

**Sultan Birthowus Vs. State Govt. of Tamil Nadu and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/827849](http://sooperkanoon.com/827849)

**Court :** Chennai

**Decided On :** Oct-24-1998

**Reported in :** 1999CriLJ816

**Judge :** M. Karpagavinayagam and ; B. Akbar Basha Khadiri, JJ.

**Acts :** Conservation of Foreign Eixchange and Prevention of Smuggling Activities Act, 1974 - Sections 3(1)

**Appeal No. :** Habeas Corpus Petition No. 80 of 1998

**Appellant :** Sultan Birthowus

**Respondent :** State Govt. of Tamil Nadu and ors.

**Advocate for Def. :** S. Anbalagan, Addl. P.P. for Respondent Nos. 1 and 3 and ;T. Arun, A.C.G.S.C. for Respondent No. 2

**Advocate for Pet/Ap. :** S. Abdul Nazeer, Adv.

**Disposition :** Petition allowed

**Judgement :**

**M. Karpagavinayagam, J.**

1. The petitioner, who is the detenu, has filed this habeas corpus petition seeking to quash the order of detention dated 5-11-1997 passed under Section 3(1)(i) of

the Conservation of Foreign Eixchange and Prevention of Smuggling Activities Act, 1974.

2. The detailed facts are not necessary to dispose of the petition, in view of the fact that this petition has to be allowed on a short ground.

3. The relevant particulars which are required for the purpose of disposal of this petition arc as follows : The petitioner was arrested by the customs authorities on 9-9-1997 when he was in possession of foreign currency and a voluntary confession statement was obtained from him on the same day. On 10-9-1997 he was produced before the learned Magistrate, who in turn remanded him to judicial custody. On the same day, the petitioner filed a bail application stating that he was innocent and the confession statement obtained from him by the customs authorities was not a voluntary one; but the same was obtained out of threat and coercion. However, after hearing both the parties, the learned Magistrate dismissed the application for bail on 22-9-1997. Thereafter, the petitioner filed an application for bail before the Sessions Court, wherein also, he reiterated that the alleged confession was not a voluntary one. That application was also dismissed by the Sessions Court on 22-10-1997. Thereafter, he filed an application before this Court for bail and the same was dismissed on 27-10-1997.

4. It is thus clear that in all the three applications filed by him, before the Magistrate, before the Sessions Court and before this Court, he had categorically stated that the confession statement obtained from him by the customs authorities on 9-9-1997 was not a voluntary one and thereby, the said confession was retracted.

5. On the request of the sponsoring authority, the detaining authority clamped the order of detention dated 5-11-1997 on the basis of the recovery of foreign currencies from the petitioner and on the basis of the confession statement obtained from him on 9-9-1997, which is voluntary.

6. The main ground urged by the learned counsel for the petitioner is that inasmuch as the order of detention was mainly based on the alleged voluntary confession made on 9-9-1997, without considering the bail applications filed by

him before the respective forums retracting the said confession statement, the order becomes invalid as it suffers from non application of mind. It is submitted that if the detaining authority was aware and alive to the fact of retraction given in the bail applications, filed earlier to the detention order, the detaining authority would have considered the same and rejected the request of the sponsoring authority.

7. The learned counsel for the petitioner, relying on the decisions of the cases in *Arun Kumar Soni v. Union of India* ; *Sitaram v. State of Rajasthan* : 1986 CriLJ860 and *Satyanarayan Subedit v. Union of India* : 1991 CriLJ1536 , submitted that non-placement of these materials of bail applications containing retraction of the earlier confession statement and non-consideration of these materials would make the detention order illegal and consequently, the detention also becomes illegal.

8. While repelling the said submission, the learned Additional Public Prosecutor, on the strength of the decisions of the cases in *Madanlal Anand v. Union of India* : 1990 CriLJ659 and *Noor Salman Makant v. Union of India* : 1994 CriLJ602 submitted that the detaining authority has not considered the said applications for bail, since the said applications were not placed before the sponsoring authority on the date when the detention order was passed, i.e. on 5-11-1997. It is also pointed out that the detaining authority received the bail application on 7-11-1997, the copies of which have been furnished to the detenu on his request.

9. From the submission made by the learned Additional Public Prosecutor, it is clear that the sponsoring authority did not place the vital materials, viz., the bail applications, in which the confession given earlier was retracted, before the detaining authority. If the detaining authority was aware of the fact that the confession was retracted in the bail applications, filed on 10-9-1997 before the Magistrate, then, the detaining authority would not have used the word 'voluntary'. This Court as well as the Apex Court would time and again quote that when the detaining authority considers 'confession' as a main material, holding it as voluntary, he shall, before passing an order, consider whether any retraction has been made prior to the passing of the order. Admittedly, this has not been done.

10. The learned Additional Public Prosecutor while referring to the decision in the case of Madanlal Anand v. Union of India : 1990 CriLJ659 would submit that when the grounds are separable, even though the confession can be ignored on the reason that retraction has not been considered. The other ground viz., recovery can be considered to sustain the order of detention.

11. We are afraid that this submission does' not merit acceptance. In the ease of K. Satyanarayan Subudhi v. Union of India : 1991 CriLJ1536 a similar argument was advanced. By distinguishing the said judgment the Apex Court would hold that the recovery and confession are not separable grounds and it is only one ground, and thereby, the non-placement of the retraction of the confession statement by the detenu before the detaining authority and non-consideration of the same would make the order of detention invalid. The relevant observation made in this regard is as follows :

We have considered the same very minutely and carefully and it appears to us that in fact there were not two grounds but only one ground and the non-placement of the retraction of the confessional statement by the detenu before the detaining authority and non-consideration of the same while arriving at his subjective satisfaction in making the order of detention goes to the root of the order of detention and in our considered opinion makes the order of detention invalid.

12. In view of the above observations, we feel that the order of detention suffers from illegality and the same is liable to be set aside and it is accordingly set aside.

13. In the result, the habeas corpus petition is allowed. The detenu is directed to be set at. liberty forthwith, unless he is required with regard to any other case.