
(2009) 12 AHC CK 0197

In the Allahabad High Court

Case No : Civil Miscellaneous Habeas Corpus W.P. No. 49017 of 2009

Tahsin @ Chhota

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 17-12-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Uttar Pradesh Prevention of Cow Slaughter Act, 1955 — Section 3, 5, 8

Citation : (2009) 12 AHC CK 0197

Hon'ble Judges : Imtiyaz Murtaza, J and Shyam Shankar Tiwari, J

Final Decision : Allowed

Judgement

Imtiyaz Murtaza, J.

Impugned herein is the order of detention dated 3.5.2009 passed by District Magistrate Saharanpur. The reliefs sought by means of this petition as are relevant may be excerpted below.

"(i) issue a writ order or direction in the nature of certiorari quashing the impugned order of detention dated 3.5.2009 passed by District Magistrate Saharanpur.

(ii) issue a writ order or direction in the nature of mandamus commanding/ directing the respondents to set at liberty to the petitioner forthwith."

The order of detention impugned herein in its prologue, recapitulates the events leading to initiation of action against the petitioner. The order of detention as a preface recites that the petitioner is a person involved in cow slaughtering alongwith his accomplices and the activities of the petitioner are causing alarm and danger to the communal amity and harmony between the two communities i.e. Hindu and Muslims in and around the area. The grounds of detention, it would transpire from the record, are founded on F.I.R. lodged at case crime no. 64 of 2009 under section 3/5/8 of the Prevention of Cow Slaughters Act at P.S. Fatehpur District Saharanpur.

The order of detention impugned herein principally recites the events as contained in the F.I.R lodged by the police itself at case crime no. 64 of 2009 that on 7.4.2008 at about 3 p.m. While the petitioner was busy slaughtering the oxen alongwith his accomplices by reciting in undertone "Kalma", the police of P.S. Fatehpur raided the house in question and upon sudden arrival of police, the petitioner alongwith few of his accomplices escaped by scaling over the wall while some of his accomplices who were aiding the petitioner in slaughtering were caught red handed. On search of the house, 140 skins relating to cow family some of which were fresh and some were stale, 8 live oxen, two calves and two knives, one Kulhari etc. The search of the house of one of the accomplices of the petitioner namely, Sada also yielded 20 kg of beef, a pair of scales etc. It is further recited in the order that this incident hyped up the tension in the communally sensitive area and the people on both sides collected and raised slogans and all this led to heightened tension and apprehending breaking out of communal riots, the people rushed back to the shelter of their houses and closed the doors and windows and chaotic situation was created and the people ran helter and skelter and as a result, tempo of normal life was disturbed. In order to restore normalcy, police reinforcement was rushed and situation was brought to control with great difficulty. It is further stated that it is likely that he may be enlarged on bail. Looking to the gravity of the crime, it is spelt out, in case the petitioner is admitted to bail, he would indulge in acts which would affect the public order.

We have heard learned counsel for the petitioner and also learned A.G.A at prolix length. Although various arguments were advanced across the bar, but the argument substantially raised is that the petitioner preferred representation dated 4.5.2009 addressed to Union of India, but the same has not yet been decided. We have searched the entire record, but no counter affidavit on behalf of Union of India has forthcoming on record. It is, however, argued on behalf of Union of India that representation dated 4.5.2009 was received on 9.5.2009 and the same was rejected after due deliberations on 19.6.2009. From a glance through the record, it would transpire that on 3.11.2009, 10 days and no more time was granted to the counsel appearing for Union of India to file counter affidavit but on 16.11.2009 when the case was taken up, no counter affidavit had been brought on record. The case was again adjourned to 18.11.2009 affording one more opportunity for filing counter affidavit but again on 18.11.2009, no counter affidavit was filed.

Under the constitutional scheme, the representation of the detenu has to be considered without any delay. Article 22 of the Constitution does not envisage any specific period constituting the delay. The phrase used in clause (5) of Article 55 is "as soon as may be" In *Rajammal v. State of Tamil Nadu* and another 1999 SCC (Cri) 93, the Apex Court observed that the "test is not the duration or range the delay but how it is explained by the authority concerned." In para 9 of the said decision the Apex Court recapitulating the facts of that case observed as under:

"In the present case, the representation was sent by the detenu on 13.1.1998 which reached the Secretary to the Government of Tamil Nadu on 5.2.1998. The Government which received remarks from different authorities submitted the relevant file before the under secretary for processing it on the next day. The under Secretary forwarded it to the Deputy Secretary on the next working day. Thereafter the file was submitted before the Minister who received it while he was on tour. The minister passed the order only on 14.2.1998. Though there is explanation for the delay till 9.2.1998 there is no explanation whatsoever as for the delay which occurred thereafter. Merely stating that the Minister was on tour and hence he could pass orders only on 14.2.1998 is not a justifiable explanation when the liberty of a citizen guaranteed under Article 21 of the Constitution is involved. Absence of the Minister at the Headquarters is not sufficient to justify the delay since the file could be reached the Minister with utmost promptitude in cases involving the vitally important fundamental right of a citizen."

Per contra, the decision cited is *Union of India v. Laishram Lincola Singh* (AIR 2008 SCW 2189). It is a decision of the Apex Court in which ratio of various other decisions have been noticed with approval. The first decision noticed is *Senthamilselvi v. State of T.N. and Anr* (2006 (5) SCC 676) in which, it was substantially held that "there can be no hard and fast rule as to the measure of reasonable time and each case has to be considered from the facts of the case and if there is no negligence or callous inaction or avoidable red tapism on the facts of a case, the Court would not interfere". The Apex Court further observed that "it needs no reiteration that it is the duty of the Court to see that the efficacy of the limited, yet crucial, safeguards provided in the laws of preventive detention is not lost in mechanical routine, dull casualness and chill indifference on the part of the authorities entrusted with their application. When there is remissness, indifference or avoidable delay on the part of the authority, the detention becomes vulnerable."

Another decision noticed with approval is *L.M.S. Ummu Saleema v. B.B.Gujaral* (1981 (3) SCC 317) in which it was quintessentially held that there can be no doubt that the representation made by the detenu has to be considered by the detaining authority with the utmost expedition but as observed in *Frances Coralie Mullin v. W.C. Khambra* (1980 (2) SCC 275) "the time imperative can never be absolute or obsessive". Likewise other decisions relied upon are *Kamarunnissa v. Union of India* (1991) (1) SCC 128, *Birendra Kumar Rai v. Union of India* (1993 (1) SCC 272) etc.

Another decision worth reliance on the point of non filing of counter affidavit by the Union of India is *Rajindra v. Commissioner of Police Nagpur Division and others*, 1994 SCC (Cri) 1706. Para 13 of the said decision being relevant, is quoted below.

"An effort was made by the learned Addl. Solicitor General to persuade us to adjourn the matter to enable the Central Government to produce the file for our perusal. It appears that of late, the Central Government does not show that

sense of responsibility which is expected of it while dealing with detention cases, namely, of filing a counter in time before the Court dealing with the Habeas Corpus petition. Needless to say that the Central Government should be alive to the need to act promptly in such detention cases where the liberty of an individual is concerned. The Court is expected to go by the pleadings and the Central government is expected to place the factual material in connection with the detention order by filing a counter affidavit so that the petitioner has an opportunity to meet with that factual information. The indulgence shown by the Courts in pursuing the file seems to have given an impression that the Central Government is under no obligation to file a counter affidavit to explain the delay. We propose to remove this impression once and for all if it persists and to impress upon the Central Government that it is under obligation to file its counter within the time permitted by the Court failing which the case may go by default. Let it be clearly understood that production of the file is not a substitute for a counter to be filed by the Central Government. The Court peruses the file not to absolve the Central Government of its responsibility to file counter but to satisfy its conscience if it notices ambiguities in the Government's stand. If the Courts have shown indulgence by perusing the file where affidavit is not filed for good reason, let that indulgence not be misused by construing it to be a licence to dispense with the obligation to file a return. In the instant case no counter was filed and the High Court has taken note thereof but, if we may say so with respect, the Court has taken note thereof but, if we may say so with respect, the Court has shown indulgence by observing that the counter is not filed "presumably because there is no specific allegation in this behalf in the petition. Let it be stated that once a representation is made, the detenu is entitled to the representation being dealt with expeditiously. If there is some exfacie delay, the obligation is on the State to explain that delay. There is no question of a specific allegation to be made in the petition except pointing out by placing facts that there has been a delay which ex facie calls for an explanation and that obligation has to be discharged by filing a proper counter and explaining the delay. The Courts have not been unduly strict in insisting that each day's delay must be explained but it is obligatory on the part of the Government to show by filing a counter affidavit that it has acted promptly in dealing with the representation. What is essential is that the Court must be satisfied that the officers dealing with the representation were not indifferent to the urgency of the situation of the detenu being in jail. We are afraid that in the instant case by failing to file a counter affidavit and by failing to explain the exfacie delay, the Central Government failed in its duty and, therefore, we see no alternative but to uphold the contention and quash the detention order."

A brief survey of all the decided cases considered in judicial crucible yield the conclusion the representation has to be decided with utmost expedition. As stated supra, no counter affidavit has been filed by the Union of India and from the facts on record, it would transpire that there was inordinate delay. The delay is unexplained. No good reason is explained for not filing the counter affidavit.

Therefore, the conclusion is irresistible that the Central Government has failed in its duty to file counter affidavit and therefore we have no alternative but to uphold the contention and quash the detention order. It must be borne in mind that it is a matter involving the vitally important fundamental right of a citizen.

In the above conspectus, the petition is allowed and further detention pursuant to the impugned order of detention dated 3.5.2009 is quashed as no counter affidavit was filed by the Union of India and it is directed that the petitioner shall be set at liberty forthwith unless wanted in any other case.