
(1996) 08 AHC CK 0103

In the Allahabad High Court

Case No : Habeas Corpus Petition No. 38237 of 1995

Javed Akhtar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 12-08-1996

Acts Referred:

Constitution of India, 1950 — Article 166, 21, 22, 22(5)

National Security Act, 1980 — Section 14, 3(2), 3(4), 5(3), 6

Citation : (1997) CriLJ 2274

Hon'ble Judges : N.L. Ganguly, J;B.K. Sharma, J

Bench : Division Bench

Advocate : Prem Prakash, for the Appellant; Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

N.L. Ganguly, J.—This Habeas Corpus Petition has been filed by the petitioner with a prayer to quash the Order of detention of the petitioner passed by the District Magistrate, Kanpur Nagar u/s 3(2) of the National Security Act. Annexure No. 1 to the Writ Petition was presented before the Court. The Division Bench granted time to the State Counsel to file the counter affidavit. The counter affidavit of Sri Harbhajan Singh,. District Magistrate, Kanpur Nagar and of Sri Banshi Dhar Pandey, UDA in the Confidential Section 6, U.P. Secretariate, Lucknow and affidavit of Sri O. I. Singh, Dy. Jailor, Kanpur Nagar were filed. After the counter affidavits of the District Magistrate and the State Government, the petition was admitted on 5-4-96. The notice was issued in this case to the Union of India through Secretary, Ministry of Home Affairs Government of India who is also opposite party and the Unions Standing Counsel had received for them. No counter affidavit on behalf of the Union of India has been filed. Rejoinder affidavit to the counter affidavits of the District Magistrate and the State Government and the Dy. Jailor has been filed on behalf of the petitioner.

2. The order of detention dated 23-9-95, Annexure 1 to the Writ Petition, was

executed and served to the petitioner on 25-9-95 in Jail through Jail authorities. The order of approval u/s 3(4) of the Act was passed by the State on 30-9-95. Reference u/s 5(3) of the Act was made to the Central Government on 30-9-95. The petitioner's representation dated 14-10-95 was submitted through the Jail authorities which was forwarded to the District Magistrate on 16-10-95. The representation of the petitioner was received by the State Government on 17-10-95. The representation was placed before the Advisory Board on 18-10-95. The copy of the representation was sent to the Central Government u/s 14 of the Act on 18-10-95. The District Magistrate sent the comments to the State on 30-10-95. It is to be noted that the District Magistrate sent the petitioner's representation which was received by the State Government on 17-10-95 and the comments were sent by the District Magistrate, Kanpur on 30-10-95. It has been stated that the comments on the representation was put up before the Advisory Board on 31-10-95 and the same day the comments were also sent to the Central Government. On 1-11 -95 the State Government rejected the representation. On 3-11 -95 hearing before the Advisory Board is said to have taken place and on 21-11-95, the order for confirmation was passed. On 16-11-95 the Central Government communicated that the representation of the petitioner was rejected.

3. The petitioner in paragraphs 19 and 20 of the Writ Petition stated that the petitioner's representation dated 14-10-95 sent through the Superintendent, District Jail, Kanpur Nagar against the ground of detention to the detaining authority, as also the State Government and the Central Government but no communication was made to him as to what has transpired upon the said representation. It has been stated that the detaining authority exercised the powers infringing the provisions of Article 22(5) of the Constitution. It has been stated that the Central Government and the State Government have not bothered to consider the representation and the facts and circumstances therein. It has been stated that the State Government did not consider the petitioner's representation before referring it to the Advisory Board or placing it before the Board. The District Magistrate Sri HarBhajan Singh in para 18 of the counter affidavit denied the averments. In para 19 of the counter affidavit, it is stated that after considering, the said representation, the same was rejected by the State Government and the petitioner's representation has been found without merit by the authorities.

4. In para 3 (i) of the counter affidavit of Sri Banshi Dhar Pandey, it has been stated that the petitioner's representation dated 14-10-95 was forwarded by the District Magistrate to the State Government on 17-10-95. It has been specifically mentioned that the representation was not accompanied with the comments or parawise reply of the District Magistrate, Kanpur Nagar. However, the State Government placed the aforesaid representation before the Advisory Board on 18-10-1995,. A copy of the representation was also sent to the Secretary, Ministry of Home Affairs, New Delhi by the State Government on 18-10-95. It has been slated that the State Government's comments was placed before the

detaining authority - advisory Board on 31-10-95. A copy of the same was also sent to the Secretary. Ministry of Home Affairs, New Delhi on 31-10-95. The Ministry of Home Affairs, New Delhi vide their Telex dated 16-11-95 intimated to the petitioner through the Superintendent, District Jail, Kanpur Nagar, as well as, State Government that the petitioner's representation was rejected.

5. Sri Prem Prakash, learned counsel for the petitioner placed before us the necessary facts and circumstances in the present writ petition. He submitted that the District Magistrate had not sent his comments along with the copy of the representation. It has been admitted that the comments were sent on 30-10-95 by the District Magistrate to the State Government. The learned counsel for the petitioner emphasised and submitted that there was no justification for the District Magistrate not to have sent his comments after receipt of the representation. He submitted that there was a delay of 16 days in sending the comments and there is no explanation given by the District Magistrate for the delay. The learned counsel submitted that this ground alone is sufficient for quashing the impugned order. He submitted that the unexplained delay in sending the comments violated the provisions of Article 22(5) of the Constitution.

6. Sri Tripathi, learned A. G. A. submitted that there is no pleading or averments in the Writ Petition that no comment on the representation was sent by the District Magistrate with delay. He further submitted that unless there was a pleading and specific averment in the Writ Petition, the petitioner cannot be permitted to argue before the Court that there was no ground or explanation (for) not sending the comments by the District Magistrate on the petitioner's representation. The learned counsel for the petitioner submitted that it is not required to state in the Habeas Corpus Writ Petition about a fact which is admitted and contained in the counter affidavit of the State Government by Sri Banshi Dhar Pandey. He submitted that it is not necessary to strictly comply with and follow the provision of the CPC of pleading. He submitted that in a Habeas Corpus Writ Petition, no affidavit is necessary for invoking" the jurisdiction of the High Court. The jurisdiction of the High Court may be invoked even by sending a post card informing the Court that a citizen has been wrongly detained violating the provisions of law.

7. Sri Prem Prakash placed Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, . In para 4 of the said judgment the Apex Court was pleased to observe as under :

It is also necessary to point out that in case of an application for a writ of habeas corpus, the practice evolved by this Court is not to follow strict rules of pleading nor place undue emphasis on the question as to on whom the burden of proof lies. Even a postcard written by a detinue from jail has been sufficient to activate this Court into examining the legality of detention. This Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. Whenever a petition for a writ of habeas corpus has come up

before this Court, it has almost invariably issued a rule calling upon the detaining authority to justify the detention.

The Apex Court further observed relying upon *Sk. Nizamuddin Vs. State of West Bengal*, held as under :

Once the rule is issued it is the bounden duty of the Court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and the citizen is not deprived of his personal liberty otherwise than in accordance with law.

8. Another decision on the same point, referred is *Mohinuddin alias Moin Master Vs. District Magistrate, Beed and Others*, . The Apex Court in the said Judgment was pleased to observe as under : (at p. 1979 of AIR)

It was an improper exercise of power on the part of the High Court in disallowing "the writ petition on the ground of imperfect pleadings. Normally, writ petitions are decided on the basis of affidavits and the petitioner cannot be permitted to raise grounds not taken in the petition at the hearing. The same rule cannot be applied to a petition for grant of a writ of habeas corpus. It is enough for the detinue to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detinue was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Article 22(5). In return to a rule nisi issued by this Court or the High Court in a habeas corpus petition, the proper person to file the same is the District Magistrate who had passed the impugned order of detention and he must explain his subjective satisfaction and the grounds therefore, and if for some good reasons the District Magistrate is not available, the affidavit must be sworn by some responsible officer like the Secretary or the Deputy Secretary to the Government in the Home Department who personally dealt with or processed the case in the Secretariat or submitted it to the Minister or other officer duly authorised under the Rules of Business framed by the Governor under Article 166 of the Constitution to pass order on behalf of the Government in such matters : *Niranjansingh Vs. State of Madhya Pradesh*, , *Habibullah Khan Vs. The State of West Bengal*, , *Jagdish Prasad Vs. The State of Bihar* and *Another*, and *Mohd. Alam Vs. State of West Bengal*, .

9. The learned counsel for the petitioner placed, *Julia Jose Mavely Vs. Union of India and others*, , where the Apex Court was pleased to observe as under (Para 3)

The respondent has not offered such explanation in his counter affidavit. Secondly, even accepting this present explanation, the delay cannot be said to have been explained because the postal transmission, according to the learned

counsel was by speed post and there was no supporting affidavit filed by the sponsoring authority who alone could explain the delay at his end.

10. Large number of cases namely Mahesh Kumar Chauhan alias Banti Vs. Union of India and others, , Rama Dhondur Borade Vs. V.K. Saraf, Commissioner of Police and Others, , where 14 days delay in respect of the further information was held to be illegal. The Apex Court relying Jayanarayan Sukul Vs. State of West Bengal, was pleased to observe as under :

It is established beyond any measure of doubt that the appropriate authority is bound to consider the representation of the detainee as early as possible. The appropriate Government itself is bound to consider the representation as expeditiously as possible. The reason for immediate consideration of the representation is too obvious to be stressed. The personal liberty of a person is at stake. Any delay would not only be an irresponsible act on the part of the appropriate authority but also unconstitutional because the Constitution enshrines the fundamental right of a detainee to have his representation considered and it is imperative that when the liberty of a person is in peril immediate action should be taken by the relevant authorities.

11. In Jayanarayan Sukul Vs. State of West Bengal, , the Apex Court in Constitution Bench judgment was pleased to state four principles to be followed in regard to the representation of the detainee. Firstly the appropriate authority is bound to give an opportunity to the detainee to make a representation and to consider the representation of the detainee as early as possible. Secondly, the consideration of the representation of the detainee by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detainee by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raises a correlative duty of the State. Fourthly, the appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detainee's representation to the Advisory Board. If the appropriate Government will not send the matter to the Advisory Board, if however the Government will not release the detainee the Government will send the case along with the detainee's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detainee the Government will release the detainee. If the Advisory Board will express any opinion against the release of the detainee the Government may still exercise the power to release the detainee.

12. Sri Prem Prakash cited (Kundanbhai Dulabhai Shaikh v. District Magistrate, Ahmedabad). The Hon'ble Supreme Court was pleased to observe in observing that case that (at p. 3002 of AIR):

The representation dated 2-9-95, which was made to the Central Government could not be disposed of for want of comments from the State Government. It was noticed that the representation has lying with the State Government from 2-9-1995 to 27-9-1995 and it was on that date that it was sent to the Central Government which received it on 4-10-1995. The Central Government, in spite of its telegrams and reminders, was not furnished the comments by the State Government for over a month. The comments of the State Government were received by the Central Government on 6-11-1995 and the representation was disposed of on 8-11-1995. This again is a glaring example of the lethargy on the part of the State Government, as a result of which petitioners representation could not be disposed of expeditiously by the Central Government with the obvious consequences that the petitioner's right under Article 22(5) of the Constitution read with Section 8 of the Act was violated.

13. The learned A. G. A. submitted that since the petitioner had not pleaded about the non-sending of the comments by the District Magistrate along with the representation to the State Government was not a plea in the writ petition, and this argument had been developed on the basis of the averments in the counter affidavit of Sri Banshi Dhar Pandey on behalf of the State Government. We have already referred to the decision of the Hon"ble Supreme Court that the technicalities of law pleaded are not available for Habeas Corpus writ petition. It is the entire material before the Court which is to be examined and not to go by technicalities of procedure. However, the learned A.G. A. placed before us 1993 All WC 425 (Munney Khan v. State of U.P.) and placed paragraph 12 of the said judgment before us and placed the sentence in the paragraph that: "If such a plea had been specifically taken in the petition and averments in support thereof had been made, the State would have got an opportunity to give a reply and explain as to how it is possible to cut a live wire. In absence of pleadings, we are not prepared to entertain the submission made by the learned counsel"

14. The authority of the Division Bench placed before us is not helpful to the State. The ruling cited was for a case where facts were brought before the High Court to show that in the facts and circumstances were not possible to be committed. Here we are not concerned with any such fact whether without specialised criminal activity of cutting a live wire it was possible or not. This Court is not examining any factual matter as to whether it is possible to commit such an offence, as stated. We are concerned with the question whether the District Magistrate sent his comments with the representation of the petitioner at the earliest. The fact is stated in the counter affidavit of Sri Banshi Dhar Pandey of the State Government, which needs no factual investigation. It has to be accepted that the comments had not been sent by the District Magistrate alongwith the representation and admittedly according to the record, it was sent after 16 days of the sending of the representation.

15. Learned A.G.A. submitted that after receiving the counter affidavit of Sri Banshi Dhar Pandey when the petitioner became aware of the fact, it was

necessary for the petitioner to get the petition amended or atleast moved a supplementary affidavit to bring the fact about the delay in sending of the comments by the District Magistrate. We have already made it clear that the technical procedures of pleading law are not to be strictly adhered to in the Habeas Corpus writ petition and the argument of the learned A.G.A. is misconceived.

16. Learned A.G.A. submitted that at least an opportunity be given to the State Government for filing a supplementary affidavit giving the explanation for the delay in sending the comments of the District Magistrate. The learned A.G.A. could not address verbally also before us the facts which may justify his request for stating some facts explaining the delay in sending the comments of the District Magistrate. Merely because a legal argument based on the decision of the High Court which is clearly in favour of the petitioner, the learned A.G.A. cannot be permitted to delay the disposal of the Habeas Corpus writ petition by asking time for supplementary counter affidavit.

17. Learned A.G.A. cited Jitender Tyagi Vs. Delhi Administration and another, . He placed paragraph 17 of the said judgment and urged that the Hon"ble Supreme Court declined to allow the petitioner to place a question of law which also involved question of fact. The authority cited by the learned A.G.A. is not helpful to the case of the State. Here in the present case, there is no factual controversy. It is admitted that no comment on the explanation was sent by the District Magistrate to the State Government along with the petitioner's representation which was sent after 16 days by the District Magistrate. Thus, there is no controversy about the fact and the petitioner is not raising any controversy about any factual position but urged on the basis of the averments from the affidavit of Sri Banshi Dhar Pandey for the State Government itself.

18. The learned A.G.A. submitted that he may be permitted some time to obtain the record of the State Government and from the record, he submitted that he would show that there was sufficient justification for sending the comments of the district Magistrate after 16 days of sending of the petitioner's representation. The learned counsel for the petitioner Sri Prem Prakash vehemently opposed this request that the State Counsel cannot be permitted the request that the record of the State Government be sent for at the stage of arguments when the arguments were heard also two days earlier at sufficient length. He submitted that the State Government or the learned A.G.A. cannot be permitted to fish out points to oppose the petition for Habeas Corpus writ petition. He relied upon 1994 SCC 1706 (Rajindra v. Commissioner of police, Nagpur Division) and referred to para 2 of the said judgment. He also referred to Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others, and K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others, . A perusal of the aforesaid decisions shows that the Apex Court in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, and case of Smt. Santosh Anand v. Union of India, W.P. No. 1097 of 1979 decided on 31-10-79,

has pointed out that the concept of liberty has now been widened. The Hon'ble Supreme Court has added new dimensions to various features and concepts of liberty as enshrined in Articles 21 and 22 of the Constitution. The arguments of the learned A.G.A. for obtaining the record from the State Government was also not possible in view of observations in Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others, . The Apex Court said in Shri. Tushar Thakker Vs. Union of India (UOI) and Others, as under:

This Court has repeatedly held that the detenue has a Constitutional right under Article 22(5) to be furnished with copies of formal material relied upon or referred to in the grounds of detention, with reasonable expedition.

19. In 1994 SCC 1706 (Rajindra v. Commissioner of Police, Nagpur Division), the Apex Court held as under :

The delay in disposal of the representation unless satisfactorily explained, the detention order is liable to be quashed.

The same view was also taken in K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others, .

19-A. Sri Prem Prakash, learned counsel for the appellant also placed before us the copies of the judgments in Habeas Corpus petition No. 7151 of 1993 (Babbu Singh v. Union of India) decided by the Division Bench as 18-8-93 and a decision in Writ Petition No. 8922 of 1993 (Amin Baba v. Union of India) decided by this Court, where the Division Bench held that the unexplained delay occurred on the part of the Sponsoring Authority in sending the comments without explanation was violative of Article 22(5) of the Constitution.

20. The learned A.G.A. also cited Kamlabai (Smt) Vs. Commissioner of Police, Nagpur and Others, .

21. We have examined the case laws cited by the learned counsel for the parties and perused the record. From the facts and circumstances of the case, we are not inclined to grant any time for obtaining the record of the State Government to the learned A.G.A. to enable him to fish out some legal points to oppose the Habeas Corpus writ petition nor we are inclined to grant any time for-filing supplementary counter affidavit to explain the facts and circumstances for the delay. We have held above that there is no factual controversy of this view about the date of sending of the comments on the representation by the District Magistrate which was sent after 16 days of sending of the date of the representation. The State, if had any explanation, it was for them to incorporate in the main counter affidavit filed on their behalf. Neither they incorporated the explanation nor stated any fact to the counter affidavit filed which may justify the delay in sending the comments. We are satisfied from the facts and the record of the case that the petitioner's representation was not considered expeditiously as there was no material or comment by the District Magistrate before the Advisory Board or the State Government and the order confirming the

detention was mechanically passed without due application of mind. Such an order has no legs to stand. We direct that the impugned order dated 23-9-95 passed by the District Magistrate, Kanpur Nagar be quashed and the petitioner be set at liberty unless wanted in any other case.

22. The Habeas Corpus Petition is allowed.

The parties are directed to bear their own costs.