
(2001) 05 DEL CK 0065
In the Delhi High Court
Case No : Crl W.P. 1305 of 2000

Lundup Tamang

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-05-2001

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 21, 22
National Security Act, 1980 — Section 3

Citation : (2001) 4 AD 1066 : (2001) CrLJ 3086 : (2001) 92 DLT 278 : (2001) 60 DRJ 115 : (2001) 4 RCR(Criminal) 178

Hon'ble Judges : Dr. Arijit Pasayat, C.J.; D.K. Jain, J

Bench : Division Bench

Advocate : Mr. Harjinder Singh and Mr. Yogesh Kumar Saxena, for the Appellant; Mr. K.K. Sud, ASG and Ms. Barkha Babbar and Mr Neeraj Jain for UOI and Ms. Mukta Gupta, for the Respondent

Judgement

Arijit Pasayat, C.J.—This habeas corpus writ petition has been filed by Lundup Tamang, (hereinafter referred to as detenu) challenging the order of detention passed by Lt. Governor of the National Capital Territory of Delhi (hereinafter referred to as the L.G.) in purported exercise of power u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short, the Act) with a view to preventing him from smuggling goods, and also preventing him from transporting and selling smuggled goods, in future. At the relevant point of time, the detenu was lodged in Central Jail, Tihar, New Delhi.

2. Case of the detenu in a nutshell is as follows:

Petitioner-detenu is a foreign national residing in Nepal. he had come to India in connection with his business. he was arrested by the DRI officials on the allegations on being in illicit possession of US\$ 35900, equivalent Rs.15,40,110/- in Indian currency found in the checked in package when he was going to Nepal

from New Delhi on 2.5.2000. Though the petitioner took the stand that the money was not contraband as he had brought the same at the time of his arrival from Nepal in April, 2000 in connection with his business activities of woolen garments and was taking back the amount as the deal had not materialised, and he had declared it before the Customs Officials, he was apprehended and the amount was seized. Though a statement is purported to have been recorded confessing guilt same was allegedly obtained under duress. He was arrested and produced before ACJM ON 3.5.2000. Petitioner was in judicial custody at the time when order of detention was passed by the L.G. and it was served on 5.8.2000. Petitioner made representations to the authorities on 21.8.2000 and 18.9.2000 respectively. Thereafter this habeas corpus petition has been filed.

3. Several points have been urged in support of the writ petition. Counter affidavit has been filed by the detaining authority. Though, as noted earlier, several grounds were pressed into service to contend that the order of detention was not proper, finally, challenge was restricted to one ground. It was submitted that the detaining authority had not applied his mind and he had not made the grounds (sic) and had merely approved it.

In para 11 and 12 of the writ petition, following assertion have been made.

11. That there is verbatim reproduction of the ground of detention with the complaint and sanction filed against the petitioner. The paras of the sanction and the complaint are verbatim reproduction of the grounds of detention except the paras, which are common in each detention order, this depicts non-application of mind.

12. that petitioner says and submits that the said grounds of detention have been framed formulated by the sponsoring authority and the detaining authority has mechanically signed the same without application of mind. This makes the detention of the petitioner illegal and dehorse the provisions of COFEPOSA."

In the counter-affidavit, which was filed on 31.1.2001, reply to the aforesaid assertions was as follows:

"The contents of para 11 and 12 are wrong and hence denied. It is specifically denied that the grounds are the verbatim reproduction of the dossier, complaint and sanction. The grounds have been prepared in the Home department after taking into the consideration all the material on record and the same was approved by the detaining authority with due application of mind."

This counter affidavit had been filed by G.L. Meena, Deputy Secretary (Home), Govt. of National Capital Territory of Delhi, Subsequently, another affidavit has been filed by Mukesh Prasad Deputy Secretary (Home) on 7.2.2001, wherein it has been stated as follows:

"In addition to the affidavit submitted in reply to para 11 and 12 it is clarified by present additional affidavit that the grounds of detention have been processed in the Home Department after taking into consideration all the material on record

and it was put up before the detaining authority for its consideration and orders. Taking into consideration all the material on record, the detaining authority passed the detention order. It is further submitted that since the detaining authority i.e. Lt Governor or of NCT of Delhi itself is the competent authority to pass the detention order under COFEPOSA Act 1974 there is no question of detention orders being approved by the Lt Governor in cases of detention orders passed under the national Security Act 1980 as under the National Security Act, 1980 as under the National Security Act, 1980 the powers to pass the detention order are delegated by the Lt Governor to Commissioner of Police."

4. Since there was marked variations in the stand taken by the detaining authority, we had directed original record to be produced, which were submitted by the learned counsel for detaining authority. It is to be noted that the L.G. is the competent authority to pass detention order under the Act. There is no question of it being approved by the L.G. but the position is different under the National Security Act, 1980 (in short, NSA) where approval of detention order is done by the L.G. The provisions of Section 3 of the Act and Section 3 of NSA are contextually different on this aspect. There is no provision similar to Section 3(4) of NSA under the Act. In the aforesaid background, it has to be seen as to whether the procedural safeguards mandated under Article 22 have been followed.

5. Before dealing with the respective stands, the purpose and objective of order directing detention need to be noted so that the factual aspects can be appropriately dealt with.

In Magna Carta (1215-1225) it has been stated as follows:

"No freeman shall be taken or imprisoned or disposed of his freed tenement or liberties or free customs or be outlawed, or exiled, or in any way destroyed: nor will we condemn him, nor will we commit him to prison, excepting by legal judgment of his peers or by the laws of the land."

Personal liberty protected under Article 21 of the Constitution is held so sacrosanct and so high in the scale of constitutional values that Courts have shown great anxiety for its protection and wherever a petition for writ of habeas corpus is brought up it has been held that the obligation of the detaining authority is not confined just to meet the specific grounds of challenge, but is required to show that the impugned detention meticulously accords with the procedure established by law. Indeed the English courts a century ago, echoed the stringency and concern of this judicial vigilance in matters of personal liberty in the following words:

"Then comes the question upon the habeas corpus. It is a general rule which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue." [Per

It has been said that the history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is stressed in the words of Lord Denning as follows:

"Whenever one of the King's Judges takes his seat, there is one application which by long tradition has priority over all others, counsel has but to say: My Lord, I have an application which concerns the liberty of the subject and forthwith the Judge will put all other matter aside and hear it. It may be an application for a writ of habeas corpus, or an application for bail but whatever form it takes, it is heard first." (Freedom under the Law, Hamlyn Lectures, 1949)

6. Personal liberty, is by every reckoning the greatest of human freedoms and the laws of preventive detention are strictly constructed and a meticulous compliance with the procedural safeguards, however technical, is strictly insisted upon by the Courts. The law on the matter did not start on a clean slate. The powers of Court against the harsh incongruities and unpredictabilities of preventive detention are not embodied in merely a page of history, but a whole volume. The compulsions of the primordial need to maintain order in society without which the enjoyment of all rights, including the right to personal liberty would lose all their meaning are the true justifications for the laws of preventive detention. Laws that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of State or financial stability of the State, national economic discipline provides grounds for satisfaction for a reasonable prognostication of a possible future manifestations of similar propensities on the part of the offender. This jurisdiction has been called a jurisdiction of suspicion; but the compulsions of the very preservation of the values of freedom of democratic society and of social order might compel a curtailment for individual liberty. "To lose our country by a scrupulous adherence to the written law" said Thomas Jefferson "would be to lose the law itself, with life, liberty and all those who are enjoying with us, thus absurdly sacrificing the end to the needs." This, no doubt, is the theoretical jurisdiction for the law enabling preventive detention. But the actual manner of administration of the law of preventive detention is of utmost importance. The law has to be justified by the genius of its administration so as to strike the right balance between individual liberty on the one hand and the needs of an orderly society on the other. But the realities of executive excesses in the actual enforcement of the law have put the Courts on the alert, ever ready to intervene and confine the power within strict limits of the law both substantive and procedural. The paradigms and value judgments of the maintenance of a right balance are not static but vary according to the pressures of the day and according as the intensity of the imperative that justify both the need for and the extent of the curtailment of individual liberty. Adjustments are consistently to be

made and reviewed. No law is an end in itself. The Inn that shelters from the right is no journey's end and the law, like the traveler must be ready for the morrow.

7. The Constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of States security public order disruption of national economic discipline etc being envisaged as a necessary evil to be administered under strict constitutional restrictions. In *Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others*, , Bhagwati, J. spoke of this judicial commitment:

"The court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade."

"This is an area where the Court has been most strict and scrupulous in ensuring observance with the requirement of the law and even where a requirement of the law is breached in the slightest measures, the Court has not hesitated to strike down the order of detention."

In *Vijay Narain Singh Vs. State of Bihar and Others*, : Justice Chinnappa Reddy in his concurring majority view said:

".....I do not agree with the view that those who are responsible for the national security or for the maintenance of public order must be the sole judges of what the national security or public order requires. It is too perilous a proposition. Our Constitution does not give as carte blanche to any organ of the State to be the sole arbiter in such matter....."

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".....There are two sentinels, one at either end. The legislature is required to mark the law circumscribing the limits within which persons may be preventively detained and providing for safeguards prescribed by the Constitution and Courts are required to examine, when demanded, whether there has been any excessive detention, that is whether the limits set by the Constitution and the legislature have been transgressed....."

In *Hem Lall Bhandari Vs. State of Sikkim and Others*, : it was observed:

"It is not permissible in matters relating to the personal liberty and freedom of a citizen to take either a liberal or a generous view of the lapses on the part of the officers...."

8. Article 22 of the Constitution confers four fundamental rights on every person, except in two cases mentioned in clause (3), as essential requirements and safeguards to be followed when it is necessary to deprive any person, for any cause whatsoever and for, however brief a period, of high personal liberty by placing him under arrest or keeping him in detention. Those are : (i) to be informed, as soon as may be, of the grounds of such arrest;(ii) not to be denied

the right to consult and to be defended by a legal practitioner of his choice; (iii) to be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the court of the Magistrate and (iv) not to be detailed in custody beyond the said period of 24 hours without authority of a Magistrate. Clause (1) and (2) contain the guarantee of the four fundamental rights enumerated above. Clause (3) contains two exceptions and provides that the constitutional guarantees do not apply to (a) enemy aliens and (b) person arrested or detained under any law providing for preventive detention. Clause (4) to (7) are devoted to laying down certain fundamental principles as to preventive detention and guaranteeing certain fundamental rights to persons who are arrested under any law for preventive detention. The fundamental rights guaranteed by clauses (4) to (7) to persons detained under any law for preventive detention relate to the maximum period of detention, the provisions of any Advisory Board to consider any report on the sufficiency of the cause for detention in certain cases, the right to be informed of the grounds of detention and the right to have the earliest opportunity of making a representation against the order of detention. Preventive detention is an anticipatory measure and does not relate to an offence while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the Executive is convinced that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by the law. The action of Executive in detaining a person being only precautionary, the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct, the failure to conform to which should lead to detention. The satisfaction of the detaining authority, Therefore is a purely subjective affair. The detaining authority may act on any material and on any information which may merely afford basis for a sufficiently strong suspicion to take act in but may not satisfy the test of legal proof on which alone a conviction for offence will be tenable. It is the Constitutional right of the detenu to get all the grounds on which the order has been made. As has been said by Benjamin Cordozo, "A constitution states or ought to state not rules for the passing hour, but the principles for an expanding future". The concept of grounds used in the context of detention in Article 22(5) has to receive an interpretation which will keep it meaningfully in tune with contemporary notions of the realities of the society and the purpose of the Act in the light of concepts of liberty and fundamental freedoms. While the expression "grounds" for that matter includes not only conclusion of fact but also all the "basic facts" on which those conclusions were founded; they are different from subsidiary facts or further particulars or the basic facts. The detenu is entitled to obtain particulars of the grounds which will enable him to make an effective representation against the order of detention.

9. Coming back to the facts and circumstances, orders passed by various officers

of the State and L.G. in the original file relating to detention of the petitioner need to be noted. The proposal for detention of the detenu was made on 27.7.2000 and the file was placed before the L.G. In para 17 it has been inter alia stated as follows:

"Accordingly draft grounds of detention and detention order have been prepared on the basis of documents received from the Customs Department..."

On 28-7-2000, the L.G. has passed the order. It, inter alia, contains the following:

".....the draft grounds of detention and detention order are hereby approved"

As noted above, the affidavit filed on 31.1.2001 by the detaining authority and subsequent additional affidavit dated 7.2.2001, present different pictures as regards the passing of the order by the detaining authority. While in the first affidavit it was clearly accepted that order of detention was approved, in the subsequent affidavit it was stated that there was no question of any approval as the position is different from the requirement of Section 3(4) of NSA. But as the portions quoted from the file relating to the detention go to show, what the LG had done was to approve the grounds of detention and detention order which were prepared by officials. Crucial question Therefore would be whether there was application of mind by the detaining authority.

10. Unlike Section 3(4) of NSA, under the Act or the Prevention of Illicit Trafficking in Narcotic Drugs and Psychotropic Substance Act, 1988 (in short, NDPS Act), there is no requirement of approval of an order made by the officer especially empowered by the State Government or the Central Government. Order passed by such an officer operates on its own force. All that is required by Section 3(2) of the Act is that the State Government shall within ten days forward to the Central Government a report in respect of an order i.e. made by the State Government or an officer especially empowered by the State government order passed by the empowered officer is placed on the same footing, as an order made by the State Government. In Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, , it was held that requirement regarding forwarding of a report contained under the Act cannot afford the basis for holding that the order made by an officer especially empowered by the Central Government or the State Government requires deemed approval. An approval actual or deemed, postulates application of mind to the action being approved by the authority giving approval

11. The word "approval" is nowhere defined in the enactment. But it is an official terminology concerned between subordinate official and higher authority who sanctions or confirms something which was proposed by the subordinate. The dictionary meaning of the expression "approval" is an act of approving or a formal permission or sanction to an intended act to be carried out by a subordinate who seeks permission. The word "approve" is derived from Latin word "approbare" which connotes to give one's sanction or confirmation. "Approved" in terms of approval connotes authority therefore. An authority to

which power has been given to "approve" or "modify" some proposal has certainly power to say that it will not approve at all for the words may approve, on a reasonable interpretation include not approve. If a person can approve, he or the authority is not bound to approve. (See: *Malikram v. State of Rajasthan* AIR 1967 SC 1575). Therefore, when a thing is done with approval of any person means that and only that he has with full knowledge approved. (See. *DAVIS V. LEICESTER* 1894 (2) Ch D. 208). Term "approval" also suggests that what has to be approved has already taken place though sometimes approval may also be sought of proposed action. Meaning would be more clear by way of making a differentiation between "approval" and "permission". Approval holds good until disapproved but permission does not becomes effective unless it is obtained. Permission subsequently obtained may validate the previous act. In terms of preventive action when the word "approval" is used it suggests that some action has been taken and it is that some action which sponsoring authority wants by the detaining authority which was contemplated through proposal. It is nothing but a confirmation. According to *Anderson Law Dictionary* "approve" means to accept as good or sufficient for the purpose intended, to confirm authoritatively.

12. As has been rightly conceded by learned counsel for detaining authority under the Act there is no scope for approval. The satisfaction requisite for an order of detention has to be arrived at by the detaining authority himself. The position is not the same when he merely approves an action. Above being the position, we are satisfied that the detaining authority had not applied his mind and he merely approved the draft order prepared earlier. That, according to us, vitiates the order of detention. The same is accordingly quashed. The detenu be set at liberty forthwith unless he is required to be in custody in connection with any other case/proceedings.