

(1992) 07 MP CK 0025

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 966/92

Subhash Chandra Bhandari

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 28-07-1992

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 11, 3, 5
Constitution of India, 1950 — Article 21, 22, 226
Customs Act, 1962 — Section 108
General Clauses Act, 1897 — Section 21

Citation : (1994) 46 ECC 143

Hon'ble Judges : V.D. Gyani, J;A.R. Tiwari, J

Bench : Division Bench

Final Decision : Allowed

Judgement

A.R. Tiwari, J.—Being detained in pursuance to the order F.No. 673/9/92-Cus-VIH dated 2.1.1992, passed by the Joint Secretary to the Government of India, the Ministry of Finance, Department of Revenue, u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the Act"), the petitioner detenu through his wife Smt. Bharati Bhandari resident of Indore has assailed the aforesaid order under Article 226 of the Constitution of India praying for the issuance of a writ of habeas corpus for restoration of his liberty.

2. Adumbrated in brief, the facts relevant to this petition are that the petitioner (detenu) had negotiated with one Rameshbhai to transport the goods from Indore to Delhi in his jeep on Rs. 3,000/-per trip as hire charges. The aforesaid jeep No. MP-89A-9007 was intercepted on Delhi-Mathura road at about 16.00 hours on 16.12.1991, and 27 slabs of silver packed in gunny bags were recovered from a secret cavity on the floor of the rear of the said jeep. These silver slabs were seized on the reasonable belief that the same were liable to be confiscated under the Customs Act, 1962. The detenu is alleged to have

voluntarily made statement on 16.12.1991 u/s 108 of the Customs Act through which he seems to have admitted his role in the transportation of the aforesaid contraband silver. A case was also registered against the detenu under the Customs Act and he was arrested under the offence punishable under that Act. No bail application was filed by the detenu. Investigation in the aforesaid criminal case was in progress and adjudication proceedings under the Customs Act, 1962 as also under other laws for the time being in force were likely to be initiated against the detenu. On the basis of the materials collected till then, the aforesaid authority passed the order of detention u/s 3(1) of the Act with a view to preventing the detenu from transporting the smuggled goods in future. The detenu is in custody on the strength of the aforesaid order dated 2.1.1992. He was also informed that he is entitled to make representation as permitted by the law. The detenu has payed for quashment of the aforesaid order dated 2.1.1992. The respondents have filed the return which is on record.

3. We have, on 27th July, 1992 heard Shri. R.M. Bagai assisted by Shri. Ansar Hussain, learned Counsel for the petitioner and Shri. B.G. Neema, learned Standing Counsel for the respondents.

4. Right at the threshold we may recall what Addison had said about liberty: "when liberty is gone, life grows insipid and has lost its relish." Article 21 of the Constitution very aptly mandated that no one shall be deprived of this personal liberty except according to procedure established by law. Article 22(5) required that the authority shall afford earliest opportunity of making the representation. It is thus imperative that procedural safeguards have to be scrupulously adhered to so that life may not be condemned to lose its relish illegally. The role of the Court, as sentinel of liberty thus springs into action.

5. The aforesaid order of detention was assailed on several grounds as enumerated in the petition, but the learned Counsel for the petitioner elected to urge only two grounds was liable to be exterminated even on those two grounds (sic). The grounds so urged by him are as under:--

(a) After taking the detenu in custody the member of his household preferably the parents, the child or the spouse must be informed in writing of the passing of such an order of detention and of the fact that the detenu has been taken in custody. An intimation must also be given as to the place of detention.

(b) The representation submitted by the detenu has not been considered in this case with promptitude and no reasonable and acceptable explanation exists about such an inordinate delay and as such the procedural safeguards stand violated.

On the other hand Shri. Neema in opposition strenuously submitted that prior detention under Customs Act in jail is enough to clothe the members of the family with the knowledge of detention under the Act since according to him, it is unbelievable that they would not have known it and that the delay is properly explained.

6. Liberty of an individual is too precious a thing to be trifled with and whenever the liberty is sought to be eclipsed then, the detaining authority is required to show that such an action is strictly in accordance with the procedure established by law. The Courts have always regarded personal liberty as the most precious possession of mankind and have thus insisted on unflinching adherence to procedural safeguards ingrained in the system. It is further beyond the pale of controversy that the detenu must be informed of the grounds on which the order of detention is made and he must further be afforded earliest opportunity of making representation against it. And this implies that representation, once submitted has to be considered expeditiously.

7. Section 3(1) of the Act confers the powers to order detention. The provision is extracted below:-

Section 3(1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, or any officer of a State Government, not below the rank of a Secretary of that Government, especially empowered for the purpose of this section by that Government may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from--

- (i) smuggling goods, or
- (ii) abetting the smuggling of goods, or
- (iii) engaging in transporting or concealing or keeping smuggled goods, or
- (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or
- (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,

it is necessary so to do, make an order directing that such person be detained.

By Section 3(3) of the Act, it is further mandated that the grounds on which the order has been made must be communicated. This is obviously to ensure the compliance of the provisions envisaged by Article 22(5) of the Constitution of India. The object of this provision is to ensure that the grounds are promptly communicated so that the detenu has the earliest possible opportunity to make the representation against the same, if he so desires. u/s 5 of the Act, the detenu shall be liable to be detained in such place and under such conditions as the appropriate Government may specify. In order that the procedure pertaining to detention should conform to the mandate of Article 21 as regards fairness, justness and reasonableness, it has been considered imperative that immediately after a person is taken in custody in pursuance of a detention order, the members of his family must be informed. The Apex Court has laid down time and

again that a person who is taken in custody does not forfeit by reasons of his arrest all or any one of his fundamental rights and that the detenu should be treated consistently with human dignity and civilised norms of behaviour. The principal object behind such a procedure, to our mind, is that the members of family may know about the detention as also the place of detention and on that basis may meet and interview the detenu and may make adequate arrangements for early and effective representation. This procedure of intimation thus, ensures fairness, justness and reasonableness. The petitioner has specifically incorporated in his petition as one of the grounds against the aforesaid order of detention that the members of his family were not informed (ground III of the petition). It may be noticed that this was also his pointed grievance in representation dated 6.2.1992, the copy of which is filed in this petition as Annexure p/4. The respondents have tried to meet the aforesaid ground as under:-

The petitioner was in judicial custody at the time of serving of detention order and the family members were well aware of the same and accordingly the family members were not informed about service of detention order.

It is, thus, clear that the allegation of absence of intimation to the members of the family has not been disputed at all but is sought to be explained away as above. During the course of arguments, we repeatedly asked the learned Counsel for the respondents to tell us as to on what material the respondents have taken the stand that the members of the family "were well aware" of the same. We undertook this exercise because the requirement of such an intimation can be held to be met even on showing that the members of the family, though not intimated as required, had sufficient knowledge about the factum of detention as well as place of detention through their visits to jail, interview with the detenu or by any other means.

8. The need for such an intimation has been highlighted and stressed in A.K. Roy and Others Vs. Union of India (UOI) and Others, Explaining this decision (Khan Singh Tyagi v. Union of India and Anr.) the Apex Court has further laid down in Union of India v. Vasantharathi and Ors. (1990 Cr.L.R. (SC) 248) as under:--

The object and purpose of the above observation, in our view, seem to be that the family members of the detenu should not be kept in darkness of withholding the information about the passing of the order of detention and the place of detention thereby preventing them from having any access and from rendering any help or assistance to the detenu and similarly the detenu should not be deprived of the privilege of meeting their relations and getting any help or assistance.

This requirement could thus, have been satisfied even by showing that the members of the family had even otherwise acquired sufficient knowledge as aforesaid. The learned Counsel was, however, unable to satisfy us about this and in fact had no material what-so-ever to substantiate the position assumed in the

return as aforesaid. The petitioner urged that there was no intimation or knowledge as such. The fact remains that the representation could not be preferred till 6.2.1992 (P/4) and as such, the delay in making the representation is evidently clear. This delay can be attributed, as urged, to the absence of intimation to the members of the family. The prejudice is thus, obvious. We thus, repel the contention of Shri. Neema that mere prior custody in connection with the criminal case can lead to the awareness as assumed and hold that members of family had no knowledge as required by the procedure. It is, thus, clear that the mandate of Article 22(5) of the Constitution of India stands infringed and further detention is clearly rendered impermissible under the law.

9. As regards the grievance with regard to the delay in consideration and disposal of the representation, the factual position is rather undisputed. The representation dated 6.2.1992 (though the respondents contend it is actually dated 7.2.1992) was received by the competent authority on 13.2.1992. It is averred in the return that this was placed before the detaining authority on the same date and it was the detaining authority which directed that comments from the sponsoring Authority be called. It is further submitted that the sponsoring Authority did not submit the comments promptly as a result of which the reminder was issued on 17.2.1992 and thereafter, the comments are said to have been received on 20.2.1992 by letter dated 19.2.1992. It is further submitted that the case was then processed and submitted to the Joint Secretary on 21.2.1992 who in turn, submitted the same to the Director General (EIB) and Chairman (CBDT) on the same day. The Director General (EIB) is said to have considered the same and submitted the case to the Minister of State (Revenue) on 24.2.1992 who after consideration, forwarded it to the Finance Minister on 3.3.1992. It is urged that the Minister was busy in connection with preparation of Budget and other parliamentary affairs and as such, the representation could not be considered with promptitude. It was finally considered and rejected by the Finance Minister on 5.3.1992. On these facts, it is urged that the delay is properly explained and no fault can be found with the disposal of representation. The stage is now set to refer to certain decisions in this behalf. In *Ratansingh and Anr. v. State of Punjab and Ors.* AIR 1982 SC 1 it is laid down that Section 11 of the Act confers upon the Central Governments the powers to revoke the order of detention. This power, in order to be real and effective, implies the right in a detenu to make a representation to the Central Government against the order of detention and inordinate delay on the part of the Central Government in consideration of the representation of a detenu would be clearly violative of Article 22(5), of the Constitution of India and this itself would render the detention unconstitutional. It is, thus, clear that statutory duty is cast upon the Central Government u/s 11 of the Act to apply its mind without delay. In this case the representation was virtually left unattended, for considerable time. Section 11 of the Act is extracted below:-

Section 11. Revocation of detention order:--(1) Without prejudice to the provisions of Section 21 of the General Clauses Act, 1897 (10 of 1897), a

detention order may, at any time, be revoked or modified--

(a) notwithstanding that the order has been made by an officer of a State Government, by that State Government or by the Central Government;

(b) notwithstanding that the order has been made by an officer of the Central Government or by a State Government, by the Central Government.

(2) The revocation of a detention order shall not bar the making of another detention order u/s 3 against the same person.

10. After referring an earlier decision in *Sk. Abdul Karim and Others Vs. State of West Bengal*, the Apex Court in *Khairul Haque v. State of West Bengal* (1969 (2) SC WR 529) observed thus--

The fact that Article 22(5) enjoins upon the detaining authority to afford to the detenu the earliest opportunity to make a representation must implicitly mean that such representation must, when made, be considered and disposed of as expeditiously as possible, otherwise, it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning.

It has been repeatedly stressed that in matters touching the personal liberty of a person preventively detained, the representation made by the detenu should be dealt with utmost expedition in accord with the constitutional (sic). The power and obligation conferred by Section 11 of the Act cannot be frustrated by nonchalance or laches in any manner. It is pertinent to make a reference to *Rajkishore Prasad's* decision reported in *Sanjit Roy Vs. State of Rajasthan*, wherein the order of detention was quashed on account of inordinate delay of 28 days in considering the representation of the detenu.

11. The contention of the respondents is two-fold:

(a) The detaining authority thought it proper to call for the comments from the sponsoring Authority and this took some time.

(b) The Minister concerned was busy in connection with preparation of the budget as also other parliamentary affairs.

We have carefully considered the aforesaid submission and are unable to accept the same as valid. The detaining authority had no business to delay the matter by calling for the comments from the sponsoring authority because in our view these comments could be called only by the Authority empowered to consider and decide the representation. Obviously the detaining authority is not the authority for this purpose. The matter ought to have been placed before the Competent Authority which alone could have decided whether any comments as such were necessary or not. In this view of the matter, the first contention lacks substance. Equally non-meritorious is the second contention whereby the delay is said to be explained away on the ground of minister concerned being busy as alleged. It is averred in the return that the Minister was busy in matters as

specified. We narrate hereunder the date-wise position so as to notice the "speed-breakers" from the date of initiation to the date of disposal of the subject which is required to be processed with "good speed".

6/7.2.1992 Representation submitted. 13.2.1992 - Representation received (It is not understood as to why it should have consumed six days though) and comments invited. 17.2.1992 Reminder sent (why after four days?) 20.2.1992 Comments received by letter dated 19.2.92 21.2.1992 Case processed and submitted to Joint Secretary, who submitted the same to the Director General (EIB) and Chairman (CBDT). 24.2.1992 Case considered and submitted to the Minister of State (Revenue). 3.3.1992 Case considered by the Minister of State who submitted it to Finance Minister. 5.3.1992 Case considered and rejected by the Finance Minister.

12. The delay from 13.2.1992 to 20.2.1992 is improper since detaining Authority had no such power. Further delay from 24.2.1992 to 3.3.1992 is again not proper. The explanation to our mind, is thus, hardly reasonable one when his representation was required to be considered with promptitude. Necessity for calling the comments is also not shown. The affidavit filed in support of the return is cryptic one and does not satisfactorily explain the delay as such. The respondents would have us believe that all work stood paralysed so much so that even those languishing in jail had to be forgotten. We are left unimpressed as we feel that constitutional imperative cannot be sent on holiday like this. This delay, to our mind, to say the least is rather an irresponsible act on the part of the various authorities. It is also unconstitutional because the constitution enshrines the fundamental right of a detenu to have his representation considered and it is thus imperative that immediate action must be taken when liberty of a person is in peril. This right cannot be seen to be lost in mechanical routine, dull casualness and chill indifference. One has to show live concern in such matters. In spite of weighty pronouncements, style in many cases remains unimproved. It is rather disquieting to notice such "slow-motion" processing of representations. The delay is, thus, not proper and in clear violation of the mandate of Article 22(5) of the Constitution of India. It has been held in Mohinuddin alias Moin Master Vs. District Magistrate, Beed and Others, as under:-

The representation made by the appellant addressed to the Chief Minister could not lie unattended to in the portals of the Secretariat while the Chief Minister was attending to other political affairs. Nor could the Government keep the representation in the archives of the Secretariat till the Advisory Board submitted its report.

13. It cannot be approved that the Government should act in such a cavalier fashion in dealing with the representation of the detenu. We are satisfied in the facts and circumstances of the case that there was failure on the part of the Government to discharge its obligation under Articles 22(5) of the Constitution. The plea put forth to the effect that the Minister concerned was busy in Budget or other Parliamentary affairs (not particularised) is too vague to be considered

besides being untenable in law. It will be relevant to make reference to the observations contained in Prabhu Dayal Deorah Vs. The District Magistrate, Kamrup and Others,

We may and we think it is necessary to repeat, that the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of insistence on observance of procedure. And observance of procedure has been the bastion against wanton assaults on personal liberty over the years. Under our Constitution, the only guarantee of personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law.

It is, thus, clear that the detention is illegal also on the ground of inordinate delay in considering the representation submitted by the detenu and cannot be allowed to continue. In passing, we may observe that petitioner was already in jail and had not sought even his release by filing any bail application. His jeep was also seized. There was no material to conclude about likely repetition of activities in future. Hence, there seemed to be no occasion to proceed to "prevent" in terms of Section 3(1) of the Act particularly when he stood deprived of vehicle itself. We, however, do not propose to pursue this aspect further.

14. The procedure established by law and clarified by case-law is not followed. The impugned order of detention is thus, not impeccable in that the members of the family were not intimated resulting in delay of about one month in making the representation imprimis and it is further vitiated by improper and inordinate delay of further one month in its consideration when submitted. There are then the flaws, fatal and beyond repair. We may add that we are left guessing as to why Ramesh Bhai, the alleged owner of the contraband silver slabs was not proceeded with under the Act. In fact, the learned Counsel for the respondents was unable to say anything with regard to this despite being questioned about it. In the quagmire of the facts, one can only see here the attempt to pettifog. We, however, once again keep promise to justice and we leave this at that.

15. For the foregoing reasons, this petition succeeds and is hereby allowed. We accordingly quash the order of detention dated 2.1.1992 (Annexure P/1) and direct that the petitioner-detenu be set at liberty forthwith if his detention is not required under any other law. We, however, make no order as to costs of this petition. Let a writ be issued accordingly.