

Abdu Salam @ Thiyyan S/O Thiyyan ... vs Union Of India And Others on 17 April, 1990

Equivalent citations: 1990 AIR 1446, 1990 SCR (2) 517, AIR 1990 SUPREME COURT 1446, 1990 (3) SCC 15, 1990 (3) JT 74, 1990 CRIAPPR(SC) 189, 1990 SCC(CRI) 451, (1991) SC CR R 146, (1990) 2 MAHLR 372, (1990) 2 ALLCRILR 205, (1990) 3 CRIMES 82, (1995) 58 ECR 665, (1990) MAD LJ(CRI) 571, (1991) 1 CHANDCRIC 146

Author: S.R. Pandian

Bench: S.R. Pandian

PETITIONER:

ABDU SALAM @ THIYYAN S/O THIYYAN MOHAMMAD, DETENU NO. 962, GE

Vs.

RESPONDENT:

UNION OF INDIA AND OTHERS

DATE OF JUDGMENT 17/04/1990

BENCH:

REDDY, K. JAYACHANDRA (J)

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REDDY, K. JAYACHANDRA (J)

PANDIAN, S.R. (J)

CITATION:

1990 AIR 1446	1990 SCR (2) 517
1990 SCC (3) 15	JT 1990 (3) 74
1990 SCALE (1) 31	

ACT:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act--Section 3(D--Detention order--Mere delay in arresting detenu--Whether casts doubt on the genuineness of the subjective satisfaction of the detaining authority--Delay in making the detention order and disposal of representation by the Central Government whether fatal.

HEADNOTE:

The appellant after his Haj pilgrimage had been to Jeddah and from Jeddah he landed in Bombay on 15.9.1987.

Thereafter he boarded a bus to go to his native place in Kerala. On 17.9.1987, the Custom authorities intercepted the bus wherein the petitioner was travelling and in the presence of the panch witnesses, searched his person and the chappals worn by him. On opening the chappals about 13 gold ingots with foreign markings were found and they were duly recovered. The appellant confessed that he was introduced to a person who promised to give him remuneration for carrying the gold to India and that is how he brought those gold biscuits. The detaining authority passed the detention order against the appellant on 21.9.1988, and grounds of detention were served on him within time and he was informed that if he so desired he could make a representation to the Advisory Board, and also that he could make a representation to the detaining authority or the Central Government. The appellant challenged his detention by means of a writ petition in the High Court and the same having been dismissed, he has filed this appeal after obtaining special leave. The appellant urged: (i) that the delay in making the detention order and the disposal of his representation by the Central Government are fatal and violative of Article 22(5) of the Constitution of India; and (ii) that the delay in arresting him pursuant to the detention order casts a doubt on the genuineness of the subjective satisfaction of the detaining authority.

Dismissing the appeal, this Court,

HELD: Delay ipso facto in passing an order of detention after an

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incident is not fatal to the detention of a person. In this case the delay by itself does not invalidate the detention but even otherwise it has been reasonably explained. [524G]

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" '. [523C]

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. In the instant case, this Court is satisfied with the explanation for the delay in arresting the detenu. [525G-H]

Khudiram Das v. The State of West Bengal & Ors., [1975] 2 S.C.C. 81; Tara Chand v. State of Rajasthan, [1980] 2 S.C.C. 321; Shyam Ambalal Siroya v. Union of India & Ors., [1980] 2 S.C.R. 1078; Sabir Ahmed v. Union of India & Ors., [1980] 3 SCR 738; Rama Dhondu Borade v. V.K. Saraf, Commissioner of Police & Ors., [1989] 3 S.C.C. 173; T.A. Abdul Rahman v. State of Kerala & Ors., [1989] 4 S.C.C. 741; Lakshman Khatik v. The State of West Bengal, [1974] 4 S.C.C. 1; Rajendrakumar Natvarlal Shah v. State of Gujarat & Ors., [1988] 3 S.C.C. 153; Yogendra Murari v. State of UP., [1988]

4 S.C.C. 558; Hemlata Kantilal Shah v. State of Maharashtra, [1981] 4 S.C.C. 647 and SK. Serajul v. State of West Bengal, [1975] 2 S.C.C. 7a, referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 271 of 1990.

From the Judgment and Order dated 16.1.1989 of the Delhi High Court in Criminal Writ No. 34 of 1989.

K.V. Vishwanathan and S.R. Setia for the Appellant. T.T. Kunhikanna, Udai Lalit and P. Parmeshwaran for the Respondents.

The Judgment of the Court was delivered by K. JAYACHANDRA REDDY, J. Leave granted.

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, Malapuram District in Kerala and had been to Jeddah after his Haj pilgrimage and from Jeddah he landed in Bombay on 15.9.87. Then he started by a bus to go to his native place. On 17.9.87 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 marking 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 21.9.88 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 above mentioned 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.

It is submitted that the representation was made on 27.9.88 to the Central Government and it was disposed of on 2.11.88. 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 17.9.87, the detention order was passed on 21.5.88 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 6.8.88 though passed on 21.5.88 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. In the counter-affidavit it is stated that the Collector of Customs furnished proposals for the detention of the appellant on 24.3.1988 and the detention order was passed on 21.5.1988 and the appellant was detained on 6.8.1988. The appellant made a representation to the detaining authority on 27.9.1988 and it was rejected by the State Government on 1.10.1988 and the Central Government rejected the same on 2.11.1988. 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.

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.

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 two-fold, 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.

Article 22(5) itself does not say 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 the 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. The State of West Bengal and Others*, [1975] 2 SCC 81 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. 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.

In *Tara Chand v. The State of Rajasthan*, [1980] 2 SCC 321, this Court held that:

"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 Article 22(5) so as to render the detention unconstitutional and void."

In *Shyam Ambalal Siroya v. Union of India and Ors.*, [1980] 2 SCR 1078 it is held that:

"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 and Ors.*, [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.

In *Sabir Ahmed's* case as well as in *Shyam Ambalal Siroya's* case 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). In *Rama Dhondurao Borade v. V.K. Saraf, Commissioner of Police and Others*, [1989] 3 SCC 173 the detenu made a representation to the Central Government on 26.9.1988 and the decision of the Central Government rejecting the representation was communicated to the appellant on 31.10.1988. 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 and Others*, [1989] 4 SCC 741 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.

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 27.9.88 and disposed of by the Central Government on 2.11.88, 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 27.9.88 was received in the COFEPOSA Section of the Ministry of Finance on 10.10.88 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 25.10.88 were received in the COFEPOSA Section on 27.10.88 and that the Additional Secretary examined them and with his comments, they were forwarded to the Minister of State for Revenue on 31.10.88, since 29th and 30th October, 1988 were holidays. The Minister of State for Revenue with this comments forwarded the representation on the same day i.e. 31.10.88 to the Finance Minister. The Finance Minister considered and rejected the representation on 1.11.88 and the file was received in the Office on 2.11.88 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. The next submission of the learned counsel is that the date of search was 17.9.87 and the detention order was passed on 21.5.88 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. The State of West Bengal*, [1974] 4 SCC 1 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 and Others*, [1988] 3 SCC 153, 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's case* seizure of the gold biscuits was on 30.11.86 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.

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 1.2.88 and they were processed in the Office and the show-cause notice under the Customs Act was issued on 9.2.88 and the proposals were sent for COFEPOSA action on 24.3.88 and they were received by the State Government on 2.4.88. The matter was considered by the Screening Committee which met on 28.4.88 and thereafter submitted the proposals to the detaining authority. On 2.5.88 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 2.5.88. He was reminded

on 7.5.88 and 12.5.88. His reply was received on 16.5.88 and thereafter the order was passed on 21.5.88. 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 558, it is held that:

"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 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. 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 23.5.88 for immediate execution and they were passed on to Circle Inspector, Malappuram. On 29.6.88, 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 6.8.88. 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's* case. In that case the detention order was passed on 7.10.87 and the detenu was arrested on 18.1.88. 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 *SK. Serajul v. State of West Bengal*, [1975] 2 SCC 78 it is observed that:

"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 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 above-mentioned reasons, the appeal is dismissed.

Y. Lal

Appeal dismissed.