

AGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 3118 OF 2015

Wasim Mohammed Sayyed

Age 25 years, residing at Room No. 7, Bharti
Chawl, Kurla-Andheri Road, Jarimari,
Mumbai – 400 072

...Petitioner

Versus

1. **The State of Maharashtra,**
Through the Additional Chief Secretary to
the Government of Maharashtra, Home
Department (Special), Mantralaya,
Mumbai – 400 032
 2. **V.S. Singh,**
The Principal Secretary to the Government
of Maharashtra, Mantralaya, 2nd Floor,
Madam Cama Road, Mumbai – 400 032
 3. **The Commissioner of Customs**
Air Intelligence Unit Chhatrapati Shivaji
International Airport, Sahar,
Andheri (East), Mumbai
 4. **The Superintendent of Prison,**
Nasik Road Central Prison, Nasik Road,
Maharashtra.
 5. **The Union of India,**
through Secretary Ministry of Finance,
Janpath Bhavan, 6th Floor, Janpath Marg,
New Delhi – 110 001.
- ...Respondents

Mrs. A.M.Z. Ansari, with Mrs. Nasreen Ayubi, *for the Petitioner.*
Mr. J.P. Yagnik, APP, *for Respondent Nos. 1 to 4.*

**CORAM: S.C. DHARMADHIKARI &
G.S. PATEL, JJ.**

DATED: 7th January 2016

ORAL JUDGMENT: (Per S.C. Dharmadhikari, J.)

1. By this Petition under Article 226 of the Constitution of India, the Petitioner, the brother of the detenu, challenges the order of detention dated 10th July 2015 and the continued detention of Mr. Siraz Mohammed Sayyed (“**the detenu**”). The Petitioner states that the order of detention has been passed on 10th July 2015 invoking Sections 3(1)(ii) and 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (“**COFEPOSA**”).

2. The order of detention is passed with a view to prevent the detenu in future from abetting the smuggling of goods as well as from engaging in transporting of smuggled goods. The order of detention was served on the detenu on 13th July 2015 and he was taken in custody.

3. The Petitioner states that on 10th July 2015, a communication was issued by the Principal Secretary (Appeals & Security), Home Department, Government of Maharashtra (“**the Detaining Authority**”) containing the grounds of detention. A list of documents was issued containing the statements and other materials purported to have been referred to and relied upon by the Detaining Authority for issuing the detention order.

4. In challenging the detention order, Mrs. Ansari, learned Advocate appearing for the Petitioner, would submit that she has presented three grounds. They could be summarized as paragraph Nos. 5(iii), 5(iv) and 5(v) from page 12 of the paper-book.

5. Mrs. Ansari would submit that the detenu was arrested on 8th April 2015. The basis of issuing the order of detention is the recovery of gold from four different flights of Jet Airways from beneath the seats occupied by certain passengers. The statement of the detenu was recorded on 8th April 2015 and 5th May 2015. Prior thereto, the detenu was arrested on 8th April 2015 and enlarged on bail on 22nd/23rd April 2015. Mrs. Ansari would submit that if the incident was serious enough to make an order of preventive detention that could not have been made belatedly and in such a leisurely manner. The order of detention is dated 10th July 2015 which is more than two months after the date of arrest. It was made nearly after three months of the detenu giving an inculpatory statement.

6. Mrs. Ansari would submit that the Detaining Authority while issuing the detention order has mentioned only 95 pages and the last document referred to in the detention order is dated 5th May 2015. There is no reason, therefore, to have issued a detention order and in so serious a case after this much delay. This itself would demonstrate that the live link had been snapped and the credible chain, if any, has been broken. Her criticism is that the detention order is stale and remote in point of time and on this ground alone the same should be set aside.

7. In elaborating this submission, she would invite our attention to ground (iv) in the Petition and submit that the Detaining Authority must disclose to this Court as to when the proposal for detention of the detenu was received by it and the time taken for scanning the material consisting of only 95 pages, formulating the grounds of detention and issuing the detention order. The Detaining Authority is enjoined to disclose before this Court as to when he has finalized the grounds of detention and ultimately when he issued the same. The Detaining Authority is further enjoined to state before the Court as to whether he himself formulated the grounds of detention or has merely adopted the proposal prepared by the Sponsoring Authority. Mrs. Ansari would submit that in the instant case this Court may compare the proposal submitted by the Sponsoring Authority and the grounds of detention. It would be apparent therefrom that there is no independent application of mind by the Detaining Authority but a blind adoption of the said proposal received from the Sponsoring Authority and incorporating its contents as grounds in the detention order.

8. Mrs. Ansari would submit that assuming without admitting that there was application of mind by the Detaining Authority he must disclose to this Court as to when he considered all the documents and the material and whether they were received and considered piecemeal; i.e., whether the material was considered at one and the same time. The details have to be disclosed as this is a matter of deprivation of personal liberty. The date of receiving the proposal for detention, the number of documents received and whether any additional documents after the initial ones were received must be clearly indicated. The Detaining Authority must

indicate the dates and must also indicate the details as regards the information sought from the Sponsoring Authority. In the present case, she would submit that this constitutional safeguard as has been held by the Hon'ble Supreme Court and this Court in several judgments has not been complied with.

9. She would, therefore, invite our attention to the grounds in the Petition to submit that all the documents were in the custody of the Detaining Authority on 5th May 2015 itself. Thus, it is improper to suggest that there were any further documents. Our attention is invited by Mrs. Ansari to page 48 of the paper-book, which is a part of first Affidavit filed by the Assistant Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Mumbai. He is the Sponsoring Authority and he would submit that the Sponsoring Authority did not delay the matter at all.

10. The investigation started on 8th April 2015 and the accused/detenu was arrested on 8th April 2015. The investigation revealed that the accused was involved in smuggling activities and, therefore, a proposal was drawn and submitted before the Authority concerned for approval on 24th April 2015. After the approval was received, four sets of the proposal, brief facts and indexed relied upon documents were submitted to the Office of the Detaining Authority, namely, the Principal Secretary (Appeals & Security), Home Department, Government of Maharashtra on 30th April 2015. The Affidavit, according to Mrs. Ansari, indicates that further generated documents and information as called by the Detaining Authority were sent on 6th May 2015. The Customs

Commissionerate of CSI Airport, Mumbai is only the Sponsoring Authority and the Competent Authority is the Government of Maharashtra through its Department of Home. If all the statements and documents were duly forwarded as indicated in this Affidavit and were received in the Office of the Detaining Authority, then there is absolutely no justification for having delayed the order of detention.

11. She would invite our attention to what is termed by her as an apparent inconsistency and contradiction inasmuch as in the Affidavit in Reply, which has been filed by Mr. V.S. Singh who is the Detaining Authority and holding the post of Principal Secretary (Appeals & Security), Home Department, Government of Maharashtra, it is stated that the Sponsoring Authority forwarded 31 documents running into 78 pages along with a proposal by letter dated 30th April 2015 and further generated eight documents running into pages from 79 to 95 by letter dated 16th June 2015 and 24th June 2015. Commenting upon this Affidavit, she would submit that the Detaining Authority now seeks to improve upon a version in the Affidavit of the Sponsoring Authority. That Affidavit is completely silent with regard to any further generated documents. However, assuming that there was any such attempt by the Sponsoring Authority yet, according to Mrs. Ansari, there is no justification as to why the documents having been received on 30th April 2015, the scrutiny of the proposal received from the Sponsoring Authority was not taken up till 13th May 2015. It is stated in the Affidavit of the Detaining Authority that this proposal was endorsed on 14th May 2015 by the Section Officer for being placed before the Deputy Secretary, but he was on leave from 14th

May 2015 to 18th May 2015. The Deputy Secretary endorsed the scrutiny note on 19th May 2015 and the Detaining Authority approved the note on 29th May 2015. The Affidavit says that additional information covering some points raised in the scrutiny note was called for by a letter dated 29th May 2015 but a reminder had to be endorsed and sent to the Sponsoring Authority. In the meanwhile, the Sponsoring Authority forwarded the information by letter dated 15th June 2015 which was received in the Department on 17th June 2015. Hence, there was no reminder note issued, though prepared. The information was submitted by the Section Officer on 20th June 2015. But according to Mrs. Ansari though the endorsement on information received of the Deputy Secretary is of 22nd June 2015 yet there is no explanation as to why the detention order came to be issued on 10th July 2015. It is only to fill in the gap and to explain this delay that the Detaining Authority refers to some further generated documents. In such circumstances, non application of mind is writ large and there is no indication as to why the documents which are received later on have not been categorized and referred specifically in the order of detention as narrated now. In such circumstances, Mrs. Ansari would submit that there are no details about the consideration of the proposal and if at all any further documents were generated and received, when the Detaining Authority has applied its mind to them. For these reasons, it is submitted that the order of detention is vitiated and deserves to be quashed and set aside.

12. As regards the continued detention of the detenu, Mrs. Ansari would submit that the order of detention makes a reference to an event which is stated to have occurred post arrest of the

detenu. In paragraph 20 of the grounds of detention, the Detaining Authority concluded that the employer of the detenu Sky Gourmet Company removed him from services and employment retroactive 8th April 2015. No material was placed before the Detaining Authority, according to Mrs. Ansari, from which he could gather this information and arrive at the above conclusion. This shows that there is non application of mind. Assuming that some material with regard to such termination was placed before the Detaining Authority by the Sponsoring Authority, it was incumbent upon the said Detaining Authority to have supplied copies of the documents/material which was received by the Detaining Authority with regard to this termination. This has not been supplied and, therefore, the right to make an effective representation guaranteed by Article 22(5) of the Constitution of India is violated. This would vitiate the continued detention of the detenu.

13. In support of the above contentions, Mrs. Ansari would place reliance upon an unreported judgment of this Court delivered on 20th October 1993 in Criminal Writ Petition No. 1101 of 1993. She would also rely upon another unreported judgment delivered in Criminal Writ Petition No. 118 of 1990 on 15th March 1990 by a Division Bench. As regard the right to make effective representation, Mrs. Ansari would rely upon a Supreme Court decision rendered in *Sophia Gulam Mohd. Bham v. State of Maharashtra*.¹

¹ (1999) 6 SCC 593

14. On the approach of the Detaining Authority in seeking to improve upon the initial version, our attention is invited to the judgment of the Division Bench of this Court to which one of us (S.C. Dharmadhikari, J.) was a party in Criminal Writ Petition No. 1048 of 2015 and connected matters delivered on 14th July 2015, particularly paragraphs 7 and 8 thereof.

15. On the other hand, learned APP Mr. Yagnik would submit that the order of detention is passed on the subjective satisfaction and that is not being questioned. The only grounds urged are in regard to delay in making the detention order and thereafter the continued detention being vitiated for want of supply of material and relevant documents relied upon in the order of detention.

16. As regard the first point, Mr. Yagnik would submit that there are Affidavits filed by the Deputy Secretary, Home Department, Government of Maharashtra and then there is an Additional Affidavit filed by the Detaining Authority. That, according to him, is in compliance with the requirement stipulated in the Division Bench judgment dated 14th July 2015 in Criminal Writ Petition No. 1408 of 2015 and connected matters. Now, the Detaining Authority has himself clarified the matter amply by referring to each of the documents and material on which the detention order is based. Even the delay is satisfactorily explained. Bearing in mind the smuggling activities and which are assuming dangerous proportions, this Court should not interfere with the impugned detention order is the submission of Mr. Yagnik.

17. Even with regard to the continued detention, he would submit that the right to make effective representation as enshrined under Article 22(5) of the Constitution of India is not violated and the detenu was in a position to question his detention. The employment with the employer has no bearing as far as the subjective satisfaction on which the detention order is passed. That is just an additional reference made and, therefore, continued detention and, therefore, the continued detention of the detenu cannot be set aside as well.

18. We have, with the assistance of the learned Advocates appearing for both sides, perused the Petition and all Affidavits placed on record. We have carefully perused the detention order and the grounds of detention. We have carefully perused the legal provisions and the decisions brought to our notice.

19. In the present case, we would firstly deal with the grounds of delay and non-application of mind and which are elaborately set out at pages 12 to 20 of the Petition in Grounds 5(iii), 5(iv) and 5(v).

20. In so far as the delay is concerned, admittedly the arrest of the detenu was effected on 8th April 2015 and the Sponsoring Authority prepared the requisite proposal and despatched it to the Detaining Authority on 30th April 2015. The detention order was issued on 10th July 2015 and which is after a span of two months and 10 days.

21. In the Affidavit in Reply which has been filed by the Sponsoring Authority, namely, the Assistant Commissioner of

Customs, CSI Airport, Mumbai, it is stated in paragraph 5A, on pages 49 and 50, as under:-

"5A. ... There is absolutely no delay on our part. I say that the in the present matter investigation is started on 08.04.2015 and accused was arrested on 08.04.2015. During the investigation from the record of the investigation it is found that the accused is involved in the smuggling activities and therefore accordingly the preferring of proposal started and the same was prepared simultaneously with the investigation and the same was submitted before the respective authority for approval on 24.04.2015 and after received the approval we have submitted 4 sets of the proposal, brief facts and indexed Relied upon documents in the office of the Detaining Authority i.e. Principal Secretary (Appeals & Security), Home Department, Government of Maharashtra on 30.04.2015. Further generated documents and information as per called by the Detaining Authority office were sent on 06.05.2015 to the office of the Detaining Authority i.e. Principal Secretary (appeals & Security), Home Department, Govt. of Maharashtra. ..."

22. Thus, the Sponsoring Authority maintains that as far as its role is concerned, there is no delay. It was prompt enough to draw up the proposal, get it approved and despatch it. It was received by the Detaining Authority together with relied upon documents on

30th April 2015. The specific statement in this Affidavit and which we have extracted above is that further generated documents and information as called by the Detaining Authority's Office were sent on 6th May 2015.

23. The Deputy Secretary, Home Department, Government of Maharashtra filed an Affidavit and in dealing with the subject paragraph in the Petition (on the point of delay), in paragraph 7 admits that there is a delay of two months 10 days in making the order of detention after the receipt of the proposal from the Sponsoring Authority. However, it tried to explain that the delay is *bona fide* because the Detaining Authority was required to consider the statement of other persons related to the case and same were included in the relied upon documents served on the detenu. The last statement recorded of other person was on 15th June 2015 which is mentioned at Serial No. 39 and page Nos. 94-95 of the relied upon documents (see pages 61-62 of the Petition paper-book).

24. Curiously, this statement does not indicate as to when the Sponsoring Authority forwarded it to the Detaining Authority, when was it received and whether the total proposal contained either 78 pages or 95 pages. It is obvious, therefore, that the Detaining Authority after receiving the proposal sat on it for months together. It made the first move only in mid-May 2015 after the initial procedural compliance as is now sought to be explained of preparation of scrutiny note, its approval and endorsement by the Deputy Secretary and thereafter its placing before the

Detaining Authority. That was also completed on 29th May 2015 in terms of this Affidavit (see page 64).

25. Additional information on some points raised in the scrutiny note was called for by a letter dated 29th May 2015. A note regarding a reminder letter was put up on 16th June 2015. The Deputy Secretary endorsed it on 16th June 2015. However, according to the Affidavit, the Sponsoring Authority forwarded the information by letter dated 15th June 2015 which was received in the Department on 17th June 2015. Thereafter asserting that this information went through a Section Officer and was placed before the Deputy Secretary and the Detaining Authority issued the detention order on 10th July 2015, is therefore, no explanation and to our mind it is an attempt to improve upon the versions which were placed before this Court by the Sponsoring Authority. The Sponsoring Authority filed an Additional Affidavit and which would completely falsify this assertion in the Detaining Authority's Affidavit. The Sponsoring Authority says that the letter dated 17th April 2015 was received from Sky Gourmet Company informing that the detenu will be removed from its services and employment retroactive 8th April 2015. This, according to the Sponsoring Authority and the Detaining Authority, is absolutely an internal correspondence between Sky Gourmet Company and the administration wing of Air Intelligence Unit, CSI Airport, Mumbai. Though the same was brought to the notice of the Detaining Authority by letter dated 15th June 2015 and it is mentioned in paragraph 20 of the Detention Authority's order, what this Affidavit says in continuation and at page 76 is that further generated documents, namely the statements of Mr. Siraz

Mohammed Sayyed, Mr. Abdul Razak Shaikh, Mr. Vijay Ankush Tamhanekar, Mr. Shahbudeen Chengla and Mr. Raghubeer Babulal Chautela were sent to the Office of the Detaining Authority on 6th May 2015. The detailed information on some points was forwarded to the Office of the Detaining Authority on 15th June 2015 in pursuance of their letter dated 29th May 2015. Due to oversight the Sponsoring Authority forgot to mention that some additional relied upon documents, namely, statements of Mr. Raghubeer Babulal Chautela and further statements of Mr. Abdul Razak Shaikh and Mr. Vijay Ankush Tamhanekar were also sent to the Detaining Authority on 16th June 2015.

26. We have thus an Additional Affidavit from the Sponsoring Authority who maintains that further generated documents were sent on 6th May 2015 and what was sent thereafter was detailed information on certain points. The Sponsoring Authority obviously in an attempt to assist the State and Detaining Authority varies its earlier version. However, that overlooks the contents of the earlier Affidavit and the difference between documents, further generated documents and information supplied but generated earlier or later.

27. The Detaining Authority in his personal Affidavit proceeds to state that the further generated documents forwarded by the Sponsoring Authority by letters dated 16th June 2015 and 24th June 2015 were considered by him in making the detention order and that is why there is no delay.

28. We are of the firm view that in matters of deprivation of personal liberty, this approach is indeed casual. When the matters

are brought before the Court and in considering the challenge to the detention order, it is the bounden duty of the Detaining Authority to place before the Court an Affidavit setting out the details of all the documents relying on which the detention order is passed. There should not be any inconsistency and contradiction in the versions. If the Sponsoring Authority says that all documents including further generated documents were forwarded and duly received on 6th May 2015 and only additional information and some documents as sought by the Detaining Authority were forwarded later on, then, the Detaining Authority must indicate as to what steps it took at least from the date of receipt of the additional information and so-called further generated documents. We do not see that the explanation which is now given and furnished for the delay would inspire confidence in the light of the patent contradictions pointed out above. This version and which is coming from the two Affidavits would indicate that the Deputy Secretary has merely stated that last statement of another person was recorded on 15th June 2015 and which is mentioned at pages 94-95 at Serial No. 39 of the relied upon documents. However, the Detaining Authority would in the Affidavit state that 31 documents running into 78 pages along with proposal by letter dated 30th April 2015 and further generated 8 documents running from pages 79-95 by letter dated 16th June 2015 and 24th June 2015 came to be received by it. As we have said this part is conspicuous by its absence in the Affidavit of the Deputy Secretary. In any event, we find that the delay from 30th April 2015 to the first attempt on 15th May 2015 and thereafter from 24th June 2015 till the date of the detention order, i.e., 10th July 2015 has not been explained at all.

The above steps which we have enumerated in detail would not be an explanation much less an acceptable one for the delay.

29. It is in these circumstances that we are of the view that the reliance placed by Mrs. Ansari on the varying versions and contradictory statements in these Affidavits is well placed. The order of detention must stand vitiated by the delay in making the same.

30. Even on the point of continued detention of the detenu, the Petition must succeed. The Petitioner has highlighted in the Petition itself that there is a reference in the detention order to a communication and which is stated to be forwarded by the employer to the detenu. The Sponsoring Authority terms it as an internal correspondence as between it or the Air Intelligence Unit and the employer of the detenu. That version is reiterated in the Affidavits of the Detaining Authority. However, reference is made in paragraph 20 of the detention order and in the words of the Detaining Authority as under:-

"20. I am aware that your employer Sky Gourmet company has removed you from their services and employment of Sky Gourmet retroactive 8th April 2015. But considering your past involvement in smuggling activities, as mentioned above I am subjectively satisfied that you may indulge in smuggling activities in other possible ways in future also."

31. This awareness of the Detaining Authority is certainly based on the communication which we find to have been specifically referred by the Sponsoring Authority at page 75 of the paper-book, namely, in its first Affidavit as well as second Affidavit. In the second Affidavit at page 75 it is apparent that it received a letter dated 17th April 2015 from Sky Gourmet Company informing the detenu that he will be removed from its service and employment retroactive on 8th April 2015. It is an internal correspondence according to the Sponsoring Authority. Pertinently, however, it feels that this is a vital document and brings it to the notice of the Detaining Authority vide its letter dated 15th June 2015. That is how in paragraph 20 of the detention order, there is not only a reference but from a reading of the detention order it is apparent that reliance is placed on the same as well. It is not disputed before us that this document was not supplied to the Petitioner and thereby his right of making an effective representation is denied. He has been deprived of the same and as far the law laid down by the Hon'ble Supreme Court is concerned the grounds of detention is a term understood to mean all the materials and documents.

32. The Hon'ble Supreme Court has in the judgment relied upon by Mrs. Ansari held that the right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detenu to make a representation against the order of detention. A representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are communicated to the detenu and the material on which those grounds are based are also disclosed and copies thereof

are supplied to the person detailed, in his own language. We do not see any compliance with this constitutional mandate.

33. As a result of the above discussion even the continued detention of the detenu is vitiated in law.

34. For the foregoing reasons, the Writ Petition succeeds. Rule is made absolute in terms of prayer clause (a). The detenu be set at liberty forthwith, if not required in any other case.

35. In the light of above conclusions, we have not allowed Mrs. Ansari to argue the other grounds in the Writ Petition.

(G. S. PATEL, J.)

(S.C. DHARMADHIKARI, J.)