
(2011) 05 DEL CK 0426

In the Delhi High Court

Case No : Writ Petition (Criminal) No. 422 of 2011

Ferdousi Rahman

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 04-05-2011

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 8
Customs Act, 1962 — Section 108

Citation : (2013) 1 JCC 386 : (2011) 3 JCC 1809 : (2011) 4 RCR(Criminal) 201

Hon'ble Judges : Veena Birbal, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Pradeep Jain, A. Samad, Abhas Mishra, Dveep Ahuja, Michael and S. Jha, for the Appellant; A.S. Chandhiok, ASG, Neeraj Chaudhari, CGSC, Akshay Chandra and Pratap Parmar, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—This writ petition has been filed in respect of the detention of the Petitioner's husband Mosarraf Hossain (detenue) u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the COFEPOSA Act") by virtue of a detention order No. F 678/12/2010 - CUS/VIII dated 30.08.2010. Subsequent to the passing of the detention order, which was served on the detenue on 01.11.2010, the detenue has been lodged in the Presidency Jail (Correctional Home) Kolkata. His representation to the detaining authority against the said detention which was dated 12.11.2010 had also been rejected by the detaining authority on 08.12.2010. Pursuant to the Advisory Board opinion, the detention order has been confirmed u/s 8(f) of the COFEPOSA Act by an order dated 20.01.2011 continuing the detention for a period of one year from the date of detention.

2. Two grounds have been taken by the learned Counsel appearing on behalf of the Petitioner by way of challenge to the detention order. The first ground is of

non-application of mind on the part of the detaining authority. The second ground is that there was an inordinate and unexplained delay in the execution of the detention order.

3. Insofar as the first ground is concerned, our attention was drawn straightaway to Paragraph 19 of the grounds of detention which were served upon the detainee. The said Paragraph 19 reads as under:

19. I am aware that Shri Mosarraf Hossain i.e. you have not sent any retraction in respect of your statement recorded by Directorate of Revenue Intelligence officials of Kolkata Zone.

4. A plain reading of the said Paragraph 19, according to the learned Counsel for the Petitioner, indicates that the detaining authority has made a categorical statement that she was aware that the detainee had not sent any retraction in respect of his statement recorded by the Directorate of Revenue Intelligence officials of Kolkata Zone. However, the learned Counsel for the Petitioner points out that, as a matter of fact, no statement of the detainee was recorded by the DRI officials u/s 108 of the Customs Act, 1962 and, therefore, there was no question of retraction of the same. The learned Counsel also stated that in the representation made to the detaining authority on 12.11.2010, the plea was specifically taken that no statement u/s 108 of the Customs Act, 1962 of the detainee had been recorded, so there was no question of any retraction. However, the representation was rejected without any reference to this plea, as noted above, by virtue of the communication dated 08.12.2010. According to the learned Counsel for the Petitioner, this circumstance clearly demonstrates the non-application of mind on the part of the detaining authority and, therefore, on this ground alone the detention order is liable to be set aside.

5. Coming to the second ground, the learned Counsel for the Petitioner submitted that there has been a delay of 63 days in the execution of the detention order. The detention order was issued on 30.08.2010 but was served on the detainee on 01.11.2010. He submitted that a specific plea was taken in the petition itself with regard to delay in execution of the detention order despite the fact that throughout this period of 63 days the detainee had been attending the office of the DRI regularly and continuously from 25.08.2010 after the detainee's release on interim bail till his detention on 01.11.2010. According to the learned Counsel for the Petitioner, there is no explanation given as to why the detainee could not have been served with the detention order when he was attending the office of DRI, which is the sponsoring authority, on a regular basis as would be apparent from Annexure-9 to the petition which are diary entries indicating that the detainee had attended the office of Senior Intelligence Officer, Directorate of Revenue Intelligence, Berhampore, Sub-Zonal Unit, 3/20, K.K. Banerjee Road, Berhampore-742101 on the following dates: 25.08.2010, 01.09.2010, 06.09.2010, 14.09.2010, 21.09.2010, 26.09.2010, 05.10.2010, 13.10.2010 and 27.10.2010. The learned Counsel for the Petitioner referred to the decision of this Court in the case of Saud Nihal Siddique Vs. Union of India (UOI) and

Another, and a decision of the Supreme Court in the case of A. Mohammad Farook v. Jt. Secy to G.O.I. 2000 SCC 411 in support of the plea that an unexplained delay in the execution of a detention order would be fatal to the detention order and the continued detention of the detainee. In the case of A. Mohammad Farook (supra), there was only a delay of 40 days in the execution of the detention order whereas in the present case, according to the learned Counsel for the Petitioner, there was an inordinate and unexplained delay of 63 days in execution of the detention order.

6. For these reasons, the learned Counsel for the Petitioner submitted that on both the grounds taken independently the detention order was liable to be quashed and the Petitioner was entitled to be set at liberty.

7. Mr. A.S. Chandhiok, learned Addl Solicitor General, appearing on behalf of the Respondents submitted that insofar as the first ground was concerned, i.e., of retraction having been mentioned by the detaining authority when in fact there was no such retraction, it was merely a typographical error as explained in the counter affidavit filed on behalf of the Respondents. He submitted that the statement that has been referred to in the grounds of detention was that of one Mohibur Rehman who was the co-detainee. Even the list of documents appended to the grounds of reference had no reference to any statement made by the present detainee i.e. Mosarraf Hossain. Therefore, it could be easily inferred that the retraction which was being spoken of and the statement that was being referred to in Paragraph 19 of the grounds of detention was not with regard to the present detainee but in respect of the co-detainee Mohibur Rehman. It was, therefore, contended that it was a mere typographical error and did not, in any way, vitiate the detention order passed by the detaining authority. Mr. Chandhiok also referred to a decision of the Supreme Court in the case of Kirti Kumar Nirula Vs. State of Maharashtra and Others, and, in particular, to Paragraph 12 thereof to indicate that a minor typographical error which did not enter in the formation of satisfaction by the detaining authority ought to be ignored and cannot be regarded as an error which would vitiate the detention order.

8. With regard to the plea that there was inordinate and unexplained delay in executing the detention order, Mr. Chandhiok, first of all, submitted that the court must maintain a distinction between the detaining authority and the sponsoring authority. While the sponsoring authority (DRI) had knowledge of the fact that the detainee was attending their office on a weekly basis pursuant to the interim bail order dated 18.08.2010, according to Mr. Chandhiok, the detaining authority had no such knowledge. It is in this backdrop that Mr. Chandhiok sought to distinguish the decisions cited by the learned Counsel for the Petitioner both in the case of Saud Nihal Siddique (supra) and A. Mohammad Farook (supra), because, in both those cases, according to Mr. Chandhiok, the whereabouts of the detainee were within the knowledge of the detaining authority which, according to him, was not the case in the present matter. Mr. Chandhiok also referred to the decision of the Supreme Court in the case of Vijay Kumar Vs.

Union of India (UOI) and Others, wherein the Supreme Court observed that the fact that the detaining authority had mistaken a boilable offence for a non-boilable offence had no bearing on the detaining authority making up its mind with regard to detention and therefore such a slip up would not vitiate the detention order. This decision was, of course, cited in the context of the first plea taken by the learned Counsel for the Petitioner with regard to the statement qua the fact that the detainee had not made any retraction.

9. After having gone through the record of this case and having heard the arguments advanced by the counsel for the parties as noted above, we are of the view that on both grounds the Petitioner is entitled to succeed. The first ground is that the detaining authority had not applied her mind because she made a clear statement which was admittedly incorrect. The detaining authority had made a positive statement in the grounds of detention in Paragraph 19, which we have already extracted above, that she was "aware" that Sh. Mosarraff Hossain had not sent any retraction in respect of his statement recorded by the Directorate of Revenue Intelligence officials of Kolkata Zone. When such a positive statement is made by the detaining authority, it cannot be brushed aside as a mere typographical error. What this statement indicates is that the detaining authority was aware of two things. One, that a statement of the detainee had been recorded by the DRI officials of Kolkata Zone and, two, that the detainee had not sent any retraction in respect of the said statement. The fact of the matter is that the detainee had not made any statement u/s 108 of the Customs Act before the DRI and, consequently, there was no question of any retraction of the same. The factum of making a statement and of not retracting it is a very significant factor which goes into the mind of the detaining authority while the detaining authority is considering the question of detention. It is obvious that when a person has made a statement and has not retracted the same, it is a very significant circumstance which would entitle the detaining authority to come to a conclusion that the detainee stands by that statement. Consequently, the fact that the detaining authority after having positively stated that the detainee has not made a retraction of a statement which was allegedly recorded by the DRI, turns out to be false, the only inference that can be drawn is that the detaining authority had not really applied her mind to the facts of the case. For this reason, we are clearly of the view that on this ground the detention order is liable to be set aside. The decision cited by Mr. Chandhiok in the case of Vijay Kumar (supra) is clearly distinguishable because there the question was with regard to an offence being boilable or non-boilable and that had no bearing on the detaining authority's consideration of the question of detention. In the present case, the fact that there was or was no retraction of an alleged statement had a clear bearing on the decision making process leading to the making of the detention order.

10. With regard to the second ground of there being an unexplained delay in execution of the detention order, we find that in the case of A. Mohammad Farook (supra), the Supreme Court in Paragraph 9 thereof clearly held as under:

9. There is a catena of judgments on this topic rendered by this Court wherein this Court emphasized that the detaining authority must explain satisfactorily the inordinate delay in executing the detention order otherwise the subjective satisfaction gets vitiated. Since the law is well settled in this behalf we do not propose to refer to other judgments which were brought to our notice.

In the case before the Supreme Court, there was a delay of 40 days in executing the detention order and even that period of delay, which went unexplained on the circumstances of the case, was sufficient for the Supreme Court to come to the conclusion that the detention order was bad and the same was quashed and set aside. Other instances of detention orders being quashed on the ground of unexplained delay in execution of the same are set out in this Court's decision in the case of Saud Nihal Siddique (*supra*), which we need not repeat here.

11. Mr. Chandhiok had submitted that a distinction has to be kept in mind between the detaining authority and the sponsoring authority and that what is known to be a sponsoring authority would not necessarily be known to be the detaining authority. He also submitted that the detaining authority had no knowledge of the order dated 18.08.2010 and the condition of interim bail that the detainee was to report to the DRI officials every week. This, unfortunately, is not borne out by the records. The learned Counsel for the Petitioner had drawn our attention to Paragraph 12 of the grounds of detention which reads as under:

12. Despite several summons issued to Shri Mosarraf Hossain i.e. you did not appear before the investigating agency i.e. DRI. Therefore DRI filed a petition before the court of Ld. CJM, Berhampore for issuance of warrant of arrest. You finally surrendered on 27.5.2010 and kept in Judicial Custody at Berhampore Correctional Home. The Honorable Court of Sessions Judge, Murshidabad vide its order dated 18.8.2010 granted interim bail.

(Underlining added)

The said Paragraph clearly refers to the interim bail order dated 18.08.2010. The learned Counsel for the Petitioner had also drawn our attention to Serial No. 15 of the relied upon documents, which is a copy of the bail order dated 18.08.2010 with respect to the present detainee. Therefore, the plea that the detaining authority was not aware of the condition of interim bail that the detainee was to appear on a weekly basis before the DRI officials, is untenable. Clearly, the sponsoring authority as also the detaining authority, were aware of the fact that the detainee was to report to the sponsoring authority every week as a condition of the interim bail order dated 18.08.2010. We have also indicated above that the detainee in compliance with the said condition had, in fact, appeared before the Senior Intelligence Officer, DRI on the several dates referred to above. This fact has not been explained satisfactorily by the Respondents. Therefore, in our view, there is a clear delay of 63 days, which has gone unexplained, in executing the detention order. On this ground also, following the decisions of the Supreme Court in A. Mohammad Farook (*supra*) and other decisions referred to in Saud

Nihal Siddique (supra), we feel that the detention order is liable to be quashed.

12. In view of the foregoing discussion, this writ petition is allowed. The detention order No. F 678/12/2010 - CUS/VIII dated 30.08.2010 as well as the confirmation order F. No. 673/12/2010-Cus/VIII dated 20.01.2011 are quashed. Respondents are directed to set the detainee at liberty forthwith. The writ petition stands allowed as above. There shall be no order as to costs.