

(1995) 07 BOM CK 0058

In the Bombay High Court

Case No : Criminal Writ Petition No. 1433 of 1994

Smt. Najama

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 06-07-1995

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 7
Constitution of India, 1950 — Article 22(5)

Citation : (1996) 1 BomCR 181

Hon'ble Judges : Ashok Agarwal, J;A.S.V. Moorthy, J

Bench : Division Bench

Advocate : S.G. Rajput, for the Appellant; S.G. Page, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Ashok Agarwal, J.—Petitioner is the wife of one Nizamuddin Sirajuddin who has been detained pursuant to an order passed by the Secretary (Preventive Detention) to the Government of Maharashtra, Home Department and Detaining Authority. The detention order bears No. SPL-3(A)/PSA 0191/469, is dated 18th November, 1991 and is passed u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the COFEPOSA Act). By the present petition, the petitioner seeks to impugn the aforesaid order and the consequent incarceration of the detenu.

2. Though several grounds have been advanced for the purpose of impugning the detention of the detenu, it is enough to mention only one of them, as, according to us, the same is sufficient for the disposal of the petition.

3. It is contended that the seizure on the basis of which the impugned order of detention has been issued against the detenu was effected on 14th May, 1991. The detenu was apprehended on the 15th May, 1991 and was released on bail on the 16th May, 1991. The impugned order of detention was belatedly issued on

the 18th of November, 1991. The same was belatedly served on the detenu on the 2nd of August, 1994 i.e. after a lapse of two years and eight and half months. It is contended that apart from the undue delay in issuing the order of detention there has been an undue and unexplained delay in serving the order of detention on the detenu. This, according to the learned Counsel appearing on behalf of the petitioner, has rendered the detention of the detenu illegal.

4. As far as the delay in serving the order of detention is concerned, we have on record an affidavit filed by Shri L.S. Danekar, Senior Police Inspector attached to P.C.B. C.I.D. In respect of the delay in serving the order of detention, he had averred, as follows:

"2. The detention order dated 18-11-1991 was received in our office on the same date at 18.45 hours. On 20-11-1991 at 03.30 hours Police Sub-Inspector Pande and Custom Officer Mr. Yadav and Staff of P.C.B. visited room No. 82 & 83 Kamatipura, Lane No. 03, Bombay-400 008, when the detenu was not found. Enquiries were made with one Jafferulla Jalil Addimkhan and his wife Saira Banu who were present at relevant time. The enquiries revealed that they were the tenant of the room, they did not know anything about the detenu. Mr. Jahurbhai and his wife Bismillabi were present in the room No. 83. They stated that they did not know anything about the detenu and they were tenants of the said room. The said two rooms were standing in the name of the father of the detenu Sirajuddin Sheikh. Then on 26-10-1992 Police Inspector Deshmukh, Pande and staff attached to P.C.B. C.I.D. visited the said two rooms mentioned above, but the detenu was not found. Enquiries were made with Gulam Mehabubhai who was present in the said rooms, at the relevant time; the enquires revealed that he was the tenant and he did not know anything about whereabouts of the detenu. On 28-9-1992 the detention order alongwith grounds of detentions and documents were sent to the Home Department, Mantralaya, as the detention order could not be executed on 26-2-1992, 4-2-1993, 5-2-1993 and 23-3-1993. The detenu did not attend the Honourable Chief Metropolitan Magistrate, Esplanade Court, Bombay. He was supposed to attend the Court on above mentioned dates because they were remand dates. The detenu could not be served the detention order on those dates".

"3. On 1-8-1994 at 5.30 hours Police Sub-Inspector Kishan Mahajan of Nagpada Police Station informed on telephone that Nagpada Police Station had traced detenu and at 21.15 hours on the same day the detenu was brought at the office of P.C.B. C.I.D. by P.C. No. 20287 and 25171 of Nagpada Police Station. But the detenu denied to be a detenu. Hence, telephone message was given to the Customs Officer on 1-8-1994 at 13.10 hours. J.K. Rathod from Customs office attended the office of P.C.B. C.I.D. and identified the above mentioned detenu as the said person. Thereafter, the detention order has been served upon the detenu on 2-8-1994 and detenu was lodged at Bombay Central Prison as per the committal order. What is being said hereinabove, it is clear that the detention order could not be served on the detenu immediately because detenu was not

traceable. He avoided service of the detention order. The detenu therefore cannot take advantage of the delay in execution of the detention order, in as much as the said delay is caused on account of his own conduct. For the purpose of my contentions that the efforts were made to serve the detention order, I rely upon the relevant diary entries when produced".

5. The above submission, in our view, disclose a casual and cavalier approach of the concerned authorities in the matter of serving an order of detention. The detention order is received in the office of P.C.B. C.I.D. on the 18th of November, 1991. On the 20th of November, 1991 the concerned officers have visited the residential address of the detenu in Bombay when the detenu was not found. The next attempt to serve the detenu is on the 26th of October, 1992 which is almost 11 months and 6 days after the passing of the order of detention. No explanation is forthcoming for the inaction for the aforesated period. As far as the subsequent dates which are mentioned in paragraph 2 of the affidavit are concerned, there is an apparent error. If the detention order alongwith the grounds of detention were sent to the Home Department on 28th September, 1992, on the ground that the detenu was not traceable, it is difficult to understand how efforts were made to serve the detenu on 4th of February, 1993, 5th of February, 1993 and 23rd of March, 1993. One thing is clear from the averments made earlier in paragraph 2, that after the first attempt was made to serve the detenu on the 20th of November, 1991, no steps were taken to serve the detenu till the 26th of October, 1994. This delay by itself would be sufficient to vitiate the detention of the detenu.

6. We have one more affidavit on record of Shri J.P. Dange, who at the relevant time was the Secretary (Preventive Detention) to the Government of Maharashtra, Home Department. In para 7 of his affidavit, he has stated as under :

"7. With reference to para 4(ii), I say that contents of this para largely refer to the P.C.B. C.I.D. and I shall reply on the affidavit filed on behalf of the P.C.B. C.I.D., Bombay. The Sponsoring Authority has however indicated that one of the two addresses of the detenu was situated at 82/83 Rehmat Manzil, Kamathipura, 3rd Lane, Bombay - 400 008. It was visited by the officers of the COFEPOSA Cell alongwith P.C.B. C.I.D. on 18-11-1991 but the detenu was not available. His whereabouts could not be ascertained from the enquiries made. Hence, the detention order could not be served. On 22-11-1991 another joint operation was conducted by the Officers of COFEPOSA cell and the officers of P.C.B. C.I.D. and the same place at the above address was visited by them but the detenu was not available. Hence, the detention order remained unexecuted. On 22-11-1991 a Telex Message was sent to the Assistant Collector of Customs (P) Gorakhpur requesting him to depute field officers to make discreet enquiries about the detenu was at the other address of the detenu which was given as village Fatehpur, Siodi, District - Gonda, Uttar Pradesh. On 29-4-1992, the Assistant Collector of COFEPOSA cell wrote to the Assistant Collector Prosecuting Cell, R. &

I. Bombay requesting him to make efforts to get the surety cancelled or the surety amount forfeited. On 23-9-1992 the Assistant Commissioner of Police, Crime Branch (Prev.) C.I.D. Head Quarters, Home Department (Special), informing him that the detenu was not residing at the given address nor had he attended the Court on several dates. The detention order came to be returned. It is clear therefore that the detenu was deliberately avoiding his arrest and hence the detention order could not be served on him. The delay in execution of the detention order is caused on account of detenu's own conduct and hence he cannot take advantage of the same and get the detention order set aside on that count. In any event I do not admit that my satisfaction rendered is sham and not genuine on account of time taken to execute the detention order. Besides looking to the propensity of the detenu to indulge in similar prejudicial activities in future it cannot be said that live link is snapped".

7. The aforesaid averments, which relate to the P.C.B. C.I.D., strictly speaking, are inadmissible as the affiant, sitting in Mantralaya, would have no personal knowledge in respect of the efforts made by the P.C.B. C.I.D. for tracing the detenu and serving him with the order and grounds of detention. Even if they are taken into account the same does not furnish a satisfactory explanation for the inordinate delay in serving the order of detention for the following reasons.

8. The detenu was arrested on the 15th of May, 1991 and was released on bail on the 16th of May, 1991. Several dates of remand took place between the 20th of November, 1991 and 22nd February, 1993. We have on record eight orders which have been passed by the Chief Metropolitan Magistrate in respect of R.A. No. 396 of 1991 concerning the detenu. On each of these dates, the accused is shown absent and on each of these dates an application is filed by the Custom Authorities for extension of bail and orders have been passed extending the bail. We are intrigued at this conduct on the part of the Custom Authorities. On the one hand we find that an order of detention has been issued on the 18th November, 1991 and we further find that dates for remand of the accused are held between 20th of November, 1991 and 22nd February, 1993. If the detenu, on making diligent search, was not traced, one would expect the Custom Authorities to apply for cancellation of bail. We would expect the authorities to take steps u/s 7 of the COFEPOSA Act. Section 7 provides, as under :

"7. Power in relation to absconding persons.-

(1) If the appropriate Government has reason to believe that a person in respect of whom a detention order cannot be executed, that Government may-

(a) make a report in writing of the fact to a Metropolitan Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of Sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973, (2 of 1974), shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall unless he proves that it was not possible for him to comply therewith and that he had within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(2) Notwithstanding anything contained in the code of Criminal Procedure, 1973 (2 of 1974), every offence under Clause (b) of sub-section (1) shall be cognizable".

9. Not only that no steps are taken under the aforesaid provision but we find that the concerned authorities have acted to the contrary i.e. they have applied for extension of bail. As far as the affidavit of Shri J.P. Dange is concerned, he states that on 29th of April, 1992 the Assistant Collector of COFEPOSA cell wrote to the Assistant Collector Prosecuting Cell requesting him to make efforts to get the surety cancelled or the surety amount forfeited. No steps in this direction are shown to have been taken. On the contrary application after applications are filed for grant of extension of bail and the concerned Magistrate has proceeded to pass orders granting extension of bail. The Magistrate has passed order in this behalf mechanically without bothering to find out why the Customs Authorities are applying for extension of bail when the accused is found absent. On the one hand an order of detention has been issued. Efforts to apprehend and serve the detenu with the order has been in vain and yet applications for extension of bail are filed. This practice of the Customs Authorities of applying for extension of bail in cases where the accused is found absent, which practice we have come across in a number of detention matters, to say the least deserves to be deprecated. Such applications reflect non-application of mind on the part of the Customs Authorities. Similarly, passing of such orders by the Chief or Additional Chief Metropolitan Magistrates is a practice which is required to be discontinued. Successive applications made by the Sponsoring Authorities for extension of bail and the casual and lethargic manner in which the Customs Authorities have attempted to serve the order of detention compell us to entertain suspicion about the assertion by the Customs Authorities that the detenu was absconding, and to hold that the authorities have been thoroughly negligent in executing the order of detention on the detenu.

10. In this context, a reference can usefully be made to the case of K.P.M. Basheer Vs. State of Karnataka and another, . The Apex Court in the aforesaid case has observed, thus :

"8. Of course, this contention has not been specifically taken in the Memorandum of Appeal, but there can be no bar to advance a legal argument in a case of this nature and especially when such a contention has been raised before the High Court. We went through the explanation given in para 9 of the counter-affidavit

filed on behalf of the first respondent by the then Commissioner and Secretary to Government, Home Department. It is not denied that the detention order was executed after a period 5 months and 11 days. What the first respondent states is that various efforts were taken to trace the detenu at Tellicherry at the address given in the grounds of detention as well as on the Bombay address, but he could not be secured. Further it has been stated that though the arresting officers attempted to secure him at the Court of Chief Judicial Magistrate at Belgaum on 6-3-1991, 28-3-1991 and 14-5-1991 on which dates the criminal case as against him stood posted before the Court, the officers could not do so as the appellant did not appear before the Court for hearing. Further it is mentioned that though COFEPOSA section in the office of the Collector of Customs requested the State Government on 19-4-1991 to intimate action u/s 7(1)(b) of the Act it was not done so because the seizing unit was asked to make one more attempt to trace out and detain the appellant. This explanation is not a satisfactory and reasonable one for the following reasons :

(1) No sufficient cause is shown for not taking any action u/s 7 of the Act.

(2) It appears from the paragraph 9 of the counter that the officers came to know of the correct address of the appellant at Bombay, but they could not trace him. It may be pointed out that the Bombay address at which the place the appellant-detenu was attempted to be secured is not given in the counter. Had it been given the Court would have been in a position to verify the averments made in the grounds of detention stating that the address at Bombay given by the appellant was a fictitious one".

"9. In paragraph 17 of the writ petition filed before the High Court, the appellant has asserted that he appeared before the Assistant Collector of Customs, Marine Lines, Bombay on 6-2-1991 and 20-2-1991 but no attempt was made to arrest and detain him. This specific averment is not at all denied in the counter. This indicates that the arresting officers did not take any real and genuine effort to secure and detain the appellant. The explanation now offered stating that the appellant was fugitive, eluding the drag-net of the detention order cannot be accepted, because during the alleged period of search he has appeared before the Assistant Collector of Customs, Bombay on two occasions during February, 1991, that is after passing of the detention order".

"10. All the above points show that no serious and sincere effort appears to have been taken by the arresting officers and that there was only exchange of correspondence between the Department and the arresting officers. It is incomprehensible as to why no effort has been made to secure the appellant/detenu during the two days, namely, on 6th and 20th February when he appeared before the Assistant Collector of Customs. No supporting affidavits or documents are filed to substantiate the averments made in the counter. Incidentally, it may be mentioned that though the two gold pellets (the contrabands) were seized from the appellant on 12-11-1990 the authorities concerned passed these orders only on 7-1-1991 i.e. nearly after two months".

11. In the above case, the detention order was served after a period of five months and eleven days. In the facts and circumstances of that case, it was found that the live and proximate link between the grounds of detention and the purpose of detention was snapped on account of undue and unreasonable delay in serving the order of detention and hence the order of detention was found to be liable to be quashed. In the case at hand the delay in serving the order is far more, the same is 2 years and 8 1/2 months.

12. A further reference to a case decided by Division Bench of this Court in the case of Smt. Ranjana Suresh Parmar v. The State of Maharashtra, reported in 1993 C. C. C. 215, can usefully be made. This is what has been observed :

"17. Again, therefore, turning to the facts of the present case, it is extremely relevant to notice that the prejudicial activities of the detenu were revealed on 14th December, 1990. The detenu was arrested on 5-3-1991, released on bail on the very same day. The order of detention was passed on 9th July, 1991. Even then, the sponsoring authorities i.e. Customs Authorities preferred repeated applications for extension of bail on 19-3-1991, 17-5-1991, 30-8-1991 and 28-11-1991 seeking extension of bail till 15-4-1992. It is also interesting to note that during all this period the detenu was alleged to be absconding. So far as the service of the detention order on the detenu is concerned, the police authorities attached to P.C.B., C.I.D. Bombay first made attempt on 11th July, 1991 at 11.00 p.m. when the premises were found locked. Next attempt by the police was made after a period of more than one month i.e. on 18-8-1991 when the premises were found locked and the shop keepers revealed that the detenu has not visited the shop premises for a couple of days. Thereafter the police thought fit to serve the order of detention 8-9-1991 when the detenu was not found and thereafter it took more than 3 months to the police officers to pay their next visit and it was on 15-12-1991 S.I. Pandit along with the staff went to the premises but the detenu was not available. Ultimately the detention order was served on the detenu only on 17-1-1992. Successive applications by the sponsoring authorities for extension of bail and the casual and almost negligent manner in which the police authorities had attempted to serve the order of detention, compell us to conclude that not only the assertion by the authorities that the detenu was absconding is not correct, but the authorities had almost deliberately delayed execution of the order of detention of the detenu. In the facts and circumstances of the case there is undue and unreasonable delay and the explanation offered by the authorities is not at all satisfactory. On the basis of the ratio of the aforesaid decisions already referred to above, we hold that the initial subjective satisfaction, has rendered "not genuine" in the present case".

13. In this case, order of detention was passed on the 9th of July, 1991 and the same came to be served on the detenu on the 17th of January, 1992 i.e. after a period of about 6 months and the same, on the facts of that case, was found to be an undue and unreasonable delay.

14. A further reference can be made to another case of a Division Bench of this

Court in the case of Smt. Farida Shabbir Africa wala v. Shri Mahendra Prasad, Joint Secretary COFEPOSA and others, reported in 1994 C C C. 191, wherein it is observed, thus:

"3. Second contention urged by Mr. Gupte is that there is considerable delay in execution of the order and again there is no satisfactory explanation in the return filed on behalf of the Central Government. This submission also deserves acceptance. The impugned order was passed on August 18, 1992 and was served only on April 16, 1993. In other words, the order was executed eight months after the date of issuance. In paragraph 5 of the return it is claimed that an attempt was made to apprehend the detenu on September 9, but the particulars of address furnished by the detenu was found to be fictitious. The return then claim that since the detenu could not be apprehended orders u/s 7(1)(b) were issued by the Ministry wherein the detenu was directed to appear before the Commissioner of Police, Bombay, within seven days. The detenu failed to comply. The return then claims that the detenu had business premises at Santacruz, Vakola but the occupants of premises could not give any clue about the present whereabouts of the detenu. Mr. Agrawal learned Counsel appearing on behalf of the Central Government submitted that the efforts were made to execute the order but the detenu was not traceable and therefore no fault could be found for late execution of the order. Mr. Gupte counters the submission by pointing out that on more than two occasions application was made on behalf of the Enforcement Officer before the Chief Metropolitan Magistrate for extension of remand. Learned Counsel urged that two applications were long after the order of detention was issued and in case the detaining authority was unable to trace the detenu then nothing prevented the Enforcement Officer from applying before the Magistrate for cancellation of bail. The fact that application for revocation of bail was not filed before the Magistrate is tell-tale circumstance to indicate that serious efforts were not made to trace the detenu and execute the order. The order of detention is issued with a view to prevent the detenu from indulging in prejudicial activities and such orders must be served forthwith and cannot be executed after a long period. Such action looses the efficacy of the order of detention. In our judgment the impugned order is required to be struck down on both the counts urged by the detenu."

In this case also the delay of eight months was found sufficient to invalidate the detention of the detenu.

15. As far as the case at hand is concerned, the order of detention is passed on the 18th of November, 1991 and the same is served on 2nd of August, 1994 i.e. after a period of two years and eight and half months. We have already reproduced the explanation for the delay and we have found the same to be thoroughly unsatisfactory. We have perused the order of detention and grounds in support thereof. The detenu was found to have swallowed 125 capsules each containing three foreign currency notes. In addition, he had concealed one big bundle containing foreign currency in his rectum. The foreign currency was in

respect of 5940 Kuwaiti Dinars equivalent to Indian currency of Rs. 2,67,300/-. Despite the serious allegations, the concerned authorities have shown an utter calous and casual attitude in taking steps to detain the detenu. If the purpose of detaining the detenu was to prevent him from once again indulging in similar prejudicial activities one would have expected a more efficient and expeditious effort in tracking the detenu and serving the order of detention upon him. The casual and calous approach has naturally snapped the live link between the prejudicial activities of the detenu and the need to prevent him from re-indulging in the same in future. This has naturally rendered the continued detention of the detenu illegal.

16. In the result, the petition succeeds. The impugned order of detention bearing No. SPL. 3(A)/PSA 0191/469 dated 18th November, 1991 passed by Shri J.P. Dange, Secretary (Preventive Detention) to the Government of Maharashtra, Home Department and Detaining Authority, is quashed and set aside. The detenu Mr. Nizamuddin Sirajuddin is directed to be set at liberty forthwith unless required in some other case. Rule is made absolute.

17. A copy of this order be sent to the Chief Metropolitan Magistrate, the Additional Chief Metropolitan Magistrate as also the Collector of Customs to take appropriate steps in the light of the observations contained in paragraphs 8 and 9 of the Judgment.