
(1988) 08 DEL CK 0009

In the Delhi High Court

Case No : Criminal Writ Petition No. 597 of 1987

Avinash Chander Mehra

APPELLANT

Vs

Administrator, Union Territory of Delhi and Others

RESPONDENT

Date of Decision : 11-08-1988

Acts Referred:

Citation : (1989) 17 DRJ 1

Hon'ble Judges : H.C. Goel, J

Bench : Single Bench

Advocate : Trilok Kumar and R.P. Lao, for the Appellant;

Judgement

H.C. Goel, J.

(1) By this petition under Article 226 of the Constitution of India the petitioner seeks the quashing of the order of his detention and his continued detention as passed by the Administrator, Union Territory of Delhi, respondent No. I, on June 26, 1987 u/s 3(1) read with Section 2(f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA") with a view to preventing the petitioner from engaging in transporting smuggled goods namely, gold. The facts and circumstances leading to the passing of the order of detention as stated in the grounds of detention are that on April 21, 1987 one Harpal Singh of Amritsar delivered 100 gold biscuits to the detenu at the residence of one Sukhvinder Singh alias Sukha of Amritsar for delivery to one Saleem in Delhi, which the detenu carried to Delhi on the night between April 21/22, 1987 by train. The detenu on arrival at Delhi met Saleem. Saleem stayed near a petrol pump near Ajmeri Gate, New Delhi. The petitioner went to his house in Paharganj, New Delhi and was bringing gold to be delivered to Saleem. He was intercepted by the Dri Officers when he was about to sit in a scooter to take the gold to Ajmeri Gate Petrol Pump for delivery to Saleem. This happened on April 22, 1987, 100 gold biscuits of 10 tolas each bearing foreign marking are then alleged to have been recovered from the possession of the petitioner, it is stated that the detenu was to get Rs. 5,000.00 as commission for delivery of the

said gold to him. The detenu is thus stated to have acted as a carrier for bringing the contraband gold and for delivering the same to said Saleem.

(2) The petitioner had filed a similar petition earlier under Article 226 of the Constitution for annulling his detention on September 15, 1987. That petition was dismissed as withdrawn by a learned Single Judge of this Court at the show cause stage on December 1, 1987 on an application having been moved by the petitioner in that behalf. No permission for filing a second petition in the matter was given by the Court while dismissing that petition. The present petition was thereafter filed by the petitioner on December 23, 1987. In this petition the petitioner besides taking the grounds that were earlier taken by him in his said earlier petition, has raised challenge to his detention on some new grounds. A preliminary objection was raised by the learned counsel for respondents No. 1 and 2 that the earlier petition of the petitioner having been dismissed as withdrawn by this Court, his subsequent petition i.e. the present petition is barred, including on any fresh ground. This very question arose before me recently in the case of Bhupinder Amritlal Mehta v. Union of India and others, Cr. W. 1 13/86, decided on July 29, 1988. In that case I relying on some decisions of the Supreme Court as also of a Division Bench of this court in the case of Y. Kumar v. Union of India, 1984 Cr. L.J. 1530 held that under such circumstances a second habeas corpus petition is maintainable at least insofar as challenge to the detention of the petitioner is made on any additional ground which was not taken by the detenu in his first petition and which ground itself arose during the pendency of the earlier petition. For the detailed reasons as given by me in my said judgment I hold that this petition is maintainable insofar as challenge to the detention of the petitioner is made in it on an additional ground which arose during the pendency of the earlier petition.

(3) Now, coming to the merits of the case I may straightway say that the petition is liable to be accepted on the very first ground that was urged by Mr. N.C. Chawla, learned counsel for the petitioner, as contained in para 16 of the writ petition. The admitted facts are that the petitioner made a representation dated September 16, 1987 (copy of which is annexed as Annexure E to the petition) to the detaining authority, as also to the Central Government. The representation made to the detaining authority, respondent No. 1, was rejected by him on October 13, 1987 and the order of rejection of the representation was conveyed to the petitioner on October 14, 1987. It has been contended by Mr. Chawla that there has been an inordinate delay in dealing with and disposing of the representation by the detaining authority and that the detention of the petitioner stands vitiated on that ground. Mr. A.S. Dagar, Deputy Secretary (Home), Delhi Administration filed his affidavit as a -counter on behalf of the detaining authority, respondent No. 1. The facts and circumstances as to how the representation was dealt with by the detaining authority and ultimately disposed of by him are stated in the corresponding para 16 of the affidavit of Mr. Dagar which is reproduced below :-

"WITH reference to para 16, it is submitted that there has been no inordinate delay in considering the representation dated 16-9-1987. The representation dated 16-9-87 was received in the Home Department on 18-9-87 through Superintendent, Central Jail, Tihar, New Delhi. The representation was a detailed one and detenu also sought certain information/documents and the same was sought from the sponsoring authority i.e. Dri on the same day i.e. 18-9-87. In the meantime, reference to the Advisory Board became due and his case was referred to the Advisory Board on 23-9-1987. Comments/information were prepared and copies of the documents sought by the detenu were also prepared. The comments were approved at various levels and ultimately the Directorate of Revenue Intelligence prepared the comments with copies of documents and the same were dispatched from Dri on 29-9-87 to Delhi Administration. It is submitted that 19th, 20th, 26th, 27th and 30th September, 1987 were closed days. Information sought from the sponsoring authority was received on 1-10-87, 2nd, 3rd and 4th October, 1987 were close days. The representation on the file Along with information furnished by the Directorate of Revenue Intelligence was put up to the Deputy Secretary (Home) on 5-10-87 and Home Secretary on 6-10-87 and subsequently before the detaining authority who after considering the same rejected it. The detaining authority, however, while rejecting the representation, ordered to supply certain documents demanded by the detenu in his representation on 12-10-87. The decision on the same was communicated to the detenu vide memorandum dated 13-10-87 when the file came back in the Home Department. Thus, it is clear that there has been no undue delay in considering the representation of the detenu."

A reading of this para 16 of the affidavit of Mr. Dagar shows that the presentation was received by the Home Department of the Delhi Administration on September 18, 1987 whereon comments of the sponsoring authority i.e. the Director of Revenue Intelligence having his office at New Delhi itself, were received by the Home Department of the Delhi Administration as late as on October 1, 1987 i.e. after a period 14 days from September 18, 1987. Firstly nothing has been stated in the return as filed by respondent No. I as to how did the Home Department choose to call for information/documents from the sponsoring authority on its own. Nothing has also been stated in the affidavit of Mr. Dagar as to what information and/ or documents were sent for from the sponsoring authority. As per the averments made in Mr. Dagar's affidavit it appears that some officer of the Home Department, Delhi Administration must have decided to obtain certain information and documents from the sponsoring authority. This is not the case of the detaining authority that the detaining authority had directed the Department of Home to obtain any information or any document from the sponsoring authority, being of the view that it was not possible for him to deal with and dispose of the representation of the petitioner without any such material being made available to him. I sitting with S. Ranganatban, J. in the case of U.P. Aboobacker v. Union of India CT. W. 326/86. decided on March, 27, 1987, a report of which appears in (1987) 3 (Delhi) 492, and a copy of which was placed

on the record of this case, observed that the decision as to whether a representation of a detenu should be dealt with and disposed of straightway or needed comments, and, if so, from whom, should be taken by the detaining authority to whom the representation is addressed and that no other person including the one who also may be empowered to pass an order of detention under the Cofeposa, shall on his own call for comments or call documents from the sponsoring authority. It is thus obvious that the representation was not rightly dealt with from the very beginning, inasmuch as the officials of the Home Department of the Delhi Administration ought to have placed the same before the sponsoring authority, respondent No. 1, and they should have sought his instructions as to whether any information or document was to be called from the sponsoring authority and if so, what ? It was then for respondent No. 1 to decide as to whether he required any material i.e. any document or comments of any authority for the proper decision of the representation of the detenu. There may be cases (and the present one may also fall in that category), although I am not expressing any opinion in that regard, wherein the detaining authority may not require sending for any record pertaining to the case and he may properly be in a position to dispose of the representation properly without calling for any information from the sponsoring authority. Thus, the officials of the Home Department of the Delhi Administration were not justified in assuming the said role as they did, namely that of calling for information and documents on their own from the sponsoring authority without taking any direction from the detaining authority in that behalf. Apart from this lapse on the part of the officials of the Home Department of the Delhi Administration there is a clear and inordinate and un-explained delay in dealing with the representation. As stated by me already sponsoring authority itself took 14 days, which was quite a large period having regard to the fact that the office of the Dri is also situated at Delhi itself. The detaining authority has given the first reason for this delay, viz, that after the receipt of the representation on September 18, 1987 a meeting of the advisory board had become due and the case of the petitioner was referred to the advisory board for September 23, 1987 and that the comments/information were also prepared and the comments were approved at various levels and ultimately the Directorate of Revenue Intelligence prepared the comments with copies of documents. So far as the question of reference to the advisory board is concerned, nothing could be stated by Mr. Lao as to how that was any circumstance which held up or delayed the furnishing of the required information to the sponsoring authority. Mr. Chawla, learned counsel for the petitioner, submitted that the meeting of the advisory board was infact, convened on October 19, 1987. This fact was not denied by Mr. Lao, appearing for respondent No. 1. So far as the question of making a reference to the advisory board is concerned, it is not disputed that as per Section 8(b) of the Act only an information has to be conveyed to the advisory board through the Registrar of this Court about the detaining of the particular person and about the date of which it was served. This has to be done within five weeks from the date of service of the order of detention on the detenu. Mr. Lao was unable to say

anything as to how the passing of the said information to the Registrar of this Court could delay the obtaining of the information from the sponsoring authority. As regards the question of obtaining of approval of comments at various levels, nothing is stated in the counter affidavit of Mr. Dagar as to from which official or officer from the lowest rank upwards comments were obtained and which officer had to approve them and why and under what circumstances ? Next, it is stated in the affidavit of Mr. Dagar that the comments with copies of documents were dispatched from Dri on September 29, 1987 to the Delhi Administration and September 30, 1987 was a holiday. They were accordingly received by the office of the department of Home on October 1, 1987. In the affidavit of Mr. Dagar it is also stated that in between September 18, 1987 and September 30, 1987, 19th, 20th, 26th, 27th and 30th September, 1987 were closed days, 19th and 26th were Saturdays and 20th and 27th September, 1987 were Sundays. There were usual closed days in five day a week working of the Government. From a narration of the facts as given above, it is clear that it cannot be said that the delay of 14 days in obtaining of the information/documents from the sponsoring authority, which too was not directed or desired by the detaining authority, has been satisfactorily explained.

(4) Then, again as per the affidavit of Mr. Dagar the information sought for from the sponsoring authority had been received by the Home Department of the Delhi Administration on October 1, 1987. The same was, however, placed before the Home Secretary on October 6, 1987. Nothing is at all stated as to when was the representation and the material collected by the department were actually placed before the detaining authority, respondent No. I, and on which date he passed the orders rejecting the representation of the petitioner. There was no justification on the part of the Department of Home in keeping the representation and the material with it after it had been received by them on October 1, 1987. The same ought to have been placed before the Home Secretary on that very day instead of delaying the placement of the same before the Home Secretary up to October 6, 1987. Thus, the mere fact that from 2nd to 4th October, 1987 were closed days by itself, did not satisfactorily explain the delay in the placement of the representation and the material even before the Home Secretary, Delhi Administration, on October 6, 1987 when they had already been received by his department on October 1, 1987. Then, again as mentioned by me already above nothing at all has been stated in the affidavit of Mr. Dagar as to whether the representation Along with other papers was placed before the detaining authority by the Home Department, Delhi Administration on October 6, 1987 or on which other date were they put up to the detaining authority. Thus, there is a complete absence of any Explanation whatsoever also for the delay of six days between October 6, 1987 and October 12, 1987 on which date the representation of the petitioner was rejected by the detaining authority. In view of what has been said above I hold that there has been inordinate and un-explained delay on the part of the detaining authority in dealing with and disposing of the representation of the petitioner expeditiously.

(5) I need hardly say that it is a settled law that a representation of the detenu has to be dealt with all promptitude and most expeditiously, without any loss of time and the delay in dealing with the same has to be explained satisfactorily by alleging and then proving the facts as relied upon by the detaining authority in that behalf. The Supreme Court in the case of *Harish Pahwa v. State of U.P. & Others*, 1981 Scc (Cri) 589, dealt with a similar situation. It was held that the representation of a detenu must be taken up for consideration by the detaining authority as soon as received unless it is absolutely necessary to wait for some assistance, it must be dealt with continuously until final decision is taken and communicated to the detenu. In that case the representation of the detenu was received by the State Government on June 4, 1980 which was ultimately rejected by the detaining authority on June 24, 1980 and was communicated to the detenu in jail through the detaining authority two days thereafter. No action was taken by the State Government for two days after the receipt of the representation on June 4, 1980. On June 6, 1980 comments were called for from the customs authorities with regard to the allegations made in the representation. These comments were received by the State Government on June 13, 1980. On June 17, 1980 the State Government referred the representation to its law department for its opinion which was furnished on June 19, 1980 and was ultimately rejected on June 24, 1980 on the comments of the customs authorities as obtained, as also the opinion of the law department. The case of the State Government was that the period up to June 12, 1980 was spent in obtaining the comments of the customs authorities. The representation was, thereafter under the consideration of the Government for four days from June 13, 1980 to June 16, 1980 and then of its law department from June 17, 1980 to June 19, 1980 and was thereafter under the consideration of the State Government itself for six days i.e. from June 19, 1980 to June 24, 1980. On these facts the Supreme Court observed that there was no Explanation at all as to why no action was taken in respect of the representation for the first two days of June 4, and 5, 1980 and one day of June 25, 1980 after it was rejected on June 24, 1980 as the order communicating the rejection of the representation was made two days after June 25, 1980. It was also observed that nothing was shown as to why the law department had to be consulted at all. It was also observed that it could be understood as to why the representation had to travel from table to table for six days before reaching the Chief Minister who was the only authority to decide the representation. On these facts it was held that the representation had not been dealt with continuously and expeditiously as was required to be done. The detention of the detenu was accordingly declared to be unconstitutional. There are some other decisions of the Supreme Court also in which the same view has been consistently taken. A Division Bench of this Court to which I am a party, in the case of *U.P. Aboobacker v. Union of India and Others* (supra) also took the same view and the detention of the detenu was held as vitiated under similar circumstances I may, however, mention here that the question as to whether there is an inordinate and unexplained delay, indisposing of a representation of a detenu depends on the facts and circumstances of each

case and no hard and fast rule can be laid down as regards the extent of unexplained delay which may vitiate the detention of the petitioner in conclusion I hold that the detention of the petitioner stands vitiated on the above ground, namely, that of there being an inordinate and unexplained delay on the part of the detaining authority in disposing of the representation of the petitioner expeditiously as contemplated by law. I accordingly allow the petition, set aside the detention of the petitioner and direct that the petitioner be set at liberty forthwith, if not required in any other case by any lawful order.