
(1989) 07 DEL CK 0019
In the Delhi High Court
Case No : Criminal Writ No. 602 of 1988

Rafiq Ahmad

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 04-07-1989

Acts Referred:

Citation : (1990) CriLJ 2328

Hon'ble Judges : S. Duggal, J

Bench : Single Bench

Judgement

1. The petitioner herein was detained on 1st October, 1988, pursuant to the order of detention passed on 29th September, 1988 by the Administrator of Union Territory of Delhi, in exercise of the powers under S. 3(1) read with Section 2(f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short COFEPOSA Act) on the view that his detention was necessary to prevent smuggling of goods, namely, gold into India.

2. The detention order was passed as a sequel to recovery of gold weighing 520.800 gms. valued at Rs. 1,66,320/- from the petitioner on his arrival from Bombay as domestic passenger by Air India flight No. 316 Delhi-Bombay-Dubai-Bombay-Delhi on 12th April, 1988. The statement of the petitioner was recorded under S. 108 of the Customs At, 1962 wherein he allegedly admitted recovery and gave further details. He was placed under arrest but subsequently released on bail by order passed by the Addl. Chief Metropolitan Magistrate, New Delhi on 22nd April, 1988.

3. However, it was felt necessary to detain him preventively and thus Order under challenge, in this writ petition was passed. The petitioner has filed this petition under Art. 226 of the Constitution, seeking issuance of writ of habeas corpus or any other writ, order or direction for his immediate release by quashing the detention order dated 29th September, 1988, passed by the Administrator of Union Territory of Delhi on a number of pleas set out as grounds I to XXI in the writ petition.

4. However, Mr. Bagai at the time of hearing has confined himself primarily to one ground, taken as ground "No. VIII" in the writ petition, to the effect that there was long and unreasonable delay in consideration of the representation made by the detenu (petitioner herein) and that thereby petitioner's right as enshrined in Art. 22(5) of the Constitution has been violated and his continued detention was liable to be revoked, Mr. Bagai argued that the petitioner after detention on 1st October, 1988 had submitted representation to the detaining authority on 21st October, 1988 wherein he raised the plea that there had been non-application of mind and further that inasmuch as the order of detention was passed after more than 5 months of his release from jail, there was no compelling necessity or justification to clamp the detention order on him and prayed that the detention order be set aside and further pleaded that the alleged recovery was a case of solitary incident and there was no previous history and since his passport had already been seized, there was no necessity for an order of preventive detention. He also expressed a grievance about certain documents having not been supplied to him and made a request that the same be furnished along with additional information, as solicited by him, and also pleaded that the grounds of detention and the documents accompanying the same have been supplied to him in the language known to him on the plea that he was conversant only with Urdu language whereas the documents supplied to him were either in English or Hindi.

5. The learned counsel submitted that he representation raised very limited issues, and that the counter-affidavit filed on behalf of the detaining authority clearly reveals that it was never attended to, with the requisite urgency and promptitude. He read out from the counter-affidavit, with reference to ground No. VIII of the writ petition and pointed out that it is admitted that the representation had been received in the office on 24th October, 1988. He contended that it was finally disposed of by the Administrator, who was the detaining authority, on 30th November, 1988 and that there is no satisfactory Explanation for the intervening period. As per this reply affidavit, it was decided to call for certain clarification/information from the Collector of Customs, who was the sponsoring authority; besides asking them to furnish Urdu translation of ground of detention, and that the relevant information had been received on 3rd November, 1988; 15th November, 1988 and 18th November, 1988, and thereafter the representation was put up to the Home Secretary on 18th November, 1988. The latter did not attend to the file up to 24th November, 1988 and even then, only returned the file with certain queries.

6. Mr. Bagai contends that apart from the fact that there was no justification for the authorities to sit over the representation, and not to put up to the detaining authority at the earliest opportunity; otherwise also, even assuming that the file had to be routed through the department and put up before the detaining authority with office note, and background of the case, even then there is unexplained delay which smacks of inaction on the part of the concerned officers at more than one stage resulting into total time of 45 days being taken in

disposal of the representation.

7. He has further argued that there was no justification for the Custom Authorities to send piecemeal reply to the reference made by the Delhi Administration in respect to this representation and that the affidavit submitted by Assistant Collector (Preventive), Customs Department, in this regard is wholly unsatisfactory. It is submitted that in any event the representation, in respect to the points raised by the detenu, could have been disposed of on merits without even calling for any comments from the sponsoring authority, and in any case, without waiting for the Urdu translation or supply of the documents/information asked for by the detenu.

8. Petitioner's counsel has placed reliance on two judgments of the Supreme Court, in support of his plea that in the event of any unexplained delay occurring in the disposal of the representation of the detenu, the detention order stands vitiated and the continued detention becomes liable to be revoked. He has supplied a copy of an unreported judgment of the Supreme Court in Writ Petition No. 640/80 titled : Shankar Raju Shetty v. Union of India, decided on June 26, 1980, where delay of 12 days, in considering representation after comments were received from the concerned authorities, was held to be fatal. It was emphasised that each days's delay must be clearly explained failing which the order of detention becomes invalid as it violates the protection given to the detenu under Art. 22(5) of the Constitution of India. He has also cited a very recent judgment of the Supreme Court reported in (1989) 2 JT 579 : 1989 Cri LJ 2119, (Rama Dhondu Borade v. V. K. Saraf, Commissioner of Police), where on facts it was noticed that the required information had been received on 17th October, 1988. Thereafter the representation was considered and the final decision to reject it was taken on 27th October, 1988 and the decision of the Central Government rejecting the representation was conveyed to the detenu on 31st October, 1988. After examining the counter-affidavit it found that the respondent there had failed to specifically explain the total time taken in disposal of the representation reiterating the principle (at p. 2123 of Cri LJ) :

"The detenu has an independent constitutional right to make his representation under Art. 22(5) of the Constitution of India. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness of the detention order clamped upon him and requesting for his release, to consider the said representation within reasonable dispatch and to dispose the same as expeditiously as possible. The constitutional requirement must be satisfied with respect but if this constitutional imperative is observed in breach, it would amount to negation of the constitutional obligation rendering the continued detention constitutionally impermissible and illegal, since such a breach would defeat the very concept of liberty-the highly cherished right-which is enshrined in Art. 21 of the Constitution."

9. It was further held that where the gap between receipt of representation and

its consideration by the authorities was unreasonably long and the Explanation offered by the authorities was not satisfactory, such delay can vitiate the order of detention. There the gap between the receipt and the disposal of the representation was 28 days but up to the date of service of the order of rejection on the detenu the delay worked to 32 days, and the only Explanation was that the information required from the sponsoring authority was received after delay of nearly 14 days and thereafter the representation was disposed of within 13 days, including the period of intervening holidays. In scrutiny the delay was held inordinate and unreasonable, and the Explanation furnished was held to be not acceptable.

10. Mr. Bagai urged, Therefore, that the present case is also a case where the representation of the detenu had been disposed of in a very cavalier and casual manner and no sense of urgency has been shown and it resulted in total time of 45 days being taken, when the rejection was conveyed to the petitioner. He, Therefore, prayed on the strength of the authorities quoted by him, that it was a fit case where the order of detention becomes liable to be quashed.

11. Ms. Kamini Lao appearing with Mr. R. P. Lao, however, argued that the totality of the facts of each case had to be seen, and that the representation has to be processed in the office and to be put to the detaining authority with complete data and comments and as such comments from the sponsoring authority were also necessary as also further information on the points raised by the detenu in his representation, and that the counter-affidavit filed on behalf of the Delhi Administration very specifically explained the time taken in disposal of the representation and that no inference of undue delay could be raised, nor could it be said that the delay remained unexplained. She pointed out that the counter-affidavit very clearly reveals that after the representation was received on 24th October, 1988; reference was made to the Collector of Customs on 26th October, 1988 for comments as also for supply of documents, and translated copies asked for by the detenu. She submitted that the sponsoring authority did not send a consolidated reply but supplied the information in parts, and that whereas the first reference was received on 3rd November, 1988, further information and documents were received on 15th November, 1988 and 18th November, 1988 and that after the final reply was received, the file was put to the Home Secretary on the same day.

12. Miss Lao further argued that because the Home Secretary raised certain queries, the file was re-submitted to him with the necessary noting on 29th November, 1988 and it was put up to the detaining authority on the same day and disposed of by him on the next day inasmuch as the order of rejection was passed by the Administrator on 30th November, 1988. She pleaded that since the petitioner had asked for Urdu translation of the grounds of detention as well as documents, for which there was no internal arrangement; it was on that account that time was taken by the office of the Collector of Customs to supply the translation, and it was not a case where any unexplained delay had taken place.

13. On being asked as to why the file could not be put up to the detaining authority after the receipt of the first reply from the Collector of Customs on 3rd November, 1988 because it appeared that comments had been sent vide first reply, and the subsequent communication was only with reference to the supply of documents or translated copies; Miss Lao undertook to produce the file. Accordingly, time was given and today the file has been produced. On perusal of the file I find that complete para wise comments to the representation had been sent by the office of the Collector of Customs on 3rd November, 1988. The covering letter dated 2nd November, 1988 very clearly stated that paradise comments on the said representation was endorsed, adding that since the detenu had asked for translated copies of the documents in Urdu, the same had been sent for translation and will be forwarded in due course. It is thus clear that in so far as the processing and disposal of the representation is concerned, that could be taken up after the paradise comments had been received on 3rd November, 1988 because it was very clearly indicated that nothing more had to be said regarding merits of the representation.

14. Ms. Kamini Lao also could not offer any comments to the query that there was no bar to the representation being taken up for consideration independent of the supply of the documents asked for by the detenu or the translated copies and that a decision on the representation could be taken independently on the basis of the facts and comments supplied by the Collector of Customs and that the documents asked for by the detenu could be supplied separately, and as soon as they were received. That being the case, I find that there has been a complete non-application of mind on the part of the officer who was to put up the representation to the detaining authority inasmuch as in case any earnestness was brought to bear on the matter, the representation could be processed after the paradise comments had been received on 3rd November, 1988. It is apparently a case, where there was absolutely no justification, for the representation not being taken up for being put up before the detaining authority from 3rd November, 1988 when the paradise comments were received up to 18th November, 1988 when it was finally processed.

15. This apart, even when it was put up, the office of the Home Secretary did not attend to it with requisite dispatch and promptitude, inasmuch as although the file was sent to the Home Secretary on 18th November, 1988 the first time he recorded a note was on 24th November, 1988. The Explanations given is that 19th and 20th November, 1988 were closed days because of Saturday and Sunday, and 23rd November, 1988 was a holiday on account of Guru Nanak birthday. On a parity of reasoning, as held by the Supreme Court in the case of Rama Dhondur Borade 1989 Cri LJ 2119 (supra), there was no justification for the file not being taken on the two working days falling in between. Furthermore, it is observed that the queries raised by the Home Secretary betray absolute lack of application of mind on his part because the information which he asked for was already on the file as observed in nothings at pages 3/N and 10/N of the file. These unnecessary queries resulted in further delay of 5 days because the file

came back to him only on 29th November, 1988. It is thus manifest on a reference to the file that the Home Secretary, who was the seniormost officer to put up the file to the detaining authority did not attend to the representation with any sense of urgency, and betrayed utter lack of application of mind, and seems to have been totally unmindful of the fact that he was dealing with a representation from a person placed under preventive detention, without trial.

16. On these facts, it becomes clearly a case where the representation of the detenu has been dealt with without necessary dispatch and promptitude with the result that a total time of 45 days was taken in considering the representation and conveying rejection of the same to him. It is true that the delay by itself is not fatal but the question is as to whether the time taken has been satisfactorily explained. In view of the emphasis laid by the Supreme Court on the necessity of explaining each day's delay, I find it to be a case where unnecessary and wholly uncalled for delay had been caused in processing the representation and further there is no satisfactory Explanation for the time taken in putting up the same to the detaining authority. As a result, the detention order becomes vitiated and the continued detention of the petitioner is liable to be revoked.

17. In view of this and the ground urged primarily prevailing with the court, it has not been thought necessary to go into other questions raised in the writ petition.

18. In the result, the writ petition is allowed and the rule is made absolute. It is directed that the petitioner be released forthwith, if not required to be detained in any other case or proceedings.

19. No order as to costs.

20. Petition allowed.