

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

Reserved on:22.05.2020
Pronounced on:26.05.2020

+ **W.P. (CRL) 786/2020**

MOHD NASHRUDDIN KHAN Petitioner
Through: Mr.Vikram Chaudhari, Senior
Advocate with Mr.Harshat Sethi,
Advocate.
versus

UNION OF INDIA & ORS. Respondents
Through: Ms.Maninder Acharya, ASG with
Mr.Amit Mahajan, CGSC.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

SANJEEV NARULA, J.

CRL. M.A. No. 6483/2020

1. The petitioner by way of the present application under section 482 of Criminal Procedure Code, 1973 (Cr.P.C.) seeks permission to introduce an additional prayer in the writ petition and integrate additional grounds to support the said proposed relief.

Factual Background

2. In order to discern the context of the proposed amendments, it would be appropriate and also essential that we briefly note the factual background relating to the filing of the present application. To put it

succinctly, the main writ petition under Article 226 of the Constitution of India read with section 482 of Cr.P.C. is directed against the detention order No.DT-12001/03/2020-COFEPOSA dated 21.01.2020 issued by Respondent No.2, under Section 3(1) of COFEPOSA Act, 1974. The petitioner asserts that he is a non-resident Indian citizen and is engaged in trading of gold jewellery in U.A.E. On 24.04.2019, he was detained by the officers of DRI at IGI Airport, New Delhi on the allegations of involvement in illicit import and export of gold jewellery, whilst he was travelling to India from Dubai. The petitioner was formally arrested by the officers of DRI on 26.04.2019 and was produced before the learned Duty Metropolitan Magistrate on 26.04.2019 at her residence at 23:00 hrs and was remanded to judicial custody till 27.04.2019. Vide order dated 3.06.2019, the learned CMM, Patiala House Court, New Delhi released the petitioner on bail. Subsequently, on 22.08.2019 petitioner moved an application seeking permission to travel abroad and for release of passport. Thereafter, DRI filed an application seeking cancellation of petitioner's bail. This brought about several legal proceedings between the petitioner and the DRI.

3. The petitioner at the first instance approached the Supreme Court, vide W.P. (CRL.) No. 63/2020, challenging the impugned detention order. However, the Court did not interfere and vide order dated 16.03.2020, granted permission to the Petitioner to withdraw the writ petition and approach the High Court. The relevant extract of the said order reads as under:

“Learned senior counsel appearing on behalf of the petitioner seeks permission to withdraw this Writ Petition to approach the High Court.

Permission is granted.

The Writ Petition is, accordingly, dismissed as withdrawn with the aforesaid liberty.”

4. Availing the liberty granted by the Supreme Court, as noted above, the petitioner has filed the present petition. Incontrovertibly, that the present petition has been filed prior to the execution of the detention order. Nevertheless, the petition was entertained and the learned predecessor bench vide order dated 24.04.2020 while issuing notice of the present petition, passed the following order:

“The petitioner has preferred this writ petition to assail the order of detention dated 21.01.2020 passed under Section 3 of the COFEPOSA Act. The petition has been preferred at the pre-detention stage. Issue notice. Mr. Mahajan accepts notice on behalf of the respondents.

Mr. Mahajan seeks an adjournment till Monday on the ground that the learned ASG has been briefed in the matter and she does not appear before this Bench. Alternatively, he states that the matter may be directed to be listed today itself before Division Bench –I, which has also assembled today.

On the other hand, Mr. Chaudhri submits that the petitioner be granted protection against execution of the Detention Order, in case the matter is to be adjourned to another date.

Mr. Mahajan submits that no interim directions be passed in the meantime, considering the fact that the detention order was passed on 21.01.2020, and the petitioner earlier approached the Supreme Court, and only after a month thereafter, he has moved the present petition before this Court. He submits that proceedings under Section 7 of the

COFEPOSA Act have already been taken, and the petitioner has been absconding ever since passing of the detention order. He, therefore, submits that there is no justification to grant any interim stay of detention at this stage.

We are not inclined to accept the request of Mr. Mahajan for listing of the petition before Division Bench-I today itself, considering that the matters are being taken up through video-conferencing, and it is not easy to deal with such like matters unless the files have been circulated well in advance to be read by the concerned Judges.

We have considered the submissions of Mr. Chaudhri, learned senior counsel for the petitioner and Mr. Mahajan, learned counsel for the respondent.

So far as the submission of Mr. Mahajan that there is no urgency for grant of interim protection to the petitioner is concerned, we reject this submission since it involves the personal liberty of the petitioner. The petitioner's personal liberty cannot be compromised to accommodate the respondents. In any event, the interim protection that the petitioner may be granted at this stage would only be an ad-interim order which could be recalled or varied after hearing the respondents. It is for the respondents to explain the circumstances in which the detention order has come to be passed after about nine months of his being intercepted on his return from abroad.

Considering the fact that the petitioner was earlier granted bail by the learned CMM on 03.06.2019; the application moved by the Department for cancellation of his bail was dismissed on 25.09.2019; the petitioner was granted permission to travel abroad, subject to conditions on 11.11.2019; the revision petition preferred by the Department before the learned ASJ against the said order was dismissed on 26.11.2019 and; even the High Court dismissed the Department's Crl. M.C. No.6753/2019 on 27.12.2019, we are inclined to direct that the petitioner be not detained in terms of the impugned detention order till the next date of hearing.

List on 27.04.2020 before a Bench of which one of us (Vipin Sanghi, J.) is not a member.”

5. Subsequently, on account of the urgency involved, the matter was heard by this Bench, through video conferencing. During the course of the proceedings, the petitioner has filed the application seeking to amend the petition so as to include a challenge the notification bearing no. S.O. 1119(E) dated 17.03.2020 issued by the Joint Secretary to the Government of India, while exercising power conferred under clause (b) of sub-section (1) of Section 7 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter, ‘COFEPOSA’). The said notification directs the petitioner-Sh. Mohd. Nashruddin Khan to appear before the Director General of Police, Government of Uttar Pradesh, Lucknow within seven days of publication of the order in the official gazette. The same is extracted as under:

“S.O. 1119(E).—Whereas the Joint Secretary to the Government of India, specially empowered under sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974) issued Order No. PD-12001/03/2020COFEPOSA dated 21.01.2020 under the said sub-section directing that Shri Mohammed Nashruddin, S/o Shri Shamsuddin Khan, R/o Rasulpur Adampur alias Rampur, Distt, Mau, Uttar Pradesh be detained and kept in Tihar Jail, New Delhi with a view to preventing him from smuggling goods, abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggled goods, in future.

2. Whereas the Central Government has reasons to believe that the aforesaid person has absconded or

has been concealing himself so that the said Order cannot be executed.

3. Now, therefore, in exercise of the powers conferred by clause (b) of sub-section (1) of Section 7 of the said Act, the Central Government hereby directs the aforesaid person to appear before the Director General of Police, Government of Uttar Pradesh, Lucknow, within 7 days of the publication of this Order in the Official Gazette.”

6. Since the application is strongly opposed by the Respondents on various grounds and also considering that its outcome would have a substantial bearing on further proceedings in the present writ petition, we proceeded to first hear the learned counsel on behalf of the parties, on this application. Mr. Vikram Chaudhari, learned senior counsel appearing on behalf of the petitioner argued that that during the course of hearing before this Court on 24.04.2020 through video-conferencing, the petitioner learnt that the respondents had initiated action against him, under Section 7 (1) of the COFEPOSA Act. On becoming aware of this fact, when the petitioner logged on to the website <http://egazette.nic.in/>, he became aware of the said notification which appears to be digitally signed on 17.03.2020. He argued that said notification is blatantly actuated with malice both in fact and in law, as is apparent from the record and it is imperative for the petitioner to also impugn the same. Thus, the petitioner should be permitted to incorporate the additional grounds and a prayer in the main petition to assail the said notification. Relying upon Section 7(1)(b) of the Act, he further argued that the aforesaid provision necessitates the government to take action under the said provision immediately on expiry of one month from the date of the

detention order in case it remained unexecuted during that period. He also placed reliance on the guidelines dated 21.02.2007 issued by respondent No.2 in this regard and submitted that the Government did not initially act with promptitude and deem it necessary to invoke the said provision. However, when the petitioner took recourse to legal remedies by filing a petition before the Apex Court, the Respondents hurriedly and without application of mind issued the notification with an intent to label the petitioner as an 'absconder'. The action is tainted with malice in fact and in law. Strengthening his arguments, Mr.Chaudhari submitted that the resort to section 7 of COFEPOSA was most unfair and unwarranted , in as much as,the writ petition being W.P.(Crl.) No. 63/2020 has been disposed of by the Supreme Court in presence of the respondents vide order dated 16.03.2020. Thus, in view of the fact that respondents were aware of this factual position, they cannot be heard to say that the petitioner was evading the process of law. Rather, petitioner was availing the measures available under law, which is his legal right. In this situation, Respondents had no lawful justification to invoke Section 7(1)(b) of COFEPOSA Act. He submitted that this action has been done in an attempt to overreach the process of the court and to deprive the petitioner of an opportunity to contest the present petition at the pre-execution stage.

7. Ms.Maninder Acharya, learned ASG assisted by Mr.Amit Mahajan, CGSC appearing on behalf of the respondents strongly opposed this application and contended that the writ petition itself is not maintainable. Ms.Acharya called our attention to the law laid down by the Supreme

Court in *Additional Secretary to the Govt. of India and Ors. Vs. Smt. Alka Subhash Gadia* 1992 Supp (1) SCC 496 and also in *Subhash Popat Lal Dave v Union of India*, (2014) 1 SCC 280. She emphasized that the Supreme Court has made it absolutely clear that a writ of *habeas corpus* will ordinarily not be available in a case of pre-execution/pre-arrest challenge to detention order. As a general rule, a detention order cannot be set aside at the pre-execution/pre-arrest stage unless the court is satisfied that there exist circumstances which fall within the exceptions carved out by the court. She submitted that the scope of extraordinary jurisdiction of the court is very limited and stressed that the Court should exercise caution, and not interfere in the present case as the petitioner has failed to bring his case within any of the known exceptions enumerated in the case of *Alka Subhash Gadia (supra)* and *Subhash Popat Lal Dave (supra)*. Ms. Acharya put the spotlight on the conduct of the petitioner to impress upon us that he is an evader of the process of law and this Court should insist on his surrender before anything else is considered. She also strongly objected to the maintainability of the present application and submitted that the notification under Section 7 (1)(b) of the COFEPOSA is an independent cause of action and any challenge to the same should be by way of an independent petition and cannot be clubbed with the present petition filed at the pre-execution stage. The petitioner has filed the application at a belated stage, despite being in the know of the notification, much prior in time. When the writ petition was filed, there was no challenge to the said notification. After obtaining an interim order in his favour, the petitioner has participated in the proceedings and avoided to expeditiously take steps to challenge the said notification.

Now, when the proceedings have advanced substantially, the petitioner has filed the present application to purposely delay the proceedings. The petitioner should not be permitted to derail the proceedings by bringing a challenge to a notification which is independent of the detention order. Ms. Acharya further argued that the proceedings under Section 7(1)(b) are required to be initiated when the proposed detenu willfully and deliberately evades the execution of the detention order which is passed under Section 3 of the Act. Such action is in the nature of a statutory proceeding, which have been initiated keeping in mind the objective of the COFEPOSA Act. The intent of the legislature would be defeated, if this action is not initiated in a timely manner. Notably, as per the scheme of the Act, the failure on the part of the proposed detenu to comply with the notified directions, without a reasonable cause, is an offence punishable either with imprisonment or a term up to one year or with fine or both and is mutually exclusive with the order passed under Section 3 of the COFEPOSA Act. The petitioner has been willfully evading the execution of the lawful detention order and the prosecuting agency has already initiated action against the petitioner for giving the wrong address in the bail bond filed before the learned CMM, Patiala House Court. The application is misconceived and the petitioner cannot be allowed to expand the scope of the petition which only relates to the detention order and is not in any way connected with any action taken by the Respondents for evading the execution of the detention order.

Analysis & Findings.

8. We have given due consideration to the submissions advanced by the learned senior counsel. While deciding an application for amendment of the petition of the present nature, the Court would make a *prima facie* assessment and evaluation of the proposed amendments, only to the extent of satisfying itself that the application is not frivolous or completely misplaced especially as it involves personal liberty. At this stage, we are not to decide the merits or demerits of the proposed challenge to the notification dated 17.03.2020 which is sought to be impugned by way of amendment to the petition. Therefore the sufficiency of the cause of action for amendment of the petition has to be evaluated by taking a holistic view of the facts and circumstances before us. Ms.Acharya's contention that the challenge to the notification dated 17.03.2020 cannot be combined with the present petition which is directed against the detention order, appears to be an objection without any legal foundation. At least, nothing to the contrary, has been demonstrated before us. The notification under Section 7 of the Act is not entirely alien to the subject matter of the petition. To the contrary, it is interlinked with the detention order. Section 7 of COFEPOSA reads as under:

"7. Powers in relation to absconding persons.

(1) If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government may-

(a) make a report in writing of the fact to a Metropolitan Magistrate of or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973 (2 of 1974),

shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence under clause (b) of sub-section (1) shall be cognisable.”

9. A bare perusal of the aforesaid provision shows that the said provision enables the appropriate Government to take action in terms of the said provision in respect of a person against whom a detention order has been made. The pre-requisite for the Government to exercise the power under the said provision is that the proposed detainee has absconded or is concealing himself, as a result whereof the order cannot be executed. Besides, the appropriate Government “should have a reason to believe” that the situation meets the criteria for resorting to Section 7 of the Act. Merely because the aforesaid provision stipulates that failure to comply with directions issued by the Government would amount to a separate and distinct offence, it does not necessarily mean that the challenge to a notification under the said provision has to be categorically by way of a separate and a distinct petition. Undoubtedly, the principal grievance of the petitioner concerns the detention order and since the consequential

order/notification under Section 7 of the Act is emanating therefrom, it has a direct nexus with the same and is not wholly removed from it.

10. Let us examine this from another perspective and assume a situation where the petitioner were to succeed in the main petition, without making a specific prayer for challenging the notification. Where would such an eventuality lead us? The detention order would be quashed and the consequential proceedings which have been initiated under Section 7 of the Act, on account of non-compliance, would continue to survive. Contravention of section 7 may be a separate offence contemplated under the Act, requiring independent consideration, but the substantive question before us at this stage is not whether the same deserves to be quashed or not. We are only concerned with the question as to whether the petitioner should be permitted to impugn the same along with the main petition. If we decline to consider the additional relief proposed in the application, it has a potential of leading us to procedural complications which can be best avoided if we examine the same along with the main petition. Therefore, since the proceedings under Section 7 of the Act emanate from the detention order, in our view, for the reasons noted above, the proper recourse is to allow the petitioner to impugn the same along with the main petition.

11. Another crucial aspect of Section 7 flows from the verdict of the apex court dealing with the scope of jurisdiction of the Court while entertaining a petition challenging the detention order at a pre-execution/pre-arrest stage. In the case of *Alka Subhash Gadia (supra)*

the Supreme Court has emphasized that while the court has the power to interfere with the detention order even at the pre-execution stage, but they are not obliged to do so nor will it be proper for them to do, save in exceptional cases. The discretion of the Court has to be exercised judicially on well settled principles and the detenu cannot claim such exercise of power as a matter of right. While making the aforesaid observation, in the facts of the said case, the Court further noted, that the proposed detenu was absconding and was evading the service of the detention order. In that situation, the Court made the following observations:

“34. In the present case, admittedly the proposed detenu is absconding and has been evading the service of the detention order. Respondent 1 who is his wife has sought to challenge the said order because the show-cause notice under sub-section (1) of Section 6 of the SAFEMA is issued to him, a copy of which is also sent to her. Thus the assistance of the High Court under Article 226 of the Constitution is sought by respondent 1 on behalf of the detenu to secure the order of detention with a view to defend the proceedings under the SAFEMA. In other words, the proposed detenu is trying to secure the order of detention indirectly without submitting to it. What is further, he is also trying to secure the grounds of detention as well as the documents supporting them which he cannot get unless he submits to the order of the detention. No prima facie case is made out either before the High Court or before us for challenging the order of detention which would impel the Court to interfere with it at this pre-execution stage. Unfortunately, the High Court disregarding the law on the subject and the long settled principles on which alone it can interfere with the detention order at this stage has directed the authorities not only to furnish to the detenu the order of detention but also the grounds of detention and the

documents relied upon for passing the detention order. The relevant portion of the order passed by the High Court in that behalf on June 27, 1989 speaks for itself:

“It is undoubtedly true that detailed grounds of challenge are already to be found in the CrWP. However, the returns filed are always not very satisfactory and in many cases we have found that only half truth is indicated in the return. It would, therefore, be undesirable to decide the challenge to the detention under the COFEPOSA Act merely on the basis of the affidavits. In our opinion, the challenge is required to be precisely formulated and has to be properly scrutinised. The formulation and the scrutiny require that the order and the grounds of detention and the supporting documents considered by the detaining authority be furnished to the detenu as well as produced before the Court.

We have ascertained from the learned counsel representing respondents 1 to 3 that the orders and the grounds of detention as well as supporting documents are available with the department in Bombay. We accordingly direct that copies of the same will be prepared and one copy of the same will be furnished to the petitioner's advocate on record by 5.30 p.m. on Thursday, i.e., June 29, 1989. We propose to stand over the matter till Monday, July 3, 1989 to enable the petitioner to consider as to whether any amendment of the writ petition is required. If any amendments are sought, sufficient time will have to be given to the respondents to file their return, although we must express our amazement once again that in a writ petition admitted on May 22, 1989 and made returnable within 8 weeks instructions to file return have been belatedly given after 4 weeks and that too also without the main brief.”

35. As has been pointed out at the outset, after this order, the appellants took the plea that although they were willing to produce the order of detention and the grounds of detention for the perusal of the Court, they cannot furnish them to respondent 1, unless, as required by the Act, the detenu first submits to the impugned order. The High Court thereupon issued the contempt notice by its order dated June 30, 1989.

For the reasons discussed above, we are of the view that both the orders of the High Court directing the appellants to furnish to the detenu or to respondent 1 or her counsel the order of detention, the grounds of detention and the documents supporting them as well as the contempt notice of June 30, 1989 are clearly illegal and unjustified and they are hereby quashed. Both the appeals are accordingly allowed.”

12. Thus, in a situation where the proposed detenu is an absconder, the Court while entertaining a petition at the pre-execution stage, would have to exercise extra caution and take his conduct into consideration. At the same time, in our view, the petitioner can demonstrate that the respondents have failed to exhibit earnestness in taking an action under section 7 of the Act. Indeed, in the present case, the petitioner has alleged that the action of the respondents is an act of malice in law. Mr. Chaudhari has strongly urged that the respondents were aware that the petitioner had taken recourse to legal remedy and already filed a petition before the Supreme Court challenging the detention order whereby the Court had permitted the petitioner to approach this Court. He submits that in such circumstances, the conduct of the respondents fortifies petitioner's assertion that the resort to preventive detention is made for a wrongful purpose, and on vague, extraneous and irrelevant grounds as per the parameters laid down by the Supreme Court in the Case of ***Alka Subhash Gadia (supra)***. Mr. Chaudhari has also argued that in terms of Section 7(1)(b) the action should have been taken immediately after 20.02.2020 i.e. after one month from the date of detention order. The fact that the notification was instead issued a day after the decision of the Supreme Court on petitioner's petition, reveals the real intent of causing prejudice ,

and therefore the action qualifies to be an act of malice in law. Although Ms.Acharya strongly opposes this assertion, however we feel at this stage we need not engage ourselves on this issue. Nevertheless, one thing is certain- notification under Section 7 of the Act and the facts and circumstances leading to its issuance, would have a bearing on the petitioner's challenge to the detention order one way or the other. The proposed amendments would not entirely change the scope of the main petition. Even if it did, it is settled law that the principle of constructive res judicata does not apply to petitions alleging violation of Article 21 of the Constitution. Petitioner would like the fruition of the proceedings to be conclusive in every sense and not in a piecemeal manner. Therefore, he should certainly be given an opportunity to demonstrate that the notification under Section 7 was indeed an act of malice in law and that there was no justification to resort to the same when the respondents were fully aware of the petitioner's action before the Supreme Court. In these circumstances, we would not like to deny to the petitioner an opportunity to assail the notification in question by way of addition in the prayer clause. Infact, the alternate course of action of constraining him to file an independent petition would be miscarriage of justice and be counterproductive and contrary to the intent of Section 482 of the Criminal Procedure Code. Respondent's apprehension of the inevitable resultant delay can be minimized by fast-tracking the completion of the pleadings.

13. Accordingly, we allow the application and direct the petitioner to place the amended writ petition incorporating the grounds and the prayer

within a period of three days from today with an advance copy to the respondents. Reply to the amended petition be filed within a period of seven days. The petitioner is permitted to file a rejoinder thereto within a period of three days thereafter. The matter is released from part heard. List the present writ petition for final hearing before the Roster Bench on 15.06.2020. Needless to say, our views expressed above are not to be read as conclusive reflection on the merits of the case which shall be considered independently at the appropriate stage. All rights and contentions of the parties are left open.

SANJEEV NARULA, J

MANMOHAN, J

MAY 26, 2020

v