

(1999) 03 DEL CK 0086
In the Delhi High Court
Case No : Criminal W. P. No.745/98

Mohd. Usman Farroq

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 18-03-1999

Acts Referred:

Citation : (1999) 3 AD 403 : (1999) CriLJ 2313 : (1999) 50 DRJ 692 : (1999) ILR Delhi 192 : (1999) 3 RCR(Criminal) 310

Hon'ble Judges : Devinder Gupta, Acting C.J.;Kripa Shankar Gupta, J

Bench : Division Bench

Advocate : Sh. Naveen Malhotra, AdvocatMs. Geeta Luthra, for the Appellant;

Judgement

K.S. Gupta, J.—This petition challenges the detention order dated 27th May, 1998 passed against the petitioner u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short the "Act") by respondent No. 2.

2. In the incident dated 24th March, 1998, 29,300 French Francs, 69,900 Saudi Riyals, 3000 Qatar Riyals and 3,650 UAE Dirhans were allegedly recovered concealed in button studs from the handbag of the petitioner at IGI Airport, New Delhi. Since the petitioner was unable to produce any evidence to support lawful acquisition of the said currency, the same was seized by the customs department vide panchnama dated 24th March, 1998. Voluntary statement u/s 108 of the Customs Act, 1962 is stated to have been made by the petitioner wherein he admitted the concealment and recovery of the said foreign currency from him. The petitioner was arrested on 25th March, 1998 and the order of detention under challenge was made on 27th May, 1998, which was served on him in Jail on 28th May, 1998. Representation dated 13th July, 1998 made by the petitioner against his detention was rejected by the Central Government/respondent No. 1 on 3rd August, 1998 while by the detaining authority/respondent No. 2 on 5th August, 1998. Later on, detention of the petitioner for a period of one year was confirmed on 24th August, 1998 by the detaining authority.

3. Submission advanced by Sh. Naveen Malhotra appearing for the petitioner was that the retraction of the confessional statement dated 24th March, 1998, was made by the petitioner in the bail applications(s) but that fact was not taken into consideration by the detaining authority while passing the detention order in question and, Therefore, that order is bad in law. In support of this submission, reliance was placed on the decisions rendered by the Supreme Court in Writ Petition (Crl.) No. 602/89 - Mohd. Towfect Mohd. Mulaffar Vs. The Addl. Secretary to the Government of Tamil Nadu & Anr., decided on 23rd February, 1990, Crl. A. No.1790/96 - Prem Prakash Vs. UOI & Ors. decided on 7th October, 1996 and K. Satyanarayan Subudhi Vs. Union of India, and others, . Ratio of the decisions is that non-placement of retraction of confessional statement by a detenu before the detaining authority and non-consideration of the same while arriving at the subjective satisfaction in making the order of detention goes to the root of the order of detention and renders the order of detention invalid.

4. In response to ground 12(R) of the writ petition wherein the said plea was raised, in the reply affidavit filed on behalf of respondent No. 2/detaining authority it is stated:-

R. "Content of Ground Rare wrong and denied. It is submitted that the petitioner has not retracted in his application for bail submitted before the ACMM and ASJ. He has retracted only in the bail application filed before the High Court and the same has been considered by the detaining authority. Moreover, a telegram dated 25.3.98 received from Shri Zakir Hussain alleging therein that Zafar Hussain and Mohd. Usman Farooq were taken into custody illegally and wrongfully by the customs officials. This telegram was also considered by the detaining authority and also mentioned in para 8 of the Grounds of Detention. Hence, there is no merit in the allegation that the detaining authority was not alive about the factum of the retraction before passing the detention order."

5. Paras 8 & 9 of the grounds of detention (Annexure "B"), which are relevant read as under :-

8. "Shri Zakir Hussain sent a telegram dated 25.3.98 alleging therein, that Zafar Hussain and you (Mohammad Usman Farooq) were taken into custody illegally and wrongfully by the customs officials; that nothing incriminating or contraband was recovered from you and Zaffar Hussain and statements being recorded under duress, you were informed the facts through Supdt. Central Jail, Tihar, New Delhi Vide letter dated 7.4.98.

9(i) You filed a bail application dated 28.3.98 in the hon"ble Court of ACMM, New Delhi. The customs department filed a reply dated 1.4.98. Your bail application was rejected by the hon"ble Court vide joint order dated 17.4.98.

(ii) You moved a bail application dated 18.4.98 in the hon"ble Court of Addl. Sessions Judge, New Delhi. The customs department filed a reply dated 22.4.98. Your bail application was dismissed by the hon"ble Court vide joint order dated 23.4.98.

(iii) You filed a petition dated 27.4.98 in the hon"ble High Court of Delhi for grant of bail."

6. In the rejoinder filed to the counter affidavit of respondent No. 2, it is not disputed that the retraction of the confessional statement was made by the petitioner for the first time in the bail application filed in the High Court. Rejoinder is, however, completely silent on the point of telegram dated 25th March, 1998 having been sent by Zakir Hussain and consideration thereof by the detaining authority, while passing the detention order in question, as alleged.

7. Needless to repeat that as per the reply affidavit filed on behalf of respondent No. 2 retraction made in the bail application filed in the High Court as also in the telegram dated 25th March, 1998 was taken note of by the detaining authority before passing the said detention order. It may be seen that in aforesaid para No. 9(iii) of the grounds of detention (Annexure "B"), without reference to retraction, mention is made only about the filing of bail application in the High Court. That being so, the plea now sought to be raised on behalf of respondent No. 2 that the retraction made in the application for bail filed in the High Court by the petitioner was also considered by the detaining authority at the time of the passing of the detention order in question, cannot be accepted.

8. In case Zakir Hussain had no connection with the petitioner, there was no occasion on his part to have sent the telegram on 25th March, 1998 also complaining about the petitioner's having made the confessional statement under duress. Aforementioned para 8 of the grounds of detention clearly indicates that the detaining authority was alive of the fact conveyed through the said telegram about the petitioner having made the confessional statement under duress. Thus, the non-consideration of the said fact as made in the bail application filed in the High Court again by the detaining authority, cannot be validly made the ground for assailing the order of detention in question. Moreover, as the detention order is based on more than one grounds within the meaning of Section 5(A) of the Act, so even if the statement made u/s 108 by the petitioner is ignored, other grounds remain and those are good enough to come to the prima facie belief that the detention of the petitioner was necessary. Decisions referred to above have no applicability to the facts of the present case.

9. Next submission advanced on behalf of the petitioner was that there is unexplained delay in sending the petitioner's representation dated 13th July, 1998 by the Central Government for consideration by the detaining authority as also in consideration of that representation by the Central Government. As in manifest from the copy of the said representation (Annexure "D") to the writ petition, the same is addressed to the Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi and request has been made therein to the said Secretary to revoke the detention order and also to forward the copies of the representation to the State Government as also the Advisory Board for consideration for revocation of the detention order immediately. Para No. 5(N) of the reply affidavit filed on behalf of respondent

No.1 which is relevant reads thus:-

N. "That in reply to ground 'N' it is submitted that the allegations contained therein are wrong and are denied. It is submitted that the detenu's representation dated 13.7.1998 which was addressed to the Secretary to the Government of India, Ministry of Finance, Department of Revenue was forwarded by the Superintendent, Central Jail No.1, Tihar, New Delhi vide letter dated 13.7.1998. As the representation disputed the very basis of detention & facts of the case, besides eliciting certain information, the Sponsoring Authority was requested to furnish comments vide letter dated 13.7.1998. The Sponsoring Authority furnished its comments vide letter dated 23.7.1998 which was received in the Cofeposa Unit on 24.7.1998. The same was diarised on 27.7.1998 (25th & 26th July, 1998 were closed holidays being Saturday and Sunday). The case file Along with the comments of the Sponsoring Authority was submitted to the concerned Under Secretary on 28.7.1998. The Under Secretary (COFEPOSA) returned the file with directions that a copy of the representation be sent to the State Government of NCT of Delhi as requested by the detenu. A copy of the representation dated 13.7.1998 was accordingly sent to the Government of NCT of Delhi vide letter dated 28.7.1998. Thereafter the file was re-submitted to Under Secretary on 29.7.1998. Under Secretary (COFEPOSA) examined the case and submitted the file to Joint Secretary (COFEPOSA) on 29.7.1998, who in turn submitted the file to Special Secretary & Director General, Central Economic Intelligence Bureau on 29.7.1998 itself. SS & DG, CEIB submitted the file to Secretary (Revenue), on return from tour, considered the representation, on behalf of the Central Government, and rejected the same on 1.8.1998. The file was received back in the COFEPOSA Unit on 3.8.1998. A Memo intimating the detenu about the rejection of his representation dated 13.7.1998 was issued on 3.8.1998 itself."

10. It may be noticed that immediately on receipt of the said representation, sponsoring authority was asked to furnish comments by the Ministry vide their letter dated 13th July, 1998 and the comments of the sponsoring authority were forwarded vide letter dated 23rd July, 1998. Further, copy of the said representation came to be forwarded by the Ministry to the detaining authority for consideration only on 28th July, 1998. Obviously, 11 days" time was taken by the sponsoring authority in sending the comments to respondent No.1 while 16 day"s time was taken by respondent No.1 in sending the representation to the detaining authority for consideration. Indisputably, the concerned offices of all the three agencies involved, namely, the Ministry, the sponsoring authority and the detaining authority are located in close proximity at Delhi and obviously, the time taken by the sponsoring authority in sending the comments and the Ministry in forwarding the said representation to the detaining authority for consideration was unusually long for which no Explanation whatsoever has been furnished in the reply affidavit of respondent No.1. In a recent decision in Rajammal Vs. State of Tamil Nadu & Anr. 1998 3 AD SC 256, while setting aside the order of detention on the ground of 5 days" unexplained delay in considering the

representation of the detenu by the Minister, the following observations made by a Constitution Bench of the Apex Court in K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India and others 1991 (1) SC 476, were quoted with approval:-

"It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement, however, is that indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal."

11. In yet another decision in Kundanbhai Dulabhai Sheikh Vs. District Magistrate, Ahmedabad JT 1996 (2) SC 532, the Supreme Court has commented adversely upon the delay of six days" in taking up the representation. In view of the abovementioned circumstances, due to the unusual delay in disposing of the representation by the detaining authority and also the Central Government, as noticed above, which has remained unexplained, the petitioner is entitled to succeed.

12. For the foregoing discussion, the petition is allowed, detention order dated 27th May, 1998 is quashed. The Petitioner is directed to be set at liberty forthwith, in case he is not required to be detained in any other case.