



W.P.No.25319 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.12.2022

PRONOUNCED ON : 03.01.2023

Coram:

**THE HONOURABLE MR.JUSTICE P.N.PRAKASH
AND**

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

W.P.No.25319 of 2011

and

WMP No.3943 of 2020

S.Zahir Hussain

..Petitioner

.Vs.

- 1.The State of Tamil Nadu
Rep. by the Secretary to Government
Public (SC) Department
Fort St.George, Chennai-600 009.
- 2.The Union of India
Rep. By the Additional Secretary
to the Government (COFEPOSA)
Economic Intelligence Wing
Janpath Bhawan, New Delhi.
- 3.The Directorate of Revenue Intelligence
Rep. By its Additional Director General
Department of Revenue
Ministry of Finance, Government of India
No.25, Gopalakrishna Iyer Street
T.Nagar, Chennai 600 017.
- 4.C.Rajan



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Additional Director General
The Directorate of Revenue Intelligence
Department of Revenue, Ministry of Finance
Government of India
No.25, Gopalakrishna Iyer Street
T.Nagar, Chennai-600 017.

..Respondent

Writ Petition under Article 226 of the Constitution of India, to issue a Writ of Mandamus forbearing the respondent, their men, or agents, or any one acting and claiming on behalf of them from arresting, executing the Detention Order and detaining the Petitioner under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities 1974, pursuant to the Detention Order dated 30.12.2010 passed by the First Respondent in G.O.No.SR.I/723-5/2010, Public (SC) Department.

For Petitioner : Mr.Sathish Parasaran
Senior Counsel
for Mr.K.J.Rebello

For Respondents : Mr.R.Muniyapparaj
Additional Public Prosecutor for R1

Mr.ARL.Sundaresan
Additional Solicitor General
Asst. by:
Mr.A.R.Sakthivel
Senior Panel Counsel (CGSC) for R2

Mr.N.P.Kumar
Special Public Prosecutor for R3

Mr.Velayuthampichaiya for R4



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ORDER

This Writ Petition was filed in the year 2011 to forbear the respondents from acting upon the detention order dated 30.12.2010 and detaining the petitioner under Section 3(1) of The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'the COFEPOSA').

2. The petitioner started a sole proprietary concern in the year 2000 to carry on the business of import of car accessories. The petitioner who claims to be a public spirited person, wanted to expose rampant corruption that was prevailing in the Customs Department. The petitioner also founded a Trust in the year 2004 in this regard. Various representations/complaints were made to the higher authorities of the Customs Department and to the concerned Ministry about the corruption that was prevailing in the Customs Department. Some of the complaints given by the petitioner also ended up in action being taken against some of the authorities belonging to the Customs Department. In short, the petitioner claims to be a whistleblower.

3. The further case of the petitioner is that many of the customs officials had a grudge against the petitioner and hence, false cases were foisted against the petitioner.

4. In the year 2010, a search was conducted in the residence of one



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Vaithyanathan, by the Directorate of Revenue Intelligence (DRI). The DRI refused to clear the consignment and the petitioner, who was a consultant, was trying to help out the said Vaithyanathan. On further enquiry, some irregularities were detected and a voluntary statement was also given by Vaithyanathan implicating the petitioner. Show cause notice was also issued to the petitioner for levying penalty and for adjudication, based on the statement recorded from Vaithyanathan. A detention order was passed by the Government of Tamil Nadu against the petitioner under Section 3 of the COFEPOSA on 30.12.2010. The petitioner apprehended that he was being targeted by the 4th respondent and steps are being taken to detain the petitioner illegally. It is further alleged that the respondents took steps to declare the petitioner as an absconding offender, when the petitioner was very much available and was attending public functions.

5. The petitioner has questioned the legality of the detention order mainly on the ground that it is tainted with malice and hasty steps were taken to detain the petitioner only to prevent the petitioner from making complaints against the officials belonging to the Customs Department. In view of the same, the present Writ Petition was filed questioning the detention order dated 30.12.2010 at the pre-detention stage.

6. All the four respondents have filed counter affidavits. The crux of the stand



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taken in these counter affidavits is that the petitioner, who started a mission to expose corrupt officials in Customs Department, started misusing his role and was indulging in illegal activities. That apart, he was also threatening the officials whenever the petitioner was questioned. The complaint against the petitioner was that he organised illegal import of imitation stones by way of misdeclaration and undervaluation and thereby, there was a duty evasion to the tune of Rs.1.17Crores. Considering the seriousness of the allegation and also the conduct of the petitioner in threatening the customs officials and taking into account the propensity of the petitioner to commit similar illegalities, the detention order came to be passed by the 1st respondent on 30.12.2010. After the detention order was passed, the petitioner went missing and he was absconding. Hence, steps were taken by issuing look out circular on 22.03.2011 and subsequently, a notification was also issued under Section 7(1)(b) of the COFEPOSA on 30.03.2011 by declaring the petitioner as an absconder. The petitioner, who was a witness in a case before the CBI Court in C.C.No.6 of 2008, did not attend the hearings and hence, warrant was also issued against the petitioner by the CBI Court. Paper publication was also effected and wide publicity was given to trace the petitioner and to detain him. In the meantime, the wife of the petitioner filed a similar Writ Petition in W.P.No.11441 of 2011 to prevent the authorities from acting upon the detention order and this Writ Petition was dismissed as not pressed on 22.08.2011. Subsequently, the petitioner filed



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the present Writ Petition for the same relief and obtained interim orders. The respondents have therefore sought for the dismissal of this Writ Petition.

7. Heard Mr.Sathish Parasaran, learned Senior Counsel for the petitioner, Mr.R.Muniyapparaj, learned Additional Public Prosecutor for R1, Mr.ARL.Sundaresan, learned Additional Solicitor General for R2, Mr.N.P.Kumar, learned Special Public Prosecutor for R3 and Mr.Velayuthampichaiya, learned counsel appearing on behalf of R4.

8. The learned Senior Counsel appearing on behalf of the petitioner made the following submissions:

- There was a substantial delay in executing the detention order and that by itself is a ground to interfere with the detention order. To substantiate this submission, the learned Senior Counsel relied upon the judgment in *A. Mohammed Farook Vs. Jt. Secy. To G.O.I. and Ors.* reported in JT 1999 (10) SC 290 and *Sushanta Kumar Banik Versus State of Tripura and Others* reported in 2022 SCC OnLine SC 1333.
- The detention order was passed in the year 2010 and 12 years have lapsed



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and not a single offence relating to customs violation has been reported, which shows that there is no propensity for the petitioner to commit similar offence and the live link between the alleged prejudicial activities in which the petitioner is said to have been involved and the purpose of detention has been snapped by passage of time. To substantiate this submission, the judgment of the Apex Court in *Maqsood Yusuf Merchant v. Union of India* reported in (2008) 16 SCC 31 and the judgment of the Delhi High Court in *Malini Mukesh Vora v. Union of India* reported in ILR (2010) 1 Del 35 were relied upon.

- Even the subsequent cases that were registered against the petitioner were falsely foisted cases relating to IPC offences and the petitioner is effectively defending himself in accordance with law.
- The petitioner, who was a whistleblower and was giving repeated complaints against the customs officials to curb the menace of corruption, is being targeted and the detention order passed by the 1st respondent is liable to be interfered even at the pre-detention stage, since it is done with a wrong purpose and for extraneous reasons. To substantiate this submission, the learned Senior Counsel relied upon the judgment of this Court in *D. Aswin Rao vs. State and Ors.* reported in 2021(1) MWN (Cr.) 207.



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9. The learned Additional Solicitor General appearing on behalf of the 2nd and 3rd

respondents made the following submissions:

- The delay in execution of the detention order was solely due to the abscondence of the petitioner who was not able to be traced inspite of various steps taken to find the whereabouts of the petitioner.
- The wife of the petitioner filed a similar Writ Petition in W.P.No.11441 of 2011 and it was withdrawn subsequently and the petitioner has filed a similar Writ Petition and this clearly establishes that the petitioner is abusing the process of Court.
- Even during the pendency of this Writ Petition, the petitioner was involved in threatening and attacking the customs officials and the officials of Enforcement Directorate and two First Information Reports were registered against the petitioner in Crime No.382 of 2021 and 397 of 2021. That apart, the petitioner was also convicted and sentenced in C.C.No.1863 of 2014 by the VIIth Metropolitan Magistrate, Georgetown, where the petitioner was found to have attacked the customs officials.
- There is absolutely no material to support the plea of *mala fides* as against the 4th respondent, who took charge of the office as Additional Director



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General only in April 2010.

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- If the petitioner is aggrieved by the detention order passed by the 1st respondent, the petitioner has to surrender and thereafter challenge the detention order.

- There are absolutely no grounds to interfere with the detention order at the pre-detention stage, since none of the grounds indicated by the Apex Court to make such an intervention, has been made out by the petitioner. To substantiate this submission, the learned Additional Solicitor General relied upon the following judgments:

a) *Addl. Secy. to the Govt. of India v. Alka Subhash Gadia (Smt)* reported in *1992 Supp (1) SCC 496*.

b) *Deepak Bajaj v. State of Maharashtra* reported in *(2008) 16 SCC 14*.

- The petitioner cannot take advantage of the pendency of this Writ Petition, since he had obtained an interim order and as a result, the detention order was not able to be executed and the petitioner cannot contend that the detention order has become stale. To substantiate the said submission, the learned Additional Solicitor General relied upon the judgement in *Union of India v. Amrit Lal Manchanda* reported in *(2004) 3 SCC 75*.



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10. The learned Additional Public Prosecutor appearing on behalf of the 1st respondent adopted the arguments of the learned Additional Solicitor General and supported the detention order passed by the 1st respondent. Similarly, the learned counsel appearing on behalf of the 4th respondent also adopted the arguments of the learned Additional Solicitor General and further submitted that the petitioner has made bald allegations against the 4th respondent and he has not established *mala fides* and that the Writ Petition lacks merits.

11. We have carefully considered the submissions made on either side and the materials available on record.

12. The following issues arise for consideration in this Writ Petition:

- a) Whether the live link between the situation that was prevailing at the time when the detention order was passed by the 1st respondent and the situation as it prevailed when we took up the Writ Petition for final hearing, has snapped and consequently, the detention order is liable to be interfered by this Court?
- b) Whether there was a delay in the execution of the detention order passed by the 1st respondent and consequently, the detention order is liable to be interfered with by this Court? and



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c) Whether there are grounds to interfere with the detention order passed by the 1st respondent at the pre-execution stage?

13. Insofar as the first issue is concerned, the detention order was passed by the 1st respondent on 30.12.2010. The Writ Petition was filed on 31.10.2011 and an order of interim injunction against the execution of the detention order was granted by this Court on 08.11.2011. The respondents filed their counter affidavits by January 2012. The bundle went missing for fairly a long period of time and after a lot of effort, it was traced and the Writ Petition was posted for final hearing before us. We are not getting into the issue as to who was responsible for the disappearance of the case bundle. Hence, we are merely recording the fact that the Writ Petition of the year 2011 was not able to be taken up for hearing since the case bundle went missing, but for which, this Writ Petition would have been dealt with and disposed of several years ago. Unfortunately, the Writ Petition saw the light of the day only during December 2022 i.e., nearly after 11 years. In view of these peculiar facts, we are not inclined to allow this Writ Petition on the ground of delay in taking up the Writ Petition for final hearing with a presumption that the grounds on which the detention was sought for has lapsed due to passage of time.



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14. Even assuming that the Court was the cause for the delay in taking up the Writ Petition for final hearing, the said fault cannot be put against the respondents on the principle of *Actus Curiae Neminem Gravabit*. The respondents had filed their counter affidavits immediately after the interim order was granted by this Court and for some reasons, the Court was not able to take up the Writ Petition for final hearing and hence, interfering with the detention order on the ground of passage of time, will cause grave prejudice to the respondents.

15. The Apex Court had an occasion to deal with a similar issue where there was significant delay in taking up the Writ Petition for final hearing from the date of the detention order and the High Court quashed the detention order taking into consideration the passage of time and the Apex Court interfered with such an order in *Union of India v. Amrit Lal Manchanda* reported in (2004) 3 SCC 75 and held as follows:

“19. The High Court does not appear to have considered the case in the background of whether any relief was available to the writ petitioner even before the order of detention was executed. The decision relied upon by it was not strictly applicable. Merely because the High Court had granted stay of the order of detention, the respondent cannot take advantage of the order of stay passed by the High Court to contend that there is a passage of time. The petitioner cannot be allowed to have an unfair advantage and double benefit of his own action, which delayed the execution of the detention order. In fact in Sayed Taher Bawamiya case[(2000) 8 SCC 630 : 2001 SCC (Cri) 56] the time gap was nearly 16 years. The inevitable



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conclusion therefore is that the High Court was not justified in quashing the order of detention. The writ petition filed by the respondent is dismissed. It is open to the respondent to surrender to custody as was observed in Parasmal Rampuria case [(1998) 8 SCC 402 : 1998 SCC (Cri) 1537] and take such plea as is available in law. The reliance sought to be placed on the fate of proceedings taken against others is wholly inappropriate. The individual role, behavioural attitude and prognostic propensities have to be considered, personwise, and no advantage can be allowed to be gained by the petitioners in these cases based on considerations said to have been made as to the role of the others and that too as a matter of post-detention exercise undertaken so far as they are concerned. The appeal is allowed. The order of the High Court is set aside and the writ petition filed before the High Court shall stand dismissed."

16. In the light of the above judgment, we cannot allow the petitioner to take unfair advantage of the interim order passed by this Court, which virtually prevented the respondents from executing the detention order and we are not inclined to interfere with the detention order on the ground of passage of time between the date of filing of the Writ Petition and the time when the Writ Petition was ultimately taken up for final hearing. Hence, it is not necessary for us to analyse as to whether there was any propensity for the petitioner to indulge in similar activities during the pendency of this Writ Petition, as contended by the learned Senior Counsel appearing on behalf of the petitioner, albeit we find some criminal cases registered against the petitioner for IPC Offences revolving around Customs officials. In view of the same, the first issue is



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answered accordingly against the petitioner.

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17. Insofar as the second issue that arises for consideration, the detention order is challenged on the ground of delay in executing the same against the petitioner. The detention order was passed on 30.12.2010 by the 1st respondent and this order was passed on the basis of the recommendation of the 3rd respondent, who is the sponsoring authority. The respondents have placed various materials before us to establish that the petitioner went missing and various steps that were taken by issuing look out circular and making wide publicity in newspaper and media to trace the absconding petitioner. Per Contra, the petitioner has placed certain materials like newspaper cutting to establish that he was very much available in the public domain. The contra-materials placed before us involves factual determination and we cannot completely discard the materials placed by the respondents which *prima facie* establishes that the petitioner went absconding.

18. This process was going on till April 2011 and the wife of the petitioner chose to file a Writ Petition in W.P.No.11441 of 2011 on 26.04.2011. This Writ Petition was filed with a similar prayer to forbear the respondents from detaining the petitioner pursuant to the detention order. On going through the affidavit filed in support of the



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Writ Petition, it can be seen that similar grounds of *mala fides* were raised against the 4th respondent. The wife of the petitioner has specifically stated at paragraph one of the affidavit that she is filing the Writ Petition only on the instructions given by the petitioner. Hence, it is pellucid that the alter ego in that Writ Petition is none other than the petitioner. If really the petitioner was not absconding at the relevant point of time, it defies common sense as to why the petitioner did not file the Writ Petition and instead, made his wife to file the same.

19. The above Writ Petition was withdrawn as not pressed on 22.08.2011 and accordingly, the Writ Petition stood dismissed. It is pertinent to note that no leave was granted by this Court to file a fresh Writ Petition on the same cause of action. However, the petitioner proceeded to file a fresh Writ Petition on the same cause of action for almost the same relief. The petitioner has conveniently taken a ground as if he was not aware about the Writ Petition filed by his wife. This ground raised by the petitioner, on the face of it, is not sustainable since the earlier Writ Petition was filed only on the instructions given by the petitioner and the petitioner was the author of that Writ Petition, conveniently filed in the name of his wife.

20. It is true that the principle of res judicata insofar as a Writ Petition is



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concerned, cannot be confined within the four corners of the principles of CPC.

However, the broad principles governing res judicata will also apply to Writ Petitions.

The petitioner instructed his wife to file the earlier Writ Petition in W.P.No.11441 of 2011 for a similar relief and by raising almost the same grounds and this Writ Petition was dismissed as not pressed. Hence, this Writ Petition is clearly hit by the principles of res judicata, since no liberty was reserved to file a fresh Writ Petition. On this ground alone, this Writ Petition is liable to be dismissed without even going into the merits of the case.

21. In the light of the above discussion, we hold that the delay in the execution of the detention order has been explained by the respondents and if at all the petitioner wanted to raise this ground, he should have surrendered before the first respondent and thereafter, raised this ground. This Court has to keep in mind the fact that a detention order has been put to challenge at a pre-execution stage and hence, the consideration is very different from the considerations that govern at the post-execution stage. The second issue is answered accordingly against the petitioner.

22. This Court will now get into the final issue. Insofar as interference of a



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detention order at a pre-execution stage, certain principles have been carved out by the Apex Court and the same must be kept in mind while testing the detention order passed by the 1st respondent dated 30.12.2010. The law on this issue has been captured by this Court by taking into consideration all the earlier judgments of the Apex Court in ***D. Aswin Rao vs. State and Ors.*** reported in ***2021(1)MWN (CR.) 207*** and the relevant portions are extracted hereunder:

“14. A reading of the above Judgments makes it clear that Article 226 of the Constitution empowers the High Court to exercise its Writ Jurisdiction even at a pre-detention stage where this Court finds that there is a threat of a potential violation of the Fundamental right under Article 21 of the Constitution. This Court in order to satisfy itself that there is a potential threat of violation of Article 21 of the Constitution, must have some materials before it. In other words, it cannot be based on mere apprehensions and this Court can only act on some overt acts.

15. The Hon'ble Supreme Court in the above Judgments has broadly identified certain grounds where this Court can interfere at a pre-execution stage. Even in these cases, the Hon'ble Supreme Court has made a specific reference to pre-detention order which is yet to be executed and which can be interfered with, in any of the following contingencies:

(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.



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16. The Hon'ble Supreme Court in **Subash Popatlal Dave** also made it clear that the above five grounds are merely illustrative and not exhaustive. The Hon'ble Supreme Court recognized the fact that the power exercised under Article 226 & Article 32 of the Constitution while reviewing an executive decision can never be subjected to any restrictions and such powers are untrammelled to protect the rights of the citizens."

23. We directed the detention order passed by the 1st respondent, dated 30.12.2010 to be circulated in a sealed cover along with all the relevant materials. Hence, we had the advantage of going through the entire materials and also the detention order passed by the 1st respondent. On going through the same, we do not find the detention order to fall under any of the contingencies pointed out by the Apex Court, warranting its interference. The petitioner has mainly challenged the detention order on the ground of *mala fides* against the 4th respondent. The materials placed before us shows that the detention order is backed by documents which justify the recommendation made by the sponsoring authority and the consequent detention order passed by the 1st respondent. The grounds that may be available to the petitioner after the detention order is executed, cannot be the basis to test the detention order at the pre-execution stage. The attempt made by the petitioner to question the detention order on the ground of delay in execution, has already been held against the petitioner while answering the second issue. As a sequitur, the third issue is also answered against the



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petitioner.

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24. The upshot of the above discussion leads to the only conclusion that this Writ Petition lacks merits and as a result, this Writ Petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

(P.N.P., J.)

(N.A.V., J.)

03.01.2023

Internet : Yes

Index : Yes

Speaking order /Non-Speaking order

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To

- 1.The Secretary to Government
State of Tamil Nadu
Public (SC) Department
Fort St.George
Chennai-600 009.
- 2.The Additional Secretary
to the Government (COFEPOSA)
The Union of India
Economic Intelligence Wing
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Order in
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