
(1998) 03 DEL CK 0072

In the Delhi High Court

Case No : Criminal Writ No.382 of 1997

Jitender Kumar Aggarwal

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 01-03-1998

Acts Referred:

Constitution of India, 1950 — Article 22(5), 226

Citation : (1998) 2 AD 963 : (1998) 74 DLT 34 : (1998) 45 DRJ 244

Hon'ble Judges : Mohd. Shamim, J

Bench : Single Bench

Advocate : Shri Om Dutt Aggarwal and Ms. Sangeeta Bhayana, for the Appellant; Ms. Barkha Babbar, Mr. L.R. Luthra and Mr. S.K.Aggarwal, for the Respondent

Judgement

Mohd. Shamim, J.—The petitioner through the present petition seeks quashment of the detention order dated March 5, 1997 (Annexure "A") and for issue of a writ of habeas corpus for a direction to the respondents to set his son at liberty forthwith known as Jitender Kumar Aggarwal.

2. Relevant brief facts giving rise to the presentation of the present petition are as under: that the petitioner herein is the father of the detenu Jitender Kumar Aggarwal. His son was detained in pursuance of the detention order dated March 5, 1997 passed by Shri K.L.Verma, Joint Secretary, Ministry of Finance, Department of Revenue, respondent No.2 (vide Annexure "A"), on the allegations contained in the grounds of detention served upon the detenu (Annexures B & B1). According to the grounds of detention, one Satish Kumar was apprehended at Khanna (Punjab). His person was searched which resulted in the seizure of Indian Currency to the tune of Rs. 3.50 lacs along with certain documents which led to the investigation by the police. It was revealed by him in his statement during the interrogation that the said currency was given to him by one Satish Kumar i.e. the detenu. On search of the premises in occupation of the detenu on May 25, 1996 by the officers of the Enforcement Directorate (FERA).

Rs. 31.80 lacs along with certain documents were seized from his house. The detenu in his statement stated that the seized currency was delivered to him by some un-known person under instructions of his nephew i.e. Shri Sandeep from Hong Kong and he had as yet not received any instructions from him about the seized currency. He further stated that he had been receiving Indian Currency from different persons on the instructions of said Sandeep and had been delivering the same as per his instructions to different persons. He was being paid Rs. 10,000/- per mensem as remuneration for the same. Consequently the detaining authority was of the view in view of the above that the detenu had been engaged in unauthorised transactions in violation of the Foreign Exchange Regulation Act, 1973 and thus with a view to preventing the detenu from acting in a manner prejudicial to the augmentation of the country's foreign exchange reserves it was necessary to put the detenu under detention. Therefore, the detenu was arrested on May 25, 1996 and was produced before the concerned court on May 26, 1996. However, since the charge-sheet could not be filed within the statutory period the detenu was released on bail.

3. The above said detention order is bad in law on account of an inordinate delay in passing of the same. The purported purpose of detention was punitive instead of preventive. There is an infraction of a constitutional and statutory safeguards inasmuch as all the relied upon documents have not been supplied *pari passu* grounds of detention. The grounds of detention reflect unawareness of relevant material which was neither placed before nor considered by the detaining authority. Hence it vitiated the subjective satisfaction of the detaining authority. There is non application of mind in consideration of certain extraneous material in the matter of detention which had vitiated the subjective satisfaction. The representation dated May 8, 1997 to the detaining authority through the Superintendent Jail was to be considered by all the competent authorities as per the request made therein. The said representation was accordingly rejected by the Central Government and by detaining authority on August 1, 1997. Thus there has been a long and inordinate delay on the part of the detaining authority and the Central Government in consideration of the said representation which is in clear violation of the provisions of Article 22(5) of the Constitution of India. Hence the impugned detention order and the continued detention are liable to be quashed.

4. The detenu submitted another representation dated May 8, 1997 to the detaining authority through the Superintendent Jail with a request therein that certain documents and information may kindly be supplied. This representation was rejected by the detaining authority on July 29, 1997 and by the Central Government on August 1, 1997. Thus there has been long and undue delay on the part of the detaining authority and the Central Government in consideration of the said representation.

5. The detenu sent another representation dated May 9, 1997 to the Advisory Board. He also requested therein that the same be considered by a competent

authority. The said representation was rejected on June 11, 1997. Whereas the Central Government rejected the same on June 16, 1997. Thus there was undue delay in the disposal of the said representation. It has thus been prayed that in view of the above the said detention order and the continued detention be quashed and the detenu be set at liberty forthwith.

6. Respondents Nos. 1 and 2 have opposed the present petition through the counter affidavit filed by Shri Somnath Pal, Joint Secretary to the Government of India. According to the said affidavit, the representation dated May 8, 1997 addressed to the detaining authority was received in the COFEPOSA Unit of the Ministry on May 12, 1997. Comments of the sponsoring authority were called on the said representation vide letter dated May 14, 1997. The sponsoring authority forwarded their comments vide their letter dated May 26, 1997 which was received in the COFEPOSA Unit on May 27, 1997. May 17, 1997, May 18, 1997, May 24, 1997 and May 25, 1997 were holidays being Saturdays and Sundays respectively. The same were put up before the concerned Under Secretary on May 29, 1997. The Under Secretary after considering the representation submitted the same to the Joint Secretary on May 30, 1997 who asked for some additional information on the same date. The file was submitted to the Joint Secretary on June 3, 1997 since May 31, 1997 and June 1, 1997 were holidays being Saturday and Sunday, who considered the representation and rejected the same on June 3, 1997. Memo intimating rejection was issued on June 4, 1997. Thus there is no undue or un-explained delay in considering the representation of the detenu by the Joint Secretary (C).

7. The representation dated May 8, 1997 made by the detenu was not addressed to the Central Government. However, a request was made in his representation dated July 2, 1997 received on July 3, 1997 that his representation dated May 8, 1997 may be re-considered. Accordingly, comments of the sponsoring authority were called vide letter dated July 4, 1997. Comments of the sponsoring authority were received on July 25, 1997. The file was put up before the ADG on July 29, 1997 by the concerned Under Secretary. July 5, 1997, July 6, 1997, July 12, 1997, July 13, 1997, July 19, 1997, July 20, 1997, July 26, 1997 and July 27, 1997 were holidays being Saturdays and Sundays. July 18, 1997 was Eid which was a holiday. ADG forwarded the same for consideration of the Secretary Revenue on July 30, 1997 who thereupon rejected the same on the same date. Consequently, a memo intimating the rejection was issued to the detenu on August 1, 1997. It is thus amply clear from above that there is neither undue nor un-explained delay in considering the representation dated May 8, 1997 on the part of the Central Government also.

8. The other representation dated July 2, 1997 was received in the COFEPOSA Unit on July 3, 1997 through Superintendent Jail. The same was considered by the detaining authority as well as by the Central Government. Comments of the sponsoring authority were called vide letter dated July 4, 1997. The same were received in the COFEPOSA Unit on July 25, 1997. Since the offices were closed

for seven days on account of intervening holidays the file was submitted to the Joint Secretary (C) on July 29, 1997 by the concerned Under Secretary. Joint Secretary (C) considered the representation and rejected the same on July 29, 1997. The detenu was informed with regard to the rejection on the same day.

9. Similarly, after receipt of the comments from the sponsoring authority on July 25, 1997 the file was submitted to the Secretary (R) on July 29, 1997 through ADG by the concerned Under Secretary. The ADG forwarded the same on July 30, 1997 and the Secretary (R) rejected the same on the same day. The rejection was communicated to the detenu on August 1, 1997. Consequently, there was no undue or un-explained delay on the part of the Central Government in consideration of the said representation.

10. Learned counsel for the petitioner Ms. Sangeeta Bhayana has vehemently contended that there was an undue, unexplained and inordinate delay in the disposal of the representation which the petitioner made before the authorities who are responsible for his detention and who could have set him at liberty. According to the learned counsel the petitioner made a representation on May 8, 1997 to the detaining authority, Shri K.L.Verma, Joint Secretary, COFEPOSA, Government of India, Ministry of Finance, Department of Revenue, with a request therein that his representation be considered by other competent authorities also. There is a recital to this effect in para 2 of the above said representation of the petitioner (Annexure P), yet his representation came up for consideration before the Government of India after an inordinate delay of 2 months and 23 days as is manifest from the rejection order dated August 1, 1997. Similarly, his other representation dated July 2, 1997 which was also addressed to the Joint Secretary, COFEPOSA, Ministry of Finance, was also rejected after having been considered on the aforementioned date i.e. August 1, 1997. Thus the Central Government took near about one month for the consideration of the said representation dated May 8, 1997. Even the detaining authority i.e. the Joint Secretary, COFEPOSA, to whom the representation was addressed took 26 days in considering the said representation and ultimately passed the rejection order. The learned counsel thus contends that the authorities did not attach any importance to the said representations and did not dispose them of as expeditiously as possible which they were required as per the provisions of Art. 22(5) of the Constitution of India. Thus the continued detention has been rendered illegal and bad in law. Consequently, it is liable to be quashed.

11. Learned counsel for the State, Ms. Barkha Babbar, on the other hand, has contended that there was no delay in the disposal of the representations, alluded to above. The authorities took all possible care and caution that no undue and unexplained delay is caused in disposing of the said representations and the petitioner is thus not entitled to take any advantage of the same. In any case, the detention order cannot be quashed on the said ground.

12. The question which arises for reply in view of the above said rival contentions and which squarely falls for decision in the present case is as to whether there

was any undue and unexplained delay in the disposal of the above said representation. There is no provision under the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the COFEPOSA)and even in the Constitution of India with regard to the time limit for the disposal of representation made by a detenu. However, Art. 22(5) of the Constitution of India confers a right on a detenu to make a representation. Art. 22 is in the following words. It provides as under:-

22. Protection against arrest and detention in certain cases. - (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2).....

(3).....

(4).....

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order". Thus Art. 22(5) confers upon the person detained a right to make a representation. To enable him to make a representation, a duty has been cast on the shoulders of the authorities who detained that person to communicate to such person the grounds on which the order has been made.

13. Now, the question which is precariously perched on the tip of the tongue is as to what should be the time limit within which the said representation is to be disposed of? The words used in the provision adverted to above are that the authorities would communicate to the person detained the grounds of detention at the earliest possible opportunity so as to facilitate the making of the representation at his earliest. It can thus be safely inferred from above that the underlying idea under Art. 22(5) of the Constitution of India, referred to above, is to give an opportunity to the detained person to make a representation at the earliest possible opportunity. The said representation would be rendered nugatory in case the authorities after having received the same did not consider and dispose of the same with promptitude and a sense of urgency, keeping in view the fact that the liberty of a citizen is involved therein. If they move at a snail's pace and consider the representation at their leisure without attaching the due importance which it is entitled to, this Court feels that the provisions of Art. 22(5) of the Constitution of India would be rendered otiose and meaningless. This is all the more so keeping in view the fact that a man who is detained under a preventive law, which the COFEPOSA is, has no remedy to approach a court of law under the ordinary provisions of law which are available to other citizens. Thus a duty has been cast on the shoulders of the authorities to dispose of the

representation as expeditiously as possible within the least possible time since it involves the question of the liberty of a citizen. Liberty which is the breath of our being and the backbone of our existence. " The God who gave us life, gave us liberty at the same time" (Thomas Jefferson- Summary View of Rights).

14. The question with regard to the disposal of a representation came up before different High Courts and the Hon"ble Supreme Court, time and again, and it is a subject-matter of different decisions rendered by the Hon"ble Supreme Court and different High Courts. Before proceeding any further in the matter I would like to illustrate my view with the help of certain authorities. It was observed in Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others, , " True, there is no prescribed period either under the provisions of the Constitution or under the concerned detention law within which the representation should be dealt with. The use of the word "as soon as may be" occurring in Article 22(5) of the Constitution reflects that the representation should be expeditiously considered and disposed of with due promptitude and diligence and with a sense of urgency and without avoidable delay. What is reasonable dispatch depends on the facts and circumstances of each case and no hard and fast rule can be laid down in that regard. However, in case the gap between the receipt of the representation and its consideration by the authority is so unreasonably long and Explanation offered by the authority is so unsatisfactory, such delay could vitiate the order of detention".

15. The above view was again reiterated by the Hon"ble Supreme Court in Mahesh Kumar Chauhan Bante Vs. Union of India & Ors., CRIMES 990 (2) 472, where they cited with approval the observations of Hon"ble Mr. Justice Shelat as reported in Khairul Haque Vs. State of West Bengal, (1969) 2 SCWR 529, " The fact that Art. 22(5) enjoins upon the detaining authority to afford to the detenu the earliest opportunity to make a representation must implicitly mean that such representation must, when made, be considered and disposed of as expeditiously as possible, otherwise, it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning."

16. A Division Bench of the Hon"ble Supreme Court while animadverting on the delay caused by the lethargic and apathetic attitude of state functionaries observed, in a case reported as Kundanbhai Dulabhai Shaikh Vs. Distt Magistrate, Ahmedabad & Ors, Rameshchandra Somchand Shah Vs. Distt. Magistrate, Surat & Ors., JT 1996 (2) S.C. 532," In both these cases, we have to read the old story of lethargy of the State Government. In the first case, the representation dated 23-8-1995 was received in the office of the Chief Minister on 25-8-1995 and was ultimately disposed of on 12-9-1995 and the order was communicated to the detenu on 14.9.1995. During this period, the file was being processed in the government departments. It is pointed out in the counter affidavit that the representation, on being received in the office of the Chief Minister on 25.8.1995 was sent to the Secretary, Food and Civil Supplies Department, where it was received on 29-8-1995. The internal movement of the

file thus took four days. The representation was then sent to the Special Branch where it was received on 1-9-1995. The representation was taken up by the special Branch on 6-9-1995. The inactivity in taking up the representation for six days is explained by showing in the counter-affidavit that there were about 40 to 50 representations pending for disposal and they were taken up chronologically.....". Their Lordships expressed disapproval and displeasure the way the representation was dealt with in the following words: " This indicates that the representation was placed in the queue and was not given precedence over other representations which are not said, in the counter-affidavit, to relate to detention orders. Even if they related to preventive detention, then such of those which were ready for disposal and in respect of which comments from various departments had been gathered and other formalities completed, should have been disposed of immediately and should not have been kept pending on the ground of "chronological disposal" by saying that representations filed earlier by other detenus were still to be disposed of. The Chronology must be broken as soon as a representation is ready for disposal".

17. It can thus be safely inferred from above that a representation with regard to the detention of a person must be dealt with as expeditiously as possible and every step must be taken which can reasonably be taken to quicken the pace of the disposal, since the representation relates to the liberty of a citizen.

18. Learned counsel for the State, Ms. Barkha Babbar, has argued with all the vehemence at her command that the petitioner in the instant case addressed the representation dated May 8, 1997 to Shri K.L.Verma, Joint Secretary, COFEPOSA, Ministry of Finance. Thus the Government of India was under no obligation to consider the said representation as the same was not addressed to the Government of India. While arguing so the learned counsel is oblivious of the fact that there is a mention in para 2 of the representation that it should be considered by all the competent authorities. Admittedly, the person detained is not well versed with the provisions of law. He could only at best have said that his representation be considered by all the authorities. Thus this Court feels the Government of India was duty bound to consider the said representation.

19. Furthermore, if the contention of the learned counsel is allowed to be sustained in that eventuality we fail to understand as to why the said representation dated May 8, 1997 was considered by the Government of India when, according to them, it was none of their business to do so? It is manifest from the record and the rejection order dated August 1, 1997 that it was considered by the Government of India and thereafter rejected. Thus the Government of India took 2 months and 23 days for the consideration of the said representation. No reason, much less any cogent reason, has been given by the learned counsel during the course of her arguments as to what were the factors which led to the said inordinate delay except that the said representation was addressed only to the Joint Secretary, COFEPOSA. Hence it was not considered by the Central Government.

20. Shri Somnath Pal, Joint Secretary, Government of India, Ministry of Finance, has tried to explain the delay in his affidavit dated November 29, 1997 by stating therein that the representation dated May 8, 1997 addressed to the detaining authority was received in the COFEPOSA Unit of the Ministry on May 12, 1997. Comments of the sponsoring authority were called on the said representation vide letter dated May 14, 1997. The sponsoring authority forwarded their comments dated May 26, 1997 which were received in the COFEPOSA Unit on May 27, 1997. The same were put up before the concerned Under Secretary on May 29, 1997. The Under Secretary after considering the representation submitted the same to the Joint Secretary on May 30, 1997 who asked for some additional information on the same date. The file was submitted to the Joint Secretary on June 3, 1997, since May 31, 1997 and June 1, 1997 were holidays being Saturday and Sunday. The rejection letter was issued on June 4, 1997. It is amply clear from above that according to Mr. Somnath Pal, May 17, 1997, May 18, 1997, May 24, 1997 and May 25, 1997 were holidays, being Saturdays and Sundays. Even if we exclude 6 days from the computation of period taken in the disposal of the representation then the time which was taken by the detaining authority to dispose of the said representation was 21 days. No Explanation, much less any reasonable Explanation, has been given in the said affidavit as to why so much of the time was taken in the disposal of the said representation.

21. The other representation dated July 2, 1997 as per the affidavit, alluded to above, was received in the COFEPOSA Unit on July 3, 1997. The comments of the sponsoring authority were called on July 4, 1997. The comments were received on July 25, 1997. The file was put up to the ADG on July 29, 1997. The ADG forwarded the same for consideration of the Secretary Revenue on July 30, 1997 who in turn rejected the same on the same day. As per the note given in the margin of the said affidavit there is a mention that July 5, 1997, July 6, 1997, July 12, 1997, July 13, 1997, July 18, 1997, July 19, 1997, July 20, 1997, July 26, 1997 and July 27, 1997 were holidays which means the offices were closed for a period of 9 days. If we exclude the said period from the consideration even then the authorities took 19 days in the consideration of the said representation. There is absolutely not even a single word with regard to the Explanation as to why the authorities took 19 days to dispose of the said representation.

Learned counsel for the State, Ms. Barkha Babbar, has argued that the delay in the disposal of the representation per se is not fatal and the Courts would abhor to quash a detention order simply on the basis of a delay if the authorities are in a position to explain the same. According to the learned counsel the delay in the instant case has been very much explained and thus there was no undue and unreasonable delay. Learned counsel in support of her argument has led me through the observations of the Hon'ble Supreme Court as reported in *Kamlabai (Smt) Vs. Commissioner of Police, Nagpur and Others*, ,

"The delay by itself is not a ground which proves to be fatal, if there is an Explanation. However, the short delay can not be given undue importance having

regard to the administrative actions. We do not think that the delay in this case is so inordinate as to warrant interference."

22. There is no dispute with the said proposition of law. However, the authorities in the instant case have failed to explain the delay, in the disposal of the said two representations, referred to above.

23. There is another aspect of the matter. The impugned detention order was passed on March 5, 1997. The petitioner in execution thereof was detained on March 14, 1997. Thus the detention order is going to expire on March 14, 1997. The petitioner has been under detention since then continuously. Thus he has remained under detention almost for the entire period of one year and only a few days are left in the completion of the detention period. Thus keeping in view this fact also the detention order is liable to be quashed.

24. The above view was given vent to by the Hon"ble Supreme Court in K. Satyanarayan Subudhi Vs. Union of India and others, AIR 1991 Supreme Court 1371, " We have also considered another aspect of the matter i.e. the detenu is under detention for over eight months and the order of detention is for a period of one year. Considering this aspect also along with the other aspect mentioned hereinbefore we think it just and proper to quash the order of detention and direct for the release of the detenu appellant forthwith provided he is not wanted by any other order..."

25. In the circumstances stated above the petitioner is entitled to succeed. The petition is allowed. The detention order dated March 5, 1997 (Annexure "A") is hereby quashed. The petitioner be set at liberty forthwith in case he is not required to be detained in any other case and under any other order.