

(1999) 12 CAL CK 0036
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction W.P. No. 14615 (W) of 1999

Durga Devi Rampuria

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 03-12-1999

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1), 7(1)
Constitution of India, 1950 — Article 22(5), 226
Criminal Procedure Code, 1973 (CrPC) — Section 397, 401, 439
Foreign Exchange Regulation Act, 1973 — Section 40

Citation : (2000) 1 CALLT 185 : (2000) 1 CHN 42 : (2000) 69 ECC 743

Hon'ble Judges : Nure Alam Chowdhury, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Mr. Kazi Saflullah and Mr. R.R. Biswas, Mr. Pradip Ghosh, Mr. Bhaskar Sen, Mr. Milan Mukherjee and Mr. Sudhir Mehta, for the Appellant; Mr. Dipak Sengupta, Mr. Himangshu De, Mr. Ashim Roy and Miss Anmola Jha, for the Respondent

Judgement

B. Bhattacharya. J.

1. By this application under Article 226 of the Constitution of India, the petitioner has prayed for a writ of Habeas Corpus for release of her husband after setting aside order dated September 13, 1996 being No. 673/84/96-CUS VI11 passed u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Cofeposa").

2. The facts relevant for the purpose of disposal of this application can be summarised thus :

(a) On the basis of the alleged information received from reliable sources that the detenu and his brother were indulging in transferring foreign exchange abroad without due process of law and they did not bring back the export proceeds to the extent of Rs. 29.91 crores to India, the Officers of the

Enforcement Directorate (FERA), Calcutta Zonal Office on May 24, 1996 searched the residence and the office of the detenu and according to the respondents, huge number of Incriminating documents were seized. After such search, the respondents alleged, the detenu was examined u/s 40 of the Foreign Exchange Regulation Act, 1973 (FERA") and on the basis of the aforesaid materials was arrested on May 25, 1996 for contravening various provisions of FERA. The detenu was produced before the learned Chief Metropolitan Magistrate, Calcutta on the following day when the learned Magistrate remanded him to jail custody till June 7, 1996.

(b) The detenu moved an application u/s 439 of the Code of Criminal Procedure before the learned Chief Judge, City Session Court at Calcutta and the learned Chief Judge by order dated May 30, 1996 released the detenu on bail of Rs. 50.000/- with two sureties of Rs. 25.000/- either in cash or by two registered sureties of Rs. 25.000/- each. By the said order, the detenu was directed to report to the Investigating officer once in every week until further order. On an application for cancellation of the bail as aforesaid, this court on July 16, 1996 set aside the order of bail and directed the learned Session Court to hear out the matter afresh. Pursuant to the aforesaid order passed by this court, the learned Chief Judge, City Session Court, cancelled the bail on August 27, 1996. Against the order dated August 27, 1996 an application u/s 397/ 401 of the Code of Criminal Procedure was moved whereupon this court on August 30, 1996 stayed the order dated August 27, 1996 for ten days. Ultimately on October 4, 1996, a learned single Judge of this court set aside the order dated August 28, 1996 and order of bail was Issued. Subsequently on May 13, 1998 a special bench of this court set aside the order of bail granted by the learned single Judge.

(c) in the meantime, on September 13, 1996 the detention order u/s 3(1) of the Cofeposa having been passed, the petitioner filed a writ application before the Gauhati High Court on October 14, 1996 challenging the said order at pre-execution stage. On October 23, 1996 a learned single Judge of that court granted an interim stay of the said detention order till November 12, 1996. The said Interim order having been vacated, on an appeal, the Division Bench of that court again granted stay of the detention order on January 10, 1997. However, the apex court on the prayer of the respondents vacated the stay order on March 16, 1998 thereby directing the detenu to surrender as per order of detention. However, such order was passed without prejudice to the right of the detenu to challenge the order of detention after surrender with additional pleas after amending the pending writ application.

(d) Long thereafter on July 20, 1999 the detenu surrendered before the pending FERA case and was taken into Judicial custody and the detention order dated September 13, 1996 was executed by the police on July 24, 1999 while the detenu was already in custody.

(e) in view of the fact that the order of detention was executed and the detenu is detained within the Jurisdiction of this court, this application has been filed

before this court challenging the order of detention and the pending writ application before the Gauhati High Court has not been proceeded with.

3. Mr. Ghosh, the learned counsel appearing on behalf of the petitioner has attacked the order of detention by raising the following nine points :--

(I) This court should Ignore the affidavit-in-oppositlon filed by the detaining authority Inasmuch as the same was affirmed not by the Officer who actually passed the order but by his successor who was incompetent to deny the allegations made in the writ application.

(II) Although the order of detention is mainly based on the alleged confessional statements of the detenu but the detaining authority took no notice of the fact that such statements were retracted by the detenu at the very first opportunity on the allegation that those were procured by physical and mental torture.

(III) All the materials relied upon by the detaining authority were not communicated to the detenu fn violation of Article 22(5) of the Constitution of India.

(IV) There was no explanation as regards delay in considering the representation of the detenu for his release.

(V) There was Inordinate delay in passing the order of detention from the date of alleged Incident.

(VI) There was unexplained delay in execution of the order of detention.

(VII) The detaining authority was not aware of the fact that at the lime of execution of the order of detention, the detenu was already under judicial custody and no application for ball was pending.

(VIII) The documents in support of the order of detention are considered on the basis of "pick and choose" policy.

(IX) Shortage of time in passing the detention order after receipt of documents shows non-application of mind by the detaining authority.

4. In support of the aforesaid points, Mr. Ghosh has relied upon huge number of decisions of the Supreme Court as well as of various High Courts.

5. Mr. Sengupta, the learned counsel appearing on behalf of the detaining authority has seriously disputed the aforesaid contentions of Mr. Ghosh.

6. According to Mr. Sengupta, in a case of this nature it is not always necessary for the detaining authority himself to affirm affidavit controverting allegations of the petitioner. Only in those cases, where allegations of mala fide intention or personal bias have been made against the detaining authority, Mr. Sengupta submits, such authority should himself come forward to dispute the allegation; otherwise, a succeeding officer can on the basis of his knowledge gathered from the record can effectively dispute the allegations of the petitioner. Mr. Sengupta

contends that in this case no allegation of personal bias or malice has been imputed against the detaining authority and as such on the aforesaid ground the petitioner cannot ask the court to take no notice of the affidavit affirmed on behalf of his client. In support of the aforesaid proposition of law, Mr. Sengupta Inter alia relies upon the following decisions :--

- (1) Madan Lal v. Union of India : 1990 SCC (Cri) 51
- (2) Asgar Ali v. District Magistrate : 1974 SCC (Cri) 563
- (3) Suru Mallick v. State of W.B. : 1975 SCC (Cri) 582
- (4) P.L. Lakhanpal Vs. Union of India (UOI) and Others,

7. As regards the second contention of Mr. Ghosh, Mr. Sengupta points out that the detaining authority was quite alive to the fact that a retraction was made by the detenu and such fact will appear from the detention order itself where the detaining authority had clearly mentioned that the bail application and the writ application filed by the petitioner were considered before passing of the order of detention. Mr. Sengupta submits that the petitioner having mentioned the fact of retraction of confession in those applications it necessarily follows that the detaining authority has also taken into consideration the aforesaid fact. The cases of Prakash Chandra Mehta v. Commissioner and Secretary, Govt. of Kerala (1985 SCC Cri) 332 and Panna v. A.S. Samra (1995 SCC Cri 137) were in this connection referred to.

8. Regarding the third contention of the petitioner, Mr. Sengupta submits that all the documents taken into consideration by the detaining authority were served upon the petitioner as would appear from the order of detention itself. Mr. Sengupta asserts that his client is under no obligation to disclose the source of information, although the documents seized by his client pursuant to search on the basis of information were disclosed in the order of detention. He therefore submits that the aforesaid point taken by the petitioner is without any substance.

9. As regards the allegation of delay in disposing of the representations of the petitioner against the order of detention, Mr. Sengupta contends that the authorities took about 14 days in disposing of the representations. Although each day's delay was not explained in the affidavit. Mr. Sengupta placed before us the records of his clients showing that such delay occurred due to the fact that the detaining authority had to call for parawise comments of the sponsoring authority on such representations before considering the same and there were few holidays in between the date of receipt and date of disposal of the representations. Mr. Sengupta in this connection has relied upon paragraphs 36 to 38 of the decision of the apex court in the case of Madan Lal Anand v. Union of India (supra) in support of his contention that this court can look into the official record of his client for ascertaining whether there was unreasonable delay in disposing of the representations although such delay was not specifically explained in the affidavit.

10. Mr. Sengupta next described the allegation of the petitioner of delay in passing the order of detention as baseless Inasmuch as his client while passing the order of detention on September 13, 1996 even considered the document dated September 12, 1996 as would appear from the papers mentioned in the order of detention.

11. Similarly, as regards the allegation of delay in execution of the order of detention Mr. Sengupta submits that the petitioner moved a writ application before the Gauhati High Court challenging the order of detention at pre-execution stage and obtained an order of stay from a learned single Judge for a limited period. The force of the said order having come to an end, the petitioner moved Division Bench and again obtained an order of stay. According to Mr. Sengupta, that his client did not sit Idle will appear from the fact that on the application of the detaining authority, the apex court vacated the stay order granted by the Division Bench and asked the petitioner to surrender.

12. Mr. Sengupta contends that from March 16. 1998 till July 20, 1999 the petitioner absconded inspite of specific direction of the apex court to surrender. Mr. Sengupta by showing the official record submits that his client took step for declaring the petitioner as absconder in terms of section 7 of the cofeposa and necessary order was also obtained. Thus, Mr. Sengupla claims, the detaining authority was although vigilant in the matter of execution of the order of detention.

13. Mr. Sengupta next refutes the contention of the petitioner that the detaining authority at the time of execution of the order of detention did not consider the fact that the detenu was already in Judicial custody and that there was no necessity of the execution of the detention order. Mr. Sengupta submits that his client was quite conscious of such fact and that is why the order of detention was served upon the detenu in Jail. According to him, his client was factually satisfied that notwithstanding the fact that the detenu was in judicial custody, such detention was necessary. Mr. Sengupta contends that question of satisfaction of the detaining authority cannot be gone into by a court dealing with an application for habeas corpus. in support of such contentions Mr. Sengupta places reliance upon the following decisions :--

- (1) Shibban Lal Saksena Vs. The State of Utter Pradesh and Others,
- (2) Dr. Ramakrishna Rawat Vs. District Magistrate, Jabalpur and Another,
- (3) Ram Bait Rajbarv. State of West Bengal :1975 SCC (CrI) 321

14. As regards the other contention of the petitioner that the detention order was passed by relying upon documents on the basis of "Pick and choose police". Mr. Sengupta's contention is that it is for the detaining authority to decide whether on the basis of a particular document an order of detention should be passed and in the process, the authority may reject some materials and may rely upon some other. But if the documents relied upon are really incriminating Justifying

preventive detention. it is no part of a court's Job to go Into the question of subjective satisfaction of the detaining authority as held in the above decisions.

15. Lastly, Mr. Sengupta by relying upon the decision of the apex court in the case of Panna v. A.S. Somra reported in 1995 SC (CrI) 137 contends that merely because in one day, the detaining authority has considered all these documents and arrived at a conclusion in favour of detention, such fact tpso facto cannot Invalidate the order of detention.

16. Mr. Sengupta thus prays for rejection of this application.

17. The lerned advocate appearing for the Jail authority has submitted that the representations made by the detenu to the different authorities have been sent to the respective addressee and that the fact of rejection of those representations has also been communicated to the detenu.

18. After hearing the learned counsels for the parties and after going through the materials on record we find substance atleast in favour of the nine points advanced by Mr. Ghosh.

19. As regards the first point taken by Mr. Ghosh. the law on the point is now settled, in answer to a Rule of Habeas Corpus it not always necessary for the detaining authorities to affirm affidavit controverting the allegations of the petitioner and such affidavit may be affirmed by a responsible officer who personally dealt with or porcessed the case or by an officer duly authorised by the Rules of the business of the Government concerned. However, when allegation of mala fide or abuse of power or personal bias is attributed to the detaining authority, the said authority should himself swear the affidavit. in this connection reference may be made to the decision of the apex court in the case of Gazi Khan alias; Chotia Vs. State of Rajasthan and another, relied upon by Mr. Ghosh wherein the apex court considered all the decisions on the point including the cases of Madan Lal Anand (supra), Asgar Alt (supra) and Sum Malltck (supra), all relied upon by Mr. Sengupta. in the instant case, in paragraphs 14 to 18 of the application, specific allegations have been made that the detaining authority passed the order of detention mala fide at the behest of the sponsoring authority and that the documents alleged to have been relied upon in passing the order of detention were not even placed before the detaining authority. in view of such type of allegations. in our opinion, it was the duty of the detaining authority himself to affirm the counter affidavit as he alone could dispute those allegations. Such allegations cannot be dealt with by the succeeding officer who has derived his alleged knowledge from the record of the case. The detaining authority, it is admitted by the learned counsel for the respondents No. 1 and 2, after taking Instruction, is still in service and as such is very much available. Even such fact could be disputed by the other officers who processed the case and who. has personal knowledge that those documents were actually placed before the detaining authority. in view of the aforesaid fact we are constrained to hold that the aforesaid allegations of the petitioner remain uncontroverted. Thus, we find

force in the first contention of Mr. Ghosh,

20. As regards the second contention of Mr. Ghosh, I.e. the non-consideration of the fact of retraction of the alleged confession, we are not at all Impressed by the submission of Mr. Sengupta that as the detaining authority, in the ground of detention, recorded that it considered the bail application and the writ application filed by the petitioner. it necessarily follows that the application for retraction was also taken into consideration as in the bail application such fact was mentioned and the same was an annexure of the writ application. it may be mentioned in this connection that in the ground of detention there is no specific reference to the fact of retraction of confession. in paragraph 25 of the affidavit-in-opposition used by the respondent Nos. 1 and 2, it has been alleged that the petition of retractions of the confessional statements was filed before the Chief Metropolitan Magistrate without serving any copy of the petition upon the department. in the said paragraph it has been further alleged that the department took into consideration the order dated May 26, 1996 passed by the learned Chief Metropolitan Magistrate, Calcutta wherein the Magistrate mentioned such fact in the said paragraph it was further stated that the authority also considered the bail application of the petitioner filed before the learned Chief Judge, City Sessions Court where the petitioner mentioned the fact of retraction. The department also took note of the objection dated August 30, 1996 (correct date May 30. 1996) filed by the department before the learned Chief Judge, City Sessions Court where the department denied the allegations of torture. in the affidavit however, the detaining authority nowhere disclosed that it took into consideration the application for retraction which was an annexure of the writ application. we therefore find substance in the contention of Mr. Ghosh that the detaining authority did not take pain to consider the entire writ application, otherwise it would not take the plea that the copy of the said application was not served upon the department and that it was alive to such fact from the order of learned Chief Metropolitan Magistrate, copy of the bail application and from the petition dated May 30. 1996 filed before the City Sessions Court. it will not be out of place to mention here that in the order of Chief Metropolitan Magistrate dated May 26, 1996 only the allegation of mental torture upon the petitioner has been recorded whereas in the application of retraction filed by the petitioner not only the allegation of mental torture but also of physical torture was made in details. in the bail application filed by the petitioner, such details of torture were not mentioned. Therefore, we are of the firm view that the application for retraction of confession was not taken Into consideration by the detaining authority before passing the order of detention.

21. Mr. Ghosh, in this connection, has relied upon an unreported Judgment of the apex court in the case of M.T.M- Mitlaffarv. The Additional Secretary to the Government of Tamil Nadu (writ petition (Cri) No. 602 of 1989) disposed of on February 23, 1990. in the said case, the detenu in his bail application mentioned that he had retracted his confession. in the order of detention, the detaining authority, as in the Instant case, although made reference to the bail application

in paragraph CV1I) of the ground of detention but relied upon the confession of the detenu. The apex court turned down the contention of the detaining authority that reference to the bail application indicates that the authority also took into consideration the fact of obtaining the confession by coercion. It appears that a Division Bench of Delhi High Court in the case of *Md. Usman Farooq v. Union of India and Ors.* reported in 1999 Cri. LJ 2313 has relied upon the aforesaid decision of the apex court.

22. We respectfully follow the aforesaid two decisions and we hold that mere reference of bail application or writ application in the ground of detention does not manifest application of mind of the detaining authority to the application for retraction particularly when the succeeding officer in his affidavit has alleged non-service of copy of the application of retraction upon the department. Moreover, such allegation can only be effectively disputed by the officer who dealt with the case but not by his successor as pointed out earlier. Therefore, the ground of detention being mainly based on confession of the detenu, non-consideration of the application for retraction filed by the detenu disclosing details of torture, is bound to vitiate the order of detention.

23. As regards the third point taken by Mr. Ghosh we however find substance in the contention of Mr. Sengupta that his clients were under no obligation to disclose the source of information. We are also satisfied that non-supply of the actual text of information to the detenu is not fatal in this case inasmuch as materials apparently relied upon by the detaining authority in passing order of detention were supplied to the detenu and as such the text of information received by the detaining authority on the basis of which the search and seizure were effected loses its significance. Thus, we find no substance in the aforesaid third contention of Mr. Ghosh.

24. We will now proceed to consider the fourth point viz. absence of explanation as regards delay in considering the representations of the detenu for his release. In the present case the detenu made three representations; one dated August 3, 1999 to the detaining authority, the second one dated August 4, 1999 to the Central Government and the third one dated August 5, 1999 to the Advisory Board. The detenu was communicated that the representation dated August 3, 1999 was rejected on August 17, 1999. In the writ application the petitioner demanded explanation from the respondents for the delay in disposing of the representations. It appears from the affidavit-in-opposition used by the respondent Nos. 1 and 2 that day to day delay was not at all explained. Mr. Sengupta appearing on behalf of the respondent Nos. 1 and 2 has however contended that although in the affidavit no explanation was given, he was prepared to satisfy this court by way of "a list of dates" prepared on the basis of official record showing that there was no delay at all. Accordingly, a list of dates was placed by Mr. Sengupta before us. From the said list of dates it appears that the Joint Secretary received those representations first; thereafter he forwarded those representations to the sponsoring authority for perusal comments and

after receiving parawise comments those were sent to the Ministry. Thereafter the Joint Secretary on August 17, 1999 rejected the representation and same was conveyed to the Secretary, Finance and the Finance Secretary rejected the representation on August 24, 1999.

25. The law relating to the consideration of representation made by detenu against order of detention is now well settled. it has been repeatedly held by the Supreme Court that whatever may be the delay in disposing of a representation, the authority concerned must explain to the court such delay indicating that the representation of the detenu has been expedl-tiously disposed of. The result of such consideration must also be communicated to the detenu without any delay. The law further requires that the representation made by the detenu either to the detaining authority or the Central Government or the Advisory Board must be considered independently and contemporaneously. it has been held by the apex court in the case of Mohinuddin alias Moin Master Vs. District Magistrate, Beed and Others, that waiting for the other authority for consideration of the representation and consideration of the representation after the rejection by other authority is illegal. in other words, each of the authorities should expedi-tiously dispose of the representation without waiting for the other authorities" comment or result of representation.

26. in the Instant case as mentioned earlier, in the affidavit nothing has been stated explaining the delay. We are unable to accept the contention of Mr. Sengupta that without explaining anything in the affidavit the authority concerned can rely upon a list of dates prepared on the basis of the documents available to them. If in the affidavit, sufficient explanation is given. in our view, a court in a given case can look Into the documents lying with the department for the purpose of finding out the missing link between the various dates mentioned in the affidavit. But without using any affidavit, we are afraid, the detaining authority cannot straightway rely upon a list of date prepared by them. in this connection reference may be made to the case of Rajindra v. Commissioner of Police reported in 1994 suppl. (2) SCC 716. Moreover, even the list of dates filed by the respondent shows that the representation made to the Finance Secretary was for the reason best known to the respondents received by the Joint Secretary on August 9, 1999 although the Jail authority forwarded the same on August 5, 1999 direct to the Finance Secretary. Ultimately, the file went before the Finance Secretary on August 19, 1999 though Joint Secretary and the Finance Secretary rejected the representation on August 24, 1999 give days after the same was rejected by the Joint Secretary. Similarly, the representation made to the Advisory Board was forwarded by the jail authority on August 6, 1999 but ultimately the same was rejected on October 14, 1999. Why such representation sent on August 6, 1999 was received by Joint Secretary on September 28, 1999, after the lapse of such a long time was not at all explained. The above list of dates makes it clear that there was no Independent consideration of the representations made to different authorities as all the representations came Initially to the Joint Secretary for consideration. Moreover,

as rightly pointed out by Mr. Ghosh appearing for the petitioner, the reason for demanding parawlse comments from the sponsoring authority was not at all explained. in this connection reference may be made to the decision of the Supreme Court in the case of Mrs. Venmathi Selvam Vs. State of Tamil Nadu and Another, and also in the case of P. Paulsamy Vs. Union of India and Another, . in both the aforesaid decisions, the Supreme Court held that unless there is any necessity calling for parawlse comments, the authorities concerned cannot delay the disposal of the representations in a routine manner and in such a case it must be presumed that there was no application of mind by any competent officer in the matter of consideration of the representation. We do not find any explanation why all the representations were withheld by the Joint Secretary viz. the detaining authority and why the other authorities did not dispose of the representations before the same has been rejected by the Joint Secretary. The aforesaid facts disclose that the representations filed by the detenu were not considered contemporaneously or Independently thereby making the detention Illegal and bad. We, therefore, find substance in the fourth point taken by the petitioner and we hold that there has been not only unexplained delay in the matter of disposal of the representations but those have also not been Independently disposed of by the respective authority.

27. As regards the delay in passing the order of detention, although there has been some delay on the part of the detaining authority in passing the said order, we do not consider such delay to be so unreasonable or gross so as to Invalidate the order of detention.

28. But we are convinced that the delay in execution of the order of detention in the instant case has not at all been explained and such fact made the continued detention invalid. in the Instant case, even If we accept the contention of Mr. Sengupta that due to Interim order granted by Gauhati High Court which continued till March 16, 1998 from January 10. 1997 and for a period of three weeks in 1996, the order of detention could not be executed, but no appropriate reason has been assigned in the affidavit disclosing what prevented the detaining authority from executing the order of detention from March 16, 1998 till July 24, 1999, a long period of more than 16 months. in the list of dates it has been merely stated that on various dates Inquiries were made at Calcutta address of detenu but he was not available or traceable. Similarly on various dates, the detaining authority made Inquiries at the Gauhatl address but he was not traceable. in the list of dates however it is stated that an order u/s 7(1)(b) of the Cofeposa was issued by the Ministry against the detenu and on September 22, 1998 the Commissioner of Police. Calcutta informed Calcutta Zonal Office of Enforcement that detenu did not appear before him in compliance of the order dated August 21, 1998. It is further claimed in the list of dates that order u/s 7(1)(a) of the Cofeposa was issued by the Ministry against detenu on November 5, 1998. it may not be out of place to mention here that such facts were not disclosed by the detaining authority by affidavit. Even Mr. Sengupta could not place before us the gazette notification in terms of section 7 of the Cofeposa.

29. it goes without saying that the respondents could not disclose in the affidavit or in the list of dates that any step was taken in terms of section 4 of the Cofeposa for execution of the order of detention.

30. Under the aforesaid circumstances, in our opinion, inaction on the part of the detaining authority in executing the order of detention even after March. 16. 1998. when the Supreme Court vacated the Interim order, for the next 16 months has not all been explained. in this connection we may rely upon the decision of the apex court in the case of T.A. Abdul Rahaman Vs. State of Kerala and others, where it has been held that even delay in securing arrest of the detenu after three months from the date of passing of order of detention and non-explanation for such inaction throw a considerable doubt on the genuineness of the subjective satisfaction of the detaining authority vitiating the validity of the order of detention. in the case of P.U. Iqbal Vs. Union of India (UOI) and Others, , one year's delay in arresting the detenu and serving detention order in the absence of proper explanation was found to be inordinate and unreasonable rendering the order of detention invalid. in the said decision the explanation offered by the detaining authority that the detenu was a fugitive, eluding the dragnet of the detention order was held to be "too incredulous to be swallowed". it was further held that no court should accept this kind of incredible explanation. in the instant case, as pointed out earlier, in the affidavit the respondents did not care to explain the delay and even in the list of dates they have merely described the detenu as "not available/traceable" either at his Gauhatt residence or at Calcutta residence. in view of the aforesaid delay in the matter of execution of the detention order, even if we exclude the period from September 13, 1996 till January 10. 1997 and thereafter till March 16, 1998 we find that the order of detention must be held to be invalid and should be set aside for the simple reason that the delay in execution of the order of detention shows that the detaining authority was not really or genuinely satisfied as regards the necessity of detention of the detenu for otherwise he would have tried to secure the arrest of the detenu promptly and not left the detenu free to carry on his "antinational activities".

31. Regarding the next point viz. absence of necessity of maintaining the order of detention when the detenu has already been taken to Judicial custody, although no explanation has been given in the affidavit of the respondents; we do not propose to set aside the order of detention on that ground in view of the fact that the detaining authority is quite competent to pass order of detention even in case of a person who is in the prison or who is under-going Imprisonment. (See Dr. Ramakrishna Rawat Vs. District Magistrate, Jabalpur and Another, Thus, we do not find any substance in the said contention. Similarly the other point that the authorities concerned relied upon materials on the basis of "pick and choose" policy in our opinion, if an authority considers that some of the materials are Important while some are not, they are at liberty to exclude the unimportant documents and take into consideration only the incriminating one. At any rate. in the instant case no specific case has been made out

disclosing that the authority applied "pick and choose" policy.

32. Regarding shortage of time in passing of order of detention, we propose not do deal with the said point as the order of detention is liable to be set aside on other four grounds discussed above.

33. in view of our discussions above, we hold that the order of detention is Invalid on the ground of points No.I, II, IV and VI taken by Mr. Chosh and also on the ground that the representations made by the detenu to the different authorities were not considered Independently and contemporaneously.

We, therefore, set aside the order of detention and direct the respondents to release the detenu Immediately unless required in any other case.

No costs.

N.A. Chowdhury, J.

34. I agree.

35. Application allowed