
(1990) 04 P&H CK 0018

In the Punjab And Haryana At Chandigarh

Case No : Criminal Writ Petition No. 3112 of 1989

Avinash Chander

APPELLANT

Vs

Union of India and anr

RESPONDENT

Date of Decision : 12-04-1990

Acts Referred:

Citation : (1990) 2 AICLR 154 : (1990) 2 RCR(Criminal) 358

Hon'ble Judges : Jai Singh Sekhon, J

Advocate : H.S. Mattewal, Jai Shree Anand, Sukhbir Singh, Advocates for appearing Parties

Judgement

J.S. Sekhon, J.

1. Avinash Chander Gulati petitioner through this writ petition has sought the quashment of detention order (Annexure P5) passed against him under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (as amended), hereinafter referred to as the "COFEPOSA Act", by the Joint Secretary to Government of India. Ministry of Finance, Department of Revenue, with a view to preventing him from acting in any manner prejudicial to the augmentation of foreign exchange. This writ petition was filed before the abovereferred order of detention was served upon the petitioner. The petitioner attached the grounds of detention served upon his brother Subhash Chander Galati, copartner of the petitioner in the business of M/s. Golden Silk Store, Rainak Bazar, Jalandhar, contending that the order of detention was passed on the similar grounds as against his brother Subhash Chander Galati.

2. In the grounds of detention it is mentioned that on 25/1/1989, the officers of the Punjab Police searched the business premises of M/s. Golden Silk Store, Rainak Bazar, Jalandhar, and recovered the following documents, foreign currency and Indian currency;

i) Indian currency of Rs. 57, 590/- from the business premise of M/s. Golden Silk

Store.

ii) US dollars 2000 and Can. dollars 200 in the form of International Money JUDGMENTS and Travellers Cheques and documents from the person of Shri Rakesh Kumar Arora.

iii) A slip of paper from the person of Shri Raj Paul, employee of M/s. Golden Silk Store, Jalandhar, with certain accounts written thereon;

iv) Documents from the person of Shri Avinash Chander Gulati, partner, M/s. Golden Silk Store.

On information, the Zonal Office of the Enforcement Directorate, Jalandhar, took over the seized currency, documents etc. from the Punjab Police and Sarvshri Avinash Chander Gulati, Rakesh Kumar Arora, Raj Paul and one Ramesh Kumar Mittal son of Shri Kewal Krishan Mittal, resident of Hoshiarpur, present at the time of seizure of the above referred articles from the premises M/s. Golden Silk Store, Jalandhar were summoned under section 40 of the Foreign Exchange Regulation Act, 1973. It is noteworthy that the petitioner along with his brother Subhash Chander Gulati aforesaid are partners of the firm M/s. Golden Silk Store, Jalandhar, while S/Shri Raj Paul and Rakesh Kumar Arora are their servants. During enquiry by the Enforcement Staff, Avinash Chander Gulati, the present petitioner, admitted that he along with his brother Subhash Chander Gulati are dealing in the sale and purchase of foreign currency and in that connection several persons used to visit their business concern. It was further found that accounts regarding sale and purchase of foreign currencies are maintained by Raj Paul servant of the petitioner in code words depicting US dollars as R pound R. Pound and Sterling of M & S.C. etc. etc. During the personal search of Raj Paul, the servant of the petitioner, the police recovered one paper containing accounts in the code words on 251989. It is further averred in the grounds of detention that Rakesh Kumar Mittal, who happened to be present at the business premises of the petitioner at the time of the said raid also admitted having indulged in the sale of foreign currency to the business concern of the petitioner at the instance of Ramesh Gupta@ Meshi and that on 251989 he had purchased foreign exchange from different villagers visiting India from abroad and had delivered the same at the business concern of the petitioner when the police came into action and seized the foreign currency, Indian currency and other documents. The grounds of detention also reveal the names of certain persons business concern of Hoshiarpur and some persons of Delhi wherefrom the business concern of the petitioner through aforesaid Rakesh Kumar Mittal used to purchase the foreign currency and sell it to different persons or concerns at Delhi.

3. In the petition, it is inter alia alleged that the statements of the petitioner and his copartner Subhash Chander Gulati besides their employees Rakesh Kumar Arora and Raj Paul were taken under duress by the Enforcement Staff and the nonsupply of search authorisation warrants of the search conducted in the

business premises and residential premises of the petitioner and nonsupply of the copies of the search warrants of the search conducted in, the residential premises of Jagjit Singh, Surjit Singh and Daljit Singh, M/s. London Fashion Wears, Jalandhar, M/s. Variety Emporium had resulted in denying the petitioner of his right to file effective representation under Article 22 (5) of the Constitution of India. It is further maintained that there was no nexus between the last prejudicial activity of the petitioner and the detention order as there was a gap of more than three months between the two. Inordinate delay in the execution of the detention order was also stressed. Thus, it was maintained that the detaining authority had not applied its mind to the facts and circumstances of the case and had mechanically passed the detention order. It was also maintained that some extraneous material was taken into consideration although the gist of that material was not disclosed in the grounds of detention or in the detention order.

4. This petition was resisted by the respondents by raising a preliminary objection about its maintainability contending that the petitioner being stillabsconding had no locus standi to challenge the detention order. It was further maintained that there was reasonable nexus between the last criminal activity of the petitioner and the passing of the detention order and that detention order was passed without any delay. The delay in serving the detention order was due to the abscondance of the petitioner. It was also averred that the question of supplying copies of the search authorisation warrants to the petitioner does not arise as the detention order and the grounds of detention have not been served upon the petitioner. Therefore, it cannot be said at this stage that he had been denied the right of making effective representation. It was also explained that above referred recovery of foreign currency from the business concern of the petitioner on 251989 was not an isolated incident but the conduct of the petitioner had come to the adverse notice of the Department a number of times and. on 21.11.1989 1800 US dollars and Rs. 50,000/ were seized from the business premises of M/s. Golden Silk Store by the officers D.R.I. Amritsar.

5. During the pendency of this writ petition, the detention order was upon the petitioner on 731990 and the grounds of detention were supplied to him. The petitioner thereafter moved Cr. M. No. 60 of 1990 in W.P. No. 3112 of 1989 of placing the copy of the grounds of detention as Annexure P5 and the list of documents Annexure P6 to the parent writ petition. This application was allowed and the documents Were taken on counsel for the parties and perused the

6. I have heard the learned counsel for the parties and perused the record.

7. There is no force in the preliminary objection raised by the respondent about the maintainability of this petition as the petitioner had every right to challenge the detention order on the ground of nonapplication of mind by the detaining authority. A Division Bench of the Delhi High Court in Ram Kishore Gupta v. Administrator, UT, 1988(2) CLJ (Cr. & Rev.) 68 had observed that where the material documents were purposely withheld from the detaining authority, the

detention order was vitiated due to the nonapplication of the mind by the detaining authority and that the petitioner could challenge the same without surrendering to the order of detention. Moreover, the detention order passed against Subhash Chander Gulati, brother of the petitioner, on similar grounds had already been quashed by this Court in Cr. W. P. No. 2996 of 1989 decided on 22.11.1990. The grounds of detention in the case of Subhash Chander Gulati appended as Annexure P3 to this petition as well as grounds of detention Annexure P5 served upon the petitioner being the same, there is no logic in concluding that the present petition is not maintainable because the detention order was observed upon the petitioner at the time of filing the parent petition. Moreover, after the arrest of the petitioner, this objection does not subsist.

8. There is no force in contention of the learned counsel for the respondents that it is not one of the rarest of the rare cases where writ of mandamus should be issued for quashing the order of detention. She has relied upon the judgment of the Full Bench of the Gujarat High Court in *Ved Prakash Devkinandan Chiripal and others v. State of Gujarat and anr*, 1988(2) Recent Criminal Reports 89 , wherein it was observed that in exceptional cases, High Court can entertain petition where order of detention appeared to be void ab initio. The abovereferred view of the Full Bench of the Gujarat High Court in the case in hand is helpful to the petitioner rather than to the respondents as the order of detention is void ab initio because it suffers from the infirmity of nonapplication of mind by the detaining authority as already discussed.

9. Regarding the inordinate delay in passing the order of detention from the last activity of the petitioner and the undue delay in serving the detention order upon the petitioner, it transpires that the last activity which came to the notice of the Enforcement staff of the Custom Authorities relates to the possession of the abovereferred foreign currency on 25.1.1989. In subpara (vi) of Ground No. 11 of the Writ Petition, the petitioner had specifically averred that there is no nexus between the date of the prejudicial activity and the date of passing the detention order as the prejudicial activity related to 25.1.1989 while the detention order was passed on 7.8.1989. In the corresponding paragraph of the written statement filed by Shri Kuldip Singh, Under Secretary to the Government of India, Ministry of Finance, this delay is explained as under :

"The averments made in this para not true. The fact is that the detention order was passed by the detaining Authority after examining the full records of the case & as such there was no delay in passing the detention order. Further it is to state that the detention order was passed on 7/8/89 and the petitioner is continuously absconding and could not be detained so far and on such there is no delay in executing the detention order but the petitioner is delaying his detention intentionally".

A bare perusal of the same leaves no doubt that, there is absolutely no explanation for passing the detention order on 7.8.1989 even though the prejudicial activities of the petitioner came to the notice of the authorities on

2nd/3rd May, 1989. It is simply mentioned that the detaining authority had passed the detention order after examining full record of the case. It not acceptable that the detaining authority would in the normal course of events take more than three months in examining the records of the case and passing the detention order. Thus, this delay in passing the detention order on the part of the detaining authority would certainly reflect upon the bona fides of satisfaction of the detaining authority as held by their Lordships of the Supreme Court in *Jagan Nath Biswas v. The State of West Bengal*, AIR 1975 SC 1516. In that case the detention order was passed on 27.2.1973 even though the last activity of the detenu came to the notice of the authorities on 25.8.1972. In paragraph 2 of the judgment, the apex Court had dealt with the controversy as under :

"The incidents themselves look rather serious but also stale having regard to the long gap between the occurrence and the order of detention. One should have expected some proximity in time to provide a rational nexus between the incidents relied on and the satisfaction arrived at. This Court has repeatedly pointed out that unexplained and long delay will be fatal to the plea of subjective satisfaction. In the present case, counsel for the State Shri G.S. Chatterjee took time to furnish an explanation as to why there was such a long delay for the District Magistrate to pass the order of detention. Unfortunately, we are no wiser today than at the previous hearing. In short, we are not taken into confidence by the District Magistrate as to why there should have been such an inordinate delay. We, in turn, therefore, are not satisfied about the "bona fides of the subjective satisfaction of the District Magistrate."

Again, a Bench of the apex Court comprising of four Hon"ble Judges in *Sk. Serajul v. State of West Bengal*, AIR 1975 SC 1517 had observed that undue delay in passing the order of detention and in the actual arrest thereafter reflects adversely upon the genuineness of the subjective satisfaction of the detaining authority. In that case the last prejudicial activity related to 15.11.1972 while the order of the detention was passed on 24.8.1972 and the detention order was served upon the detenu on 22.2.1973. In Paragraph 2 of the judgment, the apex Court had dealt with this matter as under :

"This subjective satisfaction, as the grounds of detention furnished to the petitioner show, was founded on three incidents of breaking open railway wagons and looting their contents committed by the petitioner and his associates. One was an incident on 21.11.1971, the other was an incident on 24.11.1971 and the third was an incident on 15.11.1972. Though the last incident occurred on 15th January, 1972, the order of detention was not made until 24th August, 1972 and even after the order of detention was made, the petitioner was not arrested until 22nd Feb., 1973. There was thus delay at both stages and this delay, unless satisfactorily explained, would throw considerable doubt on the genuineness of the subjective satisfaction of the District Magistrate, Burdwan recited in the order of detention. It would be reasonable to assume that if the District Magistrate of Burdwan was really and genuinely satisfied after proper application of mind to

the materials before him that it was necessary to detain the petitioner with a view to preventing him from acting in a prejudicial manner, he would have acted with greater promptitude both in making the order of detention as also in securing the arrest of the petitioner, and the petitioner would not have been allowed to remain at large for such a long period of time to carry on his nefarious activities. Of course when we say this we must not be understood to mean that whenever there is delay in making an order of detention or in arresting the detenu pursuant to the order of detention, the subjective satisfaction of the detaining authority must be held to be not genuine or colourable. Each case must depend on its own peculiar facts and circumstances. The detaining authority may have a reasonable explanation for the delay and that might be sufficient to dispel the inference that its satisfaction was not genuine. But here we find that though an affidavit in reply to the petition was filed by the Deputy Secretary Home (Special) Department Government of West Bengal, no explanation was forthcoming in this affidavit as to why the order of detention was made as late as on 24th August, 1972 when the last incident on which it was founded occurred on 15th January, 1972, and why the petitioner was not arrested until 22nd February, 1973, though the order of detention was made on 24th August, 1972. M. Chatterjee, learned counsel appearing on behalf of the State of West Bengal, contended that the State was not expected to render any explanation in regard to the delay in making the order of detention and arresting the petitioner because no such complaint was made in the petition. But this is hardly an argument which the State can avail when it is called upon to answer a rule issued on a petition for a writ of habeas corpus. It is the obligation of the State or the detaining authority in making its return to the rule in such a case to place all the relevant facts before the Court and if there is any delay in making the order of detention or in arresting the detenu which is prima facie unreasonable, the State must give reasons explaining the delay. Here there is no explanation for the delay which has occurred at both stages and in the absence of such explanation, we are not at all satisfied that the District Magistrate, Burdwan applied his mind and arrived at real and genuine subjective satisfaction that it was necessary to detain the petitioner with a view of preventing him from acting in a prejudicial manner. The condition precedent for the making of the order of detention was, therefore, not satisfied, and consequently, the order of detention must be quashed and set aside."

Again, a similar controversy came under the scrutiny of the apex Court in *Anand Prakash v. The State of U.P. and ors.*, 1990(1) Recent Criminal Reports 241; JT 1989(4) SC 557. In paragraph 12 of the judgment, it was dealt with as under :

"The learned counsel also contended that there is an unexplained delay which makes the ground of detention not proximate vitiating the order of detention itself. The theft of the wire was on 14/2/1984 and the FIR was registered on 15/2/1989. On that day itself as seen from the record, Jagdish, Santosh and Munshi Sharma were shown as accused on the basis of some information. The house of Jagdish was raided on 3/3/1989 and on the same day the factory of the

detenu was raided and 20 kg. of melted wire recovered from Munshi Shama but no action was taken till 251989 against the detenu. On being arrested on 251989 the detenu moved a bail application and the detention order itself was made on 351989. Though bail was granted, in view of the detention order he could not be released from jail. In spite of the fact that the recovery statement itself was made as early as on 331989 no action was taken till 351989. Nothing more is stated in the detention order. The delay has also not been satisfactorily explained in the counter statement of the respondents. The ground instance, therefore, could not be a proximate cause for a sudden decision to take action under the National Security Act and this also vitiates the order."

In Anand Prakash's case (supra) the apex Court had held that the delay of three months in passing the detention order from the last prejudicial activity of the detenu had resulted in vitiating the order of detention itself.

10. For the foregoing reasons, as already discussed, there is absolutely no plausible explanation for explaining the delay of three months in passing the detention order from the prejudicial activity imputed to the petitioner. The matter does not rest here as the detention order dated 781989 was not served upon the petitioner till 7th March, 1990. In the return, the respondents had not alleged having obtained any warrants from the concerned authority or having taken any steps under section 7 of the COFEPOSA Act. Section 7 of the COFEPOSA Act read as under :

"7. Powers in relation of absconding persons:

(1) If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or concealing himself so that the order cannot be executed that Government may

"(a) make a report in writing of fact to a Metropolitan Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of Sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) every offence under Clause (b) of subsection (1) shall be cognizable."

A perusal of the return filed by the detaining authority simply shows that the Joint Secretary, COFEPOSA in his order dated 1211990 had approved the proposal of Sectional Officer COFEPOSA to initiate action under Sec 7(1)(b) of the Act and approved the draft proposed to be published in the Gazette of India. There is no indication available from the file whether the approved draft was published in the Gazette of India after 1211990. The detention order was passed on 781988. Thus, the attitude of the detaining authority in not initiating any action under section 7(1)(b) of the COFEPOSA Act for enforcing the presence of the petitioner would clearly adversely reflect upon the genuineness of its subjective satisfaction in passing the detention order. Thus, the detention order is liable to be quashed on this ground alone.

11. Admittedly, in the grounds of detention or in the detention order, the detaining authority had not disclosed that it also took into consideration the recovery of 1800 dollars on 2111988 from the business premises of the petitioner and his brother Subhash Gulati. On the other hand, in paragraph 2 of the counteraffidavit filed by Shri Kuldip Singh, Under Secretary to the Government of India, Ministry of Finance, it is mentioned that apart from the recovery of foreign currency from the business premises of the petitioner on 251989, previously also the activities of the petitioner came under the adverse notice of the department a number of times. On 2111988, 1800 US dollars and Rs. 50,000/ were recovered from the business premises of M/s. Golden Silk Store by the officers of the D.R.I., Amritsar. Thus, it is crystal clear that the mind of the detaining authority was influenced by the recovery of some foreign currency on 21.11.1988 from the business premises of the petitioner. There being no reference of the incident in the grounds of detention or in the order of detention, it cannot be said as to which of the incident had influenced the mind of the detaining authority in passing the detention order. These two incidents of recovery of foreign currency from the business premises of the petitioner are unseverable links in the chain of indulging in the sale and purchase of foreign exchange. Thus, the provisions of section 5A of the COFEPOSA Act are of no help to the respondents in the case in hand. Section 5A of the COFEPOSA Act reads as under.

"5A. Grounds of detention severable Where a person has been detained in pursuance of an order of detention under subsection (1) of section 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly :

(a) such order shall not be deemed to be invalid or inoperative merely because one or some of the ground is or are

(i) vague,

(ii) nonexistent,

(iii) not relevant,

(iv) not connected or not proximate connected with such person, or,

(v) invalid for any other reason whatsoever, and it is not therefore possible to hold that the Government or officer making such order would have been satisfied as provided in subsection (1) of section 3 with reference to the remaining grounds and made the order of detention.

(b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said subsection (1) after being satisfied as provided in that subsection with reference to the remaining ground or grounds."

The very perusal of the opening part of this section leaves no doubt that it cures only infirmities in one or more of the grounds of detention where the detention order is made on two or more grounds, but in the case in hand, admittedly the detaining authority has passed the detention order on the incident of 25/1/1989 regarding the recovery of some foreign currency from the business premises of the petitioner. Thus, this infirmity had resulted in vitiating the detention order, as the petitioner has been deprived of the right of filing effective representation as envisaged under Article 22(5) of the Constitution. The apex Court in *Khurdiram Das v. The State of West Bengal and others*, AIR 1975 SC 550 had dealt with a similar controversy as under :

"The answer to these questions does not present any serious difficulty if only we consider the reason why the grounds are required to be communicated to the detenu as soon as may be after the detention. Obviously, the reason is twofold. In the first place, the requirement of communication of grounds of detention acts as a check against arbitrary and capricious exercise of power. The detaining authority cannot whisk away a person and put him behind bars at its own sweet will. It must have grounds for doing so and those grounds must be communicated to the detenu, so that, not only the detenu may know what are the facts and materials before the detaining authority. on the basis of which he is being deprived of his personal liberty, but he can also invoke the power of judicial review, howsoever limited and peripheral it may be. Secondly, the detenu has to be afforded an opportunity of making a representation against the order of detention. But if the grounds of detention are not communicated to him, how can he make an effective representation ? The opportunity of making a representation would be rendered illusory. The communication of the grounds of detention is therefore, also intended to subserve the purpose of enabling the detenu to make an effective representation. If this be the true reason for providing that the grounds on which the order of detention is made should be communicated to the detenu, it is obvious that the 'grounds' mean all the basic facts and materials which have been taken into account by the detaining authority in making the order of detention and on which, therefore, the order of detention is based. To quote the words of one of us (Sarkaria J.) in *Golam alias Golam Malik v. The State of West Bengal*, W.P. No. 270 of 1974, D/1281974 (SC).

.....in the context, 'grounds' does not merely mean a recital or reproduction of a ground of satisfaction of the authority in the language of section 3 of the Act, nor is its connotation restricted to a bare statement of conclusion of fact. It means something more. That something is the factual constituent of the 'grounds' on which the subjective satisfaction, of the authority is based. The basic facts and material particulars, therefore which are the foundation of the order of detention, will also be covered by 'grounds' within the contemplation of Article 22(5) and section 8 and are required to be communicated to the detenu unless their disclosure is considered by the authority to be against the public interest."

This has always been the view consistently taken by this Court in a series of decisions. It is not necessary to burden this judgment with citation of all these decisions. it would be sufficient if we quote the following observations of Patanjali Sastri C.J. in *Dr. Ram Krishan Bhardwaj v. The State of Delhi*, AIR 1953 SC 318 :

".....the petitioner has the right under Article 22(5), as interpreted by this Court by a majority, to be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation which on being considered may give relief to him. We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained."

12. Venkatarama Ayyar, J., also pointed out in *Shamrao Vishnu Parulekar v. The District Magistrate, Thana*, 1956 SCR 644 : AIR 1957 SC 23 that construing the words grounds on which the order has been made in their natural ordinary sense.

"They would include any information or material on which the order was based. The Oxford Concise Dictionary gives the following meanings to the word 'ground': Base. foundation, motive, valid reason. On this definition, the materials on which the District Magistrate considered that an order of detention should be made could properly be described as grounds therefor,

It is, therefore, clear that nothing less than all the basic facts and materials which influenced the detaining authority in making the order of detention must be communicated to the detenu. That is the plain requirement of the first safeguard of Article 22(5). The second safeguard in Article 22(5) requires that the detenu shall be afforded the earliest opportunity of making a representation against the order of detention. No avoidable delay, no shortfall in the materials communicated shall stand in the way of the detenu in making an early, yet comprehensive and effective representation in regard to all basic facts and materials which may have influenced the detaining authority in making the order of detention depriving him of his freedom. These are the legal bulwarks enacted by the Constitutionmakers against arbitrary or improper exercise of the vast powers of preventive detention which may be vested in the executive by a law of preventive detention such as the Maintenance of Internal Security Act 1971."

13. Similar controversy came under the observation of the apex Court in *Mohd.*

Dhana Ali Khan v. State of West Bengal, AIR 1976 SC 734. The same was dealt with as under :

"We are satisfied that the District Magistrate before passing the order of detention had other materials also before him. It cannot be said to what extent the District Magistrate was influenced by the other materials and not by the material which is mentioned in the grounds of detention. Thus the order of detention suffers from a very serious infirmity which goes to the roots of the matter. The liberty of the subject being an extremely precious right, where any infraction of such a right is involved the court must act as a watchdog and sentinel on the que vive to see that every benefit of the lacunae goes to the detenu."

14. For the foregoing reasons, the detention order Annexure P5 and the resultant proceedings therefrom are ordered to be quashed by accepting this writ petition. The petitioner be set at liberty forthwith, if not required in any other case.