(1992) 04 DEL CK 0043

In the Delhi High Court

Case No : Criminal Writ Appeal No. 267 of 1991

Ajay Kumar Jain APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 27-04-1992

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 226

Citation : (1992) 22 DRJ 629

Hon'ble Judges : Dalveer Bhandari, J

Bench : Single Bench

Advocate : P.K. Jain and H.K. Gangwani, for the Appellant;

Judgement

Dalveer Bhandari, J.

(1) The petitioner has preferred a writ petition under Article 226 of the Constitution of India and has prayed, inter alia, that the writ of habeas corpus be issued quashing an order of detention dated 31st January, 1991 passed u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, by the Joint Secretary to the Government of India, with a view to preventing him from smuggling goods and also preventing from engaging and transporting, concealing and keeping smuggled goods. Brief facts necessary to dispose of this writ petition arc set out as under- Delhi Zonal Office of Enforcement Directorate received an information that one Mohd. Shakir Khan has been indulging in the purchase of foreign exchange at unauthorised rates and the same is being taken by him to Dubai for sale. Accordingly, on 6.1.91, officers of the Enforcement Directorate, New Delhi mounted surveillance at Indira Gandhi International Airport, New Delhi and when Shri Mohd. Shakir Khan Along with his baggage was in the queue for click in for flight no.AI-735, he was intercepted and he and his baggage were searched u/s 34 of the Foreign Exchange Regulation Act, 1973. The search of his person and baggage resulted in recovery

and seizure of substantial foreign exchange.

(2) Shri Mohd. Shakir Khan was summoned u/s 40 of the Foreign Exchange Regulation Act, 1973, and his voluntary statement was recorded on 6th/7th January, 1991. He stated that he is an illiterate and on his request his statement was written by an officer of Enforcement Directorate. In his statement, he inter alias deposed as follows:- i) that he and his brothers are running Zakki Hotel, Nizammuddin, New Delhi; ii) that his two sons, viz. Mohd. Yusuf and Azmal are also associated with him in his aforesaid illegal business and they also take foreign exchange to Dubai; iii) that in India the foreign currencies are purchased by him and his sons Mohd. Yusuf and Azmal from S/Shri Murad Khan, Sabir, Ikhiaq, Deepak Mahajan, etc. iv) that you reside in Greater Kailash Part-1 v) that on 6.1.91, while he was going to Dubai, he was intercepted and searched by the officers of Enforcement, resulting in the seizure of foreign exchange as detailed in the panchnama; vi) that the seized foreign currency was to be given to Sharif-ud-din in Dubai and that he was to return back on the same day by flight on Dubai-Bombay-Delhi sector; vii) that the Dollars have been purchased by him from Murad Pathan @ Rs.21.50 per Dollar and rest of the foreign exchange was purchased by Mohd. Yusuf who will be in a position to state the rates of purchase; viii) that till the date of apprehension he in association with his two sons, viz. Mohd. Yusuf and Azmal have taken foreign exchange to the tune of about Rs.l2 crores to Dubai.

(3) As a follow-up, residential premises of Mohd. Shakir Khan at T- 380, Hazarat Nizammuddin in Basti, New Delhi was searched on 7.1.91 u/s 37 of Fera, 1973 by the officers of Enforcement Directorate, New Delhi and as a result thereof certain documents were recovered and seized. The business and residential premises of Rajpal Trading Co., 1810, Chandni Chowk, Delhi and at N-149, Greater Kailash I, New Delhi were also searched on 7.1.91 u/s 37 of Fera, 1973 the officers of Enforcement Directorate, New Delhi. However, nothing was recovered and seized as a result of these searches.

(4) In the mean time, the office of Enforcement Directorate, Delhi Zone, New Delhi received another specific information that one Shri Arun Kumar R/o C-30, Anand Vihar, Vikas Marg Extension, Delhi is indulging in illegal sale and purchase of foreign exchange and that one person would come to deliver foreign exchange to Shri Arun Kumar in the forenoon of 10.1.91. Accordingly, the residential premises of Shri Arun Kumar was searched u/s 37 of Fera, 1973 by the officers of Enforcement Directorate New Delhi on 10.1.91 resulting in the recovery and seizure of two loose sheets and Indian currency of Rs.21,500.00 . While the aforesaid search was under progress, two persons came at the residential premises of Shri Arun Kumar and they identified themselves as Shri Kulwant Rai Jain and Shri Ajay Kumar Jain Personal searches of Shri Kulwant Rai Jain and Ajay Kumar Jain were conducted u/s 34 of Fera, 1973 by the officers of Enforcement Directorate, New Delhi and these searches resulted in the following seizure:- (a) From search of Shri Kulwant Rai Jain -UK pound 15 (b) From search

of Shri Ajay Kumar Jain:- a. Dm 32,400 b. Us $ 13,150 c. Uk Pound 4,930 d. Aus $ 500 e. Indian Currency Rs.3,l 10.00 and f. One slip.

(5) Besides recovery and seizure as aforesaid from the petitioner, a blue coloured Maruti car no. Dna 1567 in which the petitioner came at the premises of Shri Arun Kumar was also seized.

(6) The petitioner appeared on 10.1.91 in the office of Enforcement Directorate, New Delhi in response to summons u/s 40 of Fera, 1973 and gave his statement on 10.1.91 wherein while admitting the seizure of foreign exchange and documents from his person as aforesaid he inter alias deposed as under:- (i) His employers Pankaj and Parveen, who are Prop. of M/s Gaurav Textiles are doing illegal business of sale-purchase of foreign exchange for last several years and that at their instructions, he has to go for taking such foreign exchange from some persons and for delivering to some persons and that on that day also, he had gone to the residence of Shri Arun Kumar in Anand Vihar for giving foreign currency to him (Arun Kumar) at the instructions of his employer, Pankaj. (ii) His employer - Pankaj Kumar at the time of giving foreign currency, given him a slip which has been seized Along with foreign currency and Indian currency during the course of his personal search and that the written Slip which has been seized from him contain details of foreign currency and that for entire foreign currency which has been recovered and seized during the course of his search, he was to get a total of Rs.959424.00 from Shri Arun Kumar which has been written and shown as 9594.25 in this slip and that this slip is in the handwriting of his employer Shri Pankaj Nahata. (iii) Earlier also he had gone 5-6 times at Shri Arun Kumar''s place for delivering foreign currency and each time he delivered on an average about 8-9 lakhs worth of foreign currency to Shri Arun Kumar as per instructions of his employers S/Shri Pankaj and Parveen.

(7) Shri Arun Kumar appeared on 10.1.1991 in the office of Enforcement Directorate, New Delhi in response to summons u/s 40 of the foreign exchange Regulation Act, 1978, and gave his statement on 10.1.1991 stating, inter alia, that:- (i) he is engaged in sale/purchase of foreign exchange for the last 4-5 months; (ii) that, in fact, Deepak Mahajan of Telephone no.3277214 i.e. you, identified as being on the said telephone which is on your father''s shop, has told him to purchase foreign currency at the rate settled and that you were sending Rs.10 lakhs to him 633 through your man who would arrive at his residence at 1.00 P.M. on that day i.e. on 10.1.91;'' (iii) that your man did not come to his residence as he might have come to know about the search of his residence; (iv) that on that day i.e. on 10.1.1991 in the morning he talked from his residence on phone with Pankaj (2511097) and he again talked on telephone when Pankaj told him that he was sending U.K. Pounds 4930, A.$ 500. Us $13150, Dm 32400; (v) that during the last three-four days he had sold foreign exchange approx. of Us $8000, Dm 2000, Canadian Dollar 800 and Dirham 2000 to you for about Rs.2.30 lakhs; (vi) that he has sold foreign exchange worth Rs.50 lakhs to you;

(8) On enquiry, it has been confirmed by General Manager (E), Mahanagar

Telephone Nigam Ltd., New Delhi, that Tel.no.3277214 is working as permanent connection with effect from 4.7.67 for M/s Rajpal Trading Co., 1810, Chandni Chowk, Delhi.

(9) Statements of Mohd. Yusuf Khan and Ajmal Khan sons of Mohd. Shakir Khan could not be recorded as they did not appear in the Office of Enforcement Directorate in response to summons issued to them.

(10) Shri Mohd. Shakir Khan was arrested by the Enforcement Officer u/s 35 of the Foreign Exchange Regulation Act, 1973 on 7.1.91 and produced before the court of Addl. Chief Metropolitan Magistrate, who remanded him to judicial custody till 21.1.91

(11) The petitioner and Arun Kumar were arrested u/s 35 of the Foreign Exchange Regulation Act, 1973 on 10.1.91 and were produced in the court of the Addl. Chief Metropolitan Magistrate, New Delhi on the same day. ''They were remanded to judicial custody till 25.1.91. Shri Arun Kumar was ordered to be released on bail by the Hon''ble High Court of Delhi.

(12) It will be relevant to mention that in case of Arun Kumar, the Calcutta High Court on 25.1.91 was pleased to pass an interim order of injunction restraining the respondents from serving on Shri Arun Kumar any order of detention under the provisions of the Cofeposa Act, 1974, on any of the grounds on the basis of seizure made on 10.1.91 by the officers of Enforcement Directorate, New Delhi.

(13) On the aforesaid information, the respondent arrived at the conclusion that the petitioner has been indulging in unauthorised transactions in foreign exchange in violation of provisions of the Foreign Exchange Regulation Act, 1973, and in order to prevent the petitioner from indulging in activities prejudicial to the augmentation of country''s foreign exchange resources, the petitioner was detained under the Cofeposa Act.

(14) The petitioner has challenged his detention order before this court on various grounds but during the course of arguments, the petitioner has confined his arguments to the challenge of detention order on the ground of unexplained delay in consideration of his representation. The petitioner has sent his representation dated 15.2.91 to the President of India. The petitioner has specifically urged this ground at page no.2 of the additional grounds Filed by the detenu before the court on 20th September, 1991. The representation dated 26.2.1991 of the detenu was rejected on 22nd March, 1991 by the Central Government. Shri Mahendra Prasad, Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi filed an affidavit in opposition on behalf of the Union of India on 5th March, 1992. In paras 10 to 12 of the counter- affidavit, he has stated that the representation was received by the Sponsoring authority on 28.2.91 and comments on the same were sent to the Ministry on 5.3.91. The Memorandum issued by the Ministry on 14.3.91 was received in Delhi Zonal Office of Enforcement Directorate on 20.3.91 and as directed therein additional documents were supplied to the petitioner/detenu on

22.3.91. Hence there was no delay in considering the representation. It may also be stated that all the documents relating to this case were considered by the detaining authority before passing the grounds of detention and the documents relied upon by detaining authority in passing order of detention were supplied to the petitioner/detenu Along with the grounds of detention on 5.2.91, The additional documents were served on the petitioner/detention Along with the grounds of detention on 5.2.91. The additional documents were served on the petitioner/detenu on 22.3.91 and not on 23.3.91. If the reply submitted by the respondent is carefully scrutinised, then there are certain inevitable conclusions. 1) There is no Explanation why there has been delay of more than 26 days in deciding the representation of the detenu. Again, there is no satisfactory Explanation for the non-consideration of the representation of the detenu for such a long time. This long unexplained delay is clearly vocative of the petitioner''s fundamental right as enshrined under Article 22 of the Constitution.

(15) The learned counsel for the petitioner has placed reliance on large number of decisions pronounced by the Supreme Court and this High Court.

(16) Mr. Pradeep Jain, who appeared for the petitioner, has placed reliance on the decision of the Supreme Court in Mahesh Kumar Chauhan alias Bante v. Union of India and others, 1990 7 Crim 472. In this case, there was unexplained delay of 17 days and the Court quashed the detention order on the basis of 17 days unexplained delay. The court while rendering the detention order invalid observed as under:- "Reverting to the facts of the present case as submitted by the learned counsel, except merely mentioning that the representation was forwarded to the concerned sponsoring authority on 25.8.1989 and the comments from the sponsoring authority was received by the Department on 11.9.1989, there is absolutely no Explanation as to why such a delay had occurred. Therefore, in the light of the proposition laid down in Rama Dhondu Borade''s case (albeit), we have no other option except to allow this appeal on the ground that this undue and unexplained delay is in violation of the constitutional obligation enshrined in Article 22(5) of the Constitution of India rendering the impugned order invalid.

(17) The learned counsel has also placed strong reliance on Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others, . The detention order in the said case was also quashed for the unexplained delay of 10 days. The learned counsel has also referred earlier judgments of the Supreme Court, namely, Frances Coralie Mullin Vs. W.C. Khambra and Others, , Harish Pahwa Vs. State of U. P. and Others, , Aslam Ahmed Sahira Ahmed Sadik v. Union of India and others'' 1989 (2) S.C.34 and Pratal Kumar Sinha v. State of Orissa, 1989 (2) S.C.578. The conclusions arrived in all these cases apply with equal force to the facts and circumstances of the present case that unexplained delay in consideration of the representation of the petitioner renders detention order invalid.

(18) The learned counsel also placed reliance on the judgment of this Court,

delivered by A.B.SAHARYA, J. in Criminal Writ Petition no.33 of 1990 decided on March 12, 1991, and Criminal Writ Petition no.447 of 1990 decided on February 8, 1991. In these two cases the learned Judge has discussed all leading cases of the Supreme Court and come to the conclusion that a breach on the part of the Detaining Authority in complying with the requirements of Article 22(5) of the Constitution of India would vitiate the detention order invalid.

(19) The learned counsel appearing for the petitioner, has also invited my attention to a Division Bench judgment of this court, passed in Criminal Writ Petition 110.450 of 1991 on December 5, 1991. In this case also, the Court observed that there is unreasonable unexplained delay in disposing of the representation, the order of detention which has to be quashed on that ground alone.

(20) The learned counsel for the respondent has brought to the notice of the court a judgment of the Supreme Court in Madan Lal Anand Vs. Union of India and others, . The Court''s observations are set out as under:- "Occasional observations made by this court that each day''s delay in dealing with the representation must be adequately explained are meant to emphasise the expedition with which the representation must be considered and not that it is a magical formula, the slightest breach of which must result in the release of the detenu."

(21) The ratio of this case has no application to the facts and circumstances of the present case because in the instant case there is no question of of not adequately explaining each day''s delay but there is no Explanation ,whatsoever, for the delay of more than 28 days.

(22) The counsel for the petitioner also placed reliance on the judgment of the Supreme Court in Gazi Khan alias; Chotia Vs. State of Rajasthan and another, . In this case also the Court has considered all earlier judgments and even 7 days unexplained delay was considered unreasonable and the detention order was vitiated on that ground.

(23) On perusal of all these judgments, the legal proposition, which emerges is crystal clear that long unexplained delay is clearly vocative of the petitioner''s fundamental right under Article 22(5) of the Constitution of India. In this view of the'' matter, the petitioner was justified in not urging the other grounds taken in the petition.

(24) Therefore, the impugned detention order is hereby quashed. The petitioner shall be set at liberty forthwith unless he is required to be kept in custody for some other case. Consequently, the Rule is made absolute and the writ petition is allowed.

