

Kundanbhai Dulabhai Shaikh vs Distt. Magistrate, Ahmedabad And Ors on 13 February, 1996

Equivalent citations: (1996) 1 BLJ 675, AIR 1996 SUPREME COURT 2998, 1996 AIR SCW 1281, 1996 CRILR(SC MAH GUJ) 422, (1996) 2 SCR 479 (SC), 1996 UP CRIR 405, 1996 (2) BLJR 914, (1996) 2 JT 532 (SC), 1996 (3) SCC 194, 1996 CALCRILR 265, 1996 SCC(CRI) 470, 1996 CRILR(SC&MP) 422, 1996 BLJR 2 914, (1996) 1 CURCRIR 199, (1996) 2 MADLW(CRI) 542, (1996) 2 RECCRIR 608, (1996) 1 EFR 608, (1996) 3 GUJ LR 314, (1996) 20 ALLCRIR 409, (1996) 33 ALLCRIC 319, (1996) 2 ALL WC 781, (1996) 2 CHANDCRIC 21, (1996) 1 ALLCRILR 579, (1996) SC CR R 493

Author: S. Saghir Ahmad

Bench: Kuldip Singh, S. Saghir Ahmad

CASE NO.:

Writ Petition (crl.) 491 of 1995

PETITIONER:

KUNDANBHAI DULABHAI SHAIKH

RESPONDENT:

DISTT. MAGISTRATE, AHMEDABAD AND ORS.

DATE OF JUDGMENT: 13/02/1996

BENCH:

KULDIP SINGH & S. SAGHIR AHMAD

JUDGMENT:

JUDGMENT 1996 (2) SCR 479 The Judgment of the Court was delivered by S. SAGHIR AHMAD, J. These two petitions filed under Article 32 of the Constitution of India for writs in the nature of habeas corpus were allowed by us a short order on 21st November, 1995. We now proceed to give our reasons.

2. Kundanbahi Dulabhai Shaikh, petitioner in Writ Petition (Crl.) No. 491 of 1995 and Rameshchandra Somchand Shah, petitioner in Writ Petition (Crl.) No. 492 of 1995, were detained in jail in pursuance of the orders dated 16th August, 1995, passed by the District Magistrate, Ahmedbad and District Magistrate, Surat, respectively, under section 3(2) of the Prevention of Black Marketing & Maintenance of Supplies of Essential Commodities Act, 1980 (For short, "Act"). These orders are contained in Annexure 'A' to the writ petition in both the cases. The grounds of detention were supplied separately, though on the same date, and they are contained in Annexure

'B'.

3. Petitioner in Writ Petition (Crl.) No. 491/95 is the owner of a godown where 4 barrels containing 800 litres of kerosene meant for distribution to the public under the Public Distribution Scheme were found loaded on an auto-rickshaw. On enquiry made by the staff of the supply Department, it was revealed that those barrels brought from Shreeji Petroleum Agency, Sarkhej, at the instance of Shri Ishamilbhai who was in possession of the godown and that petitioner was the owner of the auto-rickshaw, Ishamilbhai, on being questioned, have out that kerosene in 4 barrels was loaded at his instance and that he was the tenant of the godown. The grounds contain various other details. Which need not be mentioned here as those details are not relevant to the question on which we intend to dispose of this petition,

4. Petitioner in Writ Petition (Crl.) No. 492/95 carries on business in government foodgrains in a fair price shop. He was to sell the wheat at the concessional rate of Rs. per kg. but when his shop as also the registers and documents contained therein were inspected by the staff of the supply Department, it was found that he had committed serious irregularities in the sale of wheat. Consequently, he was detained under Section 3(2) of the Act in order to prevent him from carrying on his activities prejudicial to the maintenance of supplies of essential commodities.

5. In both these petitions, the principal contention raised by the counsel for the petitioners is that he representation made by the petitioners against the order of detention were not dealt with expeditiously and were not disposed of by the State Government at the earliest.

6. The opposite parties have filed counter-affidavits in which they have denied the allegations made by the petitioners and have set out in detail as to how their representations were dealt with. The reply filed by the State Govt. in Writ Petition (Crl.) No. 491/95, so far as it relates to the disposal of representation, is, as under :

"3. In fact, the above said representation dated 23.8.1995 made by the wife of the detenu Smt. Madinabibi Shaikh was addressed to Chief Minister, Gujarat State, which was received by Chief Minister's office on 25.8.1995, and was sent to the office of Secretary, Food and Civil Supplies Department which was received by the office of the secretary, Food and Civil Supplies Department on 29.8.1995. The said representation thereafter was sent to the Special Branch of Food and Civil Supplies Department. It was received by the concerned Branch, i.e. Special Branch on 1.9.1995. The Special Branch put up a note on the said representation on 6.9.1995, as there were around 40 to 50 representations which were pending for disposal during the said period. They were taken up chronologically. Therefore, the said representation came to be put up for disposal on 6.9.1995 as 5.9.1995 was holiday being Sunday. The file was cleared by Section Officer on 7.9.1995 and submitted by the Branch on 7.9.1995 to the Department which was cleared by Department on 7.9.1995 and was put up before the Deputy Secretary who in turn cleared it on 8.9.1995 and submitted it before the secretary who also cleared it on the same day and submitted the file before the Hon'ble Minister for Civil Supplies for his orders.

The file was cleared by the Hon'ble Minister on 12.9.1995 as 9.9.1995 and 10.9.1995 were government holidays. The Minister, Food and Civil Supplies, rejected the request of the petitioner and confirmed the detention order. The file was received back by the Special branch from the concerned Minister and by a letter dated 14.9.1995 detenu was informed about the decision taken on the said file of representation. It is, therefore, submitted from the above facts that there is no delay whatsoever in disposing the representation made by the wife of the detenu so far as the State Government is concerned,"

7. The Central Government, in its first counter affidavit, admitted that the representation dated 2.9.1995 of the petitioner against the order of detention was still pending, though it was received on 4.10.1995 along with the State Government's covering letter dated 27.9.1995. It was indicated that the State Government did not send its parwise comments in spite of the telegram dated 12.10.95 and the reminder dated 19.10.95. However, in the Additional Affidavit dated 20.11.1995, the Central Government says (through V.K. Jacob, Under Secretary in the Ministry of Civil supplies) that comments from the State Government were received on 6.11.95 and, after due consideration, the representation of the petitioner was rejected on 8.11.95.

8. The reply of the State Government with regard to the disposal of representation in Writ Petition (Crl.) No. 492/95 is as under : "That the representation of the petitioner dated 23.8.95 addressed to the Minister for Food and Civil Supplies (Annexure 'D' to the writ petition) was received by the concerned Special Branch of the Food and Civil Supplies Department through the office of the Minister on 29.8.1995. The said representation was put up by the Special Branch along with the file and note on 2.9.1995. The file of the said representation was then submitted before the deponent on 5.9.1995 and the same was cleared by the deponent on the same day. That the deponent forwarded the Concerned file to the Deputy Secretary, Department of Food and Civil Supplies, The Deputy Secretary cleared this file on 6.9.1995 and submitted it before the Secretary who also cleared it on the same day, i.e. 6.9.1995. The representation was then sent to the Minister for Food and Civil Supplies on 7.9.1995 for his orders. The file was received back by the Special Branch on 8.9.1995. It is stated that the decision regarding the rejection of the representation was communicated to the detenu by a letter dated 11.9.1995.

Copies of the said representation of the petitioner were sent to the Advisory Board on 12.9.95 before its scheduled meeting to be held on 14.9.95.

A copy of the said representation was also sent to the Central Government by speed post letter dated 19.9.1995. The Central Government asked for the comments of the State Govt. regarding the said representation vide its telex dated 22.9.1995. Soon after the telex was received by the special Branch of the Department, the parwise remarks were translated in English and were sent to the Central Government by speed post letter dated 11.10.1995."

9. In this case, the Central Government has also filed a counter affidavit in which the plea of the detenu with regard to the delay in the disposal of his representation is answered as follows :

"The contents of the para are not admitted hence denied. However a representation dated 23.8.95 of the detenu forwarded by the State Government vide letter dated 19.9.95 was received in the Ministry on 21.9.95. After considering the contents of the representation of the detenu, it was felt necessary that parawise remarks of the State Government should be called for and therefore, I called for the same vide our telegram date 22.9.95. However in spite of our reminders dated 29.9.95 and 5.10.95 the same were received on 18.10.95. The Central Government therefore, examined the representation on the basis of the facts available with them which are sent by the State Government through Reports/grounds of detention through their letter dated 25.8.95. The representation was rejected on 19.10.95 as there was no specific reasons furnished by the detenu that may warrant the revocation of detention order. The decision of the Central Government was conveyed to Supdt. Central Prison, Sabarmati, Ahmedabad on 19.10.95 by telegram with direction to convey to detenu. The State Government was also informed simultaneously on the same day."

10. Article 22(5) of the Constitution of India provides as under :

"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.

11. Sub-section (1) of Section 8 of the Act, inter alia, provides as under:

"8. Grounds of order of detention to be disclosed to person affected by the order-(1) when a person is detained in pursuance of a detention order, the authority making the order shall.....

communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government."

12. The words "appropriate Government" have been defined in Section 2(a) of the Act as under :

"2(a). "appropriate Government" means, as respects a detention order made by the Central Government or by an officer of the Central Government or a person detained under such order, the Central Government, and as respects a detention order made by a State Government or by an officer of a State Government or as respects a person detained under such order, the State Government;"

13. Apart from the above, Section 1.4 of the Act provides that order of detention may be revoked either by the State Government or by the Central Government. The Central Government can revoke even those orders which have been made by the State Government. The Act also provides that within

seven days of the making of a order of detention, copy of the order as also the grounds on which the order was passed shall be sent to the Central Government.

14. From the above, it will be seen that the right to make representation against the order of detention is not only a constitutional right but a statutory right as well. Since the Constitution as also the Act specifically provide that the detenu shall be given the earliest opportunity of making a representation against the order of detention, it is implicit that there is a corresponding duty on the authorities to whom the representation is made to dispose of the representation at the earliest or else the constitutional and the statutory obligation to provide the earliest opportunity of making a representation would lose both its purpose and meaning.

15. We may, at this stage, notice a frivolous contention, raised, on behalf of the respondents that since the authorities to whom the representation can be made have not been specified in Article 22(5) of the Constitution, the right of the detenu of making a representation to the appropriate government cannot be treated to be a constitutional right. Respondents, for this purpose, have placed reliance upon the decision of this court in *John Martin v. The State of West Bengal*, AIR 1975 SC 775.

16. It will be seen that right to represent has been given not only by Article 22(5) of the Constitution but also by Section 8 of the Act, the right provided under the Act has, therefore, to be treated as an extension of the constitutional right already available to a detenu under Article 22(5). The legislature has, in fact, given effect to the constitutional right by providing in Section 8 of the Act that the detenu shall have the right of making a representation to the appropriate government. In *Amir Shad Khan v. L. Hmingtiana & Ors.*, [1991] 4 SCC 39, this Court, while considering the provisions of the conservation of foreign Exchange and Prevention of Smuggling Activities Act, 1974 observed as under.

"This clause casts a dual obligation on the Detaining Authority, namely (i) to communicate to the detenu the grounds on which the detention order has been made; and (ii) to afford to the detenu the earliest opportunity of making a representation against the detention order. Consequently the failure to communicate the grounds promptly or to afford the detenu an opportunity of making a representation against the order would clearly violate the constitutional guarantee afforded to the detenu by clause (5) of Article 22 of the Constitution. It is by virtue of this right conferred on the detenu that the Detaining Authority considers it a duty to inform the appellant-detenu of his right to make a representation to the State Government, the Central Government and the Advisory Board. The right to make a representation against the detention order thus flows from the constitutional guarantee enshrined in Article 22 (5) which casts an obligation on the authority to ensure that the detenu is afforded an earliest opportunity to exercise that right, if he so desires".

This decision was considered in *Veeramani v. State of Tamil Nadu*, [1994] 2 SC 337 and it was laid down as under :

"The right to make representation against the detention order flows from Art. 22(5). But that article does not say to whom such representation is to be made. Such a representation must be made to the authority who has power to approve, rescind or revoke the decision. To know who has such power, the provisions of the Act have to be seen. Under the T.N. Act any detention order made by the empowered officer shall cease to be in operation if not approved within 12 days. Therefore, the Act never contemplated that the detaining authority has specific power to revoke and it cannot be inferred that a representation can be made to it within the meaning of Art. 22(5). Therefore, representation to be made by the detenu, after the earlier opportunity was afforded to him, can be only to the Government which has the power to approve or to revoke."

17. These decisions are enough to reject the contention of the respondents.

18. Turning now to the main question relating to the early disposal of the representation, we may immediately observe that this Court, in a large number of cases, has already laid down the principle in clear and specific terms that the representation has to be disposed of at the earliest and if there has been any delay in the disposal of the representation, the reasons for the delay must be indicated to the court or else the unexplained delay or unsatisfactory explanation in the disposal of the representation would fatally affect the order of the detention, and in that situation, continued determination would become bad. This has been the consistent view of this Court all along from its decision in *Sk, Abdul Karim & Ors. v. State of West Bengal*, [1969] 1 SCC 433; *In re : Durga show & On.*, [1970] 3 SCC 696 :

Jayanarayan Sukul v. State of West Bengal, [1970] 1 SCC 219; *Shait Hanif v. State of West Bengal*, [1974] 1 SCC 637; *Raisuddin @ Babu Tamchi v. State of U.P. & Anr.* [1983] 4 SCC 537; *Frances Coralie Mullin v. W.C. Khambra & Ors.*, [1980] 2 SCC 275; *Mohinuddin Alias Main Master v. District Magistrate, Bead & Ors.*, [1987] 4 SCC 58; *Rama Dhondu Board v. V.K. Saraf. Commissioner of Police & Ors.*, [1989] 3 SCC 173; *Aslam Ahmed Zahire Ahmed Saik v. Union of India & Ors.*, [1989] 3 SCC 277; *Mahesh Kumar Chauhan alias Banti v. Union of India & Ors.*, [1990] 3 SCC 148, right upto its reiteration in *Gazi Khan alias Chotia v. State of Rajasthan and Anr.*, [1990] 3 SCC 459.

19. Almost all these decisions were against and considered in *State of Tamil Nadu & Anr. v. A. Vaidivel Alias Sundaravadivel*, JT (1992) 5 SC 318 and above view was reiterated, which was repeated against in *K.M. Abdulla Kunhi & B.L. Abdul Khader v. Union of India & Ors.*, [1991] 1 SCC 476 and *Julia Jose Mavli v. Union of India & Ors.*, (1992) CrL LJ. 109 (SC).

20. In *Mohitiuddin and Ram Dhondu*' cases (supra), it was provided that inordinate and unexplained delay in the disposal of representation would make the continued detention of a person, illegal and unconstitutional. In *Devi Lal Mahto v. State of Bihar & Anr.*, AIR (1982) SC 1548, the continued detention was held to have become bad on account of the indifferent attitude of the Government in not attending to the representation for about 10 days.

21. In spite of law laid down above by this Court repeatedly over the past three decades, the Executive, namely, the State Government and its officers continue to behave in their old, lethargic fashion and like all other files rusting in the secretariat for various reasons including red tapism, the representation made by a person deprived of his liberty, continue to be dealt with in the same fashion. The government and its officers will not give up their habit of maintaining a consistent attitude of lethargy. So also, this Court will not hesitate in quashing the order of detention to restore the "liberty and freedom" to the person whose detention is allowed to become bad by the government itself on account of his representation not being disposal of at the earliest.

22. In both these cases, we have to read the old story of lethargy of the State Government. In the first case, the representation dated 23.8.95 was received in the office of the Chief Minister on 25.8.95 and was ultimately disposed of on 12.9.95 and the order was communicated to the detenu on 14.9.95. During this period, the file was being processed in the government departments. It is pointed out in the counter-affidavit that the representation, on being received in the office of the Chief Minister on 25.8.95 was sent to the Secretary, Food & Civil Supplies Department, where it was received on 29.8.95. The internal movement of the file thus took four days, The representation was then sent to the Special Branch where it was received on 1.9.95. The representation was taken up by the Special Branch on 6.9.95. The inactivity in taking up the representation for six days is explained by showing in the counter-affidavit that there were about 40 to 50 representations pending for disposal and they were taken up chronologically. This indicates that the representation was placed in the queue and was not given precedence over other representation which are not said, in the counter-affidavit, to relate to detention orders. Even if they related to preventive detention, then such of those which were ready for disposal and in respect of which comments from various departments had been gathered and other formalities completed should have been disposed of immediately and should not have been kept pending on the ground of "chronological disposal" by saying that representations filed earlier by other detenues were still to be disposed of. The chronology must be broken as soon as a representation is ready for disposal.

23. Apart from the above, the representation dated 2.9.95, which was made to the Central Government could not be disposed of for want of comments from the State Government. It will be noticed that this representation was lying with the State Government from 2.9.95 to 27.9.95 and it was on that date that it was sent to the Central Government which received it on 4.10.95. The Central Government, in spite of its telegrams and reminders, was not furnished the comments by the State Government for over a month. The comments of the State Government were received by the Central Government on 6.11.95 and the representation was disposed of on 8.11.95. This again is a glaring example of the lethargy on the part of the State Government, as a result of which petitioner's representation could not be disposed of expeditiously by the Central Government with the obvious consequence that the petitioner's right under Article 22 (5) of the Constitution read with Section 8 of the Act was violated.

24. In the second case also, the representation dated 23.8.95 made by the detenu was forwarded to the Central Government by the State Government under its letter dated 19.9.95 which was received on 21.9.95 by the Central Government, which by its telegram dated 22.9.95 and reminders dated 29.9.95 and 5.10.95 called for the comments of the State Government, The State Government, true

to its colours, sent the comments on 18.10.95. The representation was rejected by the Central Government on 19.10.95. The representation thus remained lying with the State Government from 23.8.95 to 19.9.95 and when it was ultimately sent to the Central Government, the comments were not furnished by the State Government till 18.10.95. Thus, in this case also, the guarantee of early disposal of representation set out in Article 22 (5) was infringed

25. Black-marketing is a social evil. Persons found guilty of economic offences have to be dealt with a firm hand, but when it comes to fundamental rights under the Constitution, this Court, irrespective of enormity and gravity of allegations made against the detenu, has to intervene as was indicated in Mahesh Kumar Chauhan's case (supra) and in an earlier decision in Mahesh Kumar Deorah v. District Magistrate, Kamrup & Ors., AIR (1974) SC 183, in which it was observed that the gravity of the evil to the community resulting from anti-social activities cannot furnish sufficient reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the law, as normal penal laws would still be available for being invoked rather than keeping a person in detention without trial.

16. Learned Counsel for the respondents referred to us the decision of this Court in State of U.P. v. Shakeel Ahmad, [1996] 1 SCC 337 and contended that this Court ignored the delay of over 23 days in the disposal of the representation. This decision is of no help to the respondents as the necessary facts on the basis of which the Court came to the conclusion that there was no delay in the disposal of representation, have not been set out. All that has been said is that "in the facts and circumstances of this case, the delay in disposal of the representation of about 23 days also is not fatal". Moreover, the period of detention had already expired and, therefore, what was laid down therein would be of no assistance to the respondents.

27. In view of the foregoing discussion we, after having considered the arguments of the counsel on both sides, by our order dated 21st November, 1995, as aforesaid, allowed these writ petitions and have now recorded the reasons therefore.