
(1998) 06 BOM CK 0073

In the Bombay High Court

Case No : Criminal Writ Petition No. 818 of 1997

Abdul Rehman

APPELLANT

Vs

The State of Maharashtra and others

RESPONDENT

Date of Decision : 18-06-1998

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 7
Customs Act, 1962 — Section 108

Citation : (1999) 5 BomCR 97 : (1999) BomCR(Cri) 97 : (1998) CriLJ 3939(1)

Hon'ble Judges : P.S. Patankar, J; N. Arumugham, J

Bench : Division Bench

Advocate : Mrs. A.M.Z. Ansari, for the Appellant; O.G. Bagave, Assistant Public Prosecutor and R.M. Agrawal, for the Respondent

Judgement

N. Arumugham, J.—This writ petition is filed under Article 226 of the Constitution of India to quash the order of detention bearing No. SPL-3(A)/. PSA 0196/57 dated 1-11-1996, passed by the 1st respondent the Principal Secretary to the Government of Maharashtra, Home Department (Preventive Detention), Mantralaya, Bombay, against the detenu Zahir Abbad Obaid, u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (For short, the COFEPOSA Act). The grounds of detention, provided by the detaining authority, were found in Annexure "B" of the detention order in detail.

2. The petitioner is the brother of the detenu Zahir Abbas Obaid. On 14-4-1996, the detenu had arrived at Mumbai, Sahar International Airport by Oman Airways Flight No. WY 800 from Dubai via Muscat and he was intercepted near the conveyor belt at the arrival hall, Module I, N.T.P.T., at the Airport, Mumbai. Since he was having an Indian passport issued at Mumbai, he had identified his baggage consisting of one "Visa" Zipper suitcase and one carton claimed after identification with his baggage tags along with a briefcase and one plastic bag as hand baggage. It appears that the detenu had declared on record that his baggage contained 15,000 watch movements valued at Rs. 60,000/- and various

types of wrist watches numbering 2500 pieces valued at Rs. 2,00,000/-. As the Customs officers were not satisfied within this declaration, they brought the detenu to the office of the Superintendent of Customs, Sahar Air Cargo, Preventive Wing, along with his baggage and opened it in the presence of the panchas and found 2821 pieces of wrist watches and 25000 pieces of watch movements which were recovered under the cover of the panchnama attested by the panchas and both were valued at Rs. 10,35,450/- C.I.F. and Rs. 20,70,900/- L.M.V. respectively. According to the customs authorities, they had reasoned to believe that they were smuggled into India and, as such, liable for confiscation under the Customs Act, 1962. As regards the seizure of the said carton baggage, a panchanama, as provided by the law, has been prepared. Statement of the detenu was recorded u/s 108 of the Customs Act and that in which the detenu has said that he used to go to Dubai to bring the goods of the foreign marks often and sell the said goods in the market in Bombay and that, accordingly, he had been to Dubai for about twenty times prior to the said date and that on a previous occasion, the goods, in his custody, were also confiscated by the Customs authorities at Sahar International Airport, Bombay, and duty of Rs. 31,000/- was paid by the detenu on one occasion, and on other occasions, it was also paid like that. Upon the movements of the detenu herein on the relevant date with the above background, the Customs authorities were not satisfied and consequently brought him to the office of the Superintendent of Customs, Sahar Air Cargo, Preventive Wing, and recorded the statements. Panchanama and statements recorded by them, were also furnished to the detenu. The two slips dated 18-12-1995 and 21-3-1996 recovered from the detenu, show the amount of Rs. 50,000/- and Rs. 10,000/- deposit in favour of Mrs. C.H. Ayisha w/o Mohammed Abbas from whom the detenu had borrowed money in Dubai for purchase of wrist watches. The said two slips were also produced by him with the authorities concerned. His address was given as Acharkare House, Post Paivalika, Manjeshwar Block, Kasargoda, District-Kerala, Pin : 670 322. Then, he was arrested on 14-4-1996 and produced before the learned Chief Metropolitan Magistrate, Mumbai, on the next date ie. 15-4-1996. However, on 16-4-1996 the learned Chief Metropolitan Magistrate, Esplanade, Mumbai, granted bail to the detenu with some conditions.

3. On 15-4-1996 itself, it appears that the detenu had retracted his earlier statement dated 14-4-1996 stating that it was not voluntary. But, however, the statements from the detenu were subsequently recorded by the respondents and a show cause notice was given to the detenu on 22-8-1996.

4. In the light of the above facts, the respondents-authorities are of the view that the detenu is likely to continue to engage in the aforesaid prejudicial activities in future also which necessitated to detain the detenu under the COFEPOSA Act with a view to preventing him in future from acting in any manner prejudicial to the augmentation of country's foreign exchange resources. The proposals were sent along with the relevant case records and the material statements collected, to the detaining authority and consequently the detention

order, as above referred, has been passed against the detenu.

5. Thus, it is seen that further statement of the detenu was recorded on 23-4-1996 and on 28-8-1996 the Department had filed their rebuttal to the retraction of the detenu prior to the issuance of the show cause notice on 22-8-1996.

6. A copy of the detention order dated 1-11-1996 passed by the detaining authority, was served upon the detenu on 5-7-1997 along with communication with a list of documents which contains a copy of the detenu's application which was filed before the learned Chief Metropolitan Magistrate for bail and the orders passed therein, on 23-6-1997 and a copy of the letter of the Advocate. On 29-1-1997 an application for extension of bail was filed before the learned Chief Metropolitan Magistrate, Mumbai. On 30-4-1997, an application was also filed for extension of bail. In the meanwhile, the detenu had filed an affidavit before the CEGAT. Then, on 19-2-1997 a notice u/s 7 of the COFEPOSA Act was published and given. On 25-5-1997, a representation was sent by the detenu before the execution of the detention order. A reply was also sent to the show cause notice dated 20-9-1996. Thus, the detenu has been detained and he is in custody.

7. The detention order, as referred to above, was challenged by Mrs. Ansari, the learned Counsel appearing for the petitioner, mainly, on four grounds. The first one, amongst the same, has been dealt with in para (v) of the grounds of the writ petition. According to her, the impugned order of detention was belatedly passed on 1-11-1996 and further it had been served on the detenu on 5-7-1997, i.e. after a lapse of more than eight months. She contended that the petitioner was available through out till the execution of the impugned order of detention and the petitioner had filed the appeal before the CEGAT against the adjudication order passed by the Commissioner of Police by filing an affidavit dated 13-8-1997. The contention that the detenu was not available for execution of the detention order, cannot be accepted. If that was so, the respondents ought to have promptly made an application before the learned Chief Metropolitan Magistrate for cancellation of the bail of the detenu and forfeiture of the amount deposited by him and that instead of doing so, it is also noted that the sponsoring authority applied for extension of bail period on the dates of remand i.e. on 29-1-1997 and 30-4-1997. To substantiate the claim, the learned Counsel for the petitioner relied upon copies of the said application for extension of the bail period and the order passed thereon by the learned Magistrate annexed as Exhibits "H" & T along with the grounds of appeal. According to the learned Counsel for the petitioner, there was a time gap of more than 6.1/2 months in passing the detention order and that to which there was no convincing reply or explanation given by the respondents and as such the very proximity ought to have been made by the respondents between the detention order and the offending activities, is totally lacking in the case.

8. Then, the learned Counsel Mrs. Ansari would contend that though the detention order was passed on 1-11-1996 which was served upon the detenu

only on 5-7-1997, by the delay of more than eight months in this case, since which remained unexplained with not any satisfactory response for such an inordinate delay. The very nexus and the proximity and the delay in such executing the detention order has caused every prejudice and clearly vitiates the detention order. The third contention of the learned Counsel is that while passing the detention order, the detaining authority has not at all applied its mind and lastly the representation made by the detenu to the authorities concerned, has not been considered promptly and in which there is a considerable delay which also vitiates the detention order.

9. A reply affidavit has been filed by the Deputy Secretary to the Government of Maharashtra, Home Department, (Special), Mantralaya, Mumbai, inter alia, supporting the validity of the detention order and in which para 5 of the same has been relied on by Mr. Bagave, learned Addl. Public Prosecutor appearing for the 1st respondent and submitted his contention by way of explanation of reasons for the delay in executing the detention order as well as providing the proximity or nexus to passing of the detention order against the detenu. It has been stated therein that the proposal along with the concerned documents has been sponsored by the Commissioner of Customs, COFEPOSA, Mumbai and received by the Home Department on 10-6-1996 and that the statements and additional information dated 23-4-1996 and 17-5-1996 was received on 19-6-1996. Consequently, according to him, other documents, viz. the Customs Pass No. 175562, boarding passes of Oman Air Zones, Oman Air Ticket No. 910-4400 236150-2 etc, were forwarded with its covering letter on 21-6-1996 and that the retraction made by the detenu on 15-4-1996 was received on 4-7-1996. On receipt of such documents, the same has been considered by the detaining authority on 11-7-1996 and further they had a discussion with the Investigating Officer on 12-7-1996 followed by the same on 2-8-1996 and 3-8-1996. Thus, the proposal has been duly considered and to formulate the draft grounds of detention and scrutinies the documents, time has been consumed from 11-8-1996 till 12-8-1996. However, in the meanwhile, the additional documents, ie., rebuttal reply filed by the sponsoring authority on 28-8-1996 and the show cause notice on 22-8-1996 was received in the Home Department on 30-8-1996 and 4-9-1996 respectively. It made the detaining authority to consider the proposal and scrutinies the documents once again along with the draft grounds of detention on 4-9-1996 and after preparing the copies of the documents, draft grounds of detention and translation copies, they had to pass the detention order on 1-11-1996. Referring the said dates, all the activities and the things done by the detaining authority with reference to its dates, the learned Counsel for the respondents submitted that in the ordinary course of nature, everything has been done in accordance with law and promptly, clearly, and by scrutinising every documents sent by the sponsoring authority and that there was no delay and that even if there is delay for the above said activities of the detaining authority, it is to be seemed that the delay in passing the detention order has been explained and that there upon the very nexus and proximity of the

offending activities of the detenu has been made available in passing the detention order.

10. The first contention of the learned Counsel appearing for the petitioner was that there was more than six months delay in passing the detention order against the detenu by the detaining authority which fails to provide any nexus or proximity to the offending activities of the detenu even if it is taken true and the response by the learned Counsel for the detaining authority is that the delay has been explained as above referred. It is, at this juncture, we had occasion to go through the every contention raised for and on behalf of the petitioner as well as the detaining authority with reference to the contentions raised in their respective affidavits and oral submissions. Coincidentally the proposal to detain the detenu under the COFEPOSA Act was received by the Home Department on 10-6-1996. The detenu was apprehended and arrested on 14-4-1996. This would mean that nearly a span of two months had taken place for the sponsoring authority to send the proposal to the Government to detain him. The delay of two months, however, has not been explained by the detaining authority or the sponsoring authority by filing any affidavit or otherwise. It is not known that as to what has been done by the sponsoring authority for about two months to send the proposal to detain the detenu in order to preventing him from his prejudicial activities provided by the law. Then comes to the documents one by one, if so to say, has been received by the detaining authority intermittently on various dates and very conveniently stated in para 5 of the affidavit for and on behalf of the detaining authority. The reception of the documents by the detaining authority from the sponsoring authority was over only on 11-7-1996 which was followed by the detaining authority indulged in having the discussion with the Investigating Officer and finally came to the conclusion to detain the detenu under the relevant provisions of the COFEPOSA. The consideration, as has been referred to, does not end with this. The detaining authority on the occasion of receiving further documents like the rebuttal reply, show cause notice, draft grounds of detention and so on and such all the documents were called for from the sponsoring authority on 10-9-1996, however, which were sent to the Home Department on 31-10-1996. After 31-10-96, the detaining authority had admittedly formulated the second consideration very leisurely and conveniently consumed nearly about 6.1/2 months and has passed the detention order in question on 1-11-1996. On the basis of the contentions made by the learned Addl. Public Prosecutor Shri Bagave for the detaining authority and having perused the explanation for the delay of about 6. 1/2 months, as specifically spelt out in para 5 of his reply affidavit, we are of the definite view that either the detaining authority or the sponsoring authority, was not prompt in considering the proposal.

11. The second condition which is the main contention raised by the learned Counsel for the petitioner is that there is inordinate delay in executing the detention order dated 1-11-1996 and for such delay there was no acceptable explanation or reasoning given by the detaining authority either in the affidavit

or otherwise and that, therefore, on this ground alone the impugned detention order becomes vitiated. Though the learned Counsel for the detaining authority has taken some futile attempts to explain such delay on the basis of the contentions made in para 8 of the reply affidavit filed by the Deputy Secretary, Home Department (Special), Mumbai. We have perused the same reply as to whether it can be accepted or not. The substance of the explanation was that the detaining authority has forwarded the order of detention as well as the grounds and documents to the Secretary of Government of Kerala, Home (S.S.A.) Department, Thiruvananthapuram, Kerala on 1-11-1996 itself for the execution thereof upon the detenu at his residential address and that on 11-11-1996 the Additional Chief Secretary, Home (S.S.A.) Department, Kerala State, informed the detaining authority that the detention order and other documents were forwarded to the Superintendent of Police, Kasargoda for execution. However, on 24-6-1996 the Superintendent of Customs (P), Mumbai informed the detaining authority that the detenu had surrendered before the learned Chief Metropolitan Magistrate, Mumbai on 23-6-1997. After informing the said fact to the authority of Kerala Government, and getting back the said order and documents, it has been stated that the same has been served on the detenu on 5-7-1997 at Mumbai. From the perusal of the reply affidavit, particularly with reference to para 8, it is noticed that the delay in serving the detention order or executing the detention order against the detenu was mainly due to the authorities of Kerala Government in not responding the request made by the detaining authority Mumbai as well as the address given by the detenu in the statement was Kerala address. According to the learned Counsel appearing for the detaining authority, after having considered the said contention with reference to the documents, we are not in a position to countenance the said contention of the learned Counsel for the respondents for the simple reason that it was not address of the detenu which is the criteria tilting the balance in favour of the authorities but the very inaction of the executing authorities contributes the delay, but, however, the uncontroverted and the admitted fact remains that the detenu himself has surrendered before the learned Chief Metropolitan Magistrate, Esplanade Mumbai on 23-6-1997 and he has moved the Chief Metropolitan Magistrate, Esplanade, Mumbai, by an application, being R.A. No. 79 of 1996 for granting him bail on 15-4-1996 itself making the Customs and Intelligence Mumbai as one of the complainants and also referring to the factual matrix of the case in the petition and after hearing both the parties with a request made by the Customs authorities to hand over the custody of the detenu to themselves, the learned Chief Metropolitan Magistrate ordered the bail for the detenu on his executing a bond and solvent surety in the sum of Rs. 1,50,000/- or cash bail deposit of Rs. one lakh in lieu of surety of Rs. 1,50,000/- and directed the detenu to attend the Court daily at 11 a.m. until further orders and also to attend the office of the Investigating Officer from 12 noon to 2 p.m. daily for a period of four working days and that the detenu shall not leave Mumbai till his residential address is verified. The order further reveals that his passport be retained by the Investigating Officer until further orders of the Court. It is also noticed that the

Customs and Intelligence are the parties and their request of custody of the detenu was rejected by the learned Chief Metropolitan Magistrate. It is also noticed that on 22-4-1996, after hearing both the sides, the learned Chief Metropolitan Magistrate, Esplanade Court, Mumbai, has passed the order that the department had not submitted any report as regards the verification of the address and that, therefore, the daily attendance of the detenu in the Court was dispensed with. Then, while the detenu was on bail and remained in Mumbai Town by fulfilling the conditions imposed by the learned Chief Metropolitan Magistrate, Mumbai, the Customs Officers has moved the Court by filing an application for extension of bail upto 30-4-1997 and that was done on 29-1-1997, and accordingly bail period was extended to the detenu till 30-4-1997. Then again another petition was filed by the Customs Department before the Addl. Chief Metropolitan Magistrate, Mumbai for extension of bail of the detenu upto 30-7-1997 and that has been ordered accordingly. The second application was filed on 30-4-1997. From the above, it is made it clear that the sponsoring authority had correct and full address of the detenu in Mumbai and that he was not at Kasargoda at any point of time and that, therefore the explanation given by the detaining authority that the address of the detenu in his first statement recorded on 14-4-1997 was since given to Kasargoda, Kerala, the detention order was sent there and since the detenu was not there, the execution of the detention order could not be done, cannot, at all, be accepted for any reason. While the sponsoring authority was fully aware of the availability of the detenu and he was attending the Court daily as confined to remain within the Mumbai town limits and that when the address, whatever it may be, given by the detenu in his statement is true or not, is supposed to be verified as directed by the Court, by the Customs Authorities and that it has not been done within the time given by the learned Magistrate and subsequently the address of the detenu has been verified at Mumbai on 26-4-1996, as is evident from the copy of the letter on record. The sponsoring authority is duty bound in law either to move the proceedings before the learned Magistrate's Court concerned to cancel the bail application or to execute the detention order passed against the detenu. Neither of the things they did. However, they have filed two applications for extension of bail for the obvious reasons known to themselves. In the light of the above said facts brought to our notice and having considered the contentions made in the reply affidavit by the detaining authority pertaining to explanation for inordinate delay of about 8.1/2 months for executing the order, is a fatal one and vitiates the detention order. The reasonings and explanation given in the reply affidavit are vague and not plausible one. It appears that the reasonings of the detaining authority have been innovated to take the undue advantage of the address found in the statement recorded by the authorities from the detenu on 14-4-1996 itself. The letter to the sponsoring authority addressed to the learned Chief Metropolitan Magistrate itself proves the fact that Kasargoda's address given by him is a permanent one, but however clinches that the address during the relevant time was of Mumbai. Under the circumstances, nothing prevented them to take steps to cancel the bail and to execute the detention order with

grounds and other copies of the documents on records on the detenu so as to prove that their activities are very prudent and bona fide.

12. It is relevant, at this stage, for us to refer the case law held in Rameshkumar Balkishan Cital v. State of Maharashtra 1998 Bom.C.R.(Cri.) 599 : 1997 All. .R. (Cri.) 1810 for the following ratio:

"What confronts the respondents in this case is the application dated 18th June 1996 made by none else than the Intelligence Officer of the Directorate of Revenue Intelligence, the contents of which, we have reproduced in para 3 above. We may add here that despite the letter dated 26th March 1996 issued by the Sponsoring Authority to the State Government, no application was made for cancellation of bail. Similarly, despite the Sponsoring Authority writing to the State Government on 9th July 1996 for initiating action u/s 7(1) of the COFEPOSA Act, no action was taken for declaring the detenu as having absconded and for the consequent action under sections 82, 83, 84 and 85 of the Code of Criminal Procedure. Despite a summons having been issued on 4th April, and 10th April 1996 calling upon the detenu to appear and his having failed to appear, an application for extension of bail was made on 18th June, 1996. In our view the correct course for the respondents was to apply for cancellation of bail and to take action u/s 7(1) of the COFEPOSA Act. Rather than doing that, an application for extension of bail was made. In our view, the cumulative effect of all these steps, acts and omissions on the part of the respondents vitiates the order of detention which is liable to be set aside."

In the midst of a catena of case laws available in this regard, it is pertinent for us to refer to one case law, decided by the Apex Court held between T.A. Abdul Rahaman Vs. State of Kerala and others, , the ratio of which is as follows :--

"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 of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner."

13. In the light of the above ratio held by the Apex Court, amongst various other case law available in this regard and after applying the same to the facts of the instant case, we are totally and fully satisfied to hold that inordinate delay in executing the order of detention passed in this case to the detenu, since, has not been explained at all by any convincing explanation or otherwise, the impugned detention order has become totally vitiated and as such on this count alone, the same is to be quashed and set aside.

14. Though the Bar for the petitioner raises some more grounds during the course of his argument and relied on several case law to substantiate the same and the learned Counsel appearing for the respondents attempted to counteract

the same by referring the case law as well as the judgment of this Court, we feel that quoting the same and consequently discussing all the said contentions and the case law in the context of what we have observed above, became unnecessary and that therefore finally we give our conclusion that the detention order, in question, in this case has become vitiated and is hereby quashed and set aside.

15. In the result, the Writ Petition succeeds and accordingly it is allowed. The impugned detention order bearing No. SPL, 3(A) PSA 0196/57 dated 1-11-1996 passed by the respondent No. 1 against the detenu Zahir Abbad Obaid, is hereby quashed and set aside. Consequently, the detenu Zahir Abbad Obaid is hereby set at liberty forthwith, provided he is not required in any other law in force.

Rule made absolute accordingly.

16. Petition allowed.