GAZI KHAN @ CHOTIA

v.

STATE OF RAJASTHAN AND ANR.

MAY 2, 1990

[S. RATNAVEL PANDIAN AND K. JAYACHANDRA REDDY, JJ.]

Preventive Detention: Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1989:

Section 3(1)—Detention order—Delay in disposal of representation of detenu—Validity of—Whether violation of fundamental rights—Practice of allowing a police officer not having dealt with the case at any point and having no personal knowledge, to swear counter/reply affidavits—Deprecated.

Constitution of India, 1950: Article 22(5)—Detention order—Delay in disposal of detenu's representation—Whether violative.

The appellant challenged before the High Court the order of detention passed against him under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1989, on various grounds including delay in disposal of his representation. An affidavit was filed by a Deputy Superintendent of Police, on behalf of the respondents stating that the representation was placed before the Assistant Secretary on 19.6.1989, a report was called for from the District Magistrate, the comments, which were received by the State Government on 1.7.1989, were placed before the Assistant Secretary on 3.7.1989 who, in turn, submitted to the higher authorities with his note on 9.7.1989 and the representation was rejected on 11.7.1989. The High Court dismissed the Writ Petition holding that there was no undue lethargy or indifference.

In the appeal, by special leave, on behalf of the detenu, it was contended that the detenu's representation was not decided within a reasonable time and hence the extraordinary delay of 27 days was fatal to the detention.

A reply was filed by the same Deputy Superintendent of Police, as Officer Incharge of the case, who filed the affidavit before the High Court, stating that there was no delay in the consideration of the representation.

A Subsequently, on the direction of the Court, an additional affidavit sworn by the Commissioner and Secretary (Home Department) stating that there was no inordinate delay in considering the representation and it was rejected after careful consideration, was filed.

B Allowing the appeal, this Court,

HELD: 1. There is no explanation for the delay from 3rd to 9th July, 1989 i.e. for 7 days, for the Assistant Secretary to merely put up a note on the basis of comments of the District Magistrate. The additional affidavit sworn to by the Commissioner and Secretary does not whisper any explanation as to why such a delay of 7 days had occurred at C the hands of the Assistant Secretary. The order of detention is, therefore, a breach of constitutional obligation as enshrined under Article 22(5) of the Constitution of India. [841F-G; 842F]

Rama Dhondu Borade v. *V.K. Saraf, Commissioner of Police &* D *Ors.*, [1989] 3 SCC 173; relied on.

Smt. Shalini Soni v. *Union of India,* [1980] 4 SCC 544, referred to.

2.1 A counter affidavit should normally be filed by the detaining E authority himself, but this is not a rigid or inflexible rule and, in the absence of any allegations of *mala fide* or abuse of powers of personal bias attributed to the detaining authority, it may be sworn by a responsible officer who personally dealt with or processed the case or by an officer duly authorised under the Rules of Business of the Government concerned. However, the practice of allowing a police officer who F has not dealt with the case any point of time at any level and who in the very nature of the case could not have any personal knowledge of the proceedings, to swear the counter and reply affidavits on behalf of the appropriate authorities should be highly deprecated and condemned and the counter and reply affidavits sworn by such officer merit nothing but rejection. [836H; 837A-B; 836F-G]

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The State of Bombay v. *Purushottam Jog Naik,* [1952] SCR 674; *Ranjit Dam* v. *State of West Bengal,* [1972] 2 SCC 516; *Shaik Hanif* v. *State of West Bengal,* [1974] 1 SCC 637; *J.N. Roy* v. *State of West Bengal,* [1973] SCC (Cri) 123; *Bhut Nath Mete* v. *State of West Bengal,* [1974] 1 SCC 645 at page 658; *Asgar Ali* v. *District Magistrate Burdwan* H *& Ors.*, [1974] 4 SCC 527; *Suru Mallick* v. *State of West Bengal,* [1975]

4 SCC 470; *Gulab Mehra* v. *State of U.P. & Ors.*, [1988] 1 SCR 126; *State of Gujarat* v. *Sunil Fulchand Shah & Anr.*, [1988] 1 SCC 600 and *Madan Lal Anand* v. *Union of India*, [1990] 1 SCC 81, referred to. A

In the instant case, the reply affidavit and the additional affidavit before the High Court as well as this Court are filed by the Deputy Superintendent of Police who has no connection whatsoever with the passing of the order or dealing with or processing the file at any point of time. In fact, he could not have got any personal knowledge with the passing of the order of its subsequent proceeding since the order has been passed by the State Government and the subsequent proceedings have been dealt with by the officials of the Secretariat. It is, therefore, terribly shocking and surprising that a police officer who has no connection whatsoever with this detention order and who had not at any relevant time personally dealt with the case has come forward to swear about the entire proceedings from the beginning right up to the rejection of the representation including the holding of the meeting of the Advisory Board on behalf of the appropriate authority. The affidavit filed by the Deputy Superintendent of Police is, therefore, not worth consideration. [841D-F; 836F-G] B C D

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 301 of 1990.

From the Judgment and Order dated 15.1.1990 of the Rajasthan High Court in H.C.P. No. 2866 of 1989. E

Pallave Shishodia, Sandeep Mehta and D. Bhandari for the Appellant.

Chandmal Lodha, S.C. Gupta (N.P.), M.N. Shroff, I. Makwana and Manoj Prasad for the Respondents. F

The Judgment of the Court was delivered by

S. RATNAVEL PANDIAN, J. This appeal by grant of special leave is directed against the Order of the High Court of Rajasthan at Jodhpur in Habeas Corpus Petition No. 2866/1989 dismissing the Writ Petition filed by the detenu Gazi Khan @ Chotia. G

The order of detention dated 30.5.1989 under challenge has been passed by the Administrative Secretary and Commissioner, Home Department, State of Rajasthan in exercise of powers under Section H

A 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1989 (for short 'the Act') on reaching his subjective satisfaction that the detenu has been involved in illegal business of smuggled charas and heroin and other psychotropic substances.

B The relevant facts as set out in the grounds of detention giving rise to this appeal may be recapitulated as follows:

The detenu Gazi Khan @ Chotia was actively involved in illegal and objectionable activities by organising a group of smugglers and financing them in the activities of smuggling without directly involving himself in such activities. However, the police of Jaisalmer has opened C a history sheet showing the indirect involvement of the detenu in such smuggling activities. The modus operandi of the detenu is revealed in the statements recorded under Section 108 of the Customs Act from a number of smugglers who were apprehended in the course of smuggling. On 3.11.1986 the detenu has himself given a statement before the D Customs Officer admitting his involvement in smuggling of ready-made garments and bidis. He was suspected in Offence No. 32 dated 30.3.1988 as well in Offence No. 17 dated 17.4.88 under the provisions of the Act as well under Section 25 of the Arms Act. But since no evidence was available incriminating the detenu with those offences no action could be taken. Further the detenu is said to have been involved E along with his associates in certain criminal cases registered under the provisions of the Indian Penal Code. The detaining authority on the above materials placed before him has passed this impugned order. The High Court before which he challenged the impugned order of detention on various grounds has dismissed the Writ Petition holding that all the contentions did not merit consideration. Hence this F appeal.

The learned counsel appearing on behalf of the appellant, raised several contentions, the main thrust of which being that the representation made by the detenu was not decided within a reasonable time and hence the delay is fatal to the detention. This point has been taken G even before the High Court. But the High Court accepting the explanation given by the Deputy Superintendent of Police, Jaisalmer in his additional affidavit filed on behalf of the respondents spurned that plea observing:

> H "In the present case as from the facts mentioned in the additional affidavit and referred to above, it cannot be said that there was undue lethargy or indifference."

Under Ground No. (d) of paragraph 16 of the Special Leave Petition, a contention is raised with regard to the delay of disposal of the representation stating that— A

> "the extraordinary delay of 27 days in consideration of representation of the petitioner is sought to be explained by mere *ipse dixit* of the detaining authorities who merely rest content with the skeletal chronology of days taken allegedly by several authorities with copies of unexplained silence about why actually several days as alleged by authorities were taken to process and consider the representation of petitioner." B

Before this Court a reply is filed by the Deputy Superintendent of Police, Jaisalmer stating that he is "appointed as Officer Incharge in this case" and that he is replying to the allegations made in the Special Leave Petition with reference to the record connected with this case. In paragraph 15(d) of his reply, it is averred that "there is no delay in the consideration of representation of the petitioner." The same Deputy Superintendent of Police in an additional affidavit filed before the High Court has sought to explain the delay stating that the representation of the detenu was placed before the Assistant Secretary on 19.6.1989 with a proposal that a report might be called from the District Magistrate, Jaisalmer, who was the sponsoring authority, that the District Magistrate who received the communication on 22.6.1989 forwarded his comments to the State Government on 29.6.1989, that the comments were received by the State Government on 1.7.1989 and were placed for perusal of the Assistant Secretary on 3.7.1989 and that the Assistant Secretary after putting up a note incorporating the comments of the District Magistrate on the representation placed the same for perusal to the Deputy Secretary on 9.7.1989 and thereafter on the recommendation of the Special Secretary (Home) the representation was rejected on 11.7.1989. C D E F

A perusal of the above additional affidavit shows that the Deputy Superintendent of Police speaks on behalf of the detaining authority, namely, the State Government as well the authorities who dealt with the representation, namely, the Assistant Secretary and the Special Secretary (Home Department). Finally, in regard to the delay in the disposal of the representation he states in para 7 of the said affidavit thus: G

> ". . . . . The delay has occasioned not by lack of deligence H

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> or promptness on the part of the party concerned but due to unavoidable circumstances and for the reasons entirely beyond the control of the Detaining Authority."

In this connection, we would like to point out that the main reply and the additional affidavit before the High Court as well as the reply B affidavit before this Court are filed only by the same Deputy Superintendent of Police on behalf of the Respondents 1 and 2.

After the judgment was reserved, we after going through the papers directed the matter to be reposted for further hearing. Accordingly the matter was listed on 17.4.1990 on which date we asked the learned counsel for the respondents to explain as to under what C authority the Deputy Superintendent of Police has arrogated himself to the knowledge of the entire file relating to the impugned order and speaks for the detaining authority and other authorities who subsequently dealt with the file. The learned counsel took an adjournment and has now filed an additional affidavit sworn by the Commissioner D and Secretary (Home Department) dated 21.4.1990. In the present additional affidavit no explanation is given to our query. The explanation given by the Secretary in his affidavit for the complaint of delayed disposal of the representation is as follows:

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> "That there was no inordinate delay in considering the representation of the petitioner and the same was rejected after careful consideration."

We are terribly shocked and surprised to note that a police officer who seems to have no connection whatsoever with this detention order and who had not at any relevant time personally dealt with F the case has come forward to swear about the entire proceedings from the beginning right up to the rejection of the representation including the holding of the meeting of the Advisory Board on behalf of the appropriate authority. This practice of allowing a police officer who has not dealt with the case at any point of time at any level and who in the very nature of the case could not have any personal knowledge of G the proceedings, to swear the counter and reply affidavits on behalf of the appropriate authorities should be highly deprecated and condemned and the counter and reply affidavits sworn by such officer merit nothing but rejection.

This Court on several occasions has expressed its views that in H response to the *Rule Nisi* a counter affidavit should normally be filed

by the detaining authority himself though it cannot be suggested as a rigid or inflexible rule applicable in all cases of detention under all circumstances. However, when allegation of *mala fide* or abuse of powers or personal bias is attributed to the detaining authority, the said authority should himself swear to the counter affidavit. In the absence of any such allegation in the petition a counter affidavit may be sworn by a responsible officer who personally dealt with or processed the case or by an officer duly authorised under the Rules of Business of the Government concerned..

A Constitution Bench of this Court in *The State of Bombay* v. *Purushottam Jog Naik,* [1952] SCR 674 in which a similar question arose, the learned Judges answered as follows:

> "..... if the Home Secretary has the requisite means of knowledge, for example, if the Minister had told him that he was satisfied or he had indicated satisfaction by his conduct and act and the Home Secretary's affidavit was regarded as sufficient in the particular case, then that would constitute legally sufficient proof. But whether that would be enough in any given case, or whether the "best evidence rule" should be applied in strictness in that particular case, must necessarily depend upon its facts. In the present case, there was the element that 57 cases were dealt with in the course of 6 days and orders passed in all on one day. But we do not intend to enter into the merits. All we desire to say is that if the learned Judges of the High Court intended to lay down as a proposition of law that an affidavit from the Minister in charge of the department is indispensable in all such cases, then they went too far."

In *Ranjit Dam* v. *State of West Bengal,* [1972] 2 SCC 516 the counter affidavit was filed by the Assistant Secretary, Home (Special) Departmant, who was authorised to file it as the detaining authority had since then been appointed as Secretary of the State Electricity Board. This Court in that circumstance stated thus:

> "The reason given in this counter-affidavit for the District Magistrate not making the affidavit himself does not appear to be satisfactory. But as nothing turns on that fact we need say no more about it for the present."

Sarkaria, J. in *Shaik Hanif* v. *State of West Bengal,* [1974] 1 SCC 637 observed thus:

> "Since the Court is precluded from testing the subjective satisfaction of the detaining authourity by objective standards, it is all the more desirable that in response to the *rule nisi* the counter-affidavit on behalf of the State should be sworn to by the District Magistrate or the authority on whose subjective satisfaction the detention order under Section 3 was passed. If for sufficient reason shown to the satisfaction of the Court, the affidavit of the person who passed the order of detention under Section 3 cannot be furnished, the counter-affidavit should be sworn by some responsible officer who personally dealt with or processed the case in the Government Secretariat or submitted it to the Minister or other officer duly authorised under the rules of business framed by the Governor under Article 166 of the Constitution to pass orders on behalf of the Government in such matters."

The learned Judge after referring to *Ranjit Dam's* case (albeit) and to *J.N. Roy* v. *State of West Bengal*, [1973] SCC (Cri) 123 stated as under:

> "Nevertheless, the failure to furnish the counter-affidavit of the Magistrate who passed the order of detention, is an impropriety. In most cases, it may not be of much consequence but in a few cases, for instance, where *mala fides* or extraneous considerations are attributed to the Magistrate or the detaining authority, it may, taken in conjunction with other circumstances, assume the shape of a serious infirmity, leading the Court to declare the detention illegal."

Having regard to the facts of that case wherein the Deputy Secretary (Home) filed the counter instead of District Magistrate it was held that the mere omission to file the affidavit by District Magistrate did not vitiate the detention order.

Speaking for the Bench, Krishna Iyer, J. in *Bhut Nath Mete* v. *State of West Bengal*, [1974] 1 SCC 645 at page 658 (para 21) has expressed his considered view on this point as hereunder:

> "True, we should have expected an affidavit from the detaining authority but even that is felt too inconvenient and a Deputy Secretary who merely peruses the records and swears an affidavit in every case is the poor proxy. Why

is an affidavit then needed at all? The fact of subjective satisfaction, solemnly reached, considering relevant and excluding irrelevant facts, sufficient in degree of danger and certainty to warrant pre-emptive casting into prison, is best made out by the detaining District Magistrate, not one who professionally reads records and makes out a precis in the form of an affidavit. The purpose is missed, going by the seriousness of the matter, the proof is deficient, going by ordinary rules of evidence, and the Court is denied the benefit of the word of one who takes responsibility for the action, if action has to be taken against the detainer later for misuse. We are aware that in the exigencies of administration, an officer may be held up far away, engrossed in other important work, thus being unavailable to swear an affidavit. The next best would then be the oath of one in the Secretariat who officially is cognisant of or has participated in the process of approval by Government—not one who, long later, reads old files and gives its gist to the Court. Mechanical means are easy but not legitimate. We emphasize this infirmity because routine summaries of files, marked as affidavits, appear in the returns to *rule nisi*, showing scant courtesy to the constitutional gravity of deprivation of civil liberty. In some cases, where a valid reason for the District Magistrate's inability to swear affidavits directly has been furnished, this Court has accepted the concerned Deputy Secretary's affidavit. This should, however, be the exception, not the rule."

Khanna, J. in *Asgar Ali* v. *District Magistrate, Burdwan & Ors.*, [1974] 4 SCC 527 while answering a contention that an affidavit by the detaining authority was essential for sustaining the validity of the detention order observed as follows:

"Although normally the affidavit of the person actually making the detention order should be filed in a petition for a writ of habeas corpus, the absence of such an affidavit would not necessarily be fatal for the case of the respondents. It would indeed depend upon the nature of allegations made by the detenu in the petition for determining whether the absence of affidavit of the person making the detention order introduces a fatal infirmity. In case an allegation is made that the officer making the detention order was actuated by some personal bias against the detenu in

A making the detention order, the affidavit of the person making the detention order would be essential for repelling that allegation. Likewise, such an affidavit would have to be filed in case serious allegations are made in the petition showing that the order was *mala fide* or based upon some extraneous considerations. In the absence of any such allegation in the petition, the fact that the affidavit filed on behalf of the respondents is not that of the District Magistrate but that of the Deputy Secretary, Home (Special) Department of the Government of West Bengal would not by itself justify the quashing of the detention order."

In *Suru Mallick* v. *State of West Bengal,* [1975] 4 SCC 470, this Court accepted the affidavit of the Deputy Secretary (Home) who dealt with the matter as the District Magistrate was not available and preoccupied with some urgent business. In *Gulab Mehra* v. *State of U.P. & Ors.,* [1988] 1 SCR 126, a Station House Officer of Kydganj Police Station filed the counter stating that District Magistrate had passed the detention order when the appellant was already in jail on the apprehension that the appellant therein was likely to be released on bail in the near future. Ray, J. speaking for the Bench while setting aside the order of detention held thus:

> "This clearly goes to show that the Sub-Inspector has arrogated to himself the knowledge about the subjective satisfaction of the District Magistrate on whom the power is conferred by the Act. The District Magistrate, the detaining authority in this case has not chosen to file his affidavit. The affidavit-in-opposition filed by the Station Officer of Police implies that he has access to the file of the District Magistrate or he influenced the decision of the District Magistrate for making the detention order."

Again in *State of Gujarat* v. *Sunil Fulchand Shah & Anr.,* [1988] 1 SCC 600, accepting a further affidavit of the Deputy Secretary (Home Department), this Court did not attach much importance to the fact that the affidavit was not filed by the detaining authority personally. However, the Court said:

> "It is true that in a case where a point as mentioned above arises the detaining authority should personally affirm on oath the stand taken on his behalf, but it cannot be suggested as an inflexible rule applicable to all detention cases irrespective of the circumstances."

Recently in *Madan Lal Anand* v. *Union of India,* [1990] 1 SCC 81 Dutt, J. speaking for the Bench pointed out: A

> "There can be no doubt that a deponent who has no personal knowledge about any fact may, on the basis of some other facts, make his submissions to the court. We do not think that any importance should be attached to the said statement made by the deponent in the counter-affidavit." B

Thereafter the learned Judge has expressed his views that when there is an allegation of *mala fide* or bias made against the detaining authority, then the detaining authority should himself swear to the counter-affidavit. Ultimately having regard to the allegation made therein and to the fact that the Under Secretary to the Government has filed the counter, the learned Judge pointed out: C

> "Merely because the detaining authority has not sworn an affidavit, it will not in all circumstances be fatal to the sustenance of the order of detention." D

As we have pointed out supra the reply affidavit and the additional affidavit before the High Court as well as this Court are filed by the Deputy Superintendent of Police who does not seem to have any connection whatsoever with the passing of the order or dealing with or processing the file at any point of time. In fact, the Deputy Superintendent of Police could not have got any personal knowledge with the passing of the order or its subsequent proceeding since the impugned order has been passed by the State Government and the subsequent proceedings have been dealt with by the officials of the Secretariat. Reverting to the facts of the case there is no explanation for the delay from 3rd to 9th July 1989, i.e. for 7 days for the Assistant Secretary merely to put up a note on the basis of the comments of the District Magistrate. The present additional affidavit sworn to by the Commissioner and Secretary on 21.4.1990 also does not whisper any explanation as to why such a delay of 7 days had occurred at the hands of the Assistant Secretary. E F G

The learned counsel appearing for the appellant in support of his contention that the unexplained delay has vitiated the order has placed reliance on a decision of this Court in *Rama Dhondu Borade* v. *V.K. Saraf, Commissioner of Police & Ors.,* [1989] 3 SCC 173 to which decision one of us (Ratnavel Pandian, J.) was a party. In that decision H

A after referring to various decisions of this Court including *Smt. Shalini Soni* v. *Union of India*, [1980] 4 SCC 544 the following proposition was laid down:

> "The detenu has an independent constitutional right to make his representation under Article 22(5) of the Constitution of India. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards this representation questioning the correctness of the detention order clamped upon him and requesting for his release, to consider the said representation within reasonable dispatch and to dispose the same as expeditiously as possible. This constitutional requirement must be satisfied with respect but if this constitutional imperative is observed in breach, it would amount to negation of the constitutional obligation rendering breach would defeat the very concept of liberty—the highly cherished right—which is enshrined in Article 21 of the Constitution."

B C D

However, in the same decision it has been pointed out that "what is reasonable dispatch depends on the facts and circumstances of each case and no hard and fast rule can be laid in that regard." We have already expressed that the affidavit filed by the Deputy Superintendent of Police is not worth consideration and there is absolutely no explanation for the delay caused at the hands of the Assistant Secretary.

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Therefore, for the reasons stated above, we set aside the impugned order of detention on the ground that there is a breach of constitutional obligation as enshrined under Article 22(5) of the Constitution of India. In the result, the appeal is allowed and the detenu is directed to be set at liberty forthwith.

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N.P.V. Appeal allowed.