varsha

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2429 OF 2023

Abdul Rasheed alias Basheer
s/o. Mohiddin Sahib arrested in the name
of Rasheed Hussian Shirazi alias Basheer
Indian Inhabitant, Aged about 62 years,
Having his address at Kottamala House,
Perumkulam Post, Vellappara Village,
Palakkad. ... Petitioner

vs.

1. Enforcement Directorate
   Zonal Office-I, Kaiser-I, Hind Building,
   Ballard Estate, Mumbai – 400 001.
2. Under Secretary to the Government of
   India Ministry of Finance Department
   of Revenue Central Economic
   Intelligence Bureau COFEPOSA Wing,
   New Delhi.
3. Union of India
   Aayakar Bhavan, Mumbai.
4. State of Maharashtra
   Through the Principal Secretary,
   Mantralaya, Mumbai – 400 032. ... Respondents

Mr. Yadunath Bargavan a/w Ms. Ratna Bhargavan, Mr Rahul Yadav i/b. R Bhargavan for Petitioner.

Mrs. M.H. Mhatre, APP for the State.

Mr. Shreeram Shirsat a/w. Ms. Adithi Rao, Mr. Tanveer Khan, Mr. Shekhar Mane for Respondent No.1(ED).

Mr. Alkileshwar Sharma for Respondent Nos. 2 and 3.

CORAM : REVATI MOHITE DERE &
GAURI GODSE, JJ.
RESERVED ON : 15st SEPTEMBER 2023
PRONOUNCED ON : 27th SEPTEMBER 2023

JUDGMENT (PER: GAURI GODSE, J.) :-

1. This petition is filed challenging the detention order dated 17th May 1993 passed by the Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, in the exercise of powers conferred under sub-section (1) of section 3 of the Conservation of Foreign Exchange and Prevention Of Smuggling Activities Act, 1974 (' COFEPOSA Act') for detaining the petitioner. The petitioner has also challenged the order dated 24th May 2023, passed by respondent no.2-The Under Secretary to the Government of India, Ministry of Finance, Department of

Revenue, in the exercise of the powers conferred by section 8(f) of the COFEPOSA Act for confirming the detention order dated 17th May 1993 and directing detention of the petitioner for one year from the date of his detention, i.e. 28th February 2023.

2. Perusal of the detention order indicates that the detaining authority has relied upon the search and seizure proceedings under section 34 of the Foreign Exchange Act 1973 ("FERA") and the statements recorded under section 40 of FERA after one Umar Ibrahim Mohamad alias Mohd. Sharif Hasan was apprehended at Mumbai airport on 20th November 1992, when he was leaving for Dubai with substantial amount of foreign currencies concealed by him. By referring to the said proceedings, the detaining authority had arrived at a subjective satisfaction that there was reason to believe that the petitioner was engaged in unauthorised acquisition of foreign exchange and transferring the same surreptitiously out of India in violation of the provisions of FERA. The detaining authority has further recorded a subjective satisfaction that the petitioner has carried

out unauthorised transactions and has adversely affected the foreign exchange resources of the country. The detaining authority has further recorded that though prosecution under the provisions of FERA is likely to be initiated against the petitioner, the detaining authority was satisfied that unless detained, the petitioner was likely to continue to engage in the activities in future prejudicial to the augmentation of the country's foreign exchange resources.

3. The aforesaid detention order dated 17th May 1993 is served upon the petitioner on 28th February 2023. Pursuant to the opinion of the Central Advisory Board as per the hearings conducted on 2nd May 2023 and 3rd May 2023, respondent no. 2, in the exercise of the powers conferred by section 8(f) of the COFEPOSA Act, confirmed the detention order dated 17th May 1993 and directed the detention of the petitioner for one year from the date of his detention, i.e. 28th February 2023. A perusal of the said order dated 24th May 2023 indicates that the petitioner's case was placed before the Central Advisory Board,

High Court of Delhi, who was of the opinion that the subjective satisfaction arrived at by the detaining authority does not call for any interference.

4. The learned counsel for the petitioner has raised various grounds to challenge the detention order. However, all the grounds are not required to be examined in as much as the petition ought to be allowed on the ground raised in clause (I) of paragraph 19 of the petition, which reads as under:

> *"(I) The law permitting preventive detention must be meticulously followed, both substantively and procedurally by the detaining authority. The detention order dated 17th May 1993 has become invalid by the passage of time as it was not followed substantively and procedurally. The board on hearing the Petitioner should not have advised for continuing the detention for a year".*

5. The learned counsel for the petitioner submitted that no efforts were made by the detaining authority to serve the

detention order by following the procedure prescribed under the COFEPOSA Act. He submitted that the record would show that the petitioner was never absconding, and the case of the detaining authority that as the petitioner was absconding, the detention order of the year 1993 could not be served upon the petitioner is baseless. The learned counsel submitted that the petitioner was very much available in the State of Kerala and that during the hearings before the Advisory Board on 2nd May 2023 and 3rd May 2023, respondent no.1 produced certain documents which indicate that respondent no.1 was aware of the whereabouts of the petitioner in 1993 itself. The learned counsel submitted that though the detaining authority was aware of the petitioner's whereabouts, the detention order was never served upon the petitioner. The learned counsel submitted that the petitioner shifted to Kerala and started his business of wholesale of vegetables at Cochin. He submitted that for the last thirty years, the petitioner is not involved in any act under the COFEPOSA Act.

6. The learned counsel, thus, submitted that the detention order passed in the year 1993 could not have been served upon the petitioner in the year 2023 on the ground that the petitioner was absconding. The learned counsel submitted that no material is on record to show that any attempt was made on behalf of the detaining authority to serve the detention order on the petitioner. He, therefore, submitted that, in the absence of knowledge of the detention order to the petitioner, he could not have been said to have absconded. The learned counsel submitted that, thus, the detention order could not have been executed after a period of 30 years. Hence, the petitioner submitted that the detention of the petitioner in the year 2023, based on the detention order issued in the year 1993, is illegal and impermissible. Hence, the learned counsel submitted that the detention order deserves to be quashed and set aside being illegal and impermissible and petitioner be released forthwith.

7. The learned counsel appearing for respondent no.1 - the Enforcement Directorate - the Sponsoring Authority, has relied

upon an affidavit dated 25th August 2023 of Shri. Vineet Rathi, Assistant Director, Directorate of Enforcement, Government of India, Ministry of Finance, in support of the detention order. The learned counsel submitted that all the efforts were made right from the year 1993 to serve the detention order upon the petitioner. He submitted that on 8th August 1993, 31st October 1993 and 17th November 1993, attempts were made by the police authorities (PCB-CID) to serve the detention order at the last known address of the petitioner. The learned counsel relied upon the report dated 15th December 1993 of the police authorities to support the submission that attempts were made to serve the petitioner. The learned counsel further submitted that inspite of making all possible efforts, the petitioner remained untraceable; therefore, an order dated 9th February 1994 was passed invoking the provision of section 7(1)(b) of the COFEPOSA Act because there was a valid reason to believe that the petitioner absconded and had concealed himself so that the detention order could not be served. The learned counsel submitted that the order dated 9th February 1994 was published

in the official gazette of India on 5th March 1994, directing the petitioner to appear before the Commissioner of Police, Bombay, within 7 days.

8. The learned counsel submitted that the provisions of sections 7(1)(b) of the COFEPOSA Act indicate that such publication in the Government Gazette is a sufficient compliance of service of the detention order upon the petitioner. The learned counsel, therefore, submitted that there is no substance in the ground of challenge raised by the petitioner. The learned counsel relied upon the copy of the Government Gazette indicating publication of the order dated 9th February 1994 on 5th March 1994. The learned counsel, therefore, submitted that there is a presumption that the petitioner had knowledge of the detention order, and the burden shifted on him to justify his absence. The learned counsel further submitted that since the petitioner was not traceable, the detention order was ultimately executed on 28th February 2023, and he was detained. The learned counsel submitted that thereafter, the same was forwarded before the

Central Advisory Board, and the petitioner was given hearing on 3rd May 2023 and 4th May 2023. After the hearing, the opinion of the Central Advisory Board was submitted in support of the detention order. Hence, thereafter, the order dated 24th May 2023 was issued, confirming the detention order dated 17th May 1993. The respondent No.1 relied upon the following decisions in support of his submissions:

i. Kasim Kadar Kunhi Vs The State of Maharashtra and others[1]

ii. Subhash Popatlal Dave Vs Union of India and another[2]

iii. Rudra Pratap Singh Vs Union of India & Ors[3]

iv. Pankaj Kumar Sharma Vs Union of India and Ors[4]

v. Mohd Nashruddin Khan Vs Union of India & Ors, Gopal Gupta v Union of India & Ors and Amit Pal Singh Vs Union of India[5]

vi. Bherchand Tikaji Bora Vs The Union of India & Ors[6]

1 WP (Cri.) 2198/2004 dated 2.2.2005, Bombay High Court
2 (2014) 1 SCC 280
3 WP(Cri.) 1326/2002, dated 23.1.2008, Delhi High Court
4 (2019) 262 DLT 481 (DB)
5 WP (CRL) 786/2020 & CRI.M.A.5862/2020, WP(CRL) 1009/2020 & CRL.M.A.8726/2020 & WP(CRL) 1019/2020 & CRL.M.A. 8743/2020
6 WP(Cri.) No. 2930, dated 6.7.2006, Bombay High Court

vii. Shabna Abdulla Vs the Union of India and Ors[7]

9. The learned counsel appearing for respondent no.2- the detaining authority, also supported the detention order by relying upon the affidavit dated 9th August 2023 of P.K. Mittal, Director (COFEPOSA Wing), Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau COFEPOSA wing, New Delhi. The learned counsel for respondent no.2 submitted that based on the statements referred to and relied upon by the detaining authority, the petitioner was directed to be detained as he has been actively involved in the unauthorised acquisition of foreign exchange and transferring the same surreptitiously outside India in violation of the provisions of FERA thereby adversely affecting the foreign exchange resources of our country. The learned counsel submitted that there is no illegality in the detention order, and the confirmation of the detention order passed based on the opinion of the Central Advisory Board. With respect to the ground of challenge

7 WP(CRI.) 596/2022, dated 24.1.2023, Kerala High Court.

raised on behalf of the petitioner is concerned, the learned counsel submitted that the petitioner had absconded and, thus, by taking advantage of his act, he cannot seek to quash the detention order by contending that the detention order cannot be served upon him after a period of 30 years. The learned counsel submitted that only as the petitioner was evading due process of law the detention order could not be served upon the petitioner immediately after the passing of the detention order. The learned counsel submitted that all necessary steps were taken to serve the detention order in time. However, only as the petitioner absconded, the detention order could not be served immediately.

10. We have considered the submissions. We have perused the record. In view of the aforesaid peculiar facts and circumstances of the case, we examined whether all possible steps were taken to serve the detention order on the petitioner. The learned counsel for respondent no.1- Sponsoring Authority relied upon the attempts made to serve the detention order. Respondent no.1 has

relied upon a report dated 15th December 1993 submitted by the Assistant Commissioner of Police (Crime) Branch (PREV) CID, HQ, Bombay. The said report indicates that visits were made on 8th August 1993, 31st October 1993 and 17th November 1993 by the officers and staff of PCB, FIP, to trace the petitioner; however, the house of the petitioner was found locked. The said report further indicates that in such circumstances, the detention order was returned unexecuted, and thus, it was 'recommended to issue a proclamation'. The learned counsel for respondent no. 1 also relied upon an enquiry report dated 5th August 1993 by the Assistant Enforcement Officer, which indicates that the petitioner was not available at the given address and that the flat was locked.

11. The order dated 9th February 1994 indicates that the Under Secretary to the Government of India, in the exercise of the power conferred by clause(b) sub-section (1) of section 7 of the COFEPOSA Act, directed the petitioner to appear before the Commissioner of Police, Bombay within a period of 7 days of the

publication of the said order in the official gazette. The learned counsel for respondent no. 1 has relied upon the publication of the said order in the official gazette to support the contention that there is due compliance of service of the detention order upon the petitioner.

12. We do not find any substance in the submissions made on behalf of respondent no.1 that publication of the order under clause(b) of sub-section (1) of section 7 of the COFEPOSA Act would amount to sufficient compliance of the service of the detention order upon the petitioner. It is not the case of respondent no.1 that any attempts were made to serve the detention order as required under clause (a) of sub-section (1) of section 7 of the COFEPOSA Act. It is not even the case of respondent no.1 that pursuant to the letter dated 15th December 1993, issued by the Assistant Commissioner of Police, Mumbai, any steps were taken to issue the proclamation. No affidavit is filed on behalf of respondent no.3-State of Maharashtra, to support all the possible steps taken to serve the detention order

upon the petitioner.

13. It is not even the case of the detaining authority that any efforts were made to trace the whereabouts of the petitioner. Except for visiting the available address in Mumbai, no efforts were made to trace any other address of the petitioner. The record does not reveal that any enquiry was made to find out the whereabouts of the petitioner. After the publication of the order dated 9th February 1994 in the official gazette, no steps were taken to execute the detention order. The affidavit filed on behalf of respondent no. 1 states that a show cause notice dated 5th November 1993 was issued to the petitioner and his accomplices for contravention of the provisions of section 8(1) read with section 64(2) of FERA and the case was finally adjudicated on 31st January 2002 and a penalty was imposed upon the petitioner. Respondent no. 1 has further relied upon reports dated 12th February 2020 and 18th January 2023 for the execution of a warrant against petitioner in Case No. 1562/CS/2002, pending before the Court of Addl Chief

Metropolitan Magistrate, Mumbai. However, even the same does not indicate that any efforts were made to trace the petitioner's whereabouts. In the absence of all the possible steps taken to serve the detention order upon the petitioner, the detaining authority is not justified in executing the detention order after thirty years on the ground that the petitioner was absconding. The detaining authority gives no satisfactory explanation for not executing the order of detention passed in the year 1993 for a period of thirty years.

14. Regarding the aforesaid decisions relied upon by the learned counsel for respondent no. 1, the same are of no assistance to respondent no. 1 to justify the execution of the detention order after a period of thirty years. In the decision of this Court in the case of ***Kasim Kunhi,*** the authorities had duly complied with the procedure under section 7(1) (a) and (b) of the COFEPOSA Act. This court, in the facts of that case, accepted the contention of the authorities explaining the delay of two years and seven months in executing the detention order.

15. In the decision of Delhi High Court in the case of ***Rudra Singh*** the detention order dated 11th April 2002 was served upon the detenu on 10th June 2002 i.e. within a period of two months. In the decision of Delhi High Court in the case of ***Pankaj Sharma*** the contention of authorities was accepted that the local police had taken effective steps to serve the detention order, including conducting raids at different locations; however, the detenu was not found, and the detention order was served upon the mother of the detenu. Thus, in both these cases, in view of the facts of the case and the explanation of the authorities, it was held that on publication of order under section 7(1)(b) of the COFEPOSA Act, the detenu's knowledge of the existence of the detention order will have to be presumed.

16. In the decision of this Court in the case of ***Bherchand Bora***, the explanation for the delay of more than five years in executing the detention order was accepted as the proclamation issued under section 7 (1) (b) of the COFEPOSA Act was pasted on the residential address of the detenu and was also published in local

newspapers; similarly, the police had also continuously made attempts to apprehend the detenu.

17. So far as the decision of the Hon'ble Supreme Court in the case of ***Subhash Popatlal Dave*** and the decision of Delhi High Court in the case of ***Mohd Nashruddin Khan*** is concerned, the same is regarding the challenge to the detention order at the pre-execution stage. The reliance on paragraph 34 of the decision of Kerala High Court in the case of ***Shabna Abdulla*** is not relevant as the same is regarding the detenu's contention of being not aware of the gazette notification, even though served with show cause notices and summons and being aware of the detention of his father and brother in the same case.

18. Hence, the aforesaid decisions relied upon by the learned counsel for respondent no. 1 are of no assistance to the submissions made on behalf of respondent no.1 to support the detention order.

19. In view of the contention of respondent no. 1 that the publication of gazette notification under section 7(1) (b) of the COFEPOSA Act is sufficient to presume that the petitioner had knowledge of the detention order, and as the petitioner has not justified his absence, the detention order is correctly executed after thirty years, we find it necessary to refer to the decision of the Hon'ble Supreme Court in the case of ***Shafiq Ahmad Vs District Magistrate and others***[8]. In the said case, the detention order was issued under section 3(2) of the National Security Act 1980. The Hon'ble Supreme Court, while examining the challenge to the detention order on the ground of delay in execution of the detention order, held in paragraph 5 as under:

> *"5. ..... Whether there has been unreasonable delay, depends upon the facts and the circumstances of a particular situation. Preventive detention is a serious inroad into the freedom of individuals. Reasons, purposes and the manner of such detention must, therefore, be subject*

---

8 **(1989) 4 SCC 556**

to closest scrutiny and examination by the courts. In the interest of public order, for the greater good of the community, it becomes imperative for the society to detain a person in order to prevent him and not merely to punish him from the threatened or contemplated or anticipated course of action. Satisfaction of the authorities based on conduct must precede action for prevention. Satisfaction entails belief. Satisfaction and belief are subjective. Actions based on subjective satisfaction are objective indication of the existence of the subjective satisfaction. Action based on satisfaction should be with speed commensurate with the situation. ***Counsel for the petitioner submitted that in this case there was no material adduced on behalf of the Government indicating that the petitioner was "absconding".*** *It was urged that there are no material at all to indicate that the petitioner was evading arrest or was absconding.* ***It was submitted that Section 7 of the Act gave power to the authorities to take action in case the persons were absconding and in case the order of detention cannot be executed. It is stated that in this case no warrant under Section 7 of the Act has been issued in respect of his property or persons. Hence, it was***

contended that the respondent was not justified in raising the plea that the petitioner was absconding. We are, however, unable to accept this contention. If in a situation the persons concerned is not available or cannot be served then the mere fact that the action under Section 7 of the Act has not been taken, would not be a ground to say that the detention order was bad. Failure to take action, even if there was no scope for action under Section 7 of the Act, would not be decisive or determinative of the question whether there was undue delay in serving the order of detention. Furthermore, in the facts of this case, as has been contended by the Government, the petitioner has no property, no property could be attached and as the Government's case in that he was not available for arrest, no order under Section 7 could have been possibly made. This, however, does not salvage the situation. The fact is that from 15-4-1988 to 12-5-1988 no attempt had been made to contact or arrest the petitioner. No explanation has been given for this. There is also no explanation why from 29-9-1988 to 2-10-1988 no attempt had been made. It is, however, stated that from May to September 1988 the "entire police force" was extremely busy in

controlling the situation. Hence, if the law and order was threatened and prejudiced, it was not the conduct of the petitioner but because of "the inadequacy" or "inability" of the police force of Meerut city to control the situation. Therefore, the fact is that there was delay. ***The further fact is that the delay is unexplained or not warranted by the fact situation****".*

Emphasis Applied

20. Section 7 of the National Security Act 1980 is pari materia to section 7 of the COFEPOSA Act. In the facts of the present case, we find that the principle of law laid down by the Hon'ble Supreme Court in the case of ***Shafiq Ahmad*** is squarely applicable. In the present case, except for explaining the steps taken to serve the petitioner with the detention order at the available address of the petitioner, there is no other explanation forthcoming. It is not even the respondents' case that any enquiry was made to find out the whereabouts of the petitioner. There is no affidavit filed on behalf of the State Government explaining

the steps taken to find out the petitioner's whereabouts and serve the detention order. Infact, the report relied upon by Mr. Shirsat, of the Assistant Commissioner of Police, shows that it was recommended that proclamation be issued, since the petitioner was not found to be staying at the given address.

21. The issue to be decided in the present case is whether there is a delay in the execution of the detention order and whether the inordinate delay of thirty years in the execution of the detention order is explained by the concerned authorities. The detention under the COFEPOSA Act is for the purpose of preventing persons from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or preventing from smuggling goods, or abetting smuggling goods, or engaging in transporting or concealing or keeping smuggled goods or dealing with the same or harbouring person engaged in such activities. Hence, there must be conduct relevant to the formation of the satisfaction having reasonable nexus with the petitioner's action, which is prejudicial to make an order for

detaining him. The unexplained and ***inordinate delay of thirty years*** in the present case does not justify the preventive custody of the petitioner. As held by the Hon'ble Supreme Court in the case of ***Shafiq Ahmad,*** the satisfaction of the authorities based on conduct must precede action for prevention based on subjective satisfaction. In the present case, the action based on satisfaction is not commensurate with the situation after thirty years of the detention order. It is not even the case of the authorities that in the last thirty years, the petitioner was engaged in any prejudicial activity or has indulged in any objectionable activity.

22. The learned counsel for the petitioner is right in submitting that there was no material adduced indicating that the petitioner was "absconding" or that the petitioner was evading arrest. Thus, by relying on the principle of law laid down by the Hon'ble Supreme Court in the case of ***Shafiq Ahmad,*** we find that the action under Section 7 of the COFEPOSA Act would not be decisive or determinative of the question of whether there was undue delay in serving the order of detention in the present case.

In the facts of this case, no attempts had been made to contact or arrest the petitioner. There is no explanation forthcoming for not taking any action to trace the whereabouts of the petitioner, and also, after the gazette publication in the year 1995 under section 7(1)(b) of the COFEPOSA Act, there is no action taken to serve the detention order.

23. Thus, there is no merit in the submissions supporting the detention order. We find substance in the ground of challenge raised on behalf of the petitioner that the detaining authority has not meticulously followed the procedure to serve the detention order, making it invalid due to the passage of time. Hence, for the reasons stated above writ petition is allowed by passing the following order:

O R D E R

I. The petition is allowed, and Rule is made absolute in terms of prayer clause 'a', which reads as under:

"a. This Hon'ble Court be pleased to issue a

Writ of mandamus or any appropriate Writ, order or direction quashing and setting aside the impugned order of detention passed by the detaining authority on 17th May 1993, served on 28th February 2023 and the order of the Government dated 24th May 1993 pursuant to the hearing conducted before the Board on 2nd and 3rd May 2023".

II. The Orders dated 17th May 1993 and 24th May 2023 (wrongly typed as 24th May 1993 in the prayer clause 'a') are quashed and set aside, and the petitioner is set at liberty forthwith, if not required in any other case.

24. All concerned to act on the authenticated copy of this order.

(GAURI GODSE, J.) (REVATI MOHITE DERE, J.)

25. After the order was pronounced, learned Counsel appearing for the respondent nos. 2 and 3 seeks stay of the said order as they intend to challenge the said order before the Apex Court. Accordingly, the order is stayed for a period of two weeks from today.

(GAURI GODSE, J.) (REVATI MOHITE DERE, J.)