
(1998) 10 BOM CK 0045

In the Bombay High Court

Case No : Criminal Writ Petition No. 73 of 1998

Narayan Madhavji Jat

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 05-10-1998

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 7, 9
Constitution of India, 1950 — Article 226

Citation : (1998) 100 BOMLR 596 : (1998) 3 MhLj 859

Hon'ble Judges : Vishnu Sahai, J;N. Arumugham, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Vishnu Sahai, J.—By this petition preferred under Article 226 of the Constitution of India, the petitioner who is a friend of the detenu Arvind Vyas, seeks to challenge the detention order dated 15.7.1996 passed by the 2nd respondent Smt. Neela Satyanarayana, the Detaining Authority, detaining the detenu u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, hereinafter referred to as the COFEPOSA Act, and the declaration dated 5.9.1997, issued by the Additional Secretary, Government of India, Ministry of Finance, Department of Revenue, New Delhi, u/s 9(1) of the COFEPOSA Act, extending the period of detention of the detenu from one year to two years.

2. The detention order dated 15.7.1996 along with the grounds of detention bearing the said date, was served on the detenu on 3.8.1997.

3. Since a reference to the prejudicial activities of the detenu contained in the grounds of detention necessitating the issuance of the impugned detention order and the impugned declaration, in our view, is not necessary for the disposal of this petition, we are not adverting to them.

4. Although in this petition, Mrs. A. M. Z. Ansari, learned Counsel for the petitioner, has pleaded a large number of grounds but since, in our view, this petition deserves to succeed on the solitary ground pleaded as ground No. 4 (vi), we are not advertent to the other grounds.

Ground No. 4(vi), in short, is that the impugned detention order dated 15.7.1996 was executed very belatedly on 3.8.1997 and since no effective steps stipulated by law to have it promptly executed, were taken, it is vitiated in law.

In the said ground, it has been specifically pleaded that the most effective method to have the detention order executed namely promptly of making an application for cancellation of bail, has not been taken and on the converse two applications for extension of bail have been moved by the Sponsoring Authority.

It has been urged by Mrs. Ansari that the returns filed from the side of the respondents, disclose that the proposal for taking action u/s 7(1)(b) of the COFEPOSA Act was not promptly made as laid down in judicial pronouncement of this Court but was made as late as 15.4.1997, i.e. nearly ten months after the passing of the detention order. Mrs. Ansari also invited our attention to the fact that the returns filed by the respondents do not also disclose whether any action u/s 7(1)(a) of the COFEPOSA Act was taken.

5. Ground No. 4(vi) of the petition has been replied to in three returns, viz. those of - (i) Mr. M. M. Kamble, Joint Secretary to the Government of Maharashtra, Home Department (Special) Maritralaya, Mumbai, (ii) Mr. C. Rigzin, Assistant Commissioner of Customs, COFEPOSA Cell, Airport, Mumbai and (iii) Shri R.B. Dange, Inspector of Police attached to P. C. B., C.I.D. Mumbai.

The short and long of the averments in the said returns is that the authorities were desperately making efforts to serve the impugned detention order on the detenu but the same could not be served as he had made himself scarce. We regret that we cannot accept this in view of the reasons mentioned in paras 6 to 9.

6. We have examined the averments in the said three returns and we are constrained to observe that they do not disclose that the most effective modes stipulated in law to have the detention order executed on the detenu were taken. From a perusal of the three returns we find that (i) no application for cancellation of the bail of the detenu was moved; (ii) on the converse, two applications for extension of his bail, viz. those dated 11.10.1996 and 13.1.1997, were moved by the Sponsoring Authority; (iii) no proposal for initiating any action u/s 7(1)(a) of the COFEPOSA Act was made; and (iv) action u/s 7(1)(b) of the COFEPOSA was taken on 15.4.1997, i.e. ten months after the passing of the detention order.

7. It is well settled that if the authorities are not able to execute the detention order and are really sincere to execute it, they should apply for cancellation of bail at the earliest opportunity. There are no dearth of authorities in support of this proposition but to eschew prolixity we are only referring to one, viz. in P.M.

Hari Kumar Vs. Union of India and others, wherein in para 13 the Apex Court thus observed :-

13. If the respondents were really sincere and anxious to serve the order of detention without any delay it was expected of them, in the fitness of things, to approach the High Court or, atleast, the Court which initially granted the bail for its cancellation....

The said decision of the Apex Court was relied upon in two Division Bench decisions of our Court, viz. those in Rameshkumar Balkrishan Cibal v. State of Maharashtra and Ors. 1997 All M.R. 1810 and Ismail Shaikh Ali v. State of Maharashtra and Ors. 1998 All M.R. 928 : 1998 Cri. L.R. 233 : 100(2) Bom. L.R. 719. In the former decision, in para 20, the Division Bench took the view that if the detention order could not be served "the correct course for the respondents was to apply for cancellation of bail". In the later decision, this Court in paras 13 and 14 has emphasised the importance of moving an application for cancellation of bail in a case where the detention order on the detenu could not be executed.

8. In the instant case, we find that not only no application for cancellation of bail was moved but on the converse two applications for extension of bail viz. those dated 11.10.1006 and 13.1.1997 were moved by the Sponsoring Authority. On the former, his bail was extended till 13.1.1997 and on the latter it was extended till 10.3.1997.

In a large number of Division Bench decisions, our court has construed the act of applying for extension of bail as the very converse of urgency to execute the detention order. To eschew prolixity we are only referring to two such decisions - (i) 1997 All M.R. 1810, (supra), (See paras 20 and 3) and (ii) 1998 All M.R. 928 supra (See para 13).

9. Not only do we find that no application for cancellation of bail was moved and on the converse two applications for extension of bail were moved, but no action u/s 7(1)(a) of the COFEPOSA Act was initiated and the proposal u/s 7(1)(b) of the COFEPOSA Act was initiated after more than ten months of passing of the detention order i.e. on 17.4.1996. This Court in 1998 All M.R. 928 (supra), in para 19, has emphasised upon the importance of taking prompt action u/s 7 of the COFEPOSA Act. The said para reads thus:-

19. We wish to emphasise that although the COFEPOSA Act does not prescribe of a time limit for commencing action u/s 7, it is implicit that action under the said provisions must be taken without much loss of time, for if taken belatedly it results in the detention order being belatedly executed on the detenu and this not only vitiates the genuineness of the subjective satisfaction of the Detaining Authority to preventively detain the detenu but also severs the live link between the prejudicial activities of the detenu and the rationale of clamping a detention order on him. Coercive measures like those contained in Section 7 are meant to be resorted to without undue delay.

In this connection, we would like to refer to a decision of our Court Shri Netaji Narayan Lotlikar Vs. State of Goa and another, wherein the Division Bench observed in paras 5 and 7 that if there is delayed action u/s 7 of the COFEPOSA Act the same has to be reasonably explained and failure to satisfactorily explain the same would be fatal.

10. The Supreme Court, in a series of decisions has frowned upon the delay in execution of the detention order but again lest our judgment be over burdened with authorities, we are referring to only that in T.A. Abdul Rahaman Vs. State of Kerala and others, wherein the detention order was issued on 7.10.1987 and the detenu was arrested on 18.1.1988 and since the said delay was not properly explained the Supreme Court quashed the detention order.

11. In our view, on account of the delay of 13 months in execution of the detention order and the failure of the authorities to take recourse to the most effective methods stipulated by law to have the detention order executed, the live link between the prejudicial activities of the detenu and the rationale of clamping the detention order on him has been snapped and the detention order instead of being preventive has become punitive. Consequently the detention order has to be set aside. And once that happens then it follows as a logical imperative that the declaration u/s 9(1) of the COFEPOSA Act has also to be set aside.

12. In the result, this petition is allowed. The impugned detention order and the impugned declaration u/s 9(1) of the COFEPOSA Act are quashed and the detenu is directed to be released forthwith unless wanted in some other case.

Rule is made absolute.