

(1990) 08 RAJ CK 0021

In the Rajasthan High Court

Case No : Habeas Corpus Petition No. 535 of 1990

Kishan Singh

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 27-08-1990

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 7, 7(1)
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 82, 83, 84, 85

Citation : (1992) CriLJ 592 : (1990) 1 RLW 158 : (1990) WLN 308

Hon'ble Judges : Nagendra Kumar Jain, J;Kanta Bhatnagar, J

Bench : Division Bench

Advocate : Sandeep Mehta, for the Appellant; J.P. Joshi, A.A.G., for the Respondent

Judgement

Kanta Bhatnagar, J.—Petitioner Kishan Singh, a detenu under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA" hereinafter) was arrested on October 24, 1989 in pursuance of the order dated December, 8, 1988.

2. Feeling aggrieved by his detention he has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India and prayed for quashing the order of his detention dated December 8, 1988 (Annexure-1) as well as order dated January 4, 1990 (Annexure-5) by which after the consideration of the case of the petitioner by the Advisory Board, he was ordered to be detained in custody for a period of two years from October 24, 1989, the date of his arrest in pursuance of the order dated December 8, 1988 (Annexure-1).

3. The allegation against the petitioner was that he was involved in nefarious activities of smuggling of Silver and Narcotics Drugs. An order under the COFEPOSA Act was passed against him by the State of Rajasthan on December

8, 1988 on the grounds enumerated in Annexure-2 of the same date. On October 24, 1989, petitioner surrendered before the Customs Officials at Jodhpur and was arrested. Petitioner made representations to the State Government and the Central Government but they were rejected. His representation before the Advisory Board, also met the same fate. The petitioner has now approached this Court.

4. We heard Mr. Sandeep Mehta, learned counsel for the petitioner and Mr. J. P. Joshi, learned Additional Advocate General for the State and perused the relevant record.

5. The learned counsel for the petitioner has assailed the legality of the order of detention on a number of grounds, out of which, most emphatically stressed, is that there is inordinate delay in arresting the petitioner in pursuance of the Order Annexure-1 in as much as the Order Annexure-1 was passed on December 8, 1988, the date on which he having come to know, about such an order being passed against him, surrendered before the customs officials at Jodhpur and was arrested. It has been urged by Mr. Mehta that the failure on the part of the State Government regarding this delay indicates that the order was not passed on a bona fide and genuine belief of the Detaining Authority regarding the involvement of the petitioner in objectionable activities and the necessity to detain him to prevent him from such involvement.

6. Mr. Mehta submitted that the question of the liberty of a person has been taken very seriously by the Highest Court of the Country and in cases of inordinate unexplained delay in arresting suspected person after the order of detention being passed has been attached great importance and on this ground alone orders of detention have been quashed. He referred to certain decision of Supreme Court in that regard which we would presently discuss.

7. Mr. J.P. Joshi, learned Additional Advocate General did not dispute the necessity of prompt action being taken in the matters Under COFEPOSA but submitted that there is no hard and fast rule that in all cases of delay benefit should be given to the detenu. The reason, Mr. Joshi submitted is that in many a cases such persons manage to escape the clutches of the concerned authority and despite best efforts cannot be arrested for a pretty long period. As such, Mr. Joshi argued that in the present case when the petitioner went underground and could not be arrested despite best efforts of the concerned officials, the gap between the order of detention and the arrest of the petitioner should not be attached any importance.

8. In order to appreciate the rival contentions it will be profitable to have some discussion of the aims and object of the Act and the safeguards provided under the Act for the security of the persons detained or sought to be detained.

9. This is an Act to provide for preventive detention of persons in certain cases for the purposes of conservation and augmentation of foreign exchange, for prevention of smuggling activities and for matters connected therewith. The Act

being useful in combating smuggling activities and operations has been enacted in a way that it has a deterrent effect. A detenu has to remain in custody under the provisions of this Act without there being any trial in the Court because detention under the Act is a preventive measure to detach the detenu from objectionable activities which affects the country as a whole. For this reason the Act being very stringent its provisions should be complied with very strictly. Despite that as the liberty of a person is involved, the Apex Court of the Country has in a number of decisions enunciated the principle that slackness of the concerned authorities in proceeding with matter would entitle the detenu to get the order of detention quashed. The Courts when approached by the person affected should be very careful and cautious to see whether the compliance of the provisions of the Act is properly made or not. In other words, it is the duty of the Courts to see that the freedom of movement and personal liberty of a man is not jeopardised without strict compliance of the provisions of the Act and understanding the aims and objects of the enactment of the Act.

10. The question of delay in arresting a person after the order of detention being passed and its effect came for consideration before their Lordships of the Supreme Court in a number of cases and the principle enunciated is that it is not in all the cases that the delay in arresting the detenu, pursuant to the order of detention may justify quashing the order of detention. The decisions however propounded the principle that if there is inordinate unexplained delay in arresting the detenu pursuant to the order of detention, that may in the given circumstances of the case lead to the conclusion that the order was not passed on a genuine satisfaction of the detaining authority regarding the activities of the detenu.

11. The question of delay came before Hon'ble the Supreme Court in *Sk. Nizamuddin Vs. State of West Bengal*, In that case the detention order under the Maintenance of Internal Security Act of 1971 was passed against the detenu. There was a delay of about two and half months in arresting the detenu pursuant to the detention order. In that situation it was observed as under (Para 3):--

it would be reasonable to assume that if the District Magistrate was really and genuinely satisfied after proper application of mind to the materials before him that it was necessary to detain the petitioner with a view to preventing him from acting in a prejudicial manner, he would have acted with greater promptitude in securing the arrest of the petitioner immediately after making of the order of detention, and the petitioner would not have been allowed to remain at large for such a long period of time to carry on his nefarious activities.

12. Their Lordships were however aware of the seriousness of the matters falling under the Acts enacted for the purpose of National Defence and Security and, therefore, made the position clear regarding the delay, in following terms, just after making the above observation (Para 3 of *Sk. Nizamuddin Vs. State of West Bengal*,

Of course when we say this, we must not be understood to mean that whenever there is delay in arresting the detenu pursuant to the order of detention, the subjective satisfaction of the detaining authority must be held to be not genuine or colourable. Each case must depend on its own peculiar facts and circumstances. The detaining authority may have a reasonable explanation for the delay and that might be sufficient to dispel the inference that its satisfaction was not genuine.

13. In that case the affidavit in reply was filed by the District Magistrate himself but no explanation was forthcoming in it as to why the petitioner was not arrested till 23-11-1973, though the order of detention was made as far back as September 10, 1973. The argument of the learned counsel appearing on behalf of respondent State, that the State was not expected to render any explanation in regard to the delay in arresting the petitioner pursuant to the order of detention because no such complaint was made in the petition, was not held to be of any avail to the State when it was called upon to answer a rule issued on a petition for a writ of habeas corpus and it was held that if there is any delay in arresting the detenu pursuant to the order of detention, this is prima facie unreasonable and the State must give reason explaining the delay. It having not been done by the State, the order of detention in that case was quashed.

14. The important question for consideration is as to what procedure should be followed by the appropriate Government in cases where the person involved in nefarious activities manages to be out of the reach of the concerned officials and cannot be arrested despite best efforts for it Sub-section (1) of Section 7 of COFEPOSA reads as under :--

Powers in relation to absconding person:--Section 7(1). If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government may:--

(a) make a report in writing of the fact to a metropolitan Magistrate or a Magistrate of the first class having the jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of Sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order, of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

15. There may however be cases in which the efforts are seriously made and the person is not available and the appropriate Government under the hope that it would succeed in apprehending that person does not exercise the power conferred u/s 7 of the COFEPOSA. There may also be cases in which no useful purpose will be served by issuing proclamation because of the person sought to be arrested either not having property or managing it in such a way that the property belonging to him may not be technically said to be his belongings. This type of case came for consideration before Hon''ble the Supreme Court in Shafiq Ahmad Vs. District Magistrate, Meerut and Others, In a case of delay in arresting detenu in pursuance of detention order the Government alleged that the detenu was absconding and evading arrest which caused the delay in his arrest. The detenu did not own any property and warrant u/s 7 in respect of property or person was not issued. Their Lordships in those circumstances held as under (Para 5):

If in situation the person concerned is not available or cannot be served then the mere fact that the action u/s 7 has not been taken, would not be a ground to say that the detention order was bad. Failure to take action, even if there was no scope for action u/s 7 would not be decisive or determinative of the question whether there was undue delay in serving the order of detention.

16. That, however, was not considered sufficient explanation for the delay in arresting the detenu and their Lordships examined the efforts made by the authorities in arresting the detenu. The order of detention in that case was passed on April 15, 1988 but the detenu was arrested on October 2, 1988 in pursuance of that order. From April 15, 1988 to May 12, 1988 no attempt was made to contact or arrest the detenu. No explanation was given for this. There was also no explanation as to why from September 29, 1988 to October 2, 1988 no attempt was made. The statement in that regard made was that from May to September, 1988 the entire police force was extremely busy in controlling the situation. In those circumstances the Court held as under:

...If the law and order was threatened and prejudiced, it was not the "inadequacy" or "inability" of the police force to control the situation. Therefore, there was delay and the delay was unexplained or not warranted by the facts situation. The detention was therefore vitiated.

17. In the case of T.A. Abdul Rahaman Vs. State of Kerala and others, the detention order was under the COFEPOSA, there was delay of three months in arresting the accused pursuant to the order of detention. In view of the significance of proximity to time when the order is made or the live-link between the prejudicial activities and the purpose of detention, it was observed as under (Para 11):--

No hard and fast rule can be precisely formulated that would be applicable guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the

offending acts and the order of detention.

18. The observations purporting to be the guidelines for the Courts in such matters were that when there is undue and long delay between the prejudicial activities and the passing of the detention order, the Court is to scrutinize whether the detaining authority has satisfactorily explained such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the Court has to investigate whether the causal connection has been broken in the circumstances of each case. The following principle was enunciated in the case:--

...when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in prejudicial manner.

19. In that case the Police Officer to whom the detention order was forwarded for execution had not filed in support any affidavit explaining the delay in securing the arrest of the detenu. Under those circumstances it was held that the failure of the detaining authority to explain the long delay in securing the arrest of the detenu after three months from the date of the passing of the detention order and this non-explanation threw a considerable doubt on the genuineness of the subjective satisfaction of the detaining authority vitiating the validity of the order of detention.

20. Keeping in mind the aims and objects of COFEPOSA and the principles enunciated by Hon'ble the Supreme Court regarding the effect of time lag between the order of detention and the arrest of detenu, we would examine the facts and circumstances of the case on hand in order to find out as to whether the forces entrusted with the work were vigilant towards discharge of duty and on their failure provisions of Section 7 of the COFEPOSA were resorted to. It will also have to be seen whether called upon to answer the Rule issued by the Court in Habeas Corpus petition, the concerned authorities have given a reasonable explanation for the delay.

21. In reply to the point of delay in arresting the accused raised in Para 8(d) of the Writ Petition the respondent State denied the fact of delay and submitted that the order of detention was of course issued on December 8, 1988 but the petitioner had gone underground and was not available for execution despite all efforts made by the authorities. In rejoinder, reiterating the averments of Para 8(d) of the petition, it is submitted that the petitioner had not gone underground but as matter of fact himself surrendered before the Customs Officials, when he came to know about the detention order. It is also mentioned that the respondent had not specified the number of attempts and the manner to serve

upon the petitioner. No affidavit of any officer concerned with the affairs has been filed to show the efforts made for arresting the detenu. However, Mr. J. P. Joshi, learned Additional Advocate General, produced for the perusal of the Court notings regarding the efforts made for the arrest of the petitioner which show that after the order of detention, efforts were made to arrest the petitioner from December 9, 1988 to April 29, 1989 and no attempt whatsoever was made thereafter for a period of about six months till the detenu himself surrendered on October 24, 1989 and was arrested. Even during the period from December 9, 1988 to September 24, 1989 search of the detenu was made only at village Tamlor, Gadhra Road and "G" Branch of B.S.F., Barmer. If the detenu could not be arrested even for period of four months after the order of detention/arrest the concerned authorities, instead of sitting idle, should have been resorted to the powers u/s 7 of the COFEPOSA because it is not the case of the State that the detenu was not owing any property and the resort to provisions under Sections 82, 83, 84 and 85 of the Code of Criminal Procedure would have been a futile exercise. Even if the efforts of the first four months may be taken into consideration, still there is no explanation from the concerned authorities for being inactive in arresting the detenu, pursuant to the order of detention for a period of about six months thereafter. We are alive of the principle that the time lag in the order of detention and arrest of the detenu will not in every case entitle the detenu to release. It would rather depend upon the facts and circumstances of each individual case as to what importance is to be attached to the delay. Much would depend upon the efforts made by the concerned authorities in arresting the detenu and the explanation coming forth from that side. In the present case the explanation given in reply is neither reasonable nor tenable, in view of the principles enunciated in the decisions referred to above, we consider it a case in which the order of detention deserves to be quashed. We have formed this opinion after perusal of the record, which indicates that serious efforts were not made by the concerned authorities in arresting the detenu. As the petition deserves to be allowed on this ground alone, arguments on other grounds were neither seriously advanced nor we consider it necessary to express any opinion on any other point.

22. Consequently, the order of detention dated December 8, 1988 (Annexure/1) and the order dated January 4, 1990 (Annexure/5) fixing one year to be the time of detention i.e. from October 24, 1989 to October 23, 1990 are quashed and set aside. The petitioner shall be released forthwith if not required in any other case.