

**(2002) 08 BOM CK 0122**

**In the Bombay High Court**

**Case No :** Criminal Writ Petition No. 515 of 2002

Usman Gani Yakubali

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

**Date of Decision :** 05-08-2002

**Acts Referred:**

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3

**Citation :** (2003) BomCR(Cri) 375 : (2003) CriLJ 1884

**Hon'ble Judges :** D.G. Deshpande, J; A.S. Aguiar, J

**Bench :** Division Bench

**Advocate :** A.M.Z. Ansari, for the Appellant; D.S. Mhaispurkar, Assistant Public Prosecutor, for the Respondent

**Final Decision :** Dismissed

## Judgement

D.G. Deshpande, J.—One Mahmood Yakubali Umer is the detenu in this case. Petition is filed by his brother. The detenu has been detained under the COFEPOSA Act by detention order dated 29-1-2002 passed by detaining authority Smt. Ranjana Sinha of the Government of Maharashtra. The Grounds of detention of the even date were served upon the detenu.

2. We heard Mrs. Ansari for the detenu at length so also learned APP for the respondents. In the petition number of grounds have been raised. However, Mrs. Ansari urged that Grounds in the petition viz. (v); (x); (ix) (a) & (b); (xii); (xiii); (xiv) and Ground No. (i) should only be considered for quashing the detention order. We are, therefore, considering those grounds only.

3. First Ground is about the delay in issuing the detention order because incident of smuggling gold coins had taken place on 22-4-2001. Investigation was completed on that day itself and the detention order was passed on 29-1-2002. Therefore, according to Mrs. Ansari, the delay has resulted in snapping the live link between the activities of the detenu and the detention order and, therefore, the detention is liable to be quashed.

4. The next ground that was raised as per Ground No. (v) was that reasoned bail order of the detenu passed on remand application dated 17-5-2001 as per Annexure-D of the petition was not placed before the detaining authority and, therefore, non-placement of a vital document has affected subjective satisfaction of the detaining authority. For theses, Mrs. Ansari relied upon the following authorities :--

- (1) Abdul Sathar Ibrahim Manik Vs. Union of India and others, ;
- (2) Iqbal Hasanali Rupani and Another Vs. The State of Maharashtra and Others, ;
- (3) 1999 SCC 1 M. Ahamedkutty v. Union of India.

5. The next ground that was raised as per Ground No. (x) was that the detenu has made his further retraction in his letter dated 22-6-2001 addressed to the Additional Commissioner of Customs, as per Annexure-1, and therefore, it was incumbent upon the sponsoring authority to place this further retraction, which was a vital document, because it would have influenced the mind of the detaining authority one way or the other, and, since this was not done by the sponsoring authority, the detenu could not make any effective representation about the same.

6. The next ground that was raised was ground No. (xii) as per which the detenu has by his letter, dated 19-7-2001 requested for adjudication as per Annexure-F and, by another letter dated 7-1-2002, written through his advocate B.J. Raichandani, the detenu has informed the Additional Commissioner of Customs that he has requested for waiver of the show cause notice as per Annexure-G. But these letters Annexure-F and G or the detenu and his advocate were not placed before the detaining authority. According to Mrs. Ansari those documents were vital and they could have influenced the mind of the detaining authority one way or the other. Non-placement of these documents has, therefore, resulted in vitiating the detention order on account of non-application of mind.

7. The next ground that was raised as per ground (ix)(a) and (ix)(b) was about retraction statement of the detenu contained in bail application dated 23-4-2001. Though this document was placed before the detaining authority, the detaining authority has not referred to or relied upon the said bail application containing retraction. This shows non-consideration of the vital document by the detaining authority.

Ground (ix)(b) is also about the same i.e. not mentioning of the said retraction in the said bail application.

8. The next ground is ground No. (xiii) as per which the documents at pages 7, 16, 32, 41 and 42 of the compilation filed by the detaining authority which is a set of the documents furnished by the detenu to the detaining authority are illegible and, therefore, the detenu could not make effective representation.

9. The next ground is that the detenu had made representation to the different

authorities viz. Detaining Authority, State Government, Central Government and the Advisory Board. The State Government rejected the representation influenced by the opinion of the detaining authority and, therefore, the detention order is liable to be quashed for want of independent consideration by the State Government in ground No. (xiv) itself the detenu has contended that there was delay in considering the representation and delay in serving the rejection. Because, according to detenu, his representation was dated 11-4-2002, it was rejected on 7-5-2002 and it was communicated on 19-5-2002. Therefore, delay in consideration and communication of rejection vitiates the detention order.

10. Regarding first ground of delay in issuing detention order it was contended by learned APP that in most of detention matters under COFEPOSA delay in itself is not vital to the detention order. The learned APP relied upon judgment of this Court in (1998) 2 Mh LJ 78 : 1995 AIHC 1800 Rafiq Abdul Karim Merchant v. Rajendra Singh wherein this aspect has been considered at length by the Division Bench. Secondly, he also contended that looking to the nature of the activities of the detenu that when he went abroad after seeking permission from the Court, he was again found indulging into the activities of smuggling as is evident from the grounds of detention and, therefore, looking to the modus operandi it could not be said that live link between the activities of the detenu and the detention order is snapped on account of delay.

11. Regarding Ground No. (v) learned APP contended that the bail order was not required to be furnished to the detaining authorities because it was not a reasoned order. There were absolutely no reasons recorded by the Magistrate, nor the Magistrate had considered the merits of the case in which the bail application was made, nor the facts were considered. And, therefore, according to him, non-placement of bail order before the detaining authority did not at all affect subjective satisfaction of the detaining authority.

12. Regarding Ground Nos. (x) and (xii) i.e. letter dated 22-6-2001, other letter dated 19-2-2001 and letter written through advocate dated 7-1-2002, the learned APP contended that all these three letters did not have any bearing upon the issue. They were not at all vital documents. There is nothing in the letters which could have affect subjective satisfaction either way and, therefore, non-placement of those letters did not at all affect validity of detention order.

13. Similarly regarding Ground Nos. (ix)(a) and (ix)(b) it was contended by learned APP that retraction statement of the detenu in the bail application was placed before the detaining authority. But it was not necessary that the detaining authority was under an obligation to show its awareness to each and every document.

14. So far as Ground No. (xiii) is concerned, i.e. about illegible documents, the learned APP contended that it could not be said that the documents were so illegible that the detenu could not read them. According to him, these documents at pages 7, 16, 37, 41 and 42 were legible and, therefore, the right of the detenu

to make effective representation was not at all affected. So far as independent consideration of the representation by the State Government, as per Ground No. (xiv) it was contended by learned APP that the representation was considered by the State Government independently and it was not influenced by the opinion of the detaining authority.

15. About delay in deciding the representation and communicating the rejection, the learned APP contended that there is no delay at all. Because so far as communication of rejection is concerned, it is clear from the affidavit of the detaining authority and jail authority that the detenu was shifted from one jail to other and order of rejection was also sent from one jail to other and, as such there was no delay.

16. We have given our anxious consideration to the submissions made by Mrs. Ansari for the detenu and learned APP Mr. Mhaispurkar for the State. We now deal with the grounds of detention in the aforesaid order.

17. The first ground is about delay in issuing detention order because, according to Mrs. Ansari, the incident of smuggling took place on 22-4-2001 and detention order is passed on 29-1-2002. No doubt the detention is issued after about nine months. However, in view of the judgment of this Court reported in Rafiq Abdul Karim Merchant Vs. Shri Rajendra Singh, Secretary to Government of Maharashtra, it cannot be held that the delay has resulted in snapping the live link between the activities of the detenu and the detention order. In the said judgment the Division Bench of this Court held that :

"Held, that delay simpliciter in the issuance of a detention order does not vitiate the same. The general rule is that it would be vitiated if there is no explanation for the same. In a case of preventive detention under the COFEPOSA or PITNDPS even unexplained delay in the issuance of the detention order, by itself would not vitiate the same. In such cases it will only be vitiated on account of delay the live link between the prejudicial activities of the detenu and the rationale of clamping a detention order on him is snapped. For determining whether such a live link has been severed or not, the propensity and potentiality of the detenu to commit prejudicial activities would be very material. If there was no material to indicate that the detenu had propensity and potentiality to commit them. Unexplained delay simpliciter in the issuance of the detention order would be fatal and the same would be vitiated because the live link between the prejudicial activities of the detenu and the rationale of clamping a detention order on him would be snapped. On the converse if there is material to show that the propensity and potentiality of the detenu to commit prejudicial activities was there then despite the unexplained delay in the issuance of the detention order the live link between the prejudicial activities of the detenu and the rationale of claiming a detention order on him would not be lost and the detention order would not be vitiated. The question of delay in issuing a detention order cannot be approached with the same sensitivity and strictness in case of a preventive detention under the COFEPOSA or PITNDPS, as in a case under the National

Security Act. A wider margin has to be given to the authorities in cases under the COFEPOSA and PITNDPS. After going through the grounds of detention it was evident that the propensity and potentiality of the detenu was such that it could not have been frustrated by a mere delay of seven and half months in the issuance of the detention order. The propensity and potentiality of the detenu was such that on account of the mere delay of 7 and 1/2 months in the issuance of the detention order, the live-link between the prejudicial activities of the detenu and the rationale of claiming a detention order on him did not get snapped.""

In the instant case the activities of the detenu, particularly his going abroad after permission of the Court and then smuggling gold coins would indicate that the detenu has misused the permission granted by the Court and, considering this aspect, the so called delay in issuing detention order, according to us, does not vitiate the detention.

18. Regarding delay in serving the order of detention the obtaining authority has in its affidavit para 13 stated that the detenu was ordinary resident of Gujarat and he has given his address of Surat. Therefore, the detention order with all the papers were forwarded to the Secretary, Government of Gujarat by speed post on 29-1-2002 and, the Under Secretary forwarded these documents on 13-2-2002 to the Commissioner of Police, Surat. The detention order was also sent by sponsoring authority to the Assistant Commissioner of Customs, Surat on 14-2-2002. Intimation was given to the Air Port authority to keep a watch on detenu. Prosecution Cell, Mumbai were also intimated about the detention order and were told to apprehend the detenu. If he appears before the Court and hand over to PCS, CID for execution of detention order. And then the Commissioner of Police, Surat informed the detaining authority that the detenu was served with the detention order on 26-3-2002.

19. The learned APP contended that when the order was sent to Surat for execution and report was awaited then there was no point to resorting to Section 7 of the COFEPOSA Act.

20. We do not find any lapse committed by the detaining authority in resorting to Section 7 of the COFEPOSA Act particularly in the circumstances of the case and the efforts made to serve the detention order. Before resorting to Section 7 all possible steps are required to be taken and, for how much period the authority should wait depends on the facts and circumstances of each case. No hard and fixed criteria can be applied in this regard that the steps u/s 7 of the COFEPOSA Act must be forwarded within a particular period. We do not find any lapse or negligence or deliberate delay on the part of the detaining authority in serving the detention order nor any laxity on their part.

21. Second contention as per ground No. (v) was that the bail order was not placed before the detaining authority. As stated above, Mrs. Ansari, appearing for the detenu, relied upon (1) Abdul Sathar Ibrahim Manik Vs. Union of India and

others, . In that case the Supreme Court has laid down its conclusions after para 12 and in conclusion No. 6 it is stated that :--

"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."

22. In the grounds of detention the detaining authority has shown its awareness that on the date of detention order the detenu was released on bail. This will be clear from para 2 of the grounds of detention.

23. As against this I was contended by learned APP Mr. Mhaispurkar that the bail order Was not at all a reasoned order and, therefore, it was not necessary to place the same before the detaining authority. Mr. Mhaispurkar drew our attention to Annexure-D of the petition which is a copy of the said bail order. A perusal of the said order shows that the order of bail is not at all A reasoned order. The Magistrate has not given any reason, nor discussed the facts of the case, but has only stated that because accused/detenu was in custody since 23-4-2001, it was not desirable to detain him further in custody. Mr. Mhaispurkar relied upon a judgment of this Court reported in Iqbal Hasanali Rupani and Another Vs. The State of Maharashtra and Others, in the absence of reasons, it can be certainly said that the bail order could not have affect the subjective satisfaction of the detaining authority either way. Further in the affidavit of detaining authority at page 58 para 11 he detaining authority has specifically stated that "the copy of the bail application and bail order dated 17-5-2001 were very much placed before the detaining authority but the detaining authority has not relied upon the same." and, therefore the copy was not furnished to the detenu. Apart from this explanation, what is required is that, the bail order is not a reasoned order and, therefore non-placement of the said order does not affect the right of the detenu to make effective representation, nor it affects subjective satisfaction of the detaining authority.

24. In this regard it was contended by Mrs. Ansari that strenuous condition was imposed upon the detenu in the said bail order, Annexure-D and he was directed not to leave Mumbai without prior permission of the Court and not to leave India till the decisions of cases of this RA and RA No. 200/RA/2000. According to Mrs. Ansari the condition imposed upon the detenu, if placed before the detaining authority it would have affect the subjective satisfaction.

25. In this regard it was contended by the learned APP that even though as per condition the detenu was ordered not to leave Mumbai without prior permission of the Court. It was clear from the grounds of detention that such a condition was imposed earlier also upon the detenu, but the detenu sought permission of the Court to go abroad and misused the said permission by importing gold coins and, therefore, non-placement of this bail order does not vitiate the detention.

26. We find considerable force in the submission made by learned APP. In the grounds of detention in para 3 the detaining authority has stated that :--

"I am also aware that you have committed the said act when allowed to go abroad pursuant to the Hon"ble Courts order."

It will be, therefore, clear that the condition imposed by the Court earlier had no effect by the detenu and, therefore, we hold that non-placement of bail order does not vitiate the detention for any reason whatsoever.

27. Contention with reference to Ground No. (x) is that the detenu has made his further retraction by his letter dated 22-6-2001, Annexure-E, but the same was not considered by the detaining authority.

28. Annexure-E is a letter dated 22-6-2001 written by the detenu himself to the Additional Commissioner of Customs. This letter is not a retraction at all. But there is reference to the earlier application of retraction dated 23-4-2001 and the fact of retraction by that letter is merely repeated by the detenu in this letter dated 22-6-2001. The earlier retraction dated 23-4-2001 was in the bail application itself, which was very much before the detaining authority. Nothing new was said by the detenu in his letter dated 22-6-2001, Annexure-E and, therefore, we do not find any force in the contention of Mrs. Ansari that non-placement of this letter has any way affect the detention order. This document is not at all vital. The fact of retraction was before the detaining authority and repetition of the said fact by the detenu in subsequent letter does not make Annexure-E as a vital document.

29. Similarly, as per Ground No. (xii) two letters of the detenu dated 19-7-2001, Annexure-F and letter of his advocate dated 7-1-2002, Annexure-G are not at all vial, nor important, nor having any bearing upon the issue involved. The detenu has not written anything which can be said to be vital and important either for his defence or against the interest of the detenu. In Annexure-F the detenu has merely given acknowledgment of the receipt of letter dated 5-7-2001 and he has stated that whatever he wanted to say has already been stated by him in his deposition and he has no new facts to be added, (stress added). In the advocate"s letter, Annexure-C also nothing new has been said, nor any importance having bearing upon the issue involved has been said and, therefore, these documents are not at all vital documents and, non-placement of the same does not adversely affect the detention order.

30. As per Ground Nos. (ix) (a) and (b) the detaining authority has not shown its awareness to the retraction statement contained in the bail application dated 23-4-2001 even though the said bail application was before the detaining authority. As against this, it was contended by learned APP that the detaining authority was not required to show its awareness to each and every document. The learned APP also relied upon the judgment of the Supreme Court reported in State of Gujarat Vs. Sunil Fulchand Shah and Another, wherein the Supreme Court in Para 9 held that "it is not necessary to mention in the grounds the

reaction of the detaining authority in relation to every piece of evidence." In view of these observations of the Supreme Court, the contention of Mrs. Ansari is rejected.

31. It was contended by Mrs. Ansari that representation of the detenu was not considered by the State Government independently. But after the detaining authority rejected the representation before it, the same papers were placed before the State Government and, then mechanically the State Government rejected the representation. (Representation sent to the State Government was decided by the Additional Chief Secretary).

32. In this regard it was contended by Mr. Mhaispurkar on the basis of affidavit of State Government that the representation to the State Government was independently considered and the State Government was not influenced by the opinion of the detaining authority or rejection of representation by the detaining authority. In this regard Mr. Mhaispurkar placed reliance on the judgment of the Supreme Court reported in *Union of India and Others Vs. Manish Bahal @ Nishu*, . Mr. Mhaispurkar conceded that he was citing this authority as it applies by analogy, though it is not direct authority on the point. In that matter the report of the Advisory Board justifying the detention order was placed before the detaining authority along with papers for disposal of the representation made by detenu to the detaining authority. In that background of the matter the Supreme Court held in paras 21, 22 and 23 that "In the scheme of things under the Act, the report of the Advisory Board is not an irrelevant material in the exercise and merely the report of the Advisory Board was placed before the detaining authority, it cannot be said that the order of detaining authority rejecting the representation of the detenu was not based on his independent consideration." The High Court in that matter had held that the Lt. Governor had not independently considered the representation. The Supreme Court held that the findings of the High Court were wrong and without any support.

33. In the case before Us also there is nothing at all to suggest that the representation of the detenu was not considered by the Additional Secretary independently. Affidavit in that regard is absolutely clear. And therefore, we reject this contention of the detenu.

34. Other contention of the detenu was that there was delay in communicating the rejection of representation. The representation was dated 11-2-2002. It was rejected on 7-5-2002 and the rejection was communicated on 19-5-2002. Therefore, according to Mrs. Ansari, there is delay of 12 days which is not explained.

35. We do not find any force in this contention. The affidavits of Government and Jailer in that regard are absolutely clear wherein the Jailer has given particulars and has stated that the order of rejecting the representation was received by him at Nasik Road Central Prison on 10-5-2002 because the detenu was in Nasik Road Central Prison. However, by that time the detenu was came to be lodged in

Arthur Road Central Prison, Mumbai. The rejection reply was, therefore, forwarded to Arthur Road Central Prison, Mumbai which was received by them on 14-5-2002. But in the meantime the detenu was again transferred to Nasik Road Jail and, therefore, Arthur Road Jail Authority transferred the rejection order to Nasik Road Jail which was received by them on 18-5-2002 in the late evening and, the detenu was communicated on 19-5-2002 about the rejection. This affidavit is absolutely clear that the detenu was being transferred from one Jail to other. And, therefore, in that background we hold that there was no delay at all in communicating the rejection and, even if the delay is said to be there, it is satisfactorily and properly explained.

36. Mrs. Ansari also contended that the documents at Sr. Nos. 7, 16, 37, 41 and 42, supplied to the detenu, were illegible. The set of documents was shown to us. Though some of the documents are partly illegible, nothing was pointed out to us that the right of the detenu to make effective representation was affected thereby. It was contended by Mrs. Ansari that supply of illegible documents amounts to non-furnishing documents. To uphold the contention it must be shown that firstly, the documents were totally and completely illegible and, secondly, that the detenu could not read the documents at all. Nothing was pointed out to us and, therefore, this contention cannot be upheld.

37. Mrs. Ansari has also relied upon the judgment of the Supreme Court reported in Ahamed Nassar Vs. The State of Tamil Nadu and Others, . about non-placement of material and vital documents which could have some bearing on the subjective satisfaction of the detaining authority with reference to two documents viz. letters of the detenu dated 22-6-2001 and 19-7-2001. However, on perusal of the aforesaid documents, we have already come to the conclusion that those documents were not at all vital and important and were not having bearing on the issue. Therefore, the arguments of the detenu cannot be accepted.

38. About illegible documents Mr. Mhaispurkar relied upon the judgment of the Delhi High Court-reported in Abdul Qahar Vs. Union of India and Others, . In that case documents from pages 93 to 135 were not legible. The High Court in para 7 of the judgment observe as under :--

"But a mere allegation in this regard would not satisfy the requirement to vitiate the detention unless it was brought home that supplied documents were so illegible that these could not be used to make an effective representation. It would be only in such a situation that detention would be invalidated."

In this background and having gone through the aforesaid documents, it cannot be said that they are so illegible as affect the right of the detenu to make effective representation.

39. Considering all the submissions it has to be ultimately hold that the petition fails. Hence, we pass the following order :--

**ORDER**

Petition is dismissed.

Rule is discharged.

Certified copy expedited.