

(1992) 01 DEL CK 0055

In the Delhi High Court

Case No : Criminal Writ Petition No. 123 of 1991

Bhurpa Tsewang Lama

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 17-01-1992

Acts Referred:

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

Constitution of India, 1950 — Article 226

Citation : (1992) 46 DLT 370

Hon'ble Judges : Dalveer Bhandari, J

Bench : Single Bench

Advocate : Sangeeta Nanchaha, Madan Lokur and K.K. Manan, for the Appellant;

Judgement

Dalveer Bhandari, J.

(1) The petitioner has preferred a writ petition, under Article 226 of the Constitution of India and has prayed, inter-alia, that writ of Habeas Corpus be issued, quashing an order of detention dated January 16, 1991, passed by the Joint Secretary to the Government of India, under Sec, 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, with a view to prevent him from smuggling goods and also preventing from engaging and transporting, concealing and keeping smuggled goods.

(2) On October 26, 1990, the petitioner was intercepted at the green channel near the exit gate and as a result of search of his luggage seven gold biscuits and two gold chains collectively weighing 1354 grams, valued at Rs. 4,49,528.00 were allegedly recovered.

(3) The petitioner submits that he has been falsely implicated in the case and was forced/coerced to make a voluntary statement, u/s 108 of the Customs Act, 1962. It was further submitted that the impugned order is illegal and is liable to be quashed.

(4) The petitioner has submitted that the detention order is liable to be quashed on the sole ground of undue and explained delay in considering his representation which has consequently led to infringement and violation of his fundamental right under Article 22(5) of the Constitution.

(5) The petitioner submits that he has sent a representation to the Detaining Authority through Superintendent, Jail on February 4, 1991. On February 14, 1991, the petitioner submits that he had sent another representation through his advocate to respondent no. 1. The representation dated February 4, 1991, was rejected on March 5, 1991. There is no Explanation whatsoever, for the delay in consideration of the representation. The petitioner in ground no. 3 specifically has made the grievance of delay in consideration of his representation. Ground III of the writ petition is set out as under :

"THAT the petitioner/detenu says and submits that he sent a representation dated 4.2.1991 (annexure D) to the detaining authority through Jail Superintendent whereby besides demanding the order of detention and grounds of detention, in a language known to him, a prayer was made for the revocation of the impugned order. However, till the filing of this writ petition, the petitioner has not received any reply from the detaining authority. It is submitted that it is enjoined upon the respondents to show to this Hon'ble Court that representation of the detenu was dealt with continuously till its final disposal and communication thereof to the detenu and on their failure to do so, the respondents would render the impugned detention order illegal and void."

(6) In order to test the veracity of the argument of learned Counsel for the petitioner, it would be proper to immediately refer to the counter affidavit which has been submitted by Mr. R.P. Kapur, Undersecretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi dated 27th May, 1991. Reply, as submitted by respondent of Ground No. III of the writ petition, it extracted as it is and set out as under :

"WITH regard to ground (ii) para 3, I say that the representation was actually dated 8.2.91, instead of 4.2.1991 as alleged. I further say that in any event the said representation was duly considered by the detaining authority. A memorandum to this effect was issued to him on 5.3.1991 stating therein that his representation has been carefully considered by the Central Government but it was regretted that the same was rejected. It was also mentioned that all the documents were supplied to him in Hindi as he had stated in his voluntary statement that he can understand and speak Hindi. Therefore, the question of supplying the grounds and documents in Nepali language did not arise at all."

(7) In the entire counter-affidavit, no Explanation whatsoever has been mentioned for the delay in consideration of the petitioner's representation. Though, the office of the Detaining Authority and the Sponsoring Authority are admittedly within the metro police of Delhi even then, it took more than 28 days in considering the petitioner's representation. There is absolutely no

Explanation ,whatsoever, for the delay in consideration of the representation. This long unexplained delay is clearly vocative of the petitioner's fundamental right as enshrined under Article 22(5) of the Constitution.

(8) The learned Counsel for the petitioner has placed reliance on large number of decisions, pronounced by the Supreme Court and this High Court.

(9) Ms. Sangeeta Nanchahal. who appeared for the petitioner, has placed reliance on the decision of the Supreme Court in Mahesh Kumar Chauhan alias Bante v. Union of India & Others 1990 (2) Cri 472. In this case, there was unexplained delay of 17 days and the Court quashed the detention order on the baaisof 17 days unexplained delay. This Court, while rendering the detention order invalid observed as under :

"REVERTING to the facts of the present case as submitted by the learned Counsel, except merely mentioning that the representation was forwarded to the concerned sponsoring authority on 25.8.1989 and the comments from the sponsoring authority was received by the Department on 11.9.1989, there is absolutely no Explanation as to why such a delay had occurred. Therefore, in the light of the proposition laid down in Rama Dhondu Borade's case (albeit), we have no other option except to allow this appeal on the ground that this undue and unexplained delay is in violation of the constitutional obligation enshrined in Article 22(5) of the Constitution of India rendering the impugned order invalid."

(10) The learned Counsel has also placed strong reliance on Rama Dhondu Borade v. V.K. Saraf Commissioner of Police and Others 1989 (3) S.C.C.137. The detention order in the said case was also quashed for the unexplained delay of 10 days. The learned Counsel has also referred earlier Judgments of the Supreme Court, namely. Frances Coralie Mullin Vs. W.C. Khambra and Others, Harish Pahwa v. State of U.P. & Ors. (AIR 1981 Sc 1126), Aslam ahmed Sahire Ahmed Sadik v. Union of India and Others 1989 (2) S.C. 34 and Pratul Kumar Sinha v. State of Orissa,). The conclusions arrived in all these cases apply with equal force to the facts and circumstances of present case that unexplained delay in consideration of the representation of the petitioner renders detention order invalid.

(11) The learned Counsel also placed reliance on the judgment of this Court, delivered by Arun B. Saharya, J. (in Criminal Writ Petition No. 33 of 1990 decided on March 12. 1991 and (Criminal Writ Petition No. 447 of 1990 decided on February 8. 1991). In these two cases the learned Judge has discussed all leading cases of the Supreme Court and came to the conclusion that a breach on the part of the Detaining Authority in complying with the requirements of Article 22 (5) of the Constitution of India would vitiate the detention order invalid.

(12) The learned Counsel, appearing for the petitioner, has also invited my attention to a Division Bench judgment of this Court, passed in (Criminal Writ Petition No. 450 of 1991 on December 5, 1991). to this case also, the Court observed that there is unreasonable unexplained delay in disposing of the

representation, the order of detention which has to be quashed on that ground alone.

(13) The learned Counsel for the respondent has brought to the notice of the Court a judgment of the Supreme Court in Madan Lal Anand Vs. Union of India and others, . The Court's observations are set out as under :

"OCCASSIONAL observations made by this Court that each day's delay in dealing with the representation must be adequately explained are meant to emphasise the expedition with which the representation must be considered and not that is a magical formula, the slightest breach of which must result in the release of the detenu,"

The ratio of this case has no application to the facts and circumstances of the present case because in the instant case there is no question of not adequately explaining each day's delay but there is no Explanation ,whatsoever, for the delay of more than 28 days.

(14) The Counsel for the petitioner also placed reliance on the judgment of the Supreme Court in Gazi Khan alias; Chotia Vs. State of Rajasthan and another, . In this case also the Court has considered all earlier judgments and even 7 days unexplained delay was considered unreasonable and the detention order was vitiated on that ground.

(15) On perusal of all these judgments, the legal proposition, which emerges is crystal clear that long unexplained delay is clearly vocative of the petitioner's fundamental right under Article 22(5) of (he Constitution of India. In this view of the matter, the petitioner was justified in not urging the other grounds, taken in the petition. Therefore, the impugned detention order dated January 16, 1991, is hereby quashed. The petitioner shall be set at liberty forthwith unless he is required to be kept in custody for some other case. Consequently, Rule is made absolute and the writ petition is allowed with costs. Counsel's fee Rs. 2,200.00
Petition dismissed