
(1997) 10 BOM CK 0053

In the Bombay High Court

Case No : Criminal Writ Petition No. 272 of 1997

Rajesh Sunderdas Lalchandani

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 15-10-1997

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 22(5), 226
Customs Act, 1962 — Section 108

Citation : (1998) 5 BomCR 241

Hon'ble Judges : D.D. Sinha, J;A.D. Mane, J

Bench : Division Bench

Advocate : M.G. Karmali and Jayant Chitnis, for the Appellant; A.M. Kanade, Public Prosecutor, for the Respondent

Judgement

A.D. Mane, J.—This criminal writ petition is filed by the brother of a detenu Jagdish Kumar Sunderlal Lalchandani @ Anil Mohanlal Bhatia, to challenge an order of detention issued on 11-3-1997 by the respondent No. 2-Secretary to the Government of Maharashtra, Home Department (Special) Mantralaya, Mumbai. The respondent No. 2 in exercise of his powers under sub-section (1) of section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974), issued the impugned order and the same was served with the order of detention along with grounds on the detenu on 23-4-1997.

2. The grounds of detention, inter alia, recite that on 22-6-1996 detenu was apprehended as one of the passengers who arrived by Air India flight No. AI-409 from Singapore at Sahar International Airport, Mumbai by the officers of the Preventive wing of Customs Preventive Commissionerate, Mumbai, on specific prior information.

3. The detenu and two others were escorted to Customs office at Bandra, along with their baggages. When the bags were examined, goods of foreign origin

valued at Rs. 4,37,500 were recovered from the detainee and they were seized under the panchanama dated 22-6-1996 under the provisions of Customs Act, 1962. In the statement recorded u/s 108 of the Customs Act, 1962 on 22-10-1996 the detainee stated that he returned from Singapore by the flight and walked through the Green Channel without paying any amount of duty at the customs along with his friend Kamallesh Girdharilal Hotwani and while going out of the Airport, he met his uncle Shankar Bhatia and when were to hire a Taxi, they were apprehended by the Customs Officer. In his further examination recorded on 15-10-1996, the detainee confirmed that he said in his statement on 22-6-1996 and stated further that he visited Singapore ten times in the past and in each of the trips he had brought goods of foreign origin valued to One to One and half crores and the goods were brought by him for himself, for Shankar Bhatia and for his friend from 5-2-1996 to 18-6-1996.

4. Now, Shri Karmali, learned Counsel for the petitioner challenges the validity of the order of detention on various grounds. The main ground of attack is that the impugned order of detention is vitiated by reasons of un-explained delay in passing the order of detention. In our opinion, the ground of un-explained delay will be a material ground and it is suffice if we confine our attention to that ground alone.

5. In order to appreciate the argument of Shri Karmali, learned Counsel for the petitioner, that there has been infringement of detainee's right under Article 22 of the Constitution of India, it is desirable to quote certain well established principles in law while dealing with a case of preventive detention. In case of Smt. Ichu Devi Choraria Vs. Union of India (UOI) and Others, , it has been observed that :

".....The power to detain without trial is an extra-ordinary power constituting encroachment on personal liberty and it is the solemn duty of the courts to ensure that this power is exercised strictly in accordance with the requirements of the Constitution and the law. The courts should always lean in favour of upholding personal liberty, for it is one of the most cherished values of mankind. Without it life would not be worthliving. It is one of the pillars of free democratic society. Men have rightly laid down their lives at its altar in order to secure it, protect it and preserve it. The Constitution has, therefore, while conceding the power of preventive detention, provided procedural safeguards with a view to protecting the citizen against arbitrary and unjustified invasion of personal liberty and the courts have always zealously tried to uphold and enforce these safeguards....."

6. Similarly, in case of Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, , it has been observed that :

".....We are not unmindful of the harmful consequences of the activities in which the detainees are alleged to be involved. But while discharging our constitutional obligation to enforce the fundamental rights of the people, more especially the

right to personal liberty, we cannot allow ourselves to be influenced by these considerations. It has been said that history of liberty is the history of procedural safeguards. The framers of the Constitution, being aware that preventive detention involves a serious encroachment on the right to personal liberty, took care to incorporate, in Clauses (4) and (5) of Article 22, certain minimum safeguards for the protection of persons sought to be preventively detained. These safeguards are required to be "jealously watched and enforced by the Court." Their rigour cannot be modulated on the basis of the nature of the activities of a particular person....."

7. In the petition, the petitioner submits that the alleged seizure of goods on basis of which the impugned order of detention was issued against the detenu was effected as far as back on 22-6-1996. Statements of the detenu as well as co-detunes were recorded on 22-6-1996. They were arrested on the same day and produced before the Court on 23-6-1996. The detenu was ordered to be released on bail on 24-6-1997 and he availed the bail order on the same day i.e. on 24-6-1996. Further, statements of the detenu and others were alleged to have been recorded on 26-6-1996. Residential premises of the detenu and others were searched on 24-7-1996. It is, therefore, the say of the petitioner that the investigation commenced on 22-6-1996 and the crucial part of the investigation was over on 2-7-1996.

8. In this context, the petitioner further says that as per the grounds of detention, last statement allegedly made by the detenu was on 15-10-1996. The petitioner submits that it was belatedly recorded. Nevertheless, the petitioner submits that assuming whilst denying that the impugned order of detention was warranted to be issued, the same in that case, ought to have been issued promptly and vigilantly soon after 2-7-1996, without waiting for the recording of the detenu's last statement, which itself was belatedly recorded on 15-10-1996. The petitioner submits that it cannot be justifiably urged at all that the impugned order of detention could not be issued prior to 15-10-1996, if it was otherwise warranted to be issued; without pressing into service the said alleged statement of the detenu recorded on 15-10-1996. Thus, it is submitted, that the enormous and inordinate delay of three and half months between 2-7-1996 and 15-10-1996 cannot be rationally explained away on the ground that as the last statement of the detenu was recorded on 15-10-1996; the impugned order of detention could not be issued earlier.

9. The petitioner further say and submits that even after the recording of the said last statement of the detenu on 15-10-1996; the impugned order of detention was not thereafter issued promptly and vigilantly without loss of time. After the said last statement of the detenu, which was recorded on 15-10-1996, the impugned order of detention was not issued for a period of almost five months till 11-3-1997, on which date the impugned order of detention was belatedly and leisurely issued. 10. Shri Karmali, learned Counsel made a great deal of emphasis on the aforesaid submissions made by the petitioner in support

of his contention that the impugned order of detention was issued after an inordinate delay and un-excusable delay of 8 1/2 months from 2-7-1996 and after lapse of 3 1/2 months even from the date of 15-10-1996, when the detenu's last statement was recorded. The detenu has not been indulged in any prejudicial activities during the said interregnum period between 2-7-1996 to 11-3-1997 and the detenu not having come to the adverse notice of the customs authorities during the said period; and as a result, the live link, having been snapped and the credible chain, having been broken, the detaining authority ought to have refrained from issuing the impugned order of detention; which is stale and punitive in character rather than preventive in nature. It is, therefore, urged that the impugned order of detention, as issued, despite such delay; is stale and remote in point of time. The grounds of detention are not proximate to the alleged prejudicial activities on the basis of which the impugned order of detention has been issued against the detenu. The impugned order of detention according to learned Counsel for the petitioner, as issued is thus, per se mala fide and ab-initio null and void.

11. Shri Karmali, learned Counsel invited our attention to further submission in the petition to show that the impugned order of detention has been issued on the basis of in all 29 documents covering 101 pages only. That clearly shows that the impugned order of detention if at all it was warranted to be issued, it could and as a matter of fact, it ought to have been issued soon after the crucial part of the investigation was over, which in fact, was so over by 2-7-1996.

12. In answer to averments made by the petitioner in grounds (i) and (ii) of the petition, as more particularly referred to above, the respondent No. 2 detaining authority in his reply affidavit filed on 2-9-1997, has stated as under :

(A) "....The seizure in question was effected on 22-6-1996. The investigation of the case was in progress. After collecting the necessary documents and after approval from Screening Committee, the Assistant Commissioner of Customs (P), COFEPOSA Cell, Mumbai submitted the proposal in respect of the detenu along with documents mentioned in the list of documents which was received in Home Department on 9-1-1997. Additional information/document was received on 15-1-1997. After preparing note in the matter, the Desk Officer concerned processed the proposal to the Joint Secretary on 4-2-1997 and Joint Secretary after making comments on the same submitted the same to me on 5-2-1997. I have seen the proposal on 6-2-1997 and discussed the matter with Joint Secretary and opined that this is a fit case for detention."

It is further stated by the deponent that;

(B)"..... I considered the proposal and scrutinised the documents and formulated the draft grounds of detention on 19-2-1997. After typing fair copy of Detention Order, Grounds of Detention and after preparing sets of documents the Detention Order, Grounds of Detention and annexure were submitted to me for signature. I have again considered the proposal and documents and issued the Detention

Order on 11-3-1997."

13. The respondent No. 2, thus asserted that after receipt of the proposal there was no delay in issuing the Detention Order. The time taken was for meeting the requirement of Article 22(5) of the Constitution of India.

14. In reply to further submissions in the subsequent paragraphs of the writ petition, it has been stated by the respondent No. 2 that;

"..... I have considered the facts and expressed my subjective satisfaction on the nexus between the date of incident and the passing of Detention Order. The live link between the order of Detention and incident was very much alive and, therefore, the order of Detention is legal, valid and within the parameter of law...."

It May be stated that there is no affidavit-in-reply filed on behalf of the sponsoring authority.

15. In substance, the arguments of the learned Counsel for the petitioner are that there was un-due and un-reasonable delay in passing the order of detention by the detaining authority and that the delay which stands un-explained vitiates the impugned order.

16. Whether, prejudicial activities of the person necessitating to pass an order of detention is proximate to the time when order is made or the live-link between prejudicial activities and purpose of detention is snapped, is a question which depends upon the facts and circumstances of each case. As observed by the Apex Court, in case of Pradeep Nikanth Paturkar Vs. S. Ramamurthi and others, there is no hard and fast rule which can be precisely formulated that would be applicable in all circumstances and no exhaustive guidelines can be laid down in this behalf. In this context, it is also necessary to mention that as observed by the Apex Court in case of T.A. Abdul Rahaman Vs. State of Kerala and others, the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. When there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer.

17. Now, coming to the case in hand, the detention order was passed on 11-3-1997. In absence of any affidavit from the sponsoring authority explaining delay caused in submitting proposal along with the list of documents which were received by the detaining authority on 9-1-1997, it can safely be accepted the contention of the petitioner that the investigation was completed before 2-7-1996. There is nothing on record to show the necessity to record additional statement of detenu which is said to have been recorded on 15-10-1996, since his Passport was already seized by the Customs Officer, which would disclose number of trips made by the detenu. Therefore, there does not appear to be

special additional circumstance, which required to be investigated after 2-7-1996. There is also nothing on record to show that why additional statement of detenu could not be recorded by the investigating agency prior to 15-10-1996. Even from the reply filed by the respondent No. 2 nothing could be gathered as to on what basis he could say that investigation was completed on 15-10-1996 and not on 2-7-1996.

18. On behalf of the respondent Shri Kanade, learned Public Prosecutor points out from ground No. 8, supporting the order of detention, that it is for the first time from the statement of detenu made on 15-10-1996, it was transpired that he had made ten trips to Singapore, and brought goods without duty and that being an incriminating circumstance, it must be presumed that by that time investigation was not completed. We, however, fail to understand why that circumstance could not be noticed from perusal of the entries in Passport on the very day when it was seized from the detenu. Therefore, we find no merit in the contention of Shri Kanade, learned Public Prosecutor that crucial date may commence from 15-10-1996 onwards.

19. Quite apart, it makes no difference because we find that in absence of any explanation from the sponsoring authority it is difficult to assess the delay at the hands of sponsoring authority between 22-6-1996 and 9-1-1997. The explanation offered by the respondent No. 2 in reply, more particularly in para No. 5 of his affidavit-in-reply is also vague in material particulars.

20. It is stated in reply affidavit of the respondent No. 2 that the additional information/document was received on 15-1-1997. There is, however, nothing on record to show that what kind of that additional information/document was and why it was necessary to be called, before making order of detention. Non-disclosure of this material fact in the affidavit-in-reply would further suggest that the respondent No. 2's reply lacks material particulars.

21. Shri Karmali, learned Counsel for the petitioner is right in relying on an unreported judgment in Criminal Writ Petition No. 80/1991, Manharlal Karsandas Dattani v. Union of India and others, of this Court (Coram : (Mrs.) Sujata Manohar (as she then was) and B.N. Srikrishna, JJ., wherein, it is observed that, failure to explain the necessity of the additional information/document negatives prompt action on the part of the detaining authority. In the present case also, it is clear that from 9-1-1997 no prompt action appears to have been taken. It is also clear from the return filed by the respondent No. 2 that the detaining authority has already applied its mind to the facts of the case and reached a subjective satisfaction that it was a fit case for detention and such subjective satisfaction was arrived at, as far as back on 6-2-1997. There is, however, no satisfactory explanation as to why the detaining authority could not pass the detention order prior to 11-3-1997.

22. These facts themselves suggest that the detaining authority not only overlooked the necessity of passing of an order of detention promptly and vigilantly

without undue delay, but the entire action suggests that there has been lack of sense of urgency. In other words, if regard be had to the various dates, as hereinabove mentioned, as emerging from the affidavit-in-reply filed by the respondent No. 2 it goes without saying that at every stage of proceeding there has been a delay which could not be reasonably explained in the return and this circumstance along would indicate that it cannot be said that the detaining authority has acted with a requisite sense of urgency. In un-reported judgment in Criminal Writ Petition No. 1039 of 1991, *Miss Sikwani Dilnawaz Joosab v. L. Hmingliana*, this Court (to which one of us was party) has held that the only irresistible inference that can be drawn is that the order of detention came to be passed mechanically without proper application of mind in regard to the object for which the order is to be passed and as such exercise of powers under the stringent law becomes an illusory exercise and as such the order, in consequence, is vitiated.

23. In the judgment in un-reported case of Criminal Writ Petition No. 68 of 1996, *Chandrakant Jethalal Shah v. State of Maharashtra*, decided on 24-6-1996 this Court (to which one of us was a partly) has held that if the delay is un-due and unexplained, it goes to the root of the case and therefore, detention came to be set aside. Further, in case of *Mohamed Ilyas Qureshi v. Satish Sahney, Commissioner of Police*, 1997 B.C.R. 555 : 1997 (2) M.L.J.125. this Court has observed that, the law is that delay simpliciter in issuance of detention order does not vitiate the detention order but it is only vitiated in case of no satisfactory explanation is forthcoming, and therefore, order of detention came to be quashed.

24. There is another aspect of the matter. It is not a case of voluminous documents which would require more time to the detaining authority to go through such record. The impugned order of detention has been issued on the basis of in all 29 documents covering 101 pages only. If at all the order of detention was intended to be issued, it could and as a matter of factor, ought to have been issued promptly by the end of October, 1996. The respondent No. 2 without better particulars, merely stated that the time taken to issue the order of detention was reasonable and also necessary for full and proper consideration of the matter. Such an explanation of the detaining authority is nothing but a whitewash, as observed by the Division Bench of this Court in case of *Keshav Jaru Salian Vs. Union of India*, .

25. It is true that in the present case show cause notice was issued on 30-12-1996 u/s 120 of the Customs Act, 196, but as observed by the Apex Court in case of 1990 (2) PLJR 77 (SC) , it was not incumbent on the authorities to wait till the issue of the show cause notice. The need to issue a show cause notice within six months has nothing to do with the processing of the detention papers. Such an explanation is thus, far from satisfactory.

26. Shri Karmali, learned Counsel for the petitioner cited number of un-reported judgments in various cases decided by this Court, in which a consistent view is

that un-explained and long delay in passing an order of detention will be fatal to the plea of subjective satisfaction. It is, therefore, necessary to have a mention of some more judgments here.

27. The un-reported judgments in Criminal Writ Petition No. 290/1990 and Criminal Writ Petition No. 2 of 1993 decided on 14/2/1990 and 7/9/1993 by the Division Bench of this Court (Coram: Pendse and Moharir, JJ., and Pendse and Saldhana, JJ.) respectively, it has been observed that:

"..... It has been repeatedly pointed out that powers of detention are to be exercised for the purposes of preventing prejudicial activity in near future and it is not permissible for the detaining authority to direct detention after passage of considerable length of time from the date of incident and more so when there is no material before the detaining authority that the detenu had indulged in prejudicial activity between the date of incident and the date of passing of the order. It is necessary that the powers of detention should be exercised with promptitude and more so, when authorities know very well that the detenu was released on bail by the Metropolitan Magistrate...."

28. In case of Keshav Jaru Salian v. Union of India, Criminal Writ Petition No. 433-/1990 decided on 27-6-1990 (Coram: Kurdukar (as he then was) and Sindhkar, JJ.) it is observed,

"..... Detention order passed after a period of nine months from seizure of gold bars from possession of detenu and the delay sought to be explained by the detaining authority is nothing but a whitewash and as such delay in issuing detention order must vitiate the subjective satisfaction of the detaining authority as regards the preventive action sought to be taken against the detenu."

29. In case of Nafisa Mohd. Hanif Ilahi v. State of Maharashtra, Criminal Writ Petition No. 261 of 1991 (to which one of us was party), decided on 22-8-1991, it has been observed that;

".....The prejudicial activity is more serious than there is a greater reason why the detaining authority should act expeditiously. The prejudicial activities of smuggling are detrimental to the interest of the country, but that fact does not give charter to the detaining authority to exercise power according to the convenience at leisure of the authority. In our judgement, on the facts and circumstances of the present case, the order of detention cannot be sustained as the powers were exercised after considerable delay, and more so when the detaining authority was fully conscious that the detenu was released on bail by the Metropolitan Magistrate....."

30. In case of Smt. Pushpa Trilokchand Chopde v. State, Criminal Writ Petition No. 480/1991 decided on 4-9-1991 (to which one of us was party), placing reliance on the case of Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others, , it has been observed that;

"The decision of the Supreme Court is misunderstood by the detaining authority.

The observations made by the Supreme Court do not give a charter to the authority to pass order of detention after considerable delay and dispense with the responsibility to explain the same.

"The liberty of the citizen cannot be deprived merely because the detaining authority is busy with several activities connected with Government work or enough staff is not available. The law of preventive detention is departure from the general rule, that no person should be detained without any enquiry or trial and if resort is to be made to this power, then the authority concerned with exercise of power must act with promptitude and failure to do so is bound to result in vitiating the order...."

31. In case of Smt. Vasanti Kantilal Gosar v. State, Criminal Writ Petition No. 657/1991 decided on 16-9-1997 by this Court (to which one of us was party), the order of detention was passed after period of almost nine months and therefore, it has been observed that;

"Due to long delay in passing the order the live-link between the activities of the detenu and the occasion to prevent him from indulging in such activities was snapped."

32. In case of Umakant Sarangdhar v. State and others. Criminal Writ Petition No. 1054 of 1991 decided on 28-10-1991 by this Court (to which one of us was party), it was observed that:

"Normally it is expected that the order of detention is required to be issued promptly and vigilantly without un-due delay. There must be "live and proximate link" between the grounds of detention and the vowed purpose of detention, namely, prevention of smuggling activities...."

It was further observed that,

"The Court may presume that the link is snapped if there is a long and unexplained delay between the date of the order of detention and the arrest of the detenu except in case of the detenu absconding despite all necessary efforts, could not be arrested till his surrender."

33. Similarly, in case of Miss Sikwani Dilnawaz Joosab v. Shri L. Hmingliana, Criminal Writ Petition No. 1039 of 1991 decided on 16-10-1991 by this Court (to which, one of us was party) it was observed that,

"If regard be had to these various dates it goes without saying that at every stage of proceedings there has been a delay which could not be reasonably explained in the return and this circumstance alone would indicate that it cannot be said that the authority has acted with requisite sense of urgency. The lack of sense of urgency constitutes a ground to invalidate the order of detention.

If the so called explanation is taken into account in the return filed by the detaining authority, it cannot be said that there is satisfactory explanation for the delay in issuing the order of detention. The only irresistible inference that can be

drawn is that the order of detention came to be passed mechanically without proper application of mind in regard to the object for which the order is to be passed and as such exercise of powers under the stringent law becomes an illusory exercise and as such the order, in consequence, is vitiated...."

34. Lastly, in case of *Shakeel Sait v. C. D. Singh*, 1997 (IV) L.L.J. 437, there was unexplained delay of three months in issuance of the order of detention and as a consequence, the detention order came to be set aside.

35. In the instant case, admittedly, detenu was on bail order of the Court from 24-6-1996 till he was served with the order of detention on 23-4-1997. There is also no material to show that he was in any way indulged in the prejudicial activities between the date of his release on bail and date of passing of the order. There is no explanation given by the detaining authority as to why this aspect was also not considered. Besides, in our judgment, the sponsoring authority as well as the detaining authority should have been more vigilant in the cases, where the order of detention is passed in respect of member of gang or smugglers of contraband articles. Necessity to exercise powers of detention with promptitude and more so when detenu was released on bail, need not be stated. Thus, in our opinion, exercise of power of detention in the present case suffers from serious infirmity as the powers are exercised after considerable delay of time and no material is on record to show subjective satisfaction of the authority at the time of passing of the order. For these reasons, the order of detention cannot be sustained.

36. In the view that we take, the writ petition is allowed. The impugned order of detention is quashed and set aside and the detenu be set at free, if not required in any other case.

37. Petition allowed.