2024:DHC:3174-DB

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 05.04.2024
Judgment delivered on: 23.04.2024

\+ W.P.(CRL) 889/2023

FAZILA SAYYED ..... Petitioner

versus

UNION OF INDIA & ORS. ..... Respondent

For the Petitioner: Ms. Aisha Ansari and Ms. T. Archana, Advocates
For the Respondents: Mr. Ajay Digpaul, CGSC for UOI with Mr. Kamal R. Digpaul, Ms. Ishita Pathak, Advocates Ms. Priyanka Kapoor, Under Secretary (COFEPOSA) Mr. Satish Aggarwala, Sr. Standing Counsel with Mr. Gagan Vaswani, Advocate for respondent No.5/DRI and Mr. Praveen Jindal, Deputy Director, DRI in person

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J

1. A Detention order[1] against Sayyed Hussain Madar @ Chand (since deceased) was passed way back on 02.05.2005 and the present writ petition has been filed by his widow praying therein that such detention order be quashed.

2. This case has chequered history.

3. Directorate of Revenue Intelligence (DRI) had information that one sea-faring vessel would be entering into Indian customs waters carrying approximately 700 metric tonnes of smuggled diesel oil of

[1] Under Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act 1974 (in short COFEPOSA)

foreign origin, which would be offloaded in several barges and then would be carried to coast. Pursuant thereto, on 21.12.2004, DRI officials spotted vessel by the name of M.T. AL SHAHABA which was found carrying High Speed Diesel (HSD)/Marine Gas Oil being brought from Muscat, Sultanate of Oman into Indian waters, illegally. Sayyed Hussain Madar @ Chand (hereinafter referred to as Detenu) was also found present on said vessel. It was learnt that he was the one who had also arranged for the barges and tow boats for the purposes of smuggling of said oil. Thus, it came to fore that huge quantity of the diesel oil was being smuggled with no import documents. The entire such diesel totalling 770.00 C.MTR weighing 635.556 metric tonnes, valued at more than Rs. 2.30 crores, was seized on 21.12.2004 under the provision of Customs Act 1962.

4. Statement of detenu was also recorded under Section 108 of Customs Act, 1962.

5. All the crew members of the barges and two tow boats and officers/crew members of said Vessel AI Shahaba, in their voluntary statements recorded under Section 108 of Customs Act, 1962, also confirmed the activity of unloading the diesel oil from the mother vessel AI Shahaba into the barges.

6. In connection with the aforesaid seizure, residential premises of one Bobby Chully as well as of detenu were raided. On the basis of said seizure and the material collected during the investigation, it came to fore that the detenu was involved in activities which amounted to smuggling as defined under Section 2(39) of the Customs Act, 1962.

7. Detenu was arrested under Section 104 of the Customs Act, 1962 on 23.12.2004 and was produced before the concerned Court at Mumbai. Admittedly, he was released on bail on 09.02.2005 in said case.

8. Since detenu was having the potentiality and propensity of indulging in smuggling activities in future, taking into account the gravity of the matter and the organized manner in which the detenu had been conducting prejudicial activities, the abovesaid detention order was passed on 02.05.2005, with a view to prevent him smuggling goods in future.

9. Such order was eventually served upon him on 23.08.2006.

10. Detenu filed writ petition before this Court in the year 2006 itself which was registered as W.P. (Crl.) 2459/2006.

11. It will be worthwhile to mention here that his such writ petition was dismissed on 16.08.2007 and the petitioner was permitted to withdraw the same with liberty to raise the issue again in case any proceedings under Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) was initiated against him. It will be appropriate to reproduce the above order dated 16.08.2007 which reads as under:-

> *"We are informed by the counsel for the petitioner that the one year period of detention will expire on 22nd August, 2007 i.e. only six days are left.*
>
> *The petitioner/detenu has raised several issues I the writ petition challenging the order of detention passed against the detenu under Section 3 (1) the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The order of detention was passed on*

2nd May, 2005, but the same could be executed only on 23rd August, 2006 and thus there is unexpected delay in execution. Another ground relates to non-application of mid by the detaining authority while passing the order of detention. Still another ground raised is that the detenu does not know English language and, therefore, service of the grounds and the order of detention to the detenu in English language is violative of the rights provided under Article 21 of the Constitution of India. There is also allegation with regard to non-supply of some relevant documents which were asked for.

These are the grounds on which the counsel for the detenu seeks to elaborate but since only six days are left, it may not serve useful purpose for which the petition is filed. Counsel for detenu states that in case respondents draw up proceedings under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, the detenu should be at liberty and allowed to raise all these issues in a fresh petition. We grant such liberty to the detenu.

The petition stands dismissed as withdrawn with liberty to the detenu to raise all issues and question the detention order in case any proceeding under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 is initiated by the respondents."

12. As per petitioner herein, action against detenu was initiated under SAFEMA on 01.01.2009. Detenu challenged the same, during his lifetime, by filing Criminal Writ Petition 406/2009 in the High Court of Judicature of Bombay.

13. Detenu, unfortunately, expired on 16.09.2010 i.e. during the pendency of said writ petition.

14. However, during the further course of hearing of the aforesaid writ petition, statement was made before the High Court of Judicature of Bombay that except for the notice dated 01.01.2009 whereby detenu was called upon to furnish the information, no proceedings had been initiated against him under SAFEMA. Accordingly, said petition was dismissed, as rendered infructuous, vide order dated 21.09.2017.

15. Another round of litigation started when the legal heirs of detenu received summons in connection with proceedings under SAFEMA.

16. The petitioner herein, being one such legal heir (widow of detenu) filed Criminal Writ Petition 571/2021 in High Court of Judicature at Bombay. In said petition, she challenged the same detention order dated 02.05.2005. Since detenu himself had earlier assailed the same before Delhi High Court and had been given liberty as mentioned already, the counsel for petitioner sought leave to withdraw Criminal Writ Petition 571/2021 with liberty to approach this Court again to assail the impugned order dated 02.05.2005.

17. Accordingly, while granting such leave and liberty, said writ petition was dismissed as withdrawn vide order dated 01.02.2023.

18. This is how the petitioner is before us and seeks to impugn detention order dated 02.05.2005 on the ground that proceedings under SAFEMA have been initiated.

19. Detention order has been challenged on various grounds. The prime contentions are as under: -

i. *Detenu had studied in Urdu medium only and had no workable knowledge of English language. In view of the fact that the Impugned order of Detention alongwith the Grounds of Detention and the documents served on the detenu in English language, the Detenu has not at all been communicated the contents of the above documents and therefore, he could not make any effective representation against the impugned order of the detention, which renders the detention illegal, null and void.*

ii. *There is gross delay in executing the impugned order of detention which suggests that subjective satisfaction of the detaining authority was not genuine. The detenu was very much available in Mumbai between 20.05.2005 and 23.08.2006 as he was carrying on his normal evocation and no efforts, whatsoever, were made by the detaining authority to serve the detention order upon him.*

iii. *Impugned order suffers from vice of non-application of mind. As per allegations, when the vessel was found in Indian customs waters, detenu was allegedly pumping diesel from the vessel into the barges but the detaining authority did not take note of the fact that responsibility of bringing the diesel oil was not of the detenu but was that of Bobby Chully and, therefore, there was no occasion to have labelled the detenu as smuggler of the goods. It is also contended that role of detenu, on the face of allegations, was merely to transport the diesel which had already been smuggled into and, therefore, there was no basis to either label him as a smuggler or to have passed any detention order with a view to prevent him from indulging in smuggling.*

iv. *The documents demanded by the detenu were not supplied to him and as a result, the detenu could not make purposeful and effective representation against the impugned order of detention.*

20. All such contentions have been refuted by the respondents.

21. We have carefully gone through the material on record and given our anxious consideration to rival contentions.

22. It is claimed by respondents that the detenu had made statement under Section 108 of the Customs Act on 23.12.2004. In his such statement, he claimed that he could read and understand English

which he learnt while in Damam, Saudi Arabia. After his such statement was recorded, he, in his own handwriting, made following endorsement in English: -

> *"The above statement running into six pages is typed on the office computer as per my say. The above statement has been given by me voluntarily and the same is true and correct. No force or consideration of any kind was used while recording the. The statement was typed on the office computer as per my say."*

23. In view of his such own endorsement, made in English language, said contention of detenu does not hold any water.

24. It has been baldly claimed by the petitioner that the Detaining Authority failed to notice that the manner of writing English clearly suggested that the writer of the endorsement did not know English language at all. However, we have no hesitation in rejecting said argument, also in view of the fact that when the earliest writ petition was filed by the detenu before this court, it was supported by an affidavit dated 30.10.2006 which contained a specific averment to the effect that he had gone through the contents of writ petition and that the same were correct. Since the writ was drafted in English language, it does not lie in the mouth of detenu to claim that he did not know English. Moreover, after his demise, no material has been placed before us which may substantiate such claim. Mere verbal averment would not take the case of petitioner anywhere.

25. As regards delay in service and execution of impugned order, it has been argued from the side of respondents that contention of detenu is totally misplaced as he himself had absconded and despite best

efforts made by the executing authority and sponsoring authority, he was not traceable. During course of the arguments, the attention of the court was drawn towards numerous attempts made for the purpose of execution and also towards the fact that since he had been concealing himself, order was also got duly published in the newspaper. It is thus argued that delay in the present peculiar factual matrix is self-explanatory and was solely on account of the fact that the detenu was absconding.

26. We have examined said aspect very minutely.

27. Indubitably, no one can be permitted to take advantage of his own wrongful conduct.

28. During course of arguments, original record was also produced in order to show the kind of efforts made by the sponsoring authority and executing authority executing service upon detenu and we have no hesitation in holding that respondents had made wholehearted efforts to serve such order upon detenu but detenu himself is to be blamed as he seemed to avoid the service thereof.

29. Detention order is dated 02.05.2005 and when his residential premises i.e. Maneka Building No. 175, Second Floor, Room No. 23, Jail Road (East), Dongri, Char Nal, Mumbai-400009 was visited by the concerned officials on 10.05.2005, his wife was found present who told them that detenu was out of town. Team of concerned officials visited said premises on 29.06.2005. Again, detenu was not present though his son was present who informed that he did not know the whereabouts of his father. Next visit is stated to be of 24.08.2005 and

again detenu was not available at his said premises. All these reports are of concerned intelligence officials of DRI, Mumbai and there is no reason to disbelieve or discard such reports.

30. Above three attempts were made by the sponsoring authority.

31. Executing authority i.e. PCB, CID Mumbai Police also attempted to serve the detention order upon detenu by visiting his premises on 10.05.2005, 12.08.2005, 02.11.2005, 09.12.2005, 23.12.2005 and 18.01.2006 but to no avail as he was not found available at the said premises.

32. According to detenu, he was very much available in Mumbai but despite that, detention order was not executed or served upon him.

33. Interestingly, even as per the writ petition, address of the detenu is the same on which the executing authority and sponsoring authority had attempted to serve him. As per said authorities, detenu was not available, though on one occasion his wife was met and on another, his son.

34. We may hasten to add that there is no specific denial about the aforesaid fact either.

35. Moreover, there is no reason or ground to hold to the contrary.

36. There is nothing before us which may even remotely suggest that these reports are false and fabricated and that there was no such visit.

37. Moreover, some of such visits, made for execution, do not seem to be disputed though it is claimed that these were made after unreasonable interval.

38. It is also obvious from the record brought by the respondents that since the Central Government had reason to believe that detenu had absconded or concealing himself so as to avoid execution of detention order, publication was directed to be carried out in newspaper directing him to appear before the Commissioner of Police, Navi Mumbai within seven days of publication of the order in official gazette. Such publication was carried out on 16.07.2005 in Maharashtra Times, Mumbai (Marathi Newspaper) and Times of India, Mumbai. Since despite repeated attempts made by the concerned agencies and despite publication, detenu did not come forward, the Central Government prepared report under Section 7(1)(a) of COFEPOSA which was placed before the Court of learned Chief Metropolitan Magistrate, Mumbai with request that Court may initiate further proceedings against him under Section 82 to 85 Cr.P.C.

39. Detenu cannot run away from such fact either.

40. There is one more factor which persuades us to hold that detenu was in the thick of the things.

41. A representation was received by the Central Government on 28.12.2005 which had been sent by son of detenu. It was rejected and memorandum was issued on 16.01.2006 to such son advising him to ask his father to immediately surrender before the authorities

concerned so that once the detention order was served upon him, he could exercise available remedies.

42. It is also admitted fact that the detention order was eventually served on detenu on 23.08.2006 when he had been detained by the Crime Preventive Branch, CID, Mumbai.

43. Be that as it may, it is very much apparent from the facts placed before us that both the authorities i.e. sponsoring authority and executing authority made constant efforts to serve and execute the detention order but detenu, very conveniently, avoided the same. There is nothing before us which may indicate that these reports are false or manipulated.

44. We rather feel that detenu has acted smart and is trying to reap fruits of his own wrongs. If delay is attributed on account of the conduct of the detenu, concerned authorities cannot be blamed at all.

45. We may also refer to *Vinod K Chawla Vs. Union of India & Ors*. (2006) 7 SCC 337 wherein, the Apex Court had occasion to consider the effect of delay in execution of detention order and it observed that when the detenu had evaded arrest and absconded and in spite of best possible efforts made by the authorities to serve the order, order could not be executed, the delay in execution would not render detention invalid.

46. Lastly, there is nothing which may indicate that activity of the detenu did not fall under 3(1)(i) of COFEPOSA.

47. As per investigation conducted by DRI, detenu was found to be the person who was directly involved in the smuggling and for organizing the finances as well as logistic and, therefore, detention order passed under Section 3(1)(i) of COFEPOSA was fully justified. We may also reiterate that detenu, when he was alive, could have easily prayed this Court for disposal of his writ petition on merit but he himself submitted that it be dismissed as withdrawn with liberty to raise all the issues in case of initiation of any proceedings under SAFEMA. Petitioner is not justified in asserting that the earlier writ petition was withdrawn on 16.08.2007, with liberty as sought for, as it could not reach for final hearing. The orders available on website rather indicate that at one earlier point of time the final arguments were heard on merits and the matter was even reserved for judgment. Be that as it may, there is nothing to infer that the detenu had withdrawn the petition as it could not reach final hearing. On the contrary, he himself had sought withdrawal, albeit, with liberty, as aforesaid.

48. We have already noted that on account of issuance of notice dated 01.01.2009, detenu was compelled to file Criminal Writ Petition 406/2009 before the High Court of Judicature at Bombay which was disposed of as the counsel for respondents had submitted that petitioner had merely been called upon to furnish certain information and no proceedings had been initiated under SAFEMA.

49. After the demise of detenu, fresh summons and Notice in connection with proceedings under SAFEMA have been issued to his

legal heirs. We have seen such communication dated 15.02.2019 and 08.12.2021. In later communication, detenu has been referred as affected person no. 1 (AP-1) and his wife as affected person no. 2 (AP-2) and according to such notice, there are two immovable properties in possession of AP-2 and she has, merely, been called upon to indicate the source of income or the means through which said two properties had been acquired. In case, affected person is in a position to satisfactorily explain about the manner in which the properties were acquired, naturally, there might not be any adverse action of any kind under SAFEMA. Thus, the petitioner can always respond to such notice appropriately.

50. Coming back to the instant petition, there is nothing before us which may compel us to quash the detention order.

51. Contentions made by the petitioner are found to be without any substance. There is nothing to indicate that detenu did not know English and it is also quite obvious that detenu was evading service and execution of the 'detention order' and since the repeated visits at his premises did not yield any result, eventually, publication had to be carried out in newspaper.

52. There is also nothing before us which may portray that the time lapse, between detention order and its execution, is such as would lead to the inference that the live-link between the prejudicial activity of the detenu and the object of detention, namely, to prevent him from indulging in such prejudicial activity, stood snapped.

53. And yes, need we remind ourselves that there is no hard and fast rule or strait-jacket formula and each case has to be evaluated on the basis of its peculiar factual matrix.

54. Before parting, we may sate that SAFEMA was enacted to provide for the forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators and for matters connected therewith or incidental thereto. In the statement of objects and reasons of the Act, it has been stated that in many cases persons engaged in smuggling activities and foreign exchange manipulation have been holding properties acquired through ill-gotten wealth in the name of their relatives, associates and confidants and as these activities posed a serious threat to economy and as one of the steps taken by the Government for cleansing the social fabric and resuscitating the national economy, it became necessary to assume powers to deprive such persons of their illegally acquired properties so as to effectively prevent the smuggling and other clandestine operations. The petitioner herein is always at liberty to agitate all contentions in such proceedings under SAFEMA and she would also be at liberty to agitate about the delay in initiation of such proceedings. We, however, wish to clarify that it may not be understood as if we have expressed any opinion, either way, on said aspect.

55. Consequently, we do not find any merit in the writ petition. Same is accordingly dismissed.

56. As a necessary corollary, interim order, which we had passed on 13.03.2004, stands vacated.

57. Petition stands disposed of in aforesaid terms.

(MANOJ JAIN)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

APRIL 23, 2024/*dr*