu, quashed the order of detention.

12. *In A. Mohammed Farook v. Govt. of India (2000) 2 SCC 360*, the only contention before the Court was that of delay in executing

the order of detention. In that case, the detention order was passed on 25.02.1999 but the authorities have chosen to execute the detention order only on 06.04.1999 after an inordinate and unreasonable delay of nearly 40 days. In the absence of proper and acceptable reasons for the delay of 40 days in executing the detention order, this Court concluded that the subjective satisfaction of the Detaining Authority in issuing the detention order dated 25.02.1999 gets vitiated and on this ground quashed the same.

13. It is clear that in the light of sub-section (5) of Article 22, it is incumbent on the Detaining Authority as well as the Executing Authority to serve the detention order at the earliest point of time. If there is any delay, it is the duty of the said authorities to afford proper explanation.

14. Now, let us consider the delay in the case on hand in serving the order of detention. Though the detention order was passed on 14.11.2006, the same was served only on 01.02.2008. Ms. Asha Gopalan Nair, learned counsel appearing for the State contended that since the detenu himself was absconding, in spite of repeated attempts made by the Executing Authority, the same were not materialized. She also brought to our notice the affidavits filed by the concerned authorities explaining the efforts made in serving the order of detention. By giving details about their efforts, she pointed out that the detenu absconded after release from the prison on 11.11.2005 and actions were also taken under Sections 7(1)(b) and 7 (1)(a) of COFEPOSA and that the detenu did not comply with the same. It is pointed out from the other side that during this period, the bail order dated 11.11.2005 was not cancelled nor an attempt was made to forfeit the amount which was deposited by the detenu. When this Court posed a specific question to the learned counsel for the State about the delay, particularly, when the detenu was released on bail on 11.11.2005 and no proper steps have been taken for cancellation of the bail and forfeiture of the amount which was deposited by the detenu, it is not disputed that such recourse has not been taken. In such circumstances, the reasons stated in the affidavit filed by the Detaining and Executing Authorities that, on several occasions, their officers visited the residential address of the detenu and he could not be traced, are all unacceptable. We hold that the respondent-authorities did not make any sincere and

earnest efforts in taking urgent effective steps which were available to them, particularly, when the detenu was on bail by orders of the court. We are satisfied that the unusual delay in serving the order of detention has not been properly and satisfactorily explained. In view of the same, we hold that the authorities have not executed the detention order promptly as required under Article 22(5) of the Constitution.

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23. *It is clear that if there is unreasonable delay in execution of the detention order, the same vitiates the order of detention. In the case on hand, though the detenu was released on bail on 11.11.2005, the detention order was passed only on 14.11.2006, actually, if the detenu was absconding and was not available for the service of the detention order, the authorities could have taken steps for cancellation of the bail and for forfeiture of the amount deposited. Admittedly, no such recourse has been taken. If the respondents were really sincere and anxious to serve the order of detention without any delay, it was expected of them to approach the court concerned which granted bail for its cancellation, by pointing out that the detenu had violated the conditions imposed and thereby enforce his appearance or production as the case may be. Admittedly, no such steps were taken instead it was explained that several attempts were made to serve copy by visiting his house on many occasions.*

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25. *In this regard, we reiterate that the Detaining Authority must explain satisfactorily the inordinate delay in executing the detention order, otherwise the subjective satisfaction gets vitiated. In the case on hand, in the absence of any satisfactory explanation explaining the delay of 14½ months, we are of the opinion that the detention order must stand vitiated by reason of non-execution thereof within a reasonable time.*

26. *We are also satisfied that no serious efforts were made by the Police Authorities to apprehend the detenu. Hence the unreasonable delay in executing the order creates a serious doubt regarding the genuineness of the Detention Authority as regards the immediate necessity of detaining the detenu in order to prevent him*

from carrying on the prejudicial activity referred to in the grounds of detention. We hold that the order of detention passed by the Detaining Authority was not in lawful exercise of power vested in it."

12. The situation in the case in hand is worse inasmuch as in the said case before the Supreme Court the authorities had initiated proceedings under Section 7(1)(a) and (b) of the COFEPOSA Act against the person sought to be detained but still the Court came to the conclusion that no serious efforts had been made to execute the detention order while in the present case before us the respondents do not even claim to have taken any steps under Section 7 of the COFEPOSA Act to have the detainee declared an absconder which declaration in turn would have made the properties of the detainee liable to be attached. So, the impugned detention order gets vitiated because of the failure of the respondents to explain the delay in its execution after the rejection of the detainee's writ petition by the Supreme Court on 02.07.2012 and the vacation of the order of stay of his arrest.

13. In view of our decision that the impugned detention order gets vitiated because of the abnormal and unexplained delay in

its execution we need not examine other grounds of challenge raised by the petitioner.

14. In the result, this writ petition is allowed and consequently the detention order dated 23rd September, 2009 passed by Ms. Rasheda Hussain, Joint Secretary to the Government of India is quashed. The detenue Raj Kumar Aggarwal @ Munna is directed to be released from jail unless he is required to be detained there in connection with some other case.

P.K. BHASIN, J

V.P. VAISH, J

OCTOBER 30, 2013