

(2002) 08 CAL CK 0028

Calcutta High Court

Case No: T No"s. 118, 120, 121 and 122 of 2002

Mahendra Jain

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision: Aug. 8, 2002**Acts Referred:**

- Constitution of India, 1950 - Article 21, 22, 226
- Customs Act, 1962 - Section 107, 108

Citation: (2003) CriLJ 1464 : (2003) 89 ECC 862 : (2003) 156 ELT 193**Hon'ble Judges:** Amitava Lala, J**Bench:** Single Bench**Advocate:** Anindya Kr. Misra, P.K. Mallick, Sibdas Banerjee, V.N. Dwivedi and O.P. Trivedi, for the Appellant; Bhaskar Sen and Swapan Dutta, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Amitava Lala, J.

The first writ petition is made by a Director of the company known as M/s. CEE AN INTERNATIONAL PRIVATE LIMITED. According to him, on 12th February, 2002 at 12.30 p.m. some persons disclosed their identity as Officers of Directorate of Revenue Intelligence, Calcutta Zonal Unit raided the office and searched the office premises. Since nothing was found after such search a list was handed over with the note "Nil". On the same day search was also conducted at the residence of the petitioner and when again nothing was found there, the similar search list with the remark "Nil" was handed over. The petitioner was directed to appear in the Zonal Unit on the same day in connection with the enquiry relating to import of one M/s. Chessman Impex Private Limited. A summon was also served on the same day i.e. 12th February, 2002. The petitioner contended that he has got nothing to do in respect of the named company for which search was conducted and summon was issued. The direction in such summons requiring the presence of the petitioner

before the appropriate authority on the same day at 5 p.m. was duly complied with.

2. The other three writ petitions were made by one Sri Vikash Kumar Jain and others Sri Surendra Nath Gangwal and Sri Samir Saha.

3. Mr. Vikash Kumar Jain claimed to be the transporter carried the goods of the concerned company namely M/s. Chessman Impex Private Limited from India to Bangladesh. The allegation is that the Officers of the Directorate of Revenue Intelligence used third degree method to him. By brutal physical assault in the dead night they forced the petitioner to write maize were carried and exported instead of wire rods. He was further forced to falsely implicate Sri Mahendra Kumar Jain, the petitioner of the first writ petition. Because of such brutal assault he blindly followed the dictate of the officers to save his life. In spite of being told about his illness and past operation he was not spared. The condition of the petitioner deteriorated in the evening of 12th February, 2002 and only then he was let off at about 9.30 p.m. He was hospitalized. Certain signatures were also obtained by the officers on several printed forms having blank spaces.

4. So far as the third writ petition is concerned the same is made by the concerned company and also by one Sri Surendra Kr. Gangwal stated to be the Director of that company imported Re-rollable Scraps against advance licence. It has completed its export obligation of 5000 MT of Non-alloy Bars and Rods (Wire rods) for short by January, 2002. The company received export proceeds by way of remittance on 6th February, 2002. The representatives of the aforesaid authority visited the office at Calcutta when the second petitioner happened to be out of Calcutta. One of the two officers enquired about him and left his telephone number. In turn, the petitioner telephoned, when he was called upon to reach the office on a particular date. The respondent No. 4 asked few questions and directed him to sit and wait. He had come to know that when he was there the office was searched. At about 5 p.m. the second petitioner sought leave of the Officer present therein to enable him to take dinner when it was refused. At about 8.30 p.m. in the night on the request of writing in Hindi instead of English he was met with slap on the face and got abuse. They were dictating certain thing which were untrue. The assault, torture, abuse and inhuman treatment continued till about 1 a.m. on 12th February, 2002. He was compelled to write the dictates and the same type of interrogation was continued up to 4.30 a.m. in the morning. At about 6 a.m. in the next day the second petitioner sought permission to go home for getting fresh and bath. However, the request was also refused. He was directed to use the toilet of the office where the doors were kept open even during use. At about 8 a.m. again interrogation started. They further, threatened that if the second petitioner do not follow what they say he will be detained for another 4 hours and the things which happened in the past would be repeated more severely. The petitioner will be implicated in various false cases whereby his whole life would be spoiled and spend behind the bars. It was also stated that if he follow their dictate nothing will happen. Upon losing all strength

the petitioner was forced to write 4 to 5 pages document. In this way, he was detained for about 36 hours by the authority concerned.

5. The last writ petition is made by one Sri Samir Saha claimed to be a Staff of the Custom's clearing agent. He acted for export of both the consignments i.e. wire rods and maize. On 11th February, 2002 at about 7 p.m. petitioner was called to the office. Since the things were getting delayed the petitioner requested leave of the Officers present there and undertook to come down again on the next date i.e. 12th February, 2002 during office hours but he was not allowed to leave. The petitioner was directed to wait for considerable time and at the evening from 4 p.m. to 10 p.m. around 4 to 5 officers questioning about the export of the aforesaid company. The petitioner was beaten on back, hip, legs and also slapped on the face since he refused to give statement which was not true. This kind of torture and physical assault continued throughout the night of 11th/12th February, 2002 and the whole day till late evening in around 9 p.m. on 12th February, 2002. The petitioner also heard cries of other people in the same office. He was not allowed to meet with him. Petitioner was forced to write certain statements.

6. The aforesaid four writ petitions appear to be arising out of self same cause. Thus all are taken together for an analogous hearing. The cause is indifferent attitude of the Revenue Intelligence Officers in respect of the petitioners excepting one i.e. the first petitioner for who's purported purpose the other petitioners were tortured in the name of investigation for whole of the day and night. The petitioners sustained physical injuries. Thus, all the writ petitioners, by making the writ petitions prayed before this Court that they are ready and willing to participate in the enquiry and/or investigation as against the summons but such activities should be proceeded in the proper manner being restricted during the office hours and in presence of observer.

7. Initially, a prayer was made for engagement of lawyer/observer which was refused by this Court but observer other than lawyer was allowed. However, the respondents prayed for vacating such order. The sole case of the respondent authorities, either at the initial stage or at the final hearing, based on a judgment reported in [Poolpandi Vs. Superintendent, Central Excise and others etc. etc.](#), Ratio of such Judgment was reiterated by a Division Bench of this Court in 1997(1) CHN 440 (Union of India and Ors. v. Ajit Kumar Agarwala and Ors). The bone of contention of their argument is that whatsoever was called upon for the purpose of interrogation by the office of the Director of Intelligence cannot be said to be accused so that they can get a protection of enquiry and investigation for a limited hour and in presence of an observer. This Court did not able to pursue himself in vacating the interim order without further hearing. Neither any appeal was preferred from such order nor they have continued with enquiry, investigation in the restricted manner. Really court became curious from that stage. Action on the part of the respondents were so severe that enquiry/investigation were continued for whole day and night but as soon as an interim order was passed by this the

Court the enquiry/investigation was entirely stopped in the garb of the limitation under the interim order, why? At least the enquiry/ investigation should have been proceeded in the restricted manner for the limited period. Therefore it can be presumed that intention of the authorities was otherwise than what they have pretended to show.

8. In the final hearing apart from above point, a question of maintainability of the writ petitions on the prayers was also taken by the respondents. According to Mr. Bhaskar Sen, learned Senior Counsel appearing for the respondents that the first writ petition is based on apprehension and the other three writ petitions are based on allegations. Neither the Court can scrutinise such factual allegations nor Court can proceed on the basis of the apprehension. Therefore, there is no basis at all for entertaining the writ petitions. Moreover, the vagueness of the prayers of the writ petitions is such that the same cannot be given any credence at all. Firstly, they have complained about the summons to which the writ court normally does not interfere. Failing therewith they have tried to make out an alternative case. They have really asked for interrogation for limited hours. The petitioners have virtually given up their original prayers and developed their case on the basis of alternative prayers. The Court does not proceed on the basis of assumption.

9. According to me, respondents' submissions should be taken up at first because the same is related to very foundation of the writ petitions.

10. It appears from [Poolpandi Vs. Superintendent, Central Excise and others etc. etc.](#), that whenever a person is called upon for questioning during investigation by the authorities under the provision of the Customs Act, he is not accused. He cannot, therefore, claim that in view of the possibility of his being made an accused in future he is entitled to the presence of a lawyer when he is questioned. Refusal to allow presence of lawyer in such case would not be violative of Article 20(3) nor can it be said that when a person is called away from his own house and questioned in the atmosphere of the Customs office without the assistance of the lawyer or his friends, his Constitutional right under Article 21 would be violated. It cannot be said that if the person who is used to certain comforts and convenience is asked to come by himself to the Department for answering the questions it amounts to mental torture. Thus, even on applying the "just, fair and reasonable test" the refusal to allow presence of lawyer would not violate Article 21.

11. In my view, the aforesaid Supreme Court judgment is not similarly placed with the factual aspects of the matters. Certain distinguishing features are given hereunder :

(a) In such judgment, I find the authorities have already made out prima facie cases and Criminal appeals are pending in connection thereto. But in the present case no prima facie case has yet born. Only on the basis of suspicion or conjecture people were brought or likely to be brought in the office to extract evidence.

(b) In such judgment, comfort or luxuries and company of choice were the sum and substance of due consideration. But in the present case the treatment towards the petitioners were far from comfort or luxuries or company of choice during the office hours. It is a case of torture in the name of enquiry and investigation during odd hours to extract evidence to convert alleged suspicion into belief.

(c) I fully associate with the observation of the Supreme Court that if the person who is used to certain comforts and convenience is asked to come by himself to the Department for answering questions itself ipso facto can not be said to be mental torture. But in this case the factual difference is that it is related to the incident/s took place after going to the department thereafter by the name of enquiry or investigation.

(d) In the Supreme Court judgment, although discussions were made in respect presence of lawyer or friend of his or her choice but the advancement of arguments and ultimate order was made in respect of presence of lawyer to distinguish the position of the accused from non-accused as per Article 22 of the Constitution of India. This court never passed such order. However interpretation of friend of his choice in such judgment and in the present case are different from each other in view of the factual circumstances. The Supreme Court had proceeded on a prima facie case and upon observing nature and character of friends of such circle of people but in this case situation is different in all respect. In the odd hours of office the petitioners were forced to disassociate themselves from others. Therefore, an observer can be directed to be present in the office to help them without interfering into the true enquiry and investigations. He is as good as writer law does not prevent from giving permission.

(e) In the cited judgment nowhere it has been stated that an arbitrary action cannot be challenged. Therefore, when an arbitrary action is complained of, court cannot behave like a silent spectator and proceed within the four corners of such prayers. Court's power is wide enough to mould the prayers to control the misdeed, if any.

12. According to me, a protection of a citizen must have to be better protection than an accused. One can be called as "accused" when there is a prima facie case against him. But in case of a citizen to prima facie case had then born. Unless and until there is a check and balance, possibility of misuse of power cannot be ruled out. Thus the protection under Article 21 is given by the Constitution of India to the people at large. It is now been reiterated universally and the country has given a formal shape of law to give such protection. Thus a concept of the protection of human rights have been developed on the basis of the international covenant of civil and political rights. Article 7 of the same provides no one shall be subjected to torture or to cruel, inhuman, degrading treatment or punishment. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. On 8th January, 1984 an Act was promulgated in our country following such international convention which is known as Protection of Human Rights Act.

The ratio of the Supreme Court judgment was restricted during the era when the rigour of FERA (Foreign Exchange Regulation Act) was the policy of the country, presently the Ministry of Commerce, Government of India introduces various relaxations following economical policy and trend of commercial globalisation. It is universally accepted position. Therefore, the outlook of the authorities in the year 1992 cannot fit in the year 2002. There is sea change in between the two periods.

13. Article 20 of the Constitution of India is made for protection of the person in respect of conviction for offences. Article 22 is made for protection against arrest and detention in certain cases. The real applicable Article in the present case is Article 21. As per Article 21 no person shall be deprived of his life or personal liberty except according to procedure established by law. This is not an idle formality. If such Article is read alongwith Article 19(1)(g) which is made for the right of the citizens in any profession, or to carry on any occupation, trade or business, the true import will come court. Therefore, the basic feature of the Constitution cannot be ignore or flung away from the river of protection. The Supreme Court judgment is categorical in respect of Article 22 about consultation with a legal practitioner. Whether legal practitioner can or cannot be present as an Observer was the prime question at the time of enquiry or investigation. However, the judgment is anterior to the Act come into force. Such Act gives protection of "human rights" reiterating the right protected under Article 21 of the Constitution of India and on the basis of the International conventions. Therefore presently a test under such Act is required to be made if at all any complaints are made.

14. As against this background, I wanted to hear the submissions of the learned Counsel appearing on behalf of the petitioners in a row. Their general submissions are that the petitioners can be interrogated by the authorities as against the summons but not in the manner treating them inhumanly and without allowing to be accompanied by any observer.

15. According to them the Customs Officer is empowered to arrest a person if he has reasons to believe that such person is guilty of an offence punishable u/s 135 of the Act. Therefore, there is every possibility that a person, who is interrogated, can be taken into custody by applying the test of criminal law. By citing [Loginder Kumar Vs. State of U.P. and others](#), thus contended that in India an arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances :

(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims;

(ii) The accused is likely to abscond and evade the processes of law;

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint;

(iv) The accused is a habitual offender, and unless kept in custody he is likely to commit similar offences again.

16. There is no such test. Even thereafter when one has prevented in the office for more than office hours continuously it is as good as arrest to him at the time of interrogation. Hence, although they are not accused in strict sense but, in effect, at par with accused. In such cases Court cannot refrain from interfering with the same. In the cases of criminal concept mens rea would be the guiding factor. As and when persons are prevented from coming out from the office in the name of interrogation for a prolonged period it is clear that such persons were treated at par with accused. Therefore they are entitled to get protection under Article 21 of the Constitution of India in such circumstances. The present case is similar to custodial violence. A judgment reported in [D.K. Basu Vs. State of West Bengal](#), has been cited to establish the same.

17. From 1985 (20) E.L.T. 292 (Mad.) (Anil G. Merchant v. Director of Revenue Intelligence, Madras and Ors.) I find that the provision of Customs Act do not authorise the Customs officer to extricate coerce or use any third degree methods in the matter of examination or interrogation of powers u/s 107 or 108, Customs Act, 1962. When a person is obliged to attend in pursuance to the summons issued u/s 108 to state the truth that he is expected to appear before the officer in obedience to the summons and in compliance with law and he cannot be considered to be a person taken in custody. Therefore, the examination should be conducted in such a way consistent with human dignity and comfort and not be inhuman, unreasonable or unfair. It was, further, contended that Sections 107, 108 of the Act do not authorize the Customs officer to detain a person in a prolonged custody and deprive him of elementary facility and privileges to which he is entitled. In such a situation taking them as captive persons and coercing them to give false statements or depriving them of elementary facilities are not authorized by the Act. As and when the officer violates any of these principles or coerce him to give false confessions it would always be open to the person concerned to complain of the same whenever the statements are sought to be used. If the allegations are established certainly nobody could rely or take note of such statements. Personal liberty cannot be cut out or cut down without fair legal procedure. The right to life enshrined in Article 21 is not limited to protection of life or facility but includes the right to live with human dignity. Any form of torture would be offensive to the human dignity and constitute an inroad into the right to live and therefore prohibited by Article 21 unless it is in accordance with procedure prescribed by law and stand on the test of reasonableness and non-arbitrariness.

18. In 1999 (2) CLJ 41 [Mohan Kr. More v. Union of India and Ors. and Ashwini More v. Union of India and Ors.] it was held that at the time of interrogation of a person as against the summons u/s 108 of the Act if torture by third degree method i.e. applied for extracting statement it would be hit by principle of violation of

fundamental right and in appropriate case Court may issue direction.

19. According to me, there are two ways of looking into the matters. One way is the right of interrogation and another way is right of human dignity. Therefore it is expected that the authorities should keep a sense of proportion or balance in dealing with the matter. In case of any disbalance Court has every right to justify whether the authority has crossed limit of interrogation or whether the petitioners are falsely implicated them in the garb of protection of human right. The affidavit on behalf of the authority is full of evasive denials. Therefore, whether any torture or third degree or any in-human method has been applied for the purpose of extracting statements in the name of interrogation cannot be tested nor it can be said that the apprehension and/or allegations are without any basis. It is true to say that the interrogating officers should have appropriate right for the purpose of interrogation but such right should not exceed the limit of the human right. Therefore, a bare denial cannot be an appropriate reply to the charges. The cases of the petitioners are not to stop the summons but to proceed with the summons in the proper manner. Such submission cannot be said to be unfair. What is the difficulty for the authorities to proceed with the enquiry or investigation during the office hours. Therefore, the next question will obviously come that when the persons are interested to have to be interrogated as against summons at the same time apply to the writ jurisdiction to get appropriate order of interrogation within reasonable time and in presence of the observer there must have been fear of terrorising themselves? It appears to me that if it had been proceeded in proper manner, the interrogation would have been completed by now. But even inspite of such interim order being passed the authority reluctantly refused to interrogate even in such manner with a plea that the court curtailed the power. Therefore, at the time of final hearing court may feel that interrogation is not the basic interest of such respondents but interrogation as per their sweet will is the basic interest which is other name of terror. There is no law which say that as against the summons Customs authorities will proceed for interrogation as per their sweet will forcibly keeping in their custody for indefinite period. If it is done then it has to be construed as informal custody. Therefore, the law relating to accused in a custody has to be expressly or impliedly, applicable. If accused can get all benefits under Article 21 of the Constitution a person in such informal custody can say that he is also entitled to get relief under Article 21 of the Constitution of India. It cannot be said that the authority will behave in violation of Article 21 without declaring one as accused and Court will give premium to such illegality. This is not true interpretation of the ratio of the judgment reported in [Poolpandi Vs. Superintendent, Central Excise and others etc. etc.](#)

20. Now a days, custodial violence is not unknown to the people and Court cannot refrain from taking any Judicial notice. If such violation exceeds the personal right and liberty as given under Article 21 of the Constitution of India, the writ Court is justifiable entertain, the writ petition and pass an appropriate order. It is significant

to note that custodial violence is not an ordinary violence even if one has been taken in the custody as against any criminal charges. The declaration has to be made whether the person concerned is formally accused or not. It is not to be misused for extracting statements by force. It is, further important to say, that the present policy of the Government does not permit the authorities to behave in such a manner. As has already been said, previously there was a regour on the part of the authority in respect of interrogation under the Customs Act. But by the introduction of the policy of liberalization, the Government thought about commercial viability intentionally. I am not for a moment say that interrogation will not be there. But its application should not be in such a manner that a wrong message should not go to the people attached to the commercial activities. If one wants to flout the law a case has to be made out on the basis of an appropriate reason to believe. Such reason to believe cannot be a weapon of fishing out the evidence by taking the person in the informal custody, torturing him for an indefinite period and extracting statements to make an evidence to fit the purpose.

21. Therefore, I do not find that the invocation of the writ jurisdiction is absolutely immaterial but it has face value. But the process of investigation adopted by the authorities should be tested by the appropriate Human Rights Commission having its machinery. Thus, I hold the view that the writ petition should be relegated to the concerned Human Rights Commission subject to completion of the formalities, who in turn, take decision in accordance with the provisions of the Protection of Human Rights Act.

22. Such order is accordingly passed in disposing all the four writ petitions. Interim order stands confirmed. This order will have binding effect on all such writ petitions. However, no order is passed as to costs.

23. Xeroxed certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the order and certified copy of this judgment.

24. All parties are to act on a signed copy minutes of the operative part of this judgment on the usual undertaking and subject to satisfaction of the Officer of the Court in respect as above.