
(1995) 09 SC CK 0031

In the Supreme Court Of India

Case No : Writ Petition (Cri.) No. 149 of 1995

P.M. Hari Kumar

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 04-09-1995

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 7(1), 9(1)
Criminal Procedure Code, 1973 (CrPC) — Section 82(2), 83

Citation : (1995) 19 ACR 717 : AIR 1996 SC 70 : AIR 1996 SC 68 : AIR 1995
SC 70 : (1995) CriLJ 4188 : (1995) 3 Crimes 826 : (1995) 60 ECR 561 : (1995)
6 JT 331 : (1995) 5 SCALE 132 : (1995) 5 SCC 691 : (1995) 3 SCR 301 Supp

Hon'ble Judges : S. C. Agrawal, J;M. K. Mukherjee, J

Bench : Division Bench

Advocate : kapil Sibal, Manmohan, Grish Chandra and Soundra Rajan, for the
Appellant; K.T.S. Tulsi, A.S.G., V.K. Verma, Dilip Tandon, Vikas Pahwa and Lal
George, for the Respondent

Final Decision : Allowed

Judgement

M.K. Mukherjee, J.—Pursuant to an order of detention dated July 11, 1990 made by the Secretary, Home and Vigilance Department, Government of Kerala u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'the Act') P.M. Hari Kumar, the petitioner herein, has been kept under detention since July 3, 1994 with a view to preventing him from smuggling goods. Consequent upon a declaration subsequently made on August 1, 1994, by an Additional Secretary (Ministry of Finance, Department of Revenue), Government of India u/s 9(1) of the Act the petitioner's detention is to continue for a period of two years. Assailing the above order and declaration the present petition has been moved on his behalf by his brother-in-law V. Rajan, for a writ of Habeas Corpus.

2. Mr. Sibal, the learned Counsel appearing for the petitioner canvassed three grounds in support of the petition. He first contended that the unreasonable and

unexplained delay of about four years in executing the order of detention clearly demonstrated that the detaining authority had not properly applied his mind and arrived at a real and genuine satisfaction about the necessity of detaining the petitioner. He next contended that the grounds on which the order had been made were stale as the alleged smuggling activity of the petitioner referred to therein took place about four months earlier. He lastly submitted that the declaration made u/s 9 of the Act was also bad as it does not indicate that the declaring authority was aware of the unusual delay in serving the order of detention and, for that matter, was satisfied that notwithstanding such lapse of time, the petitioner was required to be kept in continued detention, solely for the smuggling activity alleged in the grounds of detention.

3. As in our opinion the first contention of Mr. Sibal has got to be accepted it will be redundant to deal with the other two. For a proper appreciation of that contention it will be necessary to refer to certain relevant and undisputed facts.

4. The petitioner was arrested by the Customs Authorities on March 2, 1990 for smuggling silver ingots in India through the port of Cochin-which forms the sole basis for the impugned order of detention - and produced before the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam. On March 5, 1990 an application for bail was moved on his behalf and on the following day it was allowed by the learned Magistrate with a direction that he would appear before the Assistant Collector (Preventive Department), Cochin on any two days within a fortnight. Aggrieved by such grant of bail the Customs Authorities preferred an application before the High Court for its cancellation. The High Court, however, did not feel inclined to cancel the bail but directed, by its order dated March 21, 1990 that the petitioner shall not leave Trivandrum and Ernakulam without permission of the Court and also made it clear that such direction was in addition to the condition imposed by the Additional Chief Judicial Magistrate.

5. After the order of detention was made on July 11, 1990, the Government of Kerala issued an order on August 3, 1990 u/s 7(1)(b) of the Act directing the petitioner to appear before the Commissioner of Police, Trivandrum City within 30 days as, according to it, he was absconding. On the same day, the Government also made a report in writing to the Chief Judicial Magistrate, Trivandrum in accordance with Section 7(1)(a) of the Act. On receipt of the report, the Magistrate issued a non-bailable warrant of arrest and a proclamation in accordance with Section 82 Cr.P.C. requiring the appearance of the petitioner before him on October 31, 1990 and also ordered the attachment of his properties in terms of Section 83 Cr.P.C.

6. On November 28, 1992 the petitioner filed a suit in the Court of the Subordinate Judge, Attingal challenging the order of detention and, along with the suit, filed an application for a temporary injunction restraining the State of Kerala from arresting the detenu under the Act. On that application the learned Judge passed an order on December 1, 1992 for maintenance of status-quo. However, the suit was dismissed on Feb. 26, 1993, but the interim order was

allowed to continue for a week more.

7. On January 11, 1993 the Customs Authorities filed a complaint in the Court of the Additional Chief Judicial Magistrate (Economic Offences) Ernakulam against the petitioner and two others for smuggling the silver ingots referred in the grounds of detention, being Case No. C.C.M. 2/93 and they were summoned to appear on March 5, 1993. On the date so fixed the petitioner made a prayer for exemption from personal appearance which was allowed. As the correct addresses of the other two accused were not furnished by the prosecution the case was adjourned from time to time. The petitioner however did not appear on any of the adjourned dates and his application for exemption from appearance on each such occasion was allowed. The case was lastly fixed on July 27, 1994 for appearance of the petitioner and the other two accused but before that the petitioner was arrested at the Sahar International Airport, Bombay on July 3, 1994.

8. To explain away the delay in serving the order of detention Mr. Tulsi, the learned Additional Solicitor General, took us through the counter affidavits filed on behalf of the detaining authority and the Commissioner of Police, Trivandrum, who was entrusted with the duty of serving the order of detention, and contended that all possible steps were taken to apprehend the petitioner since the order of detention was passed but he could not be found at any of his known addresses. According to Mr. Tulsi, in view of the averments made in those affidavits it must be held that the delay had been satisfactorily and adequately explained. In support of his contention he relied upon the judgment of this Court in Subhash Muljimal Gandhi Vs. L. Himingliana and Another, wherein it was held that for an unusual and long delay in execution of an order of detention an inference that the detention was punitive and not preventive could be legitimately drawn unless the detaining authority satisfied the Court that such delay was occasioned not by an omission or commission on its part but owing to the abscondance of the detenu.

9. In responding to the above contentions of Mr. Tulsi, Mr. Sibal submitted that if the concerned authorities were really anxious to serve the impugned order of detention but could not do so as the petitioner was absconding they could - and was expected to - move an application in the Court, which granted bail to the petitioner, or the High Court for cancellation of the bail on the ground that the conditions imposed thereto were violated by the petitioner. He further submitted that there was also nothing on record to show that the concerned Authorities approached the Court, in which the complaint had been filed against the petitioner and others in January, 1993 and was pending trial at the material time to ensure personal appearance of the petitioner so as to enable them to serve the order of detention. On the contrary, the Custom Authorities, who lodged the complaint, did not raise any objection to the petitioner's prayer for exemption from personal appearance on any of the dates fixed for appearance of the accused, argued Mr. Sibal. He lastly contended that the claim of the respondents

in their affidavits that attempts at regular intervals were made to serve the detention order by going to the house of the petitioner was patently untrue for there could not be any occasion to visit his house at least after he was treated as an absconder and recourse was taken to Section 7 of the Act on August 3, 1990.

10. Unquestionably, except during the short period from November 30, 1992 to March 5, 1993, when the order of status-quo passed by the Civil Court was in operation, the detaining authority was at liberty to apprehend the petitioner and serve the order of detention during the period of four years. The only question therefore that falls for our determination is whether the explanation of the respondents that they made sincere attempts and took all effective steps to apprehend the petitioner but failed as he was absconding is satisfactory or not.

11. In dealing with the delay in execution of the order the detailing authority has stated, inter alia, in the counter affidavit (paragraph 3) as under :

He did not appear before the investigating officers as directed by Additional Chief Judicial Magistrate Court in Ernakulam in the order dated 7.3.1990 in CrI.M.P. No. 692/90 in SD/INT/L/2/90. He was not available in his residence; communication sent to his residence was returned undelivered. He did not appear for personal hearing nor did he appear in person before the Additional Chief Judicial Magistrate, Ernakulam in CC 2/1993.

(emphasis supplied)

12. In reiteration of his above statement, he has further stated therein:

It is submitted that all possible steps have been taken to apprehend the detenu. The delay in executing the detention order occurred solely due to the recalcitrant and refractory conduct of the detenu. It is submitted that the detenu was absconding and concealing himself to avoid the execution of the detention order. It may kindly be noticed that bail was granted to detenu on 6.3.1990 with a specific direction that he should appear before the Assistant Collector, Preventive Department, Cochin on any 2 days within a fortnight. In Criminal M.C. 241/90, the Honourable High Court of Kerala has stipulated that the detenu should not leave Thiruvananthapuram without permission of the Honourable Court. It is submitted that the detenu has not satisfied the conditions mentioned in the bail order.

(emphasis supplied)

13. If the respondents were really sincere and anxious to serve the order of detention without any delay it was expected of them, in the fitness of things, to approach the High Court or, at least, the Court which initially granted the bail for its cancellation as, according to their own showing, the petitioner had violated the conditions imposed, and thereby enforce his appearance or production as the case might be. Surprisingly, however, no such steps were taken and instead thereof it is now claimed that a communication was sent to his residence which was returned undelivered. Apart from the fact that no such communication has

been produced before us in support of such claim, it has not been stated that any follow-up action was taken till 3.8.90, when Section 7 of the Act was invoked. Similarly inexplicable is the respondents' failure to insist upon the personal presence of the petitioner in the criminal case (C.C. No. 2/93) filed at the instance of the Custom Authorities, more so when the carriage of its proceeding was with them and the order of detention was passed at their instance. On the contrary, he was allowed to remain absent, which necessarily raises the inference that the Customs Authorities did not oppose his prayer, much less bring to the notice of the Court about the order of detention passed against the detenu.

14. So far as the steps taken before initiating the proceeding u/s 7(1)(a) of the Act are concerned the Commissioner of Police had this to say in his counter affidavit (paragraph 3):

The detention order is issued on 11.7.1990. Thereafter it was forwarded to the office of the Commissioner of Police, Thiruvananthapuram City and the same was received at the office of the Commissioner of Police on 12.7.1990. It is submitted that various enquiries were made during the period between 12.7.1990 and 30.7.1990 regarding the whereabouts of the warrantee. The police has visited the residence of the detenu, native place and neighbouring places in search of the detenu. Several persons were contacted for getting the whereabouts of the detenu but he was found absconding. The persons contacted by the police as well as the informants set up for this purpose informed police that he had gone to Gulf countries and he was not available in his native place. Accordingly a Report No. 589/GI/90-C dated 30.7.1990 was sent to the State Government.

15. It is interesting to note that though the names and addresses of several persons whom the police is supposed to have contacted for ascertaining the whereabouts of the petitioner have been given in the affidavit, the places where they actually searched for him had not been disclosed.

16. As regards the proceeding initiated and steps taken by the Chief Judicial Magistrate, Trivendrum u/s 7(1)(a) of the Act, the detaining authority has filed a supplementary affidavit in obedience to a direction of this Court. To indicate the cursory manner in which the matter was dealt with even at this stage, it will be necessary to extract the relevant passages from that affidavit; which read as under:

3. It is submitted that the report contemplated u/s 7(1)(a) of the COFEPOSA Act was forwarded to the Chief Judicial Magistrate, Trivandrum for necessary action on 3.8.1990. It is seen from the proceedings of the Chief Judicial Magistrate Court, Trivandrum that non-bailable warrant was issued on 8.8.1990, authorising the Asst. Commissioner of Police, Cantonment Sub-division Trivandrum to arrest and produce the warrantee, Shri Hari Kumar and the case was posted to 31.10.1990 for hearing. The certified copy of the non-bailable warrant issued from the Chief Judicial Magistrate, Trivandrum is produced herewith and marked as Annexure IV. After conducting detailed enquiries, regarding the whereabouts of

the warrantee, police filed a report on 31.10.90 stating that the warrantee was not available at his native place and that his whereabouts could not be located. The report submitted to the Chief Judicial Magistrate Court is incorporated on the reverse side of Annexure IV.

4. It is further submitted that after arriving at the satisfaction that the warrantee was absconding, the proclamation has been made by the Chief Judicial Magistrate on 8.8.90. A certified copy of the said proclamation issued in Calendar Case No. CMP No. 3650/90 on the files of Chief Judicial Magistrate Court, Trivandrum is produced herewith and marked as Annexure V. The facts contained in the proclamation was public ally read to the inhabitants of the neighbourhood of the warrantee and a copy of the same was affixed on 21.9.90 at the conspicuous part of the house, where the warrantee was residing. A report to that effect was forwarded to the Chief Judicial Magistrate Court, Trivandrum by the police on 30.10.90 and the same is incorporated on the reverse page of the certified copy of the proclamation.

5. It is further submitted that as per proceedings date 8.8.90 in CMP No. 3650/90, the learned Chief Judicial Magistrate ordered attachment of the properties of the warrantee available in Trivandrum District, certified copy of the said proceedings is produced herewith, marked as Annexure VGI. On receipt of the said attachment order, the police conducted detailed enquiries and reported to the Chief Judicial Magistrate Court that the warrantee did not possess any properties liable to be attached. The report dt. 23.10.90 send by the police is incorporated on the reverse page of Annexure VI.

6. In this context, it is submitted that the Government have obtained a report from the Chief Judicial Magistrate Court, Trivandrum explaining the various steps taken against the warrantee (detenu), pursuant to the receipt of the report u/s 7(1)(a) of the COFEPOSA Act. A true copy of the said report dated 16.8.95 of the Chief Judicial Magistrate, Trivandrum is produced herewith and marked as Annexure VII. Thus it most respectfully submitted that all the steps contemplated under law were taken to execute the detention order.

(emphasis supplied)

17. From the annexures referred to in the above quoted passages we find that on one and the same day i.e. August 8, 1990 non-bailable warrant and written proclamation u/s 82 of the Cr.P.C. were issued and order of attachment u/s 83 Cr.P.C. made. The manner in which the executing authority dealt with the above three orders of the Magistrate as can be culled from the above quoted passages of the affidavit also makes an interesting reading. According to the affidavit after conducting detailed enquiries regarding the whereabouts of the warrantee (the petitioner) the police sent a report on 31.10.90 stating that the warrantee was not available at his native place (Annexure IV). It is also stated therein that it was only after arriving at the satisfaction on the basis of the above report that the warrantee (petitioner) was absconding the proclamation was made by the

Chief Judicial Magistrate on 8.8.1990. As has been earlier noticed both these steps were taken by the learned Magistrate on August 8, 1990 and it must be said therefore that the affidavit does not depict the correct state of things available on record. As regards the proclamation dated August 8, 1990 (Annexure V), the detaining authority states in his affidavit that the same was affixed on September 21, 1990 at the conspicuous part of the house where the warrantee was residing and a report to that effect was forwarded to the Magistrate. The assertion of the executing authority in the affidavit that the police conducted detailed enquiries about properties of the petitioner is belied by the endorsement of the police in Annexure VI as it only shows that the police had gone to the address appearing thereon. While on this point it is pertinent to mention that Annexures IV, V and VI refer to one and the same address even though in the affidavit it is stated that the warrant was attempted to be executed at the 'native place of the petitioner, and the others at the address appearing therein. Coming now to the report of the Chief Judicial Magistrate dated August 16, 1995 (Annexure VII) we get that the proclamation was affixed on the Court's Notice Board on August 8, 1990, but no contemporaneous record in support thereof has been produced. Before we close our discussion on this aspect of the matter, we wish to point that if really the respondents were zealous in executing the order promptly it was expected of them to persuade the Court to get the proclamation published in accordance with Section 82(2)(ii) Cr.P.C. For the foregoing discussion, we are constrained to say that the entire endeavour of the respondents was only to comply with the letters of Section 7 of the Act - and not its spirit - and even in that attempt they have failed miserably.

18. Now that we have dealt with the steps taken by the respondents to apprehend the petitioner prior to and in course of the proceeding initiated u/s 7 of the Act it will be necessary to advert to the steps taken by them subsequent thereto.

19. In their affidavits the respondents have asserted that in regular and frequent intervals the police officers had gone to the residence of the petitioner and nearby places to apprehend the petitioner. The date of such visits - till the date the Civil Court passed the order of status quo - have all been detailed therein. It has then been averred by the Executing Authority in its affidavit that the enquiries held by the police officers who had gone to apprehend him revealed that the petitioner had gone to Gulf countries and he was absconding throughout the entire period. Similar averments have been made in respect of the period following the dismissal of the suit till the execution of the order. If the enquiries had revealed that the detenu had already left for the Gulf countries, the attempt to arrest the petitioner from his house in regular intervals must be said to be an empty formality to which, as it appears, recourse was taken only to keep the record straight and for no other purpose. It will be pertinent to mention here that, according to the respondents, the petitioner was arrested while he was going out of India (and not coming to India) which an international passport which was issued at Bombay on 12.4.1990, that is prior to the date of the

passing of the order of detention. If that be so, the entries in the passport would have unambiguously answered the question whether the petitioner was absconding and, if so, during which period. We hasten to add that a person may also abscond without going out of his country but here, it is the positive case of the respondents that during the entire period in question the petitioner was staying out of India. If the above assertion of the respondents was correct they could have produced the passport or an affidavit on the basis thereof to substantiate their claim and avail of the observation made by this Court in *Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another*, that if the delay was found to be the result of the recalcitrant or refractory conduct of the detenu in evading arrest, there was warrant to consider the 'link' not snapped but strengthened.

20. On the conclusions as above we must hold that the respondents did not make any sincere and earnest efforts and take any urgent and effective steps, which were available to them, to serve the order of detention on the petitioner. That necessarily means that the unusual delay in serving the order of detention has not been properly and satisfactorily explained.

21. We, therefore, allow this petition and quash the impugned order of detention. Let the detenu be released forthwith unless waned in some other case.