
(1998) 01 GUJ CK 0039
In the Gujarat High Court
Case No : S.C.A. No. 4190 of 1997

Linder Frank Wolfgang

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 12-01-1998

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 3(2)
Constitution of India, 1950 — Article 22(5)

Citation : (1998) CriLJ 1752

Hon'ble Judges : N.N. Mathur, J

Bench : Single Bench

Advocate : M.B. Ahuja, for the Appellant; Sunil C. Patel and Government
Pleader, for the Respondent

Final Decision : Dismissed

Judgement

N.N. Mathur, J.—Petitioner-detenu-Mr. Linder Frank Wolfgang is a Foreign National holding passport of Federal Republic of Germany. He was arrested by the officers of the Customs Department on 18-12-1996 when he arrived at Ahmedabad International Airport from Muscat by Indian Airlines Flight No. IC 886. It is alleged that he passed through green channel along with his baggage consisting of two hand bags, at the exitgate, the petitioner was intercepted on account of his suspicious movement. On personal search in presence of panchas, the pair of sandals worn by him appeared unusually heavy. He admitted before the panchas that the said pair of sandals contained gold. The said sandals were passed through screening machines installed at the Arrival Hall of the airport which showed dark patches on the monitor of the screening machine indicating pieces of heavy metals. On detailed examination of the said pair of sandals, in all 88 gold bars of 10 tolas each totally weighing 10,264 kgs. and valued at Rs. 51,32000/- were found concealed in the specially made cavities in the said pair of sandals. The gold was seized and the proceedings were initiated under the provisions of the Customs Act, 1962. The petitioner was produced before the

Metropolitan Magistrate on 19-12-1996 and he was remanded to judicial custody. The bail application filed by the petitioner was rejected by order of the Addl. Chief Metropolitan Magistrate dated 11-2-1997, The petitioner filed bail application before the City Civil and Sessions Judge on 13-2-1997. Mr. K.V. Bhanujan, Addl. Chief Secretary to Government of Gujarat, with a view to prevent him from smuggling goods proclaimed the order of detention dated 3-3-1997 under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA"). The grounds of detention made u/s 3(1) of the COFEPOSA have been well set out in the grounds of detention, and therefore, I do not consider it necessary to restate the same.

2. The principal contention of Mr. Harjinder Singh, learned Advocate appearing for the petitioner challenging the order of detention is that there is an inordinate and unexplained delay in considering and disposing of the representation of the petitioner dated 25-3-1997 as such the continued detention of the petitioner is illegal and unconstitutional, being violative of Article 22(5) of the Constitution of India.

3. It is now well settled by series of decisions of the Apex Court that all the procedural safeguards prescribed under Article 22(5) of the Constitution of India should be scrupulously and strictly observed, one of which enshrined in our system of judicial interpretation, being that the detenu shall be afforded an earlier opportunity of making representation against the validity of the order of detention clamped upon him and the representation should be considered and disposed of expeditiously as possible. In the case of Mahesh Kumar Chauhan alias Banti Vs. Union of India and others, the representation of the detenu dated 21-8-1989 was forwarded to the concerned sponsoring authority on 25-8-1989 and the comments from the sponsoring authority was received by the department on 11-9-1989, In spite of the fact that the office of the detaining authority and the sponsoring authority were within the metropolis of Delhi, there was absolutely no explanation for the delay occasioned on the part of the sponsoring authority in sending his comments till 11-9-1989. The Apex Court, considering that there was undue and unexplained delay in violation of constitutional obligation enshrined in Article 22(5) of the Constitution of India rendered the order of detention invalid.

4. In the cases of Kundanbhai D Shaikh v. Distt. Magistrate, Ahmedabad reported in the Apex court in para 18 of the judgment referred to a large number of decisions wherein the principle has been laid down in specific terms that the representation has to be disposed of at the earliest, and if there has been any delay in the disposal of the representation, the reason for delay must be indicated to the Court or else the unexplained delay or any unsatisfactory explanation in the disposal of representation would fatally affect the order of detention and in that situation, continued detention become bad. The Court was at pains to observe that in spite of the law laid down by the Apex Court

repeatedly over the past three decades, the Executive, namely; the State Government and its officers continue to behave in their old, lethargic fashion and like all other files rusting in the secretariat for various reasons including red tapism, the representation made by a person deprived of his liberty, continue to be dealt with in the same fashion. The Court thus said (at page 1985; of Cri LJ):

The Government and its officers will not give up their habit of maintaining a consistent attitude of lethargy. So also, this Court will not hesitate in quashing the order of detention to restore the "liberty and freedom" to the person whose detention is allowed to become bad by the Government itself on account of his representation not being disposed of at the earliest.

In the said case, the representation dated 23-8-1995 was received in the office of the Chief Minister on 25-8-1995 which was sent to the Secretary, Food and Supplies Department where it was received on 29-8-1995. The delay of four days was explained by saying that such a time was consumed in the internal movement of file, The representation was then sent to the Special Branch which was received on 1-9-1995, The representation was taken up by the Special Branch on 6-9-1995. The inaction in taking up the representation for six days was explained by saying that there were about 40 to 50 representations pending for disposal and they were taken up chronologically, The Apex Court considered that there was nothing to show, if those 40 to 50 representations were related to preventive detention and even if so, 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", Another representation dated 2-9-95 made to the Central Government was kept lying with the State Government till 27-9-1995. After 27-9-1995, it was sent to the Central Government which was received on 4-10-1995. In spite of telegrams and reminders, the State Government did not furnish comments for over a period of month. Comments of the State Government were received by the Central Government on 6-11-95 and the representation was disposed of on 8-11 -95. The Court therefore, found that there was an unexplained delay for the period from 2-9-95 to 27-9-95. This delay was found fatal.

5. In the case of Usha Rani v. Government of A.P. reported in 1994 (Cri) SC 1408, the representation of the detenu dated 23-12-1992 was considered and decided by the Central Government after a period of 2 months i .e. on 23-2-1993 even though the State Government had considered the representation within a reasonable period. In the counter-affidavit, it was stated that a copy of the representation sent by the State Government to the Central Government on 29-12-92 did not reach the Central Government, and therefore, another copy was sent when an enquiry to this effect was made by the Central Government on service of the notice of the writ petition. The Court noticed that the relevant particulars of despatch of the representation dated 23-12-92 by the State Government to the Central Government supported by the requisite documents

were not available to enable acceptance of such a stand taken by the State Government. The Court also observed that even if it is found true, would not absolve the two Governments of the constitutional obligation to consider and decide the representation of the detenu promptly as envisaged by Article 22(5) of the Constitution of India. Thus, in the opinion of the Court, there was no cogent explanation given to account for this delay which remains unexplained. The Court accordingly quashed the order of detention.

6. In the case of Aslam Ahmed Zaire Ahmed Shaik Vs. Union of India and Others, a seven days unexplained delay on the part of the Jail Superintendent in transmitting representation to the Central Government was considered to be fatal. The Court observed thus (at page 1450; of Cri LJ) -

When it is emphasised and re-emphasised by a series of decisions of the Supreme Court that a representation should be considered with reasonable expedition, it is imperative on the part of every authority, whether in merely transmitting or dealing with it, to discharge that obligation with all reasonable promptness and diligence without giving room for any complaint or remissness, indifference or avoidable delay because the delay, caused by slackness on the part of any authority, will ultimately result in the delay of the disposal of the representation which in turn may invalidate the order of detention as having infringed the mandate of Article 22(5). It is neither possible nor advisable to lay down any rigid period of time uniformly applicable to all cases within which period the representation of detenu has to be disposed of with reasonable expedition but it must necessarily depend on the facts and circumstances of each case.

(Emphasis supplied)

7. In the case of Raisuddin alias Babu Tamchi Vs. State of Uttar Pradesh and Another, , the Court held that any remissness, indifference or avoidable delay on the part of the concerned authority in dealing with the representation, the Court will undoubtedly be treated as a factor vitiating the continued detention of the detenu. On the other hand, if the Court is satisfied that the delay was occasioned due to unavoidable circumstances or reasons entirely beyond his control, such delay will not be treated as furnishing a ground for the grant of relief to the detenu against his continued detention.

(Emphasis supplied)

8. In the case of Noor Salman Makani Vs. Union of India and others, the representation of the detenu was forwarded by the Jail Superintendent on 15-10-92 itself by Registered Post, but that was received on 22-10-1992 by the Ministry's office and the entire delay was due to delay in postal delivery. The Court found that the delay was properly explained.

9. In the case of Kamlabai (Smt) Vs. Commissioner of Police, Nagpur and Others, the representation dated 11-5-1992 was decided by the Central Government on

15-7-1992. In the reply it was stated that a wireless message was sent on 19-5-1992 asking for certain information and the information was sent on 21-5-92 and again a wireless message was sent on 13-7-1992. The Court found that the delay was explained. The Court also held that the delay by itself is not a ground which proves to be fatal, if there is an explanation. The Court also observed that short delay cannot be given undue importance having regard to the administrative actions,

10. In the instant case, Mr. Harjinder Singh, learned advocate sent a letter dated 22-3-97 from New Delhi to the Superintendent, Central Prison, Ahmedabad, along with 4 sets of representations with a request to obtain signature of his client-Linder Frank Wolfgang, who is confined in jail under detention order passed by the Addl. Chief Secretary, State of Gujarat on the said representations and forwarded the same to the said authority. The said representation was sent to the detaining authority on 25-3-1997. The petitioner was informed vide communication dated 9-4-97 that the representation has been carefully considered by the detaining authority and the same has been rejected. Similarly, the Central Government, under communication dated 12-5-97 informed the petitioner that his representation has been carefully considered by the Central Government and the same has been rejected. The grievance voiced by the petitioner that there is a long delay in considering his representation.

11. Mr. J. R. Rajput, Under Secretary, Home Department (Special), Government of Gujarat has filed a counter-affidavit. It is stated that the representation dated 25-3-1997 was received in the office of the Addl. Chief Secretary (Home) on 27-3-1997 and on the same day it was placed before the detaining authority i.e. the Addl. Chief Secretary (Home). It was received by the COFEPOSA section of the Home Department on 29-3-1997. The Addl. Chief Secretary (Home) i.e. the detaining authority rejected the representation on 9-4-1997. With respect to the representation made to the State Government, a factual note was made by the COFEPOSA section of the Home Department. After receiving the remarks of the Commissioner of Customs, Ahmedabad which were put up to the Under Secretary who cleared the file on the same day and put up to the Deputy Secretary who cleared the file on 7-4-1997 and submitted to the Addl. Chief Secretary (Home), who was cleared the file on 9-4-1997 and placed before the Home Minister of State. The Minister of State (Home) rejected the representation on 13-4-97 and the decision thereon was conveyed to the petitioner-detenu vide letter dated 15-4-97. It is also stated in the counter-affidavit that 28th, 30th March 1997, 6th, 8th and 12th April, 1997 were public holidays. Thus, so far as the State Government is concerned, there is no delay in deciding the representation.

12. Now coming to the consideration of the representation made to Central Government, Mr. M. S. Nagi, under Secretary to the Government of India, Ministry of Finance, Department of Revenue, in the counter-affidavit, has stated that the representation dated 25-3-1997 forwarded by the Jail Superintendent,

Central Prison, Sabarmati, vide his letter of the same date, was received in COFEPOSA department on 1-4-97. The comments of the sponsoring authority was called vide letter dated 2-4-97 and the comments were not received from the sponsoring authority. A fax reminder was issued on 28-4-97. The sponsoring authority submitted his comments by letter dated 30-4-97 which was received in the COFEPOSA department on 6-5-97. The case was processed and submitted to the Joint Secretary (C) on 9-5-97 who considered and submitted case file to the Secretary (R) on the same day. The Secretary (Revenue) who has been delegated the power to dispose of representation of the COFEPOSA detenu on behalf of the Central Government considered the representation of the detenu and rejected the same on 9-5-97. The case file was received back in COFEPOSA unit on 12-5-97. It is also stated that 10th and 11th May, 97 were holidays. A memo intimating the detenu about rejection of his representation was issued on 12-5-97. It is also stated that another representation dated 24-4-97 identical to the earlier representation dated 25-3-97 was received on 25-4-97. The said representation dated 24-4-97 was also sent to the sponsoring authority under D. O. letter dated 30-4-97 with request to furnish comments on the representation urgently.

13. The question arises for consideration is as to whether the delay between the period 25-3-97 to 30-4-97 at the level of sponsoring authority in not sending the comments is unexplained and fatal. Mr. J. R. Panigrahi, Assistant Commissioner of Customs, unit has filed affidavit stating that the representation dated 25-3-97 was received on 3-4-97 from the Under Secretary to the Government of India by letter dated 2-4-97. The Department sent the comments on the said representation to the State Government as well as to the Joint Secretary, Government of India (COFEPOSA unit), New Delhi by speed post on 4-4-97. Thereafter, a fax dated 28-4-97 was received from the Under Secretary, New Delhi asking them to send the comments of the representation immediately. The fax message was received on 30-4-97 of which the Under Secretary of the Government of India was informed that the comments were already sent as back as on 4-4-97 by speed post and also furnished copy of the said comments under a forwarding letter. It clearly appears that the comments were sent immediately on 4-4-97 by the sponsoring authority. The comments were sent by speed post to the State Government as well as to the Central Government. This finds collaboration from the affidavit filed by Mr. J.R. Rajput, Under Secretary, Home Secretary, State of Gujarat when he says that the comments were received by the Customs Department on 4-4-97. Now the delay during the period 5-4-97 to 30-4-97 appears to have been caused because of non-delivery of the representation at New Delhi by the postal authorities. This was beyond the control of the sponsoring authority. Thus, there is proper explanation of the delay. In view of this I hold that in the facts and circumstances of the cases, the delay in disposal of the representation of about 25 days is not fatal as the same has been satisfactorily explained. In view of this, the principal contention raised by the learned Advocate for the petitioner fails and the same is accordingly

rejected.

14. It is next contended by Mr. Hatjinder Singh, learned Advocate that the petitioner's bail application was rejected by the order dated 27-3-97, but the said order was not placed before the advisory Committee. He placed reliance on a decision of the Apex Court reported in 1982 (2) SC 295 (sic) and another decision reported in 1989 Cri LJ 637. It is stated in the counter-affidavit filed by the State that all the material considered by the detaining authority for passing the order of detention was placed before the Advisory Board. In my view, as the order of rejection of the bail application was passed after the order of the date of detention, it was not required to be placed before the Advisory Committee. It may also be stated that no such specific contention has been taken in the memo of the petition. In my view, there is no substance in this contention raised by the learned Advocate for the petitioner and the same is also rejected;

15. It is also contended by the learned Advocate that the report u/s 3(2) of the COFEPOSA has to be considered by the appropriate authority of the Central Government. In the present case, the order has been passed by the Joint Secretary, who is not empowered. According to the learned Advocate, it is only the Secretary (Revenue) who is empowered. The submission of the learned Advocate is factually incorrect. In the counter-affidavit filed by Mr. M. S. Nagi, Under Secretary to the Government of India, Ministry of Finance, it is clearly stated that the Joint Secretary submitted the file to the Secretary (Revenue) on 9-5-97. The Secretary (Revenue), who has been delegated power to dispose of the representation of the COFEPOSA detenu on behalf of the Central Government, considered the representation of the detenu and rejected the same on 9-5-97. In view of this, the contention raised by the learned advocate is rejected being devoid of merit.

16. It is lastly contended that the learned advocate could not submit an effective representation as the translation of the documents were not supplied in German language. It is true that the petitioner is a German National, but he is well conversant with English language and the relevant documents in English language were supplied to him which is evident from the endorsement made by the petitioner on the order of detention dated 3-5-97. The statement was also recorded in English. The petitioner also made his submissions before the COFEPOSA Advisory Board on 3-5-97. Mr. J R Rajput, Under Secretary, Department of Home has stated that the Advisory Board has specifically mentioned in its comments that the petitioner-detenu also knows English language and that he has understood the order of detention supplied along with the grounds of detention. Thus, in my view, there is no merit in this contention also the same is also rejected.

No other point has been raised before me.

16. A In view of the aforesaid, there is no merit in this petition and the same is accordingly rejected. Rule discharged.