

\$~12

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(CRL) 577/2018 & CRL.M.A. 3688/2018**

BORIS SOBOTIC MIKOLIC Petitioner
Through: Ms. Anjali Jha Manish and Mr.
Priyadarshi Manish, Advocates.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Vinod Diwakar, CGSC with
Ms. Titasha Banerjee, Mr. Akshaya
Agarwal & Mr. Sanjay Pal,
Advocates for Respondent Nos. 1 & 3
Mr. Satish Aggarwala, Senior
Standing Counsel for DRI.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

JUDGMENT
29.05.2018

%

Dr. S. Muralidhar, J.:

1. This is a petition by a Slovenian national seeking a writ of certiorari to quash a detention order dated 17th October 2017 issued by the Joint Secretariat of the Government of India, COFEPOSA Unit, Central Economic Intelligence Bureau, Department of Revenue, Ministry of Finance. The said detention order No. F.No.PD-12001/04/2017-COFEPOSA was issued under Section 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 [COFEPOSA Act].

2. At the outset it requires to be noted that one of the contentions raised by

the Petitioner is that he has not yet been served with a copy of the aforementioned detention order. Therefore, prayer (b) in the writ petition is for a direction to the Respondents to place on record the said detention order.

3. The background facts as set out in the petition are that the Petitioner, among others things, is a National Sports Shooter and a Member of the National Shooting Association in Slovenia. After 2004, he left business and apparently worked in an Austrian company engaged in the selling/production of arms, weapons and ammunitions as a Manager from 2004 till 2006. In 2007, he left this company as well and is stated to have opened a gun shop inside a shooting range in Maribor, which is about 25 kms away from his home town. Initially, he sold weapons to mainly Slovenian buyers. Later as shooters came for practice from all over the world to the said shooting range, he got acquainted with many of them from various countries and this included some Indian shooters as well. The Petitioner is stated to have closed the gun shop, and begun to travel to various parts of the world as a travel agent. It is stated that the Petitioner's wife is the only Director of the Company Mikos D.O.O., Slovenia which has been in existence since 2009 and has been managing its affairs. The company is engaged in the sale of arms and ammunition.

4. Two Indians i.e. Mr. Amit Goel and Mr. Anil Langan are stated to have visited Slovenia in April, 2017 and asked the Petitioner to accompany them to India for touring purposes. According to the Petitioner, since it was a lean business period as Slovenia had national holidays during that time, he

accompanied them on a visit to India. On 28th April 2017, they boarded a Turkish Airlines flight and reached India on 29th April 2017. After his immigration clearance, the Petitioner waited for the other two Indians since they had arms and ammunition with them and had approached the 'red channel' for clearance and to complete the necessary formalities. Mr. Amit Goel was in possession of weapons and paid *ad valorem* duty, after the Customs officers had ascertained the description and value of the articles carried by him.

5. As the Petitioner was about to exit along with Mr. Amit Goel, officers of the Directorate of Revenue Intelligence ('DRI'), Delhi Zonal Unit intercepted them at the exit gate of the terminal at IGI Airport and asked both the Petitioner and Mr. Goel to accompany them to the Preventive Room. Later, Mr. Anil Kumar Langan also joined them.

6. According to the Petitioner, although no weapons and arms were recovered from him, he was detained by the DRI Officers from 29th April 2017 till 1st May 2017 when he was finally produced before the Duty Magistrate. He claims to have been made to give statements as per the diktats of DRI Officers and forced to admit amongst other things that two pistols recovered from Mr Langan were actually his and that his wife's company had sold arms to the two Indians at lesser prices and he had come here to collect the money in cash. According to the Petitioner, he informed the DRI that the fire arms recovered from Mr. Goyal and Mr. Langan had been sold by his company pursuant to appropriate export permits issued by the Slovenian authorities. The Petitioner claimed to have no concern with

the company because it was managed by his wife. He maintained that he was not the seller of fire arms and therefore had not received any money either from Mr. Langan or Mr. Goyal for the sale. He claimed that as per the prevalent Slovenian law, the invoices in this regard are updated online and payment is accepted through electronic exchange only and hence under invoicing was not possible.

7. On 15th May 2017, the Petitioner applied for bail in which he also retracted the statement made by him to the DRI and stated specifically that he was not concerned with the invoices and transactions shown to him. He claimed that the documents were falsely manipulated to implicate him. The Petitioner's bail application was rejected by the Chief Metropolitan Magistrate ('CMM') on 18th May 2017. Thereafter, the Petitioner filed a bail application before the learned Sessions Judge on 2nd June 2017. By order dated 8th June 2017, the learned Sessions Judge also rejected the bail application.

8. After he had completed a period of sixty days in custody, the Petitioner was granted statutory bail under Section 167 (2) Cr PC by an order dated 1st July 2017 of the CMM subject to the following conditions:

“(i) That the I.O/DRI officers shall open the LOC against Accused since the Accused is a foreign national;

(ii) That the Accused shall not leave the territories of Delhi/ NCR for the period of 30 days from the date of his release and shall join the investigation as and when required;

(iii) That the Accused is directed to surrender his passport, if any before the I.O. within seven days from today;

(iv) That the Accused shall not leave the country without seeking prior permission from the Court;

(v) That the Accused shall attend the proceedings either before the I.O. or before the Court, in accordance with the conditions of the bond executed by him.”

9. Meanwhile, the DRI issued a Show Cause Notice (‘SCN’) dated 13th October 2017 under Section 110 (2) of the Customs Act, 1962 alleging *inter alia* that a syndicate is involved in smuggling of arms and ammunition from Slovenia to India. The SCN referred to the personal search of the Petitioner upon his arrival at the IGI Airport. It stated that the search of his baggage which included one silvery handbag resulted in the recovery of personal effects and a personal diary with certain written pages and loose papers “which appear to be relevant in the instance case”. Reference was also made in the SCN to the statements purportedly made by the Petitioner under Section 108 of the Customs Act, 1962 stating that the invoices presented before the Indian Customs Authority by Mr. Amit Goel and Mr. Anil Langan were not the original invoices and had been prepared on their instructions for the purposes of clearance at Indian Customs. The original invoices stated to have been produced by the Petitioner which were presented to Slovenian Customs were found to have detailed and complete descriptions of the goods sold at a much higher value.

10. In paragraph 16 of the SCN, it was stated that the noticees, who apart from Mr. Goyal and Mr. Langan included the Petitioner, could submit their written replies thereto “to the respective Adjudicating Authority on or before 24.10.2017.” In the same paragraph, it was stated that the noticees may also

appear for personal hearing which was fixed at 11 am on three dates i.e. 17th, 23rd or 24th October 2017 “as convenient, before the respective Adjudicating Authority.” Copies of this SCN were also marked to the Principal Commissioner of Customs (Preventive) New Customs House, New Delhi.

11. Enclosed with the present petition is a copy of an order dated 26th October 2017 passed by the Principal Commissioner of Customs (Preventive), who adjudicated the above SCN dated 13th October 2017 issued by DRI. In para 17 of the said order, it was noted that the present Petitioner had appeared for personal hearing along with his Advocate on 24th October 2017 and had submitted that “he has been cooperating all along and provided whatever information he had and that he had not been called by DRI since July, 2017 and therefore no valid reason was there for extending the date for issuance for SCN to him.” The Petitioner also pointed out to the Adjudicating Authority that in his written reply to the SCN he had denied the allegations levelled against him. He could not provide the documents sought by DRI as he was not an owner/Director of the supplier firm and that the supplier M/s Mikos was barred from sharing official documents under Slovenian law.

12. In a portion titled ‘Discussions and Findings’, the Adjudicating Authority in the order dated 26th October 2017 noted that the Petitioner had been visiting India regularly and that he had been receiving payments on behalf of M/s Mikos in cash. Enquires were in progress to obtain the complete details of all the arms and ammunitions supplied by him to the other noticees in the past which were vital to complete the investigation in

the case. Accordingly, it was ordered that the period for issuance of the SCN under Section 124 (a) of the Customs Act should be extended by six months. The Court is informed that pursuant to the above order, a copy of the final SCN dated 26th April 2018 as a soft copy was sent to the Petitioner by e-mail. It does not raise any duty demand against the Petitioner. However, a penalty is proposed. Be that as it may, the fact remains that the Petitioner did appear before the Adjudicating Authority on 24th October 2017 pursuant to the SCN dated 13th October 2017 issued to him.

13. The Petitioner states that an application was filed by him before the learned CMM seeking release of his passport and permission to go abroad for 15 days on 3rd August 2017. The CMM allowed this application by an order dated 9th October 2017 permitting the Petitioner to go abroad for 15 days on certain conditions including payment of cash of Rs.50,000/- in Court. However, despite the said order, the DRI did not release his passport. This led the Petitioner to file yet another application before the CMM on 11th October 2017. On the same date, the DRI filed Crl. M. C. No.4193/2017 in this Court. By an order dated 13th October 2017, a learned Single Judge of this Court stayed the impugned order dated 9th October 2017 of the learned CMM.

14. The Petitioner claims not to have known of passing of a detention order against him on 17th October 2017. Identical detention orders were passed in respect of the three other detainees i.e. Mr.Amit Goel, Mr. Anil Kumar Langan and Mr. Prashant Vishnoi. The said three co-detenuess made representations against their respective detention orders. The Advisory

Board under the COFEPOSA Act declined to confirm the detention orders of Mr. Amit Goel, Mr. Anil Kumar Langan and Mr. Prashant Vishnoi. A copy of the order dated 3rd January 2018 of the Advisory Board has been enclosed with the present petition as Annexure P-15.

15. The Petitioner filed a detailed representation before the detaining authority on 9th January 2018 in regard to his detention order. Since no reply was received thereto, the present petition was filed.

16. Notice was first issued in this petition on 22nd February 2018. On 28th February 2018 the Court passed the following order:

“Crl.M.A.No.3688/2018

1. The counsel for the parties have been heard.

2. The learned counsel for the Respondents states that he has instructions to oppose the prayer for interim relief on the ground that the petitioner has been absconding ever since the detention order dated 17th October 2017 was passed. Nevertheless, the counsel is unable to dispute that the Petitioner has in fact appeared before the Department of Customs on 24th October 2017. The Petitioner has disclosed his address as 'c/o Embassy of Slovenia'. The Court is informed that although letters have been written to the Slovenian Embassy for verification, the response is still awaited.

3. Further, the learned Metropolitan Magistrate (MM) appears to have passed a conditional bail order on an application filed by the Petitioner before that Court. It is stated that the said order has been challenged by the DRI in Crl. M.C. No. 4193/2017 which is pending before a learned Single Judge of this Court.

4. It is not in dispute that the detention orders in respect of the three other co-noticees who were alleged to have engaged in

smuggling of 'non-sport category' arms and ammunition from Slovenia with the Petitioner have been revoked pursuant to the orders passed by the Advisory Board on 3rd January 2018 which have been accepted by the Central Government. Learned counsel appearing for the Central Government is unable to confirm whether any independent case, not involving those three co-noticees, is made out against the Petitioner in the grounds of detention.

5. In the circumstances, the Court considers it appropriate to direct that, till the next date of hearing, no coercive steps will be taken against the Petitioner pursuant to the detention order dated 17th October 2017, which is yet to be served on the Petitioner.

6. List on 4th April 2018. Order *dasti* under the signature of the Court Master.”

17. A reply has been filed to the writ petition on behalf of the detaining authority (Respondent Nos. 1 and 3) in which *inter alia* it is submitted that the present petition is not maintainable since the Petitioner has not submitted himself to the authorities for execution of the detention order. It is averred that the Petitioner is concealing himself and is not available at his last known address and therefore the detention order could not be executed. It is pointed out that in the affidavit in support of the present petition, the address given for the Petitioner is that of Slovenia and is not a local address.

18. The reply sets out in detail the contents of the statements purportedly made by the Petitioner under Section 108 of the Customs Act. Specific to the question of the Advisory Board not confirming the detention order of the other three co-detenuess, it is stated in para 8 that the Advisory Board's opinion was confidential. However, “it is not disputed that the detention order in respect of three persons has been revoked, in view of the opinion of

the Advisory Board.” It is contended that the Petitioner is one of the largest suppliers of small arms to Indian shooters and that one baggage of Mr. Amit Goyal “was found tagged in the name of the Petitioner on 29th April 2017 while travelling to India.”

19. The Court has during the course of the hearing today required the Respondents to produce before it the detention order passed in respect of the Petitioner by the detaining authority on 17th October 2017. The Court has also perused the grounds of detention and finds that the grounds are common to all four detainees i.e. Mr. Prashant Kumar Vishnoi, Mr. Amit Goyal, Mr. Anil Kumar Langan and the Petitioner. The grounds refer to all of them as ‘you’. In other words, there is nothing in the grounds of detention that makes out a case separately against the Petitioner which is different from the grounds of detention in respect of the other three detainees.

20. One of the first grounds urged in seeking the quashing of the detention order is therefore that with identical detention orders in respect of the other three detainees having already not been confirmed by the Advisory Board, no purpose would be served by keeping the detention order in respect of the Petitioner alive. It is also pointed out that the Petitioner has been cooperating with the authorities throughout and has not made any effort to violate any of the Court orders including the conditional order of bail. It is submitted that on the other hand, despite being aware of the fact that the Petitioner was appearing before the Adjudicating Authority on 24th October 2017 pursuant to the SCN issued by the DRI, no effort was made to serve the detention order on the Petitioner and detain him.

21. At the hearing of the case today, Ms. Anjali Manish Jha, learned counsel for the Petitioner, informed the Court that the Petitioner had, in compliance with the conditional order of bail, furnished two sureties. Yet, no attempt was made by the Respondents to enquire from the Petitioner's sureties about his whereabouts. It is stated that the Petitioner was at the address of his surety.

22. In reply it is pointed out by Mr. Vinod Diwakar, learned counsel for the Respondents No. 1 and 3, that at no point in time did the Petitioner disclose his address in Delhi and therefore it was not possible for the Respondents to serve the detention order upon the Petitioner. Reference was made to an affidavit filed in reply to the petition filed by the DRI in this Court challenging the order dated 9th October 2017 passed by the learned CMM granting permission to the Petitioner to travel abroad for 15 days. It is pointed out that even in that affidavit the Petitioner has given his address as that of the Slovenian embassy in Delhi located at Vasant Vihar. However, when the Respondents enquired with the Slovenian embassy they were told that the Petitioner does not stay there.

23. Mr. Diwakar referred to the decision of the Supreme Court in ***Subhash Popatlal Dave v. Union of India (2014) 1 SCC 280*** and in particular to the observations in para 46 of the said judgment that "those who have evaded the process of law shall not be heard by the Supreme Court to say that their fundamental rights are in jeopardy." It is submitted that the Petitioner cannot be permitted to take the advantage of his own conduct and with him having

deliberately evaded the service of the detention order, he should not be granted any discretionary relief or indulgence by this Court. Reference was also made to a decision in *Additional Secretary to the Government of India v. Smt. Alka Subhash Gadia* 1992 Supp (1) SCC 496 where the limited grounds on which High Court can interfere with the detention order at the pre-execution stage has been spelt out. It is submitted that none of those conditions are satisfied in the present case. As regards the case of the other three detainees, a distinction is sought to be drawn by pointing out that in their cases they have submitted themselves to the detention orders and had undergone custody whereas the Petitioner has avoided the service of the detention order upon him. Otherwise, on merits it is not disputed that the grounds of detention are common to all the four detainees including the Petitioner.

24. The Court has considered the above submissions. It would like to begin by referring to the following observations of the Supreme Court in *Rajesh Gulati v. Govt. of NCT of Delhi* (2002) 7 SCC 129:

“It cannot be over emphasized that the object of detention under the Act is not to punish but to prevent the commission of certain offences. Section 3 (1) of the Act allows the detention of a person only if the appropriate detaining authority is satisfied that with a view to preventing such person from carrying on any of the offensive activities enumerated therein, it is necessary to detain such person. The satisfaction of the detaining authority is not a subjective one based on the detaining authority's emotions, beliefs or prejudices. There must be a real likelihood of the person being able to indulge in such activities, the inference of such likelihood being drawn from objective data.”

25. In the present case the facts not in dispute are that far from avoiding the processes of law, the Petitioner responded to the notices issued to him by the DRI. In the first instance after being detained for more than two months he applied for and obtained statutory bail under Section 167 (2) Cr PC. That order, as already noted, was subject to stringent conditions including an LOC having to be opened by the authorities to ensure that the Petitioner is not able to leave the country notwithstanding that his passport is in the custody of the DRI. It is not the case of the Respondents that any of those conditions have been violated by the Petitioner.

26. If indeed the Petitioner was refusing to co-operate in the investigations concerning him, an application ought to have been filed before the learned CMM for cancellation of his bail. There is no such application till date.

27. Thirdly, the Petitioner did respond to be SCN issued by the DRI on 13th October 2017. He appeared before the Adjudicating Authority i.e. the Principal Commissioner of Customs (Preventive) along with his Advocate on 24th October 2017.

28. Mr. Satish Aggarwal, learned counsel for the DRI submitted that the Detaining Authority would not have known that the Petitioner was going to appear before the Adjudicating Authority on 24th October 2017. He pointed out that the detaining authority in Delhi normally hands over the detention order to the Delhi Police for execution. Since the Delhi Police was not part of the adjudication proceedings, they were not aware of this fact.

29. The Court is unable to agree with the above submissions. Apart from

the fact that the SCN was issued by the DRI itself, if indeed as a sponsoring authority, the DRI was serious about the detention order being served upon the Petitioner, it had the responsibility to inform the Delhi Police that in the SCN issued on 13th October 2017, the DRI itself had fixed three alternative dates for the noticees, including the Petitioner, to appear. In this context it requires to be noted that a copy of the order passed by the Adjudicating Authority on 26th October 2017 was marked to the DRI. That order noted the fact that the Petitioner had appeared before the Adjudicating Authority on 24th October 2017. There was, therefore, no ground for the apprehension that the Petitioner was evading the process of law. Thirdly, as part of the compliance with the bail conditions, the Petitioner had provided sureties. A pointed question was asked by the Court to counsel appearing for the Respondents whether any effort had been made by the Detaining Authority or the Delhi Police to contact the sureties provided by the Petitioner to ascertain about his whereabouts. The answer was in the negative.

30. In *K.P.M Basheer v. State of Karnataka (1992) 2 SCC 295*, in similar circumstances where the detinue had been appearing before the Assistant Collector of Customs and no attempt had been made to detain him in those proceedings, the Supreme Court concluded that “the arresting officers did not take any real and genuine effort to secure and detain the Appellant.” The Supreme Court refused to accept the explanation “now offered stating that the Appellant was fugitive, eluding the dragnet of the detention order ...because during the alleged period of search he has appeared before the Assistant Collector of Customs Bombay on two occasions during February 1991, i.e. after passing of the detention order.”

31. The Court would like to add that in the instant case, even when the DRI challenged the order dated 9th October 2017 of the CMM before this Court, the Petitioner in response to the notice issued by this Court filed an affidavit. It is not as if, therefore, the Petitioner has tried to avoid the process of law. The observations in ***Subhash Popatlal Dave v. Union of India*** (*supra*) referred to by Mr. Diwakar may not *stricto sensu* apply in this case. Those observations are in respect of “a law breaker” who, at the time of passing of the detention order was absconding. In the present case, the detention order was passed not at the stage when the Petitioner was absconding but when he was about to be released on statutory bail.

32. As regards the Court interfering with the detention order at the pre-execution stage, what has observed in ***Additional Secretary v. Smt. Alka Subhash Gadia*** (*supra*) is that the jurisdiction of this Court in such circumstances has to be used sparingly. It was pointed out that:

“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 powers of judicial review to interfere with the detention orders prior to their execution on any other ground

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.”

33. It is, however, trite that the above instances are illustrative and not exhaustive. In a given case, where there have been developments subsequent to the passing of the order of detention that make its continuation and execution otiose, it might not preclude the Court from interfering even at the pre-execution stage. In the present case, the stage at which the Petitioner has approached this Court is where the Advisory Board has declined to confirm identical detention orders of the co-detenues.

34. Mr. Diwakar was unable to point out how the case of the Petitioner on merits was any different from that of the co-detenues. The only explanation offered is that while the co-detenues underwent some period of detention, the Petitioner did not. If on merits, the case of the Petitioner is no different from that of the co-detenues and the detention orders in respect of the co-accused have not been confirmed by the Advisory Board, the Court sees no purpose being served in the Petitioner being detained on the basis of the impugned detention order, the grounds for which are no different from the detention orders issued in respect of the co-detenues, which have not been confirmed by the Advisory Board.

35. As reminded by the Supreme Court in ***Rajesh Gulati v. Govt. of NCT of Delhi*** (*supra*), the purpose of a detention order is to prevent the commission of crime. However, in the present case with the Respondents unable to explain how the Petitioner’s case in this regard is any different from that of the co-detenues whose detention orders have ceased to exist, the question of

the Petitioner having the propensity to commit a crime does not arise. In any event his passport is with the DRI and as of now he is available in this country.

36. The Court is also not satisfied that any serious attempt was made during the time when the detention order in respect of the co-detenu was still alive, to execute the impugned detention order to take the Petitioner into custody despite the DRI knowing of his participation in the adjudication proceedings pursuant to the SCN issued by it. That stage having been crossed, the Court has no hesitation in holding that the detention order issued in respect of the Petitioner has ceased to serve any purpose whatsoever.

37. For the aforementioned reasons, the Court quashes the detention order No. F.No.PD-12001/04/2017-COFEPOSA dated 17th October 2017 issued by Respondent No.3 issued under Section 3 (1) of the COFEPOSA Act.

38. The writ petition is allowed and the application is disposed of in the above terms with no order as to costs.

S.MURALIDHAR, J.

I.S.MEHTA, J.

MAY 29, 2018

nk