

Abdu Salam alias Thiyyan (S/o Thiyyan Mohammad, Detenu No. 962, General Prison, Trivandrum)

Vs

Union of India and Others

Criminal Appeal No. 271 of 1990

(S. R. Pandian, K. Jayachandra Reddy JJ)

17.04.1990

JUDGMENT

K. JAYACHANDRA REDDY, J. -

1. Leave granted.

2. This is an appeal seeking a writ of habeas corpus. The appellant who has been detained under Section 3(1)(i) and 3(1)(iii) of the COFEPOSA Act, 1974, has challenged the detention order. The appellant is a native of Panakkad, Malappuram District in Kerala and had been to Jeddah after his Haj pilgrimage and from Jeddah he landed in Bombay on September 15, 1987. Then he started by a bus to go to his native place. On September 17, 1987 the customs officials intercepted the bus near Thiruvannoor and in the presence of panch witnesses, a search was conducted on the person of the appellant and the chappals worn by him were inspected and on their being opened up about 13 gold ingots with foreign markings were found and they were duly recovered. Further some incriminating documents were also recovered. The gold was valued at Rs. 4,64,951 and it was found to be smuggled gold. The appellant was interrogated by the Superintendent of Customs and a statement of the appellant was recorded. He confessed that he was introduced to a person who promised to give him remuneration provided he carries the gold to India and appellant agreed and carried these gold biscuits. Criminal proceedings were initiated. However, the detaining authority, the Home Secretary to Government of Kerala being satisfied passed the detention order dated September 21, 1988 against the appellant with a view to preventing him from smuggling activities. The grounds also were served within time and in the grounds all the abovementioned details are mentioned. In the grounds the appellant also is informed that if he desires to make a representation to the Advisory Board, he may address it to the Chairman, Advisory Board and that he can also make a representation to the detaining authority or the Central Government. Questioning the same the present appeal is filed.

3. It is submitted that the representation was made on September 27, 1988 to the Central Government and it was disposed of on November 2, 1988. Therefore there was enormous delay by the Central Government in rejecting the representation and the delay amounts to violation of Article 22(5) of the Constitution of India. The next submission is that though the alleged smuggling of gold is said to have been taken place on September 17, 1987, the detention order was passed on May 21, 1988 i.e. after a lapse of eight months and that too it was a solitary instance and because of the delay, the same has become stale and there is no other material to establish any nexus or live connection between the alleged date of smuggling and the date of detention. The next submission is that there was delay in the execution of the detention order which was executed only on August 6, 1988 though passed on May 21, 1988 and that there is no allegation that the appellant was

absconding. It is also submitted that the appellant was not given an effective opportunity to represent his case before the Advisory Board inasmuch as the appellant was not permitted to be represented by an advocate or by his next friend.

4. In the counter-affidavit it is stated that the Collector of Customs furnished proposals for the detention of the appellant on March 24, 1988 and the detention order was passed on May 21, 1988 and the appellant was detained on August 6, 1988. The appellant made a representation to the detaining authority on September 27, 1988 and it was rejected by the State Government on October 1, 1988 and the Central Government rejected the same on November 2, 1988. Therefore in the counter-affidavit it is admitted that there is a delay of one month and five days in considering and rejecting the representation by the Central Government.

5. It can be seen that so far as the State Government namely the detaining authority is concerned, there is no delay but the submission is that the delay in disposing of the representation by the Central Government also is fatal. Article 22(5) of the Constitution of India lays down that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

6. It is well settled that this clause confers a valuable right upon the detenu to make a representation and also mandates that the detaining authority should dispose of the same without delay. Therefore the right under this clause is twofold, namely that the authority making the order must communicate to the detenu the grounds on which the order has been made, as soon as the order is made and secondly that the detenu must also be afforded the earliest opportunity of making a representation against the order.

7. Article 22(5) itself does not state to whom the representation is made or who will consider the representation. By virtue of provisions of the statute under which he has been detained, the appropriate government is legally obliged to comply with these requirements. It is obligatory on the appropriate government to consider the detenu's representation separate from other consideration of the detenu's case by the Advisory Board. But what the learned counsel submits is that the Central Government which has the power to revoke the detention order passed by the State authority, is also under legal obligation to dispose of the representation without delay. Learned counsel relied on some of the decisions of this Court. In *Khudiram Das v. State of West Bengal* ((1975) 2 SCC 81 : 1975 SCC (Cri) 435) this Court held that one of the basic requirements of clause (5) of Article 22 is that the authority making the order must afford the detenu the earliest opportunity of making a representation against the order and this requirement will be ineffective unless there is a corresponding obligation to consider the representation of the detenu as early as possible. It may not be necessary for us to refer to all those decisions which deal with the delay caused by the appropriate government in considering the representation inasmuch as in the instant case there is no delay in considering the representation by the State Government which is the detaining authority.

8. Section 11 of the COFEPOSA Act, 1974 deals with the revocation of detention orders and under Section 11(b) the Central Government may, at any time, revoke or modify an order made by the State Government. Though strictly speaking the Central Government is not the detaining authority within the meaning of Article 22(5) yet they are under legal obligation to dispose of the representation as early as possible but the question is whether such delay by the Central Government also should be subjected to such a rigorous scrutiny as is done in the case of a delay caused by the

appropriate government namely the detaining authority.

9. In *Tara Chand v. State of Rajasthan* ((1980) 2 SCC 321 : 1980 SCC (Cri) 441) this Court held that : (SCC p. 322)

".. once a representation is made to the Central Government, it is duty bound to consider the same in order to exercise its discretion either in rejecting or accepting it. If there is inordinate delay in considering the representation that would clearly amount to violation of the provisions of Article 22(5) so as to render the detention unconstitutional and void."

In *Shyam Ambalal Siroya v. Union of India* ((1980) 2 SCC 346 : 1980 SCC (Cri) 447 : (1980) 2 SCR 1078) it is held that : (SCC pp. 348-49, para 6)

"The power of the Central Government to revoke the order of detention implies that the detenu can make a representation for exercise of that power. Any petition for revocation of an order of detention should be dealt with reasonable expedition ... It may be permissible for the Central Government to take reasonable time for disposing any revocation petition. But it would not be justified in ignoring the representation for revocation of the detention as a statutory duty is cast upon the Central Government. It is necessary that the government should apply its mind and either revoke the order of detention or dismiss the petition, declining to order for revocation."

In *Sabir Ahmed v. Union of India* ((1980) 3 SCC 295 : 1980 SCC (Cri) 675 : (1980) 3 SCR 738) dealing with the power of the revocation of the Central Government it is observed that such power is intended to be an additional check or safeguard against the improper exercise of its power of detention by the detaining authority or the State Government and that the Central Government should consider the same with reasonable expedition and that what is reasonable expedition depends upon the circumstances of the particular case. No hard and fast rule as to the measure of reasonable time can be laid down. It is also observed that it certainly does not cover the delay due to negligence, callous inaction, avoidable red-tapism and unduly protracted procrastination.

10. In *Sabir Ahmed case* ((1980) 3 SCC 295 : 1980 SCC (Cri) 675 : (1980) 3 SCR 738) as well as in *Shyam Ambalal Siroya case* ((1980) 2 SCC 346 : 1980 SCC (Cri) 447 : (1980) 2 SCR 1078) the representation made by the detenu to the Central Government has been ignored and left unattended for a period of about four months and under those circumstances it was held that there was violation of Article 22(5).

11. In *Rama Dhondu Borade v. V. K. Saraf, Commissioner of Police* ((1989) 3 SCC 173 : 1989 SCC (Cri) 520) the detenu made a representation to the Central Government on September 26, 1988 and the decision of the Central Government rejecting the representation was communicated to the appellant on October 31, 1988. The explanation submitted by the Central Government was not accepted on the ground that it is not satisfactory. In *T. A. Abdul Rahman v. State of Kerala* ((1989) 4 SCC 741 : 1990 SCC (Cri) 76) there was a delay of 72 days and it was observed that the representation of the detenu has not been given prompt and expeditious consideration and was allowed to lie without being properly attended to.

12. Bearing these principles in mind we shall examine whether the Central Government has

expeditiously considered the representation or not. We have already noted that the representation was made on September 27, 1988 and disposed of by the Central Government on November 2, 1988, i.e. within a month and five days. In the counter-affidavit filed on behalf of the Central Government it is stated that the representation dated September 27, 1988 was received in the COFEPOSA section of the Ministry of Finance on October 10, 1988 and the representation was in Malayalam. It is also stated that there were some allegations regarding the non-placement of certain documents and non-supply of certain documents to him. Therefore a copy of the representation was sent to the sponsoring authority i.e. Collector of Customs, Cochin on that very day and the comments from the Collector of Customs, Cochin dated October 25, 1988 were received in the COFEPOSA section on October 27, 1988 and that the Additional Secretary examined them and with his comments, they were forwarded to the Minister of State for Revenue on October 31, 1988, since October 29 and 30, 1988 were holidays. The Minister of State for Revenue with his comments forwarded the representation on the same day i.e. October 31, 1988 to the Finance Minister. The Finance Minister considered and rejected the representation on November 1, 1988 and the file was received in the office on November 8, 1988 and on the same day, a memorandum rejecting the representation was sent to the detenu. From the explanation it can be seen that the representation was considered most expeditiously and there is no "negligence or callous inaction or avoidable red-tapism". For these reasons we are unable to accept this contention of the learned counsel.

13. The next submission of the learned counsel is that the date of search was September 17, 1987 and the detention order was passed on May 21, 1988 after a long time and therefore there is no nexus between the alleged incident and the detention order and therefore there is no genuine satisfaction on the part of the detaining authority. The learned counsel submits that there was no live existing connection between the incident and the detention. In *Lakshman Khatik v. State of West Bengal* ((1974) 4 SCC 1 : 1974 SCC (Cri) 289) it is observed that mere delay in passing a detention order is not conclusive but the type of grounds given have to be seen and then consider whether such grounds could really weigh with an officer after such delay in coming to the conclusion that it was necessary to detain the detenu. In *Rajendrakumar Natvarlal Shah v. State of Gujarat* ((1988) 3 SCC 153 : 1988 SCC (Cri) 575) it is held that the mere delay in passing the detention order is not fatal unless the court finds that the grounds are stale or illusory or that there is no real nexus between the grounds and the detention. In *Abdul Rahman case* ((1989) 4 SCC 741 : 1990 SCC (Cri) 76) seizure of the gold biscuits was on November 30, 1986 and the detention order was passed 11 months thereafter. On the ground that there was no satisfactory explanation for this undue, unreasonable and unexplained delay, it was held that the delay throws a considerable doubt on the genuineness of the subjective satisfaction of the detaining authority.

14. In the counter-affidavit, in the instant case, filed on behalf of the detaining authority it is stated that the case records relating to the petitioner were received at the office of the sponsoring authority on February 1, 1988 and they were processed in the office and the show-cause notice under the Customs Act was issued on February 9, 1988 and the proposals were sent for COFEPOSA action on March 24, 1988 and they were received by the State Government on April 2, 1988. The matter was considered by the Screening Committee which met on April 28, 1988 and thereafter submitted the proposals to the detaining authority. On May 2, 1988 the detaining authority ordered to ascertain the reasons for the delay in sponsoring the case and accordingly the sponsoring authority at Cochin was addressed on May 2, 1988. He was reminded on May 7, 1988 and May 12, 1988. His reply was received on May 16, 1988 and thereafter the order was passed on May 21, 1988. In our view, the delay has been reasonably explained. The courts have not laid down that on mere such delay the detention has to be struck down. In *Yogendra Murari v. State of U. P.* ((1988) 4 SCC 559 : 1988 SCC (Cri) 992) it is held that : (SCC p. 563, para 6)

"... it is not right to assume that an order of detention has to be mechanically struck down if passed after some delay It is necessary to consider the circumstances in each individual case to find out whether the delay has been satisfactorily explained or not."

That apart, we are unable to agree with the learned counsel that because of this delay the necessary nexus got severed and that the grounds have become stale and illusory. In appreciating such a contention, the court also has to bear in mind the nature of the prejudicial activities indulged by the detenu and the likelihood of his repeating the same. It is this potentiality in him that has to be taken into consideration and if the detaining authority is satisfied on the available material then on mere delay as long as it is not highly unreasonable and undue the court should not normally strike down the detention on that ground. In *Hemlata Kantilal Shah v. State of Maharashtra* ((1981) 4 SCC 647 : 1982 SCC (Cri) 16) it is held that delay ipso facto in passing an order of detention after an incident is not fatal to the detention of a person. For these reasons we are of the view that in this case the delay by itself does not invalidate the detention but even otherwise it has been reasonably explained.

15. Yet another ground urged by the learned counsel is that there was delay in arresting the detenu after the detention order was passed and therefore there is no genuineness in the detention order. In the counter-affidavit it is stated that after the detention order was passed, it was sent to the Superintendent of Police, Malappuram on May 23, 1988 for immediate execution and they were passed on to Circle Inspector, Malappuram. On June 29, 1988, it was reported that the Circle Inspector had made due enquiries but the detenu could not be apprehended. Thereupon a special squad was deputed as per the directions of the Superintendent of Police and thereafter he was detained on August 6, 1988. It is further submitted in the counter-affidavit that the delay in execution of the order is caused due to detenu's deliberate attempt to make himself scarce. That apart there is no decision where a court has gone to the extent of holding that a mere delay in arresting the accused renders the detention invalid. In the instant case, the delay, if at all, is only about 2 1/2 months and the explanation offered for the delay is reasonable. The learned counsel, however, relied on *Abdul Rahman case* ((1989) 4 SCC 741 : 1990 SCC (Cri) 76). In that case the detention order was passed on October 7, 1987 and the detenu was arrested on January 18, 1988. The court found that there was no reasonable explanation for the delay in the counter-affidavit at all. This ground was taken into consideration along with the other important grounds in quashing the detention. In *S. K. Serajul v. State of West Bengal* ((1975) 2 SCC 78 : 1975 SCC (Cri) 425) it is observed that : (SCC head note)

"There was delay, both at the stage of passing the order of detention and in arresting him, and this delay, unless satisfactorily explained, would throw considerable doubt on the genuineness of the subjective satisfaction ...

But this must not be misunderstood to mean that whenever there is delay in making an order of detention or in arresting the detenu pursuant to the order of detention, the subjective satisfaction of the detaining authority must be held to be not genuine or colourable. Each case must depend on its own peculiar facts and circumstances. The detaining authority may have a reasonable explanation for the delay and that might be sufficient to dispel the inference that its satisfaction was not genuine."

It can therefore be seen that on the mere delay in arresting the detenu pursuant to the order of detention the subjective satisfaction of the detaining authority cannot be held to be not genuine. Each case depends on its own facts and circumstances. The court has to see whether the delay is

explained reasonably. As mentioned above, in the instant case, we are satisfied with the explanation for the delay in arresting the detenu. Therefore this contention is also liable to be rejected. For all the abovementioned reasons, the appeal is dismissed.

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