Noor Salman Makani vs Union Of India (Jayachandra Reddy,J.) on 27 October, 1993

Equivalent citations: 1994 AIR 575, 1994 SCC (1) 381, AIR 1994 SUPREME COURT 575, (1994) 1 ORISSA LR 244, (1993) 4 CURCRIR 428, (1994) 1 EFR 207, (1994) 7 OCR 157, (1993) 3 ALLCRILR 793, 1994 SCC (CRI) 521

Author: G.N. Ray

Bench: G.N. Ray

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           PETITIONER:
NOOR SALMAN MAKANI

        Vs.

RESPONDENT:
UNION OF INDIA (Jayachandra Reddy,J.)

DATE OF JUDGMENT27/10/1993

BENCH:
REDDY, K. JAYACHANDRA (J)
BENCH:
REDDY, K. JAYACHANDRA (J)
RAY, G.N. (J)

CITATION:
 1994 AIR  575            1994 SCC  (1) 381
 JT 1993 (6)   491        1993 SCALE  (4)262


ACT:



HEADNOTE:



JUDGMENT:
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The Judgment of the Court was delivered by K. JAYACHANDRA REDDY, J.- Leave granted in SLP (Crl.) No. 1484 of 1993.

2. In both these matters, Noor Salman Makani who is detained under Section 3 of the COFEPOSA Act, 1974 ('Act' for short) is the petitioner. The petitioner is a citizen of India. On August 26, 1992 he

was travelling from Calcutta to Hong Kong by Thai International Airways Flight No. TC314. After completing the immigration formalities, he approached the Customs counter for clearance. The Customs authorities opened his briefcase and recovered huge quantities of foreign exchange of various countries, the value of which is estimated at Rs 38,06,930. On August 27, 1992 he was produced under arrest before the CJM, Barasat and his application for bail was rejected. On September 19, 1992 an order of detention dated September 18, 1992 was served on him in the jail along with the grounds of detention. On October 1, 1992 a declaration under Section 9(1) of the Act was issued and the same was served on the detenu on October 13, 1992. On October 15, 1992 the petitioner made a representation to the Central Government against the declaration but the same was rejected. On December 28, 1992 the petitioner made a representation before the Advisory Board but that was also rejected. Thereafter he filed a writ of habeas corpus and a Division Bench of the Calcutta High Court dismissed the same. As against the said order the present SLP in which leave is granted, has been filed. A separate Writ Petition (Crl.) No. 261 of 1993 questioning the declaration under Section 9(1) of the Act has also been filed stating that certain new facts have come to light which invalidate the declaration. The detention order is questioned on the ground that there was delay in considering the representation and also on the ground that the detaining authority has not duly considered the circumstance that the detenu was already in jail and has simply made a bald statement in the grounds stating that "there is possibility of the detenu being released on bail" and the same shows that there is non-application of mind.

3. From the records it appears that the representation of the detenu addressed to the Joint Secretary, COFEPOSA, New Delhi was forwarded by Dum Dum Central Jail authority under registered post on October 15, 1992 and it was received by the Ministry's Office on October 22, 1992 and it was forwarded to the Sponsoring Unit on October 23, 1992 who received it on October 26, 1992. After offering parawise comments the same was sent by speed post to the Ministry's Office on October 29, 1992 which was received by the Ministry's Office on November 2, 1992. The representation was put up before the Joint Secretary on November 3, 1992 and the same was rejected on November 4, 1992. The Finance Secretary recommended the rejection of the representation on November 5, 1992 and finally the Minister for Finance rejected the same on the same day and a memo dated November 6, 1992 was issued to the petitioner intimating him about the rejection.

4. Learned counsel appearing for the petitioner submits that the delay between October 15, 1992 and November 2, 1992 has not been satisfactorily explained and hence is fatal being violative of Article 22(5) of the Constitution. It is also his submission that the delay of every day has to be explained as held by the courts. He relied on some of the judgments of this Court including Rama Dhondu Borade v. V.K. Saraf, Commissioner of Police'. There is no doubt that in many cases this Court has reiterated that the right and obligation to make and to consider the representation at the earliest opportunity is a constitutional imperative which cannot be curtailed or abridged but in considering whether there was undue and unexplained delay, the facts in each case have to be examined. In Rama Dhondu Borade case' this Court observed thus: (SCC p. 180, para 20) "True, there is no prescribed period either under the provisions of the Constitution or under the concerned detention law within which the 1 (1989) 3 SCC 173: 1989 SCC (Cri) 520: AIR 1989 SC 1861 representation should be dealt with. The use of the words 'as soon as may be' occurring in Article 22(5) of the

Constitution reflects that the representation should be expeditiously considered and disposed of with due promptitude and diligence and with a sense of urgency and without avoidable delay. What is reasonable dispatch depends on the facts and circumstances of each case and no hard and fast rule can be laid down in that regard.

However, in case the gap between the receipt of the representation and its consideration by the authority is so unreasonably long and the explanation offered by the authority is so unsatisfactory, such delay could vitiate the order of detention."

In the above case the gap between receipt and disposal of the representation was 28 days but up to the date of service of the order of rejection, the delay amounted to 32 days and the court was not satisfied with the explanation offered and it was only after a delay of 14 days that the representation was disposed of and the only explanation was that some more information was called for and that there were certain holidays in between. The Court held that the delay was unreasonable and the explanation was unsatisfactory. Relying on these observations, the learned counsel submits that in the instant case the period between October 15, 1992 and October 22, 1992 and between October 23, 1992 and November 2, 1992 amounted to undue and unexplained delay. But if we examine the facts it can be seen that the representation was forwarded by the Jail Superintendent on October 15, 1992 itself by registered post but that was received on October 22, 1992 by the Ministry's Office and the entire delay was due to the delay in postal delivery. Therefore the same cannot be said to be unreasonable and unexplained. With regards the period between October 23, 1992 and November 2, 1992 there were intervening two Saturdays and two Sundays. However, on receipt of the representation on October 22, 1992 the same was forwarded on October 23, 1992 for parawise comments. In this context, the High Court also has noted that to offer parawise remarks it would have taken some time because the representation contained several allegations against the Customs authorities and necessary information had to be gathered for offering the remarks. The Sponsoring Unit received it on October 26, 1992 and with the parawise remarks forwarded the same by speed post to the Ministry on October 29, 1992. In between there were two holidays and if we exclude these holidays then the delay comes to only five days which cannot be said to be undue and in our view the High Court has rightly rejected this contention.

5. The next submission is regarding non-application of mind by the detaining authority with regard to the circumstance that the detenu was in jail and a mere bald statement that the possibility that the detenu was likely to be released on bail cannot be ruled out is not enough and it only shows that there was no proper application of mind. In this context, the learned counsel relied on the judgment of this Court in Binod Singh v. District Magistrate2. We see no force in this submission. We do not think that anything more 2 (1986) 4 SCC 416: 1986 SCC (Cri) 490 could have been said by the detaining authority in this context. As a matter of fact the apprehension of the detaining authority came to be true as the detenu was released on bail no doubt subject to certain conditions on September 25, 1992. Therefore there are no merits in this appeal.

6. Now coming to the writ petition, the submission is that the law requires that all the relevant materials and vital facts which would have bearing on the issue and would influence the mind of the detaining authority one way or the other ought to be placed before the authority empowered to

make the declaration. According to the learned counsel, while releasing the detenu on bail the court imposed stringent conditions namely that he will stay at Calcutta Lodge, 68-B, Acharya Prafulla Chandra Ray Road, Calcutta and shall not leave the area of Calcutta Municipal Corporation without the leave of the court and will report to the Officer-in-charge of the case, Department of Customs, Calcutta every Monday and Thursday and this order with these conditions has not been placed before the authority making the declaration which would have a bearing on the necessary subjective satisfaction and that therefore the declaration itself is illegal. In this context he also relied on an unreported judgment of the Bombay High Court in Dr Hannan Gulam Husain Chougle v. Union of India3. That was a case where the detenu was released on bail and the department preferred an application for cancellation of bail and the High Court while issuing rule passed an interim stay on order of bail immediately and finally the court, however, confirmed the order of bail but imposed conditions. The submission was that the order of confirmation of bail with conditions was not placed before the declaring authority. The High Court observed that the department did not specifically say whether the documents were placed before the declaring authority or not and if they were not placed, the subjective satisfaction of the declaring authority would be rendered vitiated for non-consideration of the vital documents. The learned counsel, in the instant case, relying on these observations sought to contend that the bail order passed on September 25, 1992 imposing stringent conditions 'Is a vital document. Whether a particular document is vital or not again is an issue which depends on the facts in each case. The detention order itself was passed when the detenu was in jail and the detaining authority noted this fact and being satisfied that there was every possibility of his being released on bail, passed the detention order. If subsequently the detenu is released on bail even subject to certain conditions that does not bring about any material change. On the other hand, release on bail is a stronger ground showing that the detenu who is not in custody is likely to indulge in the prejudicial activities again. The conditions imposed would show that the detenu could move about freely in the vast area of Calcutta Municipal Corporation and therefore this order of release on bail with conditions cannot be said to be a vital document. In Dr Hannan Gulam Husain Chougle case3 the detenu was already on bail and later certain conditions were imposed restricting the movements of the detenu. That 3 Writ Petition (Cri) No. 1384 of 1991, decided on March 20, 1992 (Bom HC) would be a vital fact. But, in the instant case, as stated above, the subsequent release cannot be a vital fact. Learned counsel likewise contended that the detenu has subsequently retracted from his confession and that the retraction is a vital document and the same should have been placed before the declaring authority. In support of his submission he relied on the judgment of this Court in Ashadevi v. K. Shivraj4. That was a case where this Court noticed that three vital facts were not communicated to or placed before the detaining authority before it passed the impugned order namely that during interrogation in spite of the request of the detenu, neither the presence nor the consultation of the advocate was permitted and in spite of intimation to the advocate in that behalf, the detenu was not produced before the Magistrate and that confessional statements were retracted subsequently while he was in judicial custody and observed that the first two facts had a bearing on the question whether the confessional statements had been extorted under duress. The Court finally observed that the request to have the presence and consultation of a lawyer was turned down on some misconception of legal position and also observed that the fact of retraction would have its own impact on the detaining authority and it was for him to consider whether the confession was made voluntarily and whether the subsequent retraction was an afterthought. The facts, in the instant case, are distinguishable. The detenu was apprehended on

August 26, 1992 and was questioned and his statement along with the statements of others was recorded. On September 18, 1992 the detention order was passed. By then there was no retraction. However, the detenu claimed that he retracted on the same day and the fact remains that it was not before the detention order was passed. There is no such request for the presence of a lawyer which would have a bearing on the voluntary nature of the confession and the subsequent retraction. Therefore the retraction is clearly an afterthought and if the same is not placed before the declaring authority that will not vitiate his subjective satisfaction. We may point out that this question was not raised before the High Court and for the first time learned counsel wanted us to investigate the nature of retraction and how it was made which is a question of fact. In Ashadevi case4 all those facts existed even before the detention order was passed. Therefore the ratio in Ashadevi case4 for all the above-stated reasons cannot be made applicable to the instant case. For these reasons, both the appeal and the writ petition are dismissed. 4 (1979) 1 SCC 222: 4979 SCC (Cri) 262: AIR 1979 SC 447