

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 3258 OF 2015**

FARIDA IMRAM CHAMUNDI,
Age 34 years, residing at r. No. 5, Shanta Bai
Chawl, Poonam Nagar, Bandra Plot,
Jogeshwari (East), Mumbai – 400 060

...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

Mr. A.M.Z. Ansari, *with Ms. 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: 27th January 2016

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

1. By this Petition under Article 226 of the Constitution of India, the Petitioner challenges an order of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (“COFEPOSA” for short) passed on 17th July 2015 and served on the detenu on 4th August 2015.
2. The Petitioner is the wife of detenu.
3. A few dates are required to be referred for appreciating the ground of challenge, viz., delay in passing the detention order. The grounds of detention in support of the order of detention recite the dates. By Air India Flight AI-964, the detenu arrived in Mumbai from Hyderabad on 23rd September 2014. After clearing immigration, one Ms. Shahin Farooq Patel was intercepted by the Officers of the Air Intelligence Unit. She was subjected to a personal search in the presence of a gazetted officer and two independent *panchas*. The search yielded the recovery of a packet wrapped in transparent cello-tape from an artificial cavity pocket that was stitched around the waist of her blue jeans of the brand ‘Joe FRESH’. When the transparent cello tape was detached from the packet, 19 bars of gold of 250 grams each were recovered. These had the foreign markings more particularly described in paragraph 2

of the grounds of detention at page 34. On questioning and enquiry, the lady revealed that she had gone to Hyderabad from Mumbai on an early morning Jet Airways flight along with the detenu and his wife Farida (the present Petitioner) and a co-passenger, one Ms. Shabana Habib Shaikh. On their return on the same day by the Air India flight, the packet was handed over to her by an unknown person in the flight who was already seated as a transit passenger from Jeddah to Mumbai via Hyderabad. She received the packet on the detenu's instructions. The monetary consideration and other matters are then detailed in the grounds of detention together with value of the contraband.

4. The statements of the lady recorded are referred to in paragraph 4 of the grounds of detention. These statements were recorded on and after 23rd September 2014. Another similar case is referred to in paragraph 5. Details were received with regard to mobile phones on 4th February 2015 and 5th February 2015. Using these details the detenu and his wife, the Petitioner before us, were located. The statement of the detenu's wife, the Petitioner before us, was recorded on 19th February 2015. In the Petition the ground of delay taken as one of the challenges to the preventive detention order is summarized at pages 8, 9 and 10 as under:

“(i) The Petitioner says and submits that on or about 23.09.2014, the gold were seized from two ladies Shahin Patel and Shabana Shaikh. The detenu was arrested by the officer A.I.U. on 13.02.2015 and was granted bail on 01.04.2015. The statement of the detenu were recorded on 13.02.2015. The Petitioner says and submits that

assuming whilst denying that impugned order of detention was warranted to be issue promptly and vigilantly after the alleged incident and soon after the seizure of gold and when the two woman have given inculpatory statement on 23.09.2014 involving the detenu. The Petitioner says and submits that instead, the impugned order of detention was belatedly and leisurely issued on 17.07.2015 after a period of 10 months from the investigation in the matter and after 5 months from the date when the detenu has given inculpatory statement. The Petitioner says and submits that it is pertinent to note that the detaining authority while issuing the detention order has considered only 250 pages documents. The Petitioner says and submits that the impugned order of detention issued after 10 months is after inordinate and inexcusable delay. The Petitioner says and submits that the detenu not having come to the adverse notice of the officer of A.I.O. or any other authorities during the said interregnum period when he was granted bail and when impugned order of detention was issued and as a result the live link having been snapped sand the credible chain, if any, has been broken. The Petitioner says and submits that the impugned order of detention is state and remote in point of time. In the result, the impugned order of detention is malafide null and void."

5. In response to this ground, we have the Affidavit in Reply of the Sponsoring Authority. In that Affidavit in Reply at paragraph 4, the Sponsoring Authority states that there is absolutely no delay on its part. The case was booked on 23rd September 2014 and on the basis of the statements recorded of Ms. Shahin Farooq Patel and Ms. Shabana Habib Shaikh and further investigation in the matter, the detenu was apprehended on 13th February 2015. His statement was recorded and he was arrested on that very day. He was produced before the Additional Chief Metropolitan Magistrate, Mumbai on 14th February 2015. He retracted his statement on the same day. The Additional CMM remanded him to judicial custody. The detenu applied for bail on 14th February 2015, and a reply to the bail application was filed on 20th February 2015 by the Sponsoring Authority. The Sponsoring Authority/Department also rebutted the retraction. The judicial custody of the detenu was extended further. His bail application was rejected on 25th February 2015 and 5th March 2015. The detenu approached the Sessions Court for bail on 5th March 2015. It was rejected on 18th March 2015. Thereafter, the detenu approached this Court and it enlarged him on bail on 1st April 2015. It is stated that after completion of a preliminary investigation, the file was forwarded to the COFEPOSA cell for drawing up a proposal on 4th March 2015. The proposal was prepared on 12th March 2015 and placed before the Chief Commissioner of Customs on 13th March 2015. Approval was obtained on 26th March 2015 and there were further steps taken of forwarding it to the Screening Committee on 31st March 2015. The Screening Committee on 10th April 2015 approved the proposal. The approval was received from the COFEPOSA section

on 15th April 2015. That is how the proposal was forwarded to the Detaining Authority on 15th April 2015.

6. The Detaining Authority in the Affidavit in Reply makes bold to say that there is “only a delay of three months and four days” between the date of receipt of this proposal and the order of detention. The Affidavit then claims that once the proposal was received prompt action was taken by the Detaining Authority. The Detaining Authority tries to explain the steps taken by inviting our attention to the role of several officers and subordinates through whose hands such files pass. The Affidavit makes interesting reading and, therefore, we reproduce paragraph 6 thereof:

“6. With reference to paragraph No. 5(i), (vii) and (viii) of the petition, I say that the after getting approval of the Screening Committee in its meeting dated 10.04.2015, the Sponsoring Authority submitted 4 sets of the proposal, brief facts and indexed Relied upon documents in my office i.e. Principal Secretary (appeals & security), Home Department, Government of Maharashtra on 15.04.2015.

After the scrutiny of the proposal, I as the Detaining Authority issued the Detention Order on 17.072015 which is after a period of only 3 months and 4 days from the receipt of proposal. The time consumed by me was for scrutinizing, evaluating and analyzing in detail the proposal as well as the documents which were received by me. The time taken for coming to the decision of subjective

satisfaction by me has been explained here in below.

The proposal for Prevention detention received from Sponsoring Authority under COFEPOSA Act, 1974 is to be scrutinized by me as the Detaining Authority according to the safeguards and the procedural guidelines received by me time to time from Department of Revenue, Ministry of Finance, Government of India. For this, my office is constituted which consists of the Assistant, the Section Officer, the Deputy Secretary and the Principal Secretary (Appeals and Security), Home Department who is empowered with powers of Detaining Authority. This office works only according to the directions given by me. This office scrutinizes the proposal according to the safeguard/procedural guidelines of Government of India and submits for my order. Accordingly when the current proposal was received, it was scrutinized and the Scrutiny Note was submitted by concerned Assistant on 18.04.2015. The Section Officer endorsed it on 18.04.2015 and the Deputy Secretary endorsed it on 20.04.2015 (19.04.2015 was Sunday). I as the Detaining Authority approved the Scrutiny Note on 21.04.2015. The additional information on some points raised in the Scrutiny Note were called by letter dated 21.04.2015. The Sponsoring Authority forwarded the additional information by letter dated 06.05.2015 which was received in this Department on

11.05.2015. There were holidays on 09.05.2015, 10.05.2015 and 17.05.2015 on account of second Saturday and Sunday's. After scrutinizing the information forwarded by the Sponsoring Authority, the scrutinized note was submitted by the concerned Assistant on 18.05.2015. The Section Officer and the Deputy Secretary endorsed it on 19.05.2015. There were holidays on 23.05.2015, 24.05.2015 and 31.05.2015 on account of Fourth Saturday and Sunday's. On 02.06.2015, I as the Detaining Authority directed to get some details of the case from the Sponsoring Authority. The letter was sent to the Sponsoring Authority on 03.06.2015. The Sponsoring Authority forwarded the information by letter dated 10.06.2015 which was received in this Department on 24.06.2015. After scrutinizing the information forwarded by the Sponsoring Authority, the same was submitted by the section officer on 26.06.2015. There were holidays on 27.06.2015 and 28.06.2015 on account of Fourth Saturday and Sunday. This note was endorsed by the Deputy Secretary on 29.06.2015. After considering the proposal and after subjective satisfaction, on 01.07.2015, I as the Detaining Authority directed to take the dictation. The Detention Order was finally issued on 17.07.2015.

The detention order was thus issued after a span of 3 months and 4 days from the date of receipt of proposal. In fact, the

time which has been spent by me as the Detaining Authority shows the sincere efforts to satisfy myself as to the need of detaining the detenu and after my subjective satisfaction, the Detention Order was issued. Hence, the same cannot be casted upon the authority as a fault on my part."

7. After hearing Ms. Ansari and Mr. Yagnik on this limited point, i.e., the ground of delay, we are satisfied that the order of detention is vitiated by an enormous and unexplained delay. This Court and the Hon'ble Supreme Court on a number of occasions have criticized the approach of the Sponsoring Authorities and especially of the Detaining Authorities. If these authorities are indeed sincere about apprehending smugglers, checking smuggling and taking further steps to prevent its perpetuation, then they ought to have paid heed to the repeated warnings of the country's highest Court. Instead, we are deeply troubled to see absolutely no change in their approach. The time consumed for scrutiny, evaluation and a detailed analysis of proposals received from the Sponsoring Authority should not be so much as would enable the live link to be snapped, the credible chain broken and the very purpose of the detention proposed itself defeated. After the detenu was enlarged on bail on 1st April 2015, if the detaining authority on receipt of the proposal on 15th April 2015 does not issue the detention order till 17th July 2015, then we have no alternative but to record our satisfaction that there is indeed a long and unexplained delay sufficient to conclude that the live link is snapped.

8. We find that the scrutiny note was submitted by the assistant concerned on 18th April 2015. The Deputy Secretary endorsed it on 20th April 2015. The Detaining Authority approved the scrutiny note on 21st April 2015. The additional information forwarded by letter dated 6th May 2015 was received in the Department of Home on 11th May 2015. From 11th May 2015 till the issuance of the detention order on 17th July 2015, the explanation is that 9th, 10th and 17th May 2015 were holidays on account of second Saturday and Sundays. We are not concerned with 9th and 10th of May because on that day the additional information was not received at all. The additional information was received on 11th May 2015; yet nothing was done till 17th/18th May 2015. This additional information was scrutinized for the first time after 17th May 2015 and another note was submitted by the assistant concerned on 18th May 2015. The Section Officer and the Deputy Secretary endorsed it on 19th May 2015. The explanation then is that there were holidays on 23rd, 24th and 31st May 2015. On 2nd June 2015, the Detaining Authority directed that some further details of the case be got from the Sponsoring Authority. The letter was sent to the Sponsoring Authority on 3rd June 2015. Thus, from 19th May 2015 till 2nd June 2015, there was no meaningful action taken. A letter was sent to the Sponsoring Authority on the Detaining Authority's direction on 3rd June 2015. The Sponsoring Authority forwarded the information by its letter dated 10th June 2015, which was received in the Department on 24th June 2015. After scrutiny of this information by the Sponsoring Authority, it was submitted by the Section Officer on 26th June 2015. Then again holidays on 27th and 28th June 2015 are said to have presented difficulty. The Deputy Secretary endorsed this note on 29th June 2015 and,

thereafter, the Detaining Authority satisfied himself on 1st July 2015 and directed dictation to be taken. The Detention Order was finalised on 17th July 2015. We do not believe these explanations are satisfactory, nor are we persuaded to hold that there is no delay or that such delay as exists is trivial. The very fact that there is an order of preventive detention under a statute like COFEPOSA necessarily implies a situation of more than common urgency. This is, after all, a matter of deprivation of personal liberty. The law and our Constitutional framework demand that actions that curtail personal liberty must be taken swiftly and accurately. There is no margin for error or tardiness. The public at large expects from these officers that they will control and some day would be able to totally stop the smuggling activities.

9. Although the following two decisions of the Supreme Court have been cited innumerable times in our orders, and although each is today a locus classicus, we find they bear reiteration and repetition if only because our State-level functionnaries appear to have entirely lost sight of them. We must insist that the Respondents heed the words of the Supreme Court in *Dropti Devi & Anr. v Union of India & Ors.*¹ 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.*,²:

“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

¹ AIR 2012 SC 2550 : (2012) 7 SCC 499

² (2000) 3 SCC 409; para 45 of the AIR report.

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 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)

10. In *Dropti Devi*, the Supreme Court also noted the minority open, though dissenting on the question of law:³

45.1. In the minority opinion, G.T. Nanavati, J. although differed with the view of majority on the question of law but he also noted:

“the distinction between preventive detention and punitive detention has now been well recognised. Preventive detention is qualitatively different from punitive detention/sentence. A person is preventively detained without a trial but punitive detention is after a regular trial and when he is found guilty of having committed an offence. The basis of preventive detention is suspicion and its justification is necessity. The basis of a sentence is the verdict of the court after a regular trial. When a person is preventively detained his detention can be justified only so long as it is found necessary”.

(*Emphasis added*)

11. In *Dropti Devi*,⁴ the Supreme Court also referenced the decision of the 9-Judge bench in *Attorney General for India v Amratlal Prajivndas & Ors.*,⁵ upholding the constitutional validity of COFEPOSA and impressing upon all concerned the societal ill

³ *Dropti Devi*, *supra*, para 45.1 of the AIR report; per G.T. Nanavati J.

⁴ *Dropti Devi*, paras 46 and 58 to 60 of the AIR Report.

⁵ AIR 1994 SC 2179 : (1994) 5 SCC 54.

effects of smuggling and its impact on the nation's economy and on the public interest. Finally, the Supreme Court in *Dropti Devi* insisted that Constitutional and statutory safeguards in matters of preventive detention demand strict adherence.

12. We must also make reference to the decision of the Supreme Court in *Saeed Zakir Hussain Malik v State of Maharashtra & Ors.*⁶ 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*,⁷ 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 order is inconclusive. A Court will examine the types of grounds given for detention *and consider whether such grounds could really weight 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.

13. 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,

⁶ AIR 2012 SC 3235 : (2012) 8 SCC 233

⁷ (1974) 4 SCC 1

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 words⁸ should never be forgotten when dealing with *any* detenu:

"there, but for the grace of God, go I."

14. It is in these circumstances, while reminding the Detaining Authority as also the Sponsoring Authority of their duties and responsibilities, we have no other alternative but to quash and set aside the detention order as admittedly it is vitiated by a delay of three months and four days.

15. Rule is, therefore, made absolute in terms of prayer clause (a). The detention order is quashed and set aside. The detenu shall be released forthwith, if not required in any other case.

16. In the view that we have taken, we have not considered the other grounds on which the detention order is challenged.

(G. S. Patel, J.)

(S. C. Dharmadhikari, J.)

⁸ Often attributed to Sir Thomas More, we believe somewhat inaccurately.