

(1995) 01 DEL CK 0086

In the Delhi High Court

Case No : Criminal Writ Petition No. 314 of 1993

Gurmit Singh Cheema

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-01-1995

Acts Referred:

Customs Act, 1962 — Section 108

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 —
Section 10(1), 3, 3(1)

Citation : (1995) 1 AD 756 : (1995) 2 ALT(Cri) 12 : (1995) CriLJ 1705 : (1995)
2 Crimes 568 : (1995) 32 DRJ 369 : (1995) 2 RCR(Criminal) 149

Hon'ble Judges : Mohd. Shamim, J

Bench : Single Bench

Advocate : S.K. Agarwal and Madan Lokur, for the Appellant;

Judgement

Mohd. Shamim, J.

(1) What light is to the eyes - what air is to the lungs What love is to the heart, liberty is to the soul of man. R.G. Ingersoll, Progress.

(2) Liberty in fact is the very .breath of our being. It is inconceivable to think of a meaningful existence in the absence of liberty. That is why the framers of our Constitution thought it fit to secure for all the citizens of this country, liberty of thought, expression, belief, faith and worship. In fact, the golden strand of liberty runs throughout the fabric of our Constitution.

(3) The petitioner through the present writ petition under Article 226 of the Constitution of India has raised the question of his liberty, so vital to a man, as observed above, which he is alleged to have been illegally deprived of. He thus seeks the quashment of the order of detention dated January 20,1993 and the order of declaration No. 3/93 u/s 10(1) of the Prevention of Illicit Traffic in Narcotics Drugs and Psychotropic Substances Act,1988 (for short "the Act").

(4) Brief facts which gave rise to the present petition are as under: that the

petitioner is 55 years of age. .He originally belongs to Ludhiana. However, he had migrated to U.K. near about 25 years ago. The petitioner is a father of two daughters who are of marriageable age. The petitioner came to India in search of a suitable match for his daughters. He also wanted to explore the possibility of export of rice and garments from India to the above said country.

(5) The petitioner was forcibly removed on August 27,1992 by the officials of the Narcotic Control Bureau and was later on shown to have been arrested in a case under the Act. The petitioner was sent to judicial custody on August 29,1992. The petitioner has been in jail since then. He never moved any application for bail because of the stringent provisions of the Act. A detention order was passed u/s 3(1) of the Act on January 20,1993 by the respondent No.2 against the petitioner and the same was served on him on January 22,1993 in Central Jail, Tihar where he was being detained as an undertrial. Subsequently, several days thereafter he was served with grounds of detention Along with a list of documents relied upon by the detaining authority. The impugned order of detention passed against the petitioner is absolutely illegal, invalid, unconstitutional and unwarranted. The petitioner sent a representation to the Central Government against the order of detention through the Superintendent Jail, Tihar. The same was rejected vide letter dated March 30,1993 and communicated to the petitioner on April 13,1993. The respondent No.3 made a declaration u/s 10(1) of the Act on February 18,1993. The petitioner made a representation against the order of detention before the Advisory Board on being produced before the same on March 26,1993. The petitioner submitted another representation dated April 28,1993 to the President of India against the order of declaration and against the above said order of detention through the Superintendent Central Jail, Tihar.

(6) The said detention order and the declaration are illegal, invalid, unconstitutional and unwarranted, inter alia, on the following grounds: that the detaining authority did not take into consideration the retraction dated September 2,1992 made by the petitioner and sent from the jail which formed part of the judicial file. Thus, the detention order is liable to be quashed for non consideration of the important and vital document which could have swayed the mind of the detaining authority at the time of the passing of the detention order. There is long and inordinate delay in disposing of the representation made by the petitioner against the order of detention and the order of declaration. The order of rejection was communicated to the petitioner on April 13,1993. Thus there was a .considerable delay in the communication of the said order. The petitioner was already in detention i.e. in jail at the time of the passing of the impugned detention order. The petitioner never applied for bail: Thus there was absolutely no need for the impugned detention order. There were no compelling circumstances to pass the detention order inasmuch as there was no likelihood of the petitioner being released on bail.

(7) It has been urged for and on behalf of the respondents that neither the

sponsoring authority nor the Government received any retraction from the jail. Thus there is no question of the consideration of the same at the time of the passing of the impugned order. There is no delay, much less any undue delay, in dealing with the representations. The detaining authority had sufficient material on record to pass the impugned order and the same was passed after a careful consideration and subjective satisfaction in terms of the Act. Thus it is false and preposterous to allege that there was non application of mind. The petitioner's representation dated February 8,1993 was disposed of on March 30,1993. The representation of the petitioner to the President of India dated April 8,1993 was received on May 24,1993 and was disposed of on May 28,1993. The petition is thus false and frivolous and is liable to be dismissed.

(8) Learned counsel for the petitioner Mr. Aggarwal has vehemently contended that there was inordinate delay in dealing with the representations made by the petitioner against the detention order dated January 20,1993 and against the declaration dated February 18,1993. The respondents took 32 days indisposing of the representation dated February 8,1993. Similarly, the respondents took 46 days in dealing with the representation dated April 8,1993 made to the President of India. Thus there is a grave violation of the Fundamental Rights as guaranteed by the Constitution under Art. 22(5).

(9) The next limb of the argument of the learned counsel for the petitioner is that the detaining authority did not take into consideration very important and material and relevant documents which could have swayed its mind in either way, such as retraction statement dated September 2,1992. It thus vitiates the impugned detention order and it is liable to be quashed on this ground alone.

(10) The third contention raised by the learned counsel for the petitioner is that there was absolutely no need to pass the impugned detention order inasmuch as the petitioner was already in custody in a case under the Act and there was absolutely no likelihood of his being released on bail on account of the stringent provisions of the Act with regard to bail.

(11) Learned counsel for the respondent Mr. Madan Lokur, has urged to the contrary.

(12) I have heard the learned counsel for both the parties and have very carefully examined their rival contentions and have given my anxious thoughts thereto.

(13) Mr. Aggarwal, learned counsel for the petitioner has contended with great zeal and fervour that the detaining authority miserably failed to take into consideration very relevant and material documents, such as retraction statement made by the petitioner, which it was under an obligation to take. It thus affected the subjective satisfaction of the detaining authority and thus vitiated the order. The learned counsel in support of his argument has placed reliance on the observations of the Hon"ble Supreme Court as reported in K. Satyanarayan Subudhi v. Union of India,1991 Cr.L.J. 1536 ..

...."We have considered the same very minutely and carefully and it appears to us that in fact there were not two grounds but only one ground and the non-placement of the retraction of the confessional statement by the detenu before the detaining authority and non-consideration of the same while arriving at his subjective satisfaction in making the order of detention goes to the root of the order of detention and in our considered opinion makes the order of detention invalid".

(14) The learned counsel has then cited in support of his contention the observations of the Hon"ble Supreme Court as reported in *Ashadevi v. K.Shivraj and another*, Air 1979 Sc 447 wherein it has been held

"THAT the question whether the confessional statements recorded earlier were voluntary statements or were statements which were obtained from the detenu under duress or whether the subsequent retraction of those statements by the detenu was in the nature of an afterthought, were primarily for the detaining authority to consider before deciding to issue the detention order but since admittedly the aforesaid vital facts which would have influenced the mind of the detaining authority one way or the other were neither placed before nor considered by the detaining authority it was held that there was non- application of mind to the most material and vital facts vitiating the requisite satisfaction of the detaining authority thereby rendering the detention order invalid and illegal".

(15) The learned Standing Counsel, Mr. Madan Lokur, on the other hand, has argued that the non consideration of the retraction statement is inconsequential in the present case inasmuch as one of the documents which was considered and relied upon by the detaining authority is the application for medical examination of the petitioner which finds a mention at Serial No.20 of the list "Annexure -C". A close scrutiny of the same reveals that therein the present petitioner has stated in unequivocal terms that he did not make any confessional statement. The learned counsel thus contends that the retraction statement, if any, made by the petitioner was duly considered and yet the detention order was passed. Hence, IT is simply a figment of the imagination of the learned counsel for the petitioner that the retraction statement was not within the knowledge of the detaining authority.

(16) The next limb of the argument of the learned Standing Counsel is that assuming for the sake of argument even if the retraction was not taken into consideration at the time of the passing of the impugned order it would not vitiate the subjective satisfaction of the detaining authority. The learned counsel in support of his argument has led me through the observations of their Lordships of the Supreme Court in *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, ."Where for reaching the satisfaction envisaged in S. 3 of the Act for passing of an order of detention the detaining authority had taken into consideration the confessional statement made by the detenu under S. 108 of the Customs Act which was subsequently retracted and without taking note of the retraction, but the confessional

statement was not the only fact upon which the detention order was passed and there was evidence before the authority concerned that 60 gold biscuits of foreign origin without any Explanation of their importation were found in the possession of the detenu and that the detenu was in contact with persons who were buying smuggled gold from him and buying at high prices, even if the confession made under S. 108 of Customs Act had to be ignored and obliterated, the order of detention could not be challenged".

(17) The petitioner has stated in para 10(1) of his petition specifically that the detaining authority did not take into consideration retraction statement dated September 2,1992 which was sent from the jail and which was ordered to be kept on the file of the Court. The respondent in reply to the said para of the petition, vide paras 12(1),(2) & (3), have stated that neither the sponsoring authority nor the Government has received any alleged retraction statement dated September 2,1992 from the jail authority. The alleged retraction statement was not within the notice of the sponsoring authority and the detaining authority.

(18) It is thus manifest from above that the contention as raised by the learned Standing Counsel that the retraction statement was within the knowledge of the detaining authority and the same was duly considered is without any substance and is of no avail to the respondent. The respondent are bound by their counter affidavit. They cannot wriggle out of the same.

(19) There is yet another aspect of the matter. The application for medical examination dated January 22,1993 can by no stretch of imagination be treated as a retraction statement. There is only a passing reference in the said application that the petitioner has not made any voluntary statement. There is nothing more and nothing less in the said application. The petitioner has placed a copy of the retraction statement on the file of this Court vide Annexure -1. A close scrutiny of the. same reveals that the petitioner has given out therein the details as to how he has been falsely implicated at the instance of N.K.Arora and Jimmy Anil in connivance with officers of Narcotic Control Bureau by greasing their palms. He further goes on to state therein that the Ncb officials compelled and impelled him to copy out a statement written out by them and threatened him with dire consequences if he did not write the same. It is thus manifest from above that the said retraction statement was a very vital and material document which could have swayed the-subjective satisfaction of the detaining authority in either way had it been taken into consideration. Thus the contention of the learned Standing Counsel that the said retraction statement was before the detaining authority at the time of the passing of the impugned order and was duly taken into consideration does not hold any water. The learned Standing Counsel has also failed to show to me what were the other relevant and material documents besides the confessional statement which could have led to the passing of the impugned order.

(20) The only ground on the basis of which the impugned order of detention was clamped is that the petitioner was found in possession of heroin weighing 1670

grams. Thus I feel that the non placement of the retraction of "the confessional statement by the sponsoring authority before the detaining authority and non consideration of the same goes to the root of the matter and renders nugatory the detention order.

(21) Learned counsel for the petitioner Mr. Aggarwal has then contended that the petitioner was in jail at the time of the impugned detention order. He never applied for bail. There was no possibility of his release- on bail on account of the stringent measures of Section 37 of the Act and as such, there was no compelling necessity for passing the impugned order. The learned Standing Counsel, on the other hand, has contended that the detaining authority was free to pass the impugned order despite the fact that the petitioner was in jail the moment it came to the conclusion that there was every likelihood of the petitioner being released on bail.

(22) The rationale behind the law of preventive detention is to pre-empt the move of a particular person to indulge in illicit traffic in narcotic drugs by detaining him under the said provisions of the said Act and thus to preclude him from the said activities. Thus when a person is already in detention there is absolutely no compelling necessity to pass the detention order over again. It is a well established principle of law that a -detention order u/s 3(1) of the Act can be passed only in those discerning few cases when there is a likelihood of a person being released on bail and that there is an apprehension that on being released on bail he is likely to indulge over again in his nefarious activities. It is only on being so satisfied that the detaining authority can clamp an order of detention on such a person.

(23) The above view was given vent to by their Lordships of the Supreme Court in Dharmendra Suganchand Chelawat and another Vs. Union of India and others, ." The decisions referred to above led to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention.. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities". The Hon"ble Supreme Court reiterated the above view in a recent judgment reported in Surya Prakash Sharma Vs. State of U.P. and Others, .

(24) The learned Standing Counsel in support of his view that a detention order can be passed even when the detenu is in jail, has cited the observations of their

Lordships of the Supreme Court as reported in Smt. Azra Fatima Vs. Union of India (UOI) and Others, . To my mind the said observations are of no assistance to the learned Standing Counsel inasmuch as the said case pertains to the year 1988. The provisions relating to bail under the Act i.e. Section 37 came into force w.e.f. May 29,1989 which made the release on bail almost impossible. Further more , two of the co-accused had already been released on bail in the said case and as such there was every likelihood that the petitioner would also be released on bail. Similarly, the observations of the Hon"ble Supreme Court as reported in Abdul Sathar Ibrahim Manik Vs. Union of India and others, , are also not attracted to the case in hand and are as such of no help to the learned counsel. In the instant case the bail application was moved u/s 437 Criminal Procedure Code . by the detenu which was rejected by the learned Magistrate and there was every possibility of the detenu being released on bail as the remand was going to expire on November 10,1990.

(25) In the circumstances stated above, it can be safely concluded that there was absolutely no compelling necessity for passing the impugned order. Hence the said order is illegal and invalid.

(26) The next point raised for and on behalf of the petitioner is that there was an inordinate delay in the disposal of his representation dated February 8,1993. The said representation was forwarded to the concerned authority by Jail Superintendent after a delay of five days i.e. on February 15,1993. The comments were called from the sponsoring authority on the said date. The comments were received on March 19,1993. Thus in total there was a delay of 37 days. The learned counsel for the petitioner has thus contended that the aforesaid delay in the disposal of the said representation vitiates the detention order. The learned Standing Counsel, Mr. Lokur, has conceded with commendable fairness on his part that there is no Explanation whatsoever for the said delay. It implies thereby that he has conceded that in fact there was delay in the disposal of the said representation.]

(27) Now the question which falls for decision is as to what is the effect of delay? It is a well settled principle of law that a representation made by a detenu is to be disposed of without any delay whatsoever. In fact, the delay in tree disposal of representation can be condoned only in those discerning few cases where it has. been reasonably and satisfactorily explained. Needless to emphasise that whenever there is a question of liberty of an individual it is expected that the authorities would dispose of the representation with all the promptitude at their command and disposal.

(28) I am supported in my above view by the observations of their Lordships of the Supreme Court as reported in Harish Pahwa Vs. State of U. P. and Others, , "The representation made by a detenu has to be considered without any delay. The Supreme Court does not look with equanimity upon 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. It is the duty of the State to proceed to determine representations 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. Where this is not done the detention has to be declared unconstitutional".

(29) I am tempted here to cite the observations of their Lordships of the Supreme Court as reported in Mahesh Kumar Chauhan alias Banti Vs. Union of India and others, .." inspire of the weighty pronouncements, of this Court making the legal position clear, it is still disquieting to note that on many occasions the appropriate authorities cause considerable delay in considering and disposing of representations and also exhibit culpable indifference in explaining such delay. We feel that in case the appropriate authority is unable to explain personally the delay at various stages, then it will be desirable - indeed appropriate - for the concerned authority or authorities at whose hands the delay has occurred to individually explain such delay. The next question is should or can the Court in the absence of any Explanation wink at or skip over or ignore such an infringement of the constitutional mandate and uphold an order of detention merely on the ground that the enormity of allegations made in the grounds of detention is of very serious nature as in the present case? Our answer would be "Not at all".

(30) This brings me to the delay in the disposal of the representation dated April 8,1993 made against the declaration dated February 18,1993. The said representation was forwarded by the Superintendent, Central Jail, Tihar on April 12,1993 to the President of India. It was received by the concerned authority from the President Secretariat on May 24,1993. Subsequently it was rejected on May 28,1993. Thus there was an inordinate delay of 46 days in the disposal of the representation. The learned counsel for the petitioner thus wants to concluded me there from that the impugned order is liable to be quashed on this ground as well.

(31) The learned Standing Counsel has not challenged the factum of delay in the disposal of the said representation. However, he has contended that the said delay cannot be attributed to the concerned authority i.e. the Central Government which is to deal with the representations inasmuch as the petitioner himself chose to make a representation before the President of India instead of concerned authority. The concerned authority according to the learned Standing Counsel took only three days in disposing of the said representation. The contention of the learned counsel though an ingenious one but can be brushed aside within an anon.

(32) The representation which the petitioner is required to make is to the Central Government. Thus the only question is as to whether the President of India can

be termed as "Central Government" whom the representation can be validly made? My answer to the above question is in the affirmative. u/s 3(8) of the General Clauses Act, Central Government means the President and as such a representation made to the President of India would be deemed to be a valid representation in the eye of law. I am supported in my above view by the observations of their Lordships of the Supreme Court as reported in Raghavendra Singh v. Superintendent , District Jail, Kanpur and others, 1986 CrL. L.J. 493. It was observed therein."Under S. 3(8) of the General Clauses Act, the "Central Government" means the President and a representation addressed to the President must, Therefore, be considered to be a representation properly addressed to the Central Government. Even so some allowance may be made for the time taken to forward the representation to the appropriate Ministry".

(33) In view of the above I am of the view that the petitioner is entitled to succeed. The petition is allowed. The detention order F.No. 801/3/93-PITNDPS dated January 20,1993 and declaration No. 3/93 u/s 10(1) of the Act are hereby quashed. Let the petitioner be set at liberty in case he is not required to be detained in any other case.