

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 09.04.2012

+ **W.P.(CRL) 167/2012**

**ABDUL KALAM @ MULLAJI** ..... Petitioner  
Through **Mr. Riaz Mohd. Advocate**

versus

**UOI & ORS.** ..... Respondents  
Through **Mr. Ravinder Sharma, Adv. for UOI**

**CORAM:**  
**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**  
**HON'BLE MR. JUSTICE S.P.GARG**

**MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)**

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1. The petitioner seeks a direction for quashing of an order dated 09.09.2011 issued by the Central Government in terms of Sec. 8 (f) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'COFEPOSA'). The petitioner urges that the detention order and the grounds referred to are illegal and besides, he is facing prosecution in connection with the incident under Section 135 of the Customs Act and Section 489 IPC.

2. According to the detention order, intelligence was received by DRI that some one answering to the petitioner's description would be alighting from the Brahmaputra Mail scheduled to arrive at Delhi Railway Station on 05.07.2010 at around 6 AM. Apart from the description, information received also was specific as to the kind of clothes he was wearing. A team

was constituted which included independent witness; they all reached the Station around 5:50 AM and mounted surveillance around the location. The allegations further are that at about 8:30 AM the DRI officers spotted a person wearing white kurta payjama and riding a red motorcycle, parking near a mazaar. The said person parked his motorcycle and walked towards the mazaar. He was joined by some one who get off from an auto rickshaw. The person of the first description was identified as Mohd. Naushad Mian. He handed over a green coloured polythene packet, brought by him to the second individual, i.e., the petitioner in this case i.e. Abdul Kalam and both of them started walking towards the motorcycle. The detention order alleges that at this stage both of them were interrogated. It was alleged that the packet contained Fake Indian Currency Notes in the denomination of Rs.500/- and Rs.1000/- aggregating to Rs.2,95,000/-. The detention order alleges that Abdul Kalam i.e. the present petitioner recorded his confession under Section 108 of the Customs Act on the same day i.e. 05.07.2010 in terms of which he acknowledged to personal knowledge about the contents of the packet and also confirmed that this was a part of an organized racket. He apparently named one Amurul Islam as master mind of the entire operation. The detention order states that on the basis of the statement of the writ petitioners, further investigation was conducted pursuant to which summons/notices were issued to the other alleged offenders including Amirul Islam. The detention order mentions that summons were issued on 08.07.2010 and also later, on 12.8.2010 and 30.8.2010. Apparently, Amirul Islam did not comply with notice and appeared before the authorities. His premises were searched and incriminating documents were allegedly seized. The detention order also alleges that the documents taken into possession

revealed at least one previous incident involving the smuggling of fake Indian currency notes to the extent of Rs. 4 lakhs.

3. The petition urges that in the entirety of facts having regard to the settled authorities, the detention order made in this case cannot be sustained. It is emphasized that the record discloses that all the facts which were necessary for the detaining authority to base its decision upon, i.e. whether to make an order or not, were in its possession by August, 2010 and this included a confessional statement recorded on 05.07.2010. Yet the detaining authority inordinarily delayed in taking any decision and in fact made the impugned order on 09.09.2011. Learned counsel relied upon the decision reported as *Rajinder Arora v. Union of India & Ors* AIR 2006 SC 1719 and *Ahamed Mohaideen Jabbar v. State of Tamilnadu* 1999 (4) SCC 417.

4. Learned counsel next emphasized that record also reveals that the writ petitioner and the co-accused are facing trial and the case was handed over to the CBI. It was highlighted during the course of hearing that the petitioner was enlarged on bail by an order of the competent Court on 08.11.2011. At that stage CBI was unable to produce sufficient evidence *prima facie* for the offence alleged. The material on record included the confessional statement which *prima facie* was admissible under Sec. 108 of the Customs Act. Despite this fact, the Court apparently was of the opinion that there was not sufficient material to conclude that *prima facie* the writ petitioner was guilty. In such circumstances, argued by the learned counsel, there was no justification for continuing with the detention order which was in violation of writ petitioner's right under Article 21 of the Constitution.

5. Counsel for the respondent submitted that the mere circumstance that the writ petitioner was granted bail either before the detention order or even

later is not insufficient ground for the Court to exercise its discretion under Article 226 of the Constitution and quash an order. It was argued that so far as question on delay is concerned there was in fact no delay and that the standard for judging whether the order of detention is made after an inexcusable delay or ordinary delay is not the same as in the case of approach of detaining authority which is expected to dispose of the detenu's representation with utmost expedience. It was emphasized that the provisions of COFEPOSA impose time limits within which representation have to be dealt with and the question of delay in passing detention order has to be seen not from a mathematical perspective but whether the facts of the case disclose that the offender is likely to indulge in the same behaviour.

6. It was argued that the material gathered during the search at Amirul Islam premises, confirmed what the writ petitioner had confessed to in the statement recorded on 05.07.2010. This clearly pointed to his indulgence in the same behaviour and also established that he was a repeat offender. Therefore, the question of delay should not unduly agitate the Court. Learned counsel relied upon a decision in *Sheetal Manoj Gore v. State of Maharashtra and Ors* reported as 2006 (7) SCC 560 where it was held:

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*This Court in several judgments has emphasised the promptness with which authority concerned must deal with the representation received from the detenu. The right to represent and its fair and prompt consideration by the authority concerned is a constitutional right guaranteed to a detenu. The authorities dealing with such representations must be aware of the fact that the detenu is languishing in custody without a trial. Their conduct must, therefore, disclose a consciousness of the urgency in the matter. The norms and standards laid down*

*by this Court in the matter of consideration of the representation of a detenu, cannot be strictly applied to the case of processing of a proposal for detention of a person under the Act. No doubt, if there is inordinate delay in issuing the order of detention, it may well be argued that the live link between the prejudicial activity of the detenu and the purpose for which the order of detention is issued is snapped and being stale there was no justification for issuance of an order of detention. In the facts and circumstances of this case, we are satisfied that the details furnished by the detaining authority provide sufficient explanation for the time taken in issuing the order of detention.*

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7. The previous discussion would reveal that the order of detention is based upon the arrest and subsequent confessional statement of the petitioner recorded by the authorities on 05.07.2010. The detention order cites that an amount of fake Indian currency note, seized was to the tune of Rs.2,95,000/-. It is also a matter of record (as pointed out by the detention order as well as the documents annexed in support thereof) that the materials which led the detaining authority to arrive at its subjective satisfaction that the petitioner had to be preventively detained in terms of Section 8 were primarily the confessional statement and the documents seized from the premises of alleged Amirul Islam. The documents annexed with the detention order also reveal that even though Amirul Islam was summoned three times to record his statement, the authorities were unsuccessful. However, his premises were searched on 8.7.2010 itself. This Court also notices that investigation into the criminal proceedings initiated in the aftermath of the petitioner's arrest on 5.7.2010 were apparently handed over within reasonable time to the CBI. The detention order ultimately was made on 9.9.2011. An important aspect

which this Court notices, at the outset, is that the between August, 2010 and September, 2011 no new material was examined or placed on record of the authorities which could have perhaps been a good justification for the detaining authority to claim that there was no delay.

8. It is no doubt true that the Supreme Court in its decision in *Haradhan Saha vs. State of West Bengal* reported as (1975) 3 SCC 198, has held that the mere circumstance that a person is liable to be tried in a criminal Court is no bar on the Government passing a detention order against him. However at the same time there are decisions like *Rekha vs. State of Tamilnadu*, 2011 (5) SCC 244 where it is held that when the detaining authority takes recourse to preventive detention even when criminal proceedings are on, the Courts have to take a careful position. In *Rekha's* case (supra), it was stated that:

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*No doubt, it has been held in the Constitution Bench in Haradhan Saha case that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Article 21 and 22 of the Constitution (which we have already explained). Article 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him an opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (the Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive*

*detention law be taken recourse to.*

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9. In this case, as noticed earlier, petitioner and his co-accused are facing trial; the matter is pending with the CBI which had till late 2011 not been able to sufficient material to implicate the accused apart from the confessional statement under Sec. 108. This aspect is important because the detention order is based entirely on the said confessional statement and the recoveries made allegedly from the premises of Amirul Islam.

10. Having regard to this aspect and the further circumstance (which was not denied during the hearing) that the petitioner is enlarged on bail on the basis of the material made available to the Trial Court and also that the charge has been framed, this Court is of the opinion that the mere allegation of his having been associated in the past with some activities is an insufficient circumstance to justify the detention order. We also notice that in fact there is no case registered against the writ petitioner in respect of any similar or any other offence.

11. On the question of delay, the Supreme Court had in its decision in *T. D. Abdul Rahman vs. State of Kerala and Ors* AIR 1990 SC 225, stated as follows:

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*The conspectus of the above decisions can be summarized thus: The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be*

*applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinize whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned. When called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case. 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 a 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.*

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12. The other decision cited by the petitioner reiterates the same principle. In the present case all the material necessary to issue detention order were available with the concerned authority as on July-August, 2010 yet the detention order was in fact made on 9.9.2011.

13. Although the respondents have relied upon the decision for there are some observations in *Sheetal Manoj Gore (supra)* suggestive of a different approach which the Courts ought to adopt while considering the issue of delay yet we notice that the observations were fact-dependant. In this case, having noticed all the materials which could have been used by the detaining authority to make an order under Section 3/8 were with it in July-August,

2010 despite which no order was made, we are of the opinion that the order is untenable on the ground of inordinate delay.

14. In view of the above conclusion, we are of the opinion that the impugned order of detention dated 9.9.2011 under Sections 3 and 8, COFEPOSA cannot be sustained and is hereby quashed. The writ petitioner shall be released forthwith unless required in any other case. The writ petition is allowed in above terms.

**S. RAVINDRA BHAT**  
**(JUDGE)**

**S.P.GARG**  
**(JUDGE)**

**APRIL 09, 2012**  
**‘raj’**