

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.T. SANKARAN  
&  
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

TUESDAY, THE 20TH DAY OF OCTOBER 2015/28TH ASWINA, 1937

**WP(Crl.).No. 400 of 2015 (S)**

**PETITIONER:**

A.M. GIREESH, AGED 40 YEARS  
S/O. SH. GANGADHARAN NAIR  
RESIDENT OF PANCHINGAL HOUSE, (SIVAGANGA)  
NANMINDA P.O., NANMINDA VIA, KOZHIKODE DISTRICT  
KERALA.

BY ADVS. SRI.NIRMAL. S  
SMT.VEENA HARI

**RESPONDENTS:**

1. UNION OF INDIA THROUGH SECRETARY  
MINISTRY OF FINANCE, DEPARTMENT OF REVENUE  
NORTH BLOCK, NEW DELHI - 110 001.
2. JOINT SECRETARY (COFEPOSA),  
MINISTRY OF FINANCE, DEPARTMENT OF REVENUE, 6TH FLOOR  
JANPATH BHAVAN, JANPATH, NEW DELHI - 110 001.

R1-2 BY STANDING COUNSEL SRI.P.K.RAMKUMAR  
BY SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON 20-10-2015,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**APPENDIX**

**PETITIONER'S EXHIBITS**

- EXT.P1: TRUE COPY OF THE NEWSPAPER PUBLICATION DATED 13/07/2015 IN TIMES OF INDIA, GOA.
- EXT.P2: TRUE COPY OF THE GROUNDS OF DETENTION AND LIST RELIED UPON DOCUMENTS SERVED UPON THE ABOVE SAID IMTIAZ HUSSAIN DATED 31/03/2015.
- EXT.P3: TRUE COPIES OF THE CASH AWARDS, COMMENDATION CERTIFICATES RECEIVED BY THE PETITIONER.
- EXT.P4: TRUE COPY OF THE SUMMONS DATED 01/08/2014.
- EXT.P5: TRUE COPY OF THE SUMMONS DATED 01/09/2014.
- EXT.P6: TRUE COPY OF THE SUMMONS DATED 27/10/2014.
- EXT.P7: TRUE COPY OF THE RELIEVING ORDER DATED 10/12/2014.
- EXT.P8: TRUE COPY OF THE I CARD ISSUED BY SIB BHUBANESHWAR.
- EXT.P9: TRUE COPY OF THE REQUEST LETTER DATED 23/02/2015.
- EXT.P10: TRUE COPY OF THE REPLY DATED 18/02/2015 SENT BY THE PETITIONER.
- EXT.P11: TRUE COPY OF THE ORDER DATED 10/07/2015.
- EXT.P12: TRUE COPY OF THE LETTER DATED 13/07/2015 OF PETITIONER AND APPLICATION FORM.
- EXT.P13: TRUE COPY OF THE NOTIFICATION PUBLISHED IN OFFICIAL GAZETTE DATED 30/06/2015.
- EXT.P14: TRUE COPY OF THE INSTRUCTIONS ISSUED BY THE GOVERNMENT OF INDIA, MINISTRY OF FINANCE, DEPARTMENT OF REVENUE, CENTRAL ECONOMIC INTELLIGENCE BUREAU, OBTAINED UNDER THE RIGHT TO INFORMATION ACT FROM THE GOVERNMENT OF MAHARASHTRA DATED 04/08/2010.
- EXT.P15: TRUE COPY OF THE ORDER DATED 18/08/2015 IN W.P(CRL)NO.1707/2015 DATED 18.8.2015.
- EXT.P16: TRUE COPY OF THE JUDGMENT IN W.P(CR) NO.1386/2015 DATED 31/08/2015.
- EXT.P17: TRUE COPY OF THE MEDICAL CERTIFICATES ISSUED BY THE DOCTOR WHO TREATED HIM.
- EXT.P18: TRUE COPY OF THE STATEMENT OF THE PETITIONER RECORDED ON 4.8.2014.

**RESPONDENTS' EXHIBITS: NIL**

//TRUE COPY//

AHZ/

“C.R.”

**K.T.SANKARAN &  
RAJA VIJAYARAGHAVAN V., JJ.**

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**Dated this the 20<sup>th</sup> day of October, 2015**

**JUDGMENT**

**K.T.Sankaran, J.**

An order of detention under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (hereinafter referred to as the 'COFEPOSA Act') was issued against the petitioner. Before it could be executed, the petitioner filed W.P. (Crl) No.1707 of 2015 before the High Court of Delhi. When that Writ Petition came up for hearing on 18.8.2015, the petitioner sought permission to withdraw the Writ Petition with liberty to challenge the detention order at appropriate stage. Recording that statement, the Writ Petition was dismissed as withdrawn. For the sake of convenience, the order dated 18.8.2015 passed by the Delhi High Court is extracted below:

“Learned counsel for petitioner seeks permission to withdraw the present petition, with liberty to challenge/ impugn the detention order at an appropriate stage.

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In view of the statement made, the petition is dismissed as withdrawn.”

2. Thereafter, the present Writ Petition is filed before this Court stating that the petitioner has his permanent residence at Kozhikode within the territorial jurisdiction of this Court.

3. The petitioner was working as Assistant Central Immigration Officer Grade I at Dabolim Airport, Goa. On 7.7.2014, the officers of the Customs seized 19.491 kgs. of gold from the possession of three international passengers who arrived at Dabolim Airport, Goa from Doha. They were arrested. The allegation against the petitioner is that he knowingly abetted smuggling of 19.491 kgs. of gold into India on 7.7.2014 for his personal benefit and monetary gain. It was alleged that the petitioner has been associated with a well organized smuggling syndicate and he assisted smuggling of gold from abroad by providing information of flights and passengers. It was also alleged that the petitioner was involved in such activities even before. According to the respondents, it has come out that the petitioner was in constant touch with the mastermind of the

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smuggling activities and he was providing assistance for collecting gold from the passengers who carried the same.

4. After the incident on 7.7.2014, the petitioner was transferred to Bhubaneswar in Orissa on 28.11.2014. He joined duty at Bhubaneswar on 31.12.2014. It is stated in the Writ Petition that from 9.2.2015 to 21.2.2015 the petitioner was on earned leave which was extended for another one week from 21.2.2015. It is submitted by the learned counsel that the petitioner joined duty again on 2.3.2015 and remained at Bhubaneswar till 5.4.2015. He again took casual leave for five days from 6.4.2015 to 10.4.2015. Again he went on half pay leave on medical ground from 4.5.2015 to 29.5.2015. From 13.7.2015 the petitioner went on leave for fifteen days and a further request for extension of leave on medical ground was made by him.

5. The present Writ Petition was filed before this Court on 18.9.2015. It is averred in the Writ Petition that he contacted his friends in Goa, who informed him that there was a publication in the Times of India newspaper dated 13.7.2015 wherein his name also

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appeared “in respect of some detention order”. The petitioner also got a copy of the newspaper from his friend in Goa and he came to know that an order of detention was issued against him. The petitioner immediately went to Delhi along with his counsel in Kerala and obtained copy of the order of detention and the grounds of detention served on Imthiaz Hussain, who was one of the passengers and who was intercepted at Dabolim Airport on 7.7.2014. The petitioner stated that he went through the grounds of detention which contained the probable grounds of detention in so far as it relates to the petitioner as well.

6. The Writ Petition has been filed challenging the order of detention at its pre-execution stage, after having withdrawn the Writ Petition filed by him before the Delhi High Court for the same relief.

7. Sri.Nirmal S., the learned counsel appearing for the petitioner, submitted that there is lack of live nexus between the prejudicial activity and the order of detention. Since the petitioner was transferred from Goa to Bhubaneswar, there is no possibility of the petitioner indulging in any prejudicial activity. The change of

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circumstances have snapped the live-link between the alleged prejudicial activity and the order of detention. Another point raised by the petitioner is that by passage of time, the order of detention has become stale and irrelevant on two grounds, namely, (a) by the passage of time from the date of prejudicial activity to the date of the order of detention, and (b) passage of time from the order of detention till date.

8. Sri.P.K.Ramkumar, the learned counsel appearing for the respondents, submitted that the present Writ Petition is not maintainable since the Delhi High Court did not grant to the petitioner permission to file another Writ Petition. The learned counsel also submitted that what was sought to be reserved while withdrawing the Writ Petition before the Delhi High Court was to challenge the order of detention at appropriate stage and that appropriate stage would arrive only on the detention of the petitioner.

9. A counter affidavit has been filed by the respondents in which apart from stating the relevant facts in detail leading to the order of detention and the attempts made by the respondents to

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execute the order of detention, it is stated that the petitioner was absconding all through out to avoid execution of the order of detention.

10. Ext.P15, the order dated 18.8.2015 passed by the Delhi High Court in W.P.(Crl) No.1707 of 2015, shows that the Writ Petition was sought to be withdrawn by the petitioner reserving the liberty to challenge the order of detention “at an appropriate stage” (emphasis supplied). The stage at which the Writ Petition was filed before the Delhi High Court was the stage before the execution of the order of detention. At that stage, the Delhi High Court did not interfere with the order of detention and the petitioner did not pursue his remedies in the Writ Petition filed by him. He wanted to challenge the order of detention at the appropriate stage. The only appropriate stage thereafter would be the stage after the order of detention is executed. The order of detention has not so far been executed. Therefore, the stage which is reserved in the order of the Delhi High Court has not reached since the petitioner has not made himself available for executing the order of detention.

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11. We are not going into the question whether the Delhi High Court had granted the permission sought for. The order does not indicate that such a permission was granted. However, we assume that the permission sought for by the petitioner was granted by the Delhi High Court, though not specifically stated in the operative portion of the order. We are not disposing of the Writ Petition on the ground that the Delhi High Court did not grant permission to the petitioner to challenge the order of detention at the appropriate stage. We proceed on the basis that the Delhi High Court had granted permission to the petitioner to challenge the order of detention at the appropriate stage. But we decline to entertain the Writ Petition on the ground that the “appropriate stage” contemplated by the petitioner and as seemingly understood by the Delhi High Court has not reached till now.

12. It is relevant to note that on 19.8.2015, the arguments in W.P.(Crl) No.1386 of 2015 (filed by Harpal Singh, another person involved in the incident) were over and the Delhi High Court reserved the case for judgment on that day. The petitioner had sought permission to withdraw the Writ Petition filed by him before the Delhi

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High Court on 18.8.2015. It is not clear whether W.P.(Crl) No.1386 of 2015 also came up for hearing on 18.8.2015 before the Delhi High Court and therefore, it is also not very clear whether the petitioner sought permission to withdraw the Writ Petition filed by him before the Delhi High Court on realising that the Writ Petition filed by Harpal Singh would not be allowed by the Delhi High Court, as contended by the learned Standing Counsel appearing for the respondents.

13. The petitioner did not again approach the Delhi High Court. According to him, he does not possess money to prosecute a Writ Petition before the Delhi High Court. We are not inclined to accept this contention put forward by the petitioner. Having approached the Delhi High Court while working at Bhubaneswar and after having shifted from Bhubaneswar to Kerala, probably on getting information that he was about to be arrested, the petitioner cannot be permitted to have another round of litigation before the Kerala High Court only on the ground that he has set up his residence in Kerala. The order of detention was issued by the Joint Secretary, Government of India, Ministry of Finance, Department of Revenue, New Delhi and the petitioner rightly approached the Delhi High Court

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for appropriate reliefs. We are not inclined to accept the submission made by the petitioner that because of impecunious circumstances, he is disabled from approaching the Delhi High Court for appropriate reliefs. We are of the view, after perusing the Writ Petition, the counter affidavit and the relevant files in the case, that the petitioner is making an attempt somehow or other to get an order from one High Court or the other and it is to accomplish such result he has now approached the High Court of Kerala.

14. The question whether the live-link between the prejudicial activity and the order of detention has been snapped is a matter to be considered while considering the validity of the detention order after its execution. Likewise, the question whether because of passage of time between the prejudicial activity and the order of detention and the passage of time after the date of order of detention till today, is also a matter to be considered on facts after the order of detention is executed.

15. In **Subhash Popatlal Dave v. Union of India and another** [(2014) 1 SCC 280], the Supreme Court held as follows:

“38. It is the settled position of law declared by this Court in a number of cases that absence of live nexus between material forming the basis and the satisfaction (opinion) of the State that it is necessary to preventively detain a person is definitely fatal to the preventive detention order. All those cases where the Courts have quashed the orders of preventive detention on the theory of lack of 'live nexus' are cases where the detention orders were executed but not cases of non-execution of the detention orders for a long lapse of time after such orders came to be passed.

.....

43. If a preventive detention order is to be quashed or declared illegal merely on the ground that the order remained unexecuted for a long period without examining the reasons for such non-execution, I am afraid that the legislative intention contained in the provisions such as Section 7(1)(b) of the COFEPOSA Act would be rendered wholly nugatory. ....

.....

46. Therefore, I am of the opinion that those who have evaded the process of law shall not be heard by this Court to say that their fundamental rights are in jeopardy. At least, in all those cases, where proceedings such as the one contemplated under Section 7 of the

COFEPOSA Act were initiated consequent upon absconding of the proposed detenu, the challenge to the detention orders on the live nexus theory is impermissible. Permitting such an argument would amount to enabling the law-breaker to take advantage of his own conduct which is contrary to law.

47. Even in those cases where action such as the one contemplated under Section 7 of the COFEPOSA Act is not initiated, the same may not be the only consideration for holding the order of preventive detention illegal. This Court in *Shafiq Ahmad v. District Magistrate, Meerut* [(1989) 4 SCC 556], held so and the principle was followed subsequently in *M. Ahamedkutty v. Union of India and Anr.* [(1990) 2 SCC 1], wherein this Court opined that in such cases, the surrounding circumstances must be examined. In both *Shafiq Ahmad* and *Ahamedkutty's* cases, these questions were examined after the execution of the detention order. Permitting an absconder to raise such questions at the pre-execution stage, I am afraid would render the jurisdiction of this Court a heaven for characters of doubtful respect for law.”

16. In the light of the decision in *Subhash Popatlal Dave's* case referred to above, we are of the view that the contentions put

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forward by the learned counsel for the petitioner on the live-link theory cannot be gone into on facts in a Writ Petition filed challenging the order of detention at its pre-execution stage.

17. Learned counsel for the petitioner submitted that steps under Section 7 of the COFEPOSA Act were illegally taken and there was no ground at all for initiating such proceedings. It is submitted that on that ground also, the petitioner is entitled to challenge the order of detention at its pre-execution stage. Even if the steps taken under Section 7 of the COFEPOSA Act is not legal and proper, it is not a ground at all for challenging an order under Section 3(1) of the COFEPOSA Act at its pre-execution stage. Proceedings under Section 7 would be initiated if the person sought to be detained is absconding. That is to secure the presence of the person concerned. A step taken to secure the presence of the person against whom an order of detention is issued cannot be the basis for challenging the order of detention at its pre-execution stage. We reject the contention raised by the petitioner.

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For the aforesaid reasons, we are of the view that the Writ  
Petition is without merits and it is, accordingly, dismissed.

**K.T.SANKARAN**  
**Judge**

**RAJA VIJAYARAGHAVAN V.**  
**Judge**

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