

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2844 OF 2019

Dimple Happy Dhakad,
aged 35 years, Wife of the detenue
Shri Happy Arvind Kumar Dhakad
residing at :
1101, Solitaire Apartments,
Opp. Chembur Post Office,
Mumbai 400 071

... Petitioner

Versus

1. Directorate of Revenue Intelligence,
13, Sir Vithaldas Thackersey Marg,
Marine Lines, Mumbai 400 020.

2. Union of India,
Through Director General,
Ministry of Finance,
Department of Revenue,
CEIB, 6th Floor, k "B" Wing,
Janpath Bhawan, Janpath,
New Delhi 110 001.

3. Joint Secretary (COFEPOSA),
Government of India,
Ministry of Finance,
Department of Revenue,
CEIB, 6th Floor, "B" Wing,
Janpath Bhawan, Janpath,
New Delhi 110 001.

4. State of Maharashtra,
Through the Superintendent,
Arthur Road Central Prison,
Sane Guruji Marg, Chinchpokli,
Opp. Kasturba Hospital,
Mumbai 400 011.

... Respondents

**ALONG WITH
CRIMINAL WRIT PETITION NO. 2843 OF 2019**

Nisar Pallathukadavil Aliyar,
Presently detained at :
Arthur Road Central Prison,
Sane Guruji Marg,
Chinchpokli,
Opp,. Kasturba Hospital,
Mumbai 400 011
Resident of :
Pallathukadavil House, Thuravumkara,
Kanjoor P.O., Kizhakkumbhagom, Kanjoor,
Aluva, Ernakulam,
Kerala 683 111.

... Petitioner

Versus

1. Directorate of Revenue Intelligence,
13, Sir Vithaldas Thackersey Marg,
Marine Lines, Mumbai 400 020.

2. Union of India,
Through Director General,
Ministry of Finance,
Department of Revenue,
CEIB, 6th Floor, "B" Wing,
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3. Joint Secretary (COFEPOSA),
Government of India,
Ministry of Finance,
Department of Revenue,
CEIB, 6th Floor, "B" Wing,
Janpath Bhawan, Janpath,
New Delhi 110 001.

4. State of Maharashtra,
Through the Superintendent,
Arthur Road Central Prison,
Sane Guruji Marg, Chinchpokli,

Opp. Kasturba Hospital,
Mumbai 400 011.

... Respondents

Mr. Vikram Chaudhary a/w Dr. Sujay Kantawala, Advocate
Aishwarya Kantawala i/by Adv. Neha Ahuja for the petitioner in
WP No. 2844 of 2019.

Mr. Vikram Chaudhary a/w Dr. Sujay Kantawala, Advocate
Aishwarya Kantawala i/by Adv. Sabin Joseph for the petitioner in
WP No. 2843 of 2019.

Mrs. Aruna Pai, Special PP for respondent nos. 1 to 3.

Mr. J.P. Yagnik, APP for respondent State.

**CORAM : B.P. DHARMADHIKARI &
SMT.SWAPNA JOSHI, JJ.
DATE : JUNE 25, 2019**

JUDGMENT (Per Dharmadhikari,J.):

These criminal writ petitions challenging the order of detention dated 17/5/2019 are admitted on 04/06/2019. At that time by a speaking order, this court directed respondent no. 3 Joint Secretary (COFEPOSA) Government of India to consider the writ petition itself as representation of the detainee under article 22(5) of the Constitution of India and to produce before this court the file concerning such consideration along with the orders passed thereon. The rule was then made returnable on 12/06/2019. We need not go to the circumstances in which thereafter the matters came to be placed before us as alternate Bench. However, learned counsel appearing for respondent nos. 1

1 to 3 in these matters at the outset urged that the meeting of the Advisory Board is scheduled on 11/7/2019 and therefore, consideration of the present matters should be postponed. It is not in dispute that as per directions contained in the order dated 4/6/2019, respondent no. 3 has already considered and rejected the representation and communicated it to the petitioners. It is in this backdrop that we have heard Mr. Chaudhary learned senior counsel for the petitioners, Mr. Yadnik, learned APP for respondent State and Smt. Pai for respondent nos. 1 to 3.

2. Opposing the preliminary objection raised by respondent no.1 to 3 and pressing for hearing, learned senior advocate relied upon the judgments of the Hon'ble Apex Court in Piyush Kantilal Mehta Vs. Commissioner of Police, Ahmedabad City and another¹ particularly paragraph 6, to submit that the jurisdiction to be exercised by this Court and by the Advisory Board is distinct and this Court can and in present matters must proceed further with consideration of the controversy on merits.

3. He points out that the respondent no.1 arrested the petitioners under section 135 of the Customs Act on 29/3/2019. The Court of Additional Chief Judicial Magistrate rejected their

1 1989 Supp (1) Supreme Court Cases 322

bail application on 30/4/2019.

4. The detention order has been passed in the matter on 17/5/2019. It is submitted that after rejection of the bail application by Additional Chief Judicial Magistrate, bail applications were preferred in Sessions Court and on 16/5/2019 . In these applications, replies opposing the same were filed by respondent no. 1. It is pointed out that the Sponsoring Authority for the purposes of detention is stationed at Bombay while the competent authority (respondent no. 3) is having its office at New Delhi. About 15 detention orders are claimed to be passed on 17/5/2019 and as per the list of documents relied upon, the papers in each detention case may be more than 2000. Submission is in this situation, when reply opposing the bail was filed on 16/5/2019, the order of detention could not have been passed on 17/5/2019 itself and it is clear case of non application of mind.

5. It is further stated that the order of detention has been served upon both the petitioners on 18/5/2019 and the documents relied upon are served upon the petitioner in Writ Petition No. 2844 of 2019 on 21/5/2019 while on other petitioner on 22/5/2019. Submission is this belated supply of documents relied upon vitiates the entire exercise.

6. It is submitted that respondent no. 3 must demonstrate due application of mind to the fact that the petitioners were already in jail and order must demonstrate that there was imminent possibility of their release on bail and further possibility of their indulging in similar prohibited conduct based upon the material on record. Contention is the impugned order does not show any application of mind in this respect.

7. Learned senior Advocate Mr. Chaudhary submits that section 3(3) of Conservance of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA Act") which permits the grounds to be served upon the detainee within 5 days has been violated in the present matter. It is further submitted that there is no material on record to show that time of 4 or 5 days taken for service of the documents relied upon was required to prepare the copies as alleged in the reply.

8. Our attention is invited to guidelines contained in Handbook of compilations on instructions issued on COFEPOSA matters to urge that the guideline nos. 14, 21 and 24 in Part A which mandates "Dos" and guideline no.9 in Part B which points out "Donts" have been violated here.

9. Various judgments have been relied upon by the learned senior advocate to drive home the contentions. We will make

reference to those judgments as and when occasion therefor arises.

10. Advocate Pai has invited our attention to ground of detention served upon the respective petitioners to show that there the facts showing the conduct and involvement of respective petitioner are looked into and from their conduct, gravity of matter and huge financial loss suffered by the revenue over a span of time, preventive detention is found essential. Capacity and propensity have also been looked into and then subjective satisfaction that preventive detention is essential has been reached. She invited our attention to the judgment of the Apex Court in the case of Hardhan Saha Vs. the State of West Bengal and Ors.² to explain the different nature of preventive detention proceedings and relied upon other case laws to show that in this situation, contention that there is no satisfaction recorded about the possibility of release of the petitioners on bail is erroneous. She submits that the order of detention dated 17/5/2019 and the grounds on which the detention order was made were served upon respective petitioner immediately at the time of his detention. She relies upon the reply affidavit to point out how large number of documents were required to be copied

² (1975) 3 SCC 198

and sets prepared. She submits that these documents were ready by 21/5/2019 and thereafter the same have been served upon the petitioners. Relying upon the provisions contained in section 3, she submits that when the documents relied upon are made available within 5 days, Law does not expect any explanation from the respondents. When the time taken is more than 5 days, then only the explanation is called for.

11. She submits that the petitioner in WP No. 2844 of 2019 is kingpin of the entire operation while petitioner in Writ Petition No. 2843 of 2019 is a main jeweller who has purchased huge quantity of gold and arranged for its further sale/distribution in the country.

12. She also points out that after the orders of detention were served, the bail applications then pending before the Sessions Court were withdrawn by the petitioners. However, as no chargesheet could be filed within 60 days, they got default bail order. Because they were already in detention, they were not released.

13. She further states that as the grounds of detention were already served and supporting documents were made available within the stipulated time, petitioners have to show how any of their legal rights have been violated. They did not make any

representation before receipt of documents and hence, in the absence of any prejudice, the technical objection on that ground is misconceived.

14. Learned senior counsel in brief reply invited our attention to the judgment in the case of Kameshkumar Ishwardas Patel Vs. Union of India and Ors.³ to urge that there is no question of any prejudice in such matters and the concept of demonstrating prejudice in such violation of fundamental right is not germane in this jurisdiction. He also submits that the prosecution did not file any chargesheet on the strength of the material on which they have proceeded to detain the petitioners and it is an important facet which must be kept in mind. He further states that the grounds of detention were already served along with detention order on 18/5/2019 itself and as such there is no question of serving relied upon documents thereafter. He reiterates that the impugned orders/grounds nowhere express any apprehension of release on bail. He further adds that as both the petitioners were already in custody, the order of detention with the complete grounds including documents relied upon could have been served upon them at any time and there was no urgency which justifies the course chosen by the respondents.

³ (1995) 4 Supreme Court Cases 51

15. He has invited our attention to the fact that in the list of documents relied upon to support the ground of detention, last document is dated 16/5/2019 and its reply filed by the Sponsoring Agency opposing grant of bail to the petitioners. This reply therefore, has become available after its filing in court on 16/5/2019 and law requires respondent no. 3 Authority to consider the impact thereof afresh. This exercise could not have been completed in short time. According to him, grounds of detention or order of detention do not show any consideration of the said reply and clerically, it has been only added at the end of the list of documents. He submits that as the finding of real apprehension of release on bail is necessary in such matters, reply dated 16/5/2019 filed by respondent no. 1 opposing bail needed appropriate evaluation. That evaluation should have been reflected in the impugned order and in absence thereof, mere mechanical reference to reply dated 16/5/2019 in the list of document, shows non application of mind.

16. Article 22 of the Constitution of India vide sub article no.1 mandates that the person cannot be detained in custody without informing him as soon as may be of the grounds of such arrest. Sub Article 5 therein further mandates that after such person is detained in pursuance of the order made under any law

providing for preventive detention, the authority making the order has to communicate to him the grounds on which the order has been made as soon as possible. Provisions of section 3(1) of COFEPOSA Act show that such order of detention can be made with a view to preventing the person from acting in any manner prejudicial to the conservation of augmentation of the foreign exchange or with a view to preventing him from indulging in any of the 5 activities mentioned in that sub section. Section 3(3) states that for the purposes of clause (5) of the Constitution, the grounds on which the order of detention has been made, shall be communicated as soon as may be after the detention but ordinarily not later than 5 days. It also stipulates that in exceptional circumstances and for the reasons to be recorded in writing, this period can be more than 5 days, but not more than 15 days from the date of detention. Thus ordinarily after the order of detention is made, the grounds in support thereof can be served upon the detainee within five days and in exceptional circumstances this period can extend upto 15 days. If this period is to be more than 5 days, the reasons are required to be recorded in writing.

17. In Kamleshkumar Ishwardas Patel Vs. Union of India and

Ors.⁴ an argument was raised pointing out illicit smuggling of narcotic Drugs and Psychotropic Substances Act on large scale and harmful nature thereof, its impact on national economy. Hon'ble Apex Court has observed that while discharging the constitutional obligation to enforce the fundamental rights of the people more particularly the right to personal liberty, these considerations cannot influence the process. History of liberty is the history of procedural safeguards and certain minimum safeguards are required to be "zealously watched and enforced by the Court".

18. In Mohd Zakir Vs. Delhi Administration and Ors.⁵ in paragraph 2 Hon'ble Apex Court has also observed that the question of demanding documents is wholly relevant because it is the constitutional mandate which requires the detaining authority to give documents relied upon or referred to in the order of detention, pari passu the grounds of detention in order that the detinue may make effective representation immediately instead of waiting for the documents to be supplied with.

19. In the case of Shalini Soni Vs. Union of India⁶ in paragraph 7 the Hon'ble Apex Court has observed that when there is an express statutory obligation to communicate not merely the

4 (1995) 4 Supreme Court Cases 51

5 (1982) 3 Supreme Court Cases 216

6 (1980) 4 SCC 544

decision but the grounds on which the decision is founded, it is a necessary corollary that the grounds communicated, that is, the grounds so made known, should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely the inferential conclusions. Such grounds must reveal the whole of the factual material considered by the detaining authority. The grounds must be self-sufficient and self-explanatory.

20. In the case of M. Ahamedkutty Vs. Union of India⁷ in paragraph 19, it is observed that the right given to detainee is to make effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. The detainee has therefore, a right to be furnished with the grounds of detention along with the documents so referred to or relied on. If there is failure or even delay in furnishing those documents, it would amount to denial of the right to make an effective representation.

21. We need not to delve more on these precedents. Petitioners have placed before us 3 judgments delivered by this court in which the issue has been gone into. In the Judgment dated

⁷ (1990)2 SCC 1

24/4/1996 delivered in Criminal Writ Petition No. 2/1996, 4/1996⁸ and other connected matters, in paragraph 7, the Division Bench of this Court has found that the grounds of detention in English and detention order were served on the petitioners on 24/11/1995. The documents in support of these grounds of detention in English as well as vernacular translations were supplied on 29/11/1995. The detaining authority argued that it was not necessary to serve the grounds of detention along with the detention order, but the grounds could have been furnished to the petitioners within 5 days i.e. by 29/11/1995. Further contention was service of grounds of detention in English on 24/11/1995 should be ignored and it may be considered to have been furnished to the detainee on 29/11/1995. The Division Bench has not accepted this submission. It has been found that the vernacular translations ought to have been served on 24/11/1995 itself so as to enable the petitioners to make effective representation. The orders of detention were therefore quashed.

22. In the Judgment dated 11/7/1996 in Criminal Writ Petition No. 824 of 1995 and other connected matters⁹ the order of detention and grounds of detention were served on the detainee

8 Writ Petition No. 2/1996,4/1996.

9 Criminal Writ Petition No.824 of 1995 & Connected matters.

on 27/6/1996 unaccompanied by the documents and the material on the basis of which order of detention was issued. These documents and material were served on them on 30/6/1995. This was held invalid and orders of detention were found an initio null and void.

23. In Sanjay Waman Mhatre @ Khardya Vs. Shri R.D. Tyagi, Commissioner of Police, Mumbai and Ors.¹⁰ again the Division Bench of this court has taken same view and followed earlier two Division Bench judgments.

24. In the present petitions, the order of detention dated 17/5/2019 was served on the respective petitioners along with grounds on which the detention was ordered. The grounds of detention on its last page in paragraph 9 to 12 observe as under :

“9. While passing the Detention order under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, I have relied upon the documents mentioned in the enclosed list, which are also being served to you along with the Grounds of Detention.

10. You i.e. Shri Happy Arvindkumar Dhakad have

¹⁰ Criminal Writ Petition No. 690 of 1996

the right to represent against your detention to the Detaining Authority, to the Central Government as well as to the Advisory Board. If you wish to avail this right, you should send your representation through the Jail Authorities where you are detained, in the manner indicated below :

- a. Representation meant for the Detaining Authority should be addressed to the Joint Secretary (COFEPOSA), Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, 6th Floor, B Wing, Janpath Bhawan, Janpath, New Delhi 110 001.
- b. Representation meant for the Central Government should be addressed to the Director General, Central Economic Intelligence Bureau, Govt. of India, Ministry of Finance, Department of Revenue, 6th Floor, B Wing Janpath Bhawan, Janpath, New Delhi 110 001.
- c. Representation meant for the Advisory Board should be addressed to the Chairman, COFEPOSA Advisory Board, New Administrative Building, 12th Floor, Mantralaya, Mumbai 400 032.

11. You i.e. Shri Happy Arvindkumar Dhakad are

further informed that you shall be heard by the Advisory Board in due course, if the Board considers it essential to do so or if you so desire.

12. The above grounds are communicated to you for the purpose of Clause (5) of Article 22 of the Constitution of India and as required under Section 3(3) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.”

25. This necessitates reference to guidelines mentioned supra. Guideline No. 14 mandates that the Sponsoring Agency must bring to the notice of detaining authority any material generated after forwarding the proposal. In present matters, the proposal for detention was scrutinized and accepted by Screening Committee on 14/5/2019. The reply opposing the bail application was filed by the Sponsoring Agency in Sessions Court on 16/5/2019 and thus this material (reply) was generated after forwarding the proposal and after its acceptance.

26. Guideline No. 21 stipulates that the grounds of detention and relied upon documents must be invariably served on the detainee together including the copies translated into language known to him and this should be served as quickly as possible but within stipulated time limit of 5 days from the date of

detention. Guideline No. 24 is about application of mind when the person is in judicial custody. In Part B dealing with “Donts” guideline No. 9 again lays down that the ground of detention and relied upon documents should not be given on different dates.

27. When these guidelines, judgments mentioned by us supra are applied to the impugned orders/grounds of detention reproduced supra, it is apparent that the respondent no. 3 detaining authority has not envisaged separate service upon the detainee of the part of grounds along with the order of detention and remaining part i.e. relied upon documents thereafter. The List of documents relied upon by respondent no. 3 is enclosed with the grounds of detention and it is expressly recorded that these documents are also being served upon the petitioners along with the grounds of detention. The detainee is also made aware of the right to represent. In paragraph 12, it is expressly recorded that the grounds are communicated for the purpose of clause (5) of Article 22 of the Constitution of India and as required under section 3(3) of the COFEPOSA Act. This communication (grounds of detention) therefore, does not contemplate or authorize the piecemeal service of grounds of detention upon the petitioner. The authority passing the order contemplates service together of entire material i.e. full order

containing the process of reaching the subjective satisfaction and all documents in terms of guideline No. 21 mentioned supra. We therefore, find that on 18/5/2019 the entire order of detention i.e. order of detention plus grounds of detention were not served on these petitioners. In this situation there is no question of respondents taking recourse to section 3(3) of COFEPOSA Act because the last paragraph of grounds of detention mentions that the communication of grounds is for the purpose of Article 22(5) and section 3(3) of COFEPOSA Act.

28. This brings us to the contention that the impugned orders do not show any application of mind to the need of detention as the petitioners were already in custody. We see no finding that there was real possibility of their release on bail by the Sessions Court. Guideline No. 24 (supra) shows that when the detinue is in judicial custody, the detaining authority has to record in the grounds of detention his awareness thereof and then indicate the reasons for the satisfaction that there is imminent possibility of his release from the said custody and after release such person is likely to continue to indulge in the prejudicial activities. The impugned order mentions past history and material in support thereof. It also takes note of the fact that the petitioners were already in custody. The propensity and capacity has also been

looked into. However, there is no application of mind demonstrating the satisfaction that there was any possibility of their release on bail in proceedings before the Sessions Court.

29. We may refer to the judgment of the Hon'ble Apex Court in Kamarunnissa Vs. union of India and another¹¹ where in paragraph 13 Hon'ble Apex Court has explained the law as settled. The detaining authority has to show its awareness of the fact that the petitioner is actually in custody. On the basis of reliable material placed before him, satisfaction or reason to believe that there is real possibility of his being released on bail and after such release he would in all probability, again indulge in prejudicial activities. The detaining authority has to find it essential to detain him so as to prevent him from indulging therein. Learned APP has attempted to distinguish this judgment by inviting our attention to paragraph 11 thereof. The observations of the Hon'ble Apex Court in Paragraph 11 are mostly on the facts of that matter. It is found that the diamonds were secreted in two balloons in his rectum by one person and other 2 detenues had created cavities for concealing 100 capsules each in their bodies. Hon'ble Apex Court also found that this revealed that they had necessary training and this was all

11 (1991) 1 Supreme Court Cases 128

being done by them because of lucrative money which they earned from such smuggling. It is recorded that they were not ordinary carriers. This finding therefore, does derogate in any way from the proposition of the law laid down by the Hon'ble Supreme Court which we have reproduced supra.

30. At this stage, learned advocate for respondent nos. 1 to 3 invites our attention to the fact that she had also pressed into service paragraph 5 of the grounds of detention in the matter of Nisar Aliyar. The findings therein are again on vital role played by the petitioner Nisar Aliyar in smuggling of gold. These findings do not in any way dispense with the requirement of recording the finding of real possibility of his being released on bail. As noticed supra, the procedural safeguards are sacrosanct and must be honoured

31. As we have already observed supra, the impugned orders and grounds of detention nowhere expressly mention any such possibility. Not only this, the applications for bail moved before the Sessions Court were after initial rejection by the Court of Additional Chief Metropolitan Magistrate. These bail applications were opposed by the Sponsoring Agency by filing appropriate reply on 16/5/2019. Those replies were also supplied by the Sponsoring Agency to respondent no. 3. Respondent no. 3 has

mentioned this reply as last document i.e. document no. 194 in the list of relied upon documents. Except for this mentioning, there is no evaluation of the stand taken by the Sponsoring Agency in that reply. The reply was filed before the Sessions Court to oppose the release on bail and whether respondent no. 3 found the reply has any merit or then it had some material which could have weighted with Sessions Court in taking a different view is therefore, not seen deliberated upon in the impugned order and grounds of detention. Law mandates a finding on real possibility of release on bail. Only mention of said reply in list of documents is nothing but an indication of non application of mind.

32. Guideline No. 24 mentioned supra which cautions the detaining authority in this respect is also being observed in breach.

33. Few judgments have been cited before us to point out how the High Court or the Hon'ble Apex Court have looked into the process of application of mind to such additional material coming on record. The impact of such document on available material needs to be looked into afresh and considering the large number of pages which needed scrutiny and appreciation as also reasonable time required for it, courts have found that such

additional material was not evaluated at all. The findings in those matters are the findings of facts. Here even if we presume that there was some application of mind before 16/5/2019 to the possibility of release on bail, when the reply opposing the bail was made available to the detaining authority on 16/5/2019, respondent no. 3 authority ought to have looked into it and evaluated the objections raised opposing bail therein to consider its impact on its earlier application of mind. It could have then mentioned that after such evaluation, it was satisfied that no change in its earlier conclusion was warranted. In other words, it would not have found any merit in the reply filed opposing the bail application before the Sessions Court. This process and exercise is cardinal here as the bail applications were earlier rejected by the competent court. There is no demonstration on record of any such exercise. There is no such application of mind demonstrated even before 16/5/2019 and after 16/5/2019.

34. Respondent no. 3 Detaining authority was aware of the requirement of serving orders of detention and grounds of detention with relied upon documents. It is in the face of this requirement and knowledge it passed the order which we have mentioned supra. The submission that preparation of pages and bulk of record did not enable the respondents to serve relied

upon documents simultaneously with the order of detention upon the petitioners, is therefore, unsustainable. The authorities could have in appropriate cases indicated that because of huge records and necessary clerical work, relied upon documents would be served in terms of section 3(3) of COFEPOSA Act. The order does not carry any mention on these lines and on the contrary it gives an impression to the contrary.

35. In the light of the consideration and our findings, following the law laid down by Hon'ble Apex Court in Piyush Kantilal Mehta Vs. Commissioner of Police (Supra), we are not inclined postpone consideration of these petitions beyond 11/07/2019.

36. We therefore, find the impugned order of detention unsustainable. It is accordingly quashed and set aside. Rule is made absolute accordingly.

37. Advocate Pai at this stage upon instructions states that considering the gravity of the matter, respondent nos. 1 to 3 request for stay of this order for the period of four weeks so as to enable them to approach Hon'ble Apex Court. Request is being strongly opposed by the learned senior counsel on behalf of the petitioners.

38. In this situation, in the interest of justice, we stay this order for the period of one week from today. Stay shall cease to operate

automatically thereafter.

39. Parties to act on authenticated copy of this order.

(SMT.SWAPNA JOSHI, J.)

(B.P. DHARMADHIKARI, J.)