

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 123 OF 2017

Gaurav Kanak Jain

..Petitioner

v/s.

The State of Maharashtra .

Through Addl. Chief Secretary (Home)

Government of Maharashtra,

Home Department,

Mantralaya, Mumbai 400 032 & Ors.

..Respondents

Mr. Vikram Nankani, Senior Advocate with Mr. Sujay Kantawala, Mr. Sanjay Agarwal, Mr. H.K.Sudhakar, Ms. Neha Ahuja, Mr. Yogesh Rohira i/b. M/s. HKS Legal for the Petitioner.

Mr.S.K.Shinde, PP with Mr. J.P.Yagnik, APP for the Respondent/State.

Mr.R.K.Pathak for the Respondent No.3.

CORAM : RANJIT MORE &

SMT. ANUJA PRABHUDESSAI, JJ.

JUDGMENT RESERVED ON : 27TH MARCH 2017.

JUDGMENT PRONOUNCED ON: 5TH MAY, 2017.

JUDGMENT (PER ANUJA PRABHUDESSAI, J.)

1. Rule. Rule made returnable forthwith. With the consent of parties taken for hearing.
2. The Petitioner has filed the present petition for issuance of writ

or direction to quash and set aside the impugned order of detention bearing No. PSA-1216/CR-6(1)/SPL-3(A) dated 21st November, 2016 issued against him by the Respondent No.2 hereinabove.

3. The brief facts necessary to decide this petition are as under:

On 7th December, 2015 one Raj Vasant Jadhav was intercepted by the officers of the Respondent No.3 while he was proceeding towards the exit gate of customers arrival baggage hall at CSI Airport, Mumbai. Undeclared 7 foreign origin gold bars of 1 kg each were recovered from his possession under Section 77 of the Customs Act, 1962. Said gold bars were seized by the Officers of the Respondent No.3 under a reasonable belief that same were smuggled by him to India in contravention of the provisions of the Customs Act.

4. In his statement dated 7th December, 2015 Mr. Jadhav claimed that the smuggled gold bars belonged to one Atonu Kumar Ghosal and were to be delivered to the Petitioner herein, who is the owner of the jewelery shop. Said Jadhav had claimed that on earlier occasions he had delivered about 30 to 35 kg of gold to the Petitioner which was brought to him during last 8 to 10 visits on payment of his commission/payment by said Ghosal.

5. The Petitioner was arrested on 22nd December, 2015 and his statement was recorded. He was remanded to judicial custody on 23.12.2015 and his custody was extended from time to time.

6. On 6th January, 2016 the Screening Committee recommended the proposal sponsored by the Office of the Respondent No.3 to detain the Petitioner. Since no criminal prosecution was filed, the Petitioner was granted default bail on 22.2.2016 under Section 167 (2) of the Cr.P.C. On 1.6.2016, after completion of the investigation show cause notice was issued to the Petitioner and on 21.11.2016 the impugned detention order was passed purportedly under Section 3(1)(i) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1976 (for Short 'COFEPOSA' Act).

7. The Petitioner challenged the said order before the Apex Court in Writ Petition (Cri.) 178 of 2016 and by Order dated 5.1.2017 the Petitioner was allowed to withdraw the said petition with liberty to approach the High Court. The Petitioner has thereafter filed the present petition challenging the impugned Order of detention.

8. In response, Shri Shree Kant Singh, Principal Secretary (Appeals and Security), Government of Maharashtra, Home

Department has filed affidavit and additional affidavit. It is stated that in view of the discussion of the Apex Court in *Union of India & Ors. v. Vidya Bagaria*¹ the petition is not maintainable at pre-execution stage. The Detaining Authority has narrated the chronology of events and has stated that there is no deliberate delay in issuing the order. It is further stated that the Petitioner was absconding and was not available even though the order under Section 7(1)(b) of COFEPOSA was issued on 3.1.2007. The Detaining Authority has stated that the Petitioner has not been able to make out an exceptional ground to accept the petition at the pre-detention stage.

9. Mr. Nankani, the learned Counsel for the petitioner has assailed the impugned order mainly on the ground of delay in issuing the detention order. He has submitted that there is gross, inordinate and inexplicable delay in issuing the impugned order dated 21.11.2016. He has submitted that the gold bars were allegedly seized on 7.12.2015. The proposal for preventive detention was sponsored and approved on 6.1.2016, whereas the detention order was passed

¹ (2004) 5 SCC 577

on 21.11.2016. He has submitted that there is no reason to justify the laxity in issuing detention order and there is no live and proximate link between the alleged prejudicial activity and the necessity to detain. He has submitted that the inordinate delay in passing the order of detention vitiates the same and exposes the lack of any real subjective satisfaction on necessity of detention. He has relied upon the decision of the Apex Court in *Addl. Secretary, Government of India vs. Alka Subhash Gadia*², and the decision of this Court in *Farida Chamundi v. State of Maharashtra*³ and Shaikh Khan vs. The State of Maharashtra & Anr. Criminal W.P. No. 208 of 2012.

10. The learned APP has submitted that the Petitioner was the actual beneficiary of the illicit trade of gold, which was smuggled by Mr. Jadhav from London. She has further submitted that the delay in issuing the detention order has been explained in the additional affidavit filed by Shri Shree Kant Singh, Principal Secretary (Appeals and Security) Government of Maharashtra, Home Department, Mantralaya. She has submitted that there was no delay on behalf of

² 1992 Supp (1)SCC 496

³ 2016 ALL MR (Cri) 2285

the Detaining Authority and that the alleged delay, if any, was caused mainly because the Detaining Authority was required to obtain additional information on several points from the Sanctioning Authority. She has further stated that the Petitioner was absconding and hence there was delay in executing the detention order.

11. We have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

12. We shall first consider the issue of maintainability of the criminal petition at the pre-execution stage. In this regard, it is advantageous to refer to the decision of the full Bench of the Apex Court in *Addl. Secretary to the Government of India and Ors. vs. Smt. Alka Subhash Gadia & Anr.*⁴ wherein it has been held as under:

“30. As regards his last contention, viz., that to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this argument is also not well-merited based as it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise.

4 1992 Supp(!)SCC 496

Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the Courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the Courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary, extraordinary, and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the courts. To accept Shri Jain's present contention would mean that the courts should disregard all these time-honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibbal for the appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is

made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are *prima facie* satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary power of judicial review to interfere with the detention orders prior to their execution on any other grounds does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

31. Lastly, it is always open for the detenu or anyone on his behalf to challenge the detention order by way of habeas corpus petition on any ground available to him. It is not, therefore, correct to say that no judicial review of the detention order is available. In the view we are taking which applies also to the cases under other laws, the stage at which the judicial review is made by the Court only stands deferred till after the order is executed. A ground on which a detention order is challenged which requires investigation and cannot be adjudicated without hearing the other side and without proper material, has necessarily to await decision till the final hearing. In such cases the operation of the order of detention by its very nature cannot be stayed pending the final outcome. The only proper course

in such cases is to hear the petition as expeditiously as possible.”

13. In **Deepak Bajaj v. State of Maharashtra and Anr.**⁵, the Supreme Court has held that the five grounds mentioned in the case of Addl. Secretary to the Government of India and Ors (supra) on which the Court can set aside the detention order at the pre-existing stage are only illustrative and non-exhaustive. The Apex Court has held that :-

9. *If a person against whom a prevention detention order has been passed can show to the Court that the said detention order is clearly illegal why should he be compelled to go to jail? To tell such a person that although such a detention order is illegal he must yet go to jail though he will be released later is a meaningless and futile exercise.*

10. *It must be remembered that every person has a fundamental right of liberty vide Article 21 of the Constitution. Article 21, which gives the right of life and liberty, is the most fundamental of all the Fundamental Rights in the Constitution. Though, no doubt, restrictions can be placed on these rights in the interest of public order, security of the State, etc. but they are not to be lightly transgressed.*

11. *In Ghani vs. Jones (1970)1 Q.B. 693 (709) Lord Denning observed :*

"A man's liberty of movement is regarded so highly by the law of England that it is not to be hindered or prevented except on the surest ground"

5 (2010) 4 SCC 122

12. *The above observation has been quoted with approval by this Court in Govt. of Andhra Pradesh vs. P. Laxmi Devi J.T. 2008 (2) SC 639 (vide para 90).*

13. *If a person is sent to jail then even if he is subsequently released, his reputation may be irreparably tarnished. As observed by this Court in State of Maharashtra & Ors. vs. Public Concern for Governance Trust & Ors. 2007 (3) SCC 587, the reputation of a person is a facet of his right to life under Article 21 of the Constitution (vide paragraphs 39 and 40 of the said decision).*

14. *As observed by the three Judge bench of this Court in Joginder Kumar vs. State of U.P. & Ors. AIR 1994 SC 1349 (vide para 24) :*

".....The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person."
(emphasis supplied)

15. ...

16. *If a person against whom a preventive detention order has been passed comes to Court at the pre execution stage and satisfies the Court that the detention order is clearly illegal, there is no reason why the Court should stay its hands and compel the petitioner to go to jail even though he is bound to be released subsequently (since the detention order was illegal). As already mentioned above, the liberty of a person is a precious fundamental right under Article 21 of the Constitution and should not be likely transgressed. Hence in our opinion Smt. Alka Subhash Gadia's case (supra) cannot be construed to mean that the five grounds mentioned therein for quashing the detention order at the pre execution stage are exhaustive.*

14. The three Judges Bench of the Apex Court, in ***Subhash Popatlal Dave v. Union of India & Anr.***⁶ has reiterated that the order of preventive detention can be challenged beyond five grounds which have been enumerated in the case of Alka Subhash Gadia even at the pre-execution stage. Thus the issue of maintainability of the writ at pre-execution stage is no longer res-integra.

15. Now, coming to the ground of delay in issuing the order, before advertng to the facts, it would be advantageous to refer to the decision of the Apex Court in ***Rajendra Arora v. Union of India and Ors.***⁷, wherein the Apex Court has held that:-

“The question as regard delay in issuing the order of detention has been held to be a valid ground for quashing an order of detention by this Court in T.D. Abdul Rahman v. State of Kerala & Ors. [AIR 1990 SC 225] stating:-

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

⁶ (2014) 1 SCC 280

⁷ (2006)4 SCC 796

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.

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."

16. It would also be necessary to refer to the decision of the Apex Court in Subhash Popatlal Dave vs. Union of India (supra) wherein the Three Judges Bench of the Apex Court examined the legality of the detention order on the ground of delay in passing the detention order and has held that the delay by itself is not fatal and the same can always be explained to the satisfaction of the Court.

17. Reverting to the facts of the present case, the records reveal that 7 gold bars were seized from one Raj Vasant Jadhav on 7.12.2015. His statement was recorded on the same date wherein he

had disclosed that the said gold bars were given by one Ghosal to be delivered to the Petitioner herein. The Petitioner was thereafter arrested on 12.12.2015 and his detention was sponsored by the Screening Committee on 6.1.2016. It is to be noted that since no charge sheet was filed against the Petitioner during the stipulated period, he was granted default bail on 20.2.2016. The show cause notice was issued to him on 1.6.2016 and the detention order was passed on 21.11.2016. Thus, there is a time gap of 11 months and 14 days from the date of seizure and the detention order and 5 months and 20 days between the show cause notice and the detention order.

18. In the affidavit in reply filed by Shri Shree Kant Singh, Principal Secretary (Appeals and Security) the Respondents have sought to explain the delay by stating that the delay was not deliberate. He has stated that the loss of time was mainly because of the additional information which was required to be called from the Sponsoring Authority. In this regard, we have perused the records which were placed before us. The records reveal that the Screening Committee had approved the proposal on 6.1.2016. The Scrutiny note was

submitted on 16.1.2016 and the Detaining Authority approved the Scrutiny Note on 18.1.2016. The additional information which was called for on 18.1.2016 was received in the Department of Home on 27.1.2016. The note on additional information was submitted by the concerned Assistant Section Officer on 28.1.2016. Nothing was done till 30.1.2016, on which date the Detaining Authority directed to carry out scrutiny and verification of documents submitted by the Sponsoring Authority. It is stated that 31st January, 2016 was a holiday. The additional information was scrutinized only on 2nd February, 2016 and further information was sought to be obtained from the Sponsoring Authority. Two days later, i.e. on 4th February 2016 the Detaining Authority approved the note and on the same day called for additional information. The additional information was received in the department on 9.2.2016 and on 10.2.2016 the concerned Assistant Section Officer prepared a note in respect of the said information and submitted the same for consideration of the Detaining Authority. On 15.02.2016 the Detaining Authority directed to get some details as regards CCTV Footage, whether there was retraction of statement, and whether there was any seizure of

gold in the past. By letter dated 18.02.2016 the details were called for. Literally nothing happened between 19.2.2016 till 28.2.2016. The explanation is that 19th, 21st, 27th and 28th were holidays being Chatrapati Shivaji Maharaj Jayanti, Sunday, 4th Saturday and Sunday. The additional information was received on 1st March, 2016. Nothing was done on 2nd and 3rd March, 2016. No explanation is forthcoming as regards these two dates. On 4.3.2016 the information was submitted by the concerned Assistant Section Officer before the Detaining Authority. Again nothing transpired from 5.3.2016 till 13.3.2016. Out of these 7 days, 6th and 7th March were holidays. No satisfactory explanation is given about remaining five days. On 14.3.2016 the Detaining Authority directed to get further information from the Sponsoring Authority as regards the presence of the Petitioner at the Airport at the time of the incident. Note was prepared on 15.3.2016 and the letter in that regard was sent to the Sponsoring Authority on 17.3.2016.

19. On 15.3.2016 the Petitioner made a representation and on 21.3.2016 the Detaining Authority called for parawise comments. The letter to the Sponsoring Authority, calling for parawise remarks

was sent only on 28.3.2016.

20. In response to letter dated 17.3.2016, the Sponsoring Committee furnished the information vide its letter dated 21.3.2016. The same was placed before the Detaining Authority on 28.3.2016. Nothing transpired between 29.03.2016 till 6.4.2016. On 7.4.2016 the Detaining Authority directed to get remarks on the pre-detention representation. Nothing transpired for the next ten days. The explanation is that out of these 10 days, six days were holidays. Yet, there is no explanation as regards the remaining four days. Reminder was sent to the Sponsoring Authority on 18.4.2016 and again on 6.5.2016. In between nothing transpired. Para-wise comments were received from the Sponsoring Authority on 9.5.2016. On 12.5.2016 the Detaining Authority directed to get status of the show cause notice from the Sponsoring Authority. Letter calling for such status report was sent only on 20.5.2016. Reply was received from Sponsoring Authority on 27.5.2016. No further action was taken till 2.6.2016. On 3.6.2016 the Sponsoring Authority forwarded copy of the show cause notice and the note in respect of the same was put before the concerned Assistant Section Officer on

9.6.2016.

21. On 22.6.2016 the Detention Authority directed to verify if reply to the show cause notice was given and whether he was involved in any other offence of such nature. Letter to that effect was sent on 24.6.2016. Reminder was sent on 5.7.2016. On 20th July, 2017 the Sponsoring Authority replied that the Petitioner had not replied to the show cause notice and further informed that he was not involved in any other offence of similar nature after the case.

22. In the meantime, on 13.7.2016 the Petitioner filed another representation. By letter dated 15.7.2016 para-wise comments were called for from the Sponsoring Authority. Para-wise comments were given by the Sponsoring Authority on 11.8.2016. Nothing transpired till 28.8.2016. On 29.08.2016 the concerned Assistant Section Officer submitted a note and on 2.9.2016 the Detaining Authority directed to get classification whether the Petitioner was involved in similar case prior to this case. Reminders were issued to the Sponsoring Authority on 19.9.2016 and 14.10.2016. It is stated that on 4.11.2016 information was put up as per the statement of Jadhav, Ghosal and Murudkar and on 8.11.2016 Detaining Authority

directed to take dictation and detention order was issued on 21.11.2016.

23. We have given the detail chronological events only to highlight the time consumed by the Detaining Authority to issue the detention order. As stated earlier, there is delay of about 11 months and 14 days from the date of seizure till the date of detention order and delay of 5 months 20 days from the date of show cause notice and the Detention order. The records reveal that seeking of piecemeal information and bureaucratic red tapism was mainly the reason for the delay in issuing the detention order. Suffice it to say that in a matter of deprivation of personal liberty, the authority is under obligation to act swiftly and diligently. In the instant case, we have no doubt in our mind that the Authority did not discharge its duty with diligence and commitment. As regards explanation, apart from highlighting the holidays during this interregnum period, the authority has not given reasonable and acceptable explanation for the inordinate delay in issuing the detention order. The laxity of the Authorities, which had resulted in inordinate and unexplained delay in issuing the detention order, in our opinion, has snapped the live

link between the prejudicial activities and purpose of detention. We, therefore, have no other alternative but to quash the proceeding. Hence, the petition is allowed. Rule is made absolute in terms of prayer clause (a).

(ANUJA PRABHUDESSAI, J.)

(RANJIT MORE, J.)