

MANU/SC/0292/2013

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IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 520 of 2013 (Arising out of Special Leave Petition (Crl.) No. 1359 of 2013)

Decided On: 02.04.2013

Appellants: **Abdul Nasar Adam Ismail through Abdul Basheer Adam Ismail**
Vs.
Respondent: **The State of Maharashtra and Ors.**

Hon'ble Judges/Coram:

T.S. Thakur and Ranjana Prakash Desai, JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: K.K. Mani and Abhishek Krishnan, Adv.

For Respondents/Defendant: Arun R. Pednekar, Sanjay V. Kharde and Asha Gopalan Nair, Adv.

Case Note:

Customs - Detention - Challenge against thereto - Section 108 of Customs Act, 1962; Article 22 (5) of Constitution of India, 1950 - Order of detention passed by Customs Authorities directing Petitioner's detention with a view to preventing him in future from smuggling goods - Whether delay by Customs Authority vitiated order of detention?

Held, it was observed by Apex Court in present case that Article 22 (5) of Constitution casts a legal obligation on the Government to consider detenu's representation as early as possible. Though, no time limit is prescribed for disposal of representation, constitutional imperative is that, it must be disposed of as soon as possible. There should be no supine indifference, slackness or callous attitude. Any unexplained delay would be a breach of constitutional imperative and it would render continued detention of detenu illegal. That does not, however, mean that every day's delay in dealing with the representation of the detenu has to be explained. Explanation offered must be reasonable indicating that there was no slackness or indifference. Though, delay itself is not fatal, the delay which remains unexplained becomes unreasonable. Delay in transmitting representation to Detaining Authority by jail authority was not explained. There was no explanation for inaction on part of Superintendent of Jail. Superintendent of Jail had not filed any affidavit explaining delay. Therefore, delay, rendered continued detention of detenu, illegal. Delay in considering representation did not vitiate order of detention itself. Moreover as was laid down in case of Union of India v. Harish Kumar, wherein present Court held that, detention order passed at satisfaction of Detaining Authority on basis of material available in no manner gets

vitiated for reason of non-consideration of representation made by the detenu to Central Government. Therefore it was held that initial order of detention was not rendered void ab initio. Hence , order of detention was valid. However, on account of delay in disposal of representation of detenu by State Government, continued detention of detenu was rendered illegal. Detenu, was directed to be released from detention forthwith if he was not already released from detention and was not required in any other case. Appeal disposed off.

Case Category:

CRIMINAL MATTERS - CRIMINAL MATTERS RELATING TO PREVENTIVE DETENT.
TADA/POTA AND NATIONAL SECURITY - COFEPOSA - SAFEMA

JUDGMENT

Ranjana Prakash Desai, J.

1. Leave granted.

2. In this appeal, by special leave, the Appellant has challenged judgment and order dated 23/01/2013 passed by the Division Bench of the Bombay High Court dismissing the writ petition filed by him challenging order of detention dated 16/4/2012 issued by the detaining authority i.e. the Principal Secretary (Appeals and Security), Government of Maharashtra, Home Department under the provisions of Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "**the said Act**"). The order of detention directed his detention with a view to preventing him in future from smuggling goods.

3. From the grounds of detention, it appears to be the case of detaining authority that on 12/8/2011, the Appellant Abdul Nasar Adam Ismail ("**detenu** for convenience) arrived from Dubai by Air India flight No. AI-984. He was carrying one trolley hand bag. After he was cleared through green channel, he was stopped by the Assistant Commissioner of Customs on duty. When his personal search was conducted, it was noticed that he had concealed two packets in his undergarments near his groin area and two packets under the knee caps worn on calves. On removal of his pants, four plastic packets wrapped with cello tape, which were kept inside his cycling shorts and knee caps worn by him on his calves were recovered. Detailed examination of these four packets resulted in recovery of 3086 gms. of 22 kt. and 1004 gms. of 18 kt. gold chains. The total seized gold was valued at Rs. 95,35,932/-. The detenu's statements under Section 108 of the Customs Act, 1962 were recorded. On perusal of the proposal and accompanying documents sent by the sponsoring authority, the detaining authority passed the aforementioned detention order.

4. We have heard, at some length, Mr. K.K. Mani, learned Counsel appearing for the detenu. He assailed the detention order on two counts. Firstly, he contended that the detenu through his lawyer submitted his representation dated 23/6/2012 to the jail authority for forwarding it to the State Government. The said representation was rejected by the State Government and the rejection was communicated to the detenu by the Under Secretary to the Government of Maharashtra vide letter dated 24/7/2012. Counsel submitted that thus there is an inordinate delay in considering the representation of the detenu which has violated his right under Article 22(5) of the Constitution of India. Counsel submitted that there is delay at every stage, which indicates the casual approach of the State Government. So far as unexplained delay in transmitting the representation to the State Government by the jail authority is

concerned, he relied on the judgments of this Court in **Rattan Singh etc. v. State of Punjab and Ors.** MANU/SC/0696/1981 : (1981) 4 SCC 481, **Aslam Ahmed Zahire Ahmed Shaik v. Union of India and Ors.** MANU/SC/0037/1989 : (1989) 3 SCC 277 and **B. Alamelu v. State of Tamil Nadu and Ors.** MANU/SC/0109/1995 : (1995) 1 SCC 306. Counsel submitted that in a long line of judgments, remissness or casual approach shown by the authorities in considering the representation of the detenu is severely criticized by this Court because it breaches the mandate of Article 22(5) of the Constitution of India. In such a situation, the order of detention is liable to be set aside. In this connection, he relied on judgments of this Court in **Smt. Khatoon Begum etc. etc. v. Union of India and Ors.** MANU/SC/0086/1981 : (1981) 2 SCC 480, **Harish Pahwa v. State of U.P. and Ors.** MANU/SC/0147/1981 : (1981) 2 SCC 710, **K.M. Abdulla Kunhi and B.L. Abdul Khader v. Union of India and Ors.** MANU/SC/0511/1991 : (1991) 1 SCC 476, **Kundanbhai Dulabhai Shaikh etc. v. Distt. Magistrate, Ahmedabad and Ors. etc.** MANU/SC/0783/1996 : (1996) 3 SCC 194, **Venmathi Selvam (Mrs.) v. State of Tamil Nadu and Anr.** MANU/SC/0398/1998 : 1998 (5) SCC 510, **Rajammal v. State of Tamil Nadu and Anr.** MANU/SC/0789/1998 : (1999) 1 SCC 417, **Harshala Santosh Patil v. State of Maharashtra and Ors.** (2006) 12 SCC 211, **Pebam Ningol Mikoi Devi v. State of Manipur and Ors.** MANU/SC/0758/2010 : (2010) 9 SCC 618 and **Ummu Sabeena v. State of Kerala and Ors.** MANU/SC/1367/2011 : (2011) 10 SCC 781. Counsel submitted that the gravity of offence is irrelevant in preventive detention matters. Preventive detention is a serious inroad on the liberty of a person. The procedural safeguards are the only protection available to him and, therefore, their strict compliance is necessary. In this connection, counsel relied on the judgments of this Court in **Smt. Icchu Devi Choraria v. Union of India and Ors.** MANU/SC/0086/1980 : (1980) 4 SCC 531, **Kamleshkumar Ishwardas Patel etc. etc. v. Union of India and Ors.** MANU/SC/0732/1995 : (1995) 4 SCC 51, **Kundanbhai Dulabhai Shaikh** (supra) and **Rekha v. State of Tamil Nadu** MANU/SC/0366/2011 : (2011) 5 SCC 244.

5. So far as the second point urged by the counsel viz. that there is no independent consideration of the representation by the detaining authority is concerned, we must mention that this point was not raised in the petition nor urged before the High Court. It is not even raised in the present appeal. Ordinarily, we would not have allowed the counsel to raise any point in this Court, which was not urged before the High Court. However, we are mindful of the decision of this Court in **Mohinuddin @ Moin Master v. District Magistrate, Beed and Ors.** MANU/SC/0121/1987 : (1987) 4 SCC 58, where this Court has held that the habeas corpus petition cannot be dismissed on the ground of imperfect pleadings. We have, therefore, allowed learned Counsel to canvass this point. In support of his submission that the detention order is liable to be set aside if the detaining authority does not consider the detenu's representation independently, counsel relied on the judgments of this Court in **K.M. Abdulla Kunhi (supra), Kamleshkumar Ishwardas Patel, Venmathi Selvam** (supra) and **Harshala Santosh Patil** (supra). Counsel submitted that in the circumstances, this Court should set aside the impugned judgment and quash the order of detention dated 16/04/2012.

6. We must make it clear that these were the only points urged by learned Counsel for the detenu in this Court. While closing the hearing, we directed learned Counsel to submit a list of authorities on the above points urged by him. Learned Counsel for the State was to submit his reply to the above points. We are surprised to note that in the note submitted by learned Counsel for the detenu, he has cited four decisions of this Court under the caption "New Points". These points are not formulated. Thus,

an opportunity has been denied to learned Counsel for the State to reply to those new points. We are also at a loss to understand which are those 'New Points'. We are unhappy about this conduct. But, in any case, as already noted, since we are dealing with a preventive detention order, we would look into those four decisions.

7. Mr. Arun R. Pednekar, learned Counsel for the State of Maharashtra, on the other hand, submitted that the representation has been considered with utmost promptitude and the explanation offered by the State is reasonable and satisfactory. Counsel submitted that if the delay is properly explained, there is no breach of the constitutional imperative. If there is no indifference or slackness shown by the State Government, the order of detention cannot be set aside on the ground of delay in considering the representation. In this connection, he relied on judgments of the Constitution Bench in **K.M. Abdulla Kunhi** (supra) and **Sayed Abdul Ala v. Union of India** MANU/SC/7977/2007 : (2007) 15 SCC 208. Counsel submitted that in any event if this Court comes to the conclusion that there is unexplained delay in considering the representation of the detenu, the order of detention cannot be set aside on that ground. Only the continued detention becomes invalid. In this connection, he relied on judgments of this Court **Union of India v. Harish Kumar** MANU/SC/1372/2007 : (2008) 1 SCC 195 and **Union of India v. Manish Bahal alias Nishu** MANU/SC/0356/2001 : (2001) 6 SCC 36. So far as the submission that the representation was not considered independently by the detaining authority is concerned, counsel submitted that no such ground was raised before the High Court nor was it taken in the petition and, therefore, the detenu should not be allowed to raise it at this stage. Counsel submitted that in any case, the affidavit of the detaining authority clearly establishes that there is independent consideration of the representation by the detaining authority. The appeal, therefore, deserves to be dismissed.

8. At the outset, we must note that on a query made by this Court as to whether the detenu wants to press this appeal in case the detenu is already released from detention, counsel for the detenu submitted that he has instructions to press the appeal because if the detention order is set aside by this Court, the proceedings initiated against the detenu under the provisions of the Smugglers and Foreign Exchange Manipulators Act, 1976 will automatically lapse. We, therefore, proceed to deal with his submissions.

9. Learned Counsel urged that the gravity of the offence is irrelevant in a preventive detention matter. We entirely agree with this submission and, hence, it is not necessary to refer to the judgments cited by him on this point.

10. We shall first deal with the submission that the detaining authority has not considered the detenu's representation independently. As we have already noted, this point was not raised in the petition and admittedly, not urged before the High Court. Whether a representation is considered by the detaining authority independently or not is for the detaining authority to say on affidavit. This fact is within the exclusive personal knowledge of the detaining authority. Had this point been raised in the writ petition, the detaining authority would have dealt with it in her affidavit. In the circumstances, if there is no categorical statement in the affidavit of the detaining authority that she had independently considered the representation, she cannot be faulted for it. No inference can be drawn that the detaining authority did not consider the representation independently. In the affidavit, she has stated that the representation was processed through the concerned Assistant, the Under Secretary and the Deputy Secretary and then placed before her. She rejected it on 24/7/2012.

No objection can be taken to this procedure unless there is any slackness shown in processing the representation. Here the entire procedure was completed within four days. We have seen the record. The concerned Assistant, the Under Secretary and the Deputy Secretary have merely put their signatures on the file. They have expressed no opinion. Therefore, the submission that the detaining authority has not considered the representation independently and she could have been swayed by the endorsements made by the subordinate officers is without any basis. It is necessary to note here that this point is not raised even in the present appeal. Had it been raised, we would have called upon the detaining authority to file affidavit in this Court. In view of the above, we reject this submission.

11. We shall now deal with the judgments mentioned in the Note under the caption "New Points". So far as **Mohinuddin** is concerned, we have already discussed this judgment. It is, therefore, not necessary to refer to it again. So far as **Harish Pahwa** is concerned, we find that there is no new point discussed in this judgment. It also states that the representation of the detenu must be dealt with continuously until the final decision is taken and communicated to the detenu. The second judgment is **Baby Devassy Chully @ Bobby v. Union of India and Ors.** MANU/SC/0851/2012 : 2012 (10) SCALE 176. In this case, this Court has stated that if a person is in custody and, there is no imminent possibility of his being released, the rule is that power of preventive detention should not be exercised. In this case, the detenu was released on bail on 20/8/2011 and the detention order was passed on 16/4/2012. Thus, when the detention order was passed the detenu was not in custody. Therefore, this judgment has no application to the present case. The fourth judgment, which is stated to contain a new point, is **Saeed Zakir Hussain Malik v. State of Maharashtra** MANU/SC/0647/2012 : (2012) 8 SCC 233. In that case, the detention order was set aside on the ground of delay in passing of the detention order and delay in execution of the detention order. We have carefully perused the affidavit of the detaining authority. The detaining authority has stated what steps were taken and how the proposal submitted by the sponsoring authority was processed till the detention order was passed. The sponsoring authority has also filed affidavit explaining steps taken by it till the proposal was submitted. The High Court has rightly held that the said explanation is satisfactory. In this connection, reliance placed by the High Court on the judgment of this Court in **Rajendrakumar Natvarlal Shah v. State of Gujarat** MANU/SC/0393/1988 : (1988) 3 SCC 153 is apt. We deem it appropriate to quote the relevant paragraph.

10. *Viewed from this perspective, we wish to emphasise and make it clear for the guidance of the different High Courts that a distinction must be drawn between the delay in making of an order of detention under a law relating to preventive detention like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards of Article 22(5) of the Constitution. It has been laid down by this Court in a series of decisions that the rule as to unexplained delay in taking action is not inflexible. Quite obviously, in cases of mere delay in making of an order of detention under a law like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering who, owing to their large resources and influence have been posing a serious threat to the economy and thereby to the security of the nation, the courts should not merely on account of delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference that there was no*

*sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the court finds that the grounds are "stale" or illusory or that there is no real nexus between the grounds and the impugned order of detention. The decisions to the contrary by the Delhi High Court in **Anil Kumar Bhasin v. Union of India and Ors.** Crl. W. No. 410/86 dated 2.2.1987, **Bhupinder Singh v. Union of India and Ors.** Crl. W. No. 375/86 dated 11.12.1986, **Surinder Pal Singh v. M.L. Wadhawan and Ors.** Crl. W. No. 444/86 dated 9.3.1987 and **Ramesh Lal v. Delhi Administration** Crl. W. No. 43/84 dated 16.4.1984 and other cases taking the same view do not lay down good law and are accordingly overruled.*

In light of the above observations of this Court in our opinion, the order of detention cannot be quashed on the ground that there is delay in issuance of the detention order. So far as delay in execution of the detention order is concerned, it appears from the affidavit of the detaining authority that the detenu is a resident of Mangalore in the State of Karnataka. The affidavit of Ravindra Kumar Das, Deputy Commissioner of Customs, COFEPOSA Cell, CSI Airport, Mumbai, indicates that because the detenu was a resident of Mangalore in the State of Karnataka, the order of detention, grounds of detention and the accompanying documents were forwarded to the State of Karnataka and the order of detention, therefore, could be served on the detenu only on 10/5/2012. In the peculiar facts of this case, in our opinion, the High Court has rightly rejected this submission. We endorse the High Court's view on this point.

12. We shall now turn to the submission that there is delay in disposal of the detenu's representation by the State Government. Several judgments have been cited by learned Counsel for the Appellant. It is not necessary to refer to all of them because they reiterate the same principles. We may Begin with the observations of this court in Francis Coralie Mullin v. W.C. Khambra MANU/SC/0260/1980 : AIR 1980 SC 849. The relevant portion of the said judgement reads thus:

"The time imperative can never be absolute or obsessive". In L.M.S Umma Salee V. B.B. Gujral(1981) 3 SSC 317, it was held: The occasional observations made by this Court that each day's delay in dealing with the representation must be adequately explained are meant to emphasise the expedition with which the representation must be considered and not that it is a magical formula, the slightest breach of which must result in the release of the detenu. Law deals with the facts of life. In law, as in life, there are no invariable absolutes. Neither life nor law can be reduced to mere but despotic formulae.

13. It is also necessary to refer to the observations of the Constitution Bench of this Court in **K.M. Abdulla Kunhi** which read thus:

12. Clause (5) of Article 22 therefore, casts a legal obligation on the government to consider the representation as early as possible. It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in Clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of

each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal.

14. The principles which have been laid down by the Constitution Bench and the other judgments which we have referred to earlier can be summarized. Article 22(5) of the Constitution casts a legal obligation on the Government to consider the detenu's representation as early as possible. Though no time limit is prescribed for disposal of the representation, the constitutional imperative is that it must be disposed of as soon as possible. There should be no supine indifference, slackness or callous attitude. Any unexplained delay would be a breach of constitutional imperative and it would render the continued detention of the detenu illegal. That does not, however, mean that every day's delay in dealing with the representation of the detenu has to be explained. The explanation offered must be reasonable indicating that there was no slackness or indifference. Though the delay itself is not fatal, the delay which remains unexplained becomes unreasonable. The court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or the range of delay, but how it is explained by the authority concerned. If the inter departmental consultative procedures are such that the delay becomes inevitable, such procedures will contravene the constitutional mandate. Any authority obliged to make order of detention should adopt procedure calculated towards expeditious consideration of the representation. The representation must be taken up for consideration as soon as such representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu.

15. In light of above principles, it is now necessary to see how the State Government has disposed of the detenu's representation in this case. In this connection, relevant dates are available from the affidavit of Shivaji S. Patankar, Deputy Secretary to the Government of Maharashtra, Home Department (Special), affidavit of Medha Gadgil, Principal Secretary (Appeals & Security), Government of Maharashtra, Home Department, Mantralaya, Mumbai and affidavit of Ravindra Kumar Das, Deputy Commissioner of Customs, COFEPOSA Cell, CSI Airport, Mumbai. The High Court has correctly located the important dates from the three affidavits. In our opinion, the detaining authority and the sponsoring authority have properly explained the time lag between 6/7/2012 i.e. the date when the representation was received by the detaining authority and the date of communication of rejection to the detenu i.e. on 30/7/2012. The explanation offered by them is reasonable and acceptable. We find that the representation was taken up for consideration as soon as it was received and dealt with continuously until a final decision was taken and communicated to the detenu. Undoubtedly, time was taken to obtain para-wise comments from the sponsoring authority. But, in **Kamarunnissa v. Union of India** MANU/SC/0376/1991 : (1991) 1 SCC 128, this Court has held that seeking views of the sponsoring authority cannot be said to be a futile exercise. Thus, the time lag between receipt of the representation till its consideration and communication of rejection to the detenu is properly explained.

16. We, however, find that the delay in transmitting the representation to the detaining authority by the jail authority is not explained. If the representation was received by the Superintendent of Jail on 23/6/2012, he should have immediately sent it to the detaining authority. The detaining authority has received it on 6/7/2012. The time lag between 23/6/2012 and 6/7/2012 is not explained at all. It is only stated by the detaining authority that 23/6/2012 and 1/7/2012 were public holidays. There is no explanation for the inaction on the part of the Superintendent of Jail, Nashik Road Central Prison, Nashik. He has not cared to file any affidavit explaining why the representation which was received by him on 23/6/2012 was not sent to the detaining authority immediately. In **Pebam Ningol Mikoi Devi**, seven days' unexplained delay in forwarding the representation to the Central Government was held to be fatal. In **Aslam Ahmed Zahire Ahmed Shaik**, the detenu had handed over his representation to the Superintendent of Jail on 16/6/1998 for onward transmission to the Central Government. It was kept unattended for a period of seven days and, as a result, it reached the Government 11 days' after it was handed over to the Superintendent of Jail. The Superintendent of Jail had not explained the delay. Relying on **Vijay Kumar v. State of J. and K.** MANU/SC/0127/1982 : (1982) 2 SCC 43, the continued detention of the detenu was set aside. At the cost of repetition, we must note that in this case, the Superintendent of Jail has not filed any affidavit explaining delay. Therefore, this delay, in our opinion renders continued detention of the detenu, illegal.

17. We would like to make it clear that the delay in disposal of the representation of the detenu has vitiated only the continued detention of the detenu and not the detention order. In **Meena Jayendra Thakur v. Union of India** MANU/SC/0604/1999 : (1999) 8 SCC 177, this Court was considering a case where the detenu was detained under the provisions of the said Act. This Court held that if the detaining authority on the basis of the materials before him did arrive at his satisfaction with regard to the necessity for passing an order of detention and the order is passed thereafter, the same cannot be held to be void because of a subsequent infraction of the detenu's right or of non-compliance with the procedure prescribed under law because that does not get into the satisfaction of the detaining authority while making an order of detention under Section 3(1) of the said Act. It does not affect the validity of the order of detention issued under Section 3(1) of the said Act. Similar view has been taken by this Court in **Sayed Abdul Ala**. In that case, this Court was concerned with an order of detention issued under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. It was argued that there was delay in considering the representation of the detenu. Relying on **Meena Jayendra Thakur**, this Court expressed that even if it is to be assumed that there was some delay in considering the representation, the same would not vitiate the original order of detention. By reason of the delay, only further detention of the detenu will become illegal. The delay in considering the representation does not vitiate the order of detention itself. In **Harish Kumar**, this Court was again considering an order of detention issued under the provisions of the said Act. This Court reiterated the same view and held that the detention order passed at the satisfaction of the detaining authority on the basis of the material available in no manner gets vitiated for the reason of non-consideration of the representation made by the detenu to the Central Government. It was held that initial order of detention was not rendered void ab initio. It may be noted that even the Constitution Bench of this Court in **K.M. Abdulla Kunhi**, held that any unexplained delay in disposal of representation of the detenu would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal and set aside the continued detention of the detenu.

18. In view of this clear legal position, we hold that the order of detention dated 16/4/2012 is valid. However, on account of delay in disposal of the representation of the detenu by the State Government, the continued detention of the detenu is rendered illegal. We, therefore, direct that the detenu - Abdul Nasar Adam Ismail be released from detention forthwith if he is not already released from detention and he is not required in any other case. The appeal is disposed of accordingly.

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