

Mohammed Ashraf Vs. the State of Maharashtra and ors.

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Court : Mumbai

Decided On : Sep-24-1998

Reported in : (1999)101BOMLR775

Judge : N. Arumugham and ;Vishnu Sahai, JJ.

Appeal No. : Criminal Writ Petition No. 36 of 1998

Appellant : Mohammed Ashraf

Respondent : The State of Maharashtra and ors.

Advocate for Def. : Mr. D.G. Bagwe

Disposition : Petition allowed

Judgement :

Vishnu Sahai, J.

1. Through this petition preferred under Article 226 of the Constitution of India the petitioner, who is the brother of the detenu Abdulla Abdul Khadir, has impugned the detention order dated 12th March, 1997, passed by respondent No. 2, Shri G.S. Sandhu, the Secretary to the Govt. of Maharashtra, Home Department, (Preventive Detention) and Detaining Authority detaining the detenu under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as COFEPOSA). The detention order

along with the grounds of detention bearing the said date, was contemporaneously served on the detenu on 18.12.1997.

2. The prejudicial activities of the detenu contained in the grounds of detention are as under:

On 18.10.1996 on the basis of prior information the officers of the Customs, Preventive Commissionerate, Mumbai, intercepted the detenu who had cleared the immigration and customs formalities and was on the way to depart to Dubai by Air India Flight No. AI-709. On his personal search foreign currencies to the tune of Rs. 3,94,368/- were found. He admitted that he was carrying 82 capsules in his stomach and volunteered to eject the same. On ejecting the same foreign currencies equivalent to the tune of Rs. 8,95,694/- in terms of Indian money were found. The said currencies were seized under a panchanama. Since the detenu had failed to produce any permit from the Reserve Bank of India, under the reasonable belief that they were attempted to be smuggled out of India and thus liable to be confiscated under the provisions of the Customs Act, 1962 read with Foreign Exchange Regulations Act, 1973 the same were seized under a panchanama.

In this statement under Section 108 of the Customs Act the detenu admitted that the said currency was given to him by a person called Rehman and was to be handed over to one Ahmed at Dubai.

3. On 24.10.1996 the detenu was produced before the Chief Metropolitan Magistrate, who remanded him to judicial custody till 27.10.1996. He was granted bail on 28.10.1996 and he availed of the bail on 11.12.1996.

In the grounds it has been alleged that in order to prevent the detenu from engaging in such prejudicial activities in future it was imperative to detain him under COFEPOSA.

A perusal of the grounds also shows that the detenu was apprised of his right to make representation to the various authorities.

4. We have heard Mrs. A.N.Z. Ansari for the petitioner, Mr. D.G. Bagwe, A.P.P. for respondents Nos. 1, 2, 4 and 5, and Mr. R.M. Agarwal for respondent No. 3.

5. Although in this petition Mrs. Ansari has pleaded a large number of Grounds but since in our view, this petition is liable to succeed on Ground No. 4(iv) of the petition we are not adverting to the other grounds. In short ground No. 4(iv) is that although the detention order was issued as early as 12.3.1997 but it was executed on the detenu belatedly on 18.12.1997. In the said ground it has been averred that the authorities did not act with diligence and taking recourse to the most effective methods enjoined by law to have the detention order executed at the earliest. It has been pleaded in the said ground that the application for cancellation of detenu's bail was made very belatedly and an enquiry is sought from the respondents where action under Section 7 of the COFEPOSA was in fact taken.

The averment in Ground No. 4(iv) is to the effect that the belated execution of the detention order shows that the subjective satisfaction of the Detaining Authority to detain the detenu was not genuine and the live link between the prejudicial activities of the detenu and the rationale of clamping a detention order on him is snapped.

6. Ground No. 4(iv) has been replied to in paras 8 and 5 of the returns of the Detaining Authority and Mr. B.S. Wankhade, Desk Officer, Home Department (Special), Government of Maharashtra, Mantralaya, Mumbai, respectively. The short and long of the averments in the said returns is that since the detenu was a resident of Kasargode in the State of Kerala the authorities were endeavouring to execute the order on him there but as he was evading its execution, it could not be served on him. Ultimately on 12.12.1997 on receiving report for initiating action under Section 7(1)(b) of the COFEPOSA Act the Deputy Chief Minister declared him as an absconder on 16.12.1997. On 18.12.1997 the Superintendent of Police, Kasargode vide his letter, bearing the said date informed the Detaining Authority that the detention order along with relevant papers had been served on the detenu on the said date.

7. It is common ground between counsel for the parties that pursuant to the offending seizure on 18.10.1996 a case under Section 135 of the Customs Act

was registered against the detenu wherein he was enlarged on bail on 28.10.1996. He availed of the said bail on 11.12.96. A perusal of the said bail order which is a part of the documents supplied to the detenu shows that condition No. 3 stipulated that detenu would attend on the dates of bail extension (dates of remand). It is also not disputed by the learned Counsel for the parties that one of the dates of remand was 24.6.1997 and the detenu did not attend the Court on the said date. It is contended by Mrs. Ansari that since the detention order had already been issued on 12.3.1997 the authorities should have applied for the cancellation of the detenu's bail on the same day if their subjective satisfaction to preventively detain him was genuine. A perusal of para 3 of the return of Mr. N.M. Navghare, Assistant Commissioner of Customs (P) COFEPOSA Cell, Mumbai shows that the application for cancellation of bail of the detenu was made in the Court of Chief Metropolitan Magistrate, Esplanade, Mumbai on 9.9.97. The Supreme Court in the case of P.M. Hari Kumar v. Union of India and Ors. : 1995 CriLJ4188 has observed in connection with the question of delay in service of the detention order 'if the respondents were really sincere and anxious to serve the detention order without any delay it was expected of them to approach the High Court or at least the Court which initially granted the bail for its cancellation, as according to their own showing the petitioner had violated the conditions imposed and thereby enforce his appearance or production.' Since the legal requirement was to have the detention order executed at the earliest it follows as a logical imperative that the authorities should have moved for cancellation of bail also at the earliest. No reason has either been furnished in the said return or in that of the Detaining Authority as to why an application for cancellation of bail was not moved at the earliest.

8. Similarly we find that action under Section 7(1)(b) of the COFEPOSA Act was taken after an inordinate delay. A perusal of the return of the Detaining Authority shows that although he received the letter of the Superintendent of Police, Kasargode dated 4.9.1997 on 9.9.1997 informing him that the whereabouts of the detenu could not be known but the file for initiating action under Section 7(1)(b) of the COFEPOSA Act against the detenu by the Under Secretary to the Deputy Secretary was submitted on 11.12.1997 and the same was submitted to the Deputy Chief Minister on 12.12.1997. A Division Bench of this Court to which one

of the (Vishnu Sahai, J.) was a party, in the case of Ismail Shaikh Ali v. The State of Maharashtra : (1998)2BOMLR719 , observed in para 19 thus:

19. We wish to emphasise that although the COFEPOSA Act does not prescribe of a time limit for commencing action under Section 7 it is implicit that action under the said provisions must be taken without much loss of time, for if taken belatedly it results in the detention order being belatedly executed on the detenu and this not only vitiates the genuineness of the subjective satisfaction of the Detaining Authority to preventively detain the detenu but also severs the live link between the prejudicial activities of the detenu and the rationale of clamping a detention order on him. Coercive measures like those contained in Section 7 are meant to be restored to without undue delay.

In the said decision reliance was placed on a Division Bench decision of this Court in Shri Netaji Narayan Lotlikar v. State of Goa and Anr. wherein the Division Bench, in paragraphs 5 and 7 had observed that if there was delayed action under Section 7 of the COFEPOSA Act, the same has to be reasonably explained and failure to satisfactorily explain the same would be fatal.

In the instant case we find that no explanation is forthcoming from the side of the Detaining Authority as to why no action under Section 7(1)(b) of the COFEPOSA Act was taken in between 9.9.97 and 11.12.1997.

9. We also feel that if the authorities were really desirous to have the detention order executed, they should have searched the premises occupied by the detenu in Bombay, viz. room No. 13, Stone Building, First Floor, Hainsa Road, Byculla, Mumbai. A perusal of the panchanama of recovery prepared on 19.10.1997 shows that the detenu stated that he was the occupant of the said premises and used to stay in the said premises in Mumbai.

In our view the Detaining Authority should have repeatedly made efforts to nab the detenu on the said address. In neither of the two returns filed on behalf of the respondents, is there any averment to the effect that the authorities made any endeavour to nab the detenu on the said address.

10. Mr. D.G. Bagwe, learned Additional Public Prosecutor showed us the original file wherein there is a report dated 16.5.1997 made by the Investigating Officer to the Assistant Commissioner of Customs (P) to the effect that room No. 13, Stone Building, First Floor, Hainsa Road, Byculla, Mumbai was visited but the said premises were locked. Technically this fact should have been stated in either of the two returns. Even assuming it was true on a solitary occasion the Investigating Officer visited the said premises, that in our view was not sufficient. More than one effort should have been made to visit the said premises. We wish to emphasise that the mandate of the law is that the detention order has to be executed at the earliest and effective steps for such an exercise have to be taken recourse to by the authorities. In our judgment a solitary visit on the Mumbai premises wherein the detenu used to stay is not sufficient to conclude that the authorities were acting diligently for getting the detention order executed particularly because the file does not show that on the said visit the Investigating Officer had made an enquiry from the neighbours of the detenu about his whereabouts.

11. For the said reasons we are of the view that there has been an unexplained delay on the part of respondents Nos. 1 to 3 in the execution of the detention order. The Supreme Court, times out of number, has struck down the detention order on the ground that it was executed after an unexplained delay. However, to eschew prolixity we are only referring to two decisions viz. those in *Sk. Nizamuddin v. State of West Bengal* : 1975 CriLJ12 , and *A. Abdul Rehman v. State of Kerala and Ors.* : 1990 CriLJ578 .

In the former decision the detention order was issued on 10th September, 1993 and executed on the detenu on 23rd November, 1993 after a delay of two and a half months. The Apex Court came to the conclusion that the delay was not properly explained and consequently quashed the detention order detaining the detenu under the Maintenance of Internal Security Act 1971. In the latter decision which arose from a preventive detention under the COFEPOSA Act the detention order was issued on 7th October, 1987 and the detenu was arrested on 18th January, 1988. Since the delay was not explained the Supreme Court thus observed in para 12:

12. Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the Detaining Authority leading to the legitimate inference that the Detaining Authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner.

12. Mr. D.G. Bagwe, learned Counsel for the respondents strenuously urged that the delay in execution of the detention order was occasioned on account of the fact that detenu was absconding. He placed reliance on the decision of the Apex Court in the case of Bhawarlal Ganeshmalji v. State of Tamil Nadu and Anr. : 1979 CriLJ462 . He urged that a perusal of para 6 shows that the delay in execution of the detention order was on account of the abscission of the detenu himself and hence the delay would not vitiate the detention order. He pointed out that a perusal of para 6 also shows that the detention order was executed more than 3 years after the date of its issuance, but since the detenu was absconding the detention order was not quashed on that score by the Supreme Court.

Mr. Bagwe pointed out that both the Detaining Authority and Mr. M.M. Navghare, Assistant Commissioner of Customs (P), COFEPOSA Cell, Mumbai, in the returns categorically stated that the detenu was declared an absconder on 16.12.1997 and therefore the ratio laid down by the Supreme Court in the above case applied to the facts of this case. We regret that we do not find any merit in the said submission. The detenu was declared to be an absconder more than 9 months after the passing of the detention order. Had he been really absconding then - (a) steps under Section 7(1)(b) of the COFEPOSA Act should have been promptly taken against him (the said provision deals with the procedure to be adopted by the authorities in relation to a detenu, who is evading service of a order of preventive detention); (b) the application for cancellation of his bail in the case under the Customs Act should have been promptly made, and (c) a diligent exercise would have been made by the authorities to visit the premises wherein the detenu used to reside in Mumbai.

13. We feel that the decision of the Apex Court relied upon by Mr. Bagwe was on the facts peculiar to the case therein and has no application here. In our view, as a result of the belated service of the detention order (a) the genuineness of the subjective satisfaction of the Detaining Authority to detain the detenu under the COFEPOSA Act is vitiated; (b) the live-link between the prejudicial activities of the detenu and the rationale of clamping the detention order on him is snapped; and (c) the detention order which is meant to be preventive has become punitive. For the said reasons this petition has to succeed.

14. In the result the impugned detention order is quashed and the detenu Abdulla Abdul Khadir, is directed to be released forthwith unless wanted in some other case.

Rule is made absolute.

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