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

+ **W. P.(Crl.) 304/2015**

% *Date of Decision : 10th March, 2015*

SHISHUPAL KUMAR

..... Petitioner

Through: Mr. Pradeep Jain, Advocate, Mr. Shubhankar Jha, Advocate, Mr. Ashish Batra, Advocate, Mr. Ashish Bansal, Advocate and Mr. Tarun Chawla, Advocate.

versus

UNION OF INDIA & ANR

..... Respondents

Through: Mr. Sanjeev Narula, CGSC with Mr. Siddharth Arora, Advocate and Mr. Ajay Kalra, Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J. (ORAL)

1. Rule DB. With the consent of the parties, the writ petition is taken up for final hearing and disposal.
2. Challenge in this writ petition is to the legality and validity of the detention order bearing No. F.No. 673/08/2014-CUS VIII dated 25.07.2014 passed under Section 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred as to COFEPOSA) against the detention of the petitioner for his alleged contravention of the provisions of Customer Act, 1962 vide order dated 25.07.2014 (hereinafter referred as to the impugned order).
3. The facts of the case as detailed in the writ petition are:
 7. That on the basis of a intelligence received by the officers of Directorate of Revenue Intelligence, Jaipur it has been alleged that one syndicate is involved in illegal storage and then export of red Sanders, which is a prohibited item under Appendix II of

the CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) and as per import-export policy, 2009-2014 export of the same in any form is prohibited, in the guise of genuine exports and that one Sh. Anil Gadodia (co-detenué) is the kingpin of the syndicate, who is procuring red-sanders in trucks from South India, storing in his various godowns at Wazirpur/ Kadipur/ Burari and further supplying to one Mr. Chan who is a person of Thai origin and acting on behest of one Mr. Lin of Chinese origin. The export of red sanders to Mr. Lin is being done through one M/s Euro Exports (IEC 1305004116) of Jaipur, a marble exporter, by concealing the same in export consignments of marble and the said firm is owned by one Mr. Rameshwar Sharma and 4 live containers are being exported from Mundra port and that a ship was expected to sail on 30th September, 2013.

8. On 28.9.2013 searches were conducted at various premises in Delhi, Mudra and Jaipur by the DRI which resulted in recovery of 14.25 MT Red Sanders at Mundra Port from the Containers of M/s Euro Export.
9. On 28.9.2013 from the godown of Anil Gadodia at Wazirpur New Delhi 95 big logs of red sanders and 251 pieces of small logs of red sanders were recovered vide panchnama dated 28.9.2013.
10. Further the recovery of 8.5 Tonnes of logs of red sanders from Godown of Mr. Daljeet, recovery of photocopy of export documents pertaining to export by M/s Euro Exports of past consignments in which concealed red sanders were recovered from Residence of detenué Mayur Ranjan alias Vijay, recovery of Rs.4.2. Lakh cash and laptop etc. from residence of Mr. Yodying, recovery of export documents, hard discs, laptop, seal of ICD CONCOR from the office of M/s Euro Exports etc. had taken place.
11. The four live containers at Mundra Port which were pending export by M/s Euro Exports, Jaipur were opened and it resulted in recovery of 14.25 MT of Red Sanders vide panchnama dated 28.9.2013.

12.It has been alleged that Red Sanders is listed under Appendix II of the CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) and as per import-export policy, 2009-2014 export of the same in any form is prohibited and thus Red sanders recovered from various premises of the syndicate at various premises in Delhi and Mundra is liable to confiscation.

13.In the follow up statements of various persons including detainee were recorded under section 108 of the Customs Act, 1962 interalia:

- a) Mr. Yodying a Thai citizen in his statements under Section 108 of the Customs Act, 1962 has admitted that he used to arrange the delivery of Red –Sanders after taking it from Anil Gadodia allegedly with the help of detainee Mayur Ranjan and further used to direct him to deliver to various exporters for onward export to China; that he used to buy the red sanders from detainee by payment in cash.
- b) Mr. Rameshwar Sharma in his statements under section 108 of the Customs act, 1962 before DRI, Jaipur stated that he was lured for monetary consideration by detainee Mayur and proposed that if could agree for letting his containers be used for stuffing with the Red Sanders, Vijay alias mayor through Chen alias Yodying and a balance amount of Rs.37 lakhs are yet to be given. He has accepted his involvement in the case and has admitted to have exported Red Sanders in his containers.
- c) Mr. Anil Gadodia in his statements dated 28.9.2013 & 29.9.2013 allegedly admitted that he had supplied Red Sanders procured illegally for export through the containers of Sh. Rameshwar Sharma. In relation to the supply of Red Sanders, he was actively in touch with detainee Mayur Ranjan alias Sh. Vijay, Sh. Lin and Sh. Yoding alias Sh. Chen.
- d) That statement of detainee was also recorded on 28.9.2013 and 29.9.2013 however, same was taken

under use of force and coercion and it has been got recorded from him that the detenue had knowledge that the red sander wood is a prohibited item for export and that he had knowingly committed the offence for monetary consideration which is completely wrong and incorrect.

14.It is pertinent to mention here that the statement which was recorded from the detenue on 28.9.2013 and 29.9.2013 being incorrect and involuntary statement were retracted by the detenue on 11.10.2013 and 23.10.2013. DRI also filed reply to both retractions of detenue.

15.That on the basis of above it has been alleged that Anil Gadodia has actively connived and has supplied the Red Sanders for the export in illegal manner in violation of the of the Trade Policy 2009-2014 and provision of Customs Act, 1962 and he was alleged to have committed an offence under Section 132, 135(a) , 135(b) and 135(c) of the Customs Act, 1962 and was placed under arrest on 29.09.2013 under Section 104 of the customs Act, 1962 by the DRI, Jaipur.

16.That based on the above the detenue along with other accused person was placed under arrest by the DRI, Delhi on 29.9.2013 thereby alleging that the detenue was actively involved in the illegal procurement and fraudulent export of red sanderwood.

17.That detenue filed its bail application before CMM, Delhi on 11.10.2013 which was dismissed by the Ld. CMM, Delhi on 19.10.2013.”

4. At the outset Mr. Pradeep Jain, learned counsel for the petitioner submits that Writ Petition (Crl.) No.1695/2014 was filed by the co-detenue and a Division Bench of this Court by an order dated 04.12.2014 has quashed the detention order on almost identical grounds. He further submits that the present case is fully covered in fact and law by the decision dated 04.12.2014 especially wherein it has been held that there is unexplained delay in passing the detention order. It is also pointed out that the

present petitioner was not a party to the said Writ Petition (Crl.)No.1695/2014 as the petitioner had not been served with the detention order. The petitioner herein surrendered on 22.01.2015 and thereafter instituted the present petition.

5. Mr. Jain further submits that he has raised various grounds in the writ petition including that the subjective satisfaction has been wrongly arrived at and delay in execution of the detention order, which he would not press in case the court is satisfied that there has been unexplained delay in passing the detention order but would keep all grounds open to be urged before the appropriate forum if advised and/or necessary.
6. Mr. Sanjeev Narula, Advocate appearing for the respondents, submits that the petitioner cannot derive any benefit of the judgment passed in Writ Petition (Crl.) No. 1695/2014 dated 04.12.2014 (hereinafter referred as to earlier judgment), as in the present case there was no delay in execution of the detention order on the petitioner. Moreover Ground No.D i.e. “*subjective satisfaction wrongly arrived at by detaining authority*”, as urged in the writ petition, would also not be available as in the detention order, due to a typographical error, Section 111 of the Customs Act has been typed instead of Section 113 of the Customs Act. He further contends that the department is contemplating filing a special leave petition against the earlier judgment dated 04.12.2014.
5. Mr. Jain, learned counsel for the petitioner submits that there has been a delay in passing the detention order and reliance has been placed on the list of events filed by the respondent along with the counter affidavit. It is contended that petitioner was arrested on 29.09.2013 and after approval by DG, DRI, the proposal for detention under COFEPOSA Act, 1974 was sent by DZU to Rajasthan Government on 02.01.2014. On 16.01.2014, the proposal was returned back by the State Government

with a remark to approach the Central Government. The proposal was sent to the Central Government on 22.01.2014 and approval was granted by the Central Screening Committee on 12.02.2014, thereafter, the detention order was passed on 25.07.2014. It is contended that this aspect was duly considered in the earlier judgment dated 04.12.2014 in Writ Petition (Crl.) No. 1695/2014 and this was one of the ground for quashing the detention order. Mr. Jain has placed reliance on paras 21 to 24 of the judgment passed in Writ Petition (Crl.) No. 1695/2014 titled **Manish Gadodia Vs. Union of India & Anr.**, which are reproduced herein below:

21. We find merit in the submission of learned counsel for the petitioner that there was unexplained delay in passing of the detention order. After the alleged seizure of red sanders from the possession and custody of the detinue on 28/29.09.2013 and conduct of investigation, the complaint was filed under Section 132 and 135 of the Customs Act on 28.11.2013. Thus, the investigation was complete by the said date.

22. Further, the show cause notice under the Customs Act was issued to the detinue on 24.03.2014, which clearly establishes that the material evidence required for passing of the detention order were available to the Detaining Authority and inspite of the same, he did not pass the detention order till 25.07.2014. In the present case, the detention order was passed after a delay of about 8 months, which has defeated the purpose of the detention as it was to prevent the detinue from acting in a prejudicial manner by indulging in the prohibited trade. Thus, the live link had already broken by the time the detention order was passed belatedly on 25.07.2014.

23. Another aspect that requires consideration is that after the detinue was granted bail on 25.02.2014. Although the Central Screening Committee had considered the proposal for preventive detention, and approved it on 12.02.2014, the Detaining Authority filed for cancellation of bail rather than passing the detention order to prevent the detinue from carrying out such prejudicial activities. Further, there are no valid reasons disclosed

by the respondents as to why the detention order was passed only on 25.07.2014, i.e. after about 5 months of grant of bail when the proposal was approved by the Central Screening Committee on 12.02.2014.

24. In this regard, reliance may be placed on Rajinder Arora (supra) and Adishwar Jain (supra), which followed the decision of the Supreme Court in T.D. Abdul Rahman v. State of Kerala, AIR 1990 SC 225, wherein the Supreme Court observed as follows:

“10. The conspectus of the above decisions can be summarised thus: The question whether the prejudicial activities 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 activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case.

11. Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner”. (Emphasis supplied)”

6. Mr. Jain, has also placed reliance on a judgment delivered by this Court in case of *Sumitra Dey Bhattacharya Vs Union of India, W.P. (Crl.) No. 2118/2014 dated 22.01.2015*, relevant portion of which reads as under:

“59. The petition must succeed even on the ground of not passing the detention order for a period of 8 months, after the proposal was accepted on 28.6.2013. The sole purpose of passing the detention order is that the live link between the occurrence and the order should not become stale. By the time the proposal is sent it is deemed that the investigation is complete, which is enough to detain a person, and any additional investigation which may have been carried out, cannot be a ground to explain the delay. The department itself in its Circular bearing F.No.671/6/2001-Cus.VIII, Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, has taken note of this. Accordingly, the petition is allowed.”

7. Mr. Narula, learned counsel appearing for the respondents has placed reliance on page 27, 28 and 29 of the Counter Affidavit, which reads as under:

“DELAY IN PASSING THE DETENTION ORDER

With reference to the time taken in passing the detention order, it is submitted that the time taken in passing the detention order is explainable. The time chart of various developments during processing of the details by the detaining authority is annexed as ANNEXURE-R3. Point wise contentions are dealt as under:

(i) to (v) With respect to the contentions raised in para (i)-(v), it is submitted that as already stated at Para 3(A) above, it is again submitted that the time taken in passing the detention order is explainable and in fact this had been explicitly discussed at para – 26 of the Grounds of Detention. In this matter it is imperative to mention that Hon’ble Supreme Court in case of *M. Ahamedkutty Vs. Union of India [1990 (2) SCC 1]* held that as long as time taken in passing the detention order invalid. Also in the case of

Licil Antony Vs. State of Kerala & Others, (2014), the Supreme Court in an identical case of smuggling of Red Sanders has held that:

“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.

Further, in the case of *M. Ahamedkutty Vs. Union of India, (1990) 2 SCC 1*, the Hon’ble Supreme Court also held that:

“10....Mere delay in making of an order of detention under a law like the COFEPOSA Act 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 the 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 a view would not be warranted unless the Court finds that the grounds are stale or illusory or that there was no real nexus between the grounds and the impugned order of detention. In that case, there was no explanation for the delay between February 2, and May 28, 1987, yet it could not give rise to 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 order of detention”

As regards, contention of petitioner that there is no prejudicial activities which have been alleged against the detainee during the intervening period from the date of incident till 25.07.2014 is not tenable in this case, as the grounds of detention clearly brings out the prejudicial activities indulged into by the detainee and his propensity to indulge in such prejudicial activities again in future.

(vi) With respect to the contention in this para, it is submitted that though the Hon'ble High Court, Delhi has set aside the detention orders against two detainees namely, Sh. Anil Gadodia and Sh. Rameshwar Sharma vide orders dated 04.12.2014, however, the same have not yet attained finality as the Government is processing the same for filing Special Leave Petitions before the Hon'ble Supreme Court. the findings of the Hon'ble High Court as quoted by the petitioner (as para 23 of High Court's Order) seems to be factually incorrect as the Detaining Authority neither had any role at all in applying for cancellation of bail nor had applied for cancellation of bail. Therefore, the instant case may be considered in isolation of the above referred cases and should be decided on its own facts and merit."

8. We have heard learned counsel for the parties and considered their rival contentions. Writ Petition (Crl.) No.1695/2014, titled as **Manish Gadodia Vs. Union of India & Anr.**, was filed by the co-detainee wherein the detention order stands quashed amongst others on the ground of delay in passing the detention order. We are unable to take a view different from the view taken by the learned Division Bench which was dealing with the same detention order with respect to the co-detainee. In fact the judgment delivered by this Court has also considered the identical question with regard to delay in passing the detention order and the court has also taken into consideration the judgment rendered in the case of ***M. Ahamedkutty Vs. Union of India, (1990) 2 SCC 1*** sought to be relied upon by the counsel for the respondents in the present case.
9. For the reasons stated above and for the reason that delay has not been

explained, the writ petition is allowed. The detention order dated 25.07.2014 passed by the detaining authority is quashed and set aside. Rule is made absolute.

10. All other grounds as raised in this writ petition and the response thereto by the respondents are kept open.

G. S. SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

MARCH 10, 2015
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