
(2014) 07 BOM CK 0263

In the Bombay High Court

Case No : Criminal Writ Petition No. 2080 of 2014

Rizwan

APPELLANT

Vs

The Commissioner of Police

RESPONDENT

Date of Decision : 22-07-2014

Acts Referred:

Constitution of India, 1950 — Article 22(5), 226

Information Technology Act, 2000 — Section 4

Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons Act, 1981 — Section 3(2), 3(3), 8(1)

Citation : (2014) 07 BOM CK 0263

Hon'ble Judges : Abhay Shreeniwas Oka, J;A.S. Chandurkar, J

Bench : Division Bench

Advocate : U.N. Tripathi, Advocate for the Appellant; J.P. Yagnik, APP, Advocate for the Respondent

Judgement

A.S. Chandurkar, J.—The challenge in this Writ Petition filed under Article 226 of the Constitution of India is to the order of detention dated 5th May, 2014 passed u/s 3(2) of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons and Video Pirates Act, 1981 (hereinafter referred to as, "the said Act", for short).

2. We have heard Shri U.N. Tripathi, the learned Counsel appearing for the petitioner and Shri J.P. Yagnik, the learned Assistant Public Prosecutor for the respondents, at length.

3. Pursuant to the proposal of the sponsoring authority, namely, the Senior Inspector of Police, Hadapsar police station dated 18.3.2014, the respondent No. 1 proceeded to issue an order of detention dated 5.5.2014 u/s 3(2) of the said Act. Pursuant to aforesaid order of detention, the petitioner made a representation dated 17.05.2014 to the respondent No. 2 the Additional Chief Secretary (Home). On 11th June, 2014, the Additional Chief Secretary rejected the aforesaid representation. It is in this background that the order of detention

dated 5.5.2014 has been challenged before this Court.

4. Shri U.N. Tripathi, the learned Counsel appearing for the petitioner urged various grounds in support of the challenge to the order of detention. It was submitted that no subjective satisfaction was recorded by the detaining authority before passing the impugned order. The statements of the witnesses on the basis of which the order of detention was passed were also not supplied to the petitioner. It was further urged that though the petitioner had made a representation on 17.5.2014 and the respondent No. 2 had received it on the same day, there was unreasonable delay in considering the aforesaid representation and taking a decision thereon. In support of the aforesaid submission, the learned Counsel relied upon a decision of the Division Bench of this Court in Criminal Writ Petition No. 643 of 2014 (Riyaz Ahmed Batatawala Vs. The State of Maharashtra & Ors.) decided on 2.5.2014. It was therefore submitted that there being violation of the provisions of Article 22(5) of the Constitution of India in not considering the representation of the petitioner expeditiously, the order of detention was required to be set aside.

5. On the other hand, Shri J.P. Yagnik the learned Assistant Public Prosecutor opposed the Writ Petition and submitted that the order of detention had been passed by the detaining authority after arriving at its subjective satisfaction as regards need to detain the petitioner. It was submitted that the representation made by the petitioner was considered as expeditiously as possible by the respondent No. 2 and it could not be said that the time taken for considering said representation was unreasonable. It was further submitted by relying upon the affidavit filed on behalf of the respondents that the time taken for considering the aforesaid representation had been properly explained and hence the order of detention could not be said to be vitiated on account of delay in deciding the representation made against it. It was therefore submitted that the Writ Petition had no merit and the same was required to be dismissed.

6. The Commissioner of Police, Pune has filed affidavit dated 30.06.2014. In paragraph-13 thereof, it has been stated as under :

I say that the Detenu submitted his representation to State Government and accordingly issued notice to submit the para wise comments to the said representation. I on 12/06/2014 submitted the para wise comments to the said representation, the hearing was held before the State Government and the same is pending for order. As such there is no such delay as alleged by the Detenu. I further say that said petition filed by the Detenu is premature and therefore in any manner the Detenu's right is not prejudice to make any effective representation guaranteed under Article 22(5) of the Constitution of India. As such the contention of the Detenu holds no water. Hence, the order of detention is legal and as per the provisions of law.

Shri Bajrang Digambar Umate, Deputy Secretary, Government of Maharashtra, Home Department (Special) has filed affidavit dated 2.7.2014 and in paragraph-2

thereof it is stated as under :

2. With reference to Para 7(f) and 7(g)--It is submitted that the Representation of the detenu dt. 17.05.2014 was received in the MPDA desk on 17.05.2014. The remarks were called from Detaining Authority, Commissioner of Police, Pune City vide letter dated 17.05.2014. The Remarks were received in this desk on 06.06.2014 vide letter dated 05.06.2014 of Commissioner of Police, Pune City. The Assistant submitted the File to the Under Secretary on 06.06.2014. The Under Secretary endorsed it on 07.06.2014 and forwarded it to Deputy Secretary on the same day. The Deputy Secretary endorsed it on 09.06.2014 and forwarded it to the Additional Chief Secretary (Home) on the same day. The Additional Chief Secretary (Home) considered the Representation on 11.06.2014 and rejected it. The file received in Desk on 12.06.2014 and the rejection of Representation was communicated to the detenu vide letter dated 12.06.2014. Thus the Representation of the detenu was considered by the State Government expeditiously. Hence the contention of the petitioner raised in these paragraphs are not true.

7. It will be necessary to consider the ground raised by the petitioner with regard to delay in deciding the representation made by him against the order of detention. The representation dated 17.05.2014 was received by the office of the Home Department, Mantralaya, Mumbai on the same day. Said representation has been decided on 11.6.2014 and the decision taken thereon has been communicated to the petitioner on 12.6.2014. Thus, a period of about 26 days were required for deciding the detenu's representation.

The law in this regard is well settled. If the time taken in deciding the representation is unreasonable and if the explanation furnished for said time being taken is unsatisfactory, the same has the effect of vitiating the detention of the detenu. In a recent decision of the Apex Court in the case of Abdul Nasar Adam Ismail through Abdul Basheer Adam Ismail Vs. The State of Maharashtra and Others, in paragraph-16 it has been observed thus :

Article 22(5) of the Constitution casts a legal obligation on the Government to consider the detenu's representation as early as possible. Though no time limit is prescribed for disposal of the representation, the constitutional imperative is that it must be disposed of as soon as possible. There should be no supine indifference, slackness or callous attitude. Any unexplained delay would be a breach of constitutional imperative and it would render the continued detention of the detenu illegal. That does not, however, mean that every day's delay in dealing with the representation of the detenu has to be explained. The explanation offered must be reasonable indicating that there was no slackness or indifference. Though the delay itself is not fatal, the delay which remains unexplained becomes unreasonable. The court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or the range of delay, but how it is

explained by the authority concerned. If the interdepartmental consultative procedures are such that the delay becomes inevitable, such procedures will contravene the constitutional mandate. Any authority obliged to make order of detention should adopt procedure calculated towards expeditious consideration of the representation. The representation must be taken up for consideration as soon as such representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu.

8. In the aforesaid backdrop, it will have to be examined as to whether the respondents have considered the representation made by the petitioner with utmost expedition as contemplated by the provisions of Article 22(5) of the Constitution of India. The affidavit filed by Deputy Secretary, Home Department (Special) indicates that after receiving the representation, the remarks from the detaining authority were called for vide communication dated 17.05.2014. The same were received on 06.06.2014. The papers were thereafter forwarded to the Under Secretary who endorsed the same on 07.06.2014 and forwarded it to the Deputy Secretary on the same day. On 09.06.2014 the Deputy Secretary endorsed the same and forwarded it to the Additional Chief Secretary (Home) who considered the representation on 11.06.2014 and rejected the same.

9. Insofar as the justification sought to be given by the detaining authority for the time required in sending his remarks to the Home Department is concerned, it may be noted that the detaining authority has not given any details whatsoever as regards the date on which such remarks were sought from his office and the date when the same were transmitted. In the affidavit filed by the Deputy Secretary, Home Department (Special) it has been mentioned that the said remarks were called for as per letter dated 17.05.2014 and the same were received along with letter dated 05.06.2014 on 06.06.2014. It is therefore clear that though the remarks were called from the detaining authority on 17.05.2014 the same were sent along with a covering letter dated 05.06.2014. There is no material placed on record to indicate when the letter dated 17.05.2014 sent by the Home Department was received by the Detaining Authority. Even assuming that the same may have been received by the detaining authority after a couple of days from 17.05.2014, there is no explanation as to why a time of almost 15 days was required for sending the remarks to the Home Department. The said period is not explained and hence the time taken to send the remarks becomes unreasonable. Though it was sought to be urged by the learned Assistant Public Prosecutor that the aforesaid period is very short, said submission cannot be accepted as there is absence of any justification with regard to the time required to send remarks to the Home Department.

10. The Division Bench of this Court to which one of us (A.S. Oka, J.) was a party, has while deciding Criminal Writ Petition No. 643 of 2014 considered the aspect of period of delay being short. While negating said contention, the Division Bench observed thus:

7. It is contended by the learned APP the duration of alleged delay is very short. In the case of Rajammal (supra), the Apex Court held that the duration or range of delay in disposal of the representation is not material. It will be necessary to make a reference to paragraph 9 of the said decision which reads thus:

9 The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned.

(Underline added)

8. In the case of Harish Pahwa (supra), the Apex Court has held thus:

In our opinion, the manner in which the representation made by the appellant has been dealt with reveals a sorry state of affairs in the matter of consideration of representation made by persons detained without trial. There is no explanation at all as to why no action was taken in reference to the representation on 4th, 5th and 25th of June, 1980. It is also not clear what consideration was given by the Government to the representation from 13th June 1980 to 16th June 1980 when we find that it culminated only in a reference to the Law Department nor it is apparent why the Law Department had to be consulted at all. Again, we fail to understand why the representation had to travel from table to table for six days before reaching the Chief Minister who was the only authority to decide the representation. We may make it clear, as we have done on numerous earlier occasions, that this Court does not look with equanimity upon such delays when the liberty of a person is concerned. Calling comments from other departments, seeking the opinion of Secretary after Secretary and allowing the representation to lie without being attended to is not the type of action which the State is expected to take in a matter of such vital import. We would emphasize that it is the duty of the State to proceed to determine representations of the character above mentioned with the utmost expedition, which means that the matter must be taken up for consideration as soon as such a representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu. This not having been done in the present case we have no option but to declare the detention unconstitutional. We order accordingly, allow the appeal and direct that the appellant be set at liberty forthwith.

Appeal allowed.

(Underline added)

11. In view of the aforesaid, it will have to be held that there being unexplained

delay in considering the representation made by the detenu on 17.05.2014, the detention of the petitioner is rendered bad in law. The continued detention of the petitioner would therefore be impermissible.

12. As we find that there is unexplained delay in deciding the representation which has the effect of vitiating continued detention of the petitioner, he would be entitled to be released from detention forthwith. It would, therefore, not be necessary to examine the validity of the order of detention as such. However, before parting, it would be necessary to note that there are numerous cases wherein the detention of the detenu has been held illegal on account of unexplained and/or unreasonable delay in deciding the representation made against the order of detention. There are cases where the detaining authority has after arriving at its subjective satisfaction found it justified to pass the order of detention. However, the subsequent action of the State Authorities in not deciding the representation made against it with utmost expedition has the effect of rendering such detention illegal. The Apex Court in the case of Abdul Nasar Adam Ismail (*supra*) has observed that the delay in disposal of the detenu's representation vitiates only the continued detention and not the detention order. The effect however is that on the detention being found illegal, the detenu is entitled to be released from detention forthwith.

13. It may be noted that u/s 3(3) of the said Act, when an order of detention is made by an officer mentioned in Section 3(2) of the said Act, such officer has to forthwith report the fact to the State Government together with the grounds on which the order of detention has been made along with such other particulars which in his opinion have a bearing on the matter. The order of detention is required to be made in writing as prescribed by Section 3(2) of the said Act. Similarly, u/s 8(1) of the said Act, the order of detention has to be communicated to the detenu as early as possible and within a period of five days from the date of detention to enable him to make a representation against the said order to the State Government. It is therefore clear that the detaining authority has a statutory duty to forthwith forward the order of detention along with the material based on which it is passed to the State Government. As the order of detention has to be in writing and the grounds of detention are also required to be communicated to the detenu, it presupposes that the record of the entire matter would be available with the detaining authority. If the entire record is forthwith sent by the detaining authority after passing the order of detention which is infact its statutory obligation u/s 3(3) of the said Act, the record would be immediately available with the State Government by the time the representation of the detenu reaches it for consideration.

14. In these modern times, several modes of transmitting documents/records are available such as email, fax etc.. In view of Section 4 of the Information Technology Act, 2000 there is legal recognition of electronic records inasmuch as when any information or any matter has to be in writing and the same is available in an electronic form, the same has legal recognition thereof. By

forthwith remitting the entire record to the State Authorities who are empowered to consider the representation of a detenu, time could be saved while deciding the representation expeditiously. Under Article 22(5) of the Constitution of India while a detenu has a right to be communicated the grounds of detention so as to enable him to make a representation at the earliest opportunity, there is a corresponding obligation on the State Authorities to consider and decide the same as early as possible. Considering the statutory requirement of the said Act noted above, it would be for the State Authorities to consider and devise means by which the period for deciding the detenu's representation could be shortened. If such representations are decided as expeditiously as possible, the challenge to the order of detention on the ground of delay in deciding the representations could be met by the State authorities. We have made the above observations as it has been noticed that despite the constitutional mandate under Article 22(5) of the Constitution of India and various provisions of the said Act, representations of the detenus are not being decided by the State of Maharashtra as expeditiously as possible. We hope and trust that the State Authorities would look into the aforesaid aspect of the matter and take necessary remedial measures in that regard.

15. Hence we pass the following order :

i. Rule is made absolute in terms of prayer clause (b), which reads thus :

(b) That the order of detention being No. 2306/PCB/DET/2014 dated 05.05.2014 issued u/s 3(2) of M.P.D.A. Act, 1981 by the Respondent No. 1 against the detenu, abovenamed be quashed and set aside and on quashing the said order of detention the detenu be released forthwith;

ii. All concerned to act upon the operative part of this judgment and order duly authenticated by the Registry.

A copy of this order be sent to the Secretary, Home Department (Special), Mantralaya, Mumbai to take necessary steps in the light of what is observed in paragraphs-13 and 14 of this judgment.