
(2014) 12 BOM CK 0188

In the Bombay High Court

Case No : Criminal Writ Petition No. 4008 of 2014 with Criminal Application No. 490 of 2014

Dhanesh Shantilal Shah

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 22-12-2014

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 21, 22, 22(5), 226

Citation : (2014) 12 BOM CK 0188

Hon'ble Judges : Abhay Shreeniwas Oka, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : Aisha Mohammed Zubair Ansari, Advocates for the Appellant; J.P. Yagnik, APP, Advocates for the Respondent

Judgement

A.S. Gadkari, J.

1. The Petitioner, the father of the detenu Chirag D Shah has preferred this Writ Petition under Article 226 of the Constitution of India for a writ of Habeas Corpus and for setting aside the impugned detention order bearing No.PSA-1214/CR-47(2)/SPL-3(A) dated 16th September, 2014 issued by the Respondent No.2. By the said order dated 16th September, 2014 the Petitioner was ordered to be preventively detained by the Respondent No.2 in exercise of powers under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for brevity "the COFEPOSA Act").

2. Heard the learned counsel appearing for the Petitioner and the learned APP appearing for the Respondents. We have also perused the record produced by the learned APP minutely.

Though the Petitioner has taken various grounds in the Writ Petition thereby challenging the impugned order of detention dated 16th September, 2014 passed by the Respondent No.2, the learned counsel appearing for the Petitioner

restricted her arguments only to the point of delay in deciding the representation made by the detenu. She further submitted that the said point of delay which has occurred at the hands of various authorities, in considering the representation of the detenu, goes to the root of the matter, as it violates Article 22(5) of the Constitution of India. She submitted that the said point is vital and is the most important point in her favour for the decision of the present Writ Petition.

3. The learned counsel appearing for the Petitioner submitted that the representation preferred by the detenu in support of challenge to the said preventive detention order has been decided by the Detaining Authority/ State Government with inexplicable delay and hence, the said order stands vitiated in view of the constitutional mandate embodied under Article 22(5) of the Constitution of India. The learned counsel appearing for the Petitioner submitted that she has taken a specific ground in paragraph No.4(xi) of the Petition to that effect and has invited our attention to the same. She submitted that the Petitioner made a composite representation on 16th October, 2014 through the Superintendent, Nashik Road Central Prison to the Detaining Authority and others and the same came to be decided and communicated to the detenu at Nashik Road Central Prison at Nashik on 13th November, 2014. She urged before us that the Detaining Authority as well as the Sponsoring Authority have utterly failed to explain the delay in deciding the representation expeditiously which has caused the continuation of the order of preventive detention to vitiate. In support of her contention, the learned counsel appearing for the Petitioner has relied upon a judgment of the Division Bench of this Court, to which one of us (Shri A.S. Oka, J.) is a member, dated 2nd May, 2014, passed in Criminal Writ Petition No.643 of 2014 in the case of *Riyaz Ahmed Batatawala v. The State of Maharashtra and others*.

4. Per contra, the learned APP supported the order of detention passed by the Respondent No.2 and submitted before us that the Sponsoring Authority as well as the Detaining Authority have properly explained the alleged delay by way of filing their respective affidavits. The learned APP relying upon the statements made in the reply submitted that the delay in disposing of the representation is not inordinate and assuming that there was a delay, if any, caused in deciding the representation, the same has been properly explained in the reply.

5. It is to be noted here that in response to the Petition, Shri Shivaji S. Patankar, Deputy Secretary, Home Department, Government of Maharashtra, Mantralaya, Mumbai has filed an affidavit-in-reply dated 21st November, 2011 for and on behalf of the Respondent Nos.1 and 2. i.e. the State of Maharashtra and the Detaining Authority and has also filed an additional affidavit dated 28th November, 2014 thereby explaining the movement of the representation and the steps taken by the Respondent Nos.1 and 2 in deciding the representation of the Petitioner. Shri Prabhakar Kumar, Deputy Commissioner of Customs (Prev), M & P Wing, MPIU-II, Mumbai has also filed an affidavit dated 21st November, 2014 on

behalf of the Sponsoring Authority.

6. Before we proceed to deal with the present Petition on its own merits, it is necessary to place a useful reliance on the three decisions of the Hon'ble Supreme Court wherein the Supreme Court has laid down the law with respect to the decision on the representation of a detenu as contemplated under Article 22(5) of the Constitution of India. The first decision is in the case of Harish Pahwa Vs. State of U. P. and Others, , wherein the Apex Court has held thus :

"In our opinion, the manner in which the representation made by the appellant has been dealt with reveals a sorry state of affairs in the matter of consideration of representation made by persons detained without trial. There is no explanation at all as to why no action was taken in reference to the representation on 4th , 5th and 25th of June, 1980. It is also not clear what consideration was given by the Government to the representation from 13th June 1980 to 16th June 1980 when we find that it culminated only in a reference to the Law Department nor it is apparent why the Law Department had to be consulted at all. Again, we fail to understand 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. We may make it clear, as we have done on numerous earlier occasions, that this Court does not look with equanimity upon such delays when the liberty of a person is concerned. Calling comments from other departments, seeking the opinion of Secretary after Secretary and allowing the representation to lie without being attended to is not the type of action which the State is expected to take in a matter of such vital import. We would emphasise that it is the duty of the State to proceed to determine representations of the character above mentioned with the utmost expedition, which means that the matter must be taken up for consideration as soon as such a representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu. This not having been done in the present case we have no option but to declare the detention unconstitutional. We order accordingly, allow the appeal and direct that the appellant be set at liberty forthwith.

Appeal allowed."

The second judgment is in the case of Rajammal Vs. State of Tamil Nadu and Another, , wherein the Supreme Court has held that a duration or range of delay in disposal of the representation is not material. The Supreme Court in paragraph 9 of the said decision has held thus :

"9 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."

The third decision of the Supreme Court is in the case of Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others, , wherein the Supreme Court has held in paragraph Nos.19 and 20 as under :

"19. The propositions deducible from the various reported decisions of this Court can be stated thus:

The detenu has an independent constitutional right to make his representation under Article 22(5) of the Constitution of India. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness of the detention order clamped upon him and requesting for his release, to consider the said representation within reasonable dispatch and to dispose the same as expeditiously as possible. This constitutional requirement must be satisfied with respect but if this constitutional imperative is observed in breach, it would amount to negation of the constitutional obligation rendering the continued detention constitutionally impermissible and illegal, since such a breach would defeat the very concept of liberty--the highly cherished right--which is enshrined in Article 21 of the Constitution.

20. 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."

7. Thus, after taking into consideration the ratio laid down by the Hon'ble Supreme Court, we proceed to deal with the contentions raised by the Petitioner about the delay caused by the Detaining Authority / State in deciding his representation. In the affidavit dated 21st November, 2014 filed on behalf of the Respondent Nos.1 and 2, in paragraph No.13, the Respondents have responded to the contention of the Petitioner raised in paragraph No.4(xi) about the delay in deciding his representation. In the said paragraph No.13, Shri Shivaji S. Patankar, Deputy Secretary, Home Department, Government of Maharashtra, Mantralaya, Mumbai has stated that the detenu forwarded a composite representation dated 16th October, 2014 through the Superintendent, Nashik Road Central Prison, Nashik, which was received in the office of the Detaining Authority on 17.10.2014. The concerned Assistant in his office submitted a report

for calling the parawise comments on 17th October, 2014, the Section Officer endorsed the same on 17th October, 2014 and the Deputy Secretary endorsed the said submission on 18th October, 2014 itself. The Detaining Authority approved the note and the draft letter addressed to the Sponsoring Authority for inviting its parawise comments on the representation on 18th October, 2014 and the said letter was sent to the Sponsoring Authority on 18th October, 2014 itself. That 19th October, 2014 was a Sunday. He has further stated that there was holiday from 23rd October, 2014 to 26th October, 2014 on account of Diwali festival. It is to be noted here that the Detaining Authority has not stated or given any reason to call for the parawise comments from the Sponsoring Authority. He has further stated that as the Respondent Nos.1 and 2 did not receive the parawise comments from the Sponsoring Authority, the Assistant from his department submitted a note for approval of draft reminder letter on 29th October, 2014. The said note was endorsed by the Section Officer on 29th October, 2014 itself. The Deputy Secretary was on leave on 29th October, 2014. That the reminder letter was sent on 29th October, 2014 to the Sponsoring Authority. He has further stated that the Sponsoring Authority forwarded parawise comments by its letter dated 3rd November, 2014. That there were holidays on 2nd November, 2014, 4th November, 2014, 6th November, 2014, 8th November, 2014 and 9th November, 2014 on account of Sunday, Moharram, Gurunanak Jayanti, Second Saturday and Sunday. He has stated that the parawise comments were submitted by the concerned Assistant on 5th November, 2014 which was endorsed by the Section Officer on 5th November, 2014 and by the Deputy Secretary on 7th November, 2014. He has further stated that after considering the representation of the detenu and the parawise comments from the Sponsoring Authority, the Detaining Authority rejected the representation on 10th November, 2014. That on 10th November, 2014 the Section Officer submitted a note for approval of intimation letter which was approved by the Deputy Secretary on 10th November, 2014 itself. He has further stated that the approved intimation letter was forwarded to the detenu through Superintendent, Nashik Road Central Prison, Nashik on 13th November, 2014.

As stated hereinabove in his affidavit dated 21st November, 2014, the Deputy Secretary, Home Department for and on behalf of the Respondent Nos.1 and 2 has not explained as to why the Detaining Authority called for the parawise comments from the Sponsoring Authority for deciding the representation of the detenu. The Detaining Authority has also not stated any reason to call for the parawise comments from the Sponsoring Authority. It is also to be noted here that the delay in deciding the representation from 17th October, 2014 till 3rd November, 2014 i.e. the date on which the parawise comments were received by the Home Department, Maharashtra, Mumbai till the communication of decision has not at all been satisfactorily explained by the Respondent Nos.1 and 2.

8. In the additional affidavit dated 28th November, 2014 filed on behalf of the Respondent Nos.1 and 2, the delay which was caused at the instance of the Detaining Authority in deciding the representation of the Petitioner has further

been tried to be explained by the said Authority in its paragraph No.2. Paragraph No.2 of the said affidavit dated 28th November, 2014 reads as under :

"2. With reference to para 4(xi) of the Petition, I say that the Detenu submitted composite representation dated 16.10.2014 through Superintendent, Nashik Road Central Prison, Nashik, which was received in the office of the Detaining Authority on 17.10.2014. The concerned Assistant submitted for calling parawise on 17.10.2014. The Section Officer endorsed it on 17.10.2014 and the Deputy Secretary endorsed it on 18.10.2014. The Additional Chief Secretary (Home) approved the note and the draft letter on 18.10.2014. 19.10.2014 was Sunday. The letter was sent to Sponsoring Authority on 20.10.2014. There was holiday from 23.10.2014 to 26.10.2014 on account of Diwali. On not receiving the parawise comments from Sponsoring Authority, the Assistant submitted a note for approval of draft reminder letter on 29.10.2014. The note was endorsed by the Section Officer on 29.10.2014. The Deputy Secretary was on leave on 29.10.2014. The reminder Letter was sent on 29.10.2014. The Sponsoring Authority forwarded parawise comments by letter dated 03.11.2014. There were holidays on 02.11.2014, 04.11.2014, 06.11.2014, 08.11.2014 and 09.11.2014 on account of Sunday, Moharam, Guru Nanak Jayanti, Second Saturday and Sunday. The parawise comments were submitted by the concerned Assistant on 05.11.2014 which was endorsed by the Section Officer on 05.11.2014 and by the Deputy Secretary on 07.11.2014. Due to formation of new Government, the Additional Chief Secretary (Home) was busy in other official work and administrative work on 07.11.2014. After considering the representation of the detenu in detail and the parawise comments from the Sponsoring Authority in detail, finally the Additional Chief Secretary (Home) rejected the representation on 10.11.2014. The draft rejection intimation letter was submitted by the concerned Section Officer on 10.11.2014 which was approved by the Deputy Secretary on the same day. The approved rejection intimation letter was forwarded to the detenu through Superintendent, Nashik Road Central Prison, Nashik on 11.11.2014. Further, I crave leave to rely upon the record of the Sponsoring Authority as and when required, if they have not filed any affidavit."

9. In the affidavit-in-reply filed by Shri Prabhakar Kumar, Deputy Commissioner of Customs (Prev), M & P Wind, MPIU-II, Mumbai i.e. on behalf of Respondent No.3, the Sponsoring Authority, in its paragraph No.15 has given the chronology / details of time taken in sending the parawise comments to the Home Department, Government of Maharashtra, Mantralaya. It has been stated in paragraph No.15 that the representation dated 16th October, 2014 submitted by the detenu was received in the office of the Respondent No.3 on 20th October, 2014 from the Home Department, Government of Maharashtra and the same is scrutinized and forwarded to the Home Department, Government of Maharashtra on 3rd November, 2014. While giving the details about the time consumed by the Respondent No.3 in submitting the parawise comments, the officer of the Respondent No.3 has given the following chronology :

10. After taking into consideration the chronology submitted by the Respondent No.3, it is apparent that the delay occurred at the hands of the Respondent No.3 in forwarding the parawise comments to the Respondent Nos.1 and 2 in response to the representation submitted by the detenu has remained unexplained. There is absolutely no explanation given by the said officer about the delay caused at their instance. It is expected from the Sponsoring Authority and so also by the Detaining Authority to decide the representation of the detenu as expeditiously as possible and in the absence thereof, their failure to do so violates the mandate of Article 22(5) of the Constitution of India.

11. The learned counsel appearing for the Petitioner urged before us that, though in the affidavit dated 21st November, 2014 the Respondent Nos.1 and 2 have stated that the intimation letter about the rejection of the representation of the detenu was delivered to him in Nashik Road Central Prison on 13th November, 2014 and in its further affidavit dated 28th November, 2014 it has been stated that the rejection intimation letter was forwarded to the detenu through the Superintendent, Nashik Road Central Prison, Nashik on 11th November, 2014. She tendered before this Court the acknowledgements of the detenu of the intimation received in Nashik Road Central Prison. It appears from the said acknowledgements that the intimation letter dated 13th November, 2014 issued by the Respondent No.2 mentioning therein that the representation of the detenu has been rejected by the Principal Secretary, Government of Maharashtra, was in fact received by the detenu in prison on 18th November, 2014. There is an endorsement of the prison authorities also of the said date. In this letter dated 13th November, 2014 the endorsement made by the jail authorities of its receipt, is also dated 18th November, 2014. The Respondent Nos.1 and 2 in their affidavits dated 21st November, 2014 and 28th November, 2014 have not mentioned about the said fact and it appears to us that without verifying the actual record, the said officer has filed the affidavits in this Court. In view of the endorsement of acknowledgement dated 18th November, 2014, there is further delay of five days in communication of the rejection to the detenu which has not been explained at all by the Respondent Nos.1 and 2.

12. The said non-explanation of delay and the overall delay caused in deciding the representation of the Petitioner, in our opinion, is fatal and the same vitiates the continuation of the order of preventive detention. It is further pertinent to note here that in the additional affidavit dated 28th November, 2014 in its paragraph No.2 the Detaining Authority has stated that the composite representation submitted by the detenu dated 16th October, 2014 came to be rejected on 10th November, 2014 and the detenu came to be informed about the same at Nashik Road Central Prison, Nashik on 11th November, 2014. However, as we have noted above, about the fact that the rejection of the representation dated 16th October, 2014 came to be intimated to the detenu at Nashik Road Central Prison by the Principal Secretary (Appeals and Security) and the Detaining Authority, Government of Maharashtra on 18th November, 2014. That the intimation letter dated 11th November, 2014 about the rejection of

representation of the detenu by the Additional Chief Secretary (Home), Government of Maharashtra, Mantralaya, Mumbai, on behalf of Government of Maharashtra i.e. the Respondent No.1 was served to the detenu on 3rd December, 2014. The delay from 11th November, 2014 till 3rd December, 2014 has not at all been explained by the Respondent No.1 in the present proceedings. It is further surprising to note that the Detaining Authority has taken a bold stand that, apart from there were substantial number of public holidays, due to the formation of the new Government in the State of Maharashtra, the Additional Chief Secretary (Home) was busy in other official work and administrative work upto 7th November, 2014. The said explanation given by the Detaining Authority is unreasonable and cannot stand in the face of the law laid down in the case of Rama Dhondur Borade (supra). After considering the representation of the detenu and the parawise comments from the Sponsoring Authority in detail, finally the Additional Chief Secretary (Home) rejected the representation on 11th November, 2014 and said intimation was received by the detenu on 3rd December, 2014.

13. Thus, there is no satisfactory explanation from the Respondent Nos.1 to 3 as to why the said authorities did not consider the representation dated 16th October, 2014 sent by the detenu through jail till 13th November, 2014 and further there is no explanation at all as to why the Respondent No.2 did not intimate the rejection dated 13th November, 2014 till 18th November, 2014 to the detenu in jail. It has further not been explained by the Respondent No.1 that as to why the rejection intimation dated 11th November, 2014 was belatedly communicated to the detenu on 3rd December, 2014 in prison. There is no explanation at all which has been offered by the said authorities in the present proceedings. Thus, there is no satisfactory explanation as to why the Sponsoring Authority did not submit parawise comments from 20th October, 2014 till 3rd November, 2014 to the Detaining Authority. The said delay in submitting the parawise comments is not at all properly and satisfactorily explained in the affidavit of the Sponsoring Authority. Further the Detaining Authority has also utterly failed to explain the delay caused at their end in deciding the representation of the detenu expeditiously and the reasons given by the Detaining Authority cannot be accepted. This unexplained delay certainly violates the constitutional mandate as embodied in Article 22(5) of the Constitution of India and therefore, in our considered opinion, the continuation of the order of preventive detention dated 16th September, 2014 stands vitiated. We further hold that there is complete absence of explanation for the delay in so far as rejection of the representation made by the Petitioner to the State Government is concerned.

14. Thus, after taking into consideration the aforesaid facts, the Petition deserves to succeed as the constitutional safeguard contemplated under clause (5) of Article 22 has been violated. Hence, we pass the following order :

(a) The Rule is made absolute in terms of prayer clause (a), which reads thus:

"(a) That this Hon"ble Court be pleased to issue a Writ of Habeas Corpus or any other appropriate Writ, order or direction quashing and setting aside the said order of detention bearing No. PSA-1214/ CR-47(2)/SPL-3(A) dated 16.09.2014 and be pleased to direct that the detenu Chirag D. Shah be set at liberty."

(b) All concerned to act upon an authenticated copy of the operative part of this order;

(c) Criminal Application No.490 of 2014 does not survive and the same is disposed of.