
(2003) 02 AHC CK 0153

In the Allahabad High Court

Case No : Habeas Corpus writ Petition No. 44708 of 2002

Brij Kumar Jaiswal

APPELLANT

Vs

Superintendent, District Jail and Others

RESPONDENT

Date of Decision : 17-02-2003

Acts Referred:

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 —
Section 3(1)

Citation : (2003) CriLJ 2681 : (2003) 3 RCR(Criminal) 127

Hon'ble Judges : U.S. Tripathi, J;D.P. Gupta, J

Bench : Division Bench

Advocate : D.S. Mishra and Chandrakesh Mishra, for the Appellant; A.G.A., for the Respondent

Final Decision : Allowed

Judgement

U.S. Tripathi, J.—The petitioner has filed this petition for issuance of a writ of habeas corpus for his production before this Court and release challenging the validity of his detention order dated 1-7-2002 passed by respondent No. 2 u/s 3(1) PITNDPS ACT, 1988 and his detention in pursuance of the said order.

2. The petitioner was served with the grounds of detention on the basis of which he was detained u/s 3(1) PITNDPS Act, which disclosed that on 29-3-2002, the Circle Officer, Bhelupur and police of P.S. Lanka, district Varanasi got information through informer that the petitioner, a notorious trafficker of heroin was present in his house in Mohalla Saket Nagar along with huge quantity of heroin" and was waiting for purchasers and that in case search was made he would be apprehended along with heroin. Believing on above information, the Circle Officer and the police party tried to search witnesses, but none was available. The house of petitioner was raided by the police party headed by Circle Officer and on entering into the house the petitioner and his son Deepak were found preparing small packets (puriyas) of heroin. The petitioner and his son were arrested at about 9 p.m. and on their personal search, the petitioner was found in

possession of 750 grams heroin kept in a plastic bag and Deepak was found in possession of 250 grams heroin kept in another plastic bag. Sample was taken from each set of recovered hereoin and it were sealed in different packets. The petitioner and his son were arrested informing that they were involved in the offence punishable under Sections 8/21 N.D.P.S. Act. The samples of the heroin were sent to Forensic Science Laboratory, Mahanagar, Lucknow for chemical analysis and on analysis it was found heroin. The petitioner was in jail in connection with Case Crime No. 54 of 2001 under Sections 8/21 N.D.P.S. Act, P.S. Lanka and had moved application on 29-10-2001 for his bail before the Special Judge, N.D.P.S. Act, which was rejected. There was every possibility that the petitioner would move second bail application and would be released on bail and that after release on bail he would again indulge in similar activities of illegal trafficking in Narcotic Drugs and Psychotropic Substances. Therefore, the State of Uttar Pradesh was satisfied that it was necessary to detain the petitioner u/s 3(1) PITN.D.P.S. Act.

3. Parties have exchanged their affidavits.

4. Heard Sri D. S. Mishra, learned counsel for the petitioner, learned A.G.A. for respondents No. 1 and 2 and learned Standing Counsel for respondent No. 3 and perused the record.

5. The learned counsel for the petitioner challenged the validity of the detention order on the grounds inter alia that there has been undue and unexplained delay in deciding the representation made by the petitioner to respondent No. 3, which vitiated his detention.

6. In Paragraphs 21 to 23 of the writ petition it was averred that the representation of the petitioner for revoking/cancelling the order dated 1-7-2002 was sent to the State Government and Central Government through Jail Authorities. But it were not decided expeditiously, which was violation of Article 22(5) of the Constitution and rendered continued detention of the petitioner invalid.

7. Paragraph 6 of the counter-affidavit of Sri Lal Ratnakar Singh Deputy Jailor, District Jail, Varanasi disclosed as below :--

"on 2-8-2002 the petitioner has submitted his representation addressed to the State Government, Central Government and Advisory Board and on the same day it was sent to the Authorities concerned by registered post."

8. Paragraph 10 of the counter-affidavit of Sri C. P. Singh, Deputy Secretary, Home, Government of U.P., Lucknow disclosed that the representations of the petitioner addressed to the State Government and Central Government sent by Superintendent, District Jail, Varanasi on 2-8-2002 were received by the State Government on 5-8-2002 and the representation addressed to the Central Government was sent to the Central Government on 6-8-2002. The concerned department examined the representation on 7-8-2002 and on its preliminary

examination it was found that parawise comments on certain points was necessary. The comments were asked from Sponsoring Authority on 8-8-2002 and again a reminder was issued on 14-8-2002 for sending parawise comments. The parawise comments were sent by Sponsoring Authority on 17-8-2002, which were received to the State Government on 20-8-2002. A copy of the parawise comments was sent to the Central Government on 20-8-2002. The representation was again considered by the concerned department on 22-8-2002, by Deputy Secretary on 23-8-2002 and Special Secretary on 24-8-2002. The representation was finally rejected on 26-8-2002 by the concerned Secretary.

9. The Paragraph 6 of the counter-affidavit of Sri B. R. Sharma, Under Secretary, Government of India, Ministry of Finance. Department of Revenue, New Delhi disclosed as below :--

"It is submitted that representation dated July, 2002 addressed to the Secretary, Government of India, Ministry of Finance through department of Revenue, New Delhi was received in this office on 5-8-2002 through the Superintendent District Jail, Varanasi. Comments on the said representation were called for from the Detaining Authority namely Home Secretary, Government of Uttar Pradesh, Lucknow, vide letter dated 6-8-2002. Comments were received on 23-8-2002, 24-25th August, 2002 were holidays being Saturday and Sunday. The representation along with comments thereon was processed and submitted to the Competent Authority on 26-8-2002. The Competent Authority considered the representation on behalf of Central Government and rejected it on 28-8-2002. The detenu was informed, vide memo dated 29-8-2002."

10. The above counter-affidavits disclosed that comments were asked from the Sponsoring Authority on 8-8-2002, but the comments were sent on 17-8-2002 and were received by the State Government on 20-8-2002 and by Central Government on 28-8-2002. Thus, there is no explanation of the delay between 8-8-2002 and 20-8-2002. The Apex Court in the case of Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others, Para 21 observed as below :--

"True, there is no prescribed period either under the provisions of the Constitution or under the concerned detention law within which the representation should be dealt with. The use of the word "as soon as may be" occurring in Article 22(5) of the Constitution reflects that the representation should be expeditiously considered and disposed of with due promptitude and diligence and with a sense of urgency and without avoidable delay. What is reasonable dispatch depends on the facts and circumstances of each case and no hard and fast rule can be laid down in that regard. However, in case the gap between the receipt of the representation and its consideration by the authority is so unreasonably long and the explanation offered by the authority is so unsatisfactory, such delay could vitiate the order of detention."

11. In the case of K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India

(UOI) and Others and State of Karnataka and Others, the Apex Court held that there is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference slackness or callous attitude in considering the representation.

12. In the case of Rajammal Vs. State of Tamil Nadu and Another, the Apex Court held as below :--

"The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned."

13. In the case of Julia Jose Mavelly Vs. Union of India and others, the representation dated November 27, 1990 from the detainee was received in the COFEPOSA Unit only on December 4, 1990. That very day it was placed before the Joint Secretary, COFEPOSA, who directed that parawise comments may be called for from the sponsoring authority. A letter was issued to the sponsoring authority that very day asking for the comments. The comments were received on January 1, 1991. The officer concerned submitted the case file to JS (COFEPOSA) on January 3, 1991 who considered and rejected the same on that day. The detainee was informed of rejection of her representation by a memo issued on January 3, 1991 itself.

14. On the above fact, the Apex Court held as below (Para 3 of AIR) :--

"The learned senior counsel appearing on behalf of respondent No. 1 unsuccessfully tries to explain by stating that since the Sponsoring Authority was at a far away place i.e. Ernakulam, the delay had occasioned due to postal transmission and that if the postal delay is excluded there is actually no delay rendering the detention order invalid..... In our considered opinion, the above explanation now offered cannot be accepted for more than one reason. First, respondent No. 1 has not proffered such explanation in his counter. Secondly, even accepting this present explanation, the delay cannot be said to have been explained, because the postal transmission according to the learned counsel was by speed post. Thirdly, no supporting affidavit is filed by the Sponsoring Authority who alone could explain the delay at his end. Respondent 1 thus has failed to explain the undue delay of nearly 28 days in obtaining the comments by giving all necessary particulars."

15. In the said case it was found that, there was inordinate delay of nearly 28 days in forwarding the comments by the Sponsoring Authority, which delay stood unexplained. In the result the impugned order of detention was set aside and the detainee was directed to be set at liberty forthwith.

16. As mentioned above in this case there is no explanation of the delay from 8-8-2002 to 20-8-2002 which occurred in forwarding the comments by the Sponsoring Authority.

17. Learned A.G.A. relying on the decision of Apex Court in Ahamed Nassar Vs. The State of Tamil Nadu and Others, contended that delay is explained as it was on account of the Postal Authorities in communicating the letters and comments and taking into considerations the situation of the places from where the comments were sent and the places where the representations were considered such delay was bound to occur and it was not due to callousness of the authorities. Having considered the facts and circumstances of the case we find that the above contention is not applicable to the facts of the present case and cannot be accepted firstly; because it has nowhere been mentioned in the counter-affidavits of the State Government and the Central Government as by which mode the letters asking comments from Sponsoring Authorities were sent and received. It is also not mentioned that letters calling for comments were sent by ordinary post or registered post and comments were received from the Sponsoring Authority by ordinary post or registered post or speed post. Therefore, it cannot be inferred that the delay occurred due to Postal transmission. Secondly the delay from 8-8-2002 to 20-8-2002 was on the part of Sponsoring Authority and as held in the case of Julia Jose Mavelly Vs. Union of India and others, the Sponsoring Authority alone could explain the delay at his end. In this case no supporting affidavit has been filed by the Sponsoring Authority.

18. Learned A.G.A. further contended that the case of Julia Jose Mavelly Vs. Union of India and others, was under COFEPOSA and the present case is under PITNDPS Act and the provisions of the two cases are different. This contention has also no force in view of Apex Court decision in Smt. Khatoon Begum Ors. Vs. Union of India (UOI) and Others, in which it was held as below (Paras 1.5 and 6) :--

"Learned counsel for the State of Uttar Pradesh urged that the rule requiring expeditious consideration of a detenu's representation is a judge-made rule based on the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, and that the extensions of the application of the rule to cases of detention under the National Security Act was unwarranted. The learned counsel contrasted the provisions of the National Security Act and the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and urged that in the case of detention under the National Security Act, a certain amount of delay was inevitable having due regard to the procedure prescribed by the Act and therefore, delay in consideration of the representation should not be allowed to prejudice the detention. We are unable to agree with the submission of the learned counsel."

"The question for consideration is whether a person preventively detained under the provisions of the National Security Act is entitled to be released if there is

delay in the consideration of the representation made by him to the detaining authority. It is true that the series of cases where delay in the consideration of the representation made by a detenu was held to be fatal to the detention were cases which arose under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. We are however, unable to see how that would make any difference."

"The right of a detenu to have his representation considered "at the earliest opportunity" and the obligation of the detaining authority to consider the representation "at the earliest opportunity" are not a right and an obligation flowing from either the Conservation of Foreign Exchange and Prevention of Smuggling Activities 1974, or the National Security Act or, for that matter any other Parliamentary or State law providing for preventive detention. They are a right and an obligation created by the very Constitution which breathes life into the Parliamentary or State law. Article 22(5) enjoins a duty on the authority making the order of detention to afford the detenu "the earliest opportunity of making a representation against the order", The right and obligation to make and to consider the representation at the earliest opportunity is a constitutional imperative which cannot be curtailed or abridged. If the Parliament or the State legislature making the law providing for preventive detention devises a circumlocutory procedure for considering the representation or if the inter-departmental consultative procedures are such that delay becomes inevitable, the law and the procedure will contravene the constitutional mandate. It is essential that any law providing for preventive detention and any authority obliged to make orders for preventive detention should adopt procedures calculated towards expeditious consideration of representations made by detenus. It will be no answer to a demand for liberty to say that administrative red tape makes delay inevitable. The learned counsel for the State of Uttar Pradesh pointed out certain differences between the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act and the National Security Act which according to him make delay inevitable in the consideration of representation in cases of detention under the National Security Act. We think that the differences pointed out are irrelevant. The constitutional mandate brooks no unreasonable delay in the consideration of a representation".

19. Thus, it is clear that the decisions of the Apex Court in delay in deciding representation though on COFEPOSA are squarely applicable to the other Act detaining a person preventively including PITNDPS Act and National Security Act.

20. As held above the delay from 8-8-2002 to 20-8-2002 has not been explained and this delay of 12 days being unexplained renders the continued detention of the petitioner illegal.

21. Since the petition is to be allowed on the above ground alone we need not discuss other points raised by learned counsel for the petitioner.

22. In the result, the petition succeeds and is, accordingly, allowed. The

continued detention of the petitioner is held invalid and it is directed that the petitioner shall be released forthwith unless wanted to be detained in connection with some other case.