

(1990) 11 GUJ CK 0030

In the Gujarat High Court

Case No : Special Criminal Application No. 1009/90

Akbar Haider Balech

APPELLANT

Vs

Govt. of India

RESPONDENT

Date of Decision : 28-11-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 9, 9(1)
Constitution of India, 1950 — Article 22(5), 226

Citation : (1992) 42 ECR 140 : (1991) 54 ELT 59

Hon'ble Judges : T.U. Mehta, J; Akbar Nanjibhai Divecha, J

Bench : Division Bench

Advocate : R.R. Tripathi, Addl. P.P., R.S. Gajjar and B.B. Gajjar, for the
Appellant; P.M. Raval, for the Respondent

Judgement

A.N. Divecha, J.—Is making of a representation against detention as provided under Article 22(5) of the Constitution of India an idle or

empty formality so that consideration thereof can brook undue delay ? This is one of the several questions raised before us in support of this Writ

Petition preferred by the detenu under Article 226 of the Constitution of India challenging his detention by an order passed on 31st January, 1990

by respondent No. 2 u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (the COFEPOSA for

brief). Its copy is annexed as Annexure "B" to this petition.

2. The petitioner was served with the order of detention at Annexure "B" on 6th February, 1990. He was also supplied with the grounds of

detention on that very day. A copy thereof is as Annexure "B-1". A declaration was also issued u/s 9(1) of the COFEPOSA on 12th March

1990. Its copy is as Annexure "C". The detenu made his representation on 29th

March, 1990 to respondent No. 2. Its copy is as Annexure "G"

to this petition. It was considered and rejected by the Competent Authority some time on 22nd May, 1990. A copy of the memorandum in that

regard is at Annexure "H" to this petition.

3. It clearly transpires from the date of the representation at Annexure "G" and the date of the Memorandum at Annexure "H" that there was delay

of about 1 month and 24 days in consideration and disposal of the representation made by the petitioner detenu against his detention. According to

him, his continued detention is vitiated on account of such inordinate and undue delay in consideration of his representation by the Competent

Authority. That ground of challenge to his such detention is found contained in para 8(k) of the petition. In the affidavit-in-reply of respondents

Nos. 1 and 2 for resisting this petition, the delay in consideration of the representation made by the petitioner detenu on 29th March, 1990 is

sought to be explained in para 19 thereof. It has inter alia been stated that the petitioner's representation dated 29th March, 1990 was received by

the Ministry of Finance, Department of Revenue on 4th April, 1990. The concerned Authority found it necessary to call for comments from the

Sponsoring Authority and therefore he ordered to call for his comments. It is further stated that the copy of the representation was therefore sent to

the Sponsoring Authority for his comments on 6th April, 1990. Since comments were not supplied by the Sponsoring Authority till 25th April,

1990, a reminder was issued to him by Talex on 25th April, 1990. It has further been stated that the Sponsoring Authority found that the

comments were also required from the Investigating Authority and such comments were called from the Investigating Authority. Then, it has further

been stated that, on receipt of the said comments, the same were sent to the Ministry of Finance on 11th May, 1990. The rest of the explanation

would not be material for the present purpose.

4. It does not become clear from para 19 of the affidavit-in-reply when the comments from the Sponsoring Authority were in fact received. In any

case, such comments from the Sponsoring Authority would never have been received before 25th April, 1990. It becomes clear therefrom that

comments were invited from the Sponsoring Authority as early as on 6th April, 1990. The Sponsoring Authority was required to be reminded to

send his comments after 19 days from the first communication to him on 6th April, 1990. This delay of 19 days on the part of the Sponsoring

Authority has not come to be explained in any manner in para 19 of or anywhere else in the affidavit-in-reply nor an affidavit in that regard has

been filed by the Sponsoring Authority.

5. The unexplained delay in consideration of the representation made by the detenu against his detention may prove fatal to his continued detention.

It is a settled principle of law that the delay in consideration of such representation has to be explained at every stage. It was therefore necessary

for respondents Nos. 1 and 2 to have explained the delay of 19 days on the part of the Sponsoring Authority in supplying his comments on the

representation of the detenu.

6. We are fortified in our view by the binding decision of the Supreme Court in the case of Mahesh Kumar Chauhan alias Banti v. Union of India

and Others, reported in 1990 SSC (Cri.) 434. In that case also, there was delay in consideration of the representation of the detenu against his

detention. It transpires from the facts of that case that the representation of the detenu was sent to the Sponsoring Authority for offering para-wise

remarks some time on 25th August, 1989. His comments were received on 11th September, 1989. There was thus delay of nearly 16 days on the

part of the Sponsoring Authority in offering his comments on the representation of the detenu. That delay on the part of the authority remained

unexplained in the affidavit filed on behalf of the Detaining Authority in that case. The Supreme Court has thereupon ruled that the continued

detention of the detenu could not be sustained in view of such delay in consideration of the representation. It has been observed therein as under :

A representation of a detenu whose liberty is in peril should be considered and disposed of as expeditiously as possible; otherwise the continued

detention will render itself impermissible and invalid as being violative of Article 22(5). If any delay occurs in the disposal of a representation, such

delay should be explained by the appropriate authority to the satisfaction of the Court. In case the appropriate authority is unable to explain

personally the delay at various stages, then it will be desirable - indeed appropriate - for the concerned authority or authorities at whose hands the

delay has occurred to individually explain such delay. In absence of any

explanation, Court cannot wink at or skip over to ignore such an infringement of the Constitutional mandate and uphold an order of detention merely on the ground that the enormity of allegations made in the grounds of detention is of a very serious nature as in the present case.

The aforesaid ruling of the Supreme Court in the case of Maheshchandra (supra) is on all fours applicable to the facts of the present case. As

aforesaid, the delay of at least 19 days on the part of the Sponsoring Authority in offering his comments on the representation of the detenu has

remained unexplained. In that view of the matter, the constitutional right guaranteed in Article 22(5) of the Constitution of India can be said to have

been infringed. The continued detention of the detenu cannot, therefore, be sustained.

7. In the result, this petition deserves to be and is hereby accepted. The order of detention dated 31st January, 1990 at Annexure "B" and the

declaration u/s 9 of the COFEPOSA made on 12th March, 1990 at Annexure "C" are hereby quashed and set aside. The petitioner-detenu is

ordered to be released forthwith if not required in any other case.

8. Rule is made absolute with no order as to costs.