

**(1990) 12 DEL CK 0022**

**In the Delhi High Court**

**Case No :** Criminal Writ Appeal No. 293 of 1990

Dilip Dey

APPELLANT

Vs

Union of India and Others

RESPONDENT

**Date of Decision :** 06-12-1990

**Acts Referred:**

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

**Citation :** (1991) 44 DLT 82

**Hon'ble Judges :** A.B. Saharya, J

**Bench :** Single Bench

**Advocate :** J.K. Srivastava, H.S. Phoolka, Sudhir Nandarajog, Sanjay Goswami and Pramod Sehgal, for the Appellant;

## Judgement

Arun B. Saharya, J.

(1) By this petition under Article 226 of the Constitution of India, the petitioner has prayed that the detention order dated 6th of March, 1990 and the ensuing detention of the petitioner u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the Act) be quashed and the petitioner be set at liberty forthwith.

(2) The petitioner was detained by the impugned order made by the empowered Joint Secretary to the Government of India, with a view to preventing him from abetting the smuggling of goods. The detention order and the grounds of detention were served on the petitioner on 17th of March, 1990. It is unnecessary for the present purpose to set out all the grounds in detail.

(3) It is alleged that on 11th of December, 1989, a special petrol party of the Border Security Force, in the course of their petrol near Bay of Bengal intercepted a trawler with seven Bangladesh nationals on board. On search inter alia, bags containing yellow powder believed to be medicinal powder were recovered and the said seven persons could produce no evidence, documentary

or otherwise, as to licit importation of the said medicinal powder from Bangladesh to India. The said goods along with the seven Bangladesh nationals were handed over to customs officer of Hingalganj Customs Preventive Post who seized the said goods on the plea that they were illicitly imported into India. The said seven persons were also interrogated. They were Jatin Howlader Pulak Dey, Kabir Howlader, Abdul Hakim, Farook Howlader, Mohidal Islam and Abdul Maiek. Each of them indicated the nature of his involvement in the illicit import of the said goods. Their interrogation led the customs officer to Mohd. Toofan Khan of village Dakshinerah, Distt. Midnapore. His residential premises were searched.

(4) It is stated in para 10 of the ground of detention that during the search, Toofan Khan was not present ;but during the search at the premises of Toofan Khan on 15th of December, 1989, the petitioner and another person Shanti arrived at the spot in a hired Ambassador car No. WNF-3587.

(5) In para 11 of the grounds, it is mentioned that Santi Sarkar in his " statement dated 16th of December, 1989 disclosed that he was involved in smuggling activities for a long time, inter alia, in carrying smuggled goods in send news of arrival of medicinal powder from Kakdwip originally brought fr Bangladesh through riverine routes; that for the last six months, he carried information of smuggled medicinal powder through Rasulpur Ghat of Midnapore District; that he used to work as a broker of smuggled foreign goods including medicinal powder; that about six months ago, he was introduced to one Sunil Sarkar who used to bring medicinal powder from Bangladesh through riverine route; that Sunil Sarkar sought his assistance and he agree to do so ?that he (Shanti) introduced Sunil Sarkar with the petitioner and the petitioner "agreed to help Sunil Sarkar; "that Sunil Sarkar introduced him (Santi) with Toofan at Rajakatra; that Toofan was a resident of Village-Dakshinerah of Contai and the full name of Toofan was Toofan Khan alias Nizamuddin Khan; that Sunil Sarkar came to him (Santi) on 10.12.89 and informed him (Santi) that contraband medicine powder Would be coming on 11.12.89 by trawler and Toofan on taking delivery of the said goods at.Rasulpur would come to Calcutta and he (Santi) should be present at Rajakatra at that time; that the said Sunil Sarkar said to inform the matter to you; that accordingly he (Santi) waited at Rajakatra on 12.12.89 but no goods arrived; that the said Sunil Sarkar asked him (Santi) to go to Rasulpur and enquire about the matter; that on 15.12.89 he (Santi) along with you went to Dakshinerah Village near Contai by a car No. WMF-3587 hired from Shri R.P. Sharma residing near Mohammed Ali Park, Calcutta; that in reply to queries of the Customs he (Santi) and you said that both of you had come to meet with Toofan to enquire whether the trawler loaded with medicinal powder of Sunil Sarkar had reached Rasulpur Ghat from Bangladesh or not.....".

(6) Then, in para 12, reference is made to the statement of the petitioner as follows: "You in your statement dated 16.12.89 stated, inner alia, that you and Santi Sarkar hired a private car bearing No. WME-3587 and went to the Vill. of Tufani at Dakshinerah where some Customs officers intercepted you and Santi

Sarkar; that both you and Santi Sarkar went to meet Tufan as directed by Sunil Sarkar to collect information in respect of arrival of the trawler loaded with contraband medicinal powder from Bangladesh to Rasulpur ghat; that Sunil Sarkar used to bring contraband medicinal powder from Bangladesh by trawler for sale; that you were acquainted with the said Sunil Sarkar at your house at Habra through the said Shri Santi Sarkar; that he (Dilip) knew Santi Sarkar before; that both the said S/Sri Santi Sarkar and Sunil Sarkar requested you to help in the delivery of foreign contraband against payment of Rs. 500.00 ; that earlier you and the said Santi Sarkar and went to the house of Tufani as per direction of the said Sunil Sarkar and gave the information to Tufani that eight bags of contraband medicinal powder would come by a small trawler from Bangladesh to Rasulpur; that after two days the said Tufani brought the said goods in eight bags from Rasulpur to Rajakatra in a matador van; that you had received Rs. 500.00 from the said Sunil as remuneration for that job; that Santi Sarkar met the said Sunil Sarkar and Sunil Sarkar told the said Santi Sarkar that on 11.12.89 contraband foreign medicine powder would arrive at Rasulpur by trawler and the said Tufani would take delivery of the said goods at Rasulpur and would come to Calcutta on 12.12.89; that you were directed to "stay in your house; at Habra to do that job; that Santi Sarkar also promised you to pay Rs. 1,000.00 for that job; that on 14.12.89 the said Santi Sarkar came to your house Along with Sunil Sarkar and directed you to go to Dakshinera on 15.12.89 to collect information about the arrival of the trawler; that you knew that to deal in contraband foreign medicine powder was illegal; that earlier on 15.5.86 your lorry No. WGA-3993 loaded with contraband foreign medicine powder was apprehended by the Customs of Diamond Harbour near Kulpi; that at that time you let out your lorry to one Gour Saha of Calcutta to carry the said contraband; and that you indentified the photograph of Tufani at Customs House."

(7) The seven Bangladesh nationals, Santi Sarkar and the petitioner were arrested u/s 104 of the Customs Act, 1962. They were produced on 17th of December, 1989 before the Sub-Divisional Judicial Magistrate, Bashirhat. All of them were remanded to judicial custody till 29th of December, 1989. By the orders dated 20th of December, 1989 and 29th of December 1989, the Magistrate granted bail to Santi and the petitioner respectively.

(8) On these, among other facts, the detaining authority was satisfied that the petitioner had indulged in abetting smuggling of goods and if not prevented, he would continue to indulge in such prejudicial activities in the similar manner. In para 18 of the grounds of detention, it is stated : "While arriving at the subjective satisfaction, I have relied on and referred to the documents and statements annexed hereto."

(9) By a Communication dated 12th of April, 1990, addressed to the President of India, counsel for the petitioner demanded some documents enumerated therein. By a memorandum dated 19th of April, 1990, the Department of Revenue Ministry, of Finance, informed the petitioner and his counsel that the application

for supply of documents had been considered by the detaining authority and that the Collector of Customs (Preventive), West Bengal, Calcutta, was being directed to supply copies of those documents direct to the petitioner.

(10) Counsel for the petitioner addressed another communication to the President of India dated 7th of May, 1990 and asked for supply of six more items listed therein. With regard to this communication, it was alleged in the writ petition (filed on 23rd of May, 1990) that, till then, the petitioner had neither received any reply nor the documents had been supplied to him.

(11) Later, by an application, the petitioner sought leave to urge additional grounds to challenge his detention. It was stated that the rejection of the petitioner's representation dated 7th of May 1990, by a memo dated 23rd of May 1990, had been dispatched belatedly on 26th of May, 1990. By this application, he also placed on record the information that two out of the six documents asked for were sent to the petitioner under cover of the memorandum dated 23rd of May, 1990.

(12) By an order dated 12th of June, 1990, the Central Government, in exercise of powers conferred by Section 8(f) of the Act, confirmed the detention order and further directed u/s 10 that the petitioner be detained for a period of one year from the date of his detention i.e. from 22nd of March, 1990.

(13) The order of detention and continued detention of the petitioner have been challenged on various grounds. It is unnecessary to set out here all those grounds. Suffice it to mention two of the points argued by learned counsel for the petitioner. They are : first, that the inordinate delay in the communication of decision on the petitioner's representation dated 7th of May, 1990 has not been explained; "and secondly, that the documents demanded by the petitioner were not supplied, and that one of them was supplied belatedly after the meeting of the Advisory Board.

(14) In a case for a writ of habeas corpus, strict rules of pleadings are not applicable nor is undue emphasis placed on the question as to on whom the burden of proof lies to establish the validity or invalidity of the detention. When a rule is issued, it is incumbent on the detaining authority to satisfy the Court that the detention of the petitioner is legal and in conformity with the mandatory provisions of law authorizing such detention. In answer to the rule, the detaining authority must place all the relevant facts before the Court which would show that the detention is in accordance with Article 22(5) of the Constitution of India and the Act (See Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, .

(15) With regard to the first point, counsel for the respondents contends that there is no pleading in the writ petition, as originally filed, regarding delay in the disposal of the said representation; and, Therefore, the respondents could not explain in their counter-affidavit the time taken from 8th of May, 1990, when the" said representation was received in the President's Secretariat, to 26th of May, 1990 when rejection thereof was dispatched to the petitioner. No doubt, this

plea was not squarely raised in the petition but the petitioner has taken it up in the additional grounds filed later. The reason for this is that the writ petition was filed on 23rd of May, 1990, rejection of the representation had not been communicated till then. So, it was pleaded that the Central Government had, till then, not communicated any decision on the representation. Naturally, a specific grievance on this score could only be made by the petitioner after receipt of the rejection memo. Notice of the petitioner's application to urge additional grounds was duly served on the respondents. Thereafter, the counter-affidavit dated 11th of September, 1990 was filed, but the additional grounds were not met therein. At the hearing, counsel for the respondents rightly pointed out that a formal order granting permission to the petitioner to urge the additional grounds was never made. For this reason, the respondents did not file any reply to it. So, the respondents also cannot be blamed for not explaining in the counter-affidavit the alleged delay in disposal of the petitioner's representation. In this background, to meet this plea, counsel for the respondents was permitted to state the facts on the basis of the original record.

(16) The record shows that the said representation was received in the President's Secretariat on 8th of May, 1990. It was dispatched to the Ministry of Finance on 10th of May, 1990. 12th and 13th of May, being 2nd Saturday and Sunday, were holidays. It reached the concerned section on 14th of May, 1990, and it was put up to the Joint Secretary, in charge of the Cofeposa Department on 16th of May, 1990. The next day, it was forwarded to the Finance Minister, where it was received on 18th of May, 1990 and was considered by the Minister on 22nd of May, 1990. In between, 19th and 20th of May were non-working days. The memo rejecting the representation is dated 23rd of May, 1990. Thus, up to this stage, it cannot be said that there was any delay in dealing with the representation. Thereafter, however, it appears that the said memo dated 23rd of May, 1990 was dispatched only on 26th of May, 1990 after a delay of 3 days. This is clear from a photo copy of the envelope in "which the said memorandum was received by the petitioner. No Explanation of this delay is forthcoming despite the fact that the intervening three days were all working days.

(17) It is now well-settled that not only the consideration of the representation has to be dealt with expeditiously but utmost expedition must be observed in continuously dealing with the representation until a final decision is communicated to the detenu. (See *Pratul Kumar Sinha v. State of Orissa* Jt 1989 (2) S.C. 578 and *Harish Pahwa Vs. State of U. P. and Others*, . In *Aslam Ahmed Zahire Ahmed Shaik Vs. Union of India and Others*, , this aspect was highlighted thus : ".....it is imperative on the part of every authority, whether in merely transmitting or dealing with it, to discharge that obligation with all reasonable promptness and diligence without giving room for any complaint of remissness, indifference or avoidable delay because the delay, caused by slackness on the part of any authority, will ultimately result in the delay of the disposal of the representation which in turn may invalidate the order of detention. as having infringed the mandate of Article 22(5) of the Constitution." (Italic supplied).

(18) Confronted with this position, learned counsel for the respondents placed reliance upon observations made by the Supreme Court in *Madan Lal Anand Vs. Union of India and others*, , .... that the time imperative can never be absolute or obsessive, and that the occasional observations made by this Court that each day's delay in dealing with the representation must be adequately explained within which the representation must be considered and not that it is magical formula, the slightest breach of which must result in the release of the detenu..." This observation is based upon an earlier decision of the Supreme Court in *Mst. L.M.S. Ummu Saleema Vs. Shri B.B. Gujaral and Anr*, , where it was explained : "...Law deals with the facts of life. In law, as in life, there are no invariable absolutes .Neither life nor law can be reduced to mere but despotic formulae-...". In that case reliance was placed upon yet an earlier decision in *Frances Coralie Mullin Vs. W.C. Khambra and Others*, , in which, Chinappa Reddy, J., while pointing out that the time-imperative can never be absolute or obsessive had explained: "There has to be lee-way, depending on the necessities (we refrain from using the word "circumstances") of the case." At the same time he cautioned that "no allowance can be made for lethargic indifference. No allowance can be made for needless procrastination." In this context, we cannot lose sight of another decision of the Supreme Court in *Harish Pahwa (supra)*, where no action taken on receipt of the representation for two days was held to be fatal. Despite the Explanation suggesting calling of comments from other departments, seeking the opinion of Secretary after Secretary, it was clarified that 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 importance.

(19) In the facts and circumstances of the present case, no Explanation whatsoever is available for the three days time taken merely in dispatching the rejection memo. There can be no other inference drawn from this dormancy but that of idleness, lethargic indifference and needless procrastination in transmission of the decision of the petitioner's .representation. This avoidable and unexplained delay has resulted in rendering the continued detention of the petitioner illegal and constitutionally impermissible.

(20) In the alternative, counsel for the respondents has contended that the second communication of the President dated 17th of May, 1990 was not a "representation" in the real sense. It was, according to him, merely a demand for supply of documents. There is no substance in this plea either. First paragraph of the said communication, with reference to the detention order, states "The petitioner is innocent and he may be released". Thereafter, demand for supply of the six enumerated items has been made in para 2 of this communication. Apart from this, it is apparent, from the rejection memo itself, that the Central Government had dealt with it as a representation. The said rejection memo deals with the two requests separately. The first part regard the representation is reproduced below:

"With reference to his representation dated 7-5-90 Shri J.K. Srivastava Advocate,

on behalf of Shri Dilip Dey, a Cofeposa detenu presently lodged in Presidency Jail Alipore, Calcutta, is hereby informed that his representation regarding release of his client has been carefully considered by the Central Government but it is regretted that the same has been rejected." (*Italic added*).

Thus, it is found that the Central Government itself understood and considered this communication as a representation and rejected it as such. This ingenious plea has, Therefore, to be rejected.

(21) With regard to the supply of documents sought by the petitioner on the two occasions mentioned in para 9 and para 10 supra, it may be noted that only one document out of them, mentioned at Serial No. (i) of the second demand dated 7th of May, 1990 was included in the list of documents relied upon by the detaining authority. The demand for this document and the reason for it, stated separately at No.(ii), stand on a different footing, and will be dealt with separately.

(22) In the first demand, the documents listed at (a) to (i) fall in two categories. One category consists of "summons" for recording the statements of the seven Bangladesh Nationals who were apprehended when the trawler was intercepted by the Customs officers. Reference to these summons is found in the statements of each of those persons. It was made, perhaps, to indicate that their statements were recorded in pursuance of lawful summons. The said summons have not been relied upon nor have the same been referred to anywhere in the grounds of detention. The documents relied upon, including the statements alleged to have been made by those seven persons, were duly supplied to the petitioner along with the grounds of detention. In the other category would fall two documents pertaining to Toofan mentioned at (h) and (i) of this communication. They are : the search authorisation in respect of the residential premises of Toofan; and the postal receipt or any other proof of issue of summons to Toofan on 15th of December, 1989 or acknowledgment thereof. Here again, it may be pointed out that these documents also were neither relied upon nor referred to in the grounds of detention, and that the statement of Toofan was supplied to the petitioner. However, the Central Government directed the Collector of Customs to supply copies of all the demanded documents to the petitioner. The grievance of the petitioner is that there was undue delay in supply of these documents, as the same were supplied after 12 days of the demand, and that the search authorisation was not supplied at all.

(23) Likewise, the documents mentioned in the second demand at Serial Nos. (iii) to (vi) were not those relied upon by the detaining authority, nor were the same referred to in the grounds of detention. At item No. (iii) were orders passed by the Magistrate from 22nd of February, 1990 to 6th of March, 1990 in respect of the seven Bangladesh Nationals who had absconded before the detention order was passed. Those orders, according to counsel for the petitioner, would have shown that the petitioner's detention was vitiated as "the live link if any had been snapped". A bare perusal of the grounds detention, summarised here

in above, shows that the live link" vis-a-vis the petitioner was Santi Sarkar on one side and Sunil Sarkar on the other. There was no direct link between the petitioner and the seven Bangladesh Nationals. Documents specified at No. (iv) were "Copies of summons, if any, sent to Md. Toofan Khan, after the summon dated 15.12.89, which have been supplied to the Petitioner". At No. (v) were "Replies of the Department filed to oppose the bail applications by the seven Bangladesh nationals" and at No. (vi) was the reply filed to the anticipatory bail application of Toofan, and the Court's order thereon.

(24) The case set up against the petitioner is not based upon any of the above-mentioned documents. For this reason alone, in view of the recent decision of the Supreme Court in Kamarunnissa and Others Vs. Union of India and another, , it is not necessary to go into the question of delay in supply or the non-supply of those documents.

(25) Next, to deal with the petitioner's request for supply of the document at item No. (i) and the reason for it stated at item-No. (ii) of the second demand dated 7th of May, 1990, these two items have to be read. The same are set out below :

"(i) Photostat copy of the original seizure memo of goods said to be medicinal powder. (ii) Fathers, name and addresses of the witnesses which have been cited in the above said seizure memo. The reason for Petitioner's request is that he wishes to challenge the veracity of the purported attestation by these witnesses and that the detaining authority has acted with non-application of mind in believing the attestation of persons who do not have father's name and addresses given on the paper relied upon by him."

(26) "LIST Of Documents Relied UPON", appended to the grounds of detention, cites at Serial No. 2 : "Inventory of the goods seized under Sec. 110 of the Customs Act 62". The reason of this request was clearly stated in the demand. In response to this demand, by the memorandum dated 23rd of May, 1990, the Central Government informed the petitioner that the Collector of Customs was being requested to supply the copies of the demanded documents. Then, by a memorandum dated 11th of June. 1990, the Collector of Customs, Calcutta sent to the petitioner "photo copy of the seizure list". This copy shows that the inventory was actually drawn up in hand. It purports to bear the signatures of two witnesses, namely, Dilip bids was and Dulal Halder. Neither the father's name nor the address of either of them is noted in this document. Under the "signatures of the accused", under the name of each of the seven Bangladesh Nationals, is inscribed "L.T.I." But the thumb impressions are not there in this copy. At the time of hearing, counsel for the respondents tried to explain that the thumb marks may be dim and, Therefore, may not have come up in the photostat copy. This Explanation does not hold water. The document supplied to the petitioner, along with the grounds of detention, was a typed sheet supposedly a copy of the hand-written original inventory. When called upon to produce the original inventory, counsel for the respondents was unable to do so. Instead, he

stated that the detaining authority also did not have the original or even a photostat copy of the seizure memo before him; that the detaining authority had acted upon a typed copy of the inventory; and, that the detenu was entitled to get only a copy of what the detaining authority had considered. To say the least, this plea is far from satisfactory. If the original seizure memo was really not before the detaining authority, the order of detention must be vitiated on the ground of non-application of mind by the detaining authority as he would have acted upon a typed copy, without caring to verify the existence and genuineness of the so-called original seizure memo.

(27) Even otherwise, the photostat copy of the said inventory was supplied to the petitioner belatedly, along with the memorandum dated 11th of June, 1990, after the meeting of the Advisory Board, and just a day before the Central Government confirmed the detention order on 12th of June, 1990. Thus the petitioner was denied the opportunity to make a proper representation to the Advisory Board and to the Central Government on the basis of the copy ultimately supplied to him.

(28) Learned counsel for the respondents tried to wriggle out of this situation by arguing, on the basis of the decision in *Kamarumissa* (supra) that it is not sufficient for the petitioner to say that the copies of the documents were not supplied in time on demand but it must further be shown that the non supply has impaired the right of detenu to make effective and purposeful representation. This, according to him, must be pleaded as a fact, that being the only way in which the further requirement could be fulfilled .

(29) Reliance on that decision, for the present purpose, is misplaced. In that case, the Supreme Court was not dealing with documents relied upon in the grounds of detention. Whereas, in the present case, as earlier noticed, the document in question ,was, in fact, relied upon by the detaining authority. In respect of non-supply of such documents, the question of actual prejudice does not even arise for consideration. The test in such a case is of strict compliance with the constitutional and the statutory requirements and not of actual prejudice. Further, as pointed out by the Supreme Court in *Smi. Icchu Devi Choraria* (supra), the strict rules of pleadings are not applicable to a case like this, and it is actually for the detaining authority to show that the detention is valid and in accordance with law. The detaining authority has failed to do so in the present case.

(30) As a result, the unexplained delay "in transmitting rejection of the petitioner"s, representation dated 7th of May 1990, and the non-supply of a proper copy of the original seizure memo, if in existence, have vitiated the continued detention of the petitioner.

(31) Consequently, I declare the continued detention of the petitioner unjustified and unconstitutional; and direct that the petitioner be set at liberty forthwith, unless he is liable to be detained for some other cause.

(32) The writ petition is, accordingly, allowed and the Rule is made absolute. No costs.