

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.3421 OF 2022

Paresh Damji Bhanushali

..Petitioner

V/s.

The Union of India Through
The Director General Central
Economic Intelligence Bureau And Ors.

..Respondents

Ms. Aisha Ansari for Petitioner.

Mr. Ashish Chavan a/w Adv. Zishan Quazi and Mr. Manoj Borkar for
Respondent Nos.1 and 2.

Mrs. S.D. Shinde, A.P.P. for Respondent No.3-State.

CORAM : A. S. GADKARI AND
PRAKASH D.NAIK, JJ.

DATE : 30th JANUARY, 2023.**Judgment (per Prakash D. Naik J.) :**

. Petitioner has preferred this Petition under Article 226 of the Constitution of India challenging Order of Detention dated 12.07.2022 issued by Respondent No.2 under Section 3(1) of The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA Act") directing the detention of Mahesh Ramji Bhanushali with a view to prevent him from smuggling of goods, abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggled goods in future. Petitioner is brother-in-law of Mahesh Ramji Bhanushali (herein after referred to as "Detenu").

2. The Order of Detention was executed on the Detenu on 28.08.2022 along with Grounds of Detention dated 12.07.2022 and the documents relied upon by the Detaining Authority while issuing impugned Order of Detention.

3. Learned Advocate for Petitioner Ms. Aisha Ansari submitted that, the impugned Order of Detention was issued without application of mind. The Detaining Authority was called upon to disclose as to on what exact date the proposal for Detention was mooted by sponsoring authority; the date on which the same is placed before screening committee and the date on which cleared by the screening committee. The Detaining Authority must disclose as to on what date the proposal was forwarded by the sponsoring authority; the date on which was put up before the Detaining Authority; whether all the documents referred to in list of documents at Serial Nos.1 to 66 copies of which have been furnished to the Detenu which are running into 522 pages were received by the Detaining Authority along with proposal; which documents were received subsequently and on what date the same were received from the sponsoring authority. The detaining authority should disclose the date and time, the said authority has commenced the scanning of the documents which are voluminous and the date on which the Detaining Authority had commenced formulating the Grounds of Detention and concluded the said process. The last document considered by the Detaining Authority was dated 11.07.2022. The

Detention Order was issued on 12.07.2022. It was not possible for Detaining Authority to peruse all the documents and material and formulate the Grounds of Detention within short span of time. It is apparent that, the Detaining Authority has verbatim adopted the draft grounds or the contents of the proposal placed before him as Ground of Detention for issuing the Order of Detention. The Detaining Authority is called upon to disclose as to how many other Orders of Detention besides the impugned Order were issued by the Detaining Authority during the period when the proposal in the instant case and the date on which the impugned Order of Detention was issued. Taking into account the shortage of time at the disposal of the Detaining Authority, it was physically impossible for the Detaining Authority to have himself perused the record in short span of time and formulate the Grounds of Detention. The impugned Order of Detention is issued in casual manner by adopting the draft Grounds of Detention or the proposal placed before the Detaining Authority without applying mind to the documents and the material placed before him. The affidavit-in-reply filed by the respondents does not provide the requisite details which indicate that, the Order of Detention was issued mechanically. Documents at Pages 467-468 are dated 20.06.2022, documents at Pages 470 to 480 are dated 23.06.2022, documents at pages 431 to 444 are dated 25.06.2022, document at Page 481 is dated 29.06.2022 and documents at Pages 521 & 522 are dated 11.07.2022.

Those documents were purportedly considered by the Detaining Authority. The record indicate that, the documents at Page 521 was received by the Detaining Authority at 9.00 p.m. on 11.07.2022. In these circumstances, Detaining Authority should disclose as to on which date the documents covering into 522 pages were placed before Detaining Authority and the time taken by Detaining Authority for scanning and perusing the documents and for formulating the Grounds of Detention. Considering the aforesaid factual aspects and silence in the affidavit-in-reply for providing the details sought by Petitioner from the Detaining Authority, it is apparent that, the Order of Detention was issued in most casual and cavalier manner.

4. Learned Advocate for the Petitioner has relied upon the following decisions. :

- i. Order passed by the Apex Court dated 20.12.1985 in Special Leave Petition (Cri.) No.3376 of 1985 in the case of *Shri. Umesh Chandra Verma Vs. Union of India and Another*.
- ii. *Smt. Kirti Sujit Satam Vs. State of Maharashtra and Others*¹.
- iii. *Mehrunnissa Mushtaq Sayed Vs. Union of India and Others* decided by this Court in Criminal Writ Petition No.5370 of 2017 dated 27.04.2018.

5. Learned Advocate Mr. Chavan appearing for Respondent Nos.1 & 2 submitted that, the Detaining Authority has relied upon the entire material

¹ 2008 All MR (Cri) 774.

placed before him and issued the Order of Detention. The Grounds are formulated by the Detaining Authority. From the Grounds of Detention, it is apparent that, the Detaining Authority has taken into consideration the documents and material placed before him and recorded subjective satisfaction for issuing Order of Detention. The Grounds of Detention and the impugned Order of Detention reflects the application of mind. There was sufficient time before Detaining Authority to issue Detention Order. The documents of Sr.Nos. 65 and 66 in list of documents are not significant. In the affidavit in reply, the details about the steps taken while issuing the impugned Order of Detention are provided. The ground urged by the Petitioner is devoid of merits. Learned Advocate relied upon the Affidavit-in-reply filed on behalf of Respondent Nos.1 and 2.

6. We have perused the Affidavit in reply filed on behalf of Respondent Nos. 1 and 2. It is pertinent to note that, affidavit-in-reply has been filed by Director (COFEPOSA), Central Economic Intelligence Bureau, Department of Revenue Ministry of Finance, Government of India, on behalf of Respondent Nos.1 & 2. The impugned Order of Detention was issued by Respondent No.2. The explanation sought was expected to be provided by Respondent No.2 as the question relates to the application of mind while reaching to the subjective satisfaction in issuing the impugned Order of Detention. The Deponent has tried to step into shoes of the Detaining Authority/Respondent No.2. In Paragraph No.2 of the reply it is stated that,

the affiant have perused the records pertaining to the case and after consulting sponsoring authority i.e. Commissioner of Customs (Preventive), New Delhi, the affidavit-in-reply is filed opposing the Petition. The Order of Detention is passed by Respondent No.2 and the Affidavit-in-reply is filed by subordinate officer without disclosing the fact that, Respondent No.2 has retired from service or is transferred from the said office. The question would arise for consideration as to how subjective satisfaction and application of Respondent No.2 can be explained by subordinate authority. In Paragraph-7 of the affidavit-in-reply it is stated that, the proposal dated 30.06.2022 was received in the Office of Detaining Authority on 01.07.2022 and the same was submitted before the Screening Committee for its consideration in its meeting held on 06.07.2022 and its recommendation was circulated on 07.07.2022. It is not open to the Petitioner to know as to on what time and date the scanning of the material started and at what date and time it was concluded. Whatever time is consumed for the purpose of issuance of Detention Order, it was consumed for the purpose of better verification, scrutiny and examination of material placed before the Detaining Authority to arrive at his satisfaction regarding sufficiency of material reflected in the documents relied upon to pass the Detention Order. The Detaining Authority has acted promptly and vigilantly and applied its mind properly while issuing Detention Order. The Detaining Authority has perused the scanned material and formulated the

Grounds of Detention. There was sufficient time for the Detaining Authority to peruse, scan and formulate the Grounds of Detention.

7. It is pertinent to note that, affidavit-in-reply is silent about details sought in the grounds of challenging to ascertain application of mind by Detaining Authority. The affidavit-in-reply was not filed by the Detaining Authority. The reply does not state that, the proposal included draft grounds of Detention. It is relevant to note that, the proposal was forwarded on 30.06.2022 and the Order of Detention was issued on 12.07.2022. The list of documents indicate that, there were about 66 documents running into 522 pages. The documents at Serial Nos.65 and 66 were dated 11.07.2022. The documents at Sr. No.66 was received by Detaining Authority on 11.07.2022 at about 9.00 p.m. The impugned Order of Detention was issued on 12.07.2022. It is pertinent to note that, the documents at Pages Nos.467 and 468 were dated 20.06.2022, documents at Page Nos. 470 to 480 were dated 23.06.2022, documents at Page Nos. 431 to 444 were dated 25.06.2022, documents at Page No. 481 is dated 29.06.2022 and documents at Page Nos. 521 and 522 were dated 11.07.2022. The record must reflect that, the Detaining Authority had sufficient time to peruse and scan the documents placed before him while issuing Order of Detention. The Grounds of Detention are required to be formulated after perusing record and arrive at subjective satisfaction that, it is necessary to detain the person under law of preventive detention. The

material on record must indicate application of mind and not casual approach for issuing Order of Detention by reproducing the proposal or the draft grounds of Detention, if any. Detention of a person without trial has to be viewed seriously. Preventive detention curtails liberty of citizen and it is expected that, the Order of Detention is issued with application of mind. We are not satisfied with the explanation by the Respondents in the affidavit-in-reply which gives us reason to believe that, the impugned Order of Detention was issued in casual and cavalier manner.

8. The Hon'ble Supreme Court in the case of *Umesh Chandra Verma Vs. Union of India and Another* (supra) has observed that, the Detaining Authority could not have possibly applied mind to the voluminous documentary evidence, which was placed before him and for that reason the Order of Detention was quashed.

9. In the case of *Smt. Kirti Sujit Satam Vs. State of Maharashtra and Others* (supra), the contention of Petitioner therein was that, it was not physically possible for the Detaining Authority to peruse 154 documents running into 1712 pages while issuing Order of Detention in short span. This Court relied on decision of the Apex Court in the case of *Umesh Chandra Verma Vs. Union of India and Another* (supra) and various other decisions and held that, in the light of those judgments, the Court feels that, it was the case of non application of mind. This Court also referred to the decision in the case of *Sheetal Manoj Gore Vs. State of Maharashtra and*

*Ors.*², wherein the contention of non application of mind was rejected and it was held that, there was sufficient time for Detaining Authority to consider the matter as there was 12 working days and some of the non working days. It was also accepted by the Court that, the process of passing a Detention Order was a continuous process and in that continuous process, the material collected by the Detaining Authority is possible within the period which was available before the Detaining Authority. In the case of *Mehrunnissa Mushtaq Sayed Vs. Union of India and Others* (supra), this Court has dealt with similar contention. The factual matrix of the said decision would indicate that, the list of documents referred to 65 documents bearing total number of 687 pages. The reply filed by the Detaining Authority mentioned that, there were 687 additional documents relied upon by the Detaining Authority. This Court had observed that, it was incumbent upon Detaining Authority to made it clear as to which documents were forwarded to the Detaining Authority at the earlier point of time which were provided subsequently. This Court had relied upon decision of the Hon'ble Supreme Court in the case of *Umesh Chandra Verma Vs. Union of India and Another* (supra) and the decision in the case of *Smt. Kirti Sujit Satam Vs. State of Maharashtra and Others* (supra). The impugned Order of Detention was set aside on the ground that, there was non application of mind.

2 (2006)7 SCC 560

10. In the light of factual matrix of the present case, the documents on record and the contents of affidavit-in-reply we are of the considered opinion that, the impugned Order of Detention was issued without application of mind. The material on record does not indicate that, the Detaining Authority has applied its mind to the entire list of documents and formulated the grounds of Detention and then issued Order of Detention. In these circumstances, the Detention Order is required to be set aside.

ORDER

- i. Writ Petition is allowed.
- ii. Detention Order dated 12th July, 2022 passed by Respondent No.2 bearing No.F. No.PD-12002/01/2022-COFEPOSA is hereby set aside.
- iii. Rule made absolute.
- iv. Petitioner be released from jail forthwith, if not required in any other case.
- v. All the concerned to act on the basis of authenticated copy of this Order.

(PRAKASH D. NAIK, J.)

(A.S. GADKARI, J.)