
(1988) 04 DEL CK 0031

In the Delhi High Court

Case No : Criminal Writ Petition No. 521 of 1987

Barikad Abdul Rahiman

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-04-1988

Acts Referred:

Citation : (1988) 35 DLT 80 : (1988) 14 DRJ 333

Hon'ble Judges : M. Sharief-ud-din, J

Bench : Single Bench

Advocate : Harjinder Singh, Rohit Kochhar, P. Dayal and G.Prakash, for the Appellant;

Judgement

Malik Sharief-ud-Din, J.

(1) The petitioner has challenged in this petition the detention order dated 30th of January 1987 passed by the State of Kerala in pursuance of which the petitioner was taken into actual detention on 20th of August 1987. The detention order was passed with a view to preventing the petitioner from engaging in transporting and keeping smuggled goods and dealing in smuggled goods otherwise than by engaging in transporting and keeping smuggled goods, and it was passed under Sections 3(1)(iii) and 3(I)(iv) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

(2) The detention order came to be passed in respect of an incident dated 11th of April 1986 when the customs authorities are alleged to have recovered 21 gold biscuits of foreign make and Indian currency worth Rs. 24,100.00 from the possession of the petitioner and his accomplice. On investigation it was found that the petitioner along with some other persons was indulging in smuggling of foreign goods. It was in these circumstances that the Government of Kerala thought it absolutely necessary to detain the petitioner with a view to prevent him from indulging in this type of prejudicial activities.

(3) With a view to properly proceed with the point involved I find it necessary to

make a reference to certain dates which do assume importance on the facts and circumstances of this case. As indicated above the incident took place on 11th of April 1986. The petitioner was taken into custody on the same day and within a few days he was admitted to bail. Long thereafter on 6th of October 1986 the petitioner was served with a show cause notice and the petitioner filed reply thereto. The Court is told by the State of Kerala that the investigation was prolonged in the case because one of the accused P. Moidu failed to turn up even after issuing repeated summons to him. In the grounds of detention in para 7(b) it is stated that the first summons was issued to the said P. Moidu on 12th of May 1986 which was returned undelivered on 19th of May 1986, and fresh summons was issued to him on 5th of July 1986 which was served upon the said person by pasting it on the front door on 11th of July 1986 but he failed to comply. The affidavit of the State of Kerala goes to indicate that the sponsoring authority recommended action under Cofeposa on 16th of December 1986 and after it was processed by the Screening Committee the detention order came to be passed on 30th of January 1987. May I repeat that the detention order was thereafter actually executed on 20th of August 1987 and a declaration u/s 9(1) of the Cofeposa was made on 18th of September 1987. The other details regarding the making of representation and decisions thereon are not important for my purpose.

(4) The petitioner has assailed the validity of the detention order on a number of grounds. But since I am impressed with one of the grounds and find myself in complete agreement with Mr. Herjinder Singh, learned counsel for the petitioner, that the detention order is vitiated I would like to decide this petition on that solitary ground without going into the merits or otherwise of the remaining contentions.

(5) Mr. Herjinder Singh contends that there has been a long and unexplained delay—firstly in passing the detention order, and secondly, in the execution of the detention order—and as such there is no proximate nexus between the need to detain and the purpose sought to be achieved. His contention is that the detention order essentially is made with a view to prevent a citizen from indulging in prejudicial activities and since the purpose is to prevent such activities and not to punish the delay : according to him in the passing and execution of detention order would amount to imposing a penalty upon a citizen and punish him which is not permissible. The law on the point of delay is settled. The law as I understand is that there should be no delay either in passing of the detention order or execution thereof. But the delay by itself may not be fatal if it is properly explained and could not be avoided. What constitutes a fatal delay will, of course, depend upon the facts and circumstances of each and every case and there can be no hard and fast rule in this regard. It is this test which is to be applied to the facts of this case to find out whether the detention order stands vitiated or not.

(6) In the present case the plea on the point of delay in passing of detention

order and the execution thereof has been specifically raised by the petitioner and it has been explained by the State of Kerala in its counter affidavit. The respondents. State of Kerala, has stated that one P. Moidu, one of the accused, did not turn up to give evidence even after issuing repeated summons to him and as such there was unavoidable delay in completion of the investigation. It has further been stated that after completion of the investigation the names of the detenu and the others were proposed by the sponsoring authority on 16th of December 1986 for action under Cofeposa and that the detention order was thereafter passed on 30th of January 1987 when the case was processed by the Screening Committee. It has further been explained that the detention order could not be executed till 20th of August 1987 because the petitioner was absconding. Learned counsel for the respondents have tried to explain that in this manner the delay was unavoidable and it has been properly explained.

(7) On a careful consideration of the Explanation I am of the view that the Explanation is far from satisfactory. It would appear from ground No. 7(b) that the last attempt to procure the attendance of P. Moidu, if at all his presence was necessary, was made on 11th of April 1986. The Court is not told that thereafter any attempt was made to procure the presence of the aforesaid person. The Court is told that he was required in investigation for purposes of evidence. But it appears that his evidence was not at all recorded thereafter and even without his evidence the investigation was completed only on 16th of December 1986. What was happening between 11th of April 1986 or at least between 11th of July 1986 to 16th of December 1986 and thereafter to 30th of January 1987, has nowhere been explained. Only a general statement is made about the completion of the investigation and the entire Explanation is couched in a very vague language and the Court is not taken into confidence as to what exactly was happening throughout this period. This shows that there has been an unexplained and unreasonable delay in passing of the detention order.

(8) The position is no better in so far the execution of the detention order is concerned. The detention order was actually executed on 20th of August 1987, almost 8 months after it was passed. It would appear from the enclosures to the affidavit of State of Kerala that even though the detention order was passed on 30th of January 1987 it was endorsed to the District Superintendent Police concerned on 16th of February 1987 without explaining as to what the detaining authority was doing during these 16 days. It would appear that thereafter till the month of May there was no communication between the Superintendent Police and the detaining authority and total indifference was shown to the urgency of the execution of the detention order as if it was a forgotten chapter. It was only in the month of May that the authorities awoke to send a reminder to the District Superintendent Police for the execution of the detention order. On 20th of May 1987 the Superintendent of Police concerned writes that the detenu's whereabouts are not known. In normal course having come to know that the detenu was absconding the proper way of dealing with the matter was to act according to law and initiate proceedings u/s 7 of the COFEPOSA. Instead of

following the statutory provisions the detaining authority on 25th of May 1987 seeks the advice of Collector of Customs as to whether action u/s 7 of the Cofeposa should be initiated against the detenu. On 12th of June 1987 the Collector of Customs advised him to initiate action. u/s 7(1) of the COFEPOSA. Even thereafter no action u/s 7(1) is taken and the Court is not taken into confidence as to what happened between 12th June 1987 to 20th of August 1987 when the detention order was actually executed. This clearly shows that total indifference was shown towards the execution of the detention order. In the circumstances of this case one really wonders whether there was really any need for passing the detention order. If the authority was satisfied that there was immediate need to pass the detention order with a view to prevent a mischief it ought to have been equally alert in showing keenness for the expeditious execution of the detention order. In the light of these facts and circumstances of this case I am of the view that on this ground of delay alone the detention order stands vitiated. The petition is allowed and the continued detention of the petitioner is quashed. The detenu shall be released forthwith if not required in any other case.

(9) Before parting with this order I must take notice of the objection raised by Mr. G. Prakash, learned counsel for the State of Kerala, that this Court has no jurisdiction. According to him the detention order has been passed by the State of Kerala and it is only the High Court of Kerala which has jurisdiction to entertain this petition. I do not find myself in agreement with Mr. Prakash, learned counsel for the State of Kerala as the declaration, u/s 9 of the Cofeposa has been passed by the Central Government which has the effect of prolonging the detention order by one more year. In practical terms the detention order has merged in the said declaration made u/s 9. The Central Government being seated at Delhi the objection is over-ruled.