
(2002) 05 MP CK 0016

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2468 of 2001 (I)

Mohammad Asif

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 15-05-2002

Acts Referred:

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 —
Section 3(1)

Citation : (2003) 1 MPJR 496

Hon'ble Judges : S.L. Kochar, J;N.K. Jain, J

Bench : Division Bench

**Advocate : Maqsood Khan, for the Appellant; G. Desai, Dy. Advocate General,
for the Respondent**

Judgement

S.L. Kochar, J.

This petition in the nature of habeas corpus has been filed assailing the order of detention dated 18.06.98 issued by Respondent No. 2 Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi against Mohd. Shakir s/o Mohd. Shafi (detenu) u/s 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (For brevity, herein-after referred to as the "Act") with a view to preventing him from engaging in purchase, possession concealment and illicit trafficking of narcotic drugs, by his brother-petitioner Mohd. Asif.

According to the petitioner, the Respondent No. 2 Smt. Reva Nayyar, Joint Secretary to the Government of India Ministry of Finance, Department of Revenue had passed the order dated 18.6.98 as per provisions of Section 3(1) of the Act to detain the detenu with a view to preventing him from engaging in the purchase, possession, concealment and illicit trafficking of Narcotic drugs- (Annexure-A). This order was served on the detenu on 23.8.2001 along with the grounds of detention and the documents referred to in the list. These documents were purported to have been relied upon by the detaining authority (Annexure-

C). The detention was communicated to the Government of India- Respondent No. 1 containing the grounds of detention (Annexure-B). The matter was referred to the Advisory Board and the same has been confirmed by the report dated 30.10.2001 and, thereafter, the detention order was confirmed for one year by order dated 20.11.2001.

The detenu had made several representations and the same were considered and rejected. The document Annexure-B is showing the detailed facts which were considered by the detaining authority for passing the detention order. According to the grounds of detention dated 31.12.97, the truck bearing Registration No. MKU-6278 was intercepted on Neemuch-Ratlam road while coming from Mandsaur side. The search of the truck was taken. The driver of the said truck was Usman of Gafood Mohd. and according to the information given by the driver, the second person who managed to escape was Mohd. Shakir s/o Mohd. Shafi, the detenu. In the search of the truck in total 21.600 Kgs heroin was found contained in four bags.

On enquiry, the Station House Officer of Police Station VD. Nagar Mandsaur had submitted the report about the involvement of the detenu in two more cases of N.D.P.S. Act. The authorities were made to apprehend the detenu, but he was found absconding because of which, the detention order could not be served on him and the same was served on 23.8.2001 when he was already arrested on 21.8.2001 in the crime registered by the concerned Narcotic Department under the NDPS Act in pursuance of non-bailable warrant issued by the Special Court. He was remanded to judicial custody by the Special Court, Mandsaur.

The detaining authority, in the grounds of detention order (Annexure-B) has mentioned in para 19 that "even though the case is under trial in the Special Court, NDPS Act Mandsaur (M.P.) I am satisfied that there is compelling necessity to detain Mohd. Shakir under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Act, 1988 in view of the likelihood of his indulging in illicit traffic in narcotic drugs as is evident from the trend of his activities," Again, in para 21, the detaining authority has observed that "Even though the case is under trial in the Special Court, NDPS Act, Mandsaur (M.P.), I am satisfied that in view of the facts stated above, it is necessary to detain Mohd, Shakir under the Prevention of Illicit traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 with a view to preventing him trafficking in narcotic drugs."

The impugned detention order has been assailed in this writ petition by the petitioner mainly on the following three grounds:-

(i) That, the detenu was in custody in Special Case No. 29/98 pending before the Special Judge Mandsaur when the detention order was served on him on 23.8.2001. At the time of serving the detention order, the detaining authority ought to have considered as to whether despite detenu being in custody, the impugned order of detention was still warranted to be executed and served on the detenu. Failing to consider this aspect of the matter, the detention order is

rendered null and void.

Reliance has been placed on the decisions of the Supreme Court in Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others,), Amritlal vs. Union of India (2000 (1) LJ 401), Kartic Chandra Guha Vs. The State of West Bengal and Others, There are several other judgments rendered by the Delhi and Bombay High Courts cited on the same point. Learned counsel has also relied upon a Circular dated 22.12.98, issued by the Govt. of India Ministry of Finance Department of Revenue PIT NDPS Act. Relying on the judgment of Vinodsingh's case (supra) this Circular was issued by the concerned Department for consideration of the judicial custody of the detenu facing trial in Criminal Case and prospect of his being released on bail also thereafter apprehension of his involvement in the same activities.

(ii) There is delay in serving and/or in execution of the detention order with grounds which makes shows that there was no immediate necessity of passing that order and the same was wholly artificial or non-existent. The petitioner has relied on a number of judgments of the Supreme Court and various other High Courts out of which few are reflected here i.e. (a) Mohd. Farukh vs. Union of India (2000 SCC (Cri) 411 (b) Manju Ramesh Nahar vs. Union of India (1999 SCC (Cri) 498)

(iii) Delay in consideration of representation of the detenu and the same has not been explained in the return filed by the Respondents.

For this, the learned counsel for the petitioner has relied upon the judgments of the Supreme Court i.e. Mahesh Kumar Chauhan alias Banti Vs. Union of India and others, and Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others,

Combating with these grounds submissions the learned Dy. Advocate General Shri Desai, in reply, submitted that the ground No. (i) challenging the detention order relying on Vinodsingh's case (supra) is pertaining to the provisions of National Security Act, 1980 and there is wide difference between aim and object of National Security Act as well as the Act as aforesaid. Regarding Ground No. 2, his contention is that since the detenu himself was absconding and was not available at his residential place, he cannot lodge grievance for delay in serving the detention order. For ground No. (3), he submits that the delay in consideration of representation has been properly explained in the reply and placed reliance on the judgment reported in 1999 (8) SCC 493 (Ahmad Nassar V. State of Tamil Nadu). He further put forth that as a matter of fact there was no delay in consideration of the representation of the detenu. Even otherwise if there is any delay, the same has reasonably been explained by the Respondents.

Having heard the learned counsel for the parties and after perusing the petition along with the annexures filed by the petitioner and the decisions relied upon as well as the return submitted by the Respondents with Annexures and the decisions relied on by them, this Court is of the considered view that the

detention is bad in law on ground No. 1 itself i.e. non-consideration of the fact of pendency of trial and the detention of detenu in judicial custody in a regular trial is vital, to the detention order as ruled in the cases of Vinod Singh and Amritlal (supra) as well as other pronouncements on the same legal issue by the Supreme Court as well as several other High Courts. In Vinod Singh's case, the Supreme Court held that:

Where the order of detention under S. 3 (2) of the National Security Act was served upon the detenu, when he was already in jail in respect of a murder case and there was no indication that this factor of the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration by the detaining authority properly and seriously before the service of the order of detention, the continued detention of the detenu under the Act would not be justified. The power of directing preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of the facts for social defence. If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. And if that is the position, then, however, disreputable the antecedents of a person might have been without consideration of all the aforesaid relevant factors, the detenu could not have been put into preventive custody.

In this case there were grounds for the passing of the detention order but after that the detenu has surrendered for whatever reasons, therefore, the order of detention though justified when it was passed but at the time of the service of the order there was no proper consideration of the fact that the detenu was in custody or that there was any real danger of his release. Nor does it appear that before the service there was consideration of this aspect properly. In the facts and circumstances of this case, therefore, the continued detention of the detenu under the Act, was not justified.

Same legal and factual back-drop is available in the case of Amritlal (supra).

Now, coming to the facts of this case, the detention order was passed on 18.06.98 whereas the same was served on 23.8.2001 (Annexure-A) and the grounds (Annexure-B) are not revealing the fact of consideration of judicial custody of the detenu and possibility of his being released on bail. Thereafter his indulgence in the same activities on the basis of the judgment of Vinod Singh (supra) the circular dated 22.12.98 was issued. The operative portion is referred herein-below:

It may please be clearly borne in mind that fresh consideration by the Detaining Authority of the need to detain a person who has been remanded to judicial custody/jail on his surrender or otherwise after passing of the detention order is a must before executing the detention order. The ratio of the aforesaid judgment

of the Hon''ble Supreme Court should, therefore, be meticulously followed in all such cases without fail.

In view of the Supreme Court Judgment as also the Circular, the detaining authority must have considered afresh the need to detain a person who has been remanded to judicial custody/jail on his surrender or otherwise after passing of the detention order, is a must before executing the detention order. The ratio of the aforesaid judgment of the Hon''ble Supreme Court should, therefore, be meticulously followed in all such cases without fail. In the present case, the same has not been at all followed which is clear after perusal of the ground of detention in paras 19 and 21. The detaining authority has mentioned only this much that though the detenu is facing criminal cases even then the authority was satisfied with a view to preventing him, engaging in the purchase, possession, concealment and illicit trafficking in narcotics drugs. However, after passing of the order dated 18.6.98, there is absolutely no consideration by the detaining authority while serving the order upon the detenu after his surrender and remanding to judicial custody in the month of August, 2001. Therefore, the detention order is a nullity.

So far as the ground No. 2 is concerned, this ground is not available to the detenu because, he himself was absconding and was not available at his given address as well as in the surrounding area. In the reply sufficient material has been submitted by the respondents to show that the authority has tried their level best to trace out and apprehending the detenu, but he was not available and absconding.

Regarding ground No. 3, really this is a matter of great concern that from time to time the representations were submitted by the detenu but the same were not considered immediately and no satisfactory explanation was given for the delay in consideration of the representation of the detenu. According to the petitioner, the detenu submitted representations dated 29.8.2001, 14.9.2001 and 4.10.2001 through the prison authorities at Indore addressed to The Advisory board, and detaining authority of Central Government. He received two communications dated 29.9.2001 and 1.10.2001 communicating the detenu that representation dated 29.8.2001 has been rejected, by the detaining authority and the Central Government respectively. According to him, as regards the representation dated 4.10.2001, he had not received any communication till the date of filing of this petition. There is no satisfactory reply submitted by the Respondents about ground No. 12 taken in the petition at pages No. 28, 29 and 30. According to the reply, at page 7, the Secretary to the Govt. of India Ministry of Finance received representation on 4.9.2001. The same was sent for obtaining parawise comments to the detaining authority. The comments were sought on the same day. After obtaining approval/orders dated 05.9.2001 comments from sponsoring authority were received on 24.9.2001.

The representation along with the comments thereon was put up to the detaining authority and after careful consideration, the same was rejected on 26.9.01. The

decision was communicated to the detenu through the Supdt. Central jail. In this reply, no reasonable cause and plausible explanation has been given as to why the delay had occurred from 5.9.2001 when the matter was sent for comments from the sponsoring authority and the comments were received on 24.9.2001. Why this delay of about 19 days. The same is the factual metrix about other representation for which the dates were given but the cause for delay has not been shown so that this Court may examine the reasonableness of the explanation. Therefore, the petitioner has raised successful ground on the basis of the Supreme Court judgment referred to in ground (iii) mentioned herein-above, and the detention order is liable to be quashed.

1 The contention of the learned Dy. Adv. General Shri Desai that the case of Vinod Singh (supra) was relating to the National Security and there is material difference regarding object of clipping the person under the provisions of National Security Act and the Prevention of Illicit traffic in Narcotic Drugs and Psychotropic Substances Act is not acceptable. We find no force in this argument, because Vinod Singh's case has been relied upon for the aforesaid purpose by the Supreme Court in the case of Amritlal (supra). The same factual position is available in the present case.

In the wake of the aforesaid discussion, we do not feel inclined to record our concurrence with the order of detention passed in the matter. As such, the same is quashed. This however, will not affect the detenu's detention under the criminal cases. If, however, the detenu is released on bail in Cr. Cases, as registered by the concerned Police for the offences of NDPS Act, the matter of service of detention order under the Act, on the aforesaid materials may be reconsidered by the appropriate authority in accordance with the law.