

(2012) 08 BOM CK 0127

In the Bombay High Court

Case No : Criminal Writ Petition No. 793 of 2012

Amiruddin Jamaluddin Sayyed

APPELLANT

Vs

Medha Gadgil, The Principal Secretary (Appeals and Security), Government of Maharashtra, Home Department, Mantralaya, Mumbai and Others

RESPONDENT

Date of Decision : 31-08-2012

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 22(5), 226

Citation : (2013) 1 BomCR(Cri) 427

Hon'ble Judges : R.Y. Ganoo, J;A.M. Khanwilkar, J

Bench : Division Bench

Advocate : D.S. Mhaispurkar, for the Appellant; A.S. Pai, Assistant Public Prosecutor for Respondent Nos. 1 to 5 and Ms. P.H. Kantharia, Assistant Public Prosecutor, for the Respondent

Judgement

A.M. Khanwilkar, J.—This petition, is filed by the brother of detenu-Saiyed Jamaluddin Naeemuddin, praying for issuance of writ of habeas corpus under Article 226 of the Constitution of India and for quashing and setting-aside the preventive detention order passed by the Principal Secretary (Appeals and Security), Government of Maharashtra, Home Department and the Detaining Authority dated 26th September, 2011 bearing No. PSA-1211/CR-17(1)/SPL/3(A), in exercise of powers u/s 3(1) of the COFEPOSA Act, 1974. The petitioner has raised diverse grounds for quashing and setting-aside the impugned preventive detention order passed against his brother.

2. After hearing the Counsel for the parties, we, tentatively, indicated that the first ground urged by the petitioner appears to be a formidable ground and the petition can be disposed of on that basis without going into any other contention articulated in the memo of writ petition. However, the said ground, would entitle the Petitioner for a mere declaration that the continued detention of the detenu

is rendered illegal and vitiated; but not good enough for quashing and setting-aside the impugned detention order. Indeed, the Counsel for the petitioner was at pains to persuade us to take the view that even the said ground can be the basis to quash and set-aside the impugned preventive detention order, which order, according to him, was essential to extricate the detenu or persons claiming through him from any further action under provisions of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter referred to as 'the SAFEMA'). We shall advert to this aspect a little later.

3. Reverting to the first contention, on which the detenu ought to succeed, is one of avoidable and unexplained delay in consideration of the detenu's representation by the Central Government. The petitioner asserts that the five copies of representations were sent on behalf of the detenu addressed to the Detaining Authority, State Government and Central Government vide Advocate's letter dated 30th January, 2012. The said representation was forwarded by the Superintendent of Central Prison, Nashik vide letter dated 1st February, 2012 to the respective Authorities. As regards the representation sent to the Central Government, the same was received in the COFEPOSA, Union Ministry of Finance, Department of Revenue, New Delhi on 7th February, 2012. Nevertheless, the representation was finally considered by the authorised Officer of the Central Government only on 20th March, 2012. This delay was avoidable and substantial part thereof has remained unexplained. To consider this ground, we may have to advert to the reply affidavit filed of Respondent No. 6 dated 16th April, 2012. Paragraph 2.2. of the said affidavit reads thus:

2.2. With regard to the averments made in Para- BB in the Grounds of the Petition insofar as these relate to the Respondent No. 6 i.e. Union of India, it is respectfully submitted that as per the records maintained in the Cofeposa Unit of the Ministry a representation dated 01.02.2012 (not 30.01.2012 as claimed by the Petitioner) in respect of the detenu Shri. Saiyed Jamaluddin Naeemuddin, the brother of the Petitioner herein, as forwarded by the Superintendent of Central Prison, Nashik, vide their letter dated 01.02.2012, was received in the COFEPOSA Unit of the Ministry of Finance, Department of Revenue, New Delhi on 07.02.2012. Parawise comments on the representation and other relevant information were called for from the Sponsoring Authority, viz the Commissioner of Customs (Preventive), Mumbai and the Detaining Authority viz the State Government of Maharashtra, Mumbai on 07.02.2012 itself. The comments of the Sponsoring Authority on the representation, sent vide letter dated 13.02.2012 by post, were received in the COFEPOSA Unit of Ministry of Finance, Department of Revenue, New Delhi on 21.02.2012. The comments of the Detaining Authority on the representation, sent vide letter dated 15.02.2012 by post, were received in the COFEPOSA Unit of Ministry of Finance, Department of Revenue, New Delhi on 29.02.2012. COFEPOSA Section submitted the file along with all the relevant records & documents to the Assistant Director General (COFEPOSA) on 29.02.2012 for examination. Assistant Director General (COFEPOSA) discussed the matter with the officers of the Sponsoring Authority over telephone and

obtained some information/clarification relating to the report of the State Advisory Board and the decision of the State Government based on that report, so as to examine the representation in detail. The said information/documents were received in his office on 15.03.2012 through FAX. After obtaining all the requisite information and also after conducting detailed examination of the issues raised in the representation and the comments of the Sponsoring Authority and Detaining Authority thereon, Assistant Director General (COFEPOSA) prepared a comprehensive note and submitted the file to the Joint Secretary (Cofeposa) on 15.03.2012. The Joint Secretary (COFEPOSA), in turn, submitted the file to the Special Secretary & Director General, Central Economic Intelligence Bureau, New Delhi on 15.03.2012 itself, with her remarks. Special Secretary & Director General, Central Economic Intelligence Bureau, Ministry of Finance, Department of Revenue, New Delhi was on tour at that particular time. On return from his tour, the said representation was considered by the Special Secretary & Director General, Central Economic Intelligence Bureau, Ministry of Finance, Department of Revenue, New Delhi, on behalf of the Central Government on 20.03.2012 and the same was rejected by him being devoid of merit. The file was received back in the COFEPOSA Unit on 21.03.2012. The detenu was intimated about the rejection of his representation dated 01.02.2012 vide Memorandum dated 21.03.2012.

4. The explanation offered by the Central Government, who was obliged to consider the representation sent by the detenu expeditiously, can be straightaway accepted for the period between 1st February, 2012 till 29th February, 2012.

5. However, the explanation for the period between 29th February, 2012 till 15th March, 2012, to say the least, appears to be the ipse dixit of the affiant. We say so because we called upon the Counsel appearing for the said Authority to produce the original record and to substantiate by contemporaneous noting made in the file as to the dates on which the telephone calls were made and to which Officer and other incidental matters. However, the Learned APP in all fairness accepted that no noting is found in the file regarding the steps taken between 29th February, 2012 till 15th March, 2012. It would inevitably follow that it is a case of callousness and supine indifference shown by the Officers in the Office of the Assistant Director General (COFEPOSA). For, once the complete file along with all the relevant records and documents were submitted in the office of the Assistant Director General (COFEPOSA) on 29th February, 2012, the reason why the same could not be processed further with utmost dispatch, is not forthcoming except the bare words in the reply affidavit that some information was called on telephone and it was awaited. In other words, the time taken between 29th February, 2012 till 15th March, 2012 in our considered opinion, was not only avoidable but has remained unexplained. Thus, infringing the right guaranteed to the detenu under Article 22(5) of the Constitution of India.

6. Assuming that we were to ignore the casualness and supine indifference of the

officials referred to earlier, even for the subsequent period between 15th March, 2012 till 20th March, 2012, the situation is no different. The explanation given in the reply affidavit is about the inability of the Officer who was supposed to consider the representation, on the specious plea that he was on tour during the relevant period. In the first place, inability of the officer to consider the representation, due to being away on tour, by itself, cannot be a just excuse. It is then necessary to plead and substantiate that it was "not possible" for the office to forward the file to the concerned officer at the location where he was on tour or such other cause. That is completely lacking in the present case. Thus, it is a case of not only avoidable delay but then also of no explanation offered (unexplained) in that behalf for the period between 15th March, 2012 till 20th March, 2012. In similar situation the Courts have frowned upon and have repeatedly held that such lapse abridges the fundamental right of the detenu resulting in his continued detention illegal. To wit, in the case of Mohinuddin alias Moin Master Vs. District Magistrate, Beed and Others, , the Court opined that wholly unexplained and unduly long delay in disposal of the representation by the Authority, the further detention of the detenu must be held illegal and he must be set at liberty forthwith. In the case of Rajammal Vs. State of Tamil Nadu and Another, , almost similar stand was taken by the Authority. It was contended that the representation of the detenu was considered and rejected immediately after the Minister of Law who was supposed to approve the decision of the Deputy Secretary, returned from the Camp to the Head Quarters. The Court rejected such explanation as unacceptable.

7. The Counsel for the petitioner has drawn our attention to the decision of the Division Bench of this Court in the case of Vilas Shankar Dhande v. Commissioner of Police & Ors. reported in 2012 (1) Bom. C.R. (Cri.) 452, which restates the legal position that if it is a case of no explanation, it is fatal; and even if explanation is given by the Authority, but indicates supine indifference, slackness and callous attitude on the part of the officials of the Department resulting in unreasonably delaying transmission of the documents to be placed before the concerned Authority who is supposed to take the final decision, it would logically follow that the continued detention of such detenu would be illegal as it affects his right guaranteed under Article 22(5) of the Constitution of India.

8. Notably, the explanation offered with regard to the period between 15th March, 2012 till 20th March, 2012, is a vague statement that the Special Secretary and Director General, Central Economic Indulgence Burreau, Ministry of Finance, Department of Revenue was on tour at that particular time. In the first place, nothing is mentioned as to whether the official was on foreign tour or within India. Further, no explanation is offered that it was "not possible" to depute a Special Messenger with the file for being placed before the Special Secretary for his consideration with utmost dispatch, instead of keeping it pending till he returns from tour. Moreover, no details as to when the Special Secretary, in fact, proceeded on tour and on which date he returned, are given in the reply affidavit. Notably, 15th and 16th were working days. And, 17th was a

third Saturday, presumably working. Again 19th and 20th March, 2012 were working days. If the Special Secretary had proceeded on tour from his Head Quarters after 15th March, 2012, it would be a clear case of callousness, casualness, indifference and slackness on his part in not deciding the representation before proceeding on tour. Suffice it to observe that the explanation offered even for the period between 15th March, 2012 till 20th March, 2012, is unacceptable. The respondent No. 6 has failed to substantiate that the time so spent was unavoidable.

9. Taking any view of the matter, therefore, it will have to be held that the continued and further detention of the detenu is illegal and has vitiated on the above counts singularly and otherwise. As a result, he must be set at liberty forthwith.

10. As aforesaid, the Counsel for the petitioner was at pains to persuade us to take the view that the Court must quash and set-aside the impugned preventive detention order on this count. This submission does not commend to us. This question is no more *res integra*. Counsel for the petitioner, however, has relied on the unreported decision of the Apex Court in the case of co-detenu Rashid Kapadia v. Medha Gadgil & Ors. in Criminal Appeal No. 1101/12 decided on 25th July, 2012. Indeed, in this case, the finding recorded by the Apex Court is that there was unexplained delay in consideration of representation made by the detenu infringing his constitutional right under Article 22(5). Nevertheless, the Court passed the following operative order:

24. Therefore, we have no option, but to come to the conclusion that the detention order cannot be sustained on the abovementioned ground alone and it is required to be, accordingly, set aside.

25. In view of such conclusion, we do not think it necessary to go into other contentions raised on behalf of the appellant. The Appeal is, therefore, allowed.

11. This submission, though attractive at the first blush, will have to be stated to be rejected on accepting the argument of the respondents that this decision cannot be cited as a precedent, as the Court has not specifically considered this contention. As aforesaid, the question is no more *res integra*. The Apex Court in the case of Union of India (UOI) and Another Vs. Harish Kumar, , while advertent to its earlier decisions, has rejected this very contention. The Apex Court has held that the validity of the detention order or the subjective satisfaction is not affected because of the subsequent infraction of right of representation.

12. A priori, it is not possible to accede to the petitioner's request to quash and set aside the impugned preventive detention order. When this position was made known to the Counsel for the petitioner, he submitted that the petitioner has very good case even on other grounds and would substantiate that the subjective satisfaction of the Detaining Authority itself is vitiated. He, however, submitted that, that may take some time and involve unwinding arguments on both sides. As a result of which, the detenu would continue to remain in jail as also Court's

valuable time would be taken in considering those grounds. To obviate both these situations, in the interest of justice, the detenu or persons entitled to claim through him may be granted liberty to agitate the grounds urged in this petition or any other ground available to them in law, concerning the validity of the subjective satisfaction recorded by the Detaining Authority, in the event, the Authorities decide to take recourse to the consequential action against them or their properties under the provisions of SAFEMA. The petitioner, therefore, prays that the Court may dispose of this writ petition for the time being by declaring that the continued and further detention of Saiyed Jamaluddin Naeemuddin had become illegal and vitiated, necessitating his immediate release from jail and keeping all other contentions open, to be considered if and when occasion arises. We have no difficulty in accepting this submission, except to observe that if such occasion arises in future, that plea will have to be considered as per law. We may not be understood to have expressed any opinion either way as to whether such course is available to the petitioner, the detenu or any person claiming through him, as the case may be.

13. Accordingly, we proceed to pass the following order :

ORDER

The continued detention of the detenu Saiyed Jamaluddin Naeemuddin pursuant to the impugned detention order dated 26th September, 2011, bearing No. PSA-1211/CR-17(1)/SPL/3(A), is vitiated. Accordingly, the respondents are directed to release the detenu Saiyed Jamaluddin Naeemuddin forthwith, if not required in connection with any other criminal case.

The Counsel for the Petitioner prayed that the Registry be directed to issue operative order forthwith as the transcription of the judgment may take some time. We accept this request and order accordingly.