

**Court No. - 42**

**AFR**

**Case :-** HABEAS CORPUS WRIT PETITION No. - 390 of 2019

**Petitioner :-** Sonu @ Firoz

**Respondent :-** State Of U.P. And 4 Others

**Counsel for Petitioner :-** Syed Ali Imam

**Counsel for Respondent :-** G.A., Prahlad Kumar Khare

**Hon'ble Manoj Misra,J.**

**Hon'ble Virendra Kumar Srivastava,J.**

We have heard Sri S.A. Imam for the petitioner; the learned A.G.A. for respondents 1, 3, 4 and 5; Sri Prahlad Kumar Khare for the respondent no. 2; and have perused the record.

This habeas corpus petition questions the detention of the petitioner under the provisions of the National Security Act, 1980 (for short 'Act, 1980') pursuant to a detention order dated 11.12.2018 passed by the District Magistrate, Bulandshahar (for short D.M.) in exercise of powers conferred upon him by Section 3(3) read with Section 3(2) of the Act, 1980. A prayer has also been made to set the petitioner at liberty.

Briefly stated the relevant facts of the case are as follows: while the petitioner was confined in District Jail, Bulandshahar in connection with Case Crime No. 318 of 2018, pertaining to Police Station Khurja Dehat, District Bulandshahar, under Sections 3/5/5A/8 of Cow Slaughter (Prevention) Act, he was served with the impugned detention order dated 11.12.2018. The State Government approved the detention order on 20.12.2018. On 21.12.2018, against the order of detention, the petitioner submitted representation in nine sets to the jail authorities at District Jail, Bulandshahar for onward transmission to the Appropriate Government/ State Government; Central Government; Advisory Board; and the detaining authority. The representation was received in the office of D.M. on the same day i.e. 21.12.2018. The D.M., on the same day, that is 21.12.2018, called for report from the Senior Superintendent of Police,

Bulandshahar (for short S.S.P.). The S.S.P. submitted his report in the office of D.M. on 28.12.2018. The D.M. rejected the representation on 29.12.2018 and on the same day i.e. 29.12.2018, forwarded the representation, with his comments, to the State Government as well as to the Central Government. The representation was received in the concerned Section of the State Government on 3.1.2019 and in the concerned Section of the Central Government on 2.1.2019.

The State Government sent the representation along with its para-wise comments to the Central Government and to the Advisory Board on 4.1.2019. Thereafter, the concerned Section of the State Government, that is Home (Gopan) Anubhag-7 of the State Government, examined the representation on 7.1.2019. The Under Secretary examined the representation on 8.1.2019 and the Special Secretary examined the representation on 9.1.2019. The Secretary, Government of U.P., thereafter, examined the representation on 10.1.2019 and, thereafter, the file was put for final order of the higher authorities in the State Government. The State Government thereafter rejected the representation on 11.1.2019. It is noteworthy that 5<sup>th</sup> and 6<sup>th</sup> January, 2019 were Saturday and Sunday, respectively.

In so far as the Central Government is concerned, from its counter affidavit filed by Sri Balraj, Under Secretary, Ministry of Home Affairs, New Delhi, the representation was received in the concerned Section on 02.01.2019. The representation along with para-wise comments of the detaining authority was processed for the consideration of Union Home Secretary on 3.1.2019 and it was rejected on 11.1.2019.

In the counter affidavit of the Central Government there is no explanation for the period in between 3.1.2019 and 11.1.2019 as regards how the representation was dealt with during that period.

The matter was referred to the Advisory Board within three weeks of the detention vide letter dated 21.12.2018. The Advisory Board heard

the petitioner and considered the matter on 16.01.2019 and gave its report to the State Government, vide letter dated 22.01.2019, finding sufficient cause for preventive detention of the petitioner. The State Government confirmed the detention, vide order dated 28.01.2019, under section 12(1) of the Act, 1980, provisionally, for a period of three months with effect from 11.12.2018, which was extended, provisionally, for a period up to six months, vide order dated 8.3.2019, and, thereafter, further extended, provisionally, for a period up to nine months, vide order dated 31.5.2019, with effect from 11.12.2018 i.e. the date of detention.

The learned counsel for the petitioner states that although there are various points for him to press in this petition, but since this petition can be allowed on the ground of unexplained delay in transmission of representation by the detaining authority to the State Government / Central Government/ Advisory Board, and unexplained delay in consideration of the representation at the level of the Central Government, as would be clear from the returns filed, he is pressing the petition on the those grounds alone.

The learned counsel for the petitioner has submitted that, admittedly, the representation was received in the office of the D.M. on 21.12.2018. The representation was addressed to the State Government / the Central Government / the Advisory Board/ the detaining authority, but the said representation was not forwarded to the appropriate governments until 29.12.2018. It has been submitted that the only explanation offered in the counter affidavit for the delay in onward transmission of the representation is that a report was called from the S.S.P. on 21.12.2018, which was received on 28.12.2018. There is no explanation for the delay at the level of S.S.P. in submitting the report and there is no statement in the counter affidavit as to whether from the office of D.M. any reminder was sent to the S.S.P. to forward the report promptly. It has been urged that the detaining authority and the police authorities are stationed in the same district and are in possession of all

the relevant records. Hence, there is no justification for not submitting report within a day or two, or maximum three days. He submits that this reflects supine indifference on the part of the police as well as state authorities to the constitutional right guaranteed by Article 22(5) of the Constitution of India which has resulted in violation of that right thereby rendering the continued detention illegal.

It has next been submitted that the detaining authority; the State Government; and the Central Government all have to independently address the representation of the detenu at the earliest. The Central Government has power under section 14 of the Act, 1980 to revoke a detention order therefore delay on its part also vitiates the continued detention. It has been urged that in the return filed there is no explanation by the Central Government for not deciding the representation in between 3.1.2019 and 11.1.2019.

It has been submitted that in the case of **Rajmamal vs. State of Tamil Nadu and another, (1999) 1 SCC 417**, continued detention was declared illegal in absence of explanation for delay of five days in dealing with the representation. The learned counsel for the petitioner has also placed reliance on decisions of the Apex Court in **Pebam Ningol Mikoi Devi vs. State of Manipur: (2010) 9 SCC 618, paras 33 to 37; Abdul Nasar Adam Ismail vs. State of Maharashtra, (2013) 4 SCC 435, para 19** so as to contend that unexplained delay in onward transmission of the representation vitiates the continued detention of the detenu as it violates the fundamental right of a detenu guaranteed under Article 22 (5) of the Constitution of India.

**Per-Contra**, the learned A.G.A. has submitted that the explanation for delay, if any, in onward transmission of the representation at the level of the D.M. has been provided as, ordinarily, the practice is of calling for comments on the representation from police authorities and, therefore, if the D.M. had called for comments from the S.S.P., it cannot be said that

the D.M. deliberately delayed the onward transmission of the representation. He further submitted that few days are always taken in submitting para-wise comments therefore the delay of about six or seven days in submitting comments will not be fatal.

The learned counsel for the Central Government submitted that the Central Government only took about eight days in deciding the representation which cannot be said to be such an inordinate delay that may vitiate the continued detention.

We have considered the rival submissions. In *Rajammal v. State of T.N., (1999) 1 SCC 417*, a three judges bench of the apex court, after noticing the judgement of Constitutional Bench decision of the Apex court in *K.M. Abdulla Kunhi v. Union of India (1991) 1 SCC 476*, in paragraphs 7 and 8 of its judgement, as reported, held as follows:

7. It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. Though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation, the words “as soon as may be” in clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest. But that does not mean that the authority is pre-empted from explaining any delay which would have occasioned in the disposal of the representation. The court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. This position has been well delineated by a Constitution Bench of this Court in *K.M. Abdulla Kunhi v. Union of India*. The following observations of the Bench can profitably be extracted here:

*“It is a constitutional mandate commanding the authority concerned 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 detention law concerned, 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.”*

**8. The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation, such delay**

will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. 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 range of delay, but how it is explained by the authority concerned.

(Emphasis supplied)

Thereafter, the apex court proceeded to notice the facts of the case and held that unexplained delay of 5 days in between 9.12.1988 and 14.2.1988 has vitiated the continued detention. The relevant paragraphs 9 and 11 of the judgement in **Rajammal's case (supra)**, as reported, is being extracted below:

9. What happened in this case was that the Government which received remarks from different authorities submitted the relevant files before the Under-Secretary for processing it on the next day. The Under-Secretary forwarded it to the Deputy Secretary on the next working day. **Thus there is some explanation for the delay till 9-2-1998. Thereafter the file was submitted before the Minister who received it while he was on tour. The Minister passed the order only on 14-2-1998. Though there is explanation for the delay till 9-2-1998, we are unable to find out any explanation whatsoever as for the delay which occurred thereafter. Merely stating that the Minister was on tour and hence he could pass orders only on 14-2-1998 is not a justifiable explanation when the liberty of a citizen guaranteed under Article 21 of the Constitution is involved. Absence of the Minister at the Headquarters is not sufficient to justify the delay, since the file could be reached the Minister with utmost promptitude in cases involving the vitally important fundamental right of a citizen.**

11. **We are, therefore, of the opinion that the delay from 9-2-1998 to 14-2-1998 remains unexplained and such unexplained delay has vitiated further detention of the detenu. The corollary thereof is that further detention must necessarily be disallowed.** We, therefore, allow this appeal and set aside the impugned judgment. We direct the appellant-detenu to be set at large forthwith.

(Emphasis supplied)

From the decision noticed above, the deducible legal principle is that the duration or the length of the time taken in deciding or dealing with the representation is not what is the deciding factor as to uphold the detention or to declare it illegal. The deciding factor is the explanation for the delay, if any. In other words, whenever there appears inordinate delay, at any stage of dealing with the representation, it is for the authority concerned to explain the delay. It is not enough to say that the delay was very short. Even longer delay can well be explained. So the

test is not the duration or range of delay, but how it is explained by the authority concerned.

It is well settled by a catena of decisions that an unexplained delay in transmission of representation against a preventive detention order violates the fundamental right of a detenu guaranteed under Article 22(5) of the Constitution of India thereby rendering the continued detention illegal (*vide Pebam Ningol Mikoi Devi v. State of Manipur: (2010) 9 SCC 618, paras 33 to 37; Abdul Nasar Adam Ismail v. State of Maharashtra, (2013) 4 SCC 435, para 19*). The rationale behind the above view is, if the representation is not promptly sent to the authority competent to decide, to whom it is addressed, the phrase “*shall afford him (detenu) the earliest opportunity of making representation against the order*”, as contained in Article 22(5) of the Constitution of India, would be rendered nugatory.

In **Abdul Nasar's case (supra)** in paragraph 19 of the judgment it was held as follows:

"19. 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&K*, 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 the delay. Therefore, this delay, in our opinion renders continued detention of the detenu, illegal."

In *Jaggu v. State of U.P., 2008 SCC OnLine All 1348 : (2008) 70 AIC 491 : (2008) 5 All LJ (NOC 1037)*, a Division Bench of this court found that long unexplained delay in submitting report by police authorities, which results in delay in onward transmission of representation, vitiates the continued detention. The court had observed that ordinarily one or two days are sufficient for the police authorities to

submit report. The relevant extracts from the judgement of this Court in the case of **Jaggu (supra)** are reproduced below:

“3. The detenu made a representation dated 13.9.2007 to the State Government, which was handed over to the jail authorities on 14.9.2007. The jail authorities sent the representation to the office of District Magistrate on 15.9.2007. On the same day, the District Magistrate called for comments from the Senior Superintendent of Police, Ghaziabad and the report of Senior Superintendent of Police was received by the District Magistrate on 1.10.2007. Thereafter, the District Magistrate transmitted the representation to the Central Government, the State Government and the Advisory Board on 2.10.2007.

4. **Learned Counsel for the petitioner has urged that there is no explanation of 15 days’ delay i.e. from 16.9.2007 to 30.9.2007, as to why the report was sent by the Senior Superintendent of Police after 15 days. One could understand that the report could be sent by the Senior Superintendent of Police within a day or two, but he could not sit over the matter for 15 days and send his report to the District Magistrate after 15 days. Further, from the counter affidavit of the District Magistrate, it is dear that there is no explanation given in the counter affidavit for the delay from 16.9.2007 to 30.9.2007.**

5. The Apex Court in *Rajammal v. State of Tamil Nadu*, has held that unexplained delay of five days was fatal and the decision order would be bad in law and contrary to the constitutional obligation on the Central Government to consider and decide the representation of the detenu without any delay.

6. In *Harish Pahwa v. State of U.P.* the Supreme Court has taken the similar view.

7. Similar view has been taken by the Supreme Court in the case of *Union of India v. Harish Kumar*, relied upon by the learned Counsel for the petitioner.

8. For the aforesaid reasons, further detention of the petitioner under the National Security Act is held to be illegal.”

**(Emphasis Supplied)**

At this stage, it would be apposite to notice and deal with another contention of the learned AGA as well as counsel appearing for the Central Government, which is that had a specific plea been raised by the petitioner in his petition with regard to the delay in consideration of the representation a better explanation could have been offered.

The above submission is not acceptable inasmuch as strict rules of pleadings are not to be applied in case an application for a writ of habeas corpus is filed. In *Ichhu Devi Choraria v. Union of India, (1980) 4 SCC 531*, the apex court in paragraph 4 of its judgement, as reported, had held as follows:

**“4. It is also necessary to point out that in case of an application for a writ of habeas corpus, the practice evolved by this Court is not to follow strict rules of pleading nor place undue emphasis on the question as to on whom the burden of proof lies. Even a postcard written by a detenu from jail has been sufficient to activate this Court into examining the legality of detention. This Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. Whenever a petition for a writ of habeas corpus has come up before this Court, it has almost invariably issued a rule calling upon the detaining authority to justify the detention. This Court has on many occasions pointed out that when a rule is issued, it is incumbent on the detaining authority to satisfy the court that the detention of the petitioner is legal and in conformity with the mandatory provisions of the law authorising such detention: vide *Niranjan Singh v. State of Madhya Pradesh*; *Shaikh Hanif, Gudma Majhi & Kamal Saha v. State of West Bengal* and *Dulal Roy v. District Magistrate, Burdwan*. It has also been insisted by this Court that, in answer to this rule, the detaining authority must place all the relevant facts before the court which would show that the detention is in accordance with the provisions of the Act. It would be no argument on the part of the detaining authority to say that a particular ground is not taken in the petition: vide *Nizamuddin v. State of West Bengal*. Once the rule is issued it is the bounden duty of the court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and the citizen is not deprived of his personal liberty otherwise than in accordance with law: vide *Mohd. Alam v. State of West Bengal* and *Khudiram Das v. State of West Bengal*.**

**(Emphasis Supplied)**

Similar view was taken by the apex court in the case of *Mohinuddinn V. D.M., (1987) 4 SCC 58*. The relevant portion of the judgement is found in paragraph 4 thereof, as reported, which is extracted below:

**“4. It was an improper exercise of power on the part of the High Court in disallowing the writ petition on the ground of imperfect pleadings. Normally, writ petitions are decided on the basis of affidavits and the petitioner cannot be permitted to raise grounds not taken in the petition at the hearing. The same rule cannot be applied to a petition for grant of a writ of habeas corpus. It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well settled that it is incumbent on the State to satisfy the court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Article 22(5).”**

**(Emphasis Supplied)**

From above, it is clear that strict rule of pleadings are not to be applied in an application for a writ of habeas corpus. Once the detention

is challenged, the burden is on the detaining authority to satisfy the court that the detention is not only in accordance with the provisions of the Act concerned but also strictly in accord with the constitutional safeguards embodied in Article 22(5) of the Constitution of India.

We, however, deem it appropriate to observe that if proper explanation has not been offered in the return filed, either because of lack of pleading or improper pleading at the behest of the petitioner, the court's power to call for better explanation from the detaining authorities is not taken away. Accordingly, if the court is of the view that due to imperfect pleading, explanation, though available, may not have been offered in the return, it can always grant time to the detaining authorities concerned to furnish better explanation. But where the delay in dealing with the representation, at any stage of its processing/ handling, appears on the face of the record to be inordinate, the authorities that are instrumental in petitioner's detention must on their own come forth with an explanation and they cannot take advantage of imperfect pleading on the part of the petitioner to cover up their own supine indifference towards the constitutional safeguards.

In the instant case, even if we ignore the lack of explanation offered by the Central Government in its return, for the delay in between 3.1.2019 and 11.1.2019 in deciding the representation, perhaps due to absence of pleading questioning the delay, we find that the petition can succeed on the ground of unexplained delay in transmission of the representation.

We find that admittedly the representation was submitted on 21.12.2018 which was received in the office of the D.M. on the same day and, on the same day, comments/ report was called from the sponsoring authority, that is the S.S.P. The S.S.P. submitted his comments on 28.12.2018. No explanation is offered for the delay in not submitting comments prior to 28.12.2018. Thus there is no explanation for the

period in between 22.12.2018 and 27.12.2018. Even assuming that ordinarily a day or two is taken in submission of report but here the delay is of six days. Thus, even if we give allowance for two days delay, four days delay goes completely unexplained. The detaining authority and the police authorities, on whose report the detaining authority acts, are stationed in the same district. It is unacceptable that so much of time would be taken by the police authorities to respond to the call for comments made by the detaining authority. Moreover, if such delay was there at the end of the police authorities, a reminder could have been sent, of which there is no disclosure in the return. In our view, this delay in onward transmission of the representation by the detaining authority is inordinate and has not been satisfactorily explained, which has violated the fundamental right of the detenu guaranteed by Article 22(5) of the Constitution of India thereby rendering the continued detention illegal. The petition is therefore **allowed**. The petitioner shall be set at liberty forthwith unless wanted in any other case. There is no order as to costs.

**Order Date :-** 18.7.2019

Saurabh