Syed Farooq Mohammad

Vs

Union India and Another

Writ Petition (Criminal) No. 247 of 1990

(B. C. Ray, P. B. Sawant JJ)

14.05.1990

JUDGMENT

RAY, J. -

1. The petitioner, Syed Farooq Mohammad has challenged the order of his detention passed on December 20, 1989 under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, and served on him on February 15, 1990. The order of detention was issued by Nisha Sahai Achuthan, Joint Secretary to the Government of India who was specially empowered under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act and it recited that with a view to preventing the petitioner from engaging in abetting and transportation of narcotic drugs, the said Sayyed Farooq Mohd. @ Farooq @ Sayyed Farooq Isamuddin @ Anand be detained and Kept in custody in the Yervada Central Prison, Pune. The grounds of detention were also served on the same day i.e. February 15, 1990 immediately after his arrest by the customs authorities.

2. On July 19, 1989 the staff of the Preventive Collectorate Customs, Bombay impounded two fiat cars bearing Nos. GJV 5440 and MHY 2625. The drivers of the said cars namely Aslam Mohammad Nazir and Mohammad Yakub Sheikh were apprehended. On search of the two cars, 100 packets of brown coloured powder purporting to be narcotic drug of Pakistani origin was found out of the dickies of the cars. The narcotic drug recovered from the dickies of the said cars weighed 100 kgs. and its value in the market is about 2.34 crores. Car No. GJV 5440 belonged to the petitioner-detenu, Syed Farooq Mohammad and the other car No. MHY 2625 belonged to one C. P. Reddy, an officer of international airport who was also apprehended and his statement under Section 108 of the Customs Act was recorded. It was revealed from his statement that this car was also used for transporting heroin along with petitioner's car. The statements of Aslam Mohammad Nazir and Mohammad Yakub Sheikh who were apprehended as well as the statement of other person i.e. Mohd. Azam Khan @ Wali Mohd. Khan @ Hameed Khan were also recorded under Section 108 of the Customs Act by the customs officials. From these statements it appeared that these persons were known to the detenu and they used to visit often the hotel 'Fisherman' at Worli for disco. The detenu i.e. Farooq Mohammad also used to go for disco in the said hotel 'Fisherman' at Worli. It has been stated by Aslam Mohammad Nazir that on July 19, 1989 he was sitting in room No. 106, 2nd Floor, Kali Building near Burtan apartment, Bombay Central (residence of the detenu) along with his friend, Mohd. Yakub Sheikh, driver of the other car. Hameed also came there to meet Farooq Mohammad. Hameed asked him and Mohd. Yakub Sheikh to go along with him to Kalina. He told them that a truck had come to Kalina with some packets of contraband good and that they were to take those packets near Jaslok Hospital. Thereafter, he took two fiat cars bearing registration Nos. GJV 5440 and MHY 2625 from Farooq. He gave the keys of car No. GJV 5440 to him and car No.

MHY 2625 to Mohd. Yakub. Thereafter, they drove those two cars to Kalina as per Hameed's instructions and Hameed led them in a red Maruti car bearing No. BLE 7445 where Hameed showed them one truck wherefrom four gunny bags were unloaded and kept in the dickies of the abovesaid two cars. It further appears from his statement that as per Hameed's instructions after the cars were parked near Jaslok Hospital, they handed over the keys of both the cars to Hameed and he told them to contact him again in the evening on telephone No. 367373 of R. K. Hotel. From Farooq's place they contacted him over the telephone. Hameed told them to wait there and he was coming there. Thereafter Hameed took them in the Maruti car to a place near Tejpal Road, Gowalia Tank. There he showed them the same two fiat cars bearing Nos. GJV 5440 and MHY 2625. Hameed gave the keys of the car No. GJV 5440 to him and car No. MHY 2625 to Mohd. Yakub Sheikh and asked them to drive the said two cars following his car, etc. etc.

3. Similar statement was made by Mohd. Yakub Sheikh which was recorded by the customs officials. It has also been stated by them that they were told by Hameed that each of them will get Rs. 5000 as monetary consideration. Yakub also stated that similar jobs have been done by him on 4-5 occasions and he received Rs. 5000 each time from Hameed. From the statement of Hameed recorded by the customs officials, it appears that on July 19, 1989 afternoon he collected two drivers namely Aslam Mohd. Nazir and Mohd. Yakub Sheikh and two fiat cars from Farooq of Bombay Central. This Farooq was introduced to him by Mohd. Nasir, a narcotic drug dealer who is now detained in Rajasthan in connection with a drug case.

4. The detaining authority searched the residence of the detenu on July 20, 1989 but nothing incriminating could be found therefrom. After recording the statements of these persons and examining and considering the test reports dated October 13, 1989, September 29, 1989 and November 15, 1989 which mentioned that the brown powder contained in those 100 packets is narcotic drug coming within the Narcotic Drugs and Psychotropic Substances Act, the impugned order of detention was made on December 20, 1989 and the petitioner was arrested and detained on service of the order of detention on February 15, 1990.

5. The challenge to the detention order had been made in the instant writ petition principally on four grounds which are as under :

> (1) The impugned order of detention has been passed relying on the incident which is absolutely stale as the incident is dated July 19, 1989 whereas the impugned order has been passed on December 20, 1989.
>
> (2) The statements of the three persons as recorded in the form of statement under Section 108 of the Customs Act came to the respondents on July 20, 1989. The order should have been passed immediately on July 20, 1989 but the order has been passed on December 20, 1989 i.e. after five months. The impugned order, it is therefore contended, is illegal and has been passed on ground.
>
> (3) Since no order of preventive detention has been passed against C. P. Reddy on the same evidence, no order should have been passed against the petitioner as his involvement is of the same nature and to the same extent as that of C. P. Reddy.
>
> (4) Assuming that the order rejecting bail application has been considered though not evident from the grounds of detention supplied, yet the same has not been supplied to the petitioner. This indicates that a relevant document has not been supplied to the

petitioner which affected his right of effective representation guaranteed under Article 22(5) of the Constitution. The petitioner after grant of bail by an order of this Court appeared before the respondents and applies for making statement u/s 108 of the Customs Act. He was arrested and the order of detention was served on him. This material aspect should have been considered before serving the impugned order.

6. As regards the first ground, the counsel for the petitioner has vehemently urged before this Court that the statements of the two persons i.e. Aslam Mohd. Nazir and Mohd. Yakub Sheikh the drivers of the said two cars handed over by petitioner for carrying narcotic drugs and also the statement of Hameed, did not implicate the petitioner in the transportation and smuggling of the drugs and as such there was non application of mind on the part of the detaining authority in clamping the order of detention on the petitioner. The impugned order of detention is, therefore, vitiated by non-application of mind. The learned counsel referred to certain portions of the statements recorded by the customs officials u/s 108 of the Customs Act and contended with great emphasis that there was nothing to say that the petitioner was impacted in the smuggling or transportation of the heroin which has been seized from the dickies of the two cars.

7. This contention of the learned counsel is totally devoid of merit inasmuch as the statements of these three persons as recorded by the customs officials u/s 108 of the Customs Act clearly implicate the petitioner who knowing fully that these two cars will be used for the purpose of transportation of prohibited drugs i.e. heroin and for selling of the same, handed over the keys of the two cars to the said two drivers who were sitting at his residence with Hameed on the asking of Hameed for carrying the contraband goods. In these circumstances, it is meaningless to argue that the statements of these three persons did not implicate the petitioner. All the aforesaid three persons were well known to the petitioner and were sitting at the petitioner's residence, they were given the keys of the petitioner's car as well as the keys of the car of C. P. Reddy which was brought to his garage for repairs by one Ravi Poojari through whom C. P. Reddy sent his car for repairs. The petitioner knowing fully well that these two cars will be used for the purpose of transporting contraband goods i.e. heroin from the truck stationed at Kalina from which four gunny bags containing the said heroin were unloaded and placed in the dickies of these two cars, handed over the keys of the cars. It is also evident from these statements recorded by the customs officials that the petitioner along with those three persons used to visit hotel "Fisherman" for disco regularly and they were well known to the petitioner. In these circumstances, it is beyond pale of any doubt that the petitioner knowing fully well that these two cars will be used for transporting contraband goods, i.e. heroin, handed over the keys of the cars for the said purpose. Therefore, this challenge is wholly without any basis.

8. The next ground of challenge is that the cars were impounded and the contraband goods were seized on July 19, 1989 and the statement of these three persons were recorded by the customs officials on July 20, 1989 and the residential premises of the detenu were searched on July 20, 1989 but no incriminatory articles were found. The detaining authority made inordinate delay in passing impugned order of detention against the detenu as late as on December 20, 1989 under section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 to be hereinafter referred to as the 'said Act.' It has been submitted that if there was any urgent necessity to prevent the petitioner, the order should have been passed immediately on July 20, 1989 but it has been passed on December 20, 1989 i.e. after five months. The impugned order is, therefore, illegal being passed on stale ground.

9. This contention is, in our considered opinion, devoid of any substance as we have stated hereinbefore that the two cars were impounded on July 19, 1989 and brown sugar weighing 100

kgs. was recovered from the dickies of these two cars on that day. The said three persons i.e. Aslam Mohd. Nazir, Mohammad Yakub Sheikh and Hameed were examined and their statements were recorded by the customs officials on the next day i.e. July 20, 1989. It is also evident that samples of the said contraband drugs were taken from each of the 100 packets and the same were sent for chemical examination. The test reports dated October 13, 1989, September 29, 1989 and November 15, 1989 were received by the customs department and the customs officials screened all these things and the detaining authority after considering all these, passed the order of detention on December 20, 1989. In these circumstances, it cannot be said that the delay of five months in making the impugned order of detention rendered the detention illegal and bad as it was made on stale ground. The detention order has been made with promptitude considering the relevant and vital facts proximate to the passing of the impugned order of detention. This ground of challenge is, therefore, totally unsustainable.

10. The third ground of challenge is that the relevant document i.e. bail application of the petitioner and order made thereon which might have been considered by the detaining authority were not applied to the petitioner and as such his right of making effective representation guaranteed under Article 22(6) of the constitution of India has been seriously prejudiced. This ground is without any substance because firstly there is noting to show from the founds of detention that the rejection of this bail application by the Sessions Judge, Greater Bombay on January 5, 1990 was considered by the detaining authority before passing the impugned order of detention and as such this being not referred to in the grounds of detention, the documents had not been supplied to the petitioner, and it, therefore, cannot be urged that non-supply of this document prejudiced the petitioner in making effective representation against the order of detention. Article 22 (5) of the Constitution, undoubtedly, mandates that all the relevant documents referred to in the grounds of detention and which are considered by the detaining authority in coming to his subjective satisfaction for clamping an order of detention are to be supplied to the detenu. The said comment was not considered by the detaining authority in coming to his comment to his subjective satisfaction and in making the impugned order of detention. The non-furnishing to the detenu of the said document i.e. that bail application and the order passed thereon, does not affect in any manner whatsoever the detenu's right to make an effective representation in compliance with the provisions of Article 22(5) of the Constitution of India. This ground, therefore, is wholly untenable.

11. It has been contended in this connection by referring to the order made by this Court on January 22, 1990 in the special leave petition filed by the petitioner before this Court against the rejection of his application of anticipatory bail whereon his Court made an interim order while issuing show-cause notice on the special leave petition and directing that in the meantime the petitioner shall not be arrested, that the impugned order of detention is illegal. This order was made in the special leave petition which did not challenge the impugned order of detention but questioned the rejection of the application for anticipatory bail. The order of detention was made on December 20, 1989 i.e. prior to the passing of the said order dated January 22, 1990. The said order of this Court has, therefore, nothing to do with the subjective satisfaction arrived at by the detaining authority in passing the order of detention in question. It has been urged in this connection that the fats in between the passing of the detention order and implementing the detention order have to be take into account for considering whether the detention order should be served on the detenu even after passing of the order by this Court dated January 22, 1990 stating that the petitioner shall not be arrested in the meantime. The counsel for the petitioner referred the case of Binod Singh v. District Magistrate, Dhanbad ((1986) 4 SCC 416 : 1986 SCC (Cri) 490 : (1986) 3 SCR 905) wherein the detenu was served with the order of detention u/s 3(2) of the national Security Act while he was in jail custody in connection with the criminal charge u/s 302 IPC. The question arose whether in such cases where

the detention order which was passed before the detenu surrendered before the court and was taken into custody in a criminal case, should be served on the detenu after he has surrendered in the criminal case and was in jail as an undertrial prisoner. It has been held by this Court that : (SCC p. 420 para 7)

> ".... the power of directing preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of the facts necessitating preventive custody of a person for social defence. If a man is in custody and there is imminent possibility of his being released, the power of preventive detention should not be exercised."

12. This ruling as well as the ruling in Suraj Pal Sahu v. State of Maharashtra ((1986) 4 SCC 378 : 1986 SCC (Cri) 452 : AIR 1986 SC 2177) relied upon by the counsel for the petitioner have no application to the instant case inasmuch as in the instant case the detenu was not arrested and imprisoned in jail till February 15, 1990 when the order of detention was served on him and he was arrested by the customs authorities. Considering all these, this ground of challenge is also wholly untenable.

13. The next ground of challenge is that the detenu appeared before the respondents and applied to them to record his statement u/s 108 of the Customs Act. He was then arrested and the order of detention was served on him. It is relevant to mention in this connection the averments made in para 10 of the counter-affidavit filed on behalf of the respondents which is to the effect that in fact, when the petitioner presented himself, his statement was recorded on February 15, 1990 and it was only after the recording of the statement that the petitioner was detained in pursuance of the detention order. It has also been stated in para 11 of the said affidavit that there existed sufficient grounds which impelled the detaining authority to pass the detention order against the petitioner. It has also been stated in para 12 of the said affidavit that a detention order under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 can be legally issued even if there is a single and solitary case against a person. It has also been stated that the detaining authority carefully scrutinised all the relevant documents and facts of the case and arrived at his subjective satisfaction that preventive order of detention of the petitioner is necessary to prevent him from smuggling and transporting contraband goods and as such the impugned order of detention is not at all illegal or bad and the same is not vitiated by non-application of mind or non-consideration of relevant materials. This ground, therefore, is not sustainable.

14. The last ground of challenge is that there has been inordinate delay in arresting the detenu and in serving the detention order i.e. on February 15, 1990 after a lapse of 1 month and 25 days and no serious attempt was made to arrest the petitioner and to serve the order of detention on him in accordance with the provisions of Section 8 of the said Act which specially provides for enforcing the provisions of Sections 82, 83, 84 and 85 of the Code of Criminal Procedure. It has been urged in this connection that this unusual delay in arresting the petitioner shows that there was no real and genuine apprehension in the mind of the detaining authority regarding the necessity of detention of the petitioner and as such continued detention of the petitioner is illegal and contrary to law. It is apropos to refer in this connection to the averments made on behalf of the respondents in para 7 of the counter affidavit. It has been stated therein that the department served two notices, one of which was accepted by his mother and the second by his brother, Nizamuddin for handing over the same of the petitioner, as the petitioner was not available in the house. It has been submitted that the

petitioner deliberately avoided making himself available to the department and thus delayed completion of investigation of the case. Instead of appearing before the department, the petitioner applied to the Sessions Judge for anticipatory bail which was rejected on January 5, 1990. Thereafter, the petitioner approached this court for anticipatory bail, which was granted on January 22, 1990. It is, therefore, evident that the petitioner absconded and tried to evade arrest pursuant to the order of detention even though he knew the passing of such an order by the detaining authority. It is relevant to mention here the observations of this Court in Shafiq Ahmad v. District Magistrate, Meerut ((1989) 4 SCC 556 : 1989 SCC (Cri) 774) to the following effect : (SCC p. 562, para 5)

> ".... We are, however unable to accept this contention. If in a situation the persons concerned is not available or cannot be served then the mere fact that the action under Section 7 of the Act has not been taken, would not be a ground to say that the detention order was bad."

15. In Bhawarlal Ganeshmalji v. State of Tamil Nadu ((1979) 1 SCC 465 : 1979 SCC (Cri) 318 : (1979) 2 SCR 633) an order of detention was made against the appellant u/s 3(1) of COFEPOSA Act in December 1974. It could not be executed because the detenu was absconding and could not be apprehended despite a proclamation made under Section 7 of the Act. More than three years after the order was passed, the appellant surrendered in February 1978. It was held that there must be a 'live and proximate link' between the grounds of detention and the avowed purpose of detention. But in appropriate cases the court can assume that the link is 'snapped' if there is a long and explained delay between the date of the order of detention and the arrest of the detenu. Where the delay is not only adequately explained but is found to be the result of the detenu's recalcitrant or refractory conduct in evading arrest, there is warrant to consider the 'link' not snapped but strengthened. It was, therefore, held that the delay in serving the order of detention on the detenu does not vitiate the order.

16. In the instant case, it has been clearly averred in the affidavit that two notices were served, one on the petitioner's mother and other on the petitioner's brother directing the petitioner to appear before the detaining authority. The petitioner, it has been stated, has intentionally absconded and thereby evaded arrest. These averments have not been denied by the petitioner. In these circumstances it cannot be said that the delay was not explained and the link between the grounds of detention and the avowed purpose of detention has been snapped. Reference may also be made in this connection to the decision in T. A. Abdul Rahman v. State of Kerala ((1989) 4 SCC 741 : 1990 SCC (Cri) 76). This ground of challenge is, therefore, devoid of any merit.

17. It has also been submitted on behalf of the petitioner that the representation made by the detenu on February 28, 1990 both to the Chairman, Advisory Board as well as to the Central Government were not disposed of till March 29, 1990 when the said representation was rejected by the Central Government. It has been submitted that this long delay of one month made the continued detention of the petitioner invalid and illegal. The counsel for the respondents has produced before this Court the relevant papers from which it is evident that after receipt of the representation of the petitioner, it was sent to the detaining authority for his comments and immediately after the comments of the detaining authority were received the same were processed and put up before the Minister concerned who rejected the representation after considering the comments of the detaining authority and the State Government. It has been urged on behalf of the petitioner that the comments were not duly considered. This submission is not at all tenable inasmuch as it is evident from the relevant papers produced before this Court that the Central Government passed the order after considering the comments of the detaining authority. So this submission is without any substance and the same

is rejected.

18. It has been further submitted that the counter-affidavit was sworn not by the detaining authority but by one Shri A. K. Roy, Under Secretary in the Ministry of Finance, Department of Revenue, New Delhi and as such this affidavit cannot be taken into consideration and the averments made therein are not relevant to explain the unusual delay in serving the order of detention as well as in rejecting the representation. In this connection some rulings of this Court have been cited at the bar. In Madan Lal Anand v. Union of India ((1990) 1 SCC 81 : 1990 SCC (Cri) 51 : (1989) 2 Scale 970), the counter-affidavit filed on behalf of the respondents had been affirmed by Kuldip Singh, Under Secretary to the Government and not by the detaining authority himself. It was urged that the counter-affidavit being not sworn by the detaining authority, the averments made therein should not be taken notice of. It was held that there being no personal allegation of mala fide or bias made by the detenu against the detaining authority in person, the omission to file affidavit-in-reply by itself is no ground to sustain the allegation of mala fides or non-application of mind.

19. Similar observation has been made by this Court in Mohinuddian v. District Magistrate, Beed ((1987) 4 SCC 58 : 1987 SCC (Cri) 674) which is to the following effect : (SCC pp. 63-64, para 4)

> "In return to a rule nisi issued by this Court or the High Court in a habeas corpus petition, the proper person to file the same is the District Magistrate who had passed the impugned order of detention and he must explain his subjective satisfaction and the grounds therefor; and if for some good reason the District Magistrate is not available, the affidavit must be sworn by some responsible officer like the Secretary or the Deputy Secretary to the government in the Home Department who personally dealt with or processed the case in the Secretariat or submitted it to the Minister or other officer duly authorised under the Rules of Business framed by the government under Article 166 of the Constitution to pass orders on behalf of the government in such matters ...."

Reference has also been made therein to the cases of Niranjan Singh v. State of Madhya Pradesh ((1972) 2 SCC 542 : 1972 SCC (Cri) 880 : (1973) 1 SCR 691), Habibullah Khan v. State of West Bengal ((1974) 4 SCC 275 : 1974 SCC (Cri) 437), Jagdish Prasad v. State of Bihar ((1974) 4 SCC 455 : 1974 SCC (Cri) 491) and Mohd. Alam v. State of West Bengal ((1974) 4 SCC 463 : 1974 SCC (Cri) 499).

20. In the instant case, the counter-affidavit has been filed by Shri A. K. Roy, Under Secretary to the Government, Ministry of Finance, Department of Revenue, New Delhi although the order of detention was made by Nisha Sahai Achuthan, Joint Secretary to the Government of India, Ministry of Finance. It is evidence that the said Under Secretary was dealing with the papers relating to the particular order of detention and he placed those papers before the Minister concerned. In these circumstances, the counter-affidavit filed on behalf of the respondents cannot but be considered and there is no allegation of made fide or malice or extraneous consideration personally against the detaining authority in making the impugned order of detention. This contention, is, therefore not tenable.

21. In the premises aforesaid we dismiss the writ petition and hold that the impugned order of detention is quite in accordance with law and the same is valid. The observation made herein are confined to this application.

</html