

(1988) 04 DEL CK 0033

In the Delhi High Court

Case No : Criminal Writ Appeal No. 111 of 1988

Yogesh Chopra

APPELLANT

Vs

Administator of Delhi and Others

RESPONDENT

Date of Decision : 19-04-1988

Acts Referred:

Citation : AIR 1988 Delhi 359(1)

Hon'ble Judges : H.C. Goel, J

Bench : Single Bench

Advocate : R.M. Bagai and R.P. Lao, for the Appellant;

Judgement

H.C. Goel, J.

(1) By this writ petition under Article 226 of the Constitution of India, the petitioner Yogesh Chopra prays for the issuance of an appropriate writ for quashing the detention order dated January 8, 1988 passed by the Administrator of the Union Territory of Delhi, respondent No. 1 u/s 3(1) read with S. 2(f) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (for short "the Act"), and for an order directing that the petitioner- detenu be set at liberty forthwith.

(2) It is alleged in the grounds of detention that the petitioner was trying to export certain precious and semi-precious stones from India to Bangkok when he was apprehended on 15th September, 1987 at Indira Gandhi International Airport, New Delhi. The petitioner had reported at the Customs Counter at the said Airport. As a result of the examination of the suit case of the petitioner, the Customs Officers recovered one packet of ruby necklace, three packets of rubies, one packet of aquamarines. one packet of emeralds and two other packets of emeralds, all concealed in different parts of the suit case. Three packets containing emeralds were also stated to have been recovered concealed in two tins of Pan Parag Pan Masala kept in the same suit case. Besides that 359 Thai Bhatts and some documents were also recovered from the personal search of the

petitioner.

(3) The petitioner could not produce any evidence for the lawful export of the recovered precious and semi-precious stones and the foreign currency, namely Thai Bhatta. All the was seized by the Customs Officers.

(4) The statement of the petitioner was thereafter recovered on that very day, i.e. on 15th September, 1987 under S. 108 of the Customs Act. The house of the petitioner was also later searched, but no contraband was found from there. The statements of his father and one Shri Ashwani Jain were also recorded. The Administrator, Union Territory of Delhi., on the material placed before him by the Sponsoring Authority, namely, the Collector of Customs, Delhi on being satisfied that with a view to prevent the petitioner from smuggling the goods, namely, precious and semi-precious stones out of India, it was necessary to pass the order of detention of the petitioner passed the order under S. 3(1) read with S. 2(f) of the Act.

(5) The petitioner has challenged the passing of the order of detention on a number of grounds. Mr. Bagi learned counsel for the petitioner, in the first instance, raised the contention that there has been an undue and inordinate delay on the part of the detaining authority in passing the order of detention against the petitioner, as also there was an un-explained inordinate delay in the execution of the order of detention. It is contended that there was no necessity at all to detain the petitioner and the order of detention was passed without any genuine reasons for the same. Mr. Bagai submitted that the investigation of the case against the petitioner was complete by 26th September, 1987 on which date the statement of Shri Ashwani Jain was recorded, but the order was not passed for a period of more than three months thereafter. It was passed as late as on 8th January, 1988. His further submission is that there was also an inordinate delay in getting the order of detention executed inasmuch as the order of detention was actually executed on 2nd March, 1988, that is after a delay of one month and 24 days after the passing of the order of detention. Mr. Bagai contended that the delay in the passing of the order of detention itself or the subsequent delay in the execution of the order of detention for a period of one month and, 24 days itself initiated the order of detention. He referred to some decisions in support of this contention. After hearing the two sides I am of the view that the un-explained delay of one month and 24 days in executing the order of detention alone renders the order of detention liable to be quashed. The petitioner in para 13 of the petition stated that there was a delay of nearly two months in detaining the petitioner after the passing of the order of detention although the petitioner had all along been available at his residence and his place of work known to the authorities. In ground No. (M) of the grounds of the petition it is stated that there was also great undue delay on the part of respondent No. 1 i.e., the Administrator of the Union Territory of Delhi in detaining the petitioner. It is stated that the petitioner was available all the time at his residence and his place of work during the period from January 8, 1988 to

March 1, 1988. It further stated that the petitioner had appeared in the court of Shri Pradeep Chadha Metropolitan Magistrate in a case pertaining to his father on February 11, 1988, February 20, 1988, February 26, 1988 and February 27, 1988. The further allegations are that the petitioner continued to perform in his usual activities of business and was available at his house during this period and the total absence of any attempt to detain the petitioner during this period of nearly two months clearly established the lack of bona fides in passing the detention order. Shri P. N. Mishra, Deputy Secretary (Home) Delhi Administration Delhi who filed the counter-affidavit on behalf of the respondents in the case, in para 13 gave some facts regarding the delay in the passing of the order of detention. Then as regards the alleged delay in the execution of the order of detention, all that has been stated in para 13 of the affidavit is that the petitioner had absconded after the issuance of the detention order and could only be detained on March 1, 1988 and Therefore, there had not been any undue delay in passing the order of detention. The said averment of the petitioner that he had all along been available at his residence and place of his business and the further allegation that he had in fact appeared in a particular case in the court of Shri Pradeep Chadha, Metropolitan Magistrate, on the said dates have not at all been controverted in the affidavit of Shri Mishra. It cannot be held that the respondents have at all been able to show that the petitioner had in fact absconded during the period between January 8, 1988 and March 1, 1988 and was not available for serving the order of detention on him. Nothing has been stated in the affidavit of Shri Mishra as to when the order of detention was taken for service to the house or business premises of the petitioner, who took the same for service and what was the report made by the serving officer on any such process. In the face of the said allegations of the petitioner it was the duty of the respondents to have specifically stated on affidavit the date or dates on which the order of detention was attempted to be served on the petitioner and what were the reports of the serving officer thereon. The respondents could have also filed copies of the processes issued and the reports of the serving officers made thereon. Nothing of the kind has however, been done by the respondents. The entire information has in fact been withheld from the Court by the respondents. Even the averments regarding the alleged absconding of the petitioner in the affidavit of Shri Mishra are vague. In his affidavit Shri Mishra has not stated that the petitioner had absconded or was not available right from January 8, 1988 when , the order of detention was passed and up to March 1. 1988. All that has been stated in his affidavit is that the petitioner absconded after the issuance of detention order and could only be detained on March 1. 1988. The words used in this sentence are "Issuance of detention order" and not "the passing of the" "order of detention". It may well be that the order of detention was not even issued by the Administrator, Union Territory of Delhi till quite some time after its having been passed on January 8, 1988. In the affidavit of Shri Mishra the absconding is described only after the date of issuance of the order of detention, not right from the date of the passing of the order of detention. Then, again nothing has been stated as to when was the order of

detention actually issued, by the detaining authority. Nor has anything been stated in the affidavit of Shri Mishra as to how much period after the date of the issue of order of detention was the petitioner found having absconded as has been alleged in the affidavit. It may well be that the order of detention itself was issued after the lapse of a substantial period and only some days prior to March 1, 1988 on which date the detenu was detained. Thus, by the said averment in the affidavit of Shri Mishra it cannot be held as shown to the Court that the petitioner remained absconded during the period between January 8, 1988 and March 1, 1988 or for a substantial part thereof. The respondents have thus totally failed to show on the record that there was no undue delay on their part in executing the order of detention with all promptitude and the delay of one month and 24 days in executing the order of detention has thus remained totally un-explained by the respondents on whom the burden of explaining the same lay by submission of specific affidavits or affidavit of the concerned persons and by placing the material before the Court when the petitioner had specifically averred in his affidavit that he was all along present at his residence in Delhi and used to attend his place of business and he gave specific instances of his having appeared in the court of Shri Pradeep Chadha, Metropolitan Magistrate, on four specific dates on affidavit in his writ petition. Mr. R. P. Lao, learned counsel for the respondents, submitted that Shri Mishra in his affidavit has stated that the petitioner had absconded after the issuance of the detention order and could only be detained on March 1, 1988 and from this affidavit it should be held that the petitioner actually remained absconded during the period from January 8, 1988 to March 1, 1988 and the averments of the petitioner in his affidavit that he was available during this period at his residence as also at the place of business should not be believed. I see no merit in this submission and the same is liable to be rejected in view of my above discussion

(6) In *Sk. Nizamuddin Vs. State of West Bengal*, which was a case of detention under S. 3(2)(a) of the Maintenance of Internal Security Act, 1971 it was observed by the Supreme Court that the un-explained delay of about 2" months in defaming the petitioner pursuant to the detention order would throw considerable doubt on the genuineness of the subjective satisfaction of the District Magistrate, who was the detaining authority in that case. The Supreme Court observed as below :- "The State when it is called upon to answer a rule issued on a petition for a writ of habeas corpus, it is the obligation of the State or the detaining authority in making its return to the rule in such a case to place all the relevant facts before the Court and if there is any delay in arresting the detenu pursuant to the order of detention which is prima facie unreasonable, the State must give reasons explaining the delay. Vide *Sk. Serajul v. State of West Bengal*, W.P. 2000 of 1973, decided on September 9, 1974. Since in the present case no Explanation for the delay has been given in the affidavit-in-reply filed by the District Magistrate, we are not at all satisfied that the District Magistrate applied his mind and arrived at a real and genuine subjective satisfaction that it was necessary to detain the petitioner with a view to preventing him from acting

in a prejudicial manner. The condition precedent for the making of the order of detention was, Therefore, not satisfied and consequently the order of detention must be quashed and set aside." Besides the above judgment of the Supreme Court Mr. Bagai has placed on record two copies of the judgments passed by the Single Judges of this Court. In the case of Shri Rajiv Sharma v. Union of India and others; (Cri. Writ No. 413 of 1987 decided on December 7, 1987 by Malik Sharief-ud-din J.) (2) it was found that the order of detention was passed in Delhi on March 30, 1987 and it was executed at Ludhiana on May 31, 1987 i.e. after two months of its making. It was submitted on behalf of the detaining authority that as the detenu belonged to Punjab and resided at Ludhiana the order of detention was sent to the Home Secretary, Punjab at Chandigarh on April 3, 1987 for execution and the order was then got executed by the Home Secretary, Punjab at Ludhiana which took some time. Malik Sharief-ud-din J. in his judgment observed that this was no Explanation for the long delay of two months in executing the order of detention. It was held that the said delay of two months in executing the order of detention vitiated the order of detention. The writ petition was allowed and the order of detention was quashed. In the other case, namely, Anwar Esmail Aibani v. Union of India & Ors; (1987) 3 (Del) 383 (Criminal Writ No. 375 of 1986, decided on December 11, 1986) (3) the order of detention was passed on May 21, 1986 and was served on the petitioner on August 4, 1986. In this case also the Explanation of the detaining authority was that after the passing of the order of detention steps were taken for preparing copies of the documents relied upon by the detaining authority in forming its subjective satisfaction, copies of the grounds of detention and the order of detention for being transmitted to Bombay for its service on the detenu, who resided at Bombay whereas the detention order was passed at Delhi. It is further stated that an official of the customs authorities some time in the month of June, 1986 handed over the said documents to the Secretary (Home?), Government of Maharashtra for doing the needful. The documents were returned to the Customs Officer with the direction to prepare additional copies. The officer came back to Delhi and after doing the needful sent the record back to Bombay on June 23, 1986. It was also stated in the affidavit on behalf of the detaining authority that the Additional Commissioner of Police, Greater Bombay had tried to Serve the order on the detenu, but he was not available. The papers were then returned to Delhi. The Customs Department was aware of the next date of hearing of the case against the detenu before the Additional Chief Metropolitan Magistrate, New Delhi, and on August 4, 1986 the detenu was served with the detention order. This Explanation was found to be devoid of any substance. It was held that the delay of 75 days in serving the order of detention remained unexplained and that led to the conclusion that the detaining authority was not genuinely satisfied as regards the necessity of detaining the petitioner. The detention order was accordingly set aside. Following the law as laid down by the Supreme Court in the above said case as also by this Court I hold that the unexplained delay of one month and 24 days in serving the order of detention clearly goes to show that the detaining authority was not genuinely satisfied as

to the necessity of passing the order of detention and the order of detention was made without proper application of mind. I accordingly accept the writ petition and quash the order of detention of the petitioner. The petitioner be set at liberty forthwith unless otherwise required by virtue of any other lawful order.