(1989) 08 MP CK 0001

Madhya Pradesh High Court (Gwalior Bench)

Case No: Miscellaneous Petition No. 141 of 1989

Ajay		APPELLANT
	Vs	
State of Madhya Pradesh and Another		RESPONDENT

Date of Decision: Aug. 11, 1989

Acts Referred:

- Constitution of India, 1950 - Article 14, 19, 21, 22, 22(5)
- Criminal Procedure Code, 1973 (CrPC) - Section 76, 81, 82, 83, 87
- National Security Act, 1980 - Section 3, 3(1), 3(2), 3(3), 4
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 307, 506

Citation: (1990) CriLJ 1738 : (1989) MPJR 692 : (1990) 2 RCR(Criminal) 253

Hon'ble Judges: T.N. Singh, J; R.C. Lahoti, J; K.K. Verma, J

Bench: Full Bench

Judgement

T.N. Singh, J.

On the following two questions, this Bench is required to submit its opinion, but the questions are evidently framed with reference to the factual contentions raised with the object evidently, of final decision on the petition, to be rendered by this Bench:

"1. Whether on the Court''s satisfaction that the petitioner was already in custody on 2-9-1988, when the detention order was passed, the order of detention is rendered vitiated on that ground alone because the order of detention does not show awareness of the petitioner''s custody, if established, on 2-9-88 ?

Whether the detaining authority''s failure to explain or explain away the time-gap between 2-9-88 and 14-11-88, respectively the date of the detention order and the date of petitioner''s detention thereunder, by itself, renders the continuance of the petitioner''s detention invalid? "

Therefore, it is necessary to state first the few admitted facts appertaining the questions aforesaid albeit, with reference to pleadings. Petitioner has challenged his detention under the National Security Act, for short, the ''Act'', in this petition and in ground No. (2), he has stated, "While he was in Jail, the order of his detention Annexure-P/1 was passed", and in that regard, he has raised the contention in that ground, adding, "The detaining authority N.P. No. 2 owed a duty to consider this fact and further more, the order was served upon on (sic) 13-11-88 while the order of detention was passed on 1-9-88". At para 1 of the petition, the averment is that the petitioner "was arrested on 11-11-88 and put to Central Jail, Gwalior on 13-11-88". What is clear, therefore, is that the petitioner was at large when he was arrested, to enforce the impugned order. Indeed, in the return, in reply to statement made in Ground No. (2), the Detaining Authority has admitted, "Pursuant to the said order of detention, the petitioner was taken into detention on 13-11-88."

On pleadings, it is rightly contended that the Detaining Authority has not placed any material for the satisfaction of the Court that the two-fold contention raised in Ground No. (2) cannot succeed. There is nothing in the return and otherwise also, we have not been satisfied by the Detaining Authority that on 2-9-1988, when the impugned detention order was passed, the petitioner was not confined in jail. The awareness of Detaining Authority of petitioner''s confinement is manifested neither in the detention order nor in the grounds of detention and the very fact that the Detaining Authority has not cared to deny specifically petitioner''s contention about his confinement in Jail on 2-9-1988 buttresses the conclusion that the Detaining Authority has only tried to avoid a decision on the issue of its awareness of petitioner''s confinement on the relevant date. Admittedly also, there is no explanation to be read in the return as to why action was taken to detain the petitioner under the Act only on 13-11-1988 though the impugned detention order was passed against him on 2-9-1988. There is no whisper about that to be read in the return.

There is much substance in counsel''s argument that Summit Court, in its recent decision in the case of Abdul Razak Abdul Wahab Sheikh Vs. S.N. Sinha, Commissioner of Police, Ahmedabad and Another, , has placed the law in clear focus beyond any shade of doubt. However, according to us, that decision deals mainly with the issue of awareness. In that regard, however, their Lordships surveyed the entire gamut of judicial opinion on the question and referred to large number of that court''s earlier decisions on the subject, (e.g. Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, ; Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others, ; Shashi Aggarwal Vs. State of U.P. and Others, et al). They held that bald statement made by the Detaining Authority that detenu was likely to be released on bail and thereafter there were full possibilities of his continuance of prejudicial activities, cannot be accepted, approving the law laid down in Binod Singh (supra), where it was held that "If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should

not be exercised". They held, on consideration of the decisions cited, "the principle that emerges is that there must be awareness in the mind of the detaining authority that the detenu is in custody at the time of service of the order of detention on him and cogent relevant materials and fresh facts have been disclosed which necessitate the making of an order of detention." In that case, the order of detention was served on him in jail and in the grounds of detention, that fact was noted, but it was also stated therein, "there are full possibilities that you may be released on bail in this offence also". The awareness of the Detaining Authority was also tainted on the ground that on the date of the order, no application for bail was made on behalf of the detenu and possibility of his going out on bail was non-existent. Thus, the subjective satisfaction of the Detaining Authority as to the necessity of detaining the petitioner on the date of order was held tainted being not based on cogent and relevant material.

In this connection, we may also profitably refer to a Bench decision of the Gauhati High Court in Joynath Sharma Vs. State of Assam and Others, wherein the law on the point was examined with reference to Detaining Authority''s jurisdictional competence stemming from Section 3(2) of the Act. Relying on Kanchanlal Maneklal Chokshi Vs. State of Gujarat and Others, ; Biru Mahato Vs. District Magistrate Dhanbad, ; Vijay Kumar Vs. State of Jammu and Kashmir and Others, and other decisions, it was held that either on the face of the order or from return filed, the Court must be satisfied that jurisdictional requirement was duly fulfilled by the Detaining Authority before passing the order under the Act: that it was necessary to pass that order to effectively interdict him, by detaining him under the Act, from indulging in prejudicial activities (which the law empowered, the Detaining Authority to prevent), by due application of mind to the fact as to whether the person against whom the order is contemplated is a man at large on that date, or he is under some restraint for the time-being and he is likely to be freed therefrom.

Law, according to us, appears to be well-settled that when Detaining Authority''s subjective satisfaction is challenged on the ground of his non-awareness of the detenu being held in confinement on the date of detention order, the order is vitiated on that ground alone as jurisdictional competence of the authority to pass the order is vitiated. True, the Detaining Authority''s subjective satisfaction cannot be challenged as to sufficiency or credibility of material on which it is passed. On this question, this Court has discussed the law in Rajjan''s case ; but that is a different matter. When detention order is challenged on the ground that the detenu was held in confinement and, therefore, it was not "necessary" to pass an order against him u/s 3 of the Act with the object of subserving any of the statutory objectives contemplated thereunder, the position is different. The subjective satisfaction of the Detaining Authority in such case suffers apparently from non-application of mind to petitioner''s existing status on the date of the order as to whether he is a free man and his freedom has to be curtailed for the purpose aforesaid. For this view, we also read support in recent decision of the Apex Court in Gulab Mehra Vs. State of U.P.

and Others, : (1988 Cri LJ 168).

Accordingly, we answer question No. 1 in the affirmative and we hold that petitioner''s detention under the impugned order passed on 2-9-1988, is illegal and the order is liable to be quashed on that ground alone.

We proceed to address ourselves to the second question. It is submitted by Shri Barua that a Division Bench of this Court has already expressed its opinion conclusively in Dilip Girja Shankar Pandey Vs. State of Madhya Pradesh and Another, , that when there is inordinate delay in apprehending the detenu after passing the order of detention, it becomes the bounden duty of the Detaining Authority to satisfy the Court that necessity subsisted on the date of apprehending the detenu to detain him under the Act. If no explanation is forthcoming from the Detaining Authority for delayed apprehension, continued detention of the petitioner is void and unconstitutional. That view was taken on the basis of the decisions of the Apex Court and of a Division Bench of Gauhati High Court. (See Sk. Nizamuddin Vs. State of West Bengal, ; Sk. Serajul Vs. State of West Bengal, ; and Prabin Kumar Gogoi Vs. Deputy Secy. to the Govt. of Assam and Others, . This Court has approved the view expressed in Prabin Kumar (supra) that an order of detention passed under the Act cannot be used as a warrant of arrest to detain any person any time the authority chooses without being satisfied as to "necessity" to do so on the date of apprehending the person to be detained by him under the Act. However, support for that view can also be read in Apex Court''s decision in Suresh Mahato Vs. The District Magistrate, Burdwan and Others, , wherein their Lordships, approving Sk. Serajul (supra) and Sk. Nizamuddin (supra) observed, "if there is unreasonable delay between the date of the order of detention and the date of arrest of the detenu, such delay, unless satisfactorily explained, would throw considerable doubt on the genuineness of the subjective satisfaction of the District Magistrate and it would be a legitimate inference to draw that the District Magistrate was not really and genuinely satisfied as regards the necessity for detaining the petitioner". Because in that case, the delay was of "about one month", the inference negativing genuine satisfaction of the District Magistrate was not drawn.

The question, however, can be viewed also from another angle because it cannot be forgotten, as it is unfortunately often done, that u/s 3(2) of the Act. Legislature has entrusted the draconian power of administrative detention to the Central Government and State Government primarily. They may, "if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from, acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained". The District Magistrate or Commissioner of Police exercises power on authority in that regard being delegated to him u/s 3(3) for a period of three months "at any one time", but

that delegation is done "having regard to the circumstances prevailing or likely to prevail within local limits of the jurisdiction" of such officer. Evidently, the District Magistrate cannot delegate further that power to anybody else. Evidently also, the exercise of the power is manifested really in its enforcement. It is necessary, therefore, for the District Magistrate to ensure that detention order passed by him on any date is not enforced by any person at any time at his whim or caprice as his own power in respect to that order is subjected to the twin constraints of bonafide satisfaction as to the necessity of his acting in respect to any person for specified purposes and indeed, to act within the time scale of his own delegated authority. Because the Act, unlike the Code of Criminal Procedure, is silent on the procedure of enforcement of the detention order this Court in Dilip Girja Shankar Pandey Vs. State of Madhya Pradesh and Another, leaned on the constitutional requirement of reasonable procedure contemplated under Article 21. It has to be noted further in this context that the consequences of a Police Officer executing a warrant of arrest u/s 76, Cr.P.C. are different in that no finality is attached to his act. The accused is produced before a Magistrate within 24 hours and u/s 81, Cr.P.C., his liberty may be immediately restored to him by Court on his offering bail. Accordingly, as held in Dilip (supra), it is really a patent and potent constitutional imperative that interdicts a detaining order being used as a warrant of arrest. Indeed, after Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, and A.K. Roy and Others Vs. Union of India (UOI) and Others, , law has taken a new turn. There is greater emphasis now on court''s duty to interpret law affecting personal liberty in a manner that scope of abuse of power contemplated under such laws is effectively eschewed. This view, this Court has expressed also in Makku''s case (M.P. No. 37 of 1989, decided on 27-7-1989) : (reported in Makku Vs. State of Madhya Pradesh and Another, . Needless to reiterate that even provisions of clauses (4) to (7) of Article 22 do not stand alone; they are to be read now along with Articles 14, 19 and 21 and subjected to the requirements thereof.

For the reasons aforesaid, we also answer in the affirmative question No. 2, holding that if time-gap between passing the detention order and apprehension and detention of the detenu under the Act is not explained, that, by itself, vitiates any detention made under the Act. In the instant case, the time-gap being a long one of about 21/2 months and that not having been explained in any manner whatsoever, the petitioner''s continued detention on the basis of the impugned order is not sustainable in law.

Having answered the two questions in the manner aforesaid, we are of the view that the petition must succeed. It is accordingly allowed and petitioner''s detention under the Act under the impugned order is quashed. He shall be set at liberty forthwith if not required in connection with any other case.

K.K. Verma, J.

I agree with the conclusion reached by my learned brother Dr. T.N. Singh, J., on the first question. I, however, do not agree with him --- with utmost respect to him -- in the conclusion reached by him about the question No. 2.

First, I would like to deal with question No. 1. In the return of the State Government and the counter affidavit of the District Magistrate, Guna, the petitioner''s averment (under Ground No. 2) that he was arrested by the police in respect of the offence referred to in Ground No. 16 of the grounds of detention furnished by the District Magistrate, and that the petitioner was in jail custody in connection therewith on 2-9-1988 when the detention order was passed was not denied. It is, therefore, established that the petitioner was arrested as an accused for a substantive offence before 2-9-88 and had been in custody from the time of arrest and was in custody on 2-9-1988 when the order of detention was passed by the District Magistrate, Guna. The ground No. 16 furnished by the District Magistrate, Guna, shows that the offence was registered as Crime No. 603/88 under Sections 307/147/ 148/149 and 506 (Second Part), I.P.C. on 9-8-1988.

The order of detention and also the grounds of detention do not contaih any reference to the fact that the petitioner was already in detention in jail in connection with Offence No. 603/88, registered on 9-8-1988.

It is now well settled that there is no legal bar to pass an order of detention against a person already in judicial custody. In Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, , it was observed (Para 12):

"As an abstract proposition of law there may notbe any doubt that Section 3(1) does not preclude the authority from passing an order of detention against a person whilst he is in detention in jail .....

In Dr. Ramakrishna Rawat Vs. District Magistrate, Jabalpur and Another, , it was observed (Para 11):

"The mere service of the detention order on the petitioner in jail would not, therefore, invalidate the order."

In Ayya alias Ayub Vs. State of U.P. and Another, , it was observed at paragraph 11 :

"..... without merit, is the contention as to the impermissibility of an order of detention being made against a person already in judicial custody."

So it is not the mere fact of a person already being in custody that renders an order of detention bad in law.

In fact, an order of detention may legitimately and validly be passed against a person in custody under certain circumstances. In Masood Alam etc. Vs. Union of India (UOI) and Others, , which was referred to in Dr. Ramakrishna Rawat Vs. District Magistrate, Jabalpur and Another, , it was observed in effect that notwithstanding absence of any legal bar in serving an order of detention on a person already in jail,

the detaining authority must have relevant material for its satisfaction that the person concerned, in for an early release from the existing custody, was likely to indulge in prejudicial activities. The Court went on to say about the rationale or the kernel of the situation as follows:

"..... The real hurdle in making an order of detention against a person already in custody is based on the view that it is futile to keep a person in dual custody under two different orders .....".

The Court went on to say that the objection in the dual custody doctrine, as aforesaid, is met :

"if the earlier custody is without doubt likely to cease soon and the detention order is made merely with the object of rendering it operative when the previous custody is about to cease."

In Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, , the Court observed (Para 12) :

"The question as to whether an order of detention can be passed against a person who is in detention, or in jail, will always have to be determined in the circumstances of each case."

The Court then gave an instance where a detention order made against a person already in custody could not be defended in the following situation:

"take for instance, a case where a person has been sentenced to R. I. for 10 years. It cannot be seriously suggested that soon after the sentence of imprisonment is pronounced on the person, the detaining authority can make an order directing the detention of the said person after his release from jail at the end of the period of the sentence imposed on him."

The Court then gave another instance where a detention order could validly and properly be made against a person in custody. The Court said:

"On the other hand, if a person who is undergoing imprisonment for a very short period, say for a month or two or so, and it is known that he would soon be released from jail it may be possible for the authority to consider the antecedents history of the said person and decide whether the detention of the said person would be necessary after his release from the jail, and if the authority is bona fide satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released."

The observations of the Supreme Court in two cases show that the Court has been spelling out the fulfilment of the following requirement:

The detaining authority must be aware that the person sought to be detained is already in custody, that the custody is likely to cease soon and that the detaining

authority has also considered relevant material, that is, the antecedents of the person concerned and the likelihood or otherwise of that person committing prejudicial acts for the prevention of which the relevant law on the preventive detention provides for making an order of detention of such a person. If the detaining authority could not or did not undertake the aforementioned exercise before making an order of detention of a person already in custody, that leaves the order open to charge that the detaining authority did not apply its mind to the relevant circumstances, a consideration whereof being the guarantee that subjective satisfaction of the detaining authority was bona fide.

The aforementioned requirement finds further crystallization in the observations of the Supreme Court in Merugu Satyanarayana Vs. State of Andhra Pradesh and Others, , (Para 14):

"The awareness must be of the fact that the person against whom the detention order is being made is already under detention or in jail in respect of some offence or for some other reason. This would show that such a person is not a free person to indulge into a prejudicial activity which is required to be prevented by detention order. And this awareness must find its place either in the detention order or in the affidavit justifying the detention order when challenged. The absence of this awareness would permit an inference that the detaining authority was not even aware of this vital fact and mechanically proceeded to pass the order which would unmistakably indicate that there was non-application of mind to the most relevant fact and any order of such serious consequence resulting in deprivation of liberty if mechanically passed without application of mind, is obviously liable to be set aside as invalid."

In the case before us the order of detention and the grounds of detention show that the District Magistrate, Guna, was not even aware of the vital fact that petitioner Ajay was in jail at the time the detention order was being passed.

The confidential memo dated 18-8-1988 (Annexure R/1-A.) sent by the S.P., Guna, to the District Magistrate, Guna, did not say anything whether the petitioner had been arrested or not in connection with the offence registered against him as Crime No. 512/88 on 9-8-1988. What is more, O. P. Chauhan, Town Inspector of P.S. Guna since 6-6-1988 did not say a single word in his deposition before the District Magistrate on 2-9-1988 itself that petitioner Ajay had been taken into custody or not in connection with the aforementioned offence. It is, therefore, a case where the sponsoring authority, that is, the police agency which gave no information to the District Magistrate, Guna, on the subject whether petitioner Ajay was at large or he had been taken into custody.

So, the sponsoring authority''s aforementioned failure to inform the District Magistrate, Guna, on this vital fact resulted in non-application of the mind of the District Magistrate, Guna, to the real situation, namely, the passing of an order of

detention against a person who was already in custody. This non-application of mind resulted in rendering the factor of the subjective satisfaction of the detaining authority about passing the order of detention a non-existence one.

I, therefore, agree with my learned brother Dr. T. N. Singh, J., that the order of detention is bad in law because there was a total unawareness on the part of the District Magistrate, Guna, of the fact that petitioner Ajay had already been in custody at the time of order of detention was passed on 2-9-1988.

Now, I come to the second question referred to us.

In Sk. Nizamuddin Vs. State of West Bengal, : (1975 Cri LJ 12), the solitary incident occurred on 14th April 1973. The order of detention was passed on 10th September 1973 and the person concerned was arrested on 23rd November 1973. The time-gap in question were not satisfactorily explained. The Court held that there was no proper application of mind on the fact of the District Magistrate and that his avowed subjective satisfaction was not real and genuine. The Court, however, observed (Para 3):

"..... We must not be understood to mean that whenever there is delay in arresting the detenu pursuant to the order of detention, the subjective satisfaction of the detaining authority must be held to be not genuine, or colourable. Each case must depend on its own peculiar facts and circumstance."

In Sk. Serajul Vs. State of West Bengal, , the third and the last incident had occurred on 15-1-1972. The detention order was made on 24th August 1972. The person concerned was arrested on 22-2-1973. Thus, here, as in Shaikh Nizamuddin''s case, there was delay at both the stages. There was no satisfactory explanation from the detaining authority. The Court held that the detaining authority had not applied his mind and that there was no real or genuine subjective satisfaction. The Court, here also, observed as follows (Para 2):

"..... we must not be understood to mean that whenever there is a delay in making an ''order of detention or in arresting the detenu pursuant to the order of detention, the subjective satisfaction of the detaining authority must be held to be not genuine or colourable. Each case must depend on its own peculiar facts and circumstances."

In Prabin Kumar Gogoi Vs. Deputy Secy. to the Govt. of Assam and Others, , the order of detention was passed on 18-7-83 and the person concerned was apprehended on 8-11-83 and there was no explanation why it took so long to apprehend him. The Court held that this circumstance contradicted the element of genuine necessity for making the order of detention subsisting on the date of the apprehension of the petitioner.

Now, the Supreme Court''s judgments make it clear that in such matters each case must depend on its own peculiar facts and circumstances.

In fact, in Indradeo Mahato Vs. The State of West Bengal, , with a gap of 10 months between the making of the order of detention and the service of the order of the detention, what was said to the Court and what was the Court''s reply is as follows:

"The petitioner''s learned counsel''s submissions, recited at para 2 of the judgment, are extracted below:

"..... the gap of about 10 months ..... suggests that there was no real and genuine apprehension that the petitioner was likely to act in a manner prejudicial to the maintenance of public order. According to the submission, had the matter been grave and serious enough, the State would have taken adequate steps under Sections 87 and 88, Cr.P.C. for the purpose of securing the petitioner''s early arrest..... we are unable to accept this contention."

Their Lordships repelled the arguments saying :

"In terms, therefore, these sections may not be attracted. But even assuming it is permissible to have resort to such procedure the mere omission to do so could not, in our opinion, render the detention order either illegal or mala fide as the suggestion connoted. The petitioner''s detention cannot, therefore, be considered illegal on this ground."

In Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others, :

"10. . . . .we wish to emphasise and make it clear for the guidance of the different High Courts that a distinction must be drawn between the delay in making of an order of detention under a law relating to preventive detention like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards of Article 22(5) of the Constitution. It has been laid down by this Court in a series of decisions that the rule as to unexplained delay in taking action is not inflexible."

In Golam Hussain alias Gama Vs. The Commissioner of Police Calcutta and Others, , it was pointed out that the time-gap test does not amount to a mechanical test by counting the months of the interval between the two relevant stages relevant in the preventive detention matter.

36 Now, in the case before us it is established that the petitioner was arrested in connection with the substantive offence constituted by the last incident, the ground No. 16 in the grounds of detention. The petitioner himself averred at paragraph 1 of the petition that he was arrested by virtue of the detention order on 11-11-1988 and was committed to jail on 13-11-1988. There is, however, no averment in the petition to show when he was discharged from the jail in the substantive offence. Hence, there is no averment in the petition to show the length of time in which he had remained at large after his release from jail and before he was arrested under the National Security Act on 11-11-1988.

Coming to the point whether there was any delay and if so whether the delay was unreasonable, it may be mentioned that in the "Concise Oxford Dictionary" the expression "Delay" as a transitive verb has been given the meanings : postpone; defer; make late; hinder.

So, it is not established that the petitioner had been freely moving about for a considerable long period of time and that the police or the detaining authority set back and put off the matter of the arrest of the petitioner. This is the sense in which the expression "delay" has to be understood when the context does not require consideration of the time-gap as fixed by a definite period of time, expressed in the number of days, months etc.

I, am, therefore, of the view that there was no unreasonable loss of time in the arrest of the petitioner after his discharge from the jail in the case referred to in ground No. 16 of the grounds of detention.

I cite the following observations from Sharad Kumar Tyagi Vs. State of Uttar Pradesh and Others, :

"It is not therefore a case where the petitioner was freely moving about but no arrest was effected because his being at large was not considered a hazard to the maintenance of public order."

So Dilip Girja Shankar Pandey Vs. State of Madhya Pradesh and Another, : Suresh Mahato Vs. The District Magistrate, Burdwan and Others, , turn on their own facts and are distinguishable on facts. Makku''s case (M. P. No. 37 of 1989, decided on 27-7-1989): (reported in Makku Vs. State of Madhya Pradesh and Another, , does not deal with the situation which is involved into consideration of the second question before us.

Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, , A.K. Roy and Others Vs. Union of India (UOI) and Others, , have dealt with constitutional matters. I do not find ratio decidendi in Sk. Nizamuddin Vs. State of West Bengal, , Sk. Serajul Vs. State of West Bengal, and Sharad Kumar Tyagi''s case are in any way in conflict with the law laid down in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, and A.K. Roy and Others Vs. Union of India (UOI) and Others, cases ;

In the result, I am of the view that the detaining authority''s failure to explain why the petitioner was not arrested under the detention order from the date of the petitioner''s discharge from the jail in the substantive case and up to his being apprehended and detained in jail under the order of detention on 14-11-1988 does not by itself render the detention invalid.

R.C. Lahoti, J.

I have had the advantage of reading the opinions recorded by my learned brothers Dr. T. N. Singh, J. and K.K. Varma, J. In so far as the first question is concerned, I

unhesitatingly express my concurrence with the opinions recorded by my learned brothers and answer the question in affirmative.

As to second question, I would like to add something of my own. In my opinion, the question has two aspects: factually, whether there was a delay in executing of detention order and legally, the effect of detaining authority''s failure to explain or explain away the time-gap between the date of detention order and its execution, amounting to delay. If there has been a delay violative of the procedural safeguards flowing from Article 22 of the Constitution, the detention would be vitiated. A detention order having been passed, Section 4 of National Security Act provides that the order may be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1973. The provision indicates that the passing of detention order and its execution cannot be simultaneous and the Parliament was aware of the fact that of necessity there was bound to be a time-gap between passing of the order and its execution. The ratio flowing from Sk. Nizamuddin Vs. State of West Bengal, , Sk. Serajul Vs. State of West Bengal, , and several other cases referred to in the opinions recorded by my learned brothers is that a mere gap between the two dates does not of itself, without more, vitiate the order, though the onus of explaining the delay lies on the detaining authority.
It would be useful to extract the entire para 24 from the pronouncement of their Lordships in Sharad Kumar Tyagi Vs. State of Uttar Pradesh and Others, , which reads as under (at p. 837 of Cri LJ) :--

"One other argument advanced before us was that even though the order of detention had been passed on April 5, 1988, no steps were taken to take the petitioner into custody till he surrendered himself in Court on July 4, 1988. This contention is on the face of it devoid of merit because it has been specifically stated in the counter-affidavits that the petitioner was absconding and hence proclamations were made under Sections 82 and 83, Cr.P.C. and it was only thereafter the petitioner had surrendered himself in Court. It is not therefore a case where the petitioner was freely moving about but no arrest was effected because his being at large was not considered a hazard to the maintenance of public order."

It is clear that the time-gap of about three months between the passing of the order and its service was explained away in the counter-affidavits stating that the petitioner was absconding and that had contributed to the belated service of the detention order. In other words, if the delay is explained, the detention order is not vitiated.

In Dilip Girja Shankar Pandey Vs. State of Madhya Pradesh and Another, , there was a gap of about one-and-half months between the passing of the detention order and its execution. The delay was not explained. That had the effect of vitiating the detention order. However, Dilip proceeds to lay down the law that the detaining

authority must be satisfied even on the date of apprehending the detenu that there was subsisting necessity of detention. That proposition appears to have been laid down too widely and with respect I regret my inability to subscribe to that view. Not a single order would be valid unless the passing of the detention order and its execution were simultaneous. If such a wide proposition were to be accepted, the detaining authority would be involved into an endless process, requiring application of mind to the detention order until it was served on detenu and reach satisfaction as to whether the necessity of detaining the detenu continued till that hour of that day. The detention order may never be able to secure an exit from the office of the detaining authority for it would be the subjective satisfaction of the detaining authority which alone would be relevant and that must exist on the date of detention.

The ratio of several decisions of the Apex Court is that whether the time-gap between the two dates vitiates the detention order or not, depends on the facts and circumstances of each case. The Court expected an explanation from the detaining authority explaining away the time-gap. In none of the decided cases, the Apex Court has held the detention order vitiated for failure of the detaining authority to record its satisfaction as to the necessity of detention on the date of the apprehension of the detenu.

Coming to the case at hand, from the facts as summed up in paras 2 and 3 of the opinion recorded by my learned brother Dr. T. N. Singh, J. it is clear that the petitioner did mention in the petition that the detenu was in jail on the date of passing of the detention order. The fact that the petitioner was at large when the detention order was executed and the petitioner was taken in detention can also be gathered by construing averments in the petition. What happened between 1-9-1988 and 11-11-1988 is not to be found averred in the petition nor explained by the respondents in the counter-affidavit. Who is to blame?

Strict rules of pleadings are not applicable to habeas corpus petitions. Vide para 11 in Ayya alias Ayub Vs. State of U.P. and Another, : their Lordships of the Supreme Court have observed : (at p. 994 of Cri LJ)--

"Wherever a petition for writ of habeas corpus is brought up, it has been held that the obligation of the detaining authority is not confined just to meet the specific grounds of challenge but is one of showing that the impugned detention meticulously accords with the procedure established by law."

In the present case, the tenor of the petition indicates that the delay in execution of the detention order was a ground of challenge taken up by the petitioner and it was obligatory on the part of the detaining authority to have explained the delay, by demonstrating how the detention order was dealt with and where it remained between 1-9-1988 and 11-11-1988. The date of the petitioner''s release from jail, where he was on 1-9-1988 in connection with a substantive offence, was a fact as

much in the knowledge of the State as of the petitioner. That explanation would have been an end of the controversy but the counter-affidavit is certainly lacking that explanation which, in my opinion, was the bounden duty of the detaining authority to furnish. I would, therefore, answer question No. 2 thus:--

"The detaining authority''s failure to explain or explain away the time-gap between the date of detention order and the date of its execution does not by itself render the continuance of the detenu''s detention invalid; it would depend on the facts and circumstances of each case; but in the facts and circumstances of the present case, the failure of the detaining authority in explaining away the time-gap has vitiated the detention."

At the risk of repetition, I would like to say that the taint was attracted to the impugned order of detention because the unexplained delay in execution of order cast a doubt as to reality and genuineness of subjective satisfaction of the detaining authority arrived at earlier and not because the detaining authority failed to record its satisfaction as to necessity of detention subsisting on the date of execution.

In conclusion, I concur with the view that the petition must succeed and the petitioner''s detention must be quashed setting the petitioner at liberty forthwith, if not required in connection with any other case.

ORDER

For reasons separately recorded in the three separate judgments, the petition stands allowed and petitioner''s detention stands quashed. He shall be released forthwith if not required in connection with any other case.