

Sumar Khan Vs. State

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Court : Rajasthan

Decided On : Jul-24-2000

Reported in : 2001CriLJ43; 2000(4)WLC364; 2001(1)WLN114

Judge : N.N. Mathur and D.N. Joshi, JJ.

Acts : Narcotic Durgs Psychotropic Substances Act - Sections 8, 21 and 22; General Clauses Act - Sections 3(8); National Security Act - Sections 3(2)(3) and 12(1); [Constitution of India](#) - Articles 21, 22 and 22(5)

Appeal No. : C.W.Petn. No. 4575 of 1999

Appellant : Sumar Khan

Respondent : State

Advocate for Def. : N.M. Lodha, Adv., R.P. Vyas, Addl. Adv. General

Advocate for Pet/Ap. : G.M. Khan, Adv.

Disposition : Petition dismissed

Judgement :

N.N. Mathur, J.

1. By way of this habeas corpus petition, the petitioner Sumar Khan has challenged the detention of his brother Beebuda alias Birbal Langa resident of 6-

Dhani Mohangarh, Police Station Mohangarh, District Jaisalmer. The District Magistrate, Jaisalmer in exercise of powers conferred by Section 3(2)(3) of National Security Act, 1980 (hereinafter referred to as NSA) having satisfied that with a view to prevent Beebuda from acting in any manner prejudicial to the security of the State, directed to detain him by order dated 28th August, 1999. He was arrested and the order of detention as well as grounds of detention were served on him on the same day. It appears from the ground of detention that the detenu was found indulged in antinational activities including sending of information to I.S.I. through I.S.D./P.C.O. and his activities were prejudicial to the national security. He was also found indulged in the smuggling of arms, ammunitions and drugs. The first respondent-State of Rajasthan confirmed the detention by order dated 6-9-99 vide Annexure/3. The first respondent-State of Rajasthan by order dated 30-10-99 in exercise of powers under Section 12(1) of the N.S.A. has ordered to keep him under detention for the period 29-8-99 to 28-8-2000. The representation made to the State Govt. was rejected and the decision was communicated vide letter dated 29-9-99 Annexure/6. The detention has been challenged mainly on the following grounds:

(1) The detenu was denied the opportunity of submitting effective representation violating his fundamental rights guaranteed under Article 22(5) of the [Constitution of India](#) inasmuch as that he was not allowed to meet his lawyer.

(2) Detenu's continuing detention deserves to be quashed on the ground that there is delay in considering his representation at the level of the Central Government.

(3) Subjective satisfaction recorded by the Detaining Authority is vitiated as the Detaining Authority has not kept in view that the detenu was already in jail and his bail application was rejected.

2. We shall deal with each contention in seriatim :

Contention-1

It is submitted that on 14-9-99 the detenu's counsel Mr. G.M. Khan sought permission from the Superintendent of Central Jail, Jodhpur to meet the detenu for

submitting the petition. A copy of said letter dated 14-9-99 Annexure-7 is placed on the record. The Superintendent, Central Jail, Jodhpur after obtaining the signatures of the detenu on 'Vakalatnama' returned to the petitioner's counsel but did not permit him to meet his counsel. In this regard, in reply submitted on behalf of first and second respondent, it is stated that the Superintendent, Central Jail, Jodhpur asked Mr. G.M. Khan, learned counsel for the detenu to submit his affidavit and proper application before him to meet the detenu but, the counsel did not furnish the same. During the course of arguments, Mr. R.P. Vyas, learned Addl. Adv. Gen. has placed before me a direction of the State Govt. dated 15-8-94 which provides certain instructions with respect to persons seeking permission to meet the detenus. One of the instructions is that the lawyer who wants to meet the detenu should submit an application in writing along with affidavit giving full details of his identification or identification from the Advocate General or Advocate-on-record in case of Supreme Court (cases pertaining to Supreme Court). The instructions clearly provide that the permission can be granted only on proper identification, of the lawyer meeting the detenu. Perusal of the record shows that Mr. G.M. Khan, the learned Advocate who submitted an application AAnnexure/7 was advised to file an appropriate affidavit disclosing his identity and desire to meet the detenu, but, no such affidavit was filed. In our view, no complaint can be made by the detenu on this ground as his counsel did not file requisite affidavit before the Jail Authorities. Accordingly, the first contention stands rejected. Contention-2

It is averred in para 9 of the writ petition that on behalf of the detenu his counsel submitted a representation dated 20-9-91 Annexure/9 to the first respondent District Magistrate, Jaisalmer with a copy to His Excellency the President of India, Rashtrapati Bhawan, New Delhi. The another set of representation was sent to the Advisory Board, NSA, Rajasthan, Jaipur. The petitioner's representation was delivered in the Rashtrapati Bhawan on 25-9-99. The petitioner's counsel Mr. G.M. Khan received communication dated 29-9-99 from Rashtrapati Bhawan informing him that his representation has been forwarded to the Secretary, Govt. of India, Ministry of Home Affairs. It is submitted that the said representation has yet not been decided. The affidavit has been filed by Shri Sushil Kumar, Under Secretary, Ministry of Home, stating that the report of the State Govt. with respect to the

detention of Beebuda alias Birbal Langa was received under communication dated 9-9-99. The report was examined by the Home Ministry and a decision was taken on 16-9-99. No ground was found to interfere with the decision of the State of Rajasthan. As regards the representation, it is stated that the representation dated 20-9-99 made on behalf of detenu was received by the Ministry of Home Affairs only on 12-11-99 from President's Secretariate. Mr. N.M. Lodha, learned Central Govt. counsel has placed the record of the Ministry before us. The record shows that the said representation was received in the Ministry only on 12-11-99. The representation was immediately processed for consideration and the case of the detenu was put before the Under Secretary, Home Affairs on 15-11-99 who carefully considered the same and put it before Dy. Secretary, Home Affairs on the same day. The matter was again placed before the Joint Secretary and then before Home Secretary, Govt. of India on 16-11-99. The Union Home Secretary who has been delegated the powers of Union Home Ministry for discharging such cases, himself duly considered the case of the detenu and rejected the representation on 16-11-99. The detenu was informed of the decision of the Central Govt. by wireless message dated 17-11-99 through the Home Secretary, Govt. of Rajasthan and Superintendent, Central Jail, Jodhpur. The message was followed by a letter dated 25-11-99. It is contended by Mr. Khan that the representation submitted to the President of India must be considered as the representation submitted to the Central Govt. The representation was received in the Rashtrapati Bhawan as back as on 25-9-99 but the same was decided as late as on 16-11-99. Thus, there is considerable delay in deciding the representation. The learned counsel has relied upon various decisions of the Apex Court wherein it is held that it is constitutional obligation of the Govt. to consider representation forwarded by the detenu without delay. Learned counsel has placed reliance on decision of the Apex Court in Rajammal v. State of T.N., reported in (1999) 1 SCC 417 : (1999 Cri LJ 826). He has also placed reliance on another decision of the Apex Court in Rajindra v. Commissioner of Police, Nagpur, reported in 1994 Suppl (2) SCC 716. In Raghavendra Singh v. Superintendent, District Jail, Kanpur, reported in AIR 1986 SC 356 : (1986 Cri LJ 493) the Apex Court in view of the provisions of Section 3(8) of the General Clauses Act held that the representation addressed to the President must be considered to be a representation properly

addressed to the Central Govt. The Court however, observed that when a representation is made to the President or the Prime Minister the allowance may be made for the time taken to forward the representation to the appropriate Ministry. The Court in para 3 of the judgment has observed as follows :Under Section 3(8) of the General Clauses Act, the 'Central Government' means the President and a representation addressed to the President must, therefore, be considered to be a representation properly addressed to the Central Govt. Even so some allowance may be made for the time taken to forward the representation to the appropriate Ministry. Due allowance being made for the time which may ordinarily be taken for forwarding the representation from the President's Secretariat to the concerned Ministry, we are unable to say in the present case that there has been adequate explanation for the delay.

3. In the instant case the representation Annexure/13 has been drafted by a lawyer Shri Gulam Mustafa, who has regular appearance before this Court in detention matters. Learned counsel instead of sending the representation to the concerned Ministry has chosen to send it to his Excellency the President. It is significant to notice that it is only the copy of the representation addressed to the District Magistrate, Jaisalmer which has been sent to his Excellency the President of India. It clearly appears that the copy has been endorsed to his Excellency the President of India with oblique motive to make a ground for quashing of detention, keeping in view the law in this regard. If there was any seriousness in early disposal of the representation, the lawyer would have definitely addressed the representation to the Ministry of Home. We disapprove this sort of practice adopted by the lawyers practising in the detention matters. They must clearly understand that such sort of strategy is not going to help them. We are not prepared to put our common sense in cold storage in the name of Rule of law. While dealing with the cases of preventive detention, a balance has to be struck with regard to constitutional safeguards because the only guarantee of personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law and at the same time care has to be taken that the purpose and object of the Act is not to defeat on the basis of hyper-technical approach to observance of procedure. It is also to be remembered that constitutional safeguards and the rights under Articles 21 and 22 of the

[Constitution of India](#) cannot be sacrificed at the altar of preventive detention under the Act. Thus the delay designed by the legal adviser of the detenu must be excluded. Thus, in the instant case the time till representation reached to the Ministry for effective consideration is held to be satisfactorily explained i.e. the period between 25-9-99 to 12-11-99. The letter Annexure/15 from President's Secretariate simply speaks that the representation has been forwarded to Home Ministry. It does not say when it was actually dispatched and when it was received in the Home Ministry. As soon as the representation was received in the Ministry of Home on 12-11-99, the same was decided in the shortest possible time i.e. by 16-11-99. Thus, in our opinion the delay has been properly explained and the detenu's detention cannot be quashed on this ground.

4. It is next submitted by the learned counsel that the second representation Annexure/13 has yet not been decided. In this regard, there are twofold submissions. It is firstly submitted that the said representation Annexure/13 should be considered as the first representation as it was delivered in the Ministry earlier to the representation Annexure/9 and secondly, that the second representation has yet not been decided. As far as the first contention is concerned, in view of the decision of the Apex Court in Raghavendra Singh (1986 Cri LJ 493) (supra) the representation Annexure/9 is a representation to the Central Govt. Thus, this contention is not sustainable. As far as the second representation is concerned, learned counsel has failed to point out if it contains additional and fresh grounds. It is held by Division Bench of this Court in Kalam alias Baba Kalam v. State of Rajasthan, reported in 1990 Raj Cri C 6 that the second representation by the detenu for revocation of detention order is maintainable if made on additional and fresh ground. The learned counsel has failed to point out any additional and fresh ground in the second representation, as such it was not obligatory on Central Govt. to decide the second representation. The Central Govt. has taken stand in the instant case that the second representation was not received but, this aspect is disputed by the learned counsel for the detenu. Mr. G. M. Khan, learned counsel for the petitioner has produced postal acknowledgment receipt Annexure/14 to show that the second representation was received in the Ministry of Home in the month of October, 1999. Simply on the basis of acknowledgment receipt, it cannot be said that it was representation Annexure/13 which was served on the Central

Govt. Be that as it may, in absence of any additional ground, it was not obligatory on the Central Govt. to decide the second representation. Accordingly, this contention also deserves to be rejected.

Contention No. 3.

It is submitted that the petitioner was arrested in F.I.R. Case No. 2/10 on 3rd March, 1997 for an offence under Section 8/21, 22 of the N.D.P.S. Act and on the date the impugned order of the detention dated 28-10-99 was passed, he was already in judicial custody. It is also submitted that the main accused Alu Khan in F.I.R. No. 2/97 Police Station Shahgarh has been acquitted on 23-7-99 by the trial Court in Sessions Case No. 43/97. It is also submitted that the application for bail filed by the detenu was rejected by order of the trial Court dated 30-10-99. Thus, there was no reasonable belief with the second respondent to feel that the detenu will be released. Learned counsel has placed reliance on the decision of the Apex Court in *Surya Prakash Sharma v. State of U. P.*, reported in 1995 Cri LJ 2657. We have gone through the said decision. The said case pertains to public order. The cases with respect to public order and activities prejudicial to the national security must be distinguished. In the case of *Dharmendra Suganchand Chelwant v. Union of India*, reported in AIR 1990 SC 1196 : (1990 Cri LJ 1232) it is held that the detention order can be validly passed against the person in custody in the following cases :

1. The Detaining Authority was aware of the fact that the detenu is already in detention.
2. There were compelling reasons justifying such detention despite the fact that the detenu is already under detention.
5. The Court while explaining the expression 'compelling reason' has observed that the Detaining Authority must be satisfied that (a) the detenu is likely to be released from the custody in near future, and (b) taking into consideration the nature of antecedent activities of the detenu, it is likely that after his release from the custody, he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activity. In the instant case, the

Detaining Authority was aware of the fact that the detenu was in judicial custody at the time of making the order of detention as is evident from the ground of detention. There is sufficient material on record to show that if the detenu is released on bail in that eventuality, the national security will be jeopardized because of his activity. It is to be noticed that co-accused in the case has been acquitted. The chances of detenu's acquittal on technical ground cannot be ruled out. Cases have been reported that some influential antinationals have continued to manage antinational activities, even from judicial custody. Thus, there is no merit in this contention as well and the same is rejected.

6. In view of the aforesaid, we find no merit in this habeas corpus petition. Consequently, this petition being devoid of merit is dismissed.

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