

(1998) 02 KL CK 0051

In the High Court Of Kerala

Case No : O.P. No. 7900 of 1997-S (Habeas Corpus)

Mavungal Pathumma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-02-1998

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1), 7(1), 9(1)
Constitution of India, 1950 — Article 22(5)
Criminal Procedure Code, 1973 (CrPC) — Section 82, 83, 84, 85
Customs Act, 1962 — Section 108

Citation : (1998) CriLJ 2183 : (1998) 2 ILR (Ker) 585

Hon'ble Judges : Om Prakash, C.J.; J.B. Kochy, J

Bench : Division Bench

Advocate : B. Kumar, K.T. Sankaran and Parvathy A. Menon, for the Appellant; George C.P. Tharkan, S.C.G.S.C. (for Nos. 1 and 4) and K. Sasikumar, Govt. Pleader (for Nos. 2 and 3), for the Respondent

Final Decision : Dismissed

Judgement

J.B. Kochy, J.—Petitioner is the wife of one " Mr. M. Ahammedkutty (hereinafter referred to as "the detenu") detained under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the Act"). The grounds stated in the detention order is that on 20-11-1994 one P. A. Soopy arrived at Calicut Airport from Sharjah. After he has crossed the green channel for Customs clearance, on examination, a white glazed paper was recovered from him wherein it was written in Malayalam "Give P. A1. Soopy twenty immediately." The Customs officials suspected smuggling activities and examined his registered baggage. On questioning, it was stated that the paper was given to him by the detenu in whose room the passenger stayed at Sharjah. Before he started journey the detenu had entrusted him a gas stove for handing over to his brother Beeran and on handing over the same and the slip to Beeran, he will be given Rs. 20,000/-. The registered baggage

contained one gas cooking table "Super General SG 003 Gas cooking table, Made in Japan." On examination, it was found that three stands of the stove were made of 24 Ct. pure gold which was coated with silver. Value of the 24 Ct. pure gold with weight of 6537.3 gms. was assessed by the Customs authorities as Rs. 31,11,755/-. A statement was recorded from Shri Soopy u/s 108 of the Customs Act and he was arrested and produced before the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam. Thereafter, the Superintendent, Special Customs Preventive Unit searched the residence of Shri Beeran and found 14 gas stoves without stands and an amount of Rs. 1,87,700/-. Statements were recorded from the detenu wherein he admitted that he and his brother were sending gold through carriers. This statement was later retracted. Shri Soopy also admitted that on earlier occasions also, he used to carry gas stoves at the request of the detenu and his brother.

2. On the ground that the detenu and his brother Shri Beeran are financiers and organisers of smuggling activities engaged in bringing gold to the country and on the reasonable apprehension that he may continue to abet his smuggling activities, detention order was issued. On 26-12-1994 the detenu obtained anticipatory bail from this Court. Statements u/s 108 of the Customs Act were recorded on 26-12-1994, 27-12-1994 and 28-12-1994. These statements were retracted on 29-12-1994. According to him, his brother owns two flour mills in Sharjah and he was also working in the flour mill and the gas stove was carried at the instance of his brother and he has no share in it. Statements were also recorded from Soopy. The detention order is dated 28-3-1995. But, the detention order was executed only when he surrendered before the Police authorities on 17-1-1997. The detenu has sent a representation to Union of India (respondent No. 1) and State of Kerala (respondent No. 2) through the Prison authorities. The representation was rejected by the State of Kerala by communication dated 12-2-1997 (Ext. P10). Central Government rejected it on 28-2-1997 (Ext. P11). A declaration was issued u/s 9(1) of the Act on 13-2-1997 (Ext. P12). Against the declaration also, detenu filed representation addressed to the 2nd respondent and also to the COFEPOSA Advisory Board as Ext. P13.

3. Major grounds urged by the petitioner in this original petition are : (1) The conclusion in the detention order that he had abetted smuggling of gold through Soopy is not justified and there is no statement by the detenu that he had knowledge that the gas stove contained a stand made of gold coated with silver. Acquisition of gold was done only by his brother Beeran and profit will go only to Beeran. He only assisted his brother when he asked for help and detenu did not abet smuggling of gold; (2) Detention order is dated 28-2-1995. But, it was executed only on 17-1-1997. Therefore, there is undue delay; (3) His representations even though reached before the authorities were not considered before making declaration. Therefore, while making the declaration relevant materials were not considered and on that ground itself Ext. P12 declaration dated 13-2-1997 issued u/s 9(1) of the Act should be set aside. Since one year of detention was already over, if declaration is set aside, he can be set free by

this Court; and (4) There was inordinate delay and non-application of mind while rejecting his representations.

4. First ground which is more elaborately raised in Ground "A" of the original petition that the conclusion reached in the grounds for the detention order of the detenu that he had abetted smuggling of gold by Soopy and grounds of detention that he is likely to smuggle gold in future is not justified, has to be considered in the context of Section 3(1) of the Act. Section 3(1) of the Act is as follows :

1. The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, especially empowered for the purpose of this section by that Government may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from-

(i) smuggling goods, or

(ii) abetting the smuggling of goods, or

(iii) engaging in transporting or concealing or keeping smuggled goods, or

(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods.

It is necessary so to do, make an order directing that such person be detained.

What is required is that the authority must be satisfied that the detention of the person is necessary in order to prevent from acting in any prejudicial manner as indicated in the Act. Every preventive measure is based on the principle that a person should be prevented from doing something, if it is reasonably probable that he would do if left free and unfettered. This being the nature of the proceeding, it is the subjective satisfaction of the authorities that should govern the matter. As held by the Supreme Court in *Rajendra Prashad Vs. State of Uttar Pradesh and Another*, (1) the detaining authority can pass a detention order on the subjective satisfaction as to the activities of the detenu. The satisfaction of the detention order is the subjective satisfaction which cannot be decided by objective standards. In *Ram Bali Rajbhar Vs. The State of West Bengal and Others*, Supreme Court while laying down the law on this subject held that the Courts must be careful in substituting its own opinion about what is enough for the subjective satisfaction of the detaining authority with which interference could be justified only if it is clear that no reasonable person could possibly be satisfied about the need to detain on the grounds given, in which case the detention would be in excess of the power to detain. The required satisfaction

must have reference to a need to prevent what is anticipated from the detenu. The past conduct or activity is relevant in so far as it furnishes reasonable apprehension. The reasonableness of the satisfaction of the detaining authority cannot be questioned in a Court of appeal. The adequacy of the material on which the satisfaction purports to rest also cannot be examined in a Court of law. In *State of Orissa and Another Vs. Shri Manilal Singhanian and Another*, the Supreme Court held that the only limited jurisdiction possessed by a Court is to examine whether the subjective satisfaction reached by the detaining authority was based on no material at all or was such as no reasonable person would arrive on the basis of material which was before the detaining authority (sic). The Court would not sit in appeal against all orders of detention and cannot go into the question of sufficiency or otherwise of the material for arriving at the satisfaction of the relevant authority. However, the Court can interfere if it is shown that the exercise of power was mala fide or on grounds alien to the Act.

5. In *Asha Keshavrao Bhosale Vs. Union of India (UOI) and Another*, also it was held that satisfaction under the preventive detention law was a subjective satisfaction and it is not for the Court to test the adequacy of the material on which the satisfaction was reached. In this case, from Mr. Soopy a gas cooking table was recovered and it was found that the stands of the stove were made of 24 Ct. gold coated with silver and three stands weighed together more than 6½ kilos of pure gold. A chit was also recovered with the following words : "Give P. A. Soopy twenty immediately." As per the statement recorded from the detenu as well as Mr. Soopy, the above gas stove was handed over to Shri Soopy by the detenu and earlier also such things happened and 4 such stoves without stands were subsequently recovered from the house of his brother which is also jointly owned by him. Merely because of a subsequent retraction statement by the detenu that his brother handed over the same to him and he was not aware of the material etc. will not make the subjective satisfaction totally extraneous. As held by the Supreme Court in *Mrs Saraswathi Seshagiri Vs. State of Kerala and Another*, the nature of the act and attendant circumstances may come to the conclusion that detention may be necessary to prevent him from abetting smuggling. It is the subjective satisfaction of the authority which the Court cannot objectively examine. Grounds of detention mentioned in Ext. P2 are not totally extraneous to the ground mentioned in Section 3(1) of the Act. There is no allegation of mala fide against any officers also; In the above circumstances, this Court cannot interfere with the subjective satisfaction entered by the authorities in making the order of detention.

6. On going through the order of detention it can be seen that subjective satisfaction was arrived at by the authorities after considering the entire facts. Statements given by the detenu as well as his retraction etc. were considered. It is also contended by the petitioner that earlier case of seizure of gold where detenu and his brother were involved was relied on even though no such seizure manazur was produced or supplied to the detenu along with the grounds. The detenu was detained only because of the recovery of the items from Soopy. But,

earlier instances were also narrated in the order of detention. In fact detenu himself was not denied the above allegation. A reading of the ground of detention¹ as well as submissions made by the petitioner make it clear that there were sufficient grounds for subjective satisfaction of the authorities to issue the detention order and in any event no; valid grounds are urged so as to attract interference of this Court in the order of detention and the grounds therein as this Court is not acting as a Court of appeal.

7. Second ground urged before us is that there was inordinate delay in implementing the order of detention. According to Ground "B", detention had been issued on 28-3-1995 whereas it was executed only on 17-1-1997 when the detenu surrendered before the Police and there is delay of one year and ten months. It is the contention of the petitioner that there is no proximity between the execution of the detention order and the prevention of the alleged activities. In *P.M. Hari Kumar Vs. Union of India and others*, it was held that when unusual delay in serving the placed the detention was not plained satisfactorily, the detention order can be sol aside. There, the Court found that me officers did not make any sincere and earnest efforts to implement the detention order and the delay in serving the order of detention was not satisfactorily explained. The same view was taken by a Division Bench of this Court in *B. Shareefa Ummer v. Joint Secretary* (1992) 2 KLT 313. In that case, a Division Bench of this Court found that on the facts of that case the authorities were not able to explain the delay in execution of the order. It is true that unexplained delay in execution would throw considerable doubt on the genuineness of the subjective satisfaction. But, as held by the Supreme Court if the delay is explained, it is not fatal.

8. The Supreme Court in *Sk. Serajul Vs. State of West Bengal*, held as follows (para 2 of Cri LJ) :

There was delay, both at the stage of passing the order of detention and in arresting him, and this delay, unless satisfactorily explained, would throw considerable doubt on the genuineness of the subjective satisfaction....

But this must not be misunderstood to mean that whenever there is delay in making an order of detention or 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.

In the decision reported in *Abdul Salam alias Thiyyan Vs. Union of India and others*, , the Supreme Court held that if delay in implementing the detention order is explained reasonably it will not make the detention order invalid. Now, we will consider the question whether the delay was explained reasonably by the authorities.

9. The detenu obtained anticipatory bail from this Court on 26-12-1994. The

detention order was issued on 28-3-1995 after recording the statements of the detenu and others. The contention of the Government is that petitioner was absconding and notification u/s 7(1) of the Act was issued in the Gazette extraordinary directing him to surrender before the Superintendent of Police, Malappuram within 30 days from the date of publication of the order. He did not appear before the Investigating Officer after 28-12-1994 in spite of summons issued to him u/s 108 of the Customs Act. He went underground after 28-12-1984. After that he did not respond to the summons. Finally, the detenu was forced to surrender consequent on initiation of proceedings for attachment of property under Sections 82 - 85 of the Code of Criminal Procedure read with Section 7(1) of the Act. Therefore, it can be seen that the detenu was absconding after getting bail. He was declared as an absconder and the detention order was not able to be implemented. In *Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another*, it was held by the Supreme Court that if the delay was caused as the detenu went underground for evading arrest is a criminal activity, there was warrant to consider the link not snapped but strengthened. Therefore, on the facts of this case, delay was explained by the authorities. They have done whatever they can, but the detenu was absconding. Since the delay is explained, it cannot be held that the detention order has become invalid because of the delay.

10. Third ground pressed before us was that while making the declaration u/s 9(1) of the Act, representation filed by the detenu was not considered even though it was received by the authority. Therefore, relevant materials were not considered while making declaration. The representation filed by the detenu should have been placed before the declaring authority before passing declaration and non-consideration of the above relevant document will lead to the setting aside of the declaration. Time for release under the original detention order is over when his representation was considered. Petitioner relied on the single Bench decision of the Delhi High Court reported in *Narinder Bahal Vs. Union of India and Others*, There, it was held that right to make representation is a constitutional right and inordinate delay in disposal of the representation against a declaration is illegal and invalid. It was also held that when a representation of the detenu challenging a detention order is received within time by the specified authority it should have been placed before the declaring authority before declaration is passed and it is a relevant document.

11. It is not disputed that Ext. P9 representation dated 4-2-1997 was received by the sponsoring authority and it was rejected by the Kerala Government on 12-2-1997 by Ext. P10. Copy of the representation dated 4-2-1997 was forwarded by the sponsoring authority and the same was received in the COFEPOSA Unit only on 10-2-1997. Proposal for declaration u/s 9(1) of the Act was forwarded by the sponsoring authority on 30-1-1997 much before the representation and the proposal was received in the COFEPOSA Unit on 3-2-1997. The case was processed and submitted to the Joint Secretary, COFEPOSA, Department of Revenue on 7-2-1997 8th and 9th February, 1997

were closed holidays being Saturday and Sunday. On 10th itself Joint Secretary, COFEPOSA, sent the case to the Additional Secretary to the Government of India and declaration was passed on 13-2-1997. It is the contention of the petitioner that Ext. P9 representation which was available on 10-2-1997 but it was not considered while passing declaration on 13-2-1997. But, it is the contention of the Union of India that Ext. P9 representation dated 4-2-1997 addressed to the Advisory Board; Additional Secretary to Government of India and Commissioner and Secretary to Government, Home Department, Trivandrum forwarded by the Superintendent, Thiruvananthapuram by letter dated 4-2-1997 was received in the COFEPOSA Unit on 10-2-1997. By that time, proposal for issue of declaration had already been submitted to the Addl. Secretary and, admittedly, this representation was not forwarded and, therefore, on 13-2-1997 the representation was not considered while making the declaration. The representation was subsequently considered by the Secretary, Department of Revenue and the same was rejected and an intimation thereof was issued. Since representation was not received by the COFEPOSA Unit when the proposal for declaration was sent to the Addl. Secretary, it was not forwarded. Within three days, declaration was passed. According to the Department, representation was also rejected subsequently after considering all facts as there was no new contention than what was mentioned by him and no prejudice is caused by not considering the same. We see much force in the above contention. Ext. P9 representation was subsequently considered and similar representations were again considered by the authorities concerned and found that there is no merit in the representation. On going through the detention order and on the facts pleaded in Ext. P9 representation we are satisfied that no prejudice is caused to the petitioner in not considering the representation before declaration was passed. We also note that at the time proposal for declaration was sent, the representation was not available. By the time it was processed, declaration was already passed and we cannot find fault with in not considering the representation by the declaring authority because of the reasons already explained. The above representation and subsequent representations were considered by various authorities and rejected which shows that no prejudice has been caused merely in the failure of the representation. From the facts of the case, admissions made etc., we see no ground in the contention that non-consideration of the representation by the declaring authority before issuing Ext. P12 declaration will vitiate the declaration.

12. Last contention raised is that there was inordinate delay in disposing of the representation and there was no application of mind while disposing of the representation. In *Raghavendra Singh Vs. Superintendent, District Jail, Kanpur and Others*, it was held that unduly long delay of 75 days in disposal of the representation by the Central Government makes the detention order illegal. In that case, it was held that delay of 75 days were not properly explained by the Central Government. In *Aslam Ahmed Zahire Ahmed Shaik Vs. Union of India and Others*, also Supreme Court held that unreasonable and undue delay in

disposal of the representation makes the detention illegal and unconstitutional. But, the Supreme Court in the above case also held that 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 the detenu has to be disposed of with reasonable expedition. In that case, it was held that no explanation was given by the authorities for retaining the representation.

13. In *Tara Chand Vs. State of Rajasthan and Others*, it was held by the Supreme Court that:

...once a representation is made to the Central Government, it is duty bound to consider the same in order to exercise its discretion either in rejecting or accepting it. If there is inordinate delay in considering the representation that would clearly amount to violation of the provisions of Article 22(5) so as to render the detention unconstitutional and void.

14. In *Shyam Ambalal Siroya Vs. Union of India (UOI) and Others*, it was held that (para 6 of Cri LJ):

The power of the Central Government to revoke the order of detention implies that the detenu can make a representation for exercise of that power. Any petition for revocation of an order of detention should be dealt with reasonable expedition.... It may be permissible for the Central Government to take reasonable time for disposing any revocation petition. But, it would not be justified in ignoring the representation for revocation of the detention as a statutory duty is cast upon the Central Government. It is necessary that the Government should apply its mind and either revoke the order of detention or dismiss the petition, declining to order for revocation.

In *Sabir Ahmed Vs. Union of India (UOI)*, it was held that no hard and fast rule as to the measure of reasonable time can be laid down even though the delay due to negligence, callous inaction, avoidable red-tapism and unduly protracted procrastination cannot be condoned. Considering the above cases in *Abdul Salam alias Thiyyan Vs. Union of India and others*, the Supreme Court held that it will depend upon the facts of each case and no relief can be laid down. It was also held that delay of one month and five days taken in that case was not fatal, as there was no negligence or callous inaction on the part of the authorities.

15. In *Kamlabai (Smt) Vs. Commissioner of Police, Nagpur and Others*, it was held that short delay should not be given undue importance having regard to administrative actions. In *State of U.P. Vs. Shakeel Ahmed*, also Supreme Court, on the facts of the case, held that delay was not fatal. From the above decisions, it can be seen that u/s 22(5) of the Constitution the Government should consider the representation "as soon as it is received by them" as it will affect the liberty of a citizen. The duty of the Government is to consider the representation without unexplained delay. It is a constitutional safeguard. Therefore, the delay on the part of the Government in considering the representation has to be accounted. There is, however, no fixed or absolute standard of time fixed and it

will depend upon the circumstances of each case. There is no hard and fast rule to measure the time taken by the appropriate authority. Now, we may examine the facts of this case.

16. The representation dated 4-2-1997 (Ext. P9 was disposed of by Ext. P10 by the Government of Kerala on 12-2-1997 and it was also communicated to the detenu. The complaint of the petitioner regarding delay in disposal of the representation is mainly against the Central Government. The above representation was disposed of only on 28-2-1997 by the Government of India by Ext. PI 1. It is the case of the respondents that the representation dated 4-2-1997 was sent without any delay by the Superintendent of Prison and it was received in the COFEPOSA Unit on 10-2-1997. Copies of the same representation was also received on 12-2-1997 from the Government of Kerala. Parawise comments were called from the sponsoring authority and sponsoring authority without any delay furnished reply letter dated 17-2-1997 and it was received in the COFEPOSA Unit on 20-2-1997. The case was processed and submitted to the Joint Secretary (COFEPOSA) on 27-2-1997 who is empowered by the Finance Minister to consider representations from the detenus detained under the orders passed by the State Government. The Joint Secretary (COFEPOSA) considered the representation on the same date and rejected the same on 28-2-1997 and it was communicated on 3-3-1997. 1-3-1997 and 2-3-1997 were closed holidays being Saturday and Sunday. The aforesaid representation was separately submitted to the Secretary, Department of Revenue on 3-3-1997 who after recording his recommendations marked the file to the Secretary, Department of Revenue on 3-3-1997 itself and the Secretary, Department of Revenue considered and rejected the representation on 4-3-1997 and the file was received back through proper channel on 6-3-1997 in the COFEPOSA section. On that date itself intimation was also given to the detenu. Another representation dated 21-3-1997 addressed to the Secretary, Department of Revenue and Additional Secretary, Department of Revenue were received in the COFEPOSA Unit on 25-3-1997. That representation was immediately forwarded to the sponsoring authority on 27-3-1997 for parawise comments and parawise comments dated 2-4-1997 were received on 7-4-1997. The representation was processed and put up before the Joint Secretary (COFEPOSA) and the Joint Secretary after recording his recommendations on 15-4-1997 submitted the file to the declaring authority, i.e., the Additional Secretary. Additional Secretary, Department of Revenue considered and rejected the representation on 21-4-1997. Similarly, representation dated 21-3-1997 was separately processed and submitted on 15-4-1997 to the Joint Secretary (COFEPOSA) who after recording his recommendations on 16-4-1997 itself submitted the file to the Secretary, Department of Revenue for consideration and it was also rejected on 21-4-1997. The third representation dated 12-4-1997 from the detenu was received on 21-4-1997. Parawise comments were called for from the sponsoring authority on 22-4-1997 and parawise comments were received in COFEPOSA unit on 2-5-1997. 3rd and 4th May, 1997 were closed holidays being Saturday and

Sunday and the representation was considered on 6-5-1997 and on the same day the relevant file was put up to the processing officer. File was processed without any delay and submitted on 14-5-1997 to the Joint Secretary (COFEPOSA) who after recording his recommendations on 19-5-1997 marked the file to the Secretary, Department of Revenue and finally the above representation was again rejected on 19-5-1997 itself. The file sent separately on 14-5-1997 to the Joint Secretary (COFEPOSA) with the same representation was also processed and finally it was also rejected by the Additional Secretary, Department of Revenue. Considering these facts, it can be seen that representations were considered expeditiously. There is no unexplained delay.

17. Based on the recent decision of the Apex Court in *P. Mariyumma v. State of Kerala* W.P. CrI. No. 34 of 1997 it was argued that if there is non-application of mind while disposing of representation, detenu can be freed. There is no dispute for the above proposition. While passing the order of detention, declaration and disposing representation, authority should apply its mind. Question is whether there is application of mind or not.

18. Photostat copies of the representations with remarks of the various authorities with the final order by way of disposal of the representation by the concerned authorities were produced as Annexure "A" to "F" along with the statement dated 9-1-1998 by the Senior Central Government Standing Counsel. A perusal of the same shows that there is application of mind. Annexure "B" shows detailed note regarding the matter put up by the Under Secretary (Finance) and Joint Secretary passed orders rejecting the representation after considering all relevant facts. The representation, its parawise comments of the sponsoring authority and other materials were considered when the representation was finally rejected by the Secretary also after applying its mind as can be seen from Annexure "C. Annexure "E" also shows that the representation dated 21-3-1997 was considered and rejected by Additional Secretary after considering all relevant materials. Annexure "F" is also an order by the Secretary on the same representation. A very detailed judicial order is not necessary while passing confirmation order and while considering representation as held by the Supreme Court in *Smt. Madhu Khanna Vs. Administrator, Union Territory of Delhi and Others*, . The contention that the representation was not disposed of by the very same officer who passed the order of declaration will not make any difference as the officer who disposed of the representation was the subsequent incumbent to that post who is authorised or by an officer who is competent to dispose of such representations under the Act. There is no pleading also to the effect that the officers who disposed of the representation are not competent to dispose of such representations. Successive representations were filed with similar contentions and they were considered and orders were passed by competent authorities and we find no infirmity in the above. On perusal of the records we are satisfied that there is no substance in the plea of inordinate delay and non-application "of mind while disposing of the representations.

19. In view of the above circumstances, we see no ground to interfere with the order of detention or order of declaration and hence we dismiss the original petition.