

(2012) 11 BOM CK 0002

In the Bombay High Court

Case No : Criminal Writ Petition No. 1900 of 2012

Shri Irfan Ibrahim Qadri

APPELLANT

Vs

Medha Gadgil and Others

RESPONDENT

Date of Decision : 06-11-2012

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3, 5A
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 108, 135(1)(ii)

Citation : (2013) 2 ABR 449 : (2013) ALLMR(Cri) 598 : (2013) 2 BomCR(Cri) 423 : (2013) CriLJ 1455

Hon'ble Judges : Sadhana S. Jadhav, J; A.S. Oka, J

Bench : Division Bench

Advocate : D.S. Mhaispurkar, for the Appellant; P.H. Kantharia, APP for the Respondent Nos. 1 to 5 and Smt. A.S. Pai, Special Public Prosecutor for Respondent No. 6 (DRI), for the Respondent

Judgement

A.S. Oka, J.—By this Writ Petition under Article 226 of the Constitution of India seeking a writ of habeas corpus, the Petitioner is praying for quashing and setting aside the order dated 17th April, 2012 passed by the first Respondent in exercise of powers conferred by Sub-section (1) of Section 3 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA Act"). The Petitioner's brother has been ordered to be detained with a view to prevent him in future from smuggling goods. Learned Counsel appearing for the Petitioner submitted that the detainee was arrested for the offence u/s 135(1)(ii) of the Customs Act on 18th May, 2011 and was ordered to be released on bail by the learned Magistrate on the same day. He submitted that apart from directing the detainee to furnish PR bond and solvent surety (one or two) in the sum of Rs. 2 lakhs, he was directed to attend the concerned department/Investigating Officer once in a week. A condition was imposed of not leaving Mumbai without prior permission of the Investigating Officer. He was directed not to leave India without permission of the Court. He

pointed out that under the same order, the detainee's passport was ordered to be retained with the Department. He submitted that admittedly the said order was not placed before the detaining authority. He submitted that the order granting bail in the present case was a vital document. He submitted that the subjective satisfaction of the detaining authority was vitiated as the bail order was not considered by the detaining authority as the same was not placed before her. He submitted that the sponsoring authority had placed before the detaining authority an application made for cancellation of the said bail order. He submitted that the said application was withdrawn on 22nd November, 2011 and the said order was not placed before the detaining authority. Learned Counsel appearing for the Petitioner relied upon a decision of the Apex Court in the case of *Sunila Jain Vs. Union of India (UOI) and Another*, . Relying upon Paragraphs 18 of the said decision, he submitted that in the facts of the case, the bail order was a vital document and the non-placement and non-consideration of the bail order vitiates the detention order. He placed reliance on a decision of the Division Bench of this Court in the case of *Baban Prakash Ranware v. Commissioner of Police, Pune & Others* decided on 23rd July, 2012. He, therefore, urged that as the subjective satisfaction is vitiated, the impugned order deserves to be quashed and set aside.

2. The learned Special Public Prosecutor appearing for the sixth Respondent urged that the offence in relation to which the bail was granted to the detainee does not form part of the grounds of detention. The detention order is based on subsequent incident of 26th August, 2011 and subsequent prejudicial conduct of the detainee. She, therefore, urged that it was not at all necessary for the sponsoring authority to place the bail order before the detaining authority and in any case, it was not a vital document at all as the offence in connection with which bail was granted is not even referred to in the grounds. She pointed out that the application for cancellation of bail may be a part of the documents submitted by the sponsoring authority before the detaining authority but the same has not been considered by the detaining authority. She invited the attention of the Court to what is held by the Apex Court in Paragraphs 19 to 22 of the same decision in the case of *Sunila Jain (supra)*. She submitted that in any event the bail order was passed in case of a bailable offence and, therefore, it was not necessary to place the said fact before the detaining authority. She submitted that in the facts of the case before the Apex Court in *Sunila Jain's* case (*supra*), the Apex Court held that the order granting bail in case of a bailable offence is not at all a vital document.

3. She relied upon Section 5A of the COFEPOSA Act and submitted that the grounds of detention are severable. She submitted that in view of Section 5A of the COFEPOSA Act, the grounds of detention being severable, even assuming that the submission made by the Petitioner has some merit, the order of detention cannot be set aside on that count. She has placed reliance on the decision of the Apex Court in the case of *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, . She, therefore, submitted that there is no merit in the challenge to the order of detention. The

learned APP appearing for the detaining authority and the State of Maharashtra made similar submissions. By way of rejoinder, the learned Counsel appearing for the Petitioner submitted that in the bail order, there are stringent restraints imposed on the detainee and that is the reason why it was a vital document.

4. We have given careful consideration to the submissions. It is contended by the Respondents that there is no reliance placed on the offence which is subject matter of RA No. 29 of 2011 in which the detainee was enlarged on bail on 18th August, 2011. This was a case where it was alleged that on 17th May, 2011, the detainee was arrested at Chhatrapati Shivaji International Airport which resulted in the recovery of Iridium concealed in his undergarments and recovery of electronic goods such as mobile phones, i-pads and 68 kgs of some white chemical powder. The value of the goods was Rs. 61,65,000/-. After recording his statement u/s 108 of the Customs Act, 1962, he was produced before the learned Metropolitan Magistrate on 18th May, 2011 when the bail was granted to the detainee. In the order of detention, reliance is placed on the incident of 26th August, 2011 when DRI intercepted two passengers viz. Khatib Shamsouddin Shaukat and Khalid Mohamed Idris Qureshi who arrived from Hong Kong to Mumbai. They were found carrying Iridium powder worth Rs. 30,00,000/-. The said Khatib disclosed that the detainee had given him the job of carrier. It is alleged that one statement of detainee was recorded u/s 108 of the Customs Act, 1962 on 18th October, 2011 in which he stated that he was given assignment of smuggling Iridium by one Vicky. Paragraph 7 of the grounds reads thus:-

7. Your statement was recorded u/s 108 of the Customs Act, 1962. On 18.10.2011 at DRI Mumbai office in which you stated that you are running transport business of your proprietorship firm of M/s. Anupam Logistics. During your stay at Hong Kong, one Shri Vicky, had given you assignment of smuggling of Iridium from Hong Kong to India for monetary consideration of Rs. 30,000/- per kg. Shri Vicky gave you one consignment of 68 kgs of white powder which was "anti malaria" and "anti cancer" drug for smuggling from Hong Kong to India for monetary consideration of Rs. 1500/- per kg. You also smuggled 12 I-Phones and 3 I-Pads from Hong Kong to India for one of your friend Shri Raju without monetary consideration. You were apprehended by DRI, Mumbai on 17.05.2011 at CSI, Airport, Mumbai along with above mentioned smuggled "Iridium Powder", "White Powder", 12 i-phones and 3 i-pads and were arrested in the same case on 18.05.2011.

(Underline added)

Moreover in Paragraph 9 of the ground, it is stated that "you have engaged in such prejudicial activities, it is imperative that you should be detained.....". Thus, in the grounds, there is a reference to the incident of 17th May, 2011 in which case, the bail was granted on 18th May, 2011. Thus, the submission made by learned Special Public Prosecutor on behalf of the sixth Respondents that the incident of 17th May, 2011 is not a part of grounds of detention is factually incorrect and is contrary to record.

5. It will be necessary to make a reference to the order granting bail dated 18th May, 2011 in the case relating to aforesaid incident of 17th May, 2011 referred to in the grounds. The relevant part of which reads thus:-

Perused heard. As per complainant he is regular traveller and hence bail may be granted with certain condition. The Ld. APP clearly mentioned in writing and orally submitted that the offence is bailable.

So considering the same accused be released on PR and solvent surety (one or two) of Rs. Two lacs. He is at liberty to deposit cash bail of same amount provisionally for 8 weeks. The accused is directed to attend the concerned department/I.O. once in a week. The I.O. is hereby directed to retain the passport in further orders. The accused is hereby directed not to leave Mumbai without permission and/or consent of the I.O. and not to leave India without permission of the Court. Pronounce in open court.

(underline added)

6. At this stage, it is necessary to make a reference to the decision of the Apex Court in the case of Ahamed Nassar Vs. The State of Tamil Nadu and Others, . In Paragraph 20, the Apex Court has observed thus:-

20.A man is to be detained in the prison based on the subjective satisfaction of the detaining authority. Every conceivable material which is relevant and vital which may have a bearing on the issue should be placed before the detaining authority. The sponsoring authority should not keep it back, based on his interpretation that it would not be of any help to a prospective detenu. The decision is not to be made by the sponsoring authority. The law on this subject is well settled; a detention order vitiates if any relevant document is not placed before the detaining authority which reasonably could affect his decision.

7. As far as the order on bail application is concerned, in Clause 12(6) of Paragraph 13 of the decision of the Apex Court in the case of Abdul Sathar Ibrahim Manik v. Union of India (supra), the Apex Court held thus:-

12(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu.

8. The decision in the case of Abdul Sathar Ibrahim Manik (supra) was considered in the case of Sunila Jain (supra). In Paragraph 12 of the decision in the case of Sunila Jain (supra), it was held thus:-

12. The question as to whether an offence is bailable or not is not a vital fact whereupon an order of bail can be passed. Application of mind to the averments made in a bail application may be relevant where the grounds stated therein reveal certain facts which are vital for passing an order of detention. In a case of

such nature, it may be said that the application for bail was necessary to be placed before the detaining authority and non-furnishing a copy thereof to the detenu would vitiate the order of detention.

9. In Paragraphs 18 to 21 of the decision in the case of Sunila Jain (*supra*) the Apex Court has held thus:-

18. The decisions of this Court referred to hereinbefore must be read in their entirety. It is no doubt true that whether a detenu on the date of the passing of the order of detention was in custody or not, would be a relevant fact. It would also be a relevant fact that whether he is free on that date and if he is, whether he is subjected to certain conditions in pursuance to and in furtherance of the order of bail. If pursuant to or in furtherance of such conditions he may not be able to flee from justice, that may be held to be relevant consideration for the purpose of passing an order of detention but the converse is not true. Some such other grounds raised in the application for bail and forming the basis of passing an order of bail may also be held to be relevant. It would, however, not be correct to contend that irrespective of the nature of the application for bail or irrespective of the nature of the restrictions, if any, placed by the court of competent jurisdiction in releasing the detenu on bail, the same must invariably and mandatorily be placed before the detaining authority and the copies thereof supplied to the detenu.

19. The decisions relied upon by Mr. Mani in our opinion do not lay down as universal rule that irrespective of the facts and circumstances of the case it would be imperative to place all applications for bail as also the orders passed thereupon before the detaining authority and copies thereof supplied to the detenu. On the petitioner's own showing, only that part of the application for grant of bail that the offence in question is bailable, was relevant. No other submission had been raised at the Bar. Whether a provision of law is bailable or not is a question of law. The same is presumed to be known to the courts and/or the detaining authority. It may not be necessary even to be stated in the application for bail. If a person had been released on bail on the ground that the offence is bailable, it would not be necessary to bring the said fact before the detaining authority. The detaining authority will have to satisfy himself on the basis of the materials placed on record, as to whether the order of preventive detention should be passed against the detenu or not. The constitutional mandate can be said to be violated, provided; (1) the impairment has been caused to the subjective satisfaction to be arrived at by the detaining authority; and (2) if relevant facts had not been considered or the relevant or vital documents have not been placed before the detaining authority.

20. In the instant case the order of detention has taken note of the fact that the detenu had already been released on bail in the following terms:

You were arrested on 30-1-2003 and released on bail by the Hon''ble Judge, Special Court of Economic Offences, Bangalore, upon executing a personal bond

for an amount of Rs. 10,000/- and security in the form of cash for the like sum.

21. It is also not in dispute that a copy of the order granting bail and order of remand has been furnished to the detenu. In this view of the matter we are of the opinion that non-furnishing of a copy of the application of bail cannot be said to be a ground which impaired the subjective satisfaction of the detaining authority or the same was a relevant fact which was required to be taken into consideration by him and the application for bail was required to be supplied to the detenu. It is now well settled that all the documents placed before the detaining authority are not required to be supplied; only relevant and vital documents are required to be supplied.

(Underlines supplied)

10. Before dealing with the issue whether the bail order is a vital document, it must be noted here that this Court is not examining the correctness of the decision of the detaining authority, but this Court is examining the decision making process. An order of preventive detention is always based on subjective satisfaction of the detaining authority. Every document which may affect the subjective satisfaction of the detaining authority one way or the other is a vital document and the said document should not be kept back from the detaining authority. This Court cannot go into the question as to what could have been the effect on the subjective satisfaction of the detaining authority on consideration of a vital and relevant document. This Court has to consider only the question whether a vital document which may have affected the subjective satisfaction is kept away from the detaining authority. The reason being that non-placement or non-consideration of a vital document affects the decision making process of the detaining authority of recording subjective satisfaction. As far as the order granting bail is concerned, as held by the Apex Court in the case of *Sunila Jain* (supra), irrespective of the nature of application for bail or irrespective of the nature of restrictions imposed by releasing the detainee on bail, the same does not become vital document. In paragraph 12 of the decision in the case of *Sunila Jain* (supra), the Apex Court observed that the question as to whether the offence is bailable or not is not a vital fact whereupon an order of bail can be passed. Paragraph 18 clearly lays down parameters to decide whether the bail order is a vital document. There are two considerations. One is the nature of application for bail and the other is the nature of restrictions imposed while granting bail. If offence alleged against the detainee is bailable, and if there are no restrictions or conditions imposed while granting bail, except for the condition of executing bond and furnishing surety, the order granting bail may not be a vital document as it may not affect the subjective satisfaction of the detaining authority. In case of bailable offence, while granting bail, if a condition is imposed to ensure that the detainee does not flee from justice, such order will certainly become a vital document looking to the nature of condition. Discussion made in Paragraphs 19 and 20 of the decision in the case of *Sunila Jain* (supra) shows that in the facts of the case before the Apex Court, the bail was granted in

a bailable offence without imposing any constraint except the condition of executing personal bond and furnishing cash surety. The argument before the Apex Court of the Petitioner was that only that part of the bail application which disclosed that the offence was bailable was relevant. In the facts of the present case, apart from the condition of furnishing personal bond and one or two solvent sureties to make up the amount of Rs. 2 lakhs, the learned Magistrate directed that the passport of the detainee should be retained by the Investigating Officer and he was directed to attend the office of the Investigating Officer once in a week. Moreover, further condition was imposed on the detainee not to leave Mumbai without prior permission and/or consent of the Investigating Officer and not to leave India without permission of the Court. Thus, restraints of substantial nature were imposed on the detainee as a condition for grant of bail to ensure that he should not flee from justice. He was deprived of the custody of passport and that he was prevented from leaving the city of Mumbai. We may note here that the order of detention has been passed with a view to prevent detainee in future from smuggling goods. Thus, the order is passed by invoking clause (i) of Sub-section (1) of Section 3 of the COFEPOSA Act. The clause (ii) of Sub-section (1) of Section 3 of the COFEPOSA Act was not invoked. The detainee was also prevented from leaving India by virtue of grant of bail and by virtue of the fact that his passport was to remain with the Investigating Officer. These conditions are certainly vital.

11. Considering the drastic conditions imposed while granting bail, the order granting bail becomes relevant and vital document as the same would have influenced the subjective satisfaction of the detaining authority. We must note here that admittedly the sponsoring authority had placed a copy of the application for cancellation of the same bail order before the detaining authority. In the present case, there is no dispute that the bail order was not placed before the detaining authority and, therefore, was not considered by the detaining authority. As we have pointed out earlier, in Paragraph 7 of the grounds of detention, there is a specific reference to the arrest of the detainee in the said case on 18th May, 2011. In the ground of detention, reliance has been placed on the incident of 17th May, 2011 apart from the subsequent incident of 26th August, 2011. Therefore, the submission of the learned Counsel appearing for the Petitioner that the bail order was a vital document will have to be accepted.

12. The Special Public Prosecutor appearing for the Respondent No. 6 has relied upon Section 5A of the COFEPOSA which reads thus:-

5A. Grounds of detention severable.- Where a person has been detained in pursuance of an order of detention under sub-section (1) of section 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly -

(a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are -

- (i) vague,
- (ii) non-existent,
- (iii) not relevant,
- (iv) not connected
- (v) invalid for any other reason whatsoever,

and it is not, therefore, possible to hold that the Government or officer making such order would have been satisfied as provided in subsection (1) of section 3 with reference to the remaining ground or grounds and made the order of detention;

(b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said sub-section (1) after being satisfied as provided in that sub-section with reference to the remaining ground or grounds.

13. In Paragraph 71 of the decision of the Apex Court in the case of Prakash Chandra Mehta (supra), it is held thus:-

71. Section 5A stipulates that when the detention order has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly that if one irrelevant or one inadmissible ground had been taken into consideration that would not make the detention order bad.

In the present case, the subjective satisfaction of the detaining authority is vitiated due to non-consideration of the bail order imposing drastic conditions. It is not the case of the Respondents that on the date of passing of the detention order, the conditions in bail order were no longer in force. On account of non-consideration of vital document of bail order, the subjective satisfaction of the detaining authority stands vitiated. Therefore, reliance placed on Section 5A of the COFEPOSA Act will not save the order of detention. Therefore, the Petition must succeed and we pass the following order.

ORDER :

The Rule is made absolute in terms of prayer clause (a) which reads thus:-

(a) That this Hon''ble Court be pleased to issue a Writ of Habeas Corpus or any other appropriate writ, order or direction quashing and setting aside the said order of detention bearing No. PSA-1211/CR-110/SPL/3(A) dated 7.4.2012 and be pleased to direct that the detenu Imran Ibrahim Qadri be set at liberty.