

(2011) 03 DEL CK 0181

In the Delhi High Court

Case No : Writ Petition (Criminal) 1755 of 2010

Saud Nihal Siddique

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 03-03-2011

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3

Citation : (2011) 184 DLT 261 : (2011) 122 DRJ 643 : (2011) 2 JCC 884

Hon'ble Judges : Manmohan Singh, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Saurabh Kirpal, for the Appellant; Pawan Narang, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—On the previous occasion, i.e., 16.12.2010 when the matter had been taken up for hearing we had passed the following order:

The learned Counsel for the Petitioner has submitted that the detention order in respect of the detinue, Sayed Mohd. Masood was passed u/s 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) on 15.01.2010. However, the detention order was served on the detinue only on 25.11.2010, after a delay of 10 months and 10 days. He, however, submitted that the detinue was arrested on 05.02.2010 in relation to FIR 68/2010 and has been in jail since then. He referred to Annexure R-3 to the counter-affidavit filed on behalf of the Respondents to indicate that the arrest of the detinue was in the knowledge of the Respondents and the detaining authority on 05.02.2010 itself. He submitted that despite the detinue being in police custody, the detention order was not served on the detinue till WP (Crl.) 1741/2010 was filed in this Court on 23.11.2010, which came up for hearing on 24.11.2010. The hearing of that writ petition was adjourned to 26.11.2010. However, on 25.11.2010, the very next day after the first hearing of WP (Crl.) 1741/2010, the detention order was served on the detinue at Central Jail, Jaipur.

The learned Counsel for the Petitioner submitted that this fact clearly indicates that the detention order could have been served at any point of time but the Respondents chose not to do so and, therefore, their action was not preventive in nature but punitive in effect. It was further pointed out by the learned Counsel for the Petitioner that on 26.11.2010, WP (Crl) 1741/2010 (which had been filed at the pre-execution stage) was withdrawn with liberty to file another writ petition post-execution. The present writ petition is that petition.

The learned Counsel for the Petitioner pointed out that in the counter-affidavit it has been admitted that the Respondents were aware of the arrest of the detainee on 05.02.2010. However, it has been stated in the counter-affidavit that "the detention order could not be served in the police custody". It has also been indicated that since there were multiple legal proceedings, the detention order could not be executed till date. The learned Counsel for the Petitioner also gave a list of decisions of the Supreme Court and Delhi High Court where lesser periods of delay in execution of the detention order have been found to be fatal for the detention. The said list is as under:

Sr. No. Name of the Party Citation Period of delay

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1. A. Mohammed Farook 2000 SCC (Crl) 411 40 days
2. S. M. F. Sultan Abdul Kadar (1998) 8 SCC 343 Less than 5 months
3. T. A. Abdul Rehman AIR 1990 SC 225 3 months
4. K. P. M. Bashir 1992 Crl. L. J 1927 (3 Judges) 5 months & 11 days
5. Sk. Nizamuddin AIR 1974 SC 2353 2-1/2 months
6. Sk. Serajul v. State of West Bengal AIR 1975 SC 1517 (4 Judges) 6 months
7. Dinesh Kumar Jain 78 (1999) DLT 800 (DB) Less than 3 months
8. Vijay Kumar Gupta 98 (2002) DLT 638 (DB) 31 days (delay of 11 days in despatching the D.O & 20 days in serving the same)
9. Saroj Taneja 48 (1992) DLT 118 41 days
10. Lalit Pataudi 41 (1990) DLT 8 2 months & 20 days

Mr. Chandhiok, the learned Additional Solicitor General appearing on behalf of the Respondents, requested that some time be given to him to file a better affidavit in order to explain the delay in the serving of the detention order. We feel that the Respondents had ample opportunity to furnish the counter-affidavit and to give their reasons for delay. However, since Mr Chandhiok has made a fervent plea for furnishing an additional affidavit in order to attempt to explain the delay, we acceded to his request. However, that would not be at the cost of the detainee. The additional affidavit be filed within two weeks and the rejoinder/

affidavit, if any, be filed within one week thereafter. The learned Counsel for the Petitioner submits that he would be taking the plea that the additional affidavit cannot be filed and cannot be taken into consideration inasmuch as the Respondents cannot improve their case now.

In the meanwhile, as a provisional measure, the detainee is directed to be released on bail on his furnishing a personal bond in the sum of Rs. 5 lacs with two sureties of the like amount to the satisfaction of the Chief Judicial Magistrate, Jaipur, Rajasthan. This order has been passed in this case and the detainee will be released only if he is not required in any other case.

Renotify on 13.01.2011.

Dasti to both the parties.

2. The matter was again listed on 13.01.2011 on which date, the Respondents took a final opportunity for filing the additional affidavit to explain the delay in executing the detention order. That additional affidavit has not been filed till today.

3. Thus, there is no explanation other than what has been stated by the Respondents in their counter-affidavit with regard to the delay in executing the detention order, despite the fact that the detainee was arrested on 05.02.2010 and that fact was within the knowledge of the detaining authority. In the said counter affidavit, in the para wise reply to paras 1 and 2 at page 56 of the paper book, it has been indicated by the Respondents that the Crime Branch, EOW, Mumbai Police informed the Directorate of Enforcement that the detainee had been apprehended on 04.02.2010 near Delhi and was being brought to Mumbai on transit remand in connection with the case registered by them against him. It is also noted that he was scheduled to be produced before the local court in Mumbai before 06.02.2010. This information was intimated to the Detaining Authority vide letter dated 05.02.2010 from the Directorate of Enforcement, Mumbai. It is thus clear that detaining authority was well aware of the arrest and detention of the detainee on 04.02.2010.

4. The counter affidavit further discloses that upon receipt of the said information, the Ministry of Finance (COFEPOSA Unit) requested the Deputy Commissioner of Police (Preventive), Crime Branch, CID, Mumbai to take immediate necessary action for execution of the detention order against the detainee, by a letter dated 05.02.2010. A copy of the said letter has been enclosed as Annexure R-4 to the counter affidavit. It is further noted in the said counter affidavit that the Directorate of Enforcement, Mumbai also approached the Commissioner of Police, Mumbai for execution of the detention order vide letters dated 05.02.2010 and 22.02.2010.

5. It is also stated in the counter affidavit that the Deputy Commissioner of Police (Preventive), Crime Branch, CID, Mumbai vide letter dated 22.02.2010 reported that the detainee was arrested by the Police Officers of the EOW, Unit No. V,

Mumbai in their C.R. No. 74/2007 on 04.02.2010 and was under investigation in police custody. It is also indicated in the counter affidavit that there were many cases registered against him at different police stations in Mumbai as well as with the police authorities outside Mumbai such as Pune, Chennai, Bangalore and New Delhi. Strangely, the reason given in the counter affidavit for not serving the detention order is noted as under:

The detention order could not be served in the police custody.

6. The learned Counsel for the Respondent cited the decision of the Supreme Court in the case of Gour Chandra Dey v. State of West Bengal 1976 8 SCC 192 to submit that even where the person was in custody, one month's delay in executing the detention order was considered to be explained. That decision stands on its own facts and is clearly different from the fact-situation arising in the present case. Here the delay in execution is not of a few days or one month but the delay is of 10 months and 10 days. Throughout this period, the detainee was in police custody/judicial custody and there was no reason for the detention order not being served upon him as he was available to the authorities throughout this period.

7. We also find in the counter affidavit that a reference has been made to the letter dated 09.06.2010 issued by the Joint Commissioner of Police (Crime) Mumbai wherein he has stated as under:

Since the aforesaid legal proceedings have been initiated by various Courts, both at Mumbai and other parts of India, the said Detention Order under COFEPOSA Act could not be executed till date. The executing agency, i.e. the Preventive Crime Branch, (PCB), CID, Mumbai has however, been directed to take necessary action without any delay, subject to the legal proceedings initiated before various Courts, as mentioned above.

8. Even this letter was written on 09.06.2010 and the detainee was not served with the detention order till as late as 25.11.2010. We may point out that one of the purported reasons given for delay in the execution of the detention order was that the detainee was in police/judicial custody. But we find this explanation to be unacceptable inasmuch as the detainee was ultimately served on 25.11.2010 when he was lodged in jail at Jaipur.

9. In view of the foregoing facts, we find that there is no explanation for the delay in executing the detention order. In SMF Sultan Abdul Kader Vs. Jt. Secy., to Govt. of India and Others, the Supreme Court held as under:

There is also no material to show that the detaining authority had made any serious attempt during this whole period of delay to find out if the detention order was executed or not. Thus, the delay in execution of the detention order remains unexplained. The unreasonable delay in executing the order creates a serious doubt regarding the genuineness of the detaining authority as regards the immediate necessity of detaining the Petitioner in order to prevent him from

carrying on the prejudicial activity referred to in the grounds of detention. We are of the opinion that the order of detention was passed by the detaining authority not in lawful exercise of the power vested in him. We, therefore, allow this petition, set aside and quash the order of detention and direct that the Petitioner be set at liberty forthwith unless his presence is required in jail in connection with any other case.

10. Following the said decision of the Supreme Court and applying the same to the facts of the present case, inasmuch as here also there is no explanation for the unreasonable delay in executing the detention order, we set aside the detention order and direct that the detainee be set at liberty forthwith unless he is otherwise required in connection with any other case. We may point out that on 16.12.2010 by virtue of our order dated 16.12.2010, which is extracted above, the detainee was directed to be released on bail on his furnishing a personal bond in the sum of Rs. 5 lacs with two sureties of the like amount to the satisfaction of the Chief Judicial Magistrate, Jaipur, Rajasthan. In view of the order passed in this petition today, the bail bond stands cancelled and the sureties stand discharged. The writ petition stands allowed as above. There shall be no orders as to costs.