
(2015) 01 BOM CK 0326
In the Bombay High Court
Case No : Writ Petition No. 4618 of 2014

Anita Ajay Sharma

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 20-01-2015

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 21, 22(5)
Customs Act, 1962 — Section 108
Penal Code, 1860 (IPC) — Section 467, 468, 471, 472, 484

Citation : (2015) 323 ELT 547

Hon'ble Judges : Abhay Shreeniwas Oka, J; A.K. Menon, J

Bench : Division Bench

Advocate : V.B. Singh and Santosh Shetti, for the Appellant; J.P. Yagnik, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.K. Menon, J—This petition seeks a writ of Habeas Corpus or other appropriate writ for quashing and setting aside the order of detention bearing No. PSA-1214/CR-36(2)/SPL-3(A), dated 29-9-2014 whereby the detenu Ajay Kumar Sharma has been detained under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA") with a view to prevent him in future for abetting the smuggling of goods, transporting them, concealing or keeping smuggled goods pursuant to the powers under Section 3(1) of COFEPOSA. The petition is filed by the wife of the detenu. The facts leading to passing of the impugned detention order are as follows:

On 15-7-2013 the officers of Directorate of Revenue Intelligence (for short "DRI") seized 132.882 MTs of Red Sanders from Nhava Sheva and another quantity of 18.350 MTs of Red Sanders valued at 53.15 crores and 7.34 crores respectively. The detenu was arrested on 4-10-2013 under the provisions of the Customs Act and produced before the learned Magistrate, 8th Court, Esplanade, Mumbai, who

remanded the detenu to the custody of DRI till 10-10-2013. In the meanwhile on or about 4-10-2013 the detenu filed a retraction of the statement made on 3-10-2013. The DRI custody was extended up to 7-10-2013. Thereafter he was remanded to judicial custody up to 30-10-2013 which was subsequently extended till 29-11-2013. The learned Magistrate then extended judicial custody till 6-1-2014.

2. Meanwhile, the bail application made by the detenu was rejected by the learned Magistrate on 29-11-2013. It appears that DRI applied Sections 467, 468, 471, 472 and 484 of IPC in various remand applications and eventually the detenu was granted bail on 3-1-2014 after being in custody for 91 days by virtue of the fact that DRI failed to file complaint during statutory period of 90 days. On 8-1-2014 a further statement was recorded under 108 of the Customs Act by the DRI. The show cause notice came to be issued on 13-1-2014 and a corrigendum dated 14-1-2014 to the said notice was issued to the detenu. On 12-2-2014 DRI file a rebuttal to the retraction statement dated 4-10-2013 and the impugned detention order came to be passed on 29-9-2014. The detention order was executed on 25-10-2014. The detenu has been lodged in Central Prison, Nashik since.

3. We have heard learned counsel for the parties. On behalf of the applicant Mr. V.B. Singh learned Advocate confined his challenge to ground (H) in the petition, without prejudice to various other grounds. Learned counsel submitted that the detenu had submitted a representation addressed to the Detaining Authority, State Government, Central Government and the State Advisory Board through the Superintendent of Nashik Central Jail which was not expeditiously considered. The learned counsel urged that the reply to the said representation of the detenu ought to have been served upon the detenu without loss of time and in any event within reasonable time. According to him a reply to representation ought to have been issued independently by the Detaining Authority and State Government uninfluenced by the views of the Advisory board. In view of the fact that the replies were not so served, he submitted the detention would be violative of Article 22(5) of the Constitution of India. The mandate of the Article 22(5) requires no elaboration and the detention in the circumstances would have to be tested on the anvil of expeditious and prompt consideration. In view of the fact that the learned counsel on behalf of the petitioner has urged only the said ground we proceeded to hear the learned counsel appearing for the respondent State and DRI.

4. On this aspect, two affidavits have been filed to oppose the petition. In the affidavit of Shri Veersinha M. Patil, Deputy Secretary, Home Department of the Government of Maharashtra dated 8th January, 2015, he has dealt with aforesaid ground of challenge in paragraph 26. The deponent has stated that the representation made by the detenu dated 24-11-2013 was forwarded by Nashik Road Central Prison vide letter of the same date which was received in the office of the Detaining Authority on 26-11-2014. Parawise comments of the Sponsoring

Authority were called vide letter dated 27-11-2014. As comments were not received, a reminder was sent on 4-12-2014. It is stated that in between there was holiday on 30-11-2014 being Sunday. It is further stated that there were holidays on 7-12-2014, 12-12-2014 and 13-12-2014 on account of Sunday and Second Saturday and Sunday respectively. The parawise comments were received from the Sponsoring Authority on 17-12-2014 and based on these comments and the record available with the Detaining Authority a reply was prepared and submitted on 17-12-2014 for consideration of and orders of the Detaining Authority. It came to be endorsed by the Deputy Secretary concerned on 18-12-2014. The Principal Secretary (Appeals & Security) and the Detaining Authority after due consideration of the representation and the parawise remarks of the Sponsoring Authority rejected the representation on 18-12-2014. The rejection was conveyed on 19-12-2014 through Nashik Road Central Prison.

5. Thus, it is seen that the time taken from receipt of representation dated 26-11-2014 to the final rejection is 23 days. Meanwhile the delay in forwarding parawise comments is at least of 20 days.

6. Apropos the representation addressed to the State Government, the same was received by the State Government on 26-11-2014 and parawise comments were called for vide letter dated 27-10-2014. Once again a reminder had to be sent on 4-12-2013. During that period there was holiday on 30-11-2014 on account of Sunday. Further there were holidays on 7-12-2014, 12-12-2014 and 13-12-2014 on account of Sunday, Second Saturday and Sunday.

The parawise comments from the Sponsoring Authority were received on 17-12-2014 by the letter dated 16-12-2014. We cannot help observing that the dates of receipt of representation and date of calling of parawise comments and sending letter for reminder are all identical to the dates mentioned in the affidavit of the Detaining Authority.

7. It appears that parawise comments were sent to the Additional Chief Secretary on 17-12-2014. The affidavit further goes on to state that the Deputy Secretary and Additional Chief Secretary (Home) were in Nagpur apparently to attend the Winter Session of Maharashtra Legislative Assembly session at Nagpur which commenced on 8-12-2014. In view of the fact that there was no possibility of the two gentlemen returning to Mumbai till the end of the Assembly Session, the file was sent to Nagpur on 18-12-2014. After considering the representation of the detenu and the parawise comments from the Sponsoring Authority and the Additional Chief Secretary (Home) rejected the representation on 20-12-2014. The file sent from Nagpur was received by the Home Department, Mumbai on 23-12-2014. The letter intimating rejection was forwarded to the detenu through the Superintendent Nashik Road Central Prison on 24-12-2014. Thus, on the facts as disclosed in the affidavit of the Detaining Authority it can be seen that the representation was made on 24-12-2014 which was admittedly received by the Detaining Authority on 26-11-2014 was disposed of only on 20-12-2014 and was communicated to the detenu four days thereafter on 24-12-2014.

8. On behalf of respondent No. 4 DRI an affidavit of Mr. M.P. Madhavan, Assistant Director, DRI has been filed. In view of the fact that the petitioner has restricted himself to ground 7(H) of the petition has been dealt with in paragraph 11 of the affidavit. The representation made by the detenu was received by DRI on 28-11-2014 i.e. two days after the same was received by the Detaining Authority, although the office of DRI is also within the city of Mumbai. The copies of representation is also received by the Central Government on 9-12-2014 calling for parawise comments.

The parawise comments were then forwarded on 16-12-2014 i.e. 19 days after the receipt of representation by the DRI. It further appears that on 19-12-2014 the DRI received communication from the office of the Detaining Authority stating that the representation of the detenu was rejected by the Detaining Authority on 24-12-2014. This date is material and we will shortly advert to the same. It is further stated that vide communication dated 26-12-2014 from the Government of Maharashtra, it was conveyed that the representation was rejected by the Additional Chief Secretary, Home.

No doubt, the affidavit states that the detenu was a prime member of the organized syndicate indulging in the smuggling of Red Sanders, a natural resource prohibited for export under the provisions of Foreign Trade Policy and restricted as per Appendix II of CITES. However, it is further stated that Red Sanders are found only in India and safeguarding this endangered species it is obligation of the State.

9. While we can appreciate the importance of protecting the endangered species like Red Sanders and the same needs to be approached with great amount of zeal, the answer does not lie in preventive detention per se. Steps to be taken pursuant to such detention must be taken promptly. In the instant case, the time taken to decide the representation of the detenu is not justifiable specially in the light of various pronouncement of the Hon"ble Apex Court. In the case of *Harish Pahwa Vs. State of U. P. and Others*, AIR 1981 SC 1126 : (1981) CriLJ 750 : (1981) 1 SCALE 704 : (1981) 2 SCC 710 : (1981) SCC(Cri) 589 : (1981) 3 SCR 276 , the Supreme Court observed that the manner in which the representation (made by the appellant in that case) was dealt reveals a sorry state of affairs. Considering the fact that the representation was made by a person detained without trial, the Supreme Court observed that there is no justification for the delay and why the representation has to travel from table to table for six days before reaching the Authority who was to decide the representation. The Court observed, as it did on numerous earlier occasions, that such delay cannot be looked upon with equanimity when the liberty of a person is concerned. That the State is expected to treat the matter with utmost expedition, meaning thereby that the matter must be taken into consideration as soon as such a representation is received and, must be dealt with continuously unless it was absolutely essential to wait for some assistance in connection with it until a final decision is taken and communicated to the detenu. The Court found that this had

not been done and the detention was declared unconstitutional and the detenu was set at liberty forthwith.

10. In yet another case of *Rajammal Vs. State of Tamil Nadu and Another*, AIR 1999 SC 684 : (1999) CriLJ 826 : (1998) 8 JT 598 : (1998) 6 SCALE 574 : (1999) 1 SCC 417 : (1998) 3 SCR 551 Supp : (1999) AIRSCW 139 : (1998) 9 Supreme 398 the Supreme Court held that the test of duration or range of delay in disposal of the representation is not material but what is material is how the delay is explained by the Authority concerned. The mere fact of delay, therefore, if explained properly would not affect the continued detention of the detenu.

However, any delay caused on account of any indifference or lapse in considering the representation, will adversely affect the continued detention.

11. In the case of *Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others*, AIR 1989 SC 1861 : (1989) 2 Crimes 653 : (1990) 25 ECC 50 : (1989) 24 ECR 7 : (1989) 2 JT 579 : (1989) 1 SCALE 1581 : (1989) 3 SCC 173 : (1989) 3 SCR 191 the Hon"ble Supreme Court observed as follows in paragraphs 19 and 20:

"19 The propositions deducible from the various reported decisions of this Court can be stated thus:

The detenu has an independent constitutional right to make his representation under Article 22(5) of the Constitution of India. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness of the detention order clamped upon him and requesting for his release, to consider the said representation within reasonable dispatch and to dispose the same as expeditiously as possible. This constitutional requirement must be satisfied with respect but if this constitutional imperative is observed in breach, it would amount to negation of the constitutional obligation rendering the continued detention constitutionally impermissible and illegal, since such a breach would defeat the very concept of liberty-the highly cherished right - which is enshrined in Article 21 of the Constitution.

20. True there is no prescribed period either under the provisions of the Constitution or under the concerned detention law within which the representation should be dealt with. The use of the word "as soon as may be" occurring in Article 22(5) of the Constitution reflects that the representation should be expeditiously considered and disposed of with due promptitude and diligence and with a sense of urgency and without avoidable delay. What is reasonable dispatch depends on the facts and circumstances of each case and no hard and fast rule can be laid down in that regard.

However, in case the gap between the receipt of the representation and its consideration by the authority is so unreasonably long and the explanation offered by the authority is so unsatisfactory, such delay could vitiate the order of

detention."

It is to be noted that Article 22(5) enjoins upon the State to satisfy the constitutional requirement but if this constitutional imperative is observed in the breach, it would amount to negation of the constitutional obligation thereby rendering continued detention impermissible. The Supreme Court highlighted the fact that the representation should be expeditiously decided with due promptitude and without avoidable delay.

12. Having considered the facts of the present case and having applied the tests laid down by the Supreme Court in the aforesaid pronouncements, the response of the concerned respondents is unacceptable. The manner in which the representation of the detenu was dealt with does not in our view comply with the constitutional mandate and falls foul of the obligation to decide the representation "as soon as may be" in Article 22(5) of the Constitution. In our view the representation could have been decided much earlier. The duration of time that has lapsed between the receipt of representation and consideration by the Authority and communication of the order of detention. As stated above the delay is of 23 days and 19 days respectively. We have noticed that in many cases, holidays are cited as reason for delay. This has become routine. What has been lost sight of is the fact that the detenu continues to be incarcerated without trial even on holidays. The mere fact that four holidays intervened still does not justify the delay in considering and communicating the decision on the representation.

If indeed the mandate of Supreme Court is to be honestly carried out by the Authority, the Authority should endeavour to prepare themselves to deal with such representation more expeditiously in the interest of upholding the law.

Applying the law as laid down by the Hon'ble Supreme Court the delay of 23 days and 19 days is not adequately explained.

The delay in our view is unreasonable and does not pass the tests laid down by the Apex Court. What we find surprising is that it is stated case of Respondent No. 1 that the decision on the representation was taken on 20-12-2014 and that it was communicated after 21-12-2014 since 21-12-2014 being Sunday.

The file is said to have been received from Nagpur in Mumbai on 23-12-2014 after which the rejection intimation was sent to Nashik Road central prison. If that be so, we wonder how in the affidavit on behalf of DRI it is stated in paragraph 11 that it received a communication from the office of Detaining Authority to the effect that the representation made by the detenu was rejected by the Detaining Authority on 19-12-2014. Surely, there is more than meets the eye. Since admittedly, the Additional Chief Secretary had rejected the representation on 20-12-2014 there is no explanation on how communication of the said decision could have been received by the DRI on 19-12-2014. We are, therefore, convinced beyond all reasonable doubt that the delay is not properly explained and continued detention of the detenu is in violation of the

constitutional mandate of Article 22(5) of the Constitution of India and order of detention stands vitiated. The petition must, therefore, succeed. In the result we pass the following order:

Rule is made absolute in terms of prayer clauses (A) and (B) which reads thus:

(A) Issue a Writ of Habeas Corpus or any other appropriate Writ, order or direction quashing and setting aside the impugned Detention Order bearing No. PSA-1214/CR-36(@)/SPL-3(A), dated 29-9-2014.

(B) Direct that the detenu be released from the detention forthwith and be set at liberty.

We direct all the concerned authorities to act upon operative part of the judgment and order.