
(1994) 11 RAJ CK 0013

In the Rajasthan High Court

Case No : Habeas Corpus Petition No. 2551 of 1994

Anwar Singh

APPELLANT

Vs

The State of Rajasthan and Others

RESPONDENT

Date of Decision : 16-11-1994

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 7, 7(1), 8
Constitution of India, 1950 — Article 21, 22(5)
Customs Act, 1962 — Section 11, 3(1), 7(C)
Foreign Exchange Regulation Act, 1973 — Section 13, 67
Imports and Exports (Control) Act, 1947 — Section 3(1), 3(2)

Citation : (1995) CriLJ 3012 : (1995) 1 RLW 284 : (1995) 1 WLC 634 : (1994) 2 WLN 677

Hon'ble Judges : R.R. Yadav, J;J.R. Chopra, J

Bench : Division Bench

Advocate : J.P. Joshi and R.K. Purohit, for the Appellant; S.S. Bhandawat, A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

J.R. Chopra, J.—This Habeas Corpus petition has been filed by Anwar Singh, against his detention order Annx. 1 dated 17th June 1993, whereby he has been ordered to be detained for a period of one year, on account of his involvement in smuggling activities, under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), under Sub-section (1) of Section 3 of the aforesaid Act.

2. Annexure 1 dated 17-6-1993 and Annexure 2 dated 17-6-1993, along with its enclosures, were issued in exercise of powers conferred on the Principal Secretary, Home Department, u/s 3(1) of the Act of 1974 (COFEPOSA).

3. The detention has been challenged on the following grounds:

a) It is alleged that the detention order was passed on 17-6-1993, On

29-3-1994, the petitioner was detained in a case under the Narcotics, Drugs and Psychotropic Substances Act. The detention order, which was passed on 17-6-1993, was served on the petitioner on 29-4-1994, that is nearly ten months after passing of the detention order, although the petitioner was always available for the service of the detention order.

The grounds for detention, alleged, are that on 29-4-1992 when the petitioner alongwith one Kuldeep Singh son of Jabar Singh were going by a Jonga Jeep they were stopped near Harsani village. The number of Jonga Jeep was RNJ 7329. There was information that contraband silver is being carried in this Jeep. However, on search, no incriminatory material was found. As the information was definite and categorical, the Jeep alongwith these two persons was carried to Police Station, Sadar, Barmer and, there it was thoroughly searched. On thorough search, two secret cavities were detected on both sides of the chasis of the Jeep. In one of the cavities, 49.590 kilograms of contraband silver in square slabs, 43 in number, was found. Nothing was found there in the second cavity. The Jeep, alongwith the silver was seized because the occupants had no valid Licence with them for carrying that silver. It has been stated in the statement of these two persons that silver was delivered to them by Ajju Musalman of village Khara (Pakistan), which is a violation of Section 7(C) and Section 11 of the Customs Act, 1962, Import and Export (Control) Act, 1947- Sub-sections (1) and (2) of Section 3 and further it is in violation of Section 13 and 67 of the Foreign Exchange Regulation Act, 1973.

Be that as it may, the petitioner's case was produced before the Chief Judicial Magistrate (Economic Offences), Jaipur on 30-4-1992. His bail application was rejected by learned Chief Judicial Magistrate on 2-5-1992 but he was released by learned Sessions Judge on 6-5-1992. During the period when the petitioner was in judicial custody, that is from 22-4-1992 to 6-5-1992, a raid was conducted at his house situated in village Satto in district Jaisalmer and 1 kilogram wet opium was found from his house and some other incriminating documents were also found which related to some illegal transaction. About this recovery of opium, challan was filed against him under the Narcotics, Drugs and Psychotropic Substances Act, in which he was arrested and put in custody on 29-3-1994 and, ultimately, this detention order dated 17-6-1993, was served upon the petitioner on 29-4-1994. There, he was not allowed to meet his relatives and he then contacted his counsel Shri R.K. Purohit, Advocate. The papers were handed over to him and immediately after then representation was made but it was rejected.

4. With this factual matrix the detention is challenged on the following grounds:

- a) Firstly, he was prevented from making effective representation for ten days, which was violative of Article 22(5) of the Constitution;
- b) The detention order has been passed after an inordinate delay of one year and two months, that is, the incident relates to 22-4-1992 and the detention order was passed on 17-6-1993. The delay snaps the co-relation between preventive

detention and alleged smuggling activity and, therefore, the detention order deserves to be quashed;

c) The detention order has been passed without any application of mind and is based only on a single activity. No previous history or allegation of involvement in smuggling activities are there;

d) The detention order stands vitiated on account of its execution after 10 months of its issuance on 17-6-1993. The petitioner was available for execution of the detention order because he has been attending hearings of his case in the court for Economic Offences, Jaipur, from time to time and, thus, he was not absconding;

e) Moreover, no action u/s 7 of the Act of 1974 has been taken for such a long time and that also vitiates the detention;

f) The delay in detaining him when he was available in jail from 29-3-1994, to 29-4-1994, also vitiates the detention;

g) It is also vitiated on the ground that when the petitioner was already in custody, this fact whether he will be released on bail or not, was to be considered before executing the detention order; and

h) The detention order deserves to be revoked on the ground that the detaining authority has not supplied copies of the requisite documents to the petitioner, e.g. report of Amrit Lal Dhan Raj Soni and the incriminatory documents which were found in his house situated in village Satto by the Police and Customs authorities. The Petitioner has retracted his confessional statement and, therefore, on that basis, the detention order should not have been passed.

There is no proof that the silver has been smuggled from Pakistan and, therefore also, the detention order deserves to be revoked.

The petition is supported by affidavit of Anwar Singh. Copies of the detention order and the grounds on which the detention order was challenged, have been filed alongwith the petition together with copies of number of other documents which are supplied to him.

5. A return has been filed on behalf of the respondents in which it has been claimed that the petitioner was under custody in the Narcotics, Drugs and Psychotropic Substances Act case from 29-3-1994 and the detention order which was issued on 17-6-1993, was served on the petitioner on 29-4-1994 but in the meanwhile he was absconding and was not available at his place of abode and therefore, the order could not be served. Efforts were made to arrest him on 8th, 9th and 14th July, 1993, 6th, 13th and 21st August, 1993, 2nd and 21st September, 1993, 4th, 12th, 16th, 21st, 25th and 29th October, 1993, 18th and 25th November, 1993, 1st, 3rd and 7th December, 1993, 3rd, 18th and 25th January, 1994, 5th, 10th, 22nd and 27th February, 1994, and, 7th, 14th, 21st and 31st March, 1994 but he was not available. He was never disallowed to meet

his relations. There is no violation of Article 21 or 22(5) of the Constitution. The delay in confirmation of detention order u/s 8(f) of the Act of 1974 has been explained by a letter of Deputy Secretary, Administration Department of Home (Group IX), dated 9-9-1994. It is submitted in the return that the delay was neither inordinate nor intentional, it is wrong to state that the detaining authority has not applied its mind.

6. A perusal of the order of detention of the petitioner shows that he was involved in smuggling activities. As regard the contention that he was attending the hearings before the court of Economic Offences, Jaipur, no satisfactory reply has been filed. It is alleged that the proceedings u/s 7 of the Act of 1974 were contemplated against such a person (petitioner) if the order of detention could not be served on the petitioner for some more time. The Customs authorities have no information that the petitioner was in jail in some Narcotics, Drugs and Psychotropic Substances Act case since 29-3-1994. There is no bar to service of the detention order in jail. All the relevant documents which were supplied to him, are genuine. Retraction of the statement is an after thought action of the petitioner and there was sufficient material available on record to detain him. The silver has been smuggled from Pakistan and therefore, the detention order deserves to be sustained. The reply is supported by affidavit of Shri Rajesh Sanan, Assistant Collector (Customs), Barmer and the photostat copy of the affidavit of Shri Gyarsi Lal Verma filed before the Conservation of Foreign Exchange and Prevention of Smuggling Activities Board.

7. A rejoinder to the reply has been filed on 22-8-1994, in which it has been claimed that it has not been disclosed who made the efforts to arrest the accused, where those efforts were made and what type of efforts were made and, Shri Rajesh Sanan, who has given the affidavit, is not the person who made the efforts to arrest the accused and no affidavit of concerned person who was deputed to arrest the petitioner has been obtained and, therefore, such an affidavit is of no consequence. The copy of the affidavit by Shri Gyarsi Lal Verma shows that un-necessary delay was caused in passing the detention order. The order of detention has to be confirmed by the Government within a period of three months and that has not been done and, therefore, it was claimed that the petitioner's detention order be quashed.

8. An additional affidavit of Shri Shakti Singh has been filed in which it has been shown that he is brother of petitioner Anwar Singh and in the N.D.P.S. case, he has been acquitted by learned Judge, Special Court, N.D.P.S. Cases, Jodhpur by his judgment dated 13-6-1994.

9. We have heard Shri J.P. Joshi, appearing for the petitioner and Dr. S.S. Bhandawat, learned Additional Advocate General, appearing for the State.

10. In this case admittedly the occurrence took place on 22-4-1992 and the detention order was passed on 17-6-1993, that is, almost after expiry of one year and two months and this delay is sought to be explained by a copy of the

affidavit which was filed by Shri Gyarsi Lal Verma Assistant Secretary, Department of Home (Group IX), Jaipur. A bare ? perusal of this affidavit shows that the matter has been prosecuted very leisurely. It has been stated that the Screening Committee wanted on 19-9-1992 that the matter should be examined in the light of decision of their Lordships of Supreme Court rendered in the case of Bhupendra Singh v. Union of India, reported in 1987 SCC 111 . This judgment was rendered way back in the year 1987 and, therefore, its compliance was necessary and no time could be consumed for ensuring its compliance for months together. The Screening Committee meeting was also held with great delay and even after direction of Screening Committee in the next meeting that was held on 10-3-1993 after expiry of about 6 months, the compliance of the judgment has not been made and again the matter was adjourned to 26-3-1993. On that day also, the Committee did not consider petitioner's case and therefore, it is very much clear that the order has not been passed dispassionately. The statement of the petitioner was recorded on the same day (29-4-1992) when he was arrested and it is clear from his statement that he has been indulging himself in smuggling activities, that is he has been receiving silver from Pakistan through one Narpat Singh and has been disposing it of by delivering it to a gold smith Jayanti Bhai in Disa and he has been charging commission for it. When this material was available with them, it was sufficient to detain him and, in spite of this material one year and two months were spent in issuing an order of detention. Shri J.P. Joshi drew our attention to decision of their Lordships of Supreme Court, rendered in Pradeep Nikanth Paturkar Vs. S. Ramamurthi and others, wherein the statement of the witnesses regarding the criminal case were recorded in March, 1991 (only after release of detenue on bail) proposal for detention was submitted by the Sponsoring Authority in April 1991, basing the proposal on the statements made by the witnesses in the criminal case relating to November, 1990 and January-February, 1991. Thus, there was a delay of over five months in passing the detention order, from the date of registration of last case and a delay of four months in submitting the proposal for such detention. It is this un-explained delay, whether short or long (especially where the detenue takes a specific plea of delay, which remains un-explained) which vitiates the detention order.

In this case, the delay in passing detention order has been sought to be explained by placing on record a copy of affidavit of Shri Gyari Lal Verma, Assistant Secretary, Department of Home (Group IX), Rajasthan Secretariat, Jaipur and it is claimed that it be treated as a part of the replay of the petition which has been filed by the respondents, which is supported by an affidavit of Shri Rajesh Sanan, Assistant Collector (Customs), who is not the concerned authority. Actually, the delay has to be explained by the concerned officer and that explanation of delay, which has been furnished by filing a copy of affidavit by Shri Gyarsi Lal Verma before the Board, clearly shows that the matter has not processed with due despatch. The State Government is guilty of laches and callousness and, therefore, that snaps co-relation between the event and passing

of the order of detention. The statement of Anwar Singh was available to them on 23-4-1992 and, therefore, the detention order should have been passed immediately thereafter and not after expiry of one year and two months. Even an affidavit filed by an un-concerned authority also results in mis-carriage of justice because that does not explain the situation in which the delay has occasioned and, therefore, the affidavit of Shri Sanan is of no consequence. Reliance in this respect has been placed on a decision of their Lordships of Supreme Court rendered in Gazi Khan alias; Chotia Vs. State of Rajasthan and another,

11. Dr. S.S. Bhandawat drew our attention to a Division Bench decision of Calcutta High Court, rendered by the Hon'ble Judges in Om Prokash Modi Vs. Union of India (UOI) and Others, wherein it has been held that if the delay in passing the order of detention is not illustrative of laches or laxity on the part of the Detaining Authority, then that order has to be sustained.

In this case, it is clear from the affidavit of Shri Gyarsi Lal Verma that the detention order has been passed with great delay and, therefore, this authority has no application to the facts and circumstances of present case.

12. Our attention was next drawn by Dr. Bhandawat to a decision of their Lordships of Supreme Court, rendered in Smt. K. Aruna Kumari Vs. Government of Andhra Pradesh and Others, There, the incident took place on 18-12-1986 and the detention order was passed on 15-5-1987. The delay of five months has satisfactorily been explained in that case but, the present is not a case where the delay has been satisfactorily explained and, therefore, this authority also has no application in the facts and circumstances of this case.

13. It is no doubt true, as held by their Lordships of Supreme Court in Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others, , that mere delay in making an order of detention by itself is not fatal and, the Court has to come to a conclusion whether the delay has made, the grounds of detention, stale or illusory or that there is no real nexus between the ground of alleged order of detention and the impugned order of detention.

In the present case, it came to the notice of the Customs authorities from the statement of the petitioner himself that he has been indulging in the trade of smuggling silver etc. and regularly employs Jabar Singh who is Jonga Jeep driver, in carrying on his activities and is receiving commission, then, not to pass the detention order for one year and two months certainly snaps the relation between the order of detention and the alleged smuggling activity. This detention order has to be passed to desist the petitioner from further indulging in alleged unlawful activities and, if such detention order was not passed for one year and two months this certainly snapped the relation between the impugned order of detention and alleged illegal activity.

14. It was next contended that the detention order was served upon the petitioner after 10 months of its issuance, and that is another ground on the basis of which the detention order should be quashed. The detention order is

dated 17-6-1993 and it has been executed on 29-4-1994 on the petitioner. The petitioner was taken into custody on 29-3-1994 in an N.D.P.S. case. The delay in executing the warrant has been explained on the ground that the accused was absconding and several searches and enquiries were made to nab the petitioner between 8-7-1993 and 31-3-1994, as mentioned in reply to para 7(e) of the petition. It has not been stated as to who made those enquiries and searches, who made efforts to apprehend the accused, no affidavit of person who was deputed for executing this detention order has been filed. On these dates, which are mentioned in reply to sub-para (e) of para 7 of the petition, who went for arrest of the accused, where has he gone, what efforts were made by him; not an iota of evidence is there about it.

15. Their Lordships of Supreme Court in *M. Ahamedkutty Vs. Union of India (UOI) and Another*, have observed that if there is delay in execution of the detention order due to abscondance of the accused, the late execution of the detention order does not vitiate the order of detention.

Now, in this case, as stated above, no body's affidavit has been filed to show that who was deputed for making efforts and what types of efforts were made to detain the petitioner. In para 7(e), clause second, of the petition, the petitioner has taken a specific plea that during the course of this period, he has been regularly attending hearings before the Economic Offences Court, Jaipur and, there is no denial of this assertion. No affidavit of any person has been filed to show that this accused has not been attending the hearings before the Economic Offences Court, Jaipur during this period nor copies of order-sheets of that court have been filed to rebut that assertion of the accused regarding his availability for execution of the impugned warrant. Under these circumstances, it has to be presumed that the petitioner has been attending the hearings before the Economic Offences Court, Jaipur and, therefore, it cannot be said that he was absconding. Thus, it is a case where no sincere efforts have been made to arrest the accused.

16. Mr. J.P. Joshi next drew our attention to a Division Bench decision of this Court rendered in *Suleman v. State of Rajasthan* (1992 (1) WLC (Raj) 745), wherein it has been held that delay of 2 months and 15 days in execution of the detention order, unless explained, vitiates the detention and the order of detention has to be quashed.

17. Our attention was next invited to a decision of their Lordships of Supreme Court, rendered in *K.P.M. Basheer Vs. State of Karnataka and another*, wherein delay of five months in execution of the detention order was held sufficient to snap the live and proximate link between the grounds of detention and purpose of detention. Their Lordships felt that if the detenu was not available for execution of the order of detention, for five months, action should have been taken u/s 7 of the Act. This was a case where the Government was moved to take action u/s 7. Here, the delay in the execution was not of five months but it is of 10 months and still the Government stated that if the accused was not

available for some more time action u/s 7 was to be taken. Thus, not to take action u/s 7 further shows that no serious efforts were made for arrest of the accused, which results in snapping the live and proximate link between the grounds of detention and purpose of detention. It was further submitted by Mr. Joshi that when the accused was in custody from 29-3-1994, why no efforts were made to detain him in this case.

18. Shri J.P. Joshi further drew our attention to a Division Bench decision of this Court in *Kishan Singh v. State of Rajasthan*, reported in 1990 (1) (Raj) LW 518, wherein there was a delay of almost 10 months in executing the detention order and that delay was held to be inordinate and the Court observed that if action has not been taken u/s 7(1) of the Act of 1974, the detention stands vitiated.

19. It was next submitted by Shri Joshi that it may be true that when detention order was issued, it may be totally valid because it is the contention of the respondents that it is not a case of stray incident but from the statement of the petitioner himself it transpires that he has been indulging in such activities regularly and has been receiving commission as transporter of the smuggled silver and he has also disclosed the source from whom he has been receiving contraband articles from across the border but in spite of all this material, detention order was passed after expiry of one year and two months and it has been served upon the petitioner after ten months of its issuance when the petitioner was arrested in an N.D.P.S. case, which proceedings were the result of a joint search of the house of the accused by Customs Department and the police. Therefore, the Customs Department was in know of the fact that a case has been registered against the detenu under the Narcotics, Drugs and Psychotropic Substances Act. Then, the possibility that the accused will be released on bail in that case or not, should have been considered by the concerned authorities and, if that has not been done, it vitiates the order of detention. In this respect, reference has been made to certain observation made in a decision of their Lordships of Supreme Court, rendered in *Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others*,

"In this case there were grounds for the passing of the detention order but after that the detenu has surrendered for whatever reasons, therefore, the order of detention though justified when it was passed but at the time of service of the order there was no proper consideration of the fact that the detenu was in custody or that there was any real danger of his release nor does it appear that before the service there was consideration of this aspect properly. In the facts and circumstances of this case, therefore, the continued detention of the detenu under the Act was not justified."

20. In this respect, Dr. Bhandawat drew our attention to a decision of their Lordships of Supreme Court, rendered in *Vijay Kumar Vs. Union of India (UOI) and Others*, wherein their Lordships observed that - the detaining authority has only to be aware of earlier detention of the accused is enough. That fact need not be mentioned in the detention order.

Here, of course, the detention order does not disclose any awareness of the earlier detention because the detention of the petitioner under the N.D.P.S. case was later in time than passing of the order of detention and, therefore, to that extent, this decision has no application.

In Ahamedkutty's case 1990) 2 SCC (supra) also, their Lordships observed that if the detenu is already in jail, the grounds of detention must show detaining authority's awareness of that fact otherwise the order of detention shall vitiate.

Here, in this case, the detention order does not show in its grounds, awareness of the detaining authority about earlier detention of the petitioner, because the impugned order of detention was of an earlier date (17-6-1993) and arrest of the accused was of a subsequent date (29-3-1994) and, thus, the decision of their Lordships rendered in Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others, holds field and the continued detention of the detenu, therefore, becomes unjustified.

21. The ground that the detention order has to be confirmed within three months of its issuance, by the State Government, as held by their Lordships of Supreme Court in Nirmal Kumar Khandelwal Vs. Union of India (UOI) and Others, has been abandoned by Shri J.P. Joshi, because in this case, the confirmation order has been passed within a period of three months of the issuance of the detention order.

22. Dr. S.S. Bhandawat further drew our attention to a decision of their Lordships of Supreme Court in Smt. K. Aruna Kumari Vs. Government of Andhra Pradesh and Others, wherein their Lordships have held that subjective satisfaction of the authority ordering detention of a person should not be lightly interfered and Courts should not substitute their wisdom in place of subjective satisfaction of the detaining authority.

Here that point does not arise. We are not called upon to substitute our wisdom for the subjective satisfaction of the detaining authority. It is clear from the statements of the detenu that he was indulging in the trade of illicit trafficking of contraband silver for commission and, thus, the detention order which has been assailed on the ground that it is a case of solitary incident, cannot be sustained and, therefore, to that extent, the contention of Shri Joshi has to be over-ruled. The authority that he has cited in support of his contention, that is, Shiv Ratan Makim Vs. Union of India (UOI) and Others, , clearly spells that, if it is not a case of solitary incident but the petitioner admitted that he engages himself in such an activity frequently to earn commission then detention order can certainly be justified. Shri Joshi further placed reliance on a decision of their Lordships of Supreme Court, rendered in Anand Prakash Vs. The State of Uttar Pradesh and others, . That was also a case of solitary incident of the alleged crime. There was no previous history or no credible information or material available on record to warrant inference that if released on bail, the accused would continue illegal activities; it was held that preventive detention cannot be allowed to supplant

criminal prosecution. Here, it is not a case that he has not been indulging in such illegal activities and, therefore, to that extent this authority has no application to the facts and circumstances of this case.

23. Keeping in view all these facts and circumstances, as there is an in-ordinate delay in passing the detention order and, as the delay in executing the order of detention has not been explained satisfactorily and, as the detaining authority has not applied its mind to the fact that earlier to the execution of the detention order the petitioner was already in Jail in an N.D.P.S. case and whether this detention will continue or he is likely to be released on bail has not been considered by the detaining authority; the detention stands vitiated. The link between the grounds of detention and the purpose for which the detenu has been detained, stands snapped. The proximity between the purpose for which the detention has been ordered and the object sought to be achieved by it, also stands snapped - ,on account of long and in-ordinate delay in executing the detention order. Consequently, the order of detention, dated 17-6-1993, is quashed. The detenu be released from detention forthwith, if he is not required in any other case or is not detained under competent orders of any other competent authority in any other case.

The Habeas Corpus petition stands disposed of.