

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 3129 OF 2015**

VISHAL VIJAY TAMHANEKAR,
Age 27 years, residing at Plot No. 5, Room No.
2, Khanda Colony, CIDCO, New Panvel,
District: Raigad

...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

WITH
WRIT PETITION NO. 3171 OF 2015

ABOOBACKER SUMAIS, C.A.

S/o Abdul Rahiman (L), Age 25 years, residing
at Chengala House, P/O Cherkala, District
Kasargod, Kerala State.

...Petitioner

Versus

- 1 THE STATE OF MAHARASHTRA,**
through the Additional Chief Secretary
to the Government of Maharashtra,
Home Department (Special),
Mantralaya, Mumbai – 400 032
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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-State.*

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

DATED: 28th January 2016

JUDGMENT: (Per G.S. Patel, J.)

1. Both Writ Petitions are filed under Article 226 of the Constitution of India seeking writs of Habeas Corpus. We would not ordinarily have thought it appropriate to deliver a common judgment in matters such as these. However, as the following narrative shows, this is inevitable and necessary.

2. At the broadest level, in Petitions relating to matters of preventive detention, the Court is not concerned with the actual merits of the subjective satisfaction recorded by the Detaining Authority. The Court limits itself, as it must do, to the sufficiency and adequacy of the decision-making process. If that process be found to be in accordance with the law, one that is well settled by now, the order of preventive detention will undoubtedly be upheld. On the other hand, when the Court find a lacuna or inadequacy in the decision-making process, it will set aside the order of detention.

3. Writ Petition No. 3129 of 2015 seeks the quashing of an order dated 10th July 2015 passed under Section 3(1) of the Conservation of Foreign Exchange and Preservation of Smuggling Activities Act, 1974 (“COFEPOSA”). This order requires the detention in Nasik Road Central Prison of one Vijay Ankush Tamhanekar (“**Tamhanekar**”). The Petitioner is Tamhanekar’s son.

4. Writ Petition No. 3171 of 2015 is filed in respect of one Shahbudeen Chengala (“**Chengala**”), whose detention, also in Nasik Road Central Prison, was required by an order dated 10th July 2015 under Section 3(1) of COFEPOSA. The Petitioner in Writ Petition No. 3171 of 2015 is Chengala’s brother.

5. Tamhanekar and Chengala are two of four persons against whom orders of preventive detention were passed. The other two were one Siraj Mohamed Sayyed (“**Sayyed**”) and one Abdul Razak Shaikh (“**Shaikh**”). We have already dealt with Petitions filed against preventive detention orders against Sayyed and Shaikh. We have allowed these Petitions *inter alia* on the ground that there has been in each case a long and unsatisfactorily explained delay between the time of the incidents in question in each and the passing of the detention order. We have held that the delay was so long that the live link was snapped and the credible chain broken.

6. In the present two Petitions, although Mrs. Ansari for the Petitioners addressed us on the question of delay, we were quickly made aware of the commonality pertaining to all four Petitions. The present two Petitions were listed before us on 27th January 2016. We heard Mrs. Ansari and Mr. Yagnik, learned APP for Respondent Nos. 1 to 4, for some time. Dissatisfied with the explanations we found on Affidavit, we requested Mr. Yagnik to make available to us the relevant Government Department files. He readily agreed to do so. The files were produced before us that afternoon at 3.00 p.m. We stood the matter over till 28th January 2016. In the meantime, one of us (G.S. Patel, J.) spent some time perusing the files. We

make it clear that these files were at no point shared with Mrs. Ansari or her clients.

7. We propose in this judgment to address ourselves to what we find in these files. We have indicated our observations in general terms in order not to compromise the interests of the authorities. We then turn, and to the extent necessary, to the various averments that are made in the Affidavits in Reply.

8. To appreciate the trajectory of these matters, a few background details are necessary. It seems that on 8th April 2015, based on specific information, officers of the Air Intelligence Unit (“AIU”) at Mumbai’s CSI Airport intercepted Sayyed and Shaikh. At that time, both worked with Sky Gourmet, an on-flight catering and duty free vending service provider, as flight supervisors. Sky Gourmet provides services *inter alia* to Jet Airways, a prominent domestic and international carrier. Sayyed’s and Shaikh’s main job, apparently, was to inventory of Duty Free Goods made available for sale on board Jet Airways flights. Evidently, this only applied to Jet Airways’s international flights. The information received was that both Sayyed and Shaikh had planned to remove certain quantities of gold concealed aboard Jet Airways Flight no. 9W 543, which had arrived in Mumbai on 8th April 2015 from Dubai. Due to the intervention of AIU Officers, they did not succeed in this criminal enterprise. Both Sayyed and Shaikh were actually on board the aircraft when AIU officers searched it. The officers recovered seven gold bars of 10 tolas of gold. Each bar weighed 816 grams. These were hidden beneath the seat cushion of Seat No. 31F of Jet Airways Flight 9W 543.

9. Using further information and on immediate investigation of Sayyed's and Shaikh's Whatapp, SMS and mobile phone data, the officers concerned ascertained that these two had conspired to clandestinely clear contraband gold from three more flights scheduled to arrive shortly. Acting on this information, the AIU officers also searched Flight 9W-583 (Abu Dhabi-Mumbai), Flight No. 9W-571 (Kuwait-Mumbai), and Flight 9W-539 (Muscat-Mumbai). From the incoming Abu Dhabi Flight, 12 gold bars of ten tolas each, totalling 1405 grams were found concealed under Seat No. 36F. From Flight 9W-571, 11 gold bars of ten tolas each, totalling 1280 grams were found concealed under Seat No. 34F; and from Flight 9W-539 inbound from Muscat, two bars of 1 kg each and 11 gold bars of ten tolas each, totalling 3283 grams were found concealed under Seat Nos. 21F and 23F. Contraband gold was thus seized from four different flights. A total of 6,784 grams of foreign-marked gold bars valued at Rs. 1,65,06,830/- were seized.

10. Upon further questioning, it was found that Sayyed and Shaikh had arranged for some receiver waiting outside the airport to take possession of the smuggled goods. The AIU team kept a discreet watch on the road outside Hyatt Hotel at Sahar. It was here that Vijay Ankush Tamhanekar, the receiver in question, was apprehended. On enquiries with Tamhanekar, a second watch was set up at the bus stop near the McDonald's outlet at Andheri (East). There, a second receiver of the gold, Shahbudeen Chengala, was apprehended.

11. Thereafter, the statements of all four were recorded under Sections 108 of the Customs Act, 1962. We are not at this stage

concerned with the details of these statements. The Authorities seem to have concluded that while Sayyed and Shaikh were repeat offenders and were directly engaged in smuggling gold, Tamhanekar, who claimed to be a tourism and estate agent, used to receive gold from Shaikh and, for consideration, pass it on to Chengala. He was also previously involved in contraband drug smuggling. Tamhanekar was said to be not only a recidivist but an organizer of this smuggling racket and was later described by the Sponsoring Authority as “the kingpin”. For his part, Chengala was also said to be a repeat offender and a carrier for the smuggling cartel.

12. Before us it is contended that the roles of all four persons were intricately inter-connected and that each worked in close coordination and tandem with the others. Our inspection of the file reveals more. We propose in this judgment to discuss only so much of the contents of the files as is necessary for our purposes and no more, so as not to prejudice the State Government’s Home Department. The files for Tamhanekar and Chengala indicate that a single common proposal for the preventive detention of all four persons was submitted by the Sponsoring Authority, viz., the Assistant Commissioner of Customs, COFEPOSA Cell, Mumbai Zone III, CSI Airport, Sahar, Andheri (East). This proposal was dated 30th April 2015. The proposal itself is, of course, only to be found in the files that were shown to us. The proposal was never disclosed to the Petitioners or the Detenu, and it could not have been. That is in fact not our concern at all. What we do find, however, is that while this single consolidated proposal is dated 30th April 2015, it appears to have been received in the Home

Department at its Office on the 30th Floor, World Trade Centre, Mumbai – 400 005, i.e., at the other end of the city, at 4.30 p.m. that very day. This is of some significance because the proposal was accompanied by certain documents and subsequent questions of delay pertain to the movement of the proposal file after its receipt, and the quite extraordinary delay in regard to further documents. We need to note at this stage that the proposal was placed before the Home Department only after the proposal itself went through its various screenings before the Sponsoring Authority which finally approved it a few days earlier on 23rd April 2015. The proposal makes it clear that it is a single proposal. The covering letter speaks of “4 copies of the proposal”. All the material that we have summarized, along with more details, is set out in this proposal.

13. At the broadest level what disturbs us is that this single, unified proposal seems to have resulted in some way that is never explained in four separate detention orders. How this came to pass is unknown to us. Who split this proposal into four parts and when, and on what basis is not explained even in the file. It is unclear to us from the file whether the documents in support of the proposal are separate for each of the four persons, the same for all four persons or some combination or mixture of both these situations. On a close examination we find that this one proposal from the Sponsoring Authority does not merely have a common covering letter. The entire proposal for all four persons is identical in every respect, down to the last page. In the proposal, there is no segregation of the material proposed to be used in respect of each of the four persons. The conclusion of the proposal and its submission is also common to all four persons. The identical proposal is to be found in the files

of both Tamhanekar and Chengala. This immediately raises the question of whether there is material to evidence a sufficient application of mind to the proposal. We are unable to appreciate how this could ever be said to have been so. It is not at all apparent how from the single consolidated set of documents (proposal, annexures and covering letter) four separate detention orders were generated or produced. We cannot understand how a scrutiny of this proposal and its accompanying documents could have led a meaningful segregation with a proper application of mind to four separate cases. As we have noted, our concern is not with the merits of the subjective satisfaction recorded, but only with the decision-making process. It is this process that we find to be, on the closest possible scrutiny, wanting in every material and necessary particular.

14. What we are only told is that the proposal was received, further information was called for, the documents were scrutinized and in each case the detention order came to be passed after a careful, minute and close scrutiny. The file appears to us to indicate to the contrary. We would have thought it necessary that the Sponsoring Authority who have put up four separate proposals, one for each person or at the very least the Detaining Authority who have explained how a single proposal came to be split into four parts. It would have been impermissible, of course, for the Detaining Authority to have passed one consolidated detention order against four persons, but it cannot be that only in ostensible compliance with this requirement, in a manner that is never explained at any stage, a single proposal got split up like this.

15. But that is not all. We find that there are on the face of it errors in the files that are also not noticed or pointed out. The covering letter of 30th April 2015 has at its head a file number, the relevant portion of which is “605”. However, in the body of that letter a reference is made to another file number “165”. Mr. Yagnik, on instructions from some officer, attempted an explanation that this was a reference to an inward and outward file. We find this to be incorrect. The file shown to us shows that nearly two months later on 24th June 2015, the Superintendent of Customs, AIU/COFEPOSA, CSI Airport, Mumbai wrote to the Home Department stating that reference no. 605 was *incorrect* and the correct number was 165. Once again we are not told whether this discrepancy resulted in any papers or documents being misfiled, overlooked or being confused or exchanged. Indeed, neither the Detaining Authority nor the Sponsoring Authority in their Affidavits in Reply in these Petitions have even mentioned that there was ever any such error.

16. We will now deal with the question of delay alleged by the Petitioner. For this purpose, we propose to look in the Affidavits filed by the Detaining Authority. We do not see the ground of delay as a separate independent challenge. It is, rather, one facet or aspect of a faulty and unsatisfactory decision making process. There are many such facets. We have mentioned some of these. There are others canvassed by Mrs. Ansari, but we do not feel it is necessary to examine each of these in detail.

17. In paragraph 9 of his Affidavit in Reply affirmed on 13th January 2016 in Writ Petition No. 3129 of 2015,¹ the Detaining Authority speaks of the proposal received on 30th April 2015 and says that the detention order was issued after a 'mere' two months and ten days. There were 31 documents running into 70 pages accompanying the proposal. A further eight generated documents were received under a covering letter dated 16th June 2015. These documents were actually in the hands of the Detaining Authority on 24th June 2015. However, the Detaining Authority states at page 93 in part of paragraph 9 and again in paragraph 10 at page 94:

"... total four separate proposals received from the Sponsoring Authority pertaining to this case and hence it was necessary to scrutinize all the four proposals simultaneously."

In paragraph 10, the Detaining Authority states that:

"separate four proposals for preventive detention along with the relied upon documents were forwarded by the Sponsoring Authority vide letter dated 30th April 2015 received by me on the same day. These proposals were for preventive detention of four persons. Hence, all four proposals were scrutinized separately but simultaneously."

18. It seems to us that this is a material error, if not an actual misstatement. As the files shown to us indicate, there was in fact a single consolidated proposal for four persons. There were not four

¹ P. 92 in Writ Petition No. 3129 of 2015.

separate proposals for four different persons. We are unable to understand the basis on which these statements have been made in the Detaining Authority's Affidavit.

19. The further dates given by the Detaining Authority from pages 95 to 97 of the Affidavit only add to our distress. The Detaining Authority states that on receipt, the proposal in question, and we will assume for the moment that he is referring only to the Tamhanekar's case, was scrutinized and a scrutiny note was submitted by the Assistant concerned on 13th May 2015. This is the first of a series of unexplained delays. If the proposal itself could traverse the length of the city on a single day, we do not see how a scrutiny note could have taken an entire fortnight to traverse the same physical distance. We are then told that the scrutiny note was required to be endorsed. That endorsement was required from the Deputy Secretary, who was apparently on leave from 14th to 18th May 2015. He endorsed it on his return on 19th. There followed holidays on 23rd and 24th May during which time the Detaining Authority was, therefore, unavailable to see the endorsed scrutiny note. In short, between 13th May and 29th May 2015 (when the Detaining Authority approved the scrutiny note), the matter seems to have been at a complete standstill. Acting with admirable despatch, the Detaining Authority then called for additional information on certain points raised in the scrutiny note on 29th May 2015 itself. What happened to this call and letter of 29th May 2015 is unknown. We are only told that a note with a proposed draft reminder was placed before him on 16th June 2015. This means that there is a third unexplained delay of 15 days when nothing happened. This reminder was endorsed by the Deputy Secretary on

16th June 2015. However, it seems that the Sponsoring Authority (presumably acting on the previous call for additional information dated 29th May 2015) submitted this information under cover of his letter dated 15th June 2015. In sharp contrast to the speed of submission of the original proposal, this additional information took two whole days to travel the same distance and reached the Detaining Authority only on 17th June 2015. Of course, this information could not be dealt with quickly. It had to go through the Section Officer and then the Deputy Secretary before it finally found its way into the hands of the Detaining Authority. The Section Officer submitted the received information on 20th June 2015. The next day was a Sunday. The Deputy Secretary endorsed it the next day, Monday, 21st June 2015, and these documents then travelled to the Detaining Authority only two days later on 24th June 2015. This means that additional documents called for by the Detaining Authority on 29th May 2015 did not actually reach his hands for almost an entire month till 24th June 2015.

20. Even in the file that is shown to us, there is absolutely no explanation for any of these long delays. We are merely expected to find that these delays are either irrelevant or insignificant. We refuse to do either.

21. The Detaining Authority would do well, in our view, to constantly remind themselves that these are matters of deprivation of personal liberty. The subjects of these detention orders are secondary. It does not matter who the detenu is. What matter is that the process of law by which his or her liberty is deprived must be impeccable and beyond reproach. The Authorities would do well

to remember that it is only a matter of chance that it is they who are authorized to pass these orders and that it is these detainees who are subjected to these orders. Every person is entitled to a protection of personal liberty. That is the Constitutional mandate.

22. This law is well settled by a long catena of decisions of this Court, other High Courts and the Supreme Court. Our State-level functionaries seem to have lost sight of all of these. We insist that the Respondents heed the words of the Supreme Court in *Dropti Devi & Anr. v Union of India & Ors.*² There, the Supreme Court cited the dictum of Dr. A.S. Anand CJ (as he then was) for the majority in *Sunil Fulchand Shah v Union of India and Ors.*,³:

“Personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanizing the harsh authority over individual liberty. Since preventive detention is a form of precautionary State action, intended to prevent a person from indulging in a conduct, injurious to the society or the security of the State or public order, it has been recognised as “a necessary evil” and is tolerated in a free society in the

² AIR 2012 SC 2550 : (2012) 7 SCC 499

³ (2000) 3 SCC 409; para 45 of the AIR report.

larger interest of security of the State and maintenance of public order. However, the power being drastic, the restrictions placed on a person to preventively detain must, consistently with the effectiveness of detention, be minimal. In a democracy governed by the rule of law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. This Court, as the guardian of the Constitution, though not the only guardian, has zealously attempted to preserve and protect the liberty of a citizen. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation".

(Emphasis added)

23. We must also make reference to the decision of the Supreme Court in *Saeed Zakir Hussain Malik v State of Maharashtra & Ors.*⁴ on the question of delay in passing the detention orders under challenge. The Court cited a previous decision in *Lakshman Khatik v State of West Bengal*,⁵ under the Maintenance of Internal Security Act, 1971. The principle enunciated in *Lakshman Khatik* and carried forward four decades later in *Saeed Zakir Hussain Malik* was this: that mere delay, i.e., delay *per se*, in passing a detention

⁴AIR 2012 SC 3235 : (2012) 8 SCC 233

⁵ (1974) 4 SCC 1

order is inconclusive. A Court will examine the types of grounds given for detention *and consider whether such grounds could really weigh with an office several months later* in forming a subjective satisfaction as to the necessity for preventive detention. This, in our view, is the very principle being invoked when we speak of ‘the live link being snapped’. This is the causality implicit in our use of the phrase ‘credible chain’. The detaining authority is required, as a matter of Constitutional law, to ensure that the live link is not snapped, the credible chain not broken.

24. We also note the overarching reason for this judicial insistence. It is not some arcane legal principle meant to obstruct administration or executive action. It is a judicial principle that is held to be cardinal and essential to our survival as a body politic, firmly rooted in our Constitutional mandate, and in Article 21, the fundamental right to life and personal liberty. These are not rights that are specially created or given to smugglers and drug runners and criminals. They are rights intended for the protection of us all. Those immortal words⁶ should never be forgotten when dealing with *any* detenu:

“there, but for the grace of God, go I.”

25. These are not matters of mere delay, one such as could be excused. These are matters of such lengthy delay as would sever the chain of causality, the live link.

⁶ Often attributed to Sir Thomas More, we believe somewhat inaccurately.

26. We also find to our very great distress that the Home Department, even in this advanced age of digital communications, persists in using outdated technologies that are guaranteed only to delay matters. We understand the need to maintain a complete and accurate record and we appreciate this concern. But this does not mean that some ancient process that may have been in vogue 65 years ago should continue today. Our examination of the file shows that when the Detaining Authority requires further documents, a note is put up to the Superior Officer with a draft of the reminder letter, also placed elsewhere in the file. Once the note and the draft are approved, then the reminder letter is prepared, got signed and sent to despatch, and this process, in direct contrast to the speed with which the proposal was sent and received, takes several days, even weeks. There is also an inexplicable insistence on the use of what are called wireless messages. These are also outdated. A Section Officer in the Home Department is found to transmit a hard copy of the wireless message text to the officer in charge of the Inter-State Police Wireless Station at Malabar Hill, Mumbai - 400 006 to be sent to Delhi with copies to the COFEPOSA/Customs Authorities. It is curious that all these Authorities seem to have, and this is also borne from the files shown to us, official e-mail IDs assigned by the National Infomatics Centre, NIC. We are unable to understand why, when dealing with matters of deprivation of personal liberty, protocols cannot be evolved for the use of modern communication technologies. After all, our government both at the Central and State, increasingly insist on the use of these technologies throughout. Of course, no compromise is expected with confidentiality and required secrecy. It is nobody's case that the use of information technology and modern communication

methods necessarily means a compromise with the above. The other aspect is equally perplexing, and we presume unless otherwise proved that within the same Department, absence for one or two days or a week of an officer, that too in the rank of a Assistant, Section Officer, Under Secretary, Deputy Secretary does not affect the functioning to the extent made out in the Affidavits of the State. Just as the routine excuse of a holiday or non-working day is considered enough the other of absence or leave of such officers is deemed to be an acceptable and reasonable explanation for the delay in passing detention orders or the non-consideration of a representation against the same promptly. Some attention must be paid by all concerned.

27. If not addressed despite administering a caution, these problems routinely faced, as is stated, would result in rejection of these vague explanations. We must also note our disapproval of the practice of the State of Maharashtra and the Detaining Authority of authorizing a deputy to file Affidavits in Reply on his behalf. To our mind, these are not matters that can be dealt with in this fashion. It is the Detaining Authority alone who must file Affidavits in Reply once notice is issued. Another Division Bench of this Court has already said so. We say so again.

28. Mr. Yagnik asks us to set out guidelines for the conduct of the Authorities of their affairs in these matters. We refuse to do anything of the kind. It is no part of our judicial remit to tell the government how it must go about its Constitutional duty. We reiterate at the cost of repetition that we will, in the discharge of *our* Constitutional duties, be exacting and demanding when it

comes to an examination of the adequacy of the decision-making process. That *is* our judicial remit. That *is* our Constitutional obligation and we will hold fast to it. If the consequences of that result in setting aside of the Government's orders, then the Government must look to itself for solutions, not to us.

29. In the view taken by us on the point of delay and the inadequacy of the decision-making process, it is not necessary to examine the other points raised by Mrs. Ansari.

30. In this view of the matter, both Petitions are made absolute in terms of prayer clause (a). The detenu shall be released forthwith, if not required in any other case.

(G.S. Patel, J.)

(S.C. Dharmadhikari, J.)