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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.1276 OF 2016**

Surendra Kumar Pandey	... Petitioner
Vs.	
State of Maharashtra and Ors.	... Respondents

Mr. Vikram Nankani, Senior Counsel a/w Mr. Sanjay Agarwal, Mr. H.K. Sudhakara and Ms. Neha Ahuja i/by Prompt Legal for the Petitioner.

Mr. S.K. Shinde, Public Prosecutor a/w Mrs. M.H. Mhatre, APP for the Respondent Nos.1 and 2.

Mrs. A.S. Pai, APP for the Respondent No.3, DRI.

**CORAM : A.S. OKA &
A.A. SAYED, JJ.**

DATE : 5th AUGUST, 2016

ORAL JUDGMENT (Per A.S. Oka, J.)

1 The submissions of the learned Senior Counsel appearing for the Petitioner were heard in the last week. We have also heard the submissions of the learned Public Prosecutor and the learned counsel appearing for the Sponsoring Authority. By this Petition under Article 226 of the Constitution of India, the Petitioner has challenged an order of preventive detention dated 4th July, 2014 passed by the Additional Chief Secretary (Appeals and Security), Home Department, the

Government of Maharashtra and the Detaining Authority. The order of detention has been passed in exercise of 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”). This Petition is filed for challenging the order at pre-execution stage. There are two grounds canvassed by the learned counsel appearing for the Petitioner for challenging the order of detention at pre-execution stage. First ground is the gross delay in passing the impugned order of detention. The second ground is non-placement and consequential consideration of vital documents by the Detaining Authority. The submission is that in view of majority view of the Apex Court in the case of *Subhash Popatlal Dave V. Union of India*¹, the grounds on which the order of preventive detention can be challenged at pre-execution stage are not confined to the 5 grounds set out in the earlier decision of the Apex Court in the case of *Additional Secretary to the Government of India Vs. Smt. Alka Subhash Gadia and another*².

2 Reliance is placed by the learned Senior Counsel appearing for the Petitioner on judgment and order dated 7th November, 2014 in Criminal Writ Petition No.3829 of 2014 (Rohit Ramesh Doshi Vs. State of Maharashtra & Ors.). He urged that in the said case of co-detenu, an

1 (2014) 1 SCC 280

2 1992 Suppl.(1) SCC 496

identical order of preventive detention has been set aside by this Court by the said judgment and order on the ground of non-placement of vital documents. He submitted that there is no difference between the case of the Petitioner and the case of the co-detenu on facts considering the grounds of detention.

3 The learned Public Prosecutor firstly relying upon the affidavits filed on record contended that there is a gross delay on the part of the Petitioner in filing the present Criminal Writ Petition. He submitted that the averments made in the Petition clearly show that for considerably long time, the Petitioner was fully aware of the impugned order of preventive detention dated 4th July, 2014, but he filed the present Petition belatedly in the last week of March, 2016. He pointed out from the affidavits on record that several attempts were made to serve the impugned order of preventive detention on the Petitioner and ultimately a report under clause (a) of Sub-Section (1) of Section 7 of the COFEPOSA Act was submitted by the State Government before the Chief Metropolitan Magistrate, Mumbai. Accordingly, a notification dated 5th August, 2014 was published in Government Gazette dated 14-20th August, 2014 in exercise of powers conferred by clause (b) of Sub-Section (1) of Section 7 of the COFEPOSA. He pointed out from the averments made in the Petition that way back on 1st December, 2014 the

Petitioner submitted a representation to the Detaining Authority through his Advocate requesting the Detaining Authority to revoke the order of detention. He submitted that thus there is a gross delay in approaching the Writ Court and on this ground itself, this Court should not entertain this Petition. Secondly, inviting our attention to the affidavits on record, he submitted that the argument of delay in passing order has no basis. While accepting that the scope of interference with the order of detention at pre-execution stage has been considerably widened by the majority view in the case of *Subhash Popatlal Dave*, he stated that majority view specifically lays down that the contention regarding adequacy of material cannot be urged in a Petition filed at pre-execution stage. His submission is that contention regarding non-placement of vital documents is essentially a contention regarding adequacy of material which is placed before the Detaining Authority on the basis of which the order of detention has been made.

4 We have given careful consideration to the submissions. Firstly, we must deal with the issue of delay in approaching the Writ Court on the part of the Petitioner. As stated earlier, this Petition challenges the order of preventive detention dated 4th July, 2014 passed by the Detaining Authority under Sub-Section (1) of Section 3 of COFEPOSA at pre-execution stage. We must note here that the present

Petition under Article 226 of the Constitution of India was affirmed on 22nd March, 2016 and was filed on the same day.

5 As disclosed in the Petition, on 1st December, 2014, the Petitioner through his Advocate made a representation to the Detaining Authority for revocation of the impugned order. As disclosed in the Petition, the said representation was followed by two more representations dated 13th May, 2015 and 7th August, 2015. Thus, without even looking at the affidavits-in-reply filed on record, at least on 1st December, 2014 the Petitioner had full knowledge of the impugned order. In the Writ Petition, though on the face of it suffers from gross delay, the Petitioner has avoided to disclose the date on which he acquired the knowledge about the impugned order. In any event, when first representation was made on 1st December, 2014, through an Advocate, the Petitioner was aware of the order. Thus, the Petition has been filed nearly after 16 months from the date of the first representation.

6 Now, at this stage, it will be necessary to make a reference to the affidavits filed on record. Shri P.H.Wagde, Joint Secretary, Home Department, Government of Maharashtra filed an affidavit-in-reply on behalf of the Detaining Authority. In paragraph 5, he has set out the

repeated efforts made to serve the impugned order of detention on the Petitioner right from 18th July, 2014.

7 At this stage, it will be necessary to make a reference to Section 7 of the COFEPOSA. Section 7 of the COFEPOSA reads thus :-

“7. Powers in relation to absconding persons. - (1) If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government may -

(a) make a report in writing of the fact to a Metropolitan Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 83, 83, 84 and 85 of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate :

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which

rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

- (2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence under clause (b) of sub-section (1) shall be cognisable.”

8 As noted earlier, the said notification dated 5th August, 2014 was published in Government Gazette dated 14-20th August, 2014. The said declaration records that the Petitioner has been absconding or is concealing himself to avoid service of the impugned detention order. Therefore, the Petitioner was called upon to remain present before the Executing Authority between 10.00 to 5.00 pm on any working days within thirty days from the date of publication of the said notification in the Government Gazette. On 30th September, 2014, the notice regarding issuance of the impugned order was pasted on the outer door of the residence of the Petitioner and a panchanama was accordingly recorded. A statement of the Petitioner's wife was recorded on the very day. A copy of the statement is annexed to the reply. As stated earlier on 18th November, 2014, a report was submitted to the Chief Metropolitan Magistrate, Mumbai in accordance with clause (a) of Sub-Section (1) of Section 7 of the COFEPOSA Act. On 22nd December, 2014, 9th February, 2015, 10th March, 2015, 15th April, 2015, 6th May, 2015, 22nd May, 2015,

10th June, 2015, 17th July, 2015, 31th July, 2015, 2nd September, 2015, 3rd October, 2015 and 27th April, 2016 reports were submitted by the Executing Authority stating that the Petitioner was absconding.

9 The documents produced along with reply show the Petitioner could not be traced even at the address mentioned in his own representations. Thus, the knowledge of passing of the impugned order will have to be attributed if not from the date of publication of notification 5th August, 2014 in Government Gazette of 7th August, 2014, but at least from 1st December, 2014. After a gap of five months thereafter, second representation was made on 13th May, 2015 and nearly three months thereafter on 7th August, 2015, the third representation was made. The Petitioner has not disclosed the actual date of his knowledge of the impugned order. In any case, from 1st December, 2014 till 22nd March, 2016 the Petitioner could have always filed a Writ Petition challenging the impugned order of detention. Even there is a gross delay from 7th August, 2015 which is the date of the last representation made by the Petitioner. The Petition was filed after lapse of 7 months from the date of the last representation. There is absolutely no explanation for the gross delay in this Petition. In the meanwhile, the Petitioner continued to evade the service of the impugned detention order with impunity. This is borne out from the affidavits filed on record.

10 The Petitioner has invoked extraordinary remedy under Article 226 of the Constitution of India. After the knowledge of the order, the Petitioner ought to have accepted the service of order and thereafter challenged the impugned order of detention at post-execution stage. But he has successfully evaded the service of the order till today.

11 Considering the conduct of the Petitioner and considering the gross delay in filing this Petition under Article 226, no relief can be granted to the Petitioner. Therefore, it is not necessary to consider the submissions made across the Bar on merits.

12 The learned counsel appearing for the Petitioner invited our attention to the order dated 13th April, 2016 which directed consideration of the representations made by the Petitioner. Though we are not inclined to interfere, the Authorities to whom the representations have been addressed will have to consider the same expeditiously and communicate the decision taken thereon to the Petitioner at the addresses mentioned in the representations.

13 Hence, we pass the following order :

ORDER

- (i) Writ Petition is rejected;
- (ii) However, the Authorities to whom representations have been addressed by the Petitioner which are referred in the Petition shall decide the same as expeditiously as possible and communicate the orders passed thereon to the Petitioner at the addresses mentioned by him in the representations;
- (iii) We make it clear that this order will not preclude the Petitioner from challenging the impugned order of detention on all permissible grounds after the impugned order is executed and all contentions in that behalf including contentions which are raised in the Petition are expressly kept open.

(A.A. SAYED, J)

(A.S. OKA, J)