
(2013) 10 BOM CK 0260

In the Bombay High Court

Case No : Criminal Writ Petition No. 2100 of 2013

Joit Kumar Jain

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 29-10-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 2337

Hon'ble Judges : Revati Mohite Dere, J;Abhay Shreeniwas Oka, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This is a petition under Article 226 of the Constitution of India wherein the challenge is to the order of preventive detention dated 8th April 2013 passed under sub-section 1 of section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA"). The petition is filed at pre-execution stage. We have heard the learned counsel for the petitioner and the learned APP for the respondent. As noted by this Court in its order dated 15th July 2013, the learned counsel for the petitioner has pressed into service grounds (C), (D), (F), (G) and (I) in the memorandum of this Writ Petition. Before we make a reference to the submissions made by the learned counsel for the petitioner, some of the factual aspects of the case will have to be noted.

2. On 18th April 2012, the petitioner was arrested by the Intelligence Officer of the Directorate of Revenue Intelligence (DIR) Mumbai on the allegation of commission of an offence punishable u/s 135 of the Customs Act, 1962 (hereinafter referred to as "the Customs Act"). The allegation is of illegal import of 10,00,000 pieces of seized memory cards in the name of four different firms. The petitioner was enlarged on bail. The petitioner obtained provisional release order of the seized goods on 28th July 2013 and 29th August 2012, the petitioner availed of the said order. On 24th September 2012, a show cause notice was issued to the petitioner on completion of the investigation alleging

that the petitioner had smuggled 9,98,035 memory cards valued at Rs. 8,11,75,446/-. On 27th September 2012, the petitioner filed an application for settlement u/s 127-B of the Customs Act. A Criminal Writ Petition was filed by the petitioner before the Apex Court praying that a direction be issued to the State of Maharashtra to consider the proposal of preventive detention of the petitioner only subject to obtaining recommendation from the Settlement Commission having jurisdiction over the case. By order dated 12th October 2012, the Apex Court observed that in view of the fact that threatened arrest of the petitioner is based on allegation of Customs violation, it would be appropriate for the State of Maharashtra to obtain comments of the Settlement Commission before any final order is passed. The Apex Court directed the petitioner to deposit his passport with the Settlement Commission. The Apex Court directed that if the order of detention of the petitioner is being considered only on the basis of the recommendations of the Customs Department, the State Government shall seek comments of the Settlement Commission before passing any order of preventive detention against the petitioner.

3. On the application made by the petitioner, the Settlement Commission passed an order on 17th May 2013 directing the petitioner to pay penalty of Rs. 10,00,000/- (Rupees ten lacs only). The Settlement Commission granted immunity to the petitioner for the amount in excess of sum of Rs. 10,00,000/- (Rupees ten lac). Subject to payment of aforesaid amount, immunity from the prosecution was granted to the petitioner in so far as the particular case was concerned.

4. On 8th April 2013, impugned order of detention was passed which was challenged by the petitioner by filing a Writ Petition before the Apex Court. Initially notice was issued by the Apex Court on 24th May 2013 and a direction was issued that no coercive measures shall be taken against the petitioner. On 31st May 2013, the petition was dismissed as withdrawn with liberty to the petitioner to approach this Court and accordingly, the present writ petition has been filed which has been admitted for final hearing.

5. The learned counsel for the petitioner relied upon the decision of the Apex Court in the case of Pawan Bhartiya Vs. Union of India and others, (2003) 11 SCC 479. Relying upon the said decision, he submitted that in view of the payment of penalty and entire duty amount by the petitioner under the order of the Settlement Commission, the order of preventive detention cannot be passed against the petitioner and as held by the Apex Court the order will have to be set aside on the ground that the entire duty amount has been paid by the petitioner. He urged that on 16th May 2013, before the Settlement Commission, indemnity bond was filed by the petitioner in which he has recorded undertaking not to indulge in any smuggling activities in future. He, therefore, submitted that the petitioner has been already prevented from indulging in smuggling activities. Relying upon the decision of the Apex Court in the case of V.C. Mohan Vs. Union of India and Others, the learned counsel for the petitioner submitted that the

order of Settlement proceedings is very relevant which is required to be considered by the Detaining Authority before recording subjective satisfaction. Relying upon the various well known decisions of the Apex Court, he submitted that the Sponsoring Authority was not pressing for prosecution against the petitioner and therefore, recourse to preventive detention cannot be a substitute for prosecution. He urged that investigation commenced when the seizure of the consignment was made on 17th April 2012 which was followed by the arrest of the petitioner on the next day. He submitted that the order of detention was belatedly issued on 8th April 2013 and therefore live link has been snapped. He urged that the order of detention suffers from delay and laches. He invited our attention to the affidavit of the Detaining Authority. He submitted that the affidavit shows that there is non-application of mind by the Detaining Authority and the order has been passed in a very casual manner. In particular, he relied upon the paragraph 9 of the reply of the Detaining Authority in which it is stated that the subjective satisfaction was recorded that the activities of the petitioner will be prejudicing the security of the State and maintenance of public Order of maintaining economic stability. Relying upon the decision of the Apex Court in the case of Rajinder Arora Vs. Union of India (UOI) and Others, he urged that the order deserves to be set aside not only on the ground of gross delay but on the ground that the same has been passed in a casual and mechanical manner. Lastly, he submitted that there is a lack of genuine necessity. He urged that in view of the latest decision of the Apex Court dated 16th July 2013 by Constitution Bench in the case of Subhash Popatlal Dave vs Union of India and another, Writ Petition (CR) No. 137 of 2011 and other connected matters, grounds of challenge to the order of preventive detention at the pre-execution stage cannot be confined to the five grounds set out in the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, He, therefore, submitted that the grounds which are urged as above including the grounds of delay will have to be considered. He urged that in view of the latest Judgment of the Apex Court, the decision of the Division Bench of this Court in the case of Ajay Bajaj vs. State of Maharashtra, 2011 (2) Bom.C.R. (Cri.) 198 : [2011 ALL MR (Cri) 726] is no longer a good law.

6. The learned APP for the respondent opposed the petition. He pointed out that the petitioner is absconding. He relied upon the various averments made in the reply filed by the Detaining Authority. He urged that no interference is called for.

7. We have given careful consideration to the submissions. The first issue is as regards the scope of challenge to the order of preventive detention at pre-execution stage. In the case of Alka Subhash Gadia (supra), the Apex Court has observed that the scope of interference at the pre-execution stage is very limited. Five grounds on which the interference can be made have been incorporated in the said decision. The question is whether the scope interference has been enlarged by the recent decision dated 16th July 2013 in the case of Subhash Popatlal Dave Vs. Union of India, Writ Petition Criminal No. 137 of 2011 with other connected petitions. We must note here that the case of Subhash

Dave along with other connected Writ Petitions and Special Leave Petitions were placed before the Larger Bench of the Apex Court. A Judgment was delivered on 10th July 2010 by the Apex Court in the said case, Subhash Popatlal Dave Vs. Union of India (UOI) and Another, The said Judgment refers to the earlier decision of the Apex Court in the case Sayed Taher Bawamiya Vs. Joint Secretary to the Govt. of India and Others, The question which is formulated by the Apex Court in the said decision was whether the grounds laid down in case of Alka Gadia were exhaustive or the same were merely by way of illustration. We must note here that on the basis of the said decision dated 10th July 2012, it was sought to be submitted before this Court in Criminal Writ Petition No. 1774 of 2012 : 966449--> that the Apex Court has held that the decision in Alka Gadia's case refers to five grounds only by way of illustration. It was urged that interference can be made at pre-execution stage even on other grounds. The said contention was negatived by the Division Bench of this Court (to which one of us Abhay Shreeniwas Oka, J. was a party). In paragraph 6 of the said decision, it was observed thus:

6 Thus, it is very clear that the Apex Court has made no deviation from the view taken in case of Alka Subhash Gadia's case (supra) read with the decision in the case of Sayed Taher Bawamiya Vs. Joint Secretary to the Govt. of India and Others, In fact, in paragraph 29, the Apex Court observed that the question whether the detention can be challenged at pre-execution stage on the grounds other than the grounds set out in paragraph 30 of the Judgment in case of Alka Subhash Gadia's case requires further examination. In the circumstances, as of today, the view taken in case of Alka Subhash Gadia (supra) read with the case of Sayed Takir Bawamiya (supra) has not been diluted. On the contrary, paragraph 29 of the decision in case of Subhash Popatlal Dave (supra), the Apex Court observed that the decision in case of Alka Subhash Gadia requires further examination. Hence, we will have to proceed to examine the challenge in the light of principles laid down in the case of Alka Gadia (supra).

8. The case of Subhash Dave was finally decided by the by the Judgment and Order dated 16th July 2013. There were three separate Judgments delivered by the three Hon'ble Judges forming part of the Bench. In the Judgment delivered by the Hon'ble Shri Justice Altamas Kabir, the then Chief Justice of India, in paragraph 39, it is observed thus:

39 As far as the first ground of challenge is concerned, we have already indicated in our earlier order of 10th July 2012, that the five exceptions culled out in Alka Subhash Gadia's case were not intended to be exclusive and that the decision in Sayed Taher Bawamiya's case could not be accepted. We had indicated that it was not the intention of the Hon'ble Judges in Alka Subhash Gadia's case to confine the challenge at the pre-execution stage only to the five exceptions mentioned therein, as that would amount to stifling and imposing restrictions on the powers of judicial review vested in the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution. After considering other decisions

delivered on the aforesaid proposition, after the decision in Alka Subhash Gadia's case, we had also held that the exercise of powers vested in the superior Courts in judicially reviewing executive decisions and orders cannot be subjected to any restrictions, as such powers are untrammelled and vested in the superior Courts to protect all citizens and non-citizens, against arbitrary action. As submitted by Mr. Rohatgi at the very beginning of his submissions, we had indicated that law is never static, but dynamic and that the right to freedom being one of the most precious rights of a citizen, the same could not be interfered with as a matter of course and even if it is in the public interest, such powers would have to be exercised with extra caution and not as an alternative to the ordinary laws of the land.

(emphasis added)

The Hon''ble Smt. Justice Gyan Sudha Mishra delivered a separate Judgment in which it was held thus:

2....To make it explicitly clear it may be reiterated that this Court has already held that the order of preventive detention can be challenged beyond the five grounds which have been enumerated in the case of Gadia's case even at the pre-execution stage.

(emphasis added)

9. In the third separate Judgment delivered by Hon''ble Shri Justice Chelameswar, it was observed that the Constitution Court can always adjudicate upon the legality of any state action challenged on the ground that the such action is inconsistent with the civil liberties guaranteed by the Constitution of India. Perusal of the said decision shows that a proposition of law has been clearly laid down that the scope of judicial review of an order of preventive detention at pre-execution stage is not confined to five grounds set out in the decision in the case of Alka Gadia and that the five grounds enumerated therein are only by way of illustration. To that extent, the decisions of this Court dated 4th February 2013 in Criminal Writ Petition No. 1774 of 2012 : 966449--> and in the case of Ajay Bajaj vs. State of Maharashtra [2011 ALL MR (Cri) 726] which hold that the delay in passing order of detention is no ground for interference at pre-execution stage cannot be read as binding precedents. The Apex Court, however, by majority held that the long delay in execution of the order of preventive detention was no ground to interfere at pre-execution stage. We must note here that in the case of State of Maharashtra and Others Vs. Bhaurao Punjabrao Gawande, it was held that interference by the Court of law at the pre-execution stage must be an exception rather than a rule. We find that the caveat added by the decision in the case of Bhaurao Gavande has not been disturbed by the Apex Court in its decision dated 16th July 2013 in the case of Subhash Popatlal Dave.

10. As the ground of delay in passing the order was urged, we had called for the file of Detaining Authority. We have perused the file. It is true that the

commission of offence smuggling of memory cards was detected on 17th April 2012. However, we have already referred to the Criminal writ petition filed by the petitioner before the Apex Court on 8th October 2012. The Apex Court by order dated 12th October 2012 directed the State Government that before passing an order of detention against the petitioner, comments of Settlement Commission should be called for. The averments made in the said writ petition show that it was pointed out to the Apex Court that investigation commenced on 17th April 2012 and on the next day the petitioner was arrested. If the Apex Court was of the view that the delay will come in the way of passing an order of preventive detention, the Apex Court would not have permitted the State Government to consider the question of passing an order of preventive detention against the petitioner after obtaining the comments of the Settlement Commission. Therefore, the alleged delay till the date of the order of the Apex Court cannot be considered to be fatal.

11. As far as the ground of delay in passing the order of detention is concerned, the law is very well settled. Delay by itself is never fatal. Delay can be always explained to the satisfaction of the Court. Therefore, in the facts of the case, it will be necessary to ascertain whether delay after 12th October 2012 which is the date of passing the order of the Apex Court has been explained. Perusal of the file shows that on 22nd October 2012, the Detaining Authority received a letter dated 15th October 2012 from the Advocate for the petitioner informing the Detaining Authority of the order of the Apex Court dated 12th October 2012. On 25th October 2012, the order of the Apex Court was placed before the Detaining Authority. On 29th October 2012, an order was passed by the Detaining Authority calling for the remarks from Sponsoring Authority the Directorate of Revenue Intelligence (DRI) on the order of the Apex Court. On 29th October 2012, a letter was issued to DRI for its remarks. It appears that a letter dated 1st November 2012 issued by the DRI was received by the Detaining Authority on 9th November 2012 in which it was stated the Detaining Authority should call for the remarks directly from the Settlement Commission. Thereafter, there was a correspondence exchanged between the DRI and the Disciplinary Authority from 12th November 2012 till 18th January 2013 as the Detaining Authority wanted the DRI to obtain the opinion of the Settlement Commission. It appears that DRI did not obtain the opinion of the Settlement Commission. On 20th November 2012, a D.O. letter was addressed to DRI. Thereafter, a reminder was sent on 10th January 2013. In the letter dated 18th January 2013 sent by the DRI which was addressed to Detaining Authority, the DRI reiterated that Detaining Authority should directly call for the remarks of the Settlement Commission, accordingly, a draft letter dated 23rd January 2013 calling for the remarks of the Settlement Commission was prepared which was approved by the Detaining Authority on the next date i.e. 24th January 2013 and was sent immediately. The comments dated 19th February 2013 were received from the Settlement Commission by the Detaining Authority on 28th February 2013. On 1st March 2013, the Detaining Authority called for the remarks of the Sponsoring

Authority (DRI) on the comments submitted by the Settlement Commission. A reply dated 11th March 2013 from DRI was received on 14th March 2013 which was placed before the Detaining Authority on 15th March 2013. On 16th March 2013, Disciplinary Authority directed that an opinion of the DS (Law) should be obtained on the question whether in the light of the order of the Apex Court, an order of detention can be issued. On 2nd April 2013, the opinion was received. The Disciplinary Authority formulated the grounds on 5th April 2013. On 8th April 2013, the impugned order of detention and grounds were signed by the Detaining Authority and were issued on the same date.

12. In view of the order of the Apex Court dated 12th October 2012, the Detaining Authority was required to obtain comments of the Settlement Commission. Initially, the comments were sought to be obtained from the Settlement Commission through the DRI. On the suggestion of the DRI, comments were directly sought from the Settlement Commission. Considering what we have observed earlier on the basis of the perusal of the file, we find that the delay has been satisfactorily explained. Therefore, the grounds taken in the petition (G) and (H) based on the delay in passing order have no merit.

13. Perusal of the file of the Detaining Authority which contains a copy of detention order and grounds show that the order of detention was passed with a view to prevent the petitioner from indulging in smuggling activities in future.

14. The submission of the learned counsel for the petitioner is that in view of the order of the Settlement Commission, there was no necessity of passing an order of detention. Firstly, he relied upon the decision of the Apex Court in the case of V.C. Mohan Vs. Union of India and Others, We have perused the said decision. In the facts of the case, the order passed by the Settlement Commission directing the detenu to make payment of additional duty was not placed before the Detaining Authority. It was held that the said document being relevant material, non-placement thereof vitiates the order of the Detaining Authority. In the present case, the order of settlement Commission was placed before the Detaining Authority and in terms of the decision of the Apex Court, the comments of the Settlement Commission were sought and the comments of the Settlement Commission were also placed before the Detaining Authority. The learned counsel for the petitioner relies upon the decision of the Apex Court in case of Pawan Bhartiya (supra). We have perused the said decision. In paragraph 4, the Apex Court has noted that similar detention orders were passed against the six persons and out of six orders, five were revoked by the Competent Authority on the ground that the custom duty which was required to be paid, was paid over before the execution of the detention orders. In the light of these peculiar facts of the case that the order of detention was set aside by the Apex Court. There is no law laid down by the Apex Court that the order of Settlement Commission comes in the way of passing an order of detention. It is true that the order of Settlement Commission will be a relevant document which should be placed before the Detaining Authority.

15. As noted earlier, in the present case, the order of preventive detention has been passed with a view to prevent the petitioner from indulging in smuggling activities. The effect of order of the Settlement Commission is that immunity has been granted to the petitioner from prosecution in case of one specific violation. The Settlement Commission imposed penalty of Rs. 10,00,000/- on the petitioner. Reliance was placed by the petitioner on the undertaking given by the petitioner on the basis of the order of Settlement Commission, Perusal of the reply filed by the Detaining Authority shows in paragraph 13 has stated thus:

13. With reference to Ground "I" of the petition, it is submitted that the petitioner is a habitual offender and therefore he has to be detained to prevent him from indulging in smuggling activities in future as from the material produced by the petitioner itself shows that in past also he has committed the smuggling activities....

(emphasis added)

16. The order of detention is not passed only on the basis of the one prejudicial conduct which is subject matter of the order of the Settlement Commission. The Detaining Authority after considering the material placed before it has recorded a subjective satisfaction regarding the necessity to pass an order of preventive detention with a view to prevent the petitioner from indulging in smuggling activities in future. Hence, there is no merit in the grounds (D) and (F).

17. As far as the ground of non application of mind and of passing order in casual manner are concerned, the same is based on what is stated in paragraph 9 of the reply of the Detaining Authority wherein it is observed that by indulging in smuggling activities, the petitioner will be prejudicing the security of the state and maintenance of public order or economic stability. Paragraph 13 of the reply which was reproduced above, clearly records the object and purpose of passing the order of preventive detention. Paragraph 9 of the reply merely refers to the consequences of a person indulging in smuggling activities. Hence, it cannot be said that there is non application of mind by the Detaining Authority. The order cannot be said to have been passed in a casual manner.

18. Therefore, we see no merit in the challenge to the order preventive detention at pre-execution stage. Accordingly, we pass the following order:

(I) Petition is rejected. Rule is discharged.

(II) However, we may observe that the findings which we have recorded in the Judgment are in the context of examining the challenge to the order of detention at pre-execution stage. After the execution of the order, it is obvious that the prospective detenu will be entitled to challenge the said order on all permissible grounds and all contentions in that behalf are expressly kept open.