
(1995) 01 RAJ CK 0024

In the Rajasthan High Court

Case No : Habeas Corpus Petition No. 4237 of 1994

Shahmir alias Shahmiria

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 11-01-1995

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1), 7

Maintenance of Internal Security Act, 1971 — Section 3, 3(1), 3(2)

Citation : (1995) CriLJ 3341

Hon'ble Judges : V.G. Palshikar, J; B.R. Arora, J

Bench : Division Bench

Advocate : J.P. Joshi, for the Appellant; K.L. Jasmatiya, A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

B.R. Arora, J.—The petitioner, in pursuance to the order dated 8-1-91 (Annexure-1), passed by the Commissioner and the Secretary to the Government, Home Department. Government of Rajasthan, Jaipur, made u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1975 (in short, "COFEPOSA Act"), with a view to prevent him from indulging in selling and transportation of the smuggled goods and to preventing him from indulging in smuggling activities was apprehended on 14-4-1994 and kept in detention in the Central Jail, Jodhpur. After his arrest, the petitioner-detenu was served with the grounds of detention. The detention of the petitioner was referred for approval to the Advisory Board as well as to the State Government. The petitioner, also, made representations against his detention. The representations made by the petitioner were dismissed by the State Government as well as by the Central Government. The Advisory Board also approved the detention of the petitioner for a period of one year, i. e., with effect from 15-4-94 to 14-4-95. The reasons for his detention are given in the memorandum of allegations attached with the order of detention. The allegations

against the petitioner, given in the memorandum, are that on 8-8-91, on the basis of the previous information received from the Central Bureau of Investigation (Border Intelligence), a bus coming from Gadra Road was detained at 8.15 a.m. and on search of one Koja Kham, five gold biscuits of ten Tolas each (total gold being fifty Tolas) were recovered. It was disclosed by Koja Khan that these gold-biscuits belonged to detenu Shahmir. Koja Khan and Shahmir were arrested and produced before the Magistrate and later on the challan was filed against petitioner Shahmir and Koja Khan in the Court of the Special Judicial Magistrate (Economic Offences), Rajasthan, Jaipur. The accused-petitioner was found involved in the recovery made by the Border Security Force of 52.390 kgs. of silver on 28-3-90 as well as 10.469 kgs. of silver recovered by the B. S. F. on 20-3-91.

2. The order of detention as well as the detention of the petitioner has been challenged only on two grounds, namely, (i) that there is no proximity between the prejudicial act alleged to have been committed by the petitioner and the subjective satisfaction of the detaining authority that it is necessary to detain him to prevent him from doing so in the future; and (ii) that there is a delay of two years three months in the execution of the order of detention, and, therefore, his detention at this point of time is punitive and not preventive. The learned Additional Advocate General appearing on behalf of the respondents, on the other hand, has submitted that the petitioner was indulging in the smuggling activities and there is no unexplained delay in passing the order of detention, He has further submitted that the petitioner cannot take any benefit of his own wrong as he himself was absconding since the order of detention was passed till he was arrested and the respondents took every steps to detain him but he could not be apprehended as he was absconding. For getting his arrest even the proceedings u/s 7 of the Act were taken against him and he was declared as "absconder".

3. We have considered the submissions made by the learned counsel for the parties.

4. The first ground on which the order of detention has been challenged, is the delay in passing the order and the contention of the learned counsel for the petitioner is that there is no proximity between the prejudicial act alleged to have been committed by the petitioner and the subjective satisfaction of the Detaining Authority that it is necessary to do so. The alleged activities, which actuated the Detaining Authority to pass the order of detention," were done on 8-8-91 while the order of detention has been passed on 8-1 -92, i. e., after a period of five months. The detention of a person is ordered to prevent him from indulging himself in such activities. There must be some proximity between the prejudicial act committed by the person concerned and the subjective satisfaction of the Detaining Authority that it is necessary to do so to prevent him from doing such an act in future and the delay in passing the order itself is not fatal because in some cases it is unavoidable and reasonable. In Smt. Kusum Chandrakant

Khaushe Vs. L. Hmlinglian and others, the contraband articles were seized on July 22, 1990, and the detention order was passed on January 11, 1991. The Apex Court, having regard to the facts and circumstances of the case, as also the explanation given by the respondents, held that there was no merit in the contention regarding delay in passing the detention order from the date of seizure of the contraband article and that period of six months was held not to be fatal. In Smt. Rekhaben Virendra Kapadia Vs. State of Gujarat and Others, the detenu was detained under order dated 22-7-74 u/s 3 of the Maintenance of Internal Security Act. The order was cancelled on 9-12-74 and he was released. He was again detained on 4-7-77 in pursuance to the order dated 7-2-77 passed u/s 3(1) of the COFEPOSA Act. The order was challenged on the ground of delay in passing the order. It was held by the Supreme Court that "the test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts and the order of detention. The question is whether the past activities of the detenu are such that the detaining authority can reasonably come to the conclusion that the detenu is likely to continue in his unlawful activities." In Gora Vs. State of West Bengal, with respect to the prejudicial activities of the detenu, on 25/26th June, 1973, an order of detention was passed by the District Magistrate, 24 Paragana, on 29-12-73, which was made under Sub-section (1) read with Sub-section (2) of Section 3 of the Internal Security Act. The order of detention was challenged on the ground of delay in passing the order. While repelling this contention, it was held by the Supreme Court that "the test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts and the order of detention. It is a subsidiary test evolved by the Court for the purpose of determining the main question whether the past activities of the detenu are such that from them a reasonable prognosis can be made as to the future conduct of the detenu and its utility, therefore; lies only in so far as it sub-serves that purpose and it cannot be allowed to dominate or drown it. The prejudicial act of the detenu may in a given case be of such a character as to suggest that it is a part of an organised operation of a complex of agencies collaborating to clandestinely and secretly carry on such activities and in such a case the detaining authority may reasonably feel satisfied that the prejudicial act of the detenu which has come to light cannot be a solitary or isolated act, but must be part of a course of conduct of such or similar activities clandestinely or secretly carried on by the detenu and it is, therefore, necessary to detain him with a view to preventing him from indulging in such activities in the future." In Anwar Singh v. The State of Rajasthan, D. B. Habeas Corpus Petition No. 2551 of 1994, decided on November 16, 1994, the delay of fourteen months in passing the order was held to be fatal as this delay has snapped the relation between making the order of detention and the alleged illegal activity. In the present case, it has to be seen : whether the past activities of the detenu were such that the Detaining Authority could have reasonably come to the conclusion that the detenu is likely to continue in his unlawful activities. The, prejudicial act of the detenu in the present case suggests that he was engaged in

the smuggling of contraband articles like silver and gold in an organised operation which was carried-on by the detenu secretly. In three cases, the petitioner has been found involved and, therefore, the Detaining Authority may have reasonably felt satisfied that the prejudicial acts of the petitioner (detenu), which have come; to the light were sufficient for the subjective satisfaction of the Detaining Authority to pass the order with a view to preventing him from indulging in such an activity in future. It was not a solitary incident in which the petitioner was found involved. The detention of the petitioner has been ordered for preventing him to indulge in smuggling activities and the matter required thorough investigation by the concerned authorities. The delay of five months in passing the order, therefore, has not snapped the live link between the grounds and the purpose and the Detaining Authority was justified in passing the order of detention. The contention raised by the learned counsel for the petitioner is, therefore, devoid of any force.

5. The next ground, on which the order of detention has been challenged by the petitioner is that the detention order was passed on 8-1-92 and the maximum period of detention, which the petitioner would have to undergo under the order is one year which has long been over and the detention of the petitioner at this point of time would be punitive and not preventive. It has, also, been contended by the learned counsel for the petitioner that no affidavit of Sohan Singh Tal wadiya or Mr. B. L. Verma has been filed to explain the delay in executing the order and the delay in executing the detention order, therefore, vitiates the detention of the petitioner. In support of its contention, learned counsel for the petitioner has placed reliance over: *Kishan Singh v. The State*, *Shafiq Ahmed v. District Magistrate, Meerut*, 1990 (1) RLW 518, *Suleman v. The State of Rajasthan* 1992 (1) WLC 745 , and *Anwar Singh v. The State of Rajasthan*, D. B. Habeas Corpus Petition No. 2551 of 1994, decided on 16-11-94. The detention order was passed on 8-1-92 and the petitioner was apprehended on 14-4-94 and was detained in the Central Jail, Jodhpur. This inordinate delay in execution of the order raises certain doubt in the subjective satisfaction of the Detaining Authority and raises a question-: whether there was any necessity to detain the petitioner to preventing him from acting in any prejudicial manner in future. The delay, also, raises a question: whether the subjective satisfaction of the Detaining Authority is not genuine and is a colourable one. The delay, if it has been caused on account of the action of the detenu himself, then will not vitiate the detention of the petitioner. If there is a satisfactory explanation relating to delay given by the Detaining Authority then also the delay would not vitiate the subjective satisfaction of the Detaining Authority. In *Kishan Singh's* case (*supra*), there was a delay often months in detaining the accused and no reasonable explanation was given by the State why this delay occurred. The concerned authority also did not take any action u/s 7 of the COFEPOSA Act to declare the detenu as an "absconder". The Court, therefore, opined that "no serious efforts were made by the concerned authority in arresting the detenu". As the delay was not properly explained by the authority, the order of detention was set-aside. In

the case of Shafiq Ahmad, (supra), the Detaining Authority tried to explain the delay on the ground that the entire Police Force was extremely busy in controlling the Law and Order situation and, therefore, no attempt could be made for arresting the detenu, who was absconding. That ground was not deemed as "sufficient" by the Supreme Court for explaining the delay and the detention order was, therefore, quashed and set aside. In the case of Suleman v. The State of Rajasthan (supra), the delay of two months fifteen days in the execution of the detention order was not explained. Even no reply was filed and no explanation for the delay was offered. This Court, therefore, quashed the detention order. In Anwar Singh's case (supra), the Division Bench of this Court again quashed the order on the ground that ten months' delay in detaining the accused after the issuance of the order of detention was not explained. In Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another, the detenu was avoiding the arrest and surrendered three years after making of the order of detention and it was held that "the purpose of detention under the COFEPOSA Act is not punitive but preventive. There must be a "live and proximate link" so that if there is a long and unexplained delay between the order of detention and arrest of the detenu, the order of detention may be struck down unless the grounds indicate a fresh application of the mind of the detaining authority to the new situation and the changed circumstances. But where the delay is adequately explained and is found to be the result of recalcitrant or refractory conduct of the detenu in evading the arrest, there is warrant to consider that the link is not snapped. On the contrary, it could be strengthened and that was what precisely happened in the instant case." In M. Ahamedkutty Vs. Union of India (UOI) and Another, it was held that "where after passing of the detention order the passage of time is caused by the detenu himself by absconding, the satisfaction of the Detaining Authority cannot be doubted and the detention cannot be held to be bad on the ground of delay in execution of the order." In Abdul Salam alias Thiyyan Vs. Union of India and others, , it has been observed by the Supreme Court as under: at page 1506; of Cri LJ.

"There was delay, both at the stage of passing the order of detention and in arresting him, and this delay, unless satisfactorily explained, would throw considerable doubt on the genuineness of the subjective satisfaction. But this must not be misunderstood to mean that whenever there is delay in making an order of detention or in arresting the detenu pursuant to the order of detention, the subjective satisfaction of the detaining authority must be held to be not genuine or colourable. Each case must depend on its own peculiar facts and circumstances. The detaining authority may have a reasonable explanation for the delay and that might be sufficient to dispel the inference that its satisfaction was not genuine."

In Subhash Muljimal Gandhi Vs. L. Himingliana and Another, , the Apex Court held that "it is undoubtedly true that an unusual delay in execution of an order of detention if not satisfactorily explained, may persuade the Court to draw such an inference. There is however, no scope for drawing such an inference in his case

as the delay here has been occasioned not by any omission or commission on the part of the detaining authority."

6. The question which, therefore, requires consideration in the present case is: whether the delay in execution of the order has been properly explained by the respondents and whether it can be attributed to the respondents to the detenu himself? The detenu was arrested on 8-1-91 and was produced before the Special Judicial Magistrate. He moved an application for the exemption from personal attendance, which was allowed on 23-1-91. Since then he is absconding and various efforts were made by the respondents to arrest him. His house as well as the house of his father-in-law and other relatives were raided on various dates given in para, number 11 of the reply as well in the additional affidavit filed by Mr. Sushil Kumar Pareek. In the Additional Affidavit filed by Mr. Sushil Kumar Pareek, the details of the previous raids and the action taken by the authorities in raiding the house of the petitioner and the other places wherefrom he could be made available, clearly explain the delay in the execution of the order. Satisfactory explanation has been given by the respondents in their reply as well as in the additional affidavit filed by Mr. Sushil Kumar Pareek relating to the delay. The delay in arresting the petitioner has, thus, properly been explained. The delay in the present case has not been caused on account of any negligence on the part of the respondents but the petitioner has to be blamed for the delay in the present case. The respondents even took the steps u/s 7 of the Act and the petitioner was declared as "absconder" vide Notification dated 9-3-93, issued in the State Gazette. The contention, raised by the learned counsel for the petitioner, is, therefore, devoid of any force as the delay in execution of the order has sufficiently been explained by the respondents.

7. In the result, we do not find any merit in this Habeas Corpus Petition and the same is hereby dismissed.