

(1999) 03 DEL CK 0090
In the Delhi High Court
Case No : Criminal Writ No. 877/98

Saeeda M.A. Saeed

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 05-03-1999

Acts Referred:

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

Citation : (1999) 2 AD 481 : (1999) CriLJ 1796 : (1999) 78 DLT 463 : (1999)
49 DRJ 245 : (1999) 1 ILR Delhi 219

Hon'ble Judges : D.K. Jain, J;C.K. Mahajan, J

Bench : Division Bench

Advocate : Ms. Sangeeta Bhayana, Adv Ms. Pinki Anand and Mr. Manish Kumar,
for the Appellant; Mr. S.K. Aggarwal, Standing Counsel (Crl.) and Mr. Neeraj
Chaudhary, for the Respondent

Judgement

D.K. Jain, J.

1.Rule D.B.

2. In this habeas corpus writ petition under Article 226 of the Constitution of India, the petitioner challenges the order made by and in the name of Lt. Governor of National Capital Territory of Delhi against his mother, Ms. Saeeda M.A. Saeed, u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short the COFEPOSA Act).

3. The order of detention, dated 18 May, 1998, served on the detenu on the same date, pari passu, with the grounds of detention, formulated by the detaining authority of even date, is based on the subjective satisfaction of the detaining authority that it was necessary to detain her with a view to preventing her from smuggling goods and also preventing her from dealing in smuggled goods otherwise than by engaging in transporting, concealing and keeping smuggled goods, in future.

4. According to the grounds of detention, on 16 September, 1997 two lady passengers namely, Ms. Roma A. Kaid Ali and Ms. Zahra Ahmed S.Al. Maraisi arrived from Bangkok and they were intercepted near the exit gate of the arrival hall of the IGI International Airport, after they had walked out through the green channel. The search of their baggage/person resulted in the recovery of gold valued at Rs. 9.8 lakhs and Rs. 10.07 lakhs (mv) respectively. The intelligence received and interrogation of the said two ladies further revealed that four of their lady co-passengers, namely, Ms. Kabolah M.M.S Al Maktari, Ms. Mariam A.A. Hadhwrami, Ms. Mariam Ali F.N. Aljanadi and Saeeda M.A. Saeed, the detenu herein, had already gone out through green channel. On the basis of local address given by them in the Immigration cards, they were apprehended in "Welcome Inn", Jangpura, New Delhi. The search of their purse/person resulted in the recovery of gold worth Rs. 8 to 10 lakhs from each of them. Further investigations revealed that the detenu herself indulged in prejudicial activities and also lured other co-accused persons to indulge in such activities.

5. It was on these facts that the detaining authority came to the aforementioned conclusion.

6. In opposition to the writ petition, reply affidavits have been filed on behalf of the detaining authority and the Union of India.

7. We have heard Ms. Sangeeta Bhayana, learned counsel for the petitioner, Mr. S.K. Aggarwal, Standing Counsel (Crl.) for the detaining authority and Ms. Pinki Anand, learned counsel for the Union of India.

8. Though in the petition several grounds, assailing the legality of the order of detention, are pleaded but at the time of hearing before us only one contention has been pressed by Ms. Bhayana. It is urged that there has been inordinate and un-explained delay in considering the representation, dated 16 September, 1998, made by the detenu to the Central Government, with a request to forward the same to the detaining authority also and as such the continued detention of the petitioner is unconstitutional and illegal, being vocative of the mandatory provisions of Article 22(5) of the Constitution of India. While pointing out that the said representation was considered and rejected by the Central Government and the detaining authority, respectively on 2 November, 1998 and 28 October 1998, it is asserted that the conduct of both the authorities indicate total lack of sense of urgency in this behalf and the order is not sustainable.

9. The question with regard to disposal of a representation made by a detenu has come up for consideration before the Supreme Court and different High Courts time and again and while stressing the constitutional requirement of expeditious consideration of detenu's representation by the Government, as spelt out by clause (5) of Article 22 of the Constitution, it has been observed by the Apex Court in a line of decisions that the detenu has an independent constitutional right to make his representation under Article 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 with reasonable dispatch and to dispose of the same as expeditiously as possible. It has been held that although there is no prescribed period either under the provisions of the Constitution or under the concerned detention law within which the representation should be dealt with, the use of the words "as soon as may be" occurring in Article 22(5) of the Constitution reflects that the representation should be expeditiously considered and disposed of with due promptitude and diligence; with a sense of urgency and without avoidable delay. What is reasonable dispatch depends on the facts and circumstances of each case and no hard and fast rule can be laid down in that regard. However, in case the gap between the receipt of the representation and its consideration by the authority is so unreasonably long and the Explanation offered by the authority is so unsatisfactory, such delay could vitiate the order of detention. (See: Rashid Sk. Vs. State of West Bengal, , Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others, , Mohinuddin alias Moin Master Vs. District Magistrate, Beed and Others, , Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others, and Kundanbhai Dulabhai Shaikh Vs. Distt. Magistrate, Ahmedabad & Others JT 1996 (2) SC 532.

10. Bearing in mind the above broad principles, we now revert to the facts in hand. It is not in dispute that the detenu made her representation to the Central Government on 16 September, 1998, with a request that it may also be forwarded to the detaining authority for its consideration. It was rejected by the Central Government on 2 November, 1998 and by the detaining authority on 28 October, 1998. Dealing with the point of delay in consideration of the said representation, what has been stated in the reply affidavit on behalf of the Central Government is as follows :

"It is submitted that a representation dated 16.9.98 addressed to the Secretary to the Government of India, Ministry of Finance, Department of Revenue was received in the COFEPOSA Unit on 18.9.98 through the Superintendent, Central Jail No.1, Tihar, New Delhi. Immediately after receipt of the representation, comments are called from the Sponsoring Authority on 21.9.98 (19th and 20th September, 1998 were closed holidays being Saturday and Sunday). The Sponsoring Authority furnished comments vide letter dated 13.10.98 which was received in COFEPOSA Unit on 14.10.98. The file was put up to Under Secretary (COFEPOSA) on 14.10.98, who examined the case and submitted the file to Joint Secretary (COFEPOSA) on 15.10.98. Joint Secretary (COFEPOSA) sought certain clarifications and returned the file on 15.10.98. Accordingly, the clarification was sought from the Detaining Authority vide letter dated 15.10.98 on the points concerning them. The Govt. of NCT of comments vide letter dt. 29.10.98. The representation of the detenu was then processed by the Under Secretary, who submitted the case file to Joint Secretary (COFEPOSA) on 30.10.98. The Joint Secretary (COFEPOSA) submitted file to Special Secretary-cum-Director General,

CEIB on 31.10.98. The Special Secretary-cum-DG, CEIB, considered the representation, on behalf of the Central Government and rejected the same on 2.11.98. A Memo was issued to the detenu on 2.11.98 intimating him about the rejection of his representation dated 16.9.98. The total time taken for disposal of the representation is 45 days out of which 18 days were holidays. Thus the actual time taken is 27 days including time taken in calling for and receiving the report through postal channel first from the Sponsoring Authority and again from the Detaining Authority on certain points on which further clarification was considered necessary for proper consideration and disposal of detenu's representation. It will thus be seen that there was no unexplained delay in the consideration and disposal of the representation."

11. In the reply-affidavit on behalf of the detaining authority it is stated that the said representation was received in the COFEPOSA Branch of the detaining authority on 20 October, 1998; the same was put up to the detaining authority on 23 October, 1998; 24 October, 1998 and 25 October, 1998 were closed holidays being Saturday and Sunday; the detaining authority considered the same and rejected it on 26 October, 1998, and thus communication to this effect was sent to the petitioner vide memo dated 28 October, 1998, who acknowledged the same on 29 October 1998.

12. Basing her argument on the Explanation furnished in the aforementioned reply-affidavits, it is asserted by learned counsel for the petitioner that the representation has been dealt with in a most cavalier and casual manner at every level. While pointing out, in this context, that the Central Government took 45 days to dispose of the representation, which by any standards cannot be said to be expeditious disposal, it is contended that no Explanation has been furnished in the affidavits as to why it took 22 days for the Sponsoring Authority to send its comments (from 21.9.98 to 13.10.98 13 days being actual working days); why the Central Government took 30 days (from 16.9.98 to 15.10.98) in forwarding the representation to the Detaining Authority and why the detaining authority took 14 days in sending its comments and in considering the representation (From 15.10.98 to 29.10.98 - 9 days being actual working days).

13. Since from the reply-affidavit it was not clear why the sponsoring authority, namely the Commissioner of Customs at IGI International Airport, New Delhi took 22 days to offer their comments, called for by the Central Government, we summoned the original file of the case maintained by the said department. The file was produced by learned counsel for the Union of India after seeking four adjournments for the purpose. Though on the order sheets in the file there are only two notings, namely: (i) receipt of the representation in the Section on 8 October, 1998; preparation of the draft para-wise comments on 12 October 1998 and (ii) approval of the comments on 13 October 1998, a chart showing date-wise movement from one Section to another has been placed at page 55 of the file. For the sake of ready reference, the said chart is reproduced hereunder:

"24.9.98 Thursday - Representation received at New Customs House 25.9.98

Friday - No action 26.9.98 Saturday : & : Weekly holidays 27.9.98 Sunday : 28.9.98 Monday : No action 29.9.98 Tuesday : No action 30.9.98 Wednesday : No action 1.10.98 Thursday - Holiday-Dussehra 2.10.98 Friday - Holiday-Gandhi Jayanti 3.10.98 Saturday : & : 4.10.98 Sunday : Weekly holidays. 5.10.98 Monday - Representation received at IGI Airport(Admn. Section) 6.10.98 Tuesday : No action 7.10.98 Wednesday : No action 8.10.98 Thursday - Forwarded to COFEPOSA Section by Admn. Section. 8.10.98 Thursday - Recd. in COFEPOSA Section at 1700 hrs. 9.10.98 Friday - Comments prepared. 10.10.98 Saturday : & : 11.10.98 Sunday : Weekly holidays. 12.10.98 Monday - Draft comments put up. 13.10.98 Tuesday - Fair comments put up, signed and dispatched."

14. The aforementioned chart reveals a sorry state of affairs in the manner of consideration of detenu's representation by the sponsoring authority itself. We fail to understand why in the first instance the representation was sent to the New Customs House on 24 September 1998, which had nothing to do in the matter and then the journey from New Customs House to its administrative section, IGI International Airport, perhaps a few meters away, taking 12 days and the administrative wing, perhaps in the same building/vicinity taking another four days to forward the file to the concerned COFEPOSA Section on 8 October, 1998. The only Explanation offered is that there were intervening holidays. Though we feel that in a case involving the personal liberty of a citizen under prevention detention the mere occurrence of general holidays cannot be used as a ground to prolong the consideration of the representation of the detenu and the authorities concerned are expected to deal with it even on holidays, but in the instant case even ignoring the holidays, it is evident from the above chart that there were more than 12 working days when the representation merely shuttled from one desk to another of the Customs Department itself, namely, the sponsoring authority. There is no Explanation worth the name for the delay which took place in the office of the sponsoring authority. We are constrained to observe that the aforementioned facts reflect an indifferent attitude of the persons concerned and are of the view that the representation has not been given prompt and expeditious consideration by the officials of the sponsoring authority. Then again no Explanation is furnished as to why it took almost one month for the Central Government to forward the representation to the detaining authority for comments and consideration and further for the detaining authority taking 13 days to send its comments and consider the representation. It is significant to note that the only point to be considered by the detaining authority was whether there was delay in the passing of the order of detention, as alleged by the detenu, for which the entire information was available on its own record. Examining the periods of delay at different stages, in the light of Explanation offered, namely the total time taken for disposal of the representation is 45 days, out of which 18 days were holidays and thus the actual time taken is only 27 days, including the time taken in calling for and receiving the reports through postal channels, first from the sponsoring authority and again from the detaining

authority, we are not satisfied that the delays at different levels have been satisfactorily explained. In our view the delay of 45 days in consideration and disposal of the representation of the detenu in the absence of satisfactory Explanation, is too long a period for ignoring the indolence on the part of the authorities concerned. At this stage we say no more except to once again remind the authorities of the anguish expressed by the Supreme Court in Kamla Kanyalal Khushalani Vs. State of Maharashtra and another, , while setting aside a detention order on account of failure on the part of the authorities in not complying with the constitutional safeguards. The Supreme Court said that whenever a detention is struck down for non-compliance with the constitutional requirements and safeguards, like delay in disposing of the representation etc., the officers concerned must be held personally responsible and action should be taken against them. We leave the issue at that to the wisdom of the authorities concerned.

15. For the foregoing reasons, we are constrained to hold that the delay in the disposal of the representation of the detenu remains unexplained, violating Article 22(5) of the Constitution, rendering the order of detention invalid.

16. Consequently, we allow the writ petition; make the rule absolute and quash further detention of the detenu under order of detention, dated 18 May, 1998, and direct that she shall be released forthwith unless required to be detained in any other case.

17. The operative part of the order shall be communicated to the Jail authorities forthwith for compliance.