

Rameshkumar Balkishan Cibal Vs. State of Maharashtra and Others

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Court : Mumbai

Decided On : Jan-14-1997

Reported in : 1998BomCR(Cri)599

Judge : A.V. Savant and; S.S. Parkar, JJ.

Acts : [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) - Sections 3(1) and 7(1); [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 82, 83 and 84; [Customs Act, 1962](#) - Sections 108

Appeal No. : Criminal Writ Petition No. 1320, of 1996

Appellant : Rameshkumar Balkishan Cibal

Respondent : State of Maharashtra and Others

Advocate for Def. : Bagwe, A.P.P.

Advocate for Pet/Ap. : M.G. Karmali and ;Smt. A.M.Z. Ansari, Advs.

Judgement :

ORDER

A.V. Savant, J.

1. Heard both the learned Counsel.

2. Petitioner Rameshkumar Balkishan Cibal is the brother of the detenu Rajkumar Balkishan Cibal. By order dated 1st February, 1996 passed under sub-section (1) of section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1947 (for short COFEPOSA Act) the detenu has been ordered to be detained with a view to preventing him from abetting the smuggling goods, as also concealing and keeping smuggled goods. The offending incident is of 28th June, 1995 when the officers of the Directorate of Revenue Intelligence, Zonal Unit, Mumbai intercepted (i) truck No. H.R-38-6942 near Anjurphata on Bhiwandi bypass of Mumbai Nasik Road at 2100 hours and (ii) truck No. M.P-23-D-2307 on Mumbai Nasik Road approximately 69 K.M. off Mumbai at around 2300 hours alongwith certain occupants. Enquiries with the occupants revealed that they were carrying some consignments of smuggled goods and were to contact the detenu for delivery of the said goods. After detailed examination, it transpired that the goods seized were to be delivered to the detenu. The goods consisted of (i) 272 packages of goods of foreign origin against the declared goods of 337 packages of CTC tea; (ii) 381 packages of goods of foreign origin against the declared goods of 421 bags of DMT chemical and (iii) Goods of foreign origin such as bearings, chemicals, computer parts, video cassettes etc. valued at Rs. 2,40,72,900/- recovered from the total of 653 packages recovered from the above mentioned two trucks. The statement of the detenu was recorded on 29th, 30th June 1995 and on 14th July, 1995 under section 108 of the Customs Act and it transpired that the detenu was acting as a disposal agent of the goods which were smuggled into India from Nepal and then transported to Bhiwandi and Mumbai. It is not necessary to go into the details of the grounds of detention for the reasons indicated hereafter.

3. The only point which Shri Karmali has raised before us, and on which the petitioner is entitled to succeed, is about the delay in execution of the order in the peculiar facts and circumstances of this case where on 18th June, 1996 the Intelligence Officer of Directorate of Revenue Intelligence himself made an application (Ex.D page 32) stating that the bail granted earlier had expired on that day namely on 18th June, 1996 and since the investigation was still in progress and papers were being processed, bail period should be extended till 29th August, 1996. Since the petitioner is entitled to succeed on this ground, we find it

necessary to reproduce the contents of the application for extension of bail dated 18th June, 1996 which reads as under:

' IN THE COURT OF THE CHIEF

METROPOLITAN MAGISTRATE

ESPLANADE : BOMBAY

REMAND APPLICATION NO. 145 OF 1995

A.A. Sayed

Intelligence Officer

Directorate of Revenue

Intelligence, Bombay Applicant

v.

Rajkumar B. Cibal,

Shri Narayan Yadav

Naib Singh S/o LaxmanSingh Respondents

APPLICATION FOR EXTENSION OF BAIL PERIOD :

MAY II PLEASE YOUR WORSHIP

A-1

BAIL Rs. 4 lacs CD

A-2 & 3,75,000/- CD

That on 1 -7-95 the abovementioned respondents were produced before Your Worship in connection with the seizure of Bail bearing & Electronic goods and were ordered to be released on bail. The bail period expired today and as the

investigations are still in progress and the papers are being processed, I pray that the bail period may kindly be extended to 29-8-96. Solemnly affirmed the aforesaid at Bombay. This 18th day of June, 96

Sd/-

Applicant.

A. A. No. 1 Pr.

Bail period extended till

29-8-96

Sd/-

Chief Metropolitan Magistrate

Esplanade, Bombay.'

4. As stated earlier, the seizure of the goods is of 28th June, 1995. The order of detention was issued on 1st February, 1996. It does appear from the affidavits filed before us on behalf of the respondents that some attempts were made for executing the order of detention. We will refer to the said attempts in brief when we deal with the affidavits of some of the respondents but the admitted fact is that on 18th June, 1996, namely four and half months after the order of detention was issued, an application was made by the Intelligence officer himself for extension of bail. It was ultimately on 15th July, 1996 that the detenu was arrested. This was as a result of the information received from the petitioner-brother of detenu-on 13th July, 1996 that the detenu was at Aurangabad. Consequently, the order of detention was served upon the detenu at Aurangabad on 15th July, 1996.

5. Shri Karmali the learned Counsel appearing on behalf of the petitioner has invited our attention to some of the decisions of the Supreme Court as also a few decisions of this Court where action of the Sponsoring Authority in applying for extension of bail or in not opposing the application for exemption from appearance in the pending case has been severely criticised. Relying upon those judgments,

Counsel contended that the action on the part of the Sponsoring Authority in applying for extension of bail on 18th June 1996 is fatal to the order of detention. This casts a doubt on the subjective satisfaction recorded by the Detaining Authority in the order of detention that it was necessary to detain the detenu with a view to preventing him from abetting the smuggling of goods or concealing or keeping of smuggled goods. We will refer to some of the said authorities a little later.

6. Shri Bagwe, the learned A.P.P. invited our attention to the affidavits in reply filed in this petition. Shri C.D. Singh, the Principal Secretary to the Government of Maharashtra, Home Department, (Preventive Detention) has filed the affidavit dated 7th October, 1996. Shri R.Y. Nalawade, Desk Officer, Govt. of Maharashtra, Home Department (Special), has filed the affidavit on the same day. Shri C.L. Mahar, Assistant Director, Directorate of Revenue Intelligence, Mumbai has filed the affidavit on 6th January, 1997 setting out various steps taken from time to time in executing the order of detention. Shri R.B. Dange, Senior Inspector of police, P.C.B. C.I.D. Mumbai has filed his affidavit on 1st January, 1997 setting out the details of visits to the residence of the detenu for executing the order of detention. An affidavit has also been filed by Shri S.C. Bhagure, Jailor Group-II attached to the Nasik Road Central Prison, Nasik but we are not concerned with the said affidavit on the point that has been raised before us.

7. Perusal of the affidavits filed by Sarvashri Singh, Nalawade, Mahar and Dange does show that after the order of detention was passed on 1st February, 1996, several attempts were made at regular intervals to trace the whereabouts of the detenu. A letter was also sent by P.C.B. C.I.D., Mumbai on 3rd February, 1996 after initial two attempts on 1st and 3rd February, 1996. The P.C.B. C.I.D. informed the officer incharge of R.A. Kidwai Marg Police Station about the difficulties in serving the order of detention. Thereafter it appears that attempts were made to serve the order of detention on 5th February, 1996 and 16th February, 1996. On 21st February, 1996 P.C.B. C.I.D. informed the State Government that the detenu was absconding. However, again on 11th March, 1996 an attempt was made to serve the detenu by trying to trace him at his residence and at the residence of his brother-the petitioner. On 26th March, 1996,

State Government wrote to the Sponsoring Authority to apply for cancellation of bail. On 29th March, 31st March, 1st April and 2nd April, 1996 efforts were made to serve the detenu either at the residence or at the shop of his father or at his own residence but these attempts failed.

8. On 4th April, 1996 summons was issued by the Sponsoring Authority requiring the detenu to appear on 11th April, 1996. Again on 5th April, 1996 the officer of P.C.B. C.I.D. Mumbai tried to serve the order of detention. On 6th April, 1996 Sponsoring Authority was requested to apply for cancellation of bail. On 7th April, 1996 another attempt was made to trace the detenu at his residence and at the petitioner's residence. Since the earlier summons issued on 4th April, 1996 was returned unserved, a fresh summons was issued on 10th April, 1996 returnable on 16th April, 1996. Again on 12th April, 1996 an attempt was made to serve the detenu at his and the petitioner's residence. Reference in all these attempts to serve the petitioner at his brother's residence is to the residence of the petitioner.

9. On 15th April, 1996 a report was made to the State Government about the detenu being absconding. Again on 3rd May, 17th May, 20th May and 7th June, 1996 an attempt was made to serve the order of detention either at the residence of the detenu or at the petitioner's residence or his father's residence. All these attempts failed. Despite this, surprisingly on 18th June, 1996 the Sponsoring Authority, as stated earlier, made an application for extension of bail. We have already reproduced the contents of the said application dated 18th June, 1996 in para 3 above. Thereafter again on 25th June, 1996 an attempt was made to serve the detenu at his and the petitioner's residence which attempt failed. The Sponsoring Authority on 9th July, 1996 sought action under section 7(1) of the COFEPOSA Act. This proposal for initiating action under section 7(1) of the COFEPOSA Act was received by the State Government from the Sponsoring Authority on 10th July, 1996. Surprisingly on 13th July, 1996 the petitioner informed the Senior Inspector, R.C.B. C.I.D. that the detenu was at Aurangabad where he could be contacted. It is thereafter that the detenu was arrested on 15th July, 1996 at Aurangabad which is date of execution of the order of detention dated 1st February, 1996.

10. Apart from the various attempts made by P.C.B. C.I.D, Mumbai, the Sponsoring Authority has also made several attempts to serve the detenu. Those were on 1st February, 1996, 28th February, 4th March, 12th March, and 23rd July, 1996. As stated earlier on 4th April, 1996 summons was issued to the detenu which was returnable on 11th April, 1996. The second summons was issued on 10th April, 1996 which was returnable on 16th April, 1996. Again an attempt was made to serve the detenu on 12th April, and 17th May, 1996 by the Sponsoring Authority along with the officers of P.C.B. C.I.D. The affidavits filed before us by the above mentioned four officers viz. Sarvashri C.D. Singh, Nalawade, Mahar and Dange do suggest that they made sincere efforts to the whereabouts of the detenu who was absconding. In the facts of the case before us, it is not possible for us to condemn these attempts as mere social calls or an empty formality. Both, the Sponsoring Authority as also the police, made sincere and conscious efforts at regular intervals to trace the whereabouts of the detenu but they did not succeed. What is, however, difficult to explain and proves fatal to the case of the respondents, is the application dated 18th June, 1996 made by the Sponsoring Authority for extension of bail. We may now refer to some of the decisions to which Shri Karmali has invited our attention,

11. In *Sk. Nizamuddin v. State of West Bengal* : 1975 CriLJ12 , the Apex Court had occasion to consider the effect of delay in execution of the order where the order of detention was issued on 10th September 1973 and was executed on 23rd November, 1973. There was a delay of two and half months which was not properly explained. The Apex Court came to the conclusion that if delay was not properly explained, then it was doubtful as to whether it was necessary to detain a detenu with a view to preventing him from acting in a prejudicial manner for the purpose of an order of detention under the Maintenance of Internal Security Act, 1971. It was held that the condition precedent for passing the order of detention itself was not satisfied and consequently the order of detention was quashed.

12. Again in *T.A. Abdul Rahaman v. State of Kerala and others* : 1990 CriLJ578 , the Apex Court considered the effect of delay in execution of the order. In Abdul Rehman's case order of detention was issued on 7th October, 1987 and the detenue was arrested on 18th January, 1988. The delay was not satisfactorily

explained. In para 12 of the judgement at page 229 of the report, the Court observed thus :-

'12. Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner.'

13. In *K.P.M. Basheer v. Union of India and others*, : 1992 CriLJ1927 , the order of detention was issued on 7th January, 1991 which was executed on 28th June, 1991. The delay was not satisfactorily explained and what was surprising was that during the said period of five and a half month the detenu had appeared before the Asstt. Collector of Customs, Marine Lines, Mumbai on two occasions namely on 6th February 1991 and 20th February, 1991 but no attempt was made to arrest and detain him. It was difficult to explain the conduct of the Authority in failing to arrest the detenu who had appeared before it twice in the month of February, 1991 after the order of detention was issued on 7th January, 1991. Relying upon these facts, the Apex Court observed thus in para 11 of its judgement at pages 1929 and 1930.

'11. Under these circumstances, we are of the view that the order of detention cannot be sustained since the live and proximate link between the grounds of detention and the purpose of detention is snapped on account of the undue and unreasonable delay in serving the appellant detenu and detaining him. As we have now come to the conclusion that the order of detention is liable to be set aside on this ground alone, we are not dealing with other contentions raised in the Memorandum of Appeal as well as in the writ petition.'

14. In *P.U. Iqbal v. Union of India and others* : 1992 CriLJ2924 the order of detention was issued on 21st August, 1989 and the detenu was arrested on 10th August, 1990 i.e. after almost one year from the date of passing of the order. In the absence of satisfactory explanation, the Apex Court expressed its doubt as to

the genuineness of the satisfaction recorded.

15. Recently in the case of P.M. Hari Kumar v. Union of India : 1995 CriLJ4188 , the Apex Court had again occasion to consider the question of delay in execution of the order. The order of detention made on 11th July, 1990 under section 3(1) of COFEPOSA Act, was executed only on 3rd July, 1994. In between, the customs authorities had complained to the Additional Chief Judicial Magistrate against the detenu who was summoned to appear on 5th March, 1993 when application was made by the detenu for exemption from appearance which was allowed. On the adjourned date also the detenu again made an application for exemption from appearance which was again allowed. The Apex Court expressed its dis-approval of the conduct of the customs authorities in, firstly, not objecting to the application for exemption from appearance before the Magistrate and, secondly, not making any application for cancellation of bail. Even in respect of the steps taken under section 7(1) of COFEPOSA Act, the Apex Court was not satisfied that the authority had acted with due diligence. In these peculiar facts, the Court came to the conclusion that the detenu was entitled to be released as a result of the unexplained delay between the passing of the order of detention and its execution.

16. Shri Karmali also invited our attention to some of the decisions of this Court where the situation was similar to one in the present case. In Babykumari Mohanlal Soni v. Union of India : 1991(55)ELT172(Bom) the detention order was issued on 31st August, 1989 but was served on 29th January 1990. It was the contention of the Government that the detenu was absconding but surprisingly on 18th October, 1989 and 14th December, 1989 an application for extension of bail was made by the Enforcement Directorate. This Court disapproved this action on the part of the Sponsoring Authority and held that if the order detention was issued with a view to preventing the prejudicial activities under section 3(1) of COFEPOSA Act and such an order was not executed for a considerable length of time, in the facts of the case the order of detention could not be sustained. Similar is the view taken by this Court in Karol Abdul Rahim Umer v. The Union of India and others, Criminal Writ Petition No. 37 of 1990 decided on 21st March, 1990. This was also a case where the conduct of the enforcement directorate in applying for extension of bail was criticised as very curious. The order of detention was

passed on 14th August, 1989 and was served on 22nd December, 1989. Through efforts were made in September and October, 1989 to serve the order of detention, an application for extension of bail was made by the Enforcement Directorate on 27th October, 1989. It was held that this was impermissible in the facts of the case and inordinate and unexplained delay was held to vitiate the order of detention which was accordingly set aside.

17. Shri Bagwe, the learned A.P.P. no doubt sought to place reliance on the Judgment of the Apex Court in the case of M. Ahamedkutty v. Union of India and another : 1990(47)ELT188(SC) . Relying upon the observations in Ahamedkutty's case, it was contended that failure to take action under section 7(1) of the COFEPOSA Act was not always fatal. The order of detention in Ahamedkutty's case was issued on 25th June, 1988 and was served on 2nd August, 1988. The Apex Court has, in para 8 of its judgment at page 7 of the report, observed that the test of proximity is not a rigid or mechanical calendar test to be blindly applied by merely counting the number of months and days between the offending act and the order of detention. It is also true that in para 14 of the judgment, the Court has preferred to its judgment in Shafiq Ahmad v. District Magistrate, Meerut to the effect that mere failure on the part of the authorities to take action under section 7 of the National Security Act, by itself, was not sufficient to vitiate the order of detention in view of the fact that police had remained extremely busy in tackling serious law and order problem. However, what is distinguishing in the facts of the present case is not the mere inaction or failure to take action under section 7(1) of the COFEPOSA Act, but a positive step of making an application for extension of bail on 18th June, 1996 as indicated above.

18. Shri Bagwe then invited our attention to the decision of the Apex Court in Subhash Muljimal Gandhi v. L. Himingliana and another A.I.R. 1994 S.C.W. 4975. A perusal of the judgment in Subhash Gandhi's case shows that it mainly deals with the question of interference with the detention order at the pre-execution stage. It is contended that the order of detention was issued on 23rd August, 1990 but was not executed till the Supreme Court heard the matter on 26th August, 1994. In our view, the observations in para 13 of the judgment in Subhash Gandhi's case, with respect, can have no application to the facts of the present

case where the Sponsoring Authority itself approached the Court with an application for extension of bail on 18th June, 1996 when the order of detention was issued on 1st February, 1996.

19. Shri Bagwe, then invited our attention to the observations of the Apex Court in *Kishore Sukan Raj Jain and others v. State of Rajasthan and others*, 1995 SCC (Cri.) 847. That was a case where the order of detention was issued on 28th May, 1992 and was served on 13th October, 1992. It is true that there were no steps taken for extension of bail nor was any action initiated under section 7(1) of COFEPOSA Act but what is important to note is that no application was made for extension of bail as in the present case.

20. In our view, the ratio of the authorities on which Shri Bagwe has placed reliance cannot be applied to the facts of the present case. What confronts the respondents in this case is the application dated 18th June, 1996 made by none else than the Intelligence Officer of the Directorate of Revenue Intelligence, the contents of which, we have reproduced in para 3 above. We may add here that despite the letter dated 26th March, 1996 issued by the Sponsoring Authority to the State Government, no application was made for cancellation of bail. Similarly, despite the Sponsoring Authority writing to the State Government on 9th July 1996 for initiating action under section 7(1) of the COFEPOSA Act, no action was taken for declaring the detenu as having absconded and the consequent action under sections 82, 83, 84 and 85 of the Code of Criminal Procedure. Despite a summons having been issued on 4th April, and 10th April, 1996 calling upon the detenu to appear and his having failed to appear, an application for extension of bail was made on 18th June, 1996. In our view the correct course for the respondents v/as to apply for cancellation of bail and to take action under section 7(1) of the COFEPOSA Act. Rather than doing that, an application for extension of bail was made. In our view, the cumulative effect of all these steps, acts and omissions on the part of the respondents vitiates the order of detention which is liable to be set aside. In our view, the acts and omissions on the part of the Sponsoring Authority and the State Government mentioned in this para cast a serious doubt on the subjective satisfaction recorded in the order of detention that it was necessary to detain him with a view to preventing him from smuggling goods or concealing and

keeping the smuggled goods.

21. In view of the above, petition succeeds. The order of detention dated 1st February, 1996 at Ex. A is hereby quashed and set aside. The detenu is ordered to be released forthwith unless he is otherwise required to be detained in some other case.

22. Rule is made absolute accordingly. No order as to costs.

23. Petition succeed.

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