

(1987) 02 DEL CK 0055

In the Delhi High Court

Anil Kumar Bhasin

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-02-1987

Acts Referred:

Citation : (1987) CriLJ 1632 : (1987) 1 RCR(Criminal) 328

Hon'ble Judges : M.K. Chawla, J

Bench : Single Bench

Judgement

This Judgment has been overruled by : Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others, AIR 1988 SC 1255 : (1991) 70 CompCas 549 : (1988) CriLJ 1775 : (1988) 2 Crimes 729 : (1988) 2 JT 409 : (1988) 1 SCALE 915 : (1988) 3 SCC 153 : (1988) 1 SCR 287 Supp

M.K. Chawla, J.—The circumstances under which the present petitioner was arrested and detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOS A Act), in brief, are that on 2-1-1986, while the Enforcement Officers were carrying out searches of the premises of M/s. Fair Deal Impex International, M/s. Narang Enterprises, Narang Sons and M/s. Fair Deal Impex (India) at L-4, Connaught Place, New Delhi, when one person who gave his name as Narinderjeet Singh entered the premises. His personal search resulted in the recovery of two loose sheets. His statement u/s 40, Foreign Exchange Regulation Act (FERA) was recorded wherein he, inter alia, stated that he needed money for the purchase of textiles in Hongkong. He requested his friends to arrange for money in Hongkong. Mr. Gurpal Singh (Surinderpal Singh) of Ambala offered to arrange money for him in Hongkong. Narinderjit Singh gave an advance of Rs. 64,583/- to Surinderpal Singh and requested him to arrange for the supply of dollars in Hongkong. On the basis of his depositions the residential premises of Surinderpal Singh were searched which resulted in seizure of certain incriminating documents.

2. Statement of Surinderpal Singh was also recorded wherein he admitted that previously he was working as a carrier for one Manmohan Singh of Ashok Vihar,

New Delhi for bringing foreign goods from abroad. Later on, his relations with Manmohan Singh got strained and he started his own trips to Dubai and Hongkong as he had no difficulty for money because his father Mangal Singh was working in Dubai. He also deposed that he had made arrangements for payment of money abroad to Anil Kumar Bhasin, the present petitioner, the details of which find mention in the grounds of detention. In this way, Shri Anil Kumar made payments to the tune of Rs. 2,62,500/- to Surinderpal Singh.

3. On the basis of the depositions made by Surinderpal Singh, the residential premises at F-65, West Patel Nagar, New Delhi were searched on 4-1-1986 when certain documents were seized. On the basis of those documents, the statement of the present petitioner was recorded wherein he admitted that he had developed acquaintance with Surinderpal Singh as both of them were working for Manmohan Singh. Thereafter, he of his own started business of bringing goods from abroad. The: petitioner also explained in detail certain documents recovered from his place.

4. As a consequence of further enquiries, the petitioner along with Surinderpal Singh were arrested u/s 35, Foreign Exchange Regulation Act, 1973, on 4-1-1986 but was subsequently ordered to be released on bail on furnishing a personal bond in the sum of Rs. 50,000/- with one surety in the like amount. However, on the basis of the material, Shri M.L. Wadhawan, Additional Secretary to the Government of India, came to the conclusion that the petitioner has been indulging in unauthorised transactions in foreign exchange in violation of the provisions of Foreign Exchange Regulation Act, 1973, which have affected the foreign exchange resources of the country adversely. On these facts, he was further satisfied that it has become necessary to detain the petitioner under the COFEPOS A Act, 1974 with a view to preventing him from indulging in activities prejudicial to the augmentation of country's foreign exchange resources. On that basis, the order of detention was passed on 23-5-1986 which was duly served on the petitioner on the same day. While in judicial custody, he was served with the grounds of detention.

5. By way of filing the present petition, the petitioner has challenged his detention on numerous grounds but during the course of arguments, the learned Counsel mainly pressed the following grounds :

(a) That there is a long and unreasonable delay in consideration of his representation dated 1-7-1986. The same has been considered and rejected by the detaining authority on 11-8-1986, thus, the delay of one month and 18 days remained unexplained, which vitiates detention being vocative of Article 22(5) of the Constitution.

(b) The order of detention has been passed to thwart, substitute and supplant normal criminal and adjudication proceedings. No show cause notice has been issued nor any complaint for the violation of the provisions of Foreign Exchange Regulation Act has been initiated against the petitioner. The order thus has been

passed not as a preventive measure but as a punitive measure.

(c) That the impugned order of detention has been passed without there being any ground whatsoever to suspect or apprehend that the petitioner would act in a manner prejudicial to the augmentation of foreign exchange.

The petitioner's detention in these circumstances is in violation of Articles 14, 1, 21 and 22(5) of the Constitution and the impugned order of detention dated 23-5-86 deserves to be quashed.

6. The respondents in their counter have controverted the pleas by alleging that the detention order has been passed with a bona fide view to prevent the petitioner from indulging in activities prejudicial to the augmentation of foreign exchange. In fact, the petitioner has been systematically engaged in such activities for a long time. Even otherwise, the solitary incident of such a nature is sufficient to justify the order of detention. Even otherwise, there is no undue delay in deciding the representation of the petitioner as alleged. None of the grounds urged by the petitioner at the bar has any substance and the impugned order is not liable to be quashed.

7. Before dealing with the grounds of attack it is relevant to keep in mind the settled proposition of law that a person preventively detained under the provisions of the N.S.A. is entitled to be released if there is delay in the consideration of the representation by him to the detaining authority. It cannot be urged in respect of any detention that a certain amount of delay was inevitable having due regard to the procedure prescribed by the Act or that the delay in consideration of the representation should not be allowed to prejudice the detention. In *Shri. Saleh Mohammed Vs. Union of India (UOI) and Others*, , the Court went to the extent of holding that "Time out of number this Court has emphasised that where the liberty of an individual is curtailed under a law of preventive detention, the representation, if any, made by him, must be attended to, dealt with and considered with watchful care and reasonable promptitude lest the safeguard provided in Article 22(5) of the Constitution and the Statute concerned should be stultified and rendered meaningless. Here in the instant case, we find that the functionaries of the State in attending to the representation of the detenu have been guilty of gross negligence and chill indifference. For more than three weeks the representation of the detenu remained lying unattended in the office of the Superintendent of Jail or the Inspector General of Prisons. This inordinate, unreasonable and unwarranted delay of about 22 days amounted to a violation of Article 22(5), which guarantees to the detenu a right to have his representation considered with reasonable expedition. It was on this short ground that the order of detention was set aside in the aforesaid case. With this background, let us examine the delay which has occurred in the case in hand. According to the petitioner, while in judicial custody, he had addressed a representation to the detaining authority on 1-7-86. The same was handed over to the Superintendent Jail on the same day. According to the respondents' counter, the representation of the detenu dated

Nil accompanied by a covering letter dated 10-7-86 from Tihar Jail was received in the office of the Ministry of Finance on 14-7-86. This delay of 4 days has not been satisfactorily explained by the respondents. The only person who could have thrown any light on this aspect was the Superintendent, Tihar Jail. His affidavit is not on record. In spite of the repeated averments in the petition supported by the affidavit of the detenu that the representation was delivered in the office of the Superintendent Jail on 1-7-86, the bald assertion of an Under Secretary to the Government of India that it was received in the Ministry of Finance on 14-7-86 does not inspire confidence. Certainly he has to go by the covering letter and the receipt of the representation in the department. But the real Explanation should have been from the concerned official at whose desk it was delayed. This is not there. The next gap in dealing with the representation at the Ministry level is from 14th to 31st July, 1986. During this period, the representation has passed two stages. From 14-7-86 to 21-7-86, it remained in the office of the Ministry of Finance. The second stage is when it was sent on 22nd July, 1986 to the Director of Enforcement Hqrs. Office, who in turn sent it to Delhi Zone office for their comments. The same could not be disposed of till 7th of August, 1986. This delay is sought to be explained by the respondents thus : ?

That the representation of the detenu was addressed to Shri M.L. Wadhawan, Additional Secretary to the Government of India and it was received in this office of the Ministry of Finance on 14-7-86. Shri Wadhawan was away on official tour and the representation was dispatched to Joint Secretary (COFEPOSA) on 21-7-86 as it concerned the COFEPOSA Unit. The same was received there on 22-7-86. As some of the points raised in the representation pertained to the Directorate of Enforcement, the sponsoring authority, it was sent on the same day to the Directorate of Enforcement Hqrs. Office who in turn sent the same to the Delhi Zone Office wherein it was received on 24-7-86. The concerned intelligence officer of this case was busy in a case of large quantity of foreign currency seized from one Maqsood on 24-7-86 on the basis of a secret information. On the next day, the intelligence officer was called for emergency duties in a raid on a large electronic manufacturer. Huge quantity of documents pertaining to Foreign Exchange Regulation Act violations were seized. He remained busy with scrutinising these documents as well as tracing Mr. Rashid, an accomplice of Maqsood from 28-7-86 to 30-7-86. Thereafter on 31-7-86, the comments on the representation of the detenu were prepared by the Intelligence Officer and submitted for approval of Dy. Director through Assistant Director. The Dy. Director approved the comments on the representation on the same day. After the approval of the comments by the Dy. Director, Enforcement, the comments were got typed on 1-8-86. 2nd and 3rd of August, 1986 were holidays. On 4th August, 1986, the same were sent to the Headquarters, on the 5th August, 1986, the Headquarters sent the comments to the COFEPOSA Unit of the Ministry of Finance. On 7-8-86, the same were put up before the detaining authority. The detaining authority after considering the same was pleased to

reject the same on 8-8-1986. Thus, there is no delay in considering the representation of the detenu. From the perusal of the Explanation ,the 8 days" delay from 14-7-86 to 21-7-86 and 8 days" delay from 24-7-86 to 31-7-86 and a further delay till 13-8-86 when the rejection was communicated to the detenu remain unexplained. There is nothing on record to suggest as to for how many days and during which period Shri M. L. Wadhawan was away on official tour. If he was on tour for a longer period, there was no occasion for the department to have kept the representation in the office. It is also not made clear by the respondent as to which portion of the representation required from the Delhi Zonal Office. Admittedly, the petitioner has not asked for the supply of any " document nor has he urged any fresh grounds. The representation in a way was like a mercy petition. All the facts were already with the detaining authority. Even if it be assumed for the sake of arguments that the representation did call for certain comments, then it was the foremost duty of the Officer concerned to have attended to the representation on preferential basis. It would have been better for the respondent to have at least filed the affidavits of the officer concerned who dealt with the representation on day to day basis explaining the inordinate delay which has occasioned in its rejection. The absence of such an evidence to my mind is fatal.

8. The practice of calling for comments from other departments or seeking the opinion of the various officers concerned has been deprecated by the Supreme Court in a number of cases. One such case is reported in Harish Pahwa Vs. State of U. P. and Others, . The relevant observations of the Supreme Court on this aspect read as under : ?

The representation made by a detenu has to be considered without any delay. The Supreme Court does not look with equanimity upon delays when the liberty of a person is concerned. Calling comments from other departments, seeking the opinion of Secretary after Secretary and allowing the representation to lie without being attended to is not the type of action which the State is expected to take in a matter of such vital import. It is the duty of the State to proceed to determine representations with the utmost expedition, which means that the matter must be taken up for consideration as soon as such a representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu. Where this is not done the detention has to be declared unconstitutional.

In view of the caution note of the Supreme Court Judgment which applies to the facts of the present case, no further elaboration on this ground is called for. This ground, by itself, is weighty enough to justify the release of the detenu.

9. The next submission of the learned Counsel for the petitioner is that this is the solitary incident as is clear from the grounds of detention and an isolated act of commission of economic offence does not justify the passing of the detention order under preventive detention law without coming to the conclusion that the

petitioner was carrying on nefarious activities in the past. There was no material on which any reasonable person could have come to a conclusion that, if freed, the petitioner was likely to indulge in prejudicial activities. The order of detention under these circumstances is not a preventive measure but a punitive measure. The respondents have denied the allegation and have taken the stand that the passing of the detention order depends on the subjective satisfaction of the detaining authority and not by the Enforcement Officer. The mere fact that the petitioner was released on bail by the Enforcement does not create any bar in passing the detention order by the detaining authority subsequently when the entire material was placed before him.

10. A few facts would make the position clear. In consequence of the depositions made by Surinderpal Singh, the residential premises of the present petitioner were searched on 4-1-86. Few loose sheets and a note-book were recovered. After arrest, his statement u/s 48, Foreign Exchange Regulation Act, 1973 was recorded. However, having satisfied themselves with the Explanation, the petitioner was not detained or produced before the A.C.M.M. New Delhi. No complaint/Challan was prepared or filed in the Court. The Officer of the Enforcement Directorate released the petitioner on bail on his furnishing a personal bond in the sum of Rs. 50,000/- with one surety in the like amount. Admittedly, Therefore, no further enquiry was conducted nor any more material gathered either from the petitioner or any of his contacts. However, the order of detention was passed by the Additional Secretary to the Government of India on 23-5-86 and on the same day, the petitioner was served with the same. In between the period of about 4½ months, no untoward incident has happened nor has any adverse activity of the petitioner come to the knowledge of the detaining authority. For that purpose, the petitioner was not served with any show cause notice or any attempt was made to cancel his bail bond. Under these circumstances, can the act of the detaining authority be considered as preventive. The simple answer to this query can be in the negative. Admittedly, the petitioner is not the main person behind arranging or dealing in the foreign exchange. Mangal Singh, resident of Dubai is the father of Surinderpal Singh. He is instrumental in arranging foreign exchange and sending contraband goods to India for sale through the present petitioner and other carriers. There is no material on record to suggest that Mangal Singh had no permission to continue with such like activities. It is not the case of the department that any foreign exchange or any amount of Indian currency was recovered from the petitioner. Prima facie, this is not a case of indulging in unauthorised transactions or any activities prejudicial to the augmentation of the country's foreign exchange resources. He appears to be a simplicities smuggler of foreign goods with no previous history. It is a typical case in which for no apparent reason, he is being preventively detained who could easily be prosecuted under the punitive laws. It is not the case of the department that any of the prosecution witnesses was likely to abstain from giving evidence because of the fear of his life or property from the petitioner or for that matter his ultimate conviction was in doubt.

11. It is no doubt true that the satisfaction of the detaining authority is subjective in nature but when the same is challenged, the detaining authority has to satisfy the court about the existence of the material on the basis of which it could form a bona fide opinion that it was necessary to detain the person concerned. It is the duty of the detaining authority to bring on record facts and circumstances which exist leading to such a conclusion. The present is not a case where the detaining authority, to my mind, was clear in its mind that there was no alternative but to detain the petitioner and that his prosecution and possible conviction cannot be a substitute for immediate action of detention. The preventive detention ordinarily should be ordered as a last resort. From the facts of the present case, it can safely be inferred that after having satisfied that the activities of the petitioner are not of such magnitude which required his immediate arrest and trial, there was no justification for the detaining authority to pass the drastic order of detention which was punitive in nature. On this aspect, the petitioner has a case for his release.

12. As a result of the above discussions, petition is allowed. The petitioner be set at liberty at once unless he is required to be detained by the orders of a competent court or authority.