

(2004) 02 DEL CK 0028

In the Delhi High Court

Case No : Writ Petition (Criminal) No. 627 of 2003

Abdul Khaliq

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-02-2004

Acts Referred:

Citation : (2004) CriLJ 1991 : (2004) 110 DLT 205 : (2004) 73 DRJ 392 :
(2004) 93 ECC 308 : (2004) 3 RCR(Criminal) 220

Hon'ble Judges : D.K. Jain, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Sangita Bhayana, for the Appellant; K.K. Sud, ASG, Barkha Babbar and Mukta Gupta, for respondents Nos. 2-4, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Jain, J.

RULE D.B.

1. By this writ petition under Article 226 of the Constitution of India, for a writ of Habeas Corpus, the petitioner challenges his detention on 18 March 2003, pursuant to the order passed on 22 November 2002 by the Lt. Governor of the National Capital Territory of Delhi (hereinafter referred as "the detaining authority"), in exercise of powers conferred u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "the COFEPOSA Act").

2. The order of detention is based on the subjective satisfaction of the detaining authority that it was necessary to detain the petitioner with a view to preventing him from smuggling goods in future.

3. According to the grounds of detention, which are in the narrative form, on 23 August 2002, one Masood Pracha, along with three passengers, namely, Abdul Khaliq-petitioner herein, Afzal Mohd. Khan and Mohd. Haroon Khan arrived at the

IGI Airport, New Delhi to catch a flight bound for Bangkok. After the immigration, all of them were intercepted one by one at the Customs counter by the Officers of the Customs in plain clothes on the basis of specific intelligence. The petitioner, a holder of Indian passport issued from Dubai was asked as to whether he was carrying any foreign currency etc. to which he replied that he was carrying less than US \$ 5000. The foreign currency recovered as a result of his personal search was seized. Since the petitioner was showing some manifestations of body concealment, he was again asked whether he had concealed any foreign currency in his body to which he replied in the negative. However, on sustained interrogation he disclosed that he had concealed two capsules containing foreign currency in his body which he could eject, which he did after some time. From the said capsules US \$ 3500 each were recovered. The foreign currency valued at Rs.5,94,971/- was seized u/s 110 of the Customs Act, 1962 (for short "the Act").

4. In his voluntary statement, recorded on 24 August 2002, u/s 108 of the Act. While admitting the recovery of the said currency in the manner afore-said, he stated that the visa was sent to him by his friend from Dubai; he had gone abroad 13 times between the period from January 2002 to August 2002; on these visits he was taking some scarves and leather goods, cheese, spices, etc. and while returning he would bring some fabrics and perfumes, etc. and that the said foreign currency was handed over to him by said Masood Pracha for being carried to Dubai by concealing in the body for which he was to get Rs.3,000/- per trip.

5. As a follow-up action, several other persons, including the above-named persons were interrogated. The petitioner was arrested the same day. On the next day, he was produced before the Duty Magistrate, Patiala House, New Delhi, who remanded him to judicial custody till 6 September 2002 and the same was extended from time to time. Two bail applications filed by the petitioner for grant of bail have since been dismissed. A complaint u/s 132 and 135(1) (a) of the Act has also been filed against the petitioner.

6. It was on these facts that the detaining authority came to the conclusion that the petitioner has the inclination and propensity for indulging in smuggling activities in an organized and clandestine manner and unless prevented, he is likely to indulge in similar nefarious activities in future. Hence the detention order.

7. Reply affidavits have been filed on behalf of the detaining authority as well as the Union of India in opposition to the writ petition.

8. We have heard Ms.Sangita Bhayana, learned counsel for the petitioner and Ms. Mukta Gupta, learned counsel for the detaining authority.

9. Although in the writ petition the propriety and validity of the order of detention has been challenged on several grounds but before us Ms.Bhayana has urged only one ground, namely, that there is an inordinate, unexplained long delay of about four months in the execution of the detention order and,

Therefore, the live and proximate link between the grounds of detention and the purpose of detention stands snapped.

10. We do not find any merit in the contention. The personal liberty of a person is one of the most cherished freedoms. But where individual liberty comes into conflict with the interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the Nation. The smuggling activities not only have deleterious effect on the national economy, they also adversely affect the security of the State. With a view to at least contain, if not eradicate, this menace, the COFEPOSA Act was enacted to provide for preventive detention in certain cases for the purposes of conservation and augmentation of the foreign exchange and prevention of smuggling activities and for matters connected therewith. The power to detain under the Act is to be exercised on the detaining authority being satisfied with respect to any person that with a view to preventing him from indulging in any prejudicial activities as specified in Section 3 of the COFEPOSA Act, it is necessary to make an order for his detention. There is no gainsaying that the satisfaction of the detaining authority has to be genuine. There has to be a live and proximate link between the grounds of detention and the purpose of detention.

11. It is now well settled by a catena of decisions of the Apex Court and the High Courts that unreasonable delay in making an order of detention, so also long and unexplained delay in execution of the order, so made, may lead to an inference that the subjective satisfaction of the detaining authority was not genuine as regards the necessity to prevent the person from indulging in any prejudicial activity and to make an order of his detention for that purpose. Thus, unless explained satisfactorily, an unreasonable delay between the date of order of detention and the date of arrest of the detenu, throws a considerable doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing the detention order and consequently renders the detention order bad and invalid because the live and proximate link between the grounds of detention and the purpose of detention is snapped in arresting the detenu. (See: P.U. Iqbal Vs. Union of India (UOI) and Others, , K.P.M. Basheer Vs. State of Karnataka and another, and SMF Sultan Abdul Kader Vs. Jt. Secy., to Govt. of India and Others,). However, if a detenu was himself absconding, the delay in arresting him would not vitiate the detention order. So also when the detenu was not available at his known address, though continuous efforts were made and he could be served either on voluntary surrender or pursuant to the steps initiated under Sections 82 and 83 Cr.PC or Sections 7(1)(a) or (b) of the COFEPOSA Act. (See: Syed Farooq Mohammad Vs. Union of India and another, , Sharad Kumar Tyagi Vs. State of Uttar Pradesh and Others, and M.Mohamed Sulthan Vs. Jt. Secretary to Govt. of India and Ors).

12. Thus, the broad principles, which can be culled from the afore-mentioned decisions are that: the delay in execution of detention order, if satisfactorily explained, does not vitiate the detention; if the detenu is trying to evade arrest

till he surrenders after a coercive process is issued against him, the delay is not fatal and if in spite of frequent search the detenu is not found at his known residential address, it could be a valid Explanation. In nutshell, the delay to be fatal must be of such length and remain unexplained so as to snap the nexus between the incident and the detention.

13. Bearing in mind the above broad principles we revert to the facts in hand. As noted above, the order of detention was passed on 22 November 2002 but it was served on the petitioner on 18 March 2003. Therefore, there is a delay of almost four months in the execution of the order. The question for consideration is whether this delay is fatal? The stand of Ms.Bhayana is that the petitioner was all the time available to the respondents in as much as his movements were known to them, but still no serious effort was made to serve the order on him till 18 March 2003. In this behalf it is pointed out that the petitioner had in fact appeared before the Court of Additional Chief Metropolitan Magistrate, New Delhi on 18 February 2003 in connection with the prosecution proceedings but still the order of detention was not served despite the fact that the officers from the Customs Department were aware of the date of hearing and were present there.

14. Explaining their position on this point, in their reply affidavit the respondents have stated that the Customs Officers visited the Patiala House Courts on 21 January 2003, when the case was fixed but the petitioner did not turn up on that date. The Customs Officers again visited the Court on 18 February 2003, i.e., next date of hearing but when they attempted to serve the detention order on him, the petitioner and his companions manhandled the Customs Officers and escaped. A complaint in this regard was lodged with the SHO, Tilak Marg Police Station, New Delhi. Thereafter, the local police made several attempts to execute the detention order on him but every time he was stated to be out of town. In an additional affidavit, while reiterating what is noted above, it is stated that even the division/beat staffs of the Delhi Police had made efforts to trace the petitioner and a regular watch was maintained on his house but despite sincere efforts he could not be traced out. It is also pointed out that in the meanwhile an order u/s 7(1)(b) of the COFEPOSA Act was issued on 24 February 2003 and a report u/s 7(1)(a) of the COFEPOSA Act was also submitted to the Chief Metropolitan Magistrate for declaring the petitioner a proclaimed offender. A copy of the Gazette Notification u/s 7(1)(b) issued on 24 February 2003 has also been placed on record.

15. In the light of the factual scenario, projected above, we are convinced that the authorities concerned had made sincere efforts in apprehending the petitioner but somehow he was successful in evading them. We are satisfied with the Explanation furnished by the respondents for the delay in execution of the order of detention. We are of the considered view that there has been no inordinate delay in the execution of the order of detention, which has resulted in snapping the live and proximate link between the grounds of detention and the purpose of detention.

16. For the foregoing reasons, the writ petition, being bereft of any merit must fail. It is dismissed accordingly. However, there shall be no order as to costs.