

(1989) 05 DEL CK 0022
In the Delhi High Court
Case No : Criminal Writ No. 673 of 1988

Smt. Amar Sang	Vs	APPELLANT
Union of India and others		RESPONDENT

Date of Decision : 02-05-1989

Acts Referred:

Citation : (1990) 1 RCR(Criminal) 227

Hon'ble Judges : S. Duggal, J

Bench : Single Bench

Judgement

1. The petitioner, who was placed under detention on 21st November, 1988, pursuant to an order of detention passed on 6th July, 1988 by Shri K. L. Varma, Joint Secretary to the Government of India, in exercise of the power conferred on him by S. 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 (hereinafter referred to as the Ordinance), challenges her detention before this Court, by writ petition filed under Art. 226 of the Constitution of India read with S. 482 of the Code of Criminal Procedure, seeking a writ of habeas corpus or any other writ, order or direction, ordering her release from the said detention.

2. The facts, in so far as they are relevant to the present petition, are that the petitioner was intercepted at IGI Airport, New Delhi on the night intervening 21-22/8/1987 while she was leaving for Barcelona having booked for the flight No. AZ-787, and 4 Kgs. of heroin was allegedly recovered from her baggage. The petitioner as well as her sister Prakash Beasley and three others were apprehended, and their statements were recorded. The petitioner was placed under arrest on 22nd August, 1987. While she was in judicial custody, a petition for interim bail was moved on her behalf, which came up before this Court on 3rd June, 1988 and in view of the medical report, it was thought to be a fit case to allow interim bail for three months from the date of her release from custody putting her on condition that she shall not leave India during the period of interim bail and shall furnish to the office of the Narcotics Control Bureau (for

short NCB), her address where she would be residing during the period of her interim bail. When she was on interim bail, the Ordinance was promulgated on 4th July, 1988 and as stated above, the detention order was passed under S. 3(1) of the said Ordinance on 6th July, 1988.

3. The detention order is challenged in this writ petition on a number of grounds but Mr. R. D. Mehra, arguing for the petitioner, pressed one ground only which has been taken up as ground No. V in the writ petition. He argued that in spite of the fact that the petitioner was available in Delhi, to the knowledge of the officers of the NCB, no steps were taken to execute the order of detention, and that there was long unexplained delay in execution of the said detention order inasmuch as it was only on 21st November, 1988 that the petitioner was put under detention in execution of the detention order dt. 6th July, 1988. Mr. Mehra has further submitted that during all this period, the petitioner was in Delhi, and that she had been attending Court of the Addl. Chief Metropolitan Magistrate where in the meantime a complaint under S. 135 of the Customs Act and various provisions of the Narcotic Drugs and Psychotropic Substances Act had been filed and that her presence had been noted as being on interim bail, when Counsel for the NCB also used to be present, and that all this was during the period this detention order remained unexecuted. He further stated that in view of the continued ailment from which the petitioner was suffering, a petition for extension of interim bail was moved in the High Court and that was taken up after notice to the NCB, by M. K. Chawla, J., and disposed of vide order dt. 29th August, 1988 when considering the medical ground, the interim bail was extended for another three months on the same terms and conditions, and that this order was passed in the presence of counsel for the NCB, namely, Shri J. S. Arora.

4. The learned counsel contended that in the light of the above, a conclusion cannot be escaped that there was no genuine need for placing the petitioner under detention, and that the order of detention had been passed without any subjective satisfaction of the detaining authority being recorded, and that it was made in mala fide exercise of the power, because the petitioner had in the meantime moved for further extension of interim bail and that she was placed under detention when notice of the third application was served on the NCB. This plea is specifically raised in para 12 of the writ petition and elaborated in ground No. V thereof.

5. Mr. Mehra has drawn my attention to the counter which has been filed on behalf of the respondents, wherein so far as this ground is concerned, except for a bald assertion that the order of detention could not be executed because the petitioner was not available at the address given by her, there is no further detail as to in which manner the detention order was sought to be executed or by whom or what endeavor had been made to trace her. Mr. Mehra has further stated that the house where she had been finally apprehended on 21st November, 1988 belongs to her other sister Mrs. Chandanajit Singh and, that this

sister had stood surety for the petitioner when she had been granted interim bail. Mr. Mehra stated at the Bar that the affidavit on the bond had disclosed that the surety was sister of the accused; and resident of H-316, New Rajinder Nagar, New Delhi and that it was not case where the petitioner was ultimately found at a place which could not, at all, be within the knowledge of the officers of NCB, who are entrusted with the execution of the detention order. Mr. Mehra contends, Therefore, that this is a case where because of undue and unexplained delay in execution of the detention order, the subjective satisfaction stands vitiated and the continued detention of the petitioner cannot be justified.

6. He has placed reliance in support of his plea on a judgment of the learned single Judge of this Court in Criminal Writ No. 111 of 1988 *Shri Yogesh Chopra v. Administrator of Delhi*, decided on April 19, 1988, where in view of the fact that during the period the order of detention remained unexecuted, the detenu had been shown to be available at his residence and place of work at Delhi, and had been further shown to be attending the Court of the Metropolitan Magistrate in a case pertaining to his father, the delay of one month 24 days in executing the order of detention was held to be fatal, to the validity of the detention order. Mr. Mehra referred to another case being Criminal Writ No. 16 of 1988, *K. Thomas Vincent v. Union of India*, decided on 26th April, 1988 where also the order of detention was held to be vitiated because of the unexplained delay in execution and on account of the failure of the authorities concerned to specifically set out the efforts made by the concerned officers, entrusted with the execution of the order of detention.

7. In yet another case reported as *T. M. Mammoo Hai v. Union of India*, (1988) 2 Delhi L 80, the detention order was struck down because of the inordinate delay in execution of the detention order which remained unexplained and when there was no detail forthcoming as to what steps had been taken by the concerned authorities to trace the detenu. This was in spite of the fact that additional affidavit had been filed where it was stated that resort was being taken to provisions of S. 7(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 on details being furnished by Collector of Customs in respect of Immovable properties of the detenu, but nevertheless in view of the total absence of Explanation of the efforts made during the period 26th August, 1987 to 11th January, 1988 by the concerned agency, the order of detention was held liable to be quashed.

8. In another matter, which came up before P. K. Bahri, J., and reported as *C. K. Mohd. Yahye v. Director of Enforcement* (1988) 2 Delhi L 441, detention order was set aside, on the facts of that case where Explanation that petitioner was absconding was rejected on the ground that during the period order of detention remained unexecuted, the detenu was shown to have filed reply to show cause notice and thus delay was held to have remained unexplained. The learned single Judge while allowing the writ petition, took note of the earlier decisions of this Court, and also a judgment of the Supreme Court in *Sk. Nizamuddin Vs. State of*

West Bengal, where in the event of delay of 2 1/2 months remaining unexplained, the order of detention was quashed.

9. Mr. Mehra further contended, that an additional affidavit, pursuant to the direction of this Court, has been filed on behalf of the detenu, enclosing copies of the proceedings before the Addl. Chief Metropolitan Magistrate, which reveal that on four dates during the period i.e. on 25th August, 1988; 17th October, 1988; 31st October, 1988 and 15th November, 1988, the petitioner had been appearing in the Court of the Addl. Chief Metropolitan Magistrate in the case filed against her by the NCB and further her presence was marked when counsel for the department also used to appear and that this by itself falsifies the stand taken by the respondents in the counter that the detention order could not be executed because the petitioner was not available, as she was not found at the address given by her. He has cited Harnek Singh Vs. State of Punjab and Others, , where the detenu was shown to be attending the Court of a Magistrate in the same district, during the period the order of detention was required to be executed. The Supreme Court held that the Explanation offered by the respondent therein that the order of detention could not be executed because the petitioner was not available, was not acceptable and that it was a case where the detention partook the character of punitive measure rather than preventive action, and where inference can be drawn that there was no urgency to put the petitioner under preventive detention.

10. Mr. G. S. Sharma, appearing for the respondents, answered these contentions by inviting attention of the Court to the counter filed on behalf of the respondents and urged that it was a case where the respondents had been able to show that the detention order could not be executed because the petitioner was not available at the address communicated by her to NCB officers. In response to Court query, Mr. Sharma has conceded that the order of detention was to be executed by officers of the NCB. He also confirmed the fact that the copy of the additional affidavit along with annexures which contained copies of the record of proceedings before the Addl. Chief Metropolitan Magistrate as well as copy of the order of interim bail passed by this Court on 3rd June, 1988 and 29th August, 1988 were served on him on 26th April, 1989 and that he forwarded the same that very day under cover of his letter, which was delivered personally to an officer on the next day, and he had sought some clarification in regard to points made on the last date of hearing but the reply he has received does not contain anything new by repeats the averments made in the counter filed earlier. It is noticed that this counter has been filed by an Under Secretary, Ministry of Finance, Department of Revenue, Government of India. He has not spelt out in this return as to on what record he has stated that the petitioner was not available at her given address or was absconding since her release ordered by the High Court. In view of the specific averments having been made in the writ petition, it was incumbent on the respondents that an affidavit of the concerned officer, who was entrusted with the execution of the detention order should have been filed. The least that could be done was to disclose the name of

such officer or the effort or endeavor made by him in executing the order of detention. The documents which have been brought on record by means of annexure along with the additional affidavit on the face of the record belie the plea of the respondents that the petitioner was not available to be put under detention in execution of the order of detention during the period 6th July, 1988 to 21st November, 1988. She had been attending the Court of the Addl. Chief Metropolitan Magistrate in the very presence of the counsel for the NCB - one appearance was in the month of August, two in the month of October and one in the month of November. It is pertinent to note, as already observed, that the order of detention was to be executed by the officer of the same very department, namely, Narcotics Control Bureau .

11. There is another pertinent feature to be noted, and that is that the petitioner moved a second petition for extension of the interim bail on medical ground which was taken up by learned single Judge of this Court on 29th August, 1988 after notice to NCB. There is not a whisper of a suggestion to the Court that the petitioner had become unavailable after procuring the order of interim bail or that she had supplied an address to the NCB where she was not available or that there is an order of detention pending execution against her for want of her correct address.

12. In face of this, it is not possible to accept the plea that the order of detention could not be executed because of non-availability of the petitioner at the given address. The petitioner has specifically alleged in the writ petition that the authorities woke up for placing her under detention in execution of the detention order when she moved a petition for extension of interim bail third time on 17th November, 1988, and apart from the fact that an advance copy was served on the Department on that very day. Otherwise also, the Court also by order dated 19th November, 1988 gave notice to the respondents for 28th November, 1988 and it was only after service of the notice that the concerned officer got into action and clamped this detention order on the petitioner to prevent her from approaching the Court with prayer of extension of interim bail. There is no specific denial of these allegations in the sense that the notice of the third petition for interim bail had been served on the department, namely, the NCB, before 21st November, 1988. It is also a case where no effort is shown to have been made to avail of the provisions of S. 8 of the Ordinance either by approaching the Court of Magistrate to invoke the powers under sections 82 to 85 of the Cr.P.C. or concerned officer for passing a pre-emption order, under S. 8(1)(b), requiring appearance of the petitioner on a given date and at a given place although the power was vested in the concerned authority both under the Ordinance as well as under which the Act which came into force on 6th September, 1988.

13. All this betrays utter lack of earnestness on the part of the respondents to execute the detention order and in view of the catena of decisions in this behalf, it is a case where the detention order stands vitiated as a presumption has to be

raised that it was passed by the detaining authority without arriving at subjective satisfaction about the necessity to preventively detain the petitioner.

14. Accordingly, I think it a fit case to allow the petition. The writ petition is accordingly allowed. Rule is made absolute and it is directed that the petitioner be released forthwith if not required to be detained in any other case or proceedings.

15. No order as to costs.

16. Petition allowed.