

(1987) 01 DEL CK 0022

In the Delhi High Court

Dinabandhu Mondal

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 01-01-1987

Acts Referred:

Citation : (1987) 01 DEL CK 0022

Hon'ble Judges : M.K. Chawla, J

Bench : Single Bench

Judgement

M.K. Chawla, J.—The Officer-in-charge of police station Habra had a definite information that some contraband articles were being carried in an Ambassador Car No. WBJ 8475 from Hakimpur (a place in India on Indo-Bangladesh Border) to Calcutta. Immediately, thereafter, he along with two sub-inspectors and other officers kept a watch on Banipur Asrafabad Road. At about 13.15 hrs. on 27th February, 1986, the police officers noticed the said car coming from the direction of Hakimpur. The Officer-in-charge signaled the said car to stop. The driver tried to speed away the vehicle with he passengers but it was intercepted immediately by the police vehicle. At that time, there were four occupants in the Car No. WBJ-8475; namely, S/Shri Dinabandhu Mondal, Prosenjit Mondal, monoranj Ghosh and Bholanath Karmaker, the driver. the search of the vehicle resulted in the recover of primary gold of foreign origin with number 9999, in 19 pcs. of 10 tolls each and one piece of 10 tolls with number 9990 kept concealed in a black colored bag made of cotton and placed in the specially designed cavity on the body of the said car blow the Dash Board. the personal search of the occupants were also taken and articles besides currency notes of various denomination were taken into possession. In the meantime, the Customs Officers reached the and the officer-in-charge, Habra police station handed over twenty pieces of gold biscuits along with other recovered articles to them. In turn, the Customs Officers of the preventive Unit seized the Ambassador car u/s 110 of the Customs Act, and on reasonable belief that the 20 pcs. of primary gold and two wrist watches all of foreign origin were illicitly imported into India were also taken into possession. All the four occupants of the car were arrested there and

then.

2. In his statement u/s 108 of the customs Act, Shri Dinabandhu Mondal, claimed the ownership of all the twenty pieces of gold biscuits of foreign origin and, inter alia, stated that he had started smuggling foreign gold since December 1985 and from then he brought at least 107 pcs. of gold biscuits. On 26th February 1986, a man, namely, Fazlul ague came to him and handed over 20 pcs. of gold biscuits and the petitioner in turn gave him Rs. 1,00,000/- in indian currency. Then the 20 pcs. of gold biscuits were kept in the secret cavity of his father's car No. WBJ 8475. On 27th march, 1986, he along with his younger brother, Prosenjit Mondal left his place, Hakimpur at that time he did not know anything about the gold On the way, Shri Monoranjan Ghosh, a person known to him from before, boarded the said car. Further, on the way, at Khashpur, his driver Shri Baholanath Karmakar boarded the car and started driving. However, at Banipur Chowmatha a signal was given by the police officers to stop. He, however, directed the driver to speed away but the car was later on intercepted and the each yielded in the recovery of the gold. He further stated that he smuggled those 20 pcs. of gold biscuits of foreign origin from Bangladesh and, Therefore, could not produce any lucid document. The other occupants almost narrated the same sequence which resulted in the recovery of 20 pcs. of gold, but they denied their involvement in the smuggling. In the course of follow-up action, the residential premises of the accused persons were immediately searched but neither any valuable document nor any incriminating material came to their possession.

3. On the basis of the facts and material which came to light, Shri M.L. Wadhawan, Additional Secretary to the Government of India, had n hesitation in holding that Shri Dinabandhu Mondal, the present petitioner has been smuggling goods and engaging in transporting and concealing smuggled goods. Even though, adjudication and prosecution proceedings under the Customs Act, 1962 are likely to be initiated but he is satisfied hat the petitioner should be detained under the conservation of Foreign Exchange and prevention of Smuggling Activities Act, 1974 with a view to preventing him from smuggling goods and engaging in transporting and concealing smuggled goods. the said order was passed on 24the June, 1986. This very order of detention which was served on the petitioner on 22nd October, 1986 is under challenge in the present writ petition. His prayer is for the issuance of a writ of Habeas Corpus to any other appropriate write, order or direction under Article 226 of the Constitution of India, to quash the detention, set aside the impugned order of detention and order his release forthwith.

4. The first and foremost contention of the learned counsel for the petitioner is that there its a complete non application of mind by the detaining authority as it did not taken to consideration the bail applications and the conditional order of release of the petitioner by the High court at calcutta. This fact even though has come into existence much prior to the order of detention, but it did not find

mention or taken note of in the impugned order. According to the learned counsel, a reasonable restriction has been placed on the detenu by the order in his bail application, which sufficiently prevented him to indulge in the activities, sought to be prevented by the impugned order. Had this fact been placed before the detaining authority, there was every likelihood of the change of mind. this ground by itself is fatal to the order of detention. the stand of the respondents is that it does not sound to reason that the detaining authority should take note of the fact that the person is no bail, as the intention of the impugned order is to restrict the movement of the person in order to prevent him from engaging in smuggling activities.

5. This stand, to my mind, is of no avail to the respondents. In order to elaborate this point and examine its consequences one has to keep in mind few relevant dates. The alleged incident is dated 27th February, 1986. On the same day, the petitioner along with other persons was arrested and sent to judicial lock up. On 3rd march, 1986, the present petitioner moved an application for his release on bail before the SDJM, Barasat. This application ws rejected. He moved the second application on 15th March, 1986, which on consideration met the same fate. The petitioners third attempt for his release on bail before the same court did not yield any positive result. After contest, this application was also rejected on 29th February, 1986. His prayer before the Sessions Judge, 24, Parganas at Alipur, did not succeed. Lastly, he tried his luck before the High court at Calcutta, where he succeeded. the order of release on bail reads as under:

"Let the two accused-petitioners be released on bail of rupees ten thousand with two sureties of Rs. 5,000/- each, one of whom should be local, to the satisfaction of the sub-Divisional Judicial Magistrate, Barasat, on condition that they shall meet the I.O. on every Monday and Friday, for a period of four weeks from the date of their release."

6. During his detention, the petitioner has been served with a show cause notice on 28th February, 1986. the detention order, as stated earlier, was passed on 24th June, 1986. It was ultimately served on the petitioner on 22nd October, 1986. Since then, he is in Jail.

7. the grounds of detention do not mention the fact of the filing of three bail application before the S.D.J.M., Barasat, another before the Sessions Judge, 24, Parganas, Alipur and the last in the series before the High court at Calcutta. the impugned order also does not mention or take note of the fate of these bail applications. Certainly, these were the most material documents, which had a direct bearing on the subjective satisfaction of the detaining authority, should have been taken note of. Had these facts been placed before the detain authority, he might have come to a different conclusion.

8. It is true that at the time when the order is to be passed, it is for the detaining authority to consider as to what are the relevant circumstances and then to form his opinion thereon., But once an order of detention is challenged in a court then

the court certainly has the jurisdiction to go into the question and to decide as to whether all the relevant circumstance have been considered by the detaining authority or not. In the present case, admittedly, the most material documents which have not been considered by the detain authority are the bail applications and the orders passed thereon, Absence of consideration of these documents, to my mind, amounts to application of mind on the part of the detaining authority rendering the detention order invalid. If the detaining authority had considered these documents, one cannot state with definitions which way, the subjective satisfaction of the detaining authority would have reacted. The conditional bail order of the High court could have persuaded the detaining authority to desist from passing the order of detention since the restriction on the freedom of movement was sufficient to prevent him from indulging in the smuggling activities. On this aspect, the Supreme court in the lattes decision reported as Anant Sakharam Raut Vs. State of Maharashtra and Another, , has settled the matter thus:-

"We do not think it necessary to go into all the grounds urged before us by the petitioner?s counsel in support of his prayer to quash the order of detention strongly pressed before us by the petitioner?s counsel is that the detaining authority was not made aware at the time of detention order was made that the detenu had moved applications for bail in the three pending cases and that he was enlarged on bail on 13-1-1986 & 15-1-1986. We have gone through the detention order carefully. There is absolutely no mention in the order about the fact that the petitioner was an under trial prisoner, that he was arrested in connection with the three cases, that applications for bail were pending and that he was that there was a complete non-application of mind on the part of the detain authority to the relevant facts and circumstances which existed at the time of the passing of the order. this fact by itself is enough to vitiate the order of detention.

9. The next submission of the learned counsel of the petitioner is that there is a long delay in the passing of the order of detention and its execution on the petitioner. According to him, there is a delay of about 4 months in making of mind by the detaining authority to pass the order of detention and a further delay of four months in the service of the said order of detention on the petitioner. the respondents have denied that there is any undue delay in the passing of detention order. their case in the counter is stated thus:

"That the incident took place on 27th February, 1986, the investigation continued thereafter, statements were recorded in March 1986. Thereafter the cases were processed at various stages in Calcutta and in Delhi. There were translation to be made of various documents in Bengali and the order came to be passed on 24th june, 1986. There is Therefore, no undue and unexplained delay in passing the order."

10. Their further stand is that this order could not be executed immediately as the detenu could not be traced. In that behalf action u/s 7(1) of the OFEPOSA

Act was taken on 15th September, 1986. Finally, the petitioner was detained on 22nd October, 1986. Therefore, the delay in execution of the detention order has been caused by the petitioner himself.

11. The question that requires going into at this stage is as to whether the Explanation furnished by the respondent is satisfactory, bona fide and acceptable or not. In the case of Smt. Hemlata Kantilal Shah V. State of Maharashtra 1982 S.C. 08, the Court has laid down that day ipso facto in passing an order of detention after an incident is not fatal to the detention of a person, for in certain cases delay may be un- avoidable. What is required by law is that the delay must be satisfactorily explained by the detaining authority.

12. It is no doubt true that where an unreasonable period has leaped between the date of the incident and the date of order of detention, an inference may legitimately be drawn that there is no nexus between the incident and the order of detention, and the order of detention may be liable to be struck down, as invalid, though there can be no hard and fast rule as to what is the length of time which should be regarded sufficient to snap the nexus between the incident and the order of detention.

13. With this background the Explanation can be examined. Prima facie on the face of it, the Explanation, if it can be called so, is devoid of any substance. It is not shown as to how much time was consumed in the investigation, and its completion, particular, when most of the documents and statements have already come into existence at the time of the arrest of the petitioner and/or immediately thereafter on the search of the premises. It is not stated as to how many witnesses were examined and if so on what dates. It is also not made clear as to how bulky and in what numbers the documents were required to be translated in Bengali and to whom this job was entrusted. The affidavit of the person concerned should have been placed on record explaining the number of days it consumed in getting the documents translated in Bengali. In fact there is no Explanation in the eye of law and this delay of four months is quite fatal to the order of detention.

14. The delay of 2-1/2 months was held to be fatal in the judgment of our own high court reported as Bhupinder Singh Vs. Union of India and Others, . The Division Bench on this aspect concluded thus:

"As noticed earlier, in the return there is no Explanation about the delay in the official record from 14-12-1984 to 28-2-1985. We find ourselves unable to agree with the counsel for the respondents that in the file there is an Explanation much less satisfactory Explanation. In our opinion, the gap between 14-12-1984 to 28-2-1985 reveals a complete disregard of the requirement of urgently dealing with cases involving preventive detention. The official record is silent as to who was handling it between the said two dates. We cannot accept the arguments of Mr. Bagai that this period of 2-1/2 months was utilised for preparing the draft grounds. We consequently hold that the delay in this case

remains unexplained "

15. useful reliance can also be place on the judgment reported as SK. Abdul Munna Vs. The State of West Bengal, ; Lakshman Khatik Vs. The State of West Bengal, ; Rabindra Kumar Ghosel alias Buli Vs. The State of West Bengal, and Md. Sahabuddin Vs. The District Magistrate, 24 Parganas and Others, . Applying the said ratio to the facts of the case in hand, I have no hesitation to hold that the detaining authority has not acted swiftly in the matter and there was no proximity between the prejudicial activity and the detention order. There is no worthwhile Explanation for the delayed action. On this ground alone the petition must succeed.

16. Then again, there is a delay of near about four months in the execution of the order of detention on the petitioner. It is urged that the order could not be served on the detinue as he was not traceable. Here also the respondents loose sight of the material fact that the release of the petitioner on bail ws a conditional one. He was required to report meet the Investigating Officer on every Monday and Friday for a period of one month from the date of his release which in this case is 18th April, 1986. Thereafter the case of the petitioner is that he has been attending the court of the Magistrate regularly on every date of hearing. To this there is no denial. It is not explain as to how the detinue could not be traced when he has been attending the court and meeting the Investigating Officer was directed by the Court. It is not explained as to which of the officer was deputed to serve the order of detention and how many times he made attempt to locate the petitioner. It is not their case that the petitioner has shifted his residence to another place or that at any point of time, he came to know of the order of detention and tried to avoid its service. Even if it be presumed for the sake of arguments that recourse to the provision u/s 7(b) of the COFEPOSA Act was taken on 15th September, 1986, for which there was no necessity, even then thereafter there is a long delay of 38 days for which no valid Explanation is forthcoming.

17. The facts reveal that a very casual approach was given to an important order of detention and its due execution on the detinue. Prima facie, the Explanation as disclosed in the counter affidavit is not convincing. it reveals a complete disregard of the urgency it deserved, while dealing with the case of preventive detention. this circumstance by itself its enough to quash the order of detention.

18. Even though, the learned counsel for the petitioner has raised other points but to my mind there is no need to go into the same as on both the courts the petition is liable to succeed.

19. As a result of the above discussion, I accept the petition and quash the order of detention., the petitioner be released forthwith unless required to be detained under any other orders of a competent court or Authority.