

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1929 OF 2015

Ansar Ebrahim Sayed	}	
Indian Inhabitant, Age 48 years,	}	
residing at 52, Zohra Manzil,	}	
2 nd Floor, room No.B-10,	}	
Navpada, Bandra (East)	}	
Mumbai-400 051	}	.. Petitioner

vs.

1. The State of Maharashtra	}	
Through the Additional Chief	}	
Secretary to the Government of	}	
Maharashtra, Home Department,	}	
Mantralaya, Mumbai-400 032.	}	

2. Mr.V.S.Singh	}	
The Principal Secretary to the	}	
Government of Maharashtra,	}	
Mantralaya,World Trade Centre,	}	
Cuffe Parade, Mumbai-400 005.	}	

3. The Commissioner of Customs,	}	
Air Intelligence Unit, Chhatrapati	}	
Shivaji International Airport	}	
Sahar, Andheri (E) Mumbai-400 099	}	

4. The Superintendent of Prison	}	
Nasik Road Central Prison, Nasik	}	
Maharashtra	}	.. Respondents

...

Mrs.A.M.Z.Ansari with Mrs Nasreen Ayubi
for Petitioner

Mr.Jayesh B.Yagnik APP for State

...
**CORAM: S.C.DHARMADHIKARI AND
G.S.KULKARNI, J**
DATE: 9TH JULY 2015

JUDGMENT (Per G.S.Kulkarni, J)

1. This writ petition under Article 226 of the Constitution of India challenges the order dated 15th December 2014 passed by the second respondent in exercise of the powers under sub-section (1) of section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA Act"). By the impugned order the 2nd respondent has directed that one Shri Mohammed Aboobaker shall be preventively detained with a view to prevent him in future from smuggling of goods as well as engaging in transporting and concealing and keeping smuggled goods and direct his detention in Nasik Road Central Prison subject to the conditions as laid down in COFEPOSA Act. The petitioner claims to be a friend of the detenu and as such interested in the life and personal liberty of the detenu.

2. Learned counsel for the petitioner states that the petitioner has raised several grounds in assailing the impugned order, however, the principal ground being urged is ground (1) in paragraph 4 of the petition. This ground is as regards the unexplained delay in the issuance of the detention order. It is urged that the impugned order has been issued after a lapse of 7 months from the date when the detenu was arrested and thus the same stands vitiated on the ground of unexplained and inordinate delay.

3. Learned counsel for the petitioner has drawn our attention to the grounds of detention to point out that the detenu was intercepted on 11th April 2014 by the Officers of the Customs at CSI Airport, Mumbai when the detenu had arrived from Dubai. The detenu was holding a Indian Passport issued at Dubai which was valid up to 9th March 2024. The detenu had cleared himself through the green channel and was intercepted by Customs Sepoy at the exit gate. The detenu was dressed in a uniform and was carrying a black colored back sack. On being asked whether the detenu was carrying

any gold in the back sack or on his person the detenu replied positively. On a detailed examination of the black colored back sack and a personal search in presence of two independent panchas, 13 Gold bars weighing 1 kg each and 2 Gold bars weighing 10 tolas each totally weighing 13232 grams was recovered from the detenu. The statement of the detenu was recorded on 11th May 2014 under section 108 of the Customs Act, 1962 and he was arrested on the same day. He was released on bail on 1st July 2014. His statement given to the customs authorities was retracted on 12th May 2014 and a rebuttal was recorded on 5th June 2014 was filed by the Department.

4. Learned counsel for the petitioner has drawn our attention to the affidavit in reply filed on behalf of the sponsoring authority of Dr.Kiran Kumar Karlapu Assistant Commissioner of Customs, C.S.I. Airport, Mumbai. Our attention is drawn to the averments as contained in paragraph 4 and 5 and more particularly regarding the denial on the part of the sponsoring authority on the

issue of delay in dealing with the case of the detenu. In paragraph 4 of the reply the sponsoring authority has stated that the case against the detenu was booked on 11th May 2014. Statement of the accused was recorded on 11th May 2014 and the detenu was arrested on the same date. The detenu was produced before the Additional Chief Metropolitan Magistrate, 8th Court, Mumbai on 12th May 2014 when the detenu retracted his statement before the Court. The Additional Chief Metropolitan Magistrate remanded the detenu to judicial custody up to 23rd May 2014. A Bail Application came to be moved by the detenu on 16th May 2014 and to which a reply came to be filed on 21st May 2014. The judicial custody of the detenu was extended up to 3rd June 2014 and again was extended up to 17th June 2014 and thereafter further extension was granted up to 27th June 2014 and again extended till 1st July 2014. Bail was granted to the detenu on 1st July 2014. It is further stated that on completion of the preliminary investigation, the file was forwarded to the COFEPOSA cell on 2nd June 2014 by making a proposal. The proposal was prepared on 3rd June 2014 and placed before the Chief

Commissioner of Customs on 4th June 2014 for which approval was received on 11th June 2014. The proposal along with all relevant documents as relied upon was forwarded to the Chairman of the COFEPOSA Screening Committee for consideration on 17th June 2014 on which day a meeting of the Committee was fixed. Minutes of the COFEPOSA screening committee were issued on 18th June 2014 wherein the screening committee approved the proposal as received by the COFEPOSA section on 20th June 2014. After getting approval of the screening committee 4 sets of the proposal, brief facts and index of relied upon documents were prepared and the same were submitted on 26th June 2014, to the Principal Secretary (Appeals and Security) Home Department of the Government of Maharashtra. In paragraph 5 it is stated that thereafter further generated documents were sent to the Office of the Detaining authority namely the Principal Secretary (Appeals and Security) Home Department on 4th August 2014 and 18th August 2014.

5. Learned counsel for the petitioner submits that the

dates as appearing in paragraph 4 and 5 of the affidavit-in-reply filed on behalf of the Sponsoring authority shows that there is no explanation for the delay between the period 26th June 2014 to 4th August 2014. Our attention is thereafter drawn to the explanation for the further delay as sought to be furnished in the affidavit-in-reply filed on behalf of the Detaining authority. This affidavit is of Shri Sanjay Dagadu Khedekar Deputy Secretary, (Home Department.) To counter the case of the petitioner on the issue of delay in passing the impugned detention order, our attention is drawn on the following statements as made in paragraph 5 appearing at page 81 to 84 of the Paper book which reads thus :

“It is pertinent to note that the Screening Committee in its meeting dated 17.06.2014 has approved 3 more proposals along with this proposal. All four proposals were received one and at the same time in the office of the Detaining Authority. Hence, it was necessary to scrutinize simultaneously all the proposals. The same was done till 23.07.2014. After scrutiny of the proposal the Scrutiny Note was submitted by concerned Assistant on 24.07.2014. The Section Officer and the then Joint Secretary endorsed it on 24.07.2014. The Detaining Authority directed to get additional information on certain points on 2.07.2014. The additional information were called by letter dated 23.07.2014. In the meanwhile, the Sponsoring Authority forwarded further generated documents from page no.85-86 on 12.08.2014. The Sponsoring Authority again

forwarded further generated documents from Page no,.87-97 and additional information by letter dated 18.8.2014 which was received in the office of the Detaining Authority on 20.8.2014. This information along with the further generated documents were scrutinized till 01.09.2014 and accordingly the concerned Assistant submitted the scrutiny note on 02.09.2014. The Section Officer endorsed it on 02.09.2014 and the then Deputy Secretary endorsed it on 03.09.2014. The Detaining Authority approved the scrutiny note on 06.09.2014. As per the approval of the Detaining Authority the additional information was called by letter dated 09.09.2014. On not receiving the information, reminder letters were issued on 20.09.2014 and 17.10.2014. The Sponsoring Authority by letter dated 07.10.2014 has forwarded incorrect information. Hence, third reminder letter seeking comments on letter dated 09.09.2014 was issued on 20.10.2014. In reply to this letter, the Sponsoring Authority forwarded information by letter dated 05.11.2014. This letter was received in the office of the Detaining Authority on 17.11.2014. The concerned Assistant submitted the information on 17.11.2014. The Section Officer endorsed it on 17.11.2014 and the then Deputy Secretary endorsed it on 18.11.2014. After considering the proposal and the further generated documents and after being subjectively satisfied that there are sufficient reasons to issue the Detention order against the detenu, the Detaining Authority dictated the Detention order and the grounds of detention. After finalization, the Detaining Authority issued the Detention order along with grounds of detention and the Relied Upon Documents on 15.12.2014 which is after a span of almost 5 ½ months from the date of receipt of proposal. Thus the contention of the petitioner that the Detention order was issued after an inordinate and inexcusable delay of 7 months is not true.”

On the above averments, learned counsel for the

petitioner contends that the manner in which the detaining authority has dealt with the proposal clearly show the lax attitude in complying with the principles of detention law and which speak volumes against any subjective satisfaction being reached warranting detention of the detenu. Learned counsel for the petitioner submits that the detaining authority called for additional information from the sponsoring authority by a letter dated 9th September 2014 and as the information was not received, reminder letters were issued on 20th September 2014 and 17th October 2014 and that the sponsoring authority by its letter dated 7th October 2014 had forwarded incorrect information and thus a third reminder seeking comments on letter dated 9th September 2014 was issued on 20th October 2014 to which the sponsoring authority forwarded its reply dated 5th November 2014 which was received by the detaining authority on 17th November 2014. Learned counsel for the petitioner submits that these dates clearly show that the detaining authority was not subjectively satisfied with the proposal earlier submitted on 26th June 2014 and thus chose to enter into further

correspondence with the sponsoring authority. It is submitted that for the extended time spent in corresponding there is no explanation whatsoever in the affidavit filed on behalf of the sponsoring authority as to what is the material which would change the opinion of the detaining authority and as such would justify the delay. It is submitted that the version of the detaining authority also cannot be believed as the sponsoring authority has categorically stated in its reply affidavit that all the information was despatched on 4th August 2014 and 18th August 2014. It is therefore, urged that the version of both these authorities are completely different and that this entirely supports the case of the petitioner that delay in issuing the detention order is not only unexplained but, grossly inordinate warranting interference of this Court to quash and set aside the same.

6. In support of her submissions, learned counsel for the petitioner has relied on the following decisions:

(i) “Pradip Nilkanth Paturkar vs S.Ramamurthi **AIR 1994 SUPREME COURT 656;**

- (ii) Isaac Babu vs Union of India (1990) **4 Supreme Court Cases 135;**
- (iii) Saeed Zakir Hussain Malik vs State of Maharashtra (2012) **8 Supreme Court Cases 233;**
- (iv) Jehova Vision Uche Umecurike vs J.P.Dange **Criminal Writ Petition No.1008 of 1992;**
- (v) Keshav Jaru Salian vs Union of India **1991 (54) E.L.T. (55) Bombay,**
- (vi) Niyaz Ahmed Ansari vs State of Maharashtra **Writ Petition No.231 of 2015.”**

7. On the other hand, learned APP supported the impugned order of detention. The learned APP submits that the contention on behalf of the petitioner that there is an unexplained delay is not correct. Learned APP in supporting the case of the detaining authority that there is no delay in passing the detention order has drawn our attention to the grounds as contained in paragraph 14 appearing at page 43A of the Paper Book which reads thus :

“14. Whatever time was required for scanning the proposal containing about 96 pages, and formulating the grounds for issuing the detention order was for the purpose of better

verification of the material placed before me and applying my mind and arriving at subjective satisfaction. Therefore, I am satisfied that the nexus between the date of incident and passing of the detention order as well as the object of your detention has been maintained.”

8. Learned APP has drawn our attention to the contents of paragraph 4 and 5 of the reply-affidavit filed on behalf of the detaining authority to contend that utmost care has been taken by the detaining authority and which clearly shows that there was no undue delay in passing an order of detention and that the live link or nexus between the prejudicial activity had not been snapped. Learned APP has also drawn our attention to certain observations as made in the detention order to contend that even prior to this order of detention in the year 2013, a show cause notice dated 29th April 2013 was issued to the detenu concerning his involvement in smuggling of 25 kgs of red sandals. Learned APP therefore, would urge that the writ petition be dismissed.

9. In support of his submissions learned APP has relied on the decisions of the Supreme Court in case of **Rajesh Natwarlal**

Shah vs State of Gujarat 1988 (3) SCC 153 and Licil Antony vs State of Kerala 2014 (11)SCC 326.

10. We have heard learned counsel for the parties and with their assistance we have gone through the detention order, grounds of detention and the pleadings as filed on behalf of the parties.

11. On examining the above facts, as referred by us, we may observe that the learned counsel for the petitioner is justified in her submission that the impugned order of detention is vitiated by an unexplained and inordinate delay in making the detention order. The detenu was apprehended on 11th May 2014 on which day he came to be arrested and was sent to judicial custody by an order passed by the Additional Chief Metropolitan Magistrate, Mumbai and was granted bail by the said Court on 1th July 2014. A perusal of the affidavit-in-reply filed on behalf of the sponsoring authority shows that decision was taken by the COFEPOSA screening

committee in its meeting held on 17th June 2014 approving the detention proposal to be forwarded to the detaining authority which ultimately came to be forwarded by the COFEPOSA section of the sponsoring authority to the detaining authority on 26th June 2014 and that further generated documents were sent to the detaining authority from 14th August 2014 to 18th August 2014. There is no explanation in the reply affidavit filed on behalf of the sponsoring authority as regards the delay from 26th June 2014 to 4th August 2014 as also the affidavit is completely silent on the effect of these so called further generated documents being forwarded to the detaining authority. The detaining authority however, gives a completely different version to say that the assistant in the office of the detaining authority submitted a scrutiny note on 2nd September 2014 which was endorsed by the Section Officer on 2nd September 2014, then the Deputy Secretary endorsed the same on 3rd September 2014 and thereafter the detaining authority approved the scrutiny note on 6th September 2014 and after this approval the detaining authority called for additional information by a letter

dated 9th September 2014 and as the same was not received, reminder letters were issued on 20th September 2014 and 17th October 2014. The detaining authority has stated that the sponsoring authority further by its letter dated 7th October 2014 forwarded incorrect information and therefore, a third reminder was issued on 20th October 2014 to which the sponsoring authority forwarded information by a letter dated 5th November 2014 as received by the detaining authority on 17th November 2014. The Assistant in the Office of the detaining authority submitted information on 17th November 2014 to the Section Officer who then endorsed the same to the Deputy Secretary on 17th November 2014 who endorsed it on 18th November 2014 to the detaining authority. It is the case of the detaining authority that thereafter the detaining authority after being subjectively satisfied that there are sufficient reasons to issue the detention order dictated an order and finalized the same along with grounds of detention on 15th December 2014. This also took about one month apart from the earlier delay.

12. A careful analysis of the statements as made in the reply affidavit of the sponsoring authority as also the detaining authority show that this can hardly be an explanation much less reasonable and acceptable to justify the delay in passing the detention order. The manner in which the proposal was being handled in the Office of the detaining authority as also reasons as stated in the affidavit in reply do not inspire any confidence, so as not to accept the case of the petitioner that there is an unexplained delay in passing the detention order. On the face of the averments, as made in the affidavits would clearly indicate that the delay of about 7 months from the date of the arrest till the date of the passing of the detention order is not satisfactorily explained and the same is unsubstantiated. There was a delay on the part of the sponsoring authority in not forwarding a complete proposal which is between the period 26th June 2014 to 4th August 2014 when further documents were forwarded to the detaining authority. Thereafter, there is no explanation between the period 30th June 2014 the date on which the proposal is received by the sponsoring authority till

24th July 2014 on which date the Assistant in the Department of the detaining authority prepared the scrutiny note. Thus, the delay on the part of the authorities finds no explanation and much less an explanation that can be reasonably believed that the authorities were serious to expediently act on the proposal, in fact they were acting at their leisure in deciding on an issue as serious as to preventively detain a citizen affecting his fundamental rights guaranteed by Article 21 of the Constitution of India. The manner in which the proposal was handled in the Office of the detaining authority namely the Assistant preparing the scrutiny note, the Section Officer endorsing it to the Deputy Secretary and the Joint Secretary endorsing the same to the detaining authority and further the detaining authority again approaching the sponsoring authority in the month of September 2014 and waiting till the reply of the sponsoring authority up to 5th November 2014 clearly indicates the casualness and show the absence of any live link or nexus between the prejudicial activity and the need for detention. These facts demonstrate that the live link between the prejudicial activity sought

to be overcome and the purpose of detention is snapped. The COFEPOSA being held to be a valid piece of legislation by the highest Court does not mean that the caution administered while upholding it has to be ignored. There is a vast difference between the legality and validity of such enactments and that being upheld and its implementation being subjected to constitutional safeguards guaranteed vide Article 22 of the Constitution of India. None can tinker with those safeguards or interfere with the same by making detention orders casually, lightly and mechanically. Eventually, the power to make such orders is coupled with a duty. That is to subserve larger public interest. All concerned should note that their lackadaisical attitude harms public good and is counter productive if such orders of detention are set aside.

13. We are of the clear opinion that the explanation which has been rendered by the respondents is not a satisfactory explanation. The authorities cannot play with the liberty of a citizen in such a casual manner. The authorities also have no 'carte blanche'

to be not diligent and casual in dealing with issues concerning of curtailment of liberty of a person and pass a belated order preventively detaining a person. Learned counsel for the petitioner is justified in placing reliance on the decisions as we have referred above. We do not wish to burden our judgment by going into details of each of these decisions, suffice it to say that these decisions lay down as a principle of law that unexplained and inordinate delay in passing of a detention order would vitiate the detention order the reason being an order of detention is required to be proximate to the time so that there is a live link between the prejudicial activities and the detention.

14. It is a settled principle of law that if there is an undue and long delay between the prejudicial activities and the passing of a detention order then in that case, the Court would undertake a scrutiny as to whether the detaining authority has satisfactorily examined such a delay and afforded a reasonable and acceptable explanation for the cause of such a delay. Applying these principles

in the facts of the present case, it is quite clear that the live link between the prejudicial activities and the purpose of detention is snapped on account of the long delay in passing the detention order.

15. The reliance as placed by the learned APP on the decisions of the Supreme Court in the case of **Rajendrakumar Natvarlal Shah and Licil Antony vs State of Kerala** (supra) would not assist the respondents in the facts of the present case. In **RajendraKumar Natvarlal Shah** (supra) the direct and proximate cause for the order of detention was importation of bulk of Indian made foreign liquor by the appellant on the night between December 29th/30th, 1986 who was acting as a cross border broker. On 1st April 1986 the driver and cleaner of the truck made a statement implicating the appellant as the main person. The appellant thereupon absconded and had moved for an anticipatory bail on 21st April 1987 but, no orders were passed as the police made a statement that there was no proposal at that stage to arrest him. The appellant was prosecuted for the offences under Bombay

Prohibition Act. On 2nd February 1987 the appellant was arrested but later on released on bail. After a lapse of 5 months i.e. 28th May 1987 the District Magistrate, Godhra passed the impugned order of detention and the grounds were served on the appellant on 30th May 1987 when he was taken into custody. The immediate and proximate cause for detention was the transportation of foreign liquor on 29th/30th December 1986. In this case what weighed with the Supreme Court was that when the appellant moved an anticipatory bail application, there was no proposal to arrest the appellant. When the appellant was arrested on 2nd February 1987 and on the same day he made a statement admitting the facts. In the meanwhile, the proposal to detain the appellant was placed before the District Magistrate. The District Magistrate on a careful consideration of the material on record that he was satisfied that it was necessary to make an order of detention, under section 3 (2) of the COFEPOSA Act, passed the detention order on 28th May 1987. In the aforesaid set of facts, where the appellant had admitted the case against him the Supreme Court observed that there being no explanation for the

delay between 2nd February 1987 and 28th May 1987 could not give rise to the legitimate inference that the subjective satisfaction arrived at by the District Magistrate was not genuine or that the grounds were stale or illusory or that there was no rational connection between the grounds and the impugned order of detention. Moreover, in paragraph 12 of the decision the Supreme Court has clarified that there is no mechanical test “by counting the months of interval was sound” and that it all depends on the nature of the acts relied on, grave and determined or less serious and corrigible on the length of the gap, short or long, on the reason for the delay in taking preventive action, like information of participation being available only in the course of investigation. The Court has to investigate *“whether the causal connection has been broken in the circumstances of each case”*.

The facts in the present case as observed above are completely different. We have observed above that there is no satisfactory explanation set forth by the detaining authority or in that behalf by the sponsoring authority in delaying to take a decision

between the period 30th June 2014 to 15th December 2014.

16. The next decision as relied upon by the learned APP is the decision of the Supreme Court in case of **Licel Antony vs State of Kerala** (supra.) The facts of this case in no manner are comparable to the case in hand. In this decision, the Supreme Court has reiterated the position in law that if there is no explanation offered by the authorities concerned with detention as to why the order of detention has been issued after a long time, then in that case such unsatisfactory and unexplained delay would vitiate the detention order. The facts of the case with which the Supreme Court was dealing, were quite gross. The allegations related to export of red sanders through International Container Transshipment Terminal. The sponsoring authority took some time to determine whether the prejudicial activities of the detenu justified the detention. During the inquiry, it transpired that the detenu and two others were part of a well-organised gang operating in smuggling of red sanders in India and abroad. It is only thereafter that on 17th December 2012 the

sponsoring authority made recommendations for the detention of the detenu and two others under section 3 of the COFEPOSA Act. In the counter affidavit, it was stated by the respondents that the record of the sponsoring authority and the scrutiny committee and other material consisted of over 1000 pages. The proposal of the sponsoring authority was received in the Office of the detaining authority on 21st December 2012 as a huge proposal was required to be evaluated and scrutinized with great care, caution and circumspection, the detaining authority upon such scrutiny and evaluation decided on 25th January 2013 to place the proposals before the screening committee and forwarded the same to it on 1st February 2013. The Supreme Court observed that if one expects care and caution in scrutiny and evaluation on the proposals, time taken by the detaining authority to place the proposal before the screening committee it cannot be said in the facts of the case there is an inordinate delay. The meeting of the scrutiny committee had taken place on 1st February 2013 and final call was to be taken by the detaining authority, which was expected to scrutinise, evaluate

and analyze all the material in detail and after the said process, the detaining authority decided on 15th April 2013 to detain the detenu. In these facts, the time taken for coming to the decision was held to have been sufficiently explained. The Supreme Court however, in holding so in para 18 of the said decision has observed as under :

18. *“ From what we have stated above, it cannot be said that there is undue delay in passing the order of detention and the live nexus between the prejudicial activity has snapped. As observed earlier, the question whether the prejudicial activity of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live link between the prejudicial activity and the purpose of detention is snapped depends on the facts and circumstances of each case. Even in a case of undue or long delay between the prejudicial activity and the passing of detention order, if the same is satisfactorily explained and a tenable and reasonable explanation is offered, the order of detention is not vitiated. We must bear in mind that distinction exists between the delay in making of an order of detention under a law relating to preventive detention like COFEPOSA and the delay in complying with procedural safeguards enshrined under Article 22 (5) of the Constitution. In view of the factual scenario as aforesaid, we are of the opinion that the order of detention is not fit to be quashed on the ground of delay in passing the same.”*

17. The facts in the present case are however quite distinct.

The detenu was granted bail on 1st July 2014. Though the proposal

for detention was initiated on 2 June 2014 and forwarded to the detaining authority on 26th June 2014 the order of detention was passed on 15th December 2014. As observed above, the respondents have failed to explain the delay satisfactorily. Apart from that what is more intriguing is that the delay occasioned in passing the detention order shows that the live nexus between the prejudicial activity has snapped, which would justify the exercise of powers by the authorities as envisaged under section 3 (1) of the COFEPOSA Act.

18. In view of the above discussion, we are of the clear opinion that the petition needs to succeed. We pass the following order :

ORDER

(i) Writ petition succeeds. The order of detention is quashed. The detenu shall be released forthwith, if not required in any other case. In the view that we have taken and finding substance in the ground raised by the detenu that the detention order is vitiated by unexplained and unreasonable delay, we deem it unnecessary to deal with the other grounds

on which the detention order has been challenged.

(ii) All concerned to act on the authenticated copy of the order.

G.S.KULKARNI, J

S.C.DHARMADHIKARI, J