

Aslam Ahmed Zahir Ahmed Shaik

Vs

Union of India and Others

Criminal Appeal No. 573 of 1988

(B. C. Ray, S. R. Pandian JJ)

04.04.1989

JUDGMENT

S. RATNAVEL PANDIAN, J. –

1. This appeal by special leave under Article 136 of the Constitution of India is preferred against the judgment made in Criminal Writ Petition No. 627 of 1988 on the file of the High Court of Judicature at Bombay dismissing the writ petition filed by the appellant assailing the validity and legality of the order of detention dated April 28, 1988 passed against him by the Joint Secretary, Ministry of Finance (Department of Revenue), Government of India, New Delhi under Section 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred as the 'Act') with a view to preventing the appellant from indulging in activities prejudicial to the augmentation of country's foreign exchange resources.

2. The detaining authority on the material placed before him arrived to a conclusion that the detenu (appellant) was indulging in receiving and making payments in India unauthorisedly under instructions from a person residing abroad in violation of the provisions of the Foreign Exchange Regulation Act, 1973 and reached his subjective satisfaction that the said unauthorised and illegal transactions carried on by the detenu had affected the foreign exchange resources of the country adversely and hence it was necessary to direct the detention of the detenu by the impugned order. The appellant having become unsuccessful before the High Court, has now approached this Court assailing the order of detention on several grounds. But the learned counsel for the appellant confined his argument only on the ground of undue delay caused by the Central Government in disposing of the representation of the detenu in violation of Article 22 (5) of the Constitution of India. According to the learned counsel, the detenu had forwarded his representation dated June 16, 1988 through the Superintendent of the central Prison, Bombay to the detaining authority and the Central Government and he received the order of rejection dated July 19, 1988 on July 26, 1988 i.e. after a period of 40 days from the date of making his representation. A contention based on the delay of 40 days in the disposal of the representation was advanced before the High Court which for the reasons mentioned in paragraph 3 of its judgment based on the explanation given in the subsequent return dated August 5, 1988 filed by the Under Secretary, Ministry of Finance, Government of India had rejected the same though was not satisfied with the earlier return of the detaining authority. The explanation given in the subsequent return recites that the representation forwarded by the detenu was received in the COFEPOSA Section of Ministry of Finance on June 27, 1988 and that after receiving the comments from the sponsoring authority on July 11, 1988 the file was forwarded to Central Government. Meanwhile the representation forwarded to the detaining authority was rejected on July 11, 1988 itself. The said file was received in the office of the Minister of State (Revenue) on July 12, 1988 but the Minister of State was on tour and on his return the

representation was forwarded to the Finance Minister on July 17, 1988 and the file was received back in COFEPOSA Section on July 19, 1988 and the order of rejection was communicated to the detenu who received it on July 26, 1988. This explanation has been accepted by the High Court. The learned counsel for the appellant has vehemently argued before us that there had been undue and unexplained delay of 11 days between the date of submission of the representation by the detenu to the Superintendent of Central Prisons, Bombay for transmission to the Central Government and the date of receipt of the representation by the Ministry of Finance and this unexplained delay has vitiated the order of detention.

3. It is seen from the impugned judgment, a similar contention was also raised before the High Court but that contention has not been properly disposed of. When this contention was urged before us, the learned counsel for the respondent sought time for filing an affidavit from the Jail Superintendent showing the date of communication of the representation to the government. Accordingly, an affidavit dated March 17, 1989 sworn by the Superintendent of Prison, Bombay was filed attempting to explain the delay that had been occasioned in transmitting the representation. The explanation reads thus :

I say that June 16, 1986 is the date of receipt of the detenu's representation and the said representation was forwarded to the Ministry on June 22, 1988. Further I have to submit that on June 19, 1988 there was a holiday being Sunday.

4. From the above explanation, it is clear that though the detenu had handed over the representation to Superintendent of Central Prison on June 16, 1988, the latter has callously ignored it and left the same unattended for a period of seven days and forwarded the same to the government at his pleasure on June 22, 1988. This Superintendent of Central Prison has not given any satisfactory and convincing explanation as why he had kept the representation with himself except saying that during the period of seven days there was a Sunday.

5. This Court in *Sk. Abdul Karim v. State of West Bengal* ((1969) 1 SCC 433) held : (SCC p. 439, para 8)

The right of representation under Article 22 (5) is a valuable constitutional right and is not a mere formality.

6. This view was reiterated in *Rashid Sk. v. State of West Bengal* ((1973) 3 SCC 476 : 1973 SCC (Cri) 376) while dealing with the constitutional requirement of expeditious consideration of the petitioner's representation by the government as spelt out from Article 22 (5) of the Constitution observing thus : (SCC p. 478, para 4)

The ultimate objective of this provision can only be the most speedy consideration of his representation by the authorities concerned, for, without its expeditious consideration with a sense of urgency the basic purpose of affording earliest opportunity of making the representation is likely to be defeated. This right to represent and to have the representation considered at the earliest flows from the constitutional guarantee of the right to personal liberty - the right which is highly cherished in our Republic and its protection against arbitrary and unlawful invasion.

7. It is neither possible nor advisable to lay down any rigid period of time uniformly applicable to all cases within which period the representation of detenu has to be disposed of with reasonable expedition but it must necessarily depend on the facts and circumstances of each case. The

expression 'reasonable expedition' is explained in *Sabir Ahmed v. Union of India* ((1980) 3 SCC 295 : 1980 SCC (Cri) 675) as follows : (SCC p. 299, para 12)

What is 'reasonable expedition' is a question depending on the circumstances of the particular case. No hard and fast rule as to the measure of reasonable time can be laid down. But it certainly does not cover the delay due to negligence, callous inaction, avoidable red-tapism and unduly protected procrastination.

8. See also *Vijay Kumar v. State of Jammu and Kashmir* ((1982) 2 SCC 43 : 1082 SCC (Cri) 348) and *Raisuddin v. State of Uttar Pradesh* ((1983) 4 SCC 537 : 1984 SCC (Cri) 16).

9. Thus when it is emphasised and re-emphasised by a series of decisions of this Court that a representation should be considered with reasonable expedition, it is imperative on the part of every authority, whether in merely transmitting or dealing with it, to discharge that obligation with all reasonable promptness and diligence without giving room for any complaint of remissness, indifference or avoidable delay because the delay, caused by slackness on the part of any authority, will ultimately result in the delay of the disposal of the representation which in turn may invalidate the order of detention as having infringed the mandate of Article 22 (5) of the Constitution.

10. A contention similar to one pressed before us was examined by this Court in *Vijay Kumar* case ((1982) 2 SCC 43 : 1982 SCC (Cri) 348) wherein the facts were that the representation of the detenu therein dated July 29, 1981 was forwarded to government by the Superintendent of Jail on the same day by post followed by a wireless message, but according to the government, the representation was not received by them. Thereafter, a duplicate copy was sent by the Jail Superintendent on being requested and the same was received by the government on August 12, 1981. Considering the time lag of 14 days in the given circumstances of that case, this Court though overlooked the same and allowed the writ petition on the subsequent time lag, made the following observation : (SCC pp. 49-50, para 12)

The jail authority is merely a communicating channel because the representation has to reach the government which enjoys the power of revoking the detention order. The intermediary authorities who are communicating authorities have also to move with an amount of promptitude so that the statutory guarantee of affording earliest opportunity of making the representation and the same reaching the government is translated into action. The corresponding obligation of the State to consider the representation cannot be whittled down by merely saying that much time was lost in the transit. If the government enacts a law like the present Act empowering certain authorities to make the detention order and also simultaneously makes a statutory provision of affording the earliest opportunity to the detenu to make his representation against his detention, to the government and not the detaining authority, of necessity the State Government must gear up its own machinery to see that in these cases the representation reaches the government as quickly as possible and it is considered by the authorities with equal promptitude. Any slackness in this behalf not properly explained would be denial of the protection conferred by the statute and would result in invalidation of the order.

11. Reverting to the instant case, we hold that the above observation in *Vijay Kumar* case ((1982) 2 SCC 43 : 1982 SCC (Cri) 348) will squarely be applicable to the facts herein. Indisputably the Superintendent of Central Prison of Bombay to whom the representation was handed over by the detenu on June 16, 1988 for mere onward transmission to the Central Government has callously ignored and kept it in cold storage unattended for a period of seven days, and as a result of that, the

representation reached the government eleven days after it was handed over to the Jail Superintendent. Why the representation was retained by the Jail Superintendent has not at all been explained in spite of the fact that this Court has permitted the respondent to explain the delay in this appeal, if not before the High Court.

12. In our view, the supine indifference, slackness and callous attitude on the part of the Jail Superintendent who had unreasonably delayed in transmitting the representation as an intermediary, had ultimately caused undue delay in the disposal of the appellant's representation by the government which received the representation eleven days after it was handed over to the Jail Superintendent by the detenu. This avoidable and unexplained delay has resulted in rendering the continued detention of the appellant illegal and constitutionally impermissible.

13. We, therefore, allow this criminal appeal by setting aside the judgment of the High Court, quash the impugned detention order and direct the detenu to be set at liberty forthwith.

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