

(1997) 11 BOM CK 0006

In the Bombay High Court

Case No : Criminal Writ Petition No. 735 of 1997

Abdul Razak Ibrahim

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 24-11-1997

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 5A, 7
Constitution of India, 1950 — Article 22, 226
Customs Act, 1962 — Section 104, 108

Citation : (1998) 100 BOMLR 45

Hon'ble Judges : J.A. Patil, J;A.P. Shah, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.P. Shah, J.—By means of this petition under Article 226 of the Constitution of India, the petitioner seeks to challenge the order of detention dated 15th January, 1997 passed by the Secretary to Government of Maharashtra, Home Department (Preventive Detention) u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ("Act" for short) with a view of preventing the petitioner from smuggling goods in future.

2. The salient and material facts which necessitated the detaining authority to pass the impugned order, as set out in the grounds of detention, are as follows :

On 22nd July, 1996 the Officers of the D.R.I. seized from one Nainmal Joshi foreign currency worth Indian rupees 13,25,000/-. The statement of the said Nainmal Joshi was recorded u/s 108 of the Customs Act, 1962 on the same day wherein he admitted that he was buying smuggled foreign marked gold biscuits from the petitioner and that he had made payment to the petitioner for purchase of 38 foreign marked gold biscuits in foreign currency and that the balance amount of Rs. 13,25,000/- was to be paid to the petitioner in the evening of 22nd July, 1996 in foreign currency. He also admitted that 38 foreign marked

gold biscuits purchased by him from the petitioner were sold to various buyers and that payments were received by him from various buyers in foreign currency. He also stated that foreign currency equivalent to Rs. 13,25,000/- was given to him by one Akbar to whom he had sold part of the foreign marked gold biscuits which were purchased from the petitioner. Pursuant to the information given by Nainmal Joshi, officers of the D.R.I. searched the business premises of the petitioner on the same day i.e. 22nd July, 1996. During the course of the search, the officers of the D.R.I. recovered foreign currency of different countries and different denominations totally valued at Rs. 5,42,375/- and Indian currency of Rs. 1,49,500/- from the business premises of the petitioner. Statements of the petitioner were recorded on 22nd July, 1996 and 25th July, 1996 in which he stated that he had started business of financing foreign going passengers in foreign currency and purchasing from them contraband gold biscuits of foreign origin in India since 1992. It was also admitted by the petitioner that foreign currency totally valued at Rs. 5,42,375/- and Indian Rs. 1,49,500/- recovered and seized from his premises were acquired as sale proceeds of the foreign marked gold biscuits sold to different buyers. It was also admitted that he purchased foreign marked gold biscuits from different persons coming from abroad and whom he had financed. He also admitted that he had sold 38 foreign marked gold biscuits to Nainmal Joshi for which part payment was received by him and the balance of Rs. 13,25,000/- was pending with Nainmal Joshi. Both the petitioner and Nainmal Joshi were arrested on 23rd July, 1996 u/s 104 of the Customs Act, 1962 and were produced before the Chief Metropolitan Magistrate, Mumbai on the same day. Both were released on bail of Rs. 2,00,000/- each on the orders of the learned Magistrate. The detaining authority, inter alia, recorded that the petitioner must be habitually indulging in prejudicial activities. The detaining authority recorded satisfaction that the petitioner is likely to continue to engage in prejudicial activities in future and in order to prevent him from indulging in such prejudicial activities in future, it is necessary to detain him under the Act. The order of detention was passed on 15th January, 1997 and was served on the petitioner on 23rd June, 1997.

3. Of the several grounds urged in the petition, Mrs. Mane, learned Counsel appearing for the petitioner stressed only the following four contentions seeking to set aside the order of detention :

(i) As there is no proximity in time to prove the rational nexus between the alleged prejudicial activity, i.e. the seizure of foreign currency on 22nd July, 1996 and passing of the impugned order of detention after nearly five months i.e. on 15th January, 1997 and as there is no reasonable and satisfactory explanation given by the detaining authority for this undue and unreasonable delay, the detention order is liable to be quashed on the ground that the credible chain between the grounds of the alleged criminal activities and the purpose of detention is snapped.

(ii) There is inordinate and unreasonable delay between the passing of the order

of detention i.e., 15th January, 1997 and the date of arrest i.e., 23rd June, 1997 which negatives the reality and genuineness of the subjective satisfaction of the detaining authority as regards necessity for detaining the petitioner and therefore, the order impugned is liable to be set aside.

(iii) The detaining authority has taken into consideration extraneous and irrelevant matters and, therefore the entire order of detention is rendered illegal and void.

(iv) The order of detention is also liable to be quashed on account of total non-application of mind by the detaining authority in as much as there is a variance between the grounds of detention and the order of the detention. The grounds of detention at best show that the petitioner was dealing in smuggled goods whereas in the order of detention it is stated that the detention of the petitioner is necessary with a view to preventing him from smuggling of goods and this inconsistency has fatally affected the subjective satisfaction of the detaining authority and, therefore, the detention order is liable to be set aside.

4. We shall now deal with the first contention based on the alleged delay in issuing the order of detention. There is no dispute that the impugned order has been passed after a lapse of five months from the date of seizure of foreign currency from the petitioner. As repeatedly pointed out by the Apex Court, that there is no hard and fast rule that merely because there is time lag between the offending acts and the date of order of detention, the casual link must be taken to be snapped and the satisfaction reached by the detaining authority should be regarded as unreal, but it all depends upon the facts and circumstances of each case and the nature of the explanation offered by the detaining authority for the delay that had occurred in passing the order. In paragraph 6 of the affidavit in-reply filed by G.S. Sandhu, Secretary (Preventive Detention), Government of Maharashtra, Home Department, the following explanation has been given :

With reference to para 4(i) of the petition, I say that the Assistant Director, D.R.I., B.Z.U. Mumbai, submitted the proposal in respect of the detenu along with the concerned documents which were received in the Home Department on 18.10.1996. This proposal was accompanied by the proposal pertaining to the co-accused of the detenu, in the present case i.e. Shri Nainmal Joshi. After processing the papers by preparing files, notes, etc, the said proposal was submitted for consideration and orders of the then Detaining Authority (i.e. Shri C.D. Singh) on 28.10.1996, along with the case of the co-detenu. It is submitted that there were four closed holidays on 20.10.1996, 21.10.1996, 26.10.1996 and 27.10.1996 respectively. The then Detaining Authority carefully considered the papers and all the documents accompanying the same in both the cases on 30.10.1996. He opined that the documents were relevant and instructed to put up the same. The Joint Secretary then prepared the note and submitted the files to the then Detaining Authority on 8.11.1996. The then Detaining Authority considered the case and opined that the case be put up before him after issuance of the Detention Orders in cases at Sr. Nos. 83 to 94.

These cases were already under his consideration. These cases pertained to a group of detenus who were involved in big case of smuggling involving goods with a value of more than a crore of rupees. All the detenus from Sr. Nos. 83 to 94 were co-detenus of one another, As stated earlier, files pertaining to them were already under consideration of the then Detaining Authority, when the file pertaining to the present detenu was put up before him. Most of these cases at Sr. Nos. 83 to 94 were disposed of on 13.11.1996 and remaining cases were disposed of on 16.11.1996. I say that the case of the co-detenu Shri Nainmal Joshi was put up before the then Detaining Authority on 15.11.1996 and 26.11.1996 but the case could not be finalised. I say that the then Detaining Authority (i.e. Shri C.D. Singh) proceeded on medical leave on 27.11.1996. Thereafter, both the cases were put up before me as I took over charge as Secretary from Shri CD. Singh. I first considered the case of the co-detenu and directed the Joint Secretary to discuss about the retraction of that detenu. The matter was discussed by me with the Joint Secretary on 19.12.1996. Thereafter, draft grounds were prepared on 21.12.1996. On 21.12.1996 the concerned Joint Secretary put up the papers in both the cases before me. I carefully considered the proposal and documents and formulated the grounds of detention on 21.12.1996 in the present case. As 22.12.1996 was closed, holiday being Sunday, the translation of the Detention Order, Grounds of Detention and other relied upon documents were called for on 23.12.1996. The translation were received on 14.1.1997. Thereafter, I again considered the proposal, and other documents and contemporaneously issued the Order of Detention on 15.1.1997 along with the Grounds of Detention. It is further stated that the claim of the detenu that investigation was completed on 25.7.1996 is not correct. The documents generated during the course of investigation and relied upon documents were being forwarded to the Detaining Authority upto 10.12.1996 by the Sponsoring Authority. After considering the proposal, and carefully scrutinising all the documents, and after reaching my subjective satisfaction that it was absolutely necessary to issue the Detention Order, I issued the Detention Order on 15.1.1997 as mentioned above. The proposal of the detenu was received in the Home Department On 18.10.1996 and the Detention Order came to be issued on 15.1.1997. The approximate time taken to issue the Detention order I.e. 3 months was the minimum time required to issue the Detention Order, hence it cannot be termed as "undue delay". Looking to the facts and circumstances of the case pertaining to the detenu it cannot be said that the live link is snapped or that the Detention order was issued on a stale ground.

5. The sponsoring authority, namely, V.V. Sharma, Assistant Director, Directorate of Revenue Intelligence, Mumbai has stated in paragraph 4 of his affidavit as follows :

The contention in para 4(i) is denied. The detenu Is involved in the seizure case of assorted foreign currency equivalent to Rs. 5,42,375/- and Indian currency of Rs. 1,49,500/- from the detenu on 22,7.96, which were sale proceeds of foreign marked gold biscuits. He is also involved in the seizure case of assorted foreign

currency equivalent to Rs. 13,25,000/- on 22.7.96 from one Shri Nainmal Jasaji Joshi (co-accused). The amount of Rs. 13,25,000/- was to be paid towards the purchase of 38 foreign marked gold biscuits, which he had purchased from the detenu. The COFEPOSA proposal was initiated immediately and was placed before the Screening Committee which met only on 29.8.96 and the Screening Committee communicated the approval on 13.9.96. The required sets of necessary documents were prepared and forwarded to the Detaining Authority alongwith the proposal on 17.10.1996.

6. Mrs. Mane strenuously urged that the explanation offered by the respondents is totally unsatisfactory. She urged that there is no explanation as to why the sponsoring authority took nearly two months time in submitting the proposal for detention to the detaining authority. She also urged that the time lag of nearly three months from the date of receipt of the proposal till the date of impugned order of detention is not properly explained. She submitted that under the circumstances the credible chain, if any, has been broken and the live link having been snapped, the order of detention is liable to be set aside. Mrs. Mane placed heavy reliance on the judgment of the Supreme Court in T.A. Abdul Rahaman Vs. State of Kerala and others, .

7. In reply, Mrs. Tahiramani, learned Public Prosecutor urged that the respondents have satisfactorily explained the delay in issuing the order of detention. According to the learned Public Prosecutor, in the facts and circumstances of the case, delay of five months cannot be said to be unreasonable or undue. She placed reliance on the decision of the Supreme Court in Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others, .

8. It is now well settled by a series of decisions of the Apex Court that the credible chain between the grounds of criminal activity alleged by the detaining authority and the purpose of detention is snapped if there is too long and unexplained interval between the offending acts and the order of detention. But no "mechanical test by counting the months of the Interval" was sound. It all depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short or long, on the reason for the delay in taking preventive action, like information of participation being available only in the course of an investigation. See in this connection Golam Hussain alias Gama Vs. The Commissioner of Police Calcutta and Others, Olia Mallick alias Oliruddin Mallick Vs. The State of West Bengal, and; Malwa Shaw Vs. The State of West Bengal, . In M. Ahamedkutty Vs. Union of India (UOI) and Another, . the Supreme Court held that the delay of five months in issuing detention order cannot be said to be vital where the delay is a result of full and detailed inspection and the consideration of facts of the case and therefore the grounds cannot be held to be remote and the detention order cannot be held to be bad on the ground.

9. In Rajendra Kumar Natwarlal Shah v. State of Gujarat and Ors. (supra) the Supreme Court has clearly drawn a distinction between the delay in making of an

order of detention under a law relating to preventive detention like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards under Article 22(5). The Supreme Court observed in paragraph 10 as follows :

A distinction must be drawn between the delay in making of an order of detention under a law relating to preventive detention like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards of Article 22(5) of the Constitution. The rule as to unexplained delay in taking action is not inflexible. In cases of mere delay in making of an order of detention under a law like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering who, owing to their large resources and influence have been posing a serious threat to the economy and thereby to the security of the nation, the Courts should not merely on account of delay in making of an order of detention assume that such delay, is not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the court finds that the grounds are "stale" or illusory or that there is no real nexus between the grounds and impugned order of detention.

10. The above decisions were considered in T.A. Abdul Rahaman Vs. State of Kerala and others, wherein the Supreme Court has observed :

The general view in case of delay in securing arrest of detenu after an order is passed can be summarised thus : The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such delay has occasioned, when called upon to answer and further the Court has to investigate whether the casual connection has been broken in the circumstances of each case. Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction as regards the necessity for detaining the detenu with a view of preventing him from acting in a prejudicial manner.

It is pertinent to note that in the above case there was delay of about ten months in passing the order of detention. The Supreme Court held that the delay was unjustified and unexplained and, therefore, quashed the detention order.

11. In the instant case illegal foreign currency was seized from the petitioner on 22nd July, 1996. It appears that immediately thereafter a proposal for preventive detention was initiated and was placed before the Screening Committee. The Screening Committee met only on 29th August, 1996 and thereafter the Screening Committee communicated the approval on 13th September, 1996. The required sets of necessary documents were prepared and forwarded to the detaining authority along with the proposal on 17th October, 1996. Thereafter the detention order came to be passed on 15th January, 1997 after complying with the necessary formalities. In these circumstances, it is not possible to accept the argument of Mrs. Mane that the delay has not been satisfactorily explained. In the facts and circumstances of this case a time lag of five months between the alleged Incident and making of order of detention is not so large that it can be said that the live link between the prejudicial activity of the petitioner and the final order of detention has been snapped. We have, therefore, no hesitation in rejecting the first contention of Mrs. Mane.

12. Coming then to the second contention, Mrs. Mane strenuously urged that there is inordinate and unexplained delay of nearly five months between the passing of order of detention and the date of arrest of the petitioner. This plea raised by the learned Counsel is replied in paragraph 7 of the affidavit of G.S. Sandhu which reads as follows :

With reference to para 4(ii) of the petition, it is stated that the Detention Order passed by me was forwarded alongwith the other documents to the Commissioner of Police, P.C.B., C.I.D., Greater Mumbai for execution upon the detenu vide Government letter, dated 15.1.97. The Assistant Commissioner of Police, Crime Branch (P), C.I.D., Mumbai vide his wireless message dated 31.1.1997 informed the Superintendent of Police, Kasargod, Dist. Kerala State, by giving the detenu's native place address and requested him to make discreet and confidential enquiries about the detenu's availability and to apprehend him. Further the Assistant Commissioner of Police, Crime Branch (P.) C.I.D. Mumbai vide its letter dated 12.2.1997 informed this Government that on 15.1.1997, 16.1.1997, 31.1.1997 efforts were made to trace the detenu but the detenu could not be traced. On 16.1.1997 and on 17.1.1997 letters were sent to Sr. P.I.M.R.A. Marg Police Station, Mumbai and to the Deputy Commissioner of Police, SB (II) C.I.D., Mumbai to verify the address of the detenu regularly and to keep a look out for the detenu at immigration, Sahar Airport and Seaport Branch, respectively. The Assistant Commissioner of Police (H.Q.), Crime Branch (P.), C.I.D., Mumbai has informed vide his letter dated 24.6.1997 that the Detention Order in this case was served upon the detenu on 23.6.1997, and he has been lodged in the Mumbai Central Prison, Mumbai. It is denied that there has been delay in execution of the Detention Order. It is submitted that the detenu himself

is responsible for delay if any in executing the Detention Order upon him. It is also denied that the Detention Order has been issued as a punitive measure and has been issued malafidely. It is stated that after carefully scrutinising all the documents in this case I was subjectively satisfied that the detenu is likely to continue to engage in such similar prejudicial activities in future and hence it was absolutely necessary to detain the detenu in order to prevent him from doing so.

13. In this connection it is necessary to refer to the affidavit of the sponsoring authority and particularly para 5 thereof which read as follows :

The contention in para 4(ii) is denied. An application for cancellation of bail was made before C.M.M. on 19.12.1996 and the Court had issued a notice to the detenu returnable on 9.2.1997. In the meantime, attempts were made to serve the Detention Order on 15.1.1997, 16.1.1997, 31.1.1997, 10.2.1997 on the detenu. On these occasions the detenu was not available at the known addresses. A copy of the notice was pasted at the address given in the notice under a Panchanama. Subsequently the Hon'ble Court again issued a notice for appearance on 24 A. 1997 on a fresh application made by the D.R.I, made returnable on 29.4.1997. However, the notice could not be served as the detenu was not available at the given address. Another notice was also issued on 13.5.1997 on the basis of the application for cancellation of bail of the detenu but the same could not be served since the detenu was not available at the given address and under a Panchanama the notice was pasted again at the given address on 13.6.1997, Finally the accused was traced and was served with the Detention Order on 23.6.1997. Hence it is incorrect to say that no attempts have been made to serve the detention order on the detenu immediately after issue of the same.

14. It is undoubtedly true that there is a time gap of nearly five months between the date of the order of detention and the arrest of the detenu. Mrs. Mane brought to our notice the decision in the case of K.P.M. Basheer Vs. State of Karnataka and another, . In that case there was a delay of more than five months in executing the detention order. It was held by the Supreme Court that no serious and sincere effort was made by the arresting officers either by taking action u/s 7 of the Act or in arresting the detenu when he appeared before the Assistant Collector of Customs and there was undue and unreasonable delay in securing and detaining the detenu and consequently the "live and proximate link" between the grounds of detention and the purpose of detention is snapped and hence the order of detention cannot be sustained. In the instant case the record shows that the petitioner was absconding even prior to the passing of the detention order. It seems that the petitioner was released on bail on a specific condition that he would attend all the dates of remand and extension of date. As the petitioner failed to appear on the date of remand before the learned Magistrate, an application was moved by the D.R.I. authorities on 19th December, 1996 for cancellation of bail. The learned Magistrate issued notice on the said application making the same returnable on 9th February, 1997. The

notice could not be served on the petitioner as he was not available at the known address. Subsequently, the learned Magistrate again issued notice for appearance on 24th April, 1997 on a fresh application made by the D.R.I, authorities and made it returnable on 29th April, 1997. However, the said notice also could not be served as the petitioner was not traced. It is seen from the affidavit of Mr. R.B. Dange, Police Inspector, that serious efforts were made to serve the detention order on the petitioner but the petitioner could not be traced. On 31.1.1997 a wireless message was sent to the Superintendent of Police, State of Kerala with a request to make efforts to trace the petitioner as the native place of the petitioner was given as Kumbalev Izzat Manzil, Station Road, Kasargod, Kerala. In these circumstances, it is difficult to hold that the delay in executing the detention order was not properly explained by the authorities. The delay in execution of the detention order has been occasioned not by omission or commission on the part of the detaining authority. On the contrary, it is the petitioner who has delayed the execution as he was absconding throughout during the relevant period.

15. Mrs. Mane next argued that the detaining authority while arriving at the subjective satisfaction has taken into consideration the previous detention order against Nainmal Joshi and this material being completely extraneous and irrelevant for arriving at subjective satisfaction, the order of detention has become unsustainable in law. The learned Public Prosecutor rightly submitted that even assuming that the ground of detention based upon earlier detention order of Nainmal Joshi is irrelevant and extraneous, the entire detention order cannot be said to be illegal or invalid. She brought to our notice the provisions contained in Section 5A of the Act. Section 5A provides that where there are two or more grounds covering various activities of the detenu, each activity is a separate grounds by itself and if one of the grounds is vague, non-existent, not relevant, not connected or not proximately connected with such person or invalid for any other reason whatsoever, then that will not vitiate the order of detention. In the present case the detention order is based on more than one act which can be sustained on the material stated in the grounds of detention. Mrs. Mane, however, urged that in a similar situation an order of detention was quashed by the Supreme Court in Vashisht Narain Karwaria Vs. State of U.P. and another, . It is not possible to accept the submission of the learned Counsel. In Vashisht Narain Karwaria's case (supra) the detention was based on a solitary ground and the Supreme Court found that the sponsoring authority had placed before the detaining authority some extraneous matters which were not referred to in the grounds of detention, might have influenced the mind of the detaining authority and hence the detention order was vitiated. The Supreme Court, therefore, held that Section 5A does not apply to the case. In the instant case the detention order is based on more than one ground. In view of the provisions contained in Section 5A, the detention order cannot be said to be vitiated on the ground that one of the grounds was irrelevant.

16. The last submission of Mrs. Mane is based upon the so called variance

between the grounds of detention and the order of detention. It is argued by Mrs. Mane that the grounds of detention indicate that the petitioner was dealing in smuggled goods and not actually involved in smuggling of the goods. But however, the detaining authority has stated in the order of detention that the order is passed with a view of preventing the petitioner from indulging in smuggling of goods. It is disclosed in the grounds of detention that the petitioner used to supply foreign currencies to persons and was financing foreign going passengers. These passengers used to bring foreign marked gold biscuits. The definition of smuggling of goods as contained in the Customs Act is wide enough to cover the alleged prejudicial activities of the petitioner. In the circumstances, there does not appear to be any inconsistency in the grounds of detention and the order of detention as alleged by the petitioner. Hence, the last contention of Mrs. Mane is also liable to be rejected.

17. In the result, petition fails and the same is dismissed.