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**(1985) 11 BOM CK 0011**

**In the Bombay High Court**

**Case No :** Criminal Writ Petition No. 625 of 1985

Pratap Jeevanlal Jadhav

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

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**Date of Decision :** 30-11-1985

**Acts Referred:**

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —  
Section 11, 3(2)

**Citation :** (1985) 11 BOM CK 0011

**Hon'ble Judges :** R.R. Jahagirdar, J;A.D. Tated, J

**Bench :** Division Bench

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**Judgement**

Jahagirdar, J.—On 28th July 1984 the petitioner arrived in India from Dubai with a luggage which was found to contain gold valued at Rs. 3,29,918/-. His statement was recorded under S. 108, Customs Act, 1962. Subsequently other material relating to the said incident came into possession of the Customs authorities. Several documents connected with the incident were placed before the officer of the Government of Maharashtra who is entrusted with the power of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, hereinafter referred to as the "COFEPOSA Act". On 2nd November 1984, the detaining authority passed the order of detention wherein it has been stated that with a view to prevent the petitioner from smuggling goods, it was necessary to detain him under the COFEPOSA Act. Accordingly he was being detained by that order. Simultaneously the grounds of detention were formulated and were made ready for being delivered to the detenu along with the order of detention. However, the detention order itself was ultimately executed on 11th January 1985.

2. In the meantime the detenu, namely the petitioner, was produced before the learned Metropolitan Magistrate at Bombay and was remanded from time to time into custody to be released on bail on 8th October 1985 in the sum of Rs. 30,000/-. After the petitioner was detained on 11th January 1985 pursuant to the order of detention passed on 2nd November 1984, a representation on his

behalf was sent by an Advocate to the jail authorities, who received the same on 18th October (February ?) 1985. Thereafter the said representation was forwarded by the jail authorities on the very next day, namely on 19th February 1985. The representation made by the petitioner was rejected by the Central Government on 27th February 1985, while it was so rejected by the State Government on 6th March 1985. It has been stated before us by Mr. Gupte, the learned Advocate appearing for the petitioner, that on 20th October 1985 the petitioner has been ultimately convicted for the offence of having smuggled gold into India.

3. The order of detention has been challenged by the petitioner on several grounds. Mr. Gupte has in the first place challenged the order of detention on the ground that the subjective satisfaction on the part of the detaining authority could not have been properly arrived at in view of the fact which, according to him, is undisputed, that the incident of smuggling on the part of the petitioner was a solitary incident. One single incident of the type in which the petitioner is alleged to have indulged in could not legitimately lead to the subjective satisfaction that the petitioner is likely to indulge in similar activities in future, which activities ought to be prevented by an order of detention under the COFEPOSA Act. As far as this question is concerned, one must proceed on the basis that there was before the detaining authority the instance of a single incident. The question is whether a single incident of smuggling could never lead to the satisfaction of the detaining authority that a particular person was likely to indulge in similar activities in future. Mr. Gupte says that it cannot, but we think that this question is conclusively decided by a judgment of a Division Bench of this Court in *Yahya Ali Ahmad Fahem Vs. State of Maharashtra and Others*, . An argument that a single incident of smuggling could not form the basis of a subjective satisfaction that similar activities would be repeated in future was advanced before different Courts and probably before some other Division Benches of this Court also. The Division Bench in *Yahya Ali's* case had an occasion to consider different judgments in the field and pointed out that no Division Bench has held that a single incident cannot form the basis of a subjective satisfaction that similar attempt would not be made in future. On the other hand, there was authority for the proposition, which proposition was endorsed by the Division Bench in *Yahya Ali's* case, that a single incident can, in the context of the facts of that particular case, lead legitimately to the conclusion that an attempt of the type involved in that solitary or single incident could be repeated. It was not unreasonable to detain a person for one single incident if that incident demonstrates its potentiality for continuing the criminality and indicates previous practice and expertise. Proceeding further the Division Bench held as follows :-

"In case of smuggling where an act of smuggling consists of bringing contraband in concealed manner, the necessary inference will be that the person is indulging in a prohibited activity with full knowledge and open eyes of the prohibited nature of the act. If this is so, then that act though a single one detected by the

authorities is indicative of the fact that he is capable of repeating the same in future ..... If an order of detention is passed for a single act which shows previous preparation and full knowledge on the part of the person indulging in an act of the prohibited nature it could be said that the order is passed on a reasonable prognosis of the future behaviour of such person."

We must, therefore, reiterate that there is no judgment of this Court which is contrary to what is stated in Yahya Ali's case (1983-85 Bom LR 188) and it cannot be said that in all cases where the order of detention is based on a solitary or single incident no subjective satisfaction of the possibility of the repetition of the act involved can be arrived at.

4. Returning to the facts of the present case it is easily seen that in the statement recorded under S. 108, Customs Act, the petitioner has stated that he was working at Dubai where he visited the shop of one Premjibhai. It was the reputation of Premjibhai that he was a person who helps needy persons to visit their relations in India. Premjibhai accordingly agreed to help the petitioner and collected his passport. On 26th July 1984 the petitioner received a message from Premjibhai to get prepared to go to India and, therefore, on 27th July 1984 the petitioner went to Premjibhai's shop. From Premjibhai's shop the petitioner was taken to one Syed who packed the petitioner's old clothes, which he had already taken along with him in a brief case, in another suitcase which ultimately was found to contain the gold on inspection at Bombay. This clearly shows that the petitioner was fully aware of the fact that on payment which was made to him he was to carry at least some contraband and for the purpose of doing it he allowed his old clothes to be used in a suitcase which ultimately carried the contraband gold. Therefore, if it is the petitioner's case that he brought a suitcase which was given to him by somebody without knowing that there was any contraband in it, that case must miserably fail because that suitcase contained his own clothes which he had given to the party concerned. This shows in the first place the guilty mind of the petitioner that he was carrying some contraband which was ultimately found to be gold and secondly he actively participated in concealing the contraband gold by allowing the party which sent the gold to India to use his old clothes for concealing the said contraband, at least to some extent.

5. On arrival in India, to the question whether he was carrying any contraband, his answer was in the negative. Looking to all these facts which are contained in his statement if the detaining authority has come to the conclusion that the petitioner is likely to repeat the prohibited act as to warrant his detention, we do not see how it can be said to be an unwarranted inference. The order of detention though passed on a single act is supportable because that single act shows previous preparation and full knowledge on the part of the petitioner. The argument based upon the single solitary incident theory must, therefore, fail.

6. In view of the settled position in law in Yahya Ali's case 1983 Bom LR 188 (supra), reliance placed by Mr. Gupte on a judgment of Kurdukar J. (with Qazi J.) delivered on 14th September 1984 in Writ Petn. No. 241 of 1984 is misplaced.

The facts of the case before that Division Bench were totally different. The facts of that case disclosed that the person who was carrying the contraband was carrying it almost openly without being aware of the nature of the contraband, except that he had agreed to carry the handbag in which the contraband was said to have been put for a consideration which was somewhat unusual. There was nothing to indicate that the detenu in that case had participated in any previous operation or had knowledge of the contraband which he was carrying. If anything, one notices from the facts of that case that he was carrying the contraband in a handbag which is an unusual method of carrying a contraband if the person doing it was aware of the nature of the goods which he was carrying. We are, therefore, of the opinion that on the facts of that case, with great respect, the judgment of that Division Bench may be correct, but that is not an authority for the proposition, especially in view of the law already laid down by another Division Bench in Yahya Ali's case, that a solitary incident cannot legitimately form the basis of the subjective satisfaction of the detaining authority that the act involved in that incident would not be repeated in future.

7. Mr. Gupte has also contended that the continued detention of the petitioner is rendered illegal in view of the fact that the representation made by the petitioner was not considered expeditiously by the detaining authority. It has been mentioned in para 3 of the petition that the petitioner had addressed a representation to the detaining authority with a covering letter of his Advocate dt. 13th February 1985 and "this representation appears to have reached the detaining authority on 18th February 1985 and has been rejected on 6th March 1985." It has not been stated in the petition, nor has it been demonstrated by Mr. Gupte before us, that the representation which accompanied the covering letter dt. 13th February 1985 of the Advocate was in fact despatched on 13th February 1985 itself. Indeed, the averment in para 3 of the petition suggests that the representation has reached the detaining authority on 18th February 1985. This is the correct position if one looks at the record, which has been made available for our perusal by Mr. More, the learned Government Pleader appearing for the State, wherein the date on which the representation is received has been mentioned by the Superintendent of the jail in which the petitioner was lodged. However, not much argument was advanced on this aspect of the case because Mr. Gupte's argument was on what he calls the undue delay in considering the representation of the petitioner by the Government.

8. We have already mentioned above that the representation of the petitioner was rejected by the Government on 5th March 1985 though it was communicated to the petitioner by a letter dt. 6th March 1985. Mr. Gupte complains that the period between 19th February 1985 and 6th March 1985, when ultimately the rejection of the petitioner's representation was intimated to him, is unduly long and has not been properly explained by the Government. In this connection Mr. Gupte relied upon Harish Pahwa Vs. State of U. P. and Others, It has been laid down by the Supreme Court that the representation made by a detenu has to be considered without any delay. The Supreme Court does not look

with equanimity upon delays when the liberty of a person is concerned. It has been said, calling comments from other departments, seeking the opinion of Secretary after Secretary and allowing the representation to lie without being attended to is not the type of action which the State is expected to take in a matter of such vital import. Proceeding further the Supreme Court has pointed out that "it is the duty of the State to proceed to determine representations with the utmost expedition, which means that the matter must be taken up for consideration as soon as such a representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu.

9. We have, with the assistance of Mr. Gupte, gone through the judgment in *Harish Pahwa Vs. State of U. P. and Others*, . From the facts of the said case it could be seen that there was some sort of dilly-dallying on the part of the State Government before a decision was taken on the representation made by the detenu. Mr. Gupte has particularly underlined certain observations of the Supreme Court in this judgment to contend that the State Government in the instant case was not justified to take assistance from some other department before taking the final decision on the representation in question. We are unable to agree that *Harish Pahwa's* case is an authority for the proposition that when the detaining authority is different from the sponsoring authority, the former should not ask for the assistance of the latter. In the present case, as disclosed in the affidavit in reply filed on behalf of the State, it has been disclosed that when the representation of the petitioner was received it was sent to the sponsoring authority on 20th February 1985, which was immediately after it was received by the State Government. The Customs Department returned the papers along with its comments on 1st March 1985. 2nd and 3rd March 1985 were Saturday and Sunday and on 4th March 1985 the officer in the department prepared parawise comments which were put before the Minister concerned on 5th March 1985 on which day the representation came to be rejected. On the facts of this case, therefore, it cannot be said that the State Government was unjustified in asking for the comments from the department which had placed the material before the detaining authority, to enable the latter to take a decision on detention. We are, therefore, of the opinion that it cannot be laid down that in no case the detaining authority can take the assistance from another department or authority, especially when the latter has brought to the notice of the detaining authority the material on the basis of which the decision to detain or not to detain the detenu is taken. On the other hand, in a given case a decision rejecting the representation may be held to be bad for failing to take into consideration the assistance from the sponsoring authority. We are satisfied that the so-called delay in the present case has not been occasioned by lack of diligence or promptness of attention on the part of the detaining authority. The challenge, therefore, to the continued detention of the petitioner on the ground of delayed consideration of his representation must fail.

10. While narrating the facts in the earlier part of this judgment we have noted

that the incident which ultimately led to the detention of the petitioner took place on 28th July 1984 and the order of detention was passed on 2nd November 1984. It has been mentioned in the petition that this delayed action on the part of the detaining authority in passing the order of detention does not betray a proper appreciation of the factors involved which should go into the formation of the subjective satisfaction while passing an order of detention. The reply to this on behalf of the detaining authority is that after the incident in question had taken place on 28th July 1984, the proposal was placed before the Screening Committee and on its clearance on 21st August 1984 the same was sent to the Home Department which received it on 4th September 1984. The detaining authority has also explained that there were documents which were required to be translated into Gujarathi language and the translation dt. 12th October 1984 and 16th October 1984 were received in the Home Department on those respective dates. The translation of the detention order and the grounds of detention in Gujarathi were received in the Home Department on 30th October 1984 from the Customs Department and the detention order was then issued on 2nd November 1984. In our opinion, the facts so stated in the affidavit in reply fully explain the delay between the date of the incident and the date of the passing of the detention order.

11. It may be noted that if the order of detention and the grounds of detention are to be supplied, as indeed they are required to be supplied under law, to the detenu, they must be supplied in a language known to the detenu. Obviously, therefore, the order of detention and the grounds of detention have to be translated into the language known to the detenu. This must necessarily take some time depending upon the language of the detenu, availability of translators and the number of documents which are to be translated. In a given case it may so happen that the documents, copies of which are to be supplied to the detenu, may be of a highly technical nature requiring longer time for translation. One, therefore, has to consider all these facts and circumstances before holding that there is an unusual delay between the date of the incident and the date of the passing of the detention order. Moreover, it is noticed that decision to detain a person is not taken hastily at least in this State because a system seems to be prevailing where a proposal is placed before the Screening Committee and after the Screening Committee has given its clearance the decision is taken. We do not see how a system which is in fact for the benefit of a possible detenu can be said to be creating delay on which ground the order of detention can be vitiated. We are, therefore, satisfied that the period between the date of the incident and the date of the passing of the order of detention has been satisfactorily explained.

12. However, it has been equally strongly urged by Mr. Gupte that the execution of the order nearly two months after it was actually passed is itself fatal to the order and indeed, Mr. Gupte says, it must affect the quality of the subjective satisfaction on the basis of which the order of detention was passed. Reliance was placed by him on a judgment of the Supreme Court in *Sk. Nizamuddin Vs. State of West Bengal*, . The facts of that case disclosed that the petitioner before

the Supreme Court was arrested in connection with an incident of theft committed by him on 14th April 1973. The order of detention was passed on 10th September 1973. The criminal case itself had been dropped, though it was not shown to the Supreme Court on which particular day that case had been dropped. Since, however, the order of detention was made on 10th September 1973 the Supreme Court proceeded on the assumption that the criminal case had been dropped on or about 10th September 1973. Ultimately the petitioner was detained on 23rd November 1973. Looking to the facts of that case the Supreme Court held that the delay on the part of the detaining authority in getting its order of detention executed at the earliest showed that the detaining authority was not serious at all about the nature of the order that he proceeded to pass. It was also noticed that no explanation in regard to the delay in arresting the petitioner pursuant to the order of detention was given even before the Court. Proceeding further, the Supreme Court held that if there is any delay in arresting the detenu pursuant to the order of detention which is prima facie unreasonable, the State must give reasons explaining the delay. Since in the case before the Supreme Court no explanation of the delay was given in the affidavit in reply, the Supreme Court proceeded to conclude that the District Magistrate had not applied his mind and did not have genuine subjective satisfaction that it was necessary to detain the petitioner with a view to preventing him from acting in a prejudicial manner.

13. Though the point relating to the delayed execution of the detention order had not been taken earlier in the petition and in fact was taken after the affidavit in reply to the petition disclosed that the said order was executed on a later date, we are proceeding to dispose of the said point. Mr. More appearing for the State has made available for our perusal the file in which the steps taken towards the execution of the order passed on 2nd November 1985 have been mentioned. Though normally we would have insisted upon an affidavit in reply to the same, in the instant case it is not necessary to do so for two reasons. First, the point has been taken by an amendment of the petition carried out on 21st October 1985 and secondly, the hearing of Habeas Corpus petitions should not be delayed merely on account of the absence of an affidavit if the necessary material can be made available for the perusal of the Court by the State which in the instant case has been done. The material made available to us shows that the detention order dt. 2nd November 1984 was received in the Customs (Preventive) Collectorate on 5th November 1984. The detenu was on bail on 16th November 1984. The police staff along with the customs officers visited the locality of the address given by the detenu at Kandivli, but the detenu could not be traced. On 18th December 1984, which was the next date of remand, efforts were again made to serve the detention order on the detenu, after obtaining permission from the Court, but the detenu himself remained absent on that day. The next remand date was 28th February 1985. However, fortunately the police staff along with the customs officers located the residential premises of the detenu on 11th January 1985. It was thus that there was a time gap between the date of the

passing of the order and the date on which the detenu was actually arrested.

14. From what has been mentioned it is clearly seen that the detaining authority himself was neither negligent nor inactive nor lethargic to see that his detention order was executed. On the other hand, from the system which is prevalent in Bombay it is seen that an order of detention passed under the COFEPOSA Act is sent to the Customs Officer who in turn takes the assistance of the police in locating the person concerned and in serving the order on him. If the person concerned is on bail and the address of the person is not always adequate to trace him, then the officers wait for him to come to the Court on a day on which he is required to attend the Court. All these procedures have been followed in the instant case. Therefore, it cannot be said that the subjective satisfaction which formed the basis of the order of detention passed on 2nd November 1984 was not genuine or real satisfaction. In parenthesis we may add that it is impossible to hold that by an event which is subsequent to the date of the order of detention the subjective satisfaction which is the basis of that order is vitiated. Only in a case like *Sk. Nizamuddin Vs. State of West Bengal*, the total apathy towards taking steps for executing the detention order passed by an authority may indicate that in fact the satisfaction forming the foundation of the said order is no satisfaction at all. In the case before us the authority passing the order of detention is not the same which is executing the said order. We have already briefly outlined the procedure which is followed here and it shows that there is no delay at all in the execution of the order in the instant case.

15. By an amendment, which was allowed by this Court and which was carried on on 31st October 1985, the petitioner has stated that there is nothing to show that the Central Government has exercised the power conferred upon it under S. 11 of the COFEPOSA Act. This power is exercised by the Central Government with a view to see whether the order passed by the State Government can be revoked looking to the facts and circumstances of a particular case. In *Sabir Ahmed Vs. Union of India (UOI)*, , the Supreme Court has laid down as follows :-

"Whether or not the detenu has under S. 11 a legal right to make a representation to the Central Government is not the real question. The nub of the matter is whether the power conferred by S. 11 on the Central Government carries with it a duty to consider any representation made by the detenu, expeditiously. The power under S. 11 may either be exercised on information received by the Central Government from its own sources including that supplied under S. 3 by the State Government, or, from the detenu in the form of a petition or representation. Whether or not the Central Government on such petition/representation revokes the detention is a matter of discretion. But this discretion is coupled with a duty. That duty is inherent in the very nature of the jurisdiction. The power under S. 11 is a supervisory power. It is intended to be an additional check or safeguard against the improper exercise of its power of detention by the detaining authority or the State Government. If this statutory safeguard is to retain its meaning and efficacy, the Central Government must

discharge its supervisory responsibility with constant vigilance and watchful care. The report received under S. 3, or any communication or petition received from the detenu must be considered with reasonable expedition. What is "reasonable expedition" is a question depending on the circumstances of the particular case. No hard and fast rule as to the measure of reasonable time can be laid down. But it certainly does not cover the delay due to negligence, callous inaction, avoidable redtapism and unduly protracted procrastination."

16. There is no affidavit in reply to the point raised by the petitioner under S. 11 of the COFEPOSA Act. We are, however, not prepared to straightway allow the petition only on the ground that there is no affidavit in reply, particularly because the amendment itself had been carried out only on 31st October 1985 and between that date and today when the petition is being heard nearly ten days of holidays had intervened. Mr. Agarwal for the Union of India has, however, fairly told us that he will make available the information immediately by sending telex messages to Delhi and he has only requested that judgment on this aspect of the case may be delivered after he obtains the information in that regard. The case is, therefore, adjourned for decision on the aforesaid question till Friday, the 22nd November 1985. Final order will be passed on that day.

17. On the last date of hearing, namely on 22nd November 1985, we adjourned this matter in order to satisfy ourselves that the Central Government has exercised its power under S. 11 of the COFEPOSA Act within reasonable time. On that day Mr. Agarwal had produced for our perusal a telex message received from the Government mentioning the dates on which the report of the State Government was received by the Central Government and on which the Central Government took action. That telex message also mentioned that an affidavit was already on its way. Hence we adjourned the matter to this date.

18. An affidavit sworn by Mr. A. K. Agnihotri, Under Secretary to the Government of India in the Ministry of Finance, Department of Revenue, has been tendered to us today. In para 3 of this affidavit it has been mentioned that Mr. K. K. Dwivedi, Joint Secretary, has been directed to consider the reports received from the State Governments under S. 3(2) of the COFEPOSA Act. Following this scrutiny on 21st November 1984, no reason for interfering with the findings of the State Government and the conclusions reached by the State Government were found. From this one can reasonably infer that the Central Government, which received on 17th November 1984 the report sent by the State Government on 7th November 1984, scrutinised the report and took a decision on 21st November 1984. Mr. Gupte, however, quarrels with the form of the affidavit and contends that the affidavit does not say that it was Mr. Dwivedi who was authorised to consider the reports who ultimately scrutinised the report and took a decision. This contention of Mr. Gupte is based upon the intransitive form of the sentence which forms the second part of Para 3 of the affidavit. Though grammatically the contention of Mr. Gupte is supportable, we think that on the facts of this case the meaning is clear that it was Mr. Dwivedi who was authorised to consider the

reports and who took the decision. It is true that the practice of filing affidavits in a regular form, which is cyclostyled and in which the necessary particulars are filled in, may not be a happy one and we hope that this practice will be soon discontinued. Normally on facts there cannot be a standard form of affidavit, though it could be urged on behalf of the Central Government that what is required to be brought to the notice of the Court in matters of this type is only limited information and this could be done by preparing a standard form to be used in different cases.

19. In the result, we find that neither the order of detention nor the continued detention of the petitioner is illegal.

Accordingly, rule is discharged.

20. Ordered accordingly.