
(2000) 08 DEL CK 0092

In the Delhi High Court

Case No : Criminal W.P. 189 and 190 of 2000

Balvinder Singh and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-08-2000

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)

Citation : (2000) CriLJ 4759 : (2000) 55 DRJ 133 : (2000) 72 ECC 48 : (2001)
1 RCR(Criminal) 253

Hon'ble Judges : Dr. Arijit Pasayat, C.J.; Surinder Kumar Aggarwal, J

Bench : Division Bench

Advocate : Sangita Bhayana, for the Appellant; Maninder Singh and Manak
Dogra and K.C. Mittal, for the Respondent

Judgement

Arijit Pasayat, C.J.—These two habeas corpus petitions are interlinked and, the grounds of challenge and rebuttal being same, Therefore, are disposed of by this common judgment. Learned counsel for the parties made similar submissions in respect of the two petitions and requested that they may be heard and disposed of together. Petitioner in each case is interned in Central Jail Tihar, New Delhi, pursuant to detention order passed by the Joint Secretary, COFEPOSA, Govt. of India, Ministry of Finance, Department of Revenue, New Delhi (hereinafter referred to as Detaining Authority) u/s 3(1) of Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (in short the Act).

2. The basis of detention was as follows:-

Acting on the basis of specific intelligence that a consignment of contraband gold was being transported to Delhi concealed in a Mahindra Jeep bearing No. DL.8C B 5044, the officers of DRI intercepted the said jeep after it entered Delhi near Delhi Police Check post at Singhu Border on 12-2-1999 at 13-15 hours. The two occupants of the jeep including the person who was driving the jeep were escorted to DRI office at I.P.Bhawan, New Delhi along with the jeep for

conducting the search since the place of interception was not proper for this purpose. On arrival at the ground floor of I.P.Bhawan two independent witnesses were called to witness the search of the jeep and of the persons of its occupants. The person who was driving the jeep at the time of interception introduced himself as Balvinder Singh, petitioner in Crl. W. 159/2000. The other person who was sitting besides him introduced himself as Jaswinder Singh, petitioner in Crl.W. 190/2000. Both the petitioners are hereinafter referred to as detenu by their respective names. Though initially both the petitioners denied having any contraband gold they subsequently admitted concealment of gold in a cavity in the jeep. After thorough search 9 bundles wrapped with thick adhesive tapes were found in the vehicle, containing 88 yellow metal bars of 10 tolas each which were found to have markings indicating their foreign origin. A certified goldsmith was called for assaying the yellow metal bars. He tested all the 88 yellow metal bars and found them to be of 24K.9990 carats purity, totally weighing 10,260.880 grams valued at Rs. 45,04,491/-. Since both the detenus could not produce any evidence - documentary or otherwise - to show the licit import/possession/transportation, the said bars Along with cloth and adhesive tapes were seized by the officers under the provisions of Section 110 of the Customs Act, 1962 (in short Customs Act) under the reasonable belief that the gold bars were smuggled and were liable to confiscation. Some documents were also seized. Notices were issued to each of the detenus u/s 102 of the Customs Act and they gave in writing that they did not want to be searched before a Gazetted Officer or a Magistrate. Proceedings under the Customs Act were initiated and on the basis of the materials on record they were arrested and produced before a criminal court. Though lower Courts had refused bail, this Court granted bail and detenus were released from judicial custody. Both the detenus were granted bail by orders of this Court dated 13-6-1999. On the basis of material placed before him the detaining authority came to the conclusion that both the detenus had the inclination and propensity to indulge in smuggling activities and unless prevented they are likely to indulge in such prejudicial activities in future. Accordingly order of detention in each case was passed. They filed applications for speedy trial on 11-3-1999 wherein it was mentioned that both of them had given retractions in Gurumuikhi to the Superintendent, Tihar Jail on 14-2-1999 who had kept the said retractions with him and told them to give the same in Hindi or in English. In reply to a communication dated 5-7-1999 sent by DRI, the Deputy Superintendent Central Jail No. 4, Tihar intimated vide letter dated 6-7-1999 that detenu Jaswinder Singh had neither submitted any retraction in Gurumuikhi on 14-2-1999, nor was he told to submit application in Hindi or English. However, a retraction application in Hindi submitted by him on 25-2-99 was forwarded to the Addl Chief Metropolitan Magistrate's Court on 26-2-1999 by the jail authorities.

3. Representations were made to the detaining authority and the Central Government which were rejected.

4. Three points have been urged in support of the writ petitions. Firstly, it is submitted that there was unusual delay in disposal of the representations.

Though initially a stand taken about delay in disposal by both - i.e. the detaining authority and the Central Government, at the time of hearing, it was confined only to the Central Government. Secondly, it was submitted that there was unusual delay in executing the order of detention. Thirdly, it was submitted that it is not borne out from records that being conscious of the, fact that petitioners had surrendered to custody, the orders of detention were executed thereafter.

Learned counsel for the respondents submitted that the averments and submissions made by the petitioners on the aforesaid three grounds are without any merit and basis and no case has been made out for interference.

5. Before dealing with the respective stands the purpose and objective of order directing detention need no be noted so that the factual aspects can be appropriately dealt with.

Personal liberty protected under Article 21 of the Constitution is held so sacrosanct and so high in the scale of constitutional values that Courts have shown great anxiety for its protection and wherever a petition for writ of habeas corpus is brought up it has been held that the obligation of the detaining authority is not confined just to meet the specific grounds of challenge, but is required to show that the impugned detention meticulously accords with the procedure established by law. Indeed the English courts a century ago, echoed the stringency and concern of this judicial vigilance in matters of personal liberty in the following words:

"Then comes the question upon the habeas corpus. It is a general rule which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue." [Per Thomas Pelham Dales case 1881 (6) QBD 376.

It has been said that the history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is stressed in the words of Lord Denning as follows:

""Whenever one of the King's Judges takes his seat, there is one application which by long tradition has priority over all others, counsel has but to say: My Lord, I have an application which concerns the liberty of the subject and forthwith the Judge will put all other matter aside and hear it. It may be an application for a writ of habeas corpus, or an application for bail but whatever form it takes, it is heard first." (Freedom under the Law, Hamlyn Lectures, 1949).

Personal liberty, is by every reckoning the greatest of human freedoms and the laws of preventive detention are strictly constructed and a meticulous compliance with the procedural safeguards however technical is strictly insisted upon by the

Court. The law on the matter did not start on a clean state. The powers of Courts against the harsh incongruities and unpredictability of preventive detention are not embodied in merely a page of history, but a whole volume. The compulsions of the primordial need to maintain order in society without which the enjoyment of all rights, including the right to personal liberty would lose all their meaning are the true justifications for the laws of preventive detention. The pressures of the day in regard to the imperatives of the security of the State and of public order might, it is true require the sacrifice of the personal liberty of individuals. Laws that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of State provides grounds for satisfaction for a reasonable prognostication of a possible future manifestations of similar propensities on the part of the offender. This jurisdiction has been called a jurisdiction of suspicion, but the compulsions of the very preservation of the values of freedom of democratic society and of social order might compel a curtailment for individual liberty. "To lose our country by a scrupulous adherence to the written law" said Thomas Jefferson "would be to lose the law itself, with life, liberty and all those who are enjoying with us, thus absurdly sacrificing the end to the needs." This, no doubt, is the theoretical jurisdiction for the law enabling preventive detention. But the actual manner of administration of the law of preventive detention is of utmost importance. The law has to be justified by the genius of its administration so as to strike the right balance between individual liberty on the one hand and the needs of an orderly society on the other. But the realities of executive excesses in the actual enforcement of the law have put the Courts on the alert, ever ready to intervene and confine the power within strict limits of the law both substantive and procedure. The paradigms and value judgments of the maintenance of a right balance are not static but vary according as the pressure of the day and according as the intensity of the imperative that justify both the need for and the extent of the curtailment of individual liberty. Adjustments are consistently made and reviewed. No law is an end in itself. The Inn that shelters from the right is no journey's end and the law, like the traveler must be ready for the morrow.

6. As to the approach to such laws which deprive personal liberty without trial the libertarian judicial faith has made its choice between the pragmatic view and the idealistic view and the idealistic or doctrinaire view. The approach to the curtailment of personal liberty which is an axiom of democratic faith and of all civilized life is an idealistic one for, loss of personal liberty deprives a man of all that is worth living for and builds up deep resentments. Liberty belongs what correspond to man's innermost self. Of this idealistic view, in the judicial traditions of free worlds Justice Douglass said:

"Faith in America is faith in her free institutions or it is nothing. The Constitution we adopted launched a daring and bold experiment. Under the compact we agreed to tolerate even ideas we despise. We also agreed never to prosecute people merely for their ideas or beliefs." (see: On misconception of the Judicial

function and the Responsibility of the Bar, Columbia Law Review, Vol 59 p232).

Judge Stanley H. Fold of the New York Court of Appeals said:

"it is a delusion of think that the nation's security is advanced by the sacrifice of the individual's basic liberty. The fears and doubts of the movement may look large, but we lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees" (Quoted by Justice Douglas at p.233 On Misconception of the Judicial Function and the Responsibility of the Bar, Columbia Law Review, Vol 59).

7. It was a part of the American Judicial faith that the Constitution and nation are one that it was not possible to believe that national security did require what the constitution appeared to condemn. Under our Constitution also, the mandate is clear and the envoy is left under no dilemma. The Constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of States security public order disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions. In Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, , Bhagwati J. spoke of this judicial commitment:

"The Court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade." "This is an area where the Court has been most strict and scrupulous in ensuring observance with the requirement of the law and even where a requirement of the law is breached in the slightest measures, the court has not hesitated to strike down the order of detention."

In Vijay Narain Singh Vs. State of Bihar and Others, Justice Chinnappa Reddy in his concurring majority view said:-

".....I do not agree with the view that those who are responsible, for the national security or for the "maintenance of public order must be the sole judges of what the national security or public order requires. It is too perilous a proposition. Our Constitution does not give as carte blanche to any organ of the State to be the sole arbiter in such matter...."

"....There are two sentinels, one at either end. The legislature is required to mark the law circumscribing the limits within which persons may be prevent detained and providing for safeguards prescribed by the Constitution and the Courts are required to examine, when demanded, whether there has been any excessive detention, that is whether the limits set by the Constitution and the legislature have been transgressed...."

In Hem Lall Bhandari Vs. State of Sikkim and Others, it was observed:

"It is not permissible in matters relating to the personal liberty and freedom of a citizen to take either a liberal or a generous view of the lapses on the part of the officers..."

8. The writ of habeas corpus was called by Blackstone as the great and efficacious writ in all manner of illegal confinement. It really represents another aspect of due process of law. As early as 1839, it was proclaimed by Lord Denman that it had been for ages effectual to an extent never known in any other country. Lord Halsbury L.C. stated in *Cox v. Hakes*, [1890] 15 AC 506 that the right to an instant determination as to the lawfulness of an existing imprisonment is the substantial right made available by this writ. Article 22 of the Constitution confers four fundamental rights on every person, except in two cases mentioned in Clause (3), as essential requirements and safeguards to be followed when it is necessary to deprive any person, for any cause whatsoever and for, however brief a period, of high personal liberty by placing him under arrest or keeping him in detention. Those are: (i) to be informed, as soon as may be, of the grounds of such arrest; (ii) not to be denied the right to consult and to be defended by a legal practitioner of his choice; (iii) to be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of the Magistrate, and (iv) not to be detained in custody beyond the said period of 24 hours without authority of a Magistrate, Clause (1) and (2) contain the guarantee of the four fundamental rights enumerated above. Clause (3) contains two exceptions and provides that the constitutional guarantees do not apply to (a) enemy aliens, and (b) persons arrested or detained under any law providing for preventive detention. Clauses (4) to (7) are devoted to laying down certain fundamental principles as to preventive detention and guaranteeing certain fundamental rights to persons who are arrested under any law for preventive detention. The fundamental rights guaranteed by Clauses (4) to (7) to persons detained under any law for preventive detention relate to the maximum period of detention, the provisions of any Advisory Board to consider any report on the sufficiency of the cause for detention in certain cases, the right to be informed of the grounds of detention and the right to have the earliest opportunity of making a representation against the order of detention. Preventive detention is an anticipatory measure and does not relate to an offence while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the Executive is convinced that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by the law. The action of Executive in detaining a person being only precautionary, the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct, the failure to conform to which should lead to detention. The satisfaction of the detaining authority, Therefore is a purely subjective affair. The detaining authority may act on any material and on any information which may merely afford basis for a sufficiently strong suspicion to take action but may not satisfy the test of legal proof on which alone a conviction for offence will be tenable. In case of preventive detention of citizen Article 22(5) of the Constitution enjoins the obligation of

appropriate Government or of detaining authority to accord the detenu earliest opportunity to make a representation and to consider that representation speedily. The right to make a representation implies the right of making an effective representation. It is the Constitutional right of the detenu to get all the grounds on which the order has been made. As has been said by Benjamin Cordozo, "A constitution states or ought to state not rules for the passing hour, but the principles for an expanding future". The concept of grounds used in the context of detention in Article 22(5) has to receive an interpretation which will keep it meaningfully in tune with contemporary notions of the realities of the society and the purpose of the Act in the light of concepts of liberty and fundamental freedoms. While the expression "grounds" for that matter includes not only conclusion of fact but also all the "basis facts" on which those conclusions were founded; they are different from subsidiary facts or further particulars or the basic facts. The detenu is entitled to obtain particulars of the grounds which will enable him to make an effective representation against the order of detention.

9. Coming to the first ground relating to delayed disposal of the representation by the Central Government, a few relevant dates need to be noted. Representation dated 15-12-1999 was forwarded by Supdt Jail vide letter dated 16.12.1999 and was received on the same day by the detaining authority. Under orders of the said authority, the representation was sent to the sponsoring authority for comments on 17.12.1999. The comments of the sponsoring authority became available on 24.12.1999. 25th and 26th December, 1999 were holidays. The representation was put up by the Section to the Under Secretary concerned on 27.12.1999. The Under Secretary concerned processed and put up the representation to the Detaining Authority on 28.12.1999. The Detaining Authority rejected the representation on 29.12.1999 and on the same day the detenu were informed. In view of this factual position as indicated above, grievance was made by the detenus only in relation to the disposal by the Central Government. Representation was simultaneously processed for consideration by the Central Government. The Under Secretary concerned submitted the case file to the Deputy Director General on 28.12.1999 and the file was put up to the Finance Secretary on the same day. But the Finance Secretary was away on tour from 25.12.1999 up to 3.1.2000. On his return he rejected the representation on 5.1.2000 and the detenus were informed about the same on that very day. It is the case of the petitioners that even if the Finance Secretary was on tour, files could have been made available to him, wherever he was and due promptitude was not exercised. Strong reliance is placed on the decision of Apex Court in *Rajammal v. State of Tamil Nadu*, 1999 SC 684. In that case, Explanation that there was delay of five days on account of Minister being on tour was not accepted as a valid ground. Though sacrificially the decision appears to be applicable to the facts of the case, but on closer examination it is found to be not so. In that case as indicated in para 10 of the judgment, the Minister had received the file while he was on tour. The order was passed on 9.2.1998. As

there was no Explanation for the delay between 9.2.1998 and 14.2.1998 when the Deputy Secretary received it and thereafter when the Minister received it on tour. There being no Explanation for inaction, adverse inference was drawn. In the case at hand, material has been placed before us which in fact is not denied by the learned counsel for the detenus that the Finance Secretary who alone was competent to deal with the representation had gone out on tour to Bombay on 25.12.1999 and his tour programme from Bombay to Puna and Goa was to be decided at Bombay. It is fairly accepted that 1st and 2nd January, 2000 were holidays and the Finance Secretary returned on 3.1.2000 and disposed of the representation on 5.1.2000 after his return. This is not a case where it can be said that there was any unexplained period showing inaction. As observed in Rajammal's case (supra), it is not the period taken for disposal which is relevant, what is relevant is to find out if for any period there was inaction and even longer delay can be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned. In the background of what has been stated above, we hold that there was no unexplained delay in disposal of the representations. The first plea is accordingly rejected. That brings us to the other two grounds of challenge.

In view of the objective of preventive determination as set out above, it becomes absolutely imperative on the part of detaining authority as well as executing authorities to be very vigilant and keep their eyes open and alert, and not to turn a blind eye in securing the detenu and executing the detention order, because any indifferent attitude on the part of detaining authority or executing authority will defeat the very purpose of the preventive action and turn the detention order as a dead letter and frustrate entire proceedings. There must be a live and proximate link between the grounds of detention alleged by the detaining authority and avowed purpose of detention viz. prevention of smuggling activities. Link is snapped if there is long and unexplained delay between date of order of detention and arrest of detenu. In such cases, order of detention can be struck down, unless grounds indicate a fresh application of mind of the detaining authority to the new situation and changed circumstances. But where delay is not only adequately explained, but is also found to be the result of recalcitrant or refractory conduct of detenu in evading arrest, there is warrant to consider the link not snapped but strengthened (see Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another, Whether delay was unreasonable or not depends on the facts and circumstances of each case. If there is unreasonable delay between date of order of detention and date of arrest of detenu, such delay, unless satisfactorily explained, throws a considerable doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing detention order and consequently renders detention order bad and invalid because live and proximate link between grounds of detention and purpose of detention is snapped in not arresting detenu.

10. The detention orders were passed on 20-7-1999 and undisputedly executed on 27-11-1999. Going by the period only, time involved appear to be unusually

long but certain interesting aspects have been highlighted in the counter-affidavit which throw beacon light on the sharp practice adopted by the detenus.

It is revealed that the detenus were to appear before the learned Addl. Chief Metropolitan Magistrate on 27-7-1999 but there was no appearance on medical grounds. On 2-8-1999 the detenus appeared and surrendered to judicial custody. Though the detenu had been granted bail earlier by order of this Court on 23-6-1999, for reasons best known to them, they surrendered to judicial custody and applied for cancellation of bail bond to give an impression to the detaining authority that the detenus had no intention of getting released. The case was posted to 16-8-1999. An impression was tried to be generated that the detenus were going to remain in the judicial custody and Therefore on 5-8-1999 the detaining authority took up for consideration question of execution of the detention order while the petitioner were in judicial custody. Keeping in view the dictum laid down be Apex Court in Vinod Singh v. District Magistrate Dhanbad and Ors. 1986 SCC 490 case the detaining authority was, as indicated above under the impression that till 16-8-1999 nothing was going to happen and detention order need not be executed. The detaining authority filed an application before the Addl. CMM on 11-8-1999 that the Department may be kept informed in case the detenus file application for bail. The application was accepted and the same was directed to be placed on record. On 16-8-1999 a representative of the Department came to know that the detenus had already been released on bail on 7-8-1999 on the basis of an application dated 6-8-1999 for restoration of the personal bond which he had earlier got cancelled. By the time the Department got knowledge and started looking for the detenus they were not available. As they remained untraceable, the Departmental authority took action u/s 7(1)(b) and 7(1)(a) of the Act on 7-9-1999 and 20-9-1999 respectively. Finally the detenus surrendered in the Court on 25-11-1999. On 26-11-1999, question whether service of detention order was necessary was considered and order was executed. In the aforesaid background it cannot be said that there was unusual delay in execution of the detention order or that the said order was passed while detenus were in judicial custody.

11. In matters where the detention orders are passed in relation to persons who are already in jail under some other laws, the detaining authorities should apply their mind and show their awareness in this regard in the grounds of detention, the chance of release of such persons on bail and stating the necessity of keeping such persons in detention under the preventive detention laws. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case. Preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order or preventing smuggling activities, etc., ordinarily, it is not needed when detenu is already in custody. The detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order. If the detaining authority is reasonably

satisfied on cogent materials that there is likelihood of his release, and in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging in such prejudicial activities the detention order can be validly made. When the detention order in respect of a person already in custody does not indicate that the detenu was likely to be released on bail, the order would be vitiated (See N. Meera Rani Vs. Government of Tamil Nadu and Another, Dharmendra Suganchand Chelawat and another Vs. Union of India and others, . The point was gone into detail in Kamarunnissa and Others Vs. Union of India and another, The principles were set out as follows. Even in the case of a person in custody, a detention order can be validly passed

(1) if the authority passing the order is aware of the fact that he is actually in custody;

(2) if he has reasons to believe on the basis of reliable material placed before him (a) that there is a real possibility of his release on bail, and (b) that on being released he would in all probability indulge in prejudicial activities, and (3) if it is felt essential to detain him to prevent him from so doing. If an order is passed after recording satisfaction in that regard, the order would be valid. In the case at hand fact situation shows how detenus like chameleons changed colours frequently i.e. got bail, went back to custody cancelling bail bonds and again got bail. Records show that ultimately when detenu surrendered to custody on 25-11-1999, orders of detention were executed, after detaining authority considered the aforesaid aspect and directed execution of the order.

12. Learned counsel for the detenus pressed reliance on a decision of this Court in Mansoor Ahmad Khan v. UOI and Ors. Crl Writ Petition No. 452/96 decided on 13-3-1997. It was contended that with reference to the said decision that when the second order of detention is passed absence of restrain the said order that the petitioner had a right of representation against additional ground was fatal. By analogy, the learned counsel for the detenus submitted that the detention order which was executed on 27-11-99 in fact was second detention order because the order was executed after a long time, and the fact that the detenus were in judicial custody was not considered. We find the decision of this Court in Mansoor Ahmad Khan, referred above has no application to the facts of the case. Said decision was rendered in conceptually different situation. A judgment is an authority for what it decides and not for something which may inferentially be called from it. The fact situation is contextually different and the decision has no application.

13. All the three points urged in support of the petitions have no merit as highlighted above.

14. The petitions deserve dismissal, which we direct.