

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL WRIT PETITION NO.961 OF 2015**

1. Abduppa Vengadan
Son of Muhammed Vengadan
Age - Adult, Occ. : Farmer,
Address - Vengadan House,
3, Muthiramanna,
Thazekode West Post Office,
District - Mallapuram,
Kerala. Pin-679 352.

2. Marackar Vengadan
Son of Abdhu Vengadan
Age - Adult, Occ. : Farmer,
Address - Vengadan House,
3, Muthiramanna,
Thazekode West Post Office,
District - Mallapuram,
Kerala. Pin-679 352.

...Petitioners.

versus

1. Union of India
[summons to be served upon
Ld. Public Prosecutor appointed
u/s. 24 of Code of Criminal
Procedure, 1973]

2. Joint Secretary,
Government of India,
Ministry of Finance,
Department of Revenue,
Room No.46, North Block,
New Delhi - 110 001.

3. The Superintendent,
Arthur Road Central Prison,
Mumbai - 400 011.

4. The State of Kerala, &
State of Maharashtra,

Through Deputy Superintendent of Police,
Perinthalmanna, Mallapuram District,
Kerala - 679 322.

..Respondents.

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Ms. Priyanka Ghosh i/b Anjali Awasthi for the Petitioners.
Ms. Rati Amrolia, APP for Respondent Nos.1 and 2.
Mr. J.P. Yagnik, APP for Respondent No.3.

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CORAM : B.R. GAVAI &
A.S. GADKARI, JJ.

9th April, 2015.

ORAL JUDGMENT (PER A.S. GADKARI, J.) :

This Writ Petition under Article 226 of the Constitution of India is filed by the cousins of the detenu - Mohammed Ali Vengadan, seeking issuance of Writ of Habeas Corpus for quashing of the order of detention dated 27th February, 1989 passed by the Respondent No.2 in exercise of powers conferred by Section 3(1) of the Conservation Of Foreign Exchange and Prevention Of Smuggling Activities Act, 1974 (for short 'the COFEPOSA Act') with a view to prevent him from smuggling goods. By the said order dated 27th February, 1989 it was directed to detain the detenu in the custody of the Central Prison at Mumbai.

2. In pursuance of the said order dated 27th February, 1989 passed by the Respondent No.2 under Section 3(1) of the COFEPOSA Act, the police authorities of the Respondent No.4, State of Kerala, executed the said order on 25th February, 2015 through Perinthalmanna Police

Station, District Malappuram, State of Kerala and the detenu is subsequently sent to and is lodged in the Arthur Road Central Prison at Mumbai on 2nd March, 2015. The circumstances under which the impugned detention order dated 27th February, 1989 was issued and the material on the basis of which the detaining authority drew its subjective satisfaction are set out in detail in the grounds of detention annexed with the detention order. We are of the opinion that the entire facts of the present case are not required to be reproduced and /or narrated herein as we are inclined to dispose of the present Petition on a short ground, viz. whether there was an unreasonable and inordinate delay in executing the order of detention from the date of passing of the detention order till its execution thereby creating a considerable doubt on the genuineness of the subjective satisfaction of the detaining authority as regards the necessity to detain the detenu particularly in view of the fact that the order of preventive detention has been executed after a lapse of about 26 years and the same has led to snapping of the live link between the smuggling activity, which the detaining authority wanted to prevent by the detention order dated 27th February, 1989. The facts of the present case disclose that the impugned order was passed on 27th February, 1989 and it was executed only on 25th February, 2015 i.e. almost after about a period of 26 years.

3. We have heard Ms. Priyanka Ghosh, learned counsel appearing for the Petitioners, Ms. Rati Amrolia, learned APP for the Respondent Nos.1 and 2 i.e. Union of India and Joint Secretary, Government of India and Mr. Yagnik, learned APP for Respondent No.3 at length and have also perused the record produced by the learned counsel appearing for the respective parties.

4. The learned counsel appearing for the Petitioners has confined her challenge to ground Nos.(iii) and (iv) of paragraph 5 of the Petition, which deals with the delay in execution of the detention order, without prejudice to various other grounds which she has raised while assailing the order of detention.

5. In response to the Petition, Dr. Kiran Kumar Karlapu, Assistant Commissioner of Customs, COFEPOSA Cell (AIU), CSI Airport, Mumbai has filed a counter affidavit dated 26th March, 2015 on behalf of the Respondent Nos.1 and 2 and opposed the Petition.

6. The learned counsel appearing for the Petitioners while assailing the order of detention submitted that no subjective satisfaction is recorded by the detaining authority for execution of the detention order after an inordinate delay of about 26 years and hence, execution of the detention order by the detaining authority is without application

of mind, arbitrary and not maintainable in law. She submitted that in fact at present no fruitful purpose would be served, as there exists no such likelihood of this detenu in involving any activities of smuggling. In view of ground No.(iv) raised in the Petition, she further submitted that the object of initiation of preventive action under the provisions of the COFEPOSA Act is of immediate nature and that is when the detaining authority is satisfied that no other option is available to prevent a person from indulging in smuggling activities, then such draconian steps are taken by issuing detention order against such person. She further contended that in the present case the said object is missing and merely in a technical manner the detention order is executed after an inordinate delay of about 26 years. She, therefore, urged before us that as the live link between the issuance of the detention order and its execution is snapped, the detention order may be quashed and set aside.

7. The learned counsel appearing for the Petitioners in support of her contention relied on the decision of the Supreme Court in the case of P.U. Iqbal v. Union of India and others reported in (1992) 1 SCC 434 and in particular paragraph Nos.7, 9, 11 and 18 which read as under :

“7. Needless to emphasize that an order of detention is not a curative or reformatory or punitive action but a preventive

action, the avowed object of which being to prevent the anti-social and subversive elements from imperiling the welfare of the country or the security of the nation or from disturbing the public tranquility or from indulging in smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances etc. As it is borne out from the preamble of the COFEPOSA Act under the provisions of which the present detention order has been passed, the detention order under this Act is made with an object of preventing "the violations of foreign exchange regulations and smuggling activities which are having an increasingly deleterious effect on the national economy" and thereby posing "a serious effect on the security of the country".

"9. In view of the above object of the preventive detention, it becomes very imperative on the part of the detaining authority as well as the executing authorities to be very vigilant and keep their eyes skinned but not to turn a blind eye in securing the detenu and executing the detention order because any indifferent attitude on the part of the detaining authority or executing authority will defeat the very purpose of the preventive action and turn the detention order as a dead letter and frustrate the entire proceedings. "

"11. The adverse effect of delay in arresting a detenu has been examined by this Court in a series of decisions and this Court has laid down the rule in clear terms that an unreasonable and unexplained delay in securing a detenu and detaining him vitiates the detention order. "

“18. It is manifestly clear from a conspectus of the above decisions of this Court, that the law promulgated on this aspect is that if there is unreasonable delay between the date of the order of detention and the date of arrest of the detenu, such delay unless satisfactorily explained throws a considerable doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing the detention order and consequently renders the detention order bad and invalid because the 'live and proximate link' between the grounds of the detention and the purpose of detention is snapped in arresting the detenu. A question whether the delay is unreasonable and stands unexplained depends on the facts and circumstances of each case.”

8. As stated herein above, Dr. Kiran Kumar Karlapu, Assistant Commissioner of Customs, COFEPOSA Cell (AIU), CSI Airport, Mumbai has filed an affidavit in reply dated 26th March, 2015 for and on behalf of the Respondent Nos.1 and 2. In response to ground No.(ii), (iii) and (iv) of the Petition, the said authority has stated that though the detention order was issued on 27th February, 1989, the detenu - Mohammed Ali Vengadan intentionally and deliberately evaded his detention and concealed himself so that the order could not be executed. He has further stated in the affidavit that subsequently the detenu was declared as absconder by the Government of India vide its order dated 3rd June, 1992 bearing F.No.673/78/89-CUS-VIII. It is

further stated that the detenu is now taking escape in the plea that there is not a single complaint received by any authority since 27th February, 1989 till date about the detenu's involvement in any smuggling activity does not hold any water as the detenu has conveniently camouflaged himself from the clutches of law. It is further stated in paragraph 6 of the said affidavit that the action under the COFEPOSA Act is a preventive detention and it has no bearing on any other law or Act time being in force in India. He has further stated that to prevent a person from carrying out further smuggling activities, action under COFEPOSA is necessary.

9. It is to be noted here that though the said authority has stated that the detenu was declared as an absconder by the Government of India by its order dated 3rd June, 1992 bearing F.No.673/78/89-CUS-VIII, the affidavit is conspicuously silent about the steps taken either by the sponsoring / detaining authority or the executing authority in tracing out the detenu and effecting his arrest in the long span of more than 25 years. As a matter of fact, in paragraph 7 of the said affidavit the said authority has admitted that, 'it is a fact that there is inordinate delay in execution of the Detention Order' but owing to it, the detention order cannot be said to be inoperative and invalid because the detenu intentionally evaded his detention and concealed himself so that the order could not be executed. We appreciate the

impartial and rational stand taken by the affiant in the said affidavit dated 26th March, 2015, thereby admitting the fact that there is an inordinate delay in execution of the detention order dated 27th February, 1989. In our considered opinion, this itself is sufficient to vitiate the execution of the detention order after lapse of about more than 25 years.

10. Reverting back to the case in hand, as we have stated herein above, there is an inordinate delay of about 26 years at the hands of the detaining authority in executing the detention order dated 27th February, 1989 in securing the detenu and serving the order from the date of passing of the detention order by the detaining authority, which delay is not only unreasonable, but is inordinate and stands unexplained by all the authorities concerned. In our considered opinion, the clearly apathetic attitude and the oblivious conduct of the police authorities of the Respondent No.4 in not acting promptly in securing the detenu has rendered the order of detention invalid. The explanation offered by the Respondent Nos.1 and 2 by its affidavit dated 26th March, 2015 that the detenu intentionally and deliberately evaded his detention and concealed himself so that the order of detention could not be executed is not at all credible to be accepted. Further we are of the considered opinion that no Court will implicitly

accept this kind of incredible explanation.

11. It is by now the settled position of law, as has been enunciated by the Supreme Court in the case of **Shafiq Ahmad v. District Magistrate, Meerut** reported in **(1989) 4 SCC 556** that, while dealing with a situation in a case where there was a delay of two and half months in detaining the detenu therein, pursuant to the order of detention, the Supreme Court has held that “there was undue delay, delay not commensurate with the facts situation in that case and the conduct of the respondent authorities betrayed that there was no real and genuine apprehension that the detenu was likely to act in any manner prejudicial to public order. The order, therefore is bad and must go”.

12. In the present case, the circumstances indicate that the detaining authority, after passing the detention order dated 27th February, 1989 was indifferent in securing the detenu by not taking proper action with great caution. It further appears that the police authorities of the Respondent No.4 were also not prompt in their action in executing the said detention order and the execution of the said detention order was unduly delayed, which allowed the detenu to remain at large for a long period and has consequently defeated the very purpose of the impugned order. The Respondent Nos.1 and 2

have failed to satisfactorily explain the delay occurred in executing the order of detention after a lapse of about 26 years. As has been held by the Supreme Court in the case of **P.U. Iqbal** (supra), the delay throws a considerable doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing the detention order and consequently renders the detention order bad and invalid because of the 'live and proximate link' between the grounds of detention and the purpose of detention is snapped in arresting the detenu. The Petition, therefore, deserves to be allowed thereby setting at liberty the detenu forthwith.

13. For the aforesaid reasons, we pass the following order :

- i) The Petition is allowed. Rule is made absolute in terms of prayer clause (a);
- ii) The detenu - Mohammed Ali Vengadan alias Vappu is directed to be set at liberty forthwith, if not required in any other case.

(A.S. Gadkari, J.)

(B.R. Gavai, J.)