Ashiq Hussain Faktoo vs Union Of India & Ors on 30 August, 2016

Equivalent citations: AIR 2016 SC 4033, 2016 (9) SCC 739, 2016 CRI. L. J. 4845, AIR 2016 SC(CRI) 1335, (2016) 4 DLT(CRL) 460, 2016 CRILR(SC&MP) 953, (2016) 3 CURCC 438, (2016) 3 ALLCRIR 2792, (2016) 4 CURCRIR 195, (2016) 3 UC 1607, (2016) 166 ALLINDCAS 252 (SC), (2016) 4 RECCRIR 194, (2016) 2 ALD(CRL) 643, 2016 CRILR(SC MAH GUJ) 953, 2016 ALLMR(CRI) 4059, (2017) 1 JCR 136 (SC), (2016) 4 CRIMES 7, (2016) 3 CRILR(RAJ) 953, (2016) 8 SCALE 336, (2017) 1 MH LJ (CRI) 66, (2016) 96 ALLCRIC 961, 2017 (1) SCC (CRI) 86, 2016 (4) KCCR SN 517 (SC), AIR 2016 SUPREME COURT 4033, AIR 2016 SC (CRIMINAL) 1335

Author: Ranjan Gogoi

Bench: A.M. Khanwilkar, Prafulla C. Pant, Ranjan Gogoi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION
WRIT PETITION (CRIMINAL) NO.46 OF 2008

ASHIQ HUSSAIN FAKTOO ...PETITIONER

VERSUS

UNION OF INDIA & ORS. ...RESPONDENTS

JUDGMENT

RANJAN GOGOI, J.

1. The writ petitioner has been convicted by this Court by its judgment and order dated 30th January, 2003 passed in Criminal Appeal No.889 of 2001 under Section 3 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA Act") and under Section 302 read with Section 120B of the Indian Penal Code, 1860 (hereinafter referred to as "IPC"). He has been sentenced, inter alia, to undergo imprisonment for life. The review petitions filed by the writ petitioner as also by the co-accused (Mohd. Shafi Khan @ Mussadiq Hussain) against the aforesaid judgment dated 30th January, 2003 i.e. Review Petition (Criminal) No.478 of 2003 and Review Petition (Criminal) No.1377 of 2003 have been dismissed by order dated 2nd September, 2003 of this Court. Curative Petition filed by the co-accused (Mohd. Shafi Khan @ Mussadiq Hussain) i.e. Curative Petition (Criminal) No.23 of 2004 in Review Petition (Criminal) No.1377 of 2003 in Criminal Appeal No.889 of 2001 has also been dismissed by order dated 2nd

February, 2005 of this Court. Thereafter, this writ petition under Article 32 of the Constitution of India has been filed by the present accused writ petitioner making the following prayers:

> (a) Issue a writ in the nature of habeas corpus or other similar direction, order or writ to the Respondents thereby commanding them to produce the petitioner before this Hon'ble Court and thereafter forthwith release him from illegal custody; and
>
> (b) grant any other or further reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and in the interests of justice."

2. Notwithstanding the prayers made, extracted above, in essence, the writ petition seeks interference with the order of conviction and the sentence imposed on the petitioner by this Court by its judgment and order dated 30th January, 2003 passed in Criminal Appeal No.889 of 2001.

3. The Bench initially hearing the present writ petition had passed an order dated 24th September, 2014 to the following effect:

> "We have been apprised by Mr. Jethmalani as the writ petition was filed, no application for review was filed. We are of the considered opinion if the present writ petition is converted to a review petition and heard in the open Court on the fundamental principles of review as well as the maxim ex debito justitiae, the cause of justice would be subserved and accordingly we direct the Registry to convert the present writ petition to a review petition and list before the appropriate Bench in open Court as expeditiously as possible.
>
> Ordered accordingly" Subsequently the matter has been referred to a larger Bench. This is how we are in seizen of the matter.

4. As already noted review petitions were filed by the present writ petitioner as also by the co-accused (Mohd. Shafi Khan @ Mussadiq Hussain) and the same were dismissed by this Court by order dated 2nd September, 2003 the said fact was not brought to the notice of the Court while the order dated 24.09.2013 was rendered.

5. Shri Ram Jethmalani, learned Senior Counsel appearing for the writ petitioner has urged that the sole basis of the conviction of the writ petitioner is the alleged confession made by him. Shri Jethmalani has urged that the same is not a confession in law inasmuch as nowhere in the said statement the accused implicates himself with the alleged offence(s) in any manner. Neither the confession has been put to the accused in the course of his examination under the provisions of Section 313 of the Code of Criminal Procedure, 1973, nor there is any corroboration to the alleged confession. Shri Jethmalani has further urged that Section 15 of the TADA Act makes a confession made to a Police Officer, not lower in rank than a Superintendent of Police, admissible in the trial of such person. Section 15 of the TADA Act, therefore, works as an exception to Section 25 of the Indian Evidence Act, 1872. However, in the instant case, the confession was recorded while the accused was in police custody and, therefore, would not be admissible under Section 26 of the

Indian Evidence Act, 1872. The provisions of Section 15 of the TADA Act are not in exception to what has been laid down in Section 26 of the Indian Evidence Act, 1872. It is also urged that the confession recorded is contrary to the provisions of Rule 15 of the TADA Rules read with the guidelines laid down by this Court in para 263 of the judgment in Kartar Singh Vs. State of Punjab[1]. On the aforesaid grounds, Shri Jethmalani has submitted that a manifest miscarriage of justice has been occasioned by the conviction of the accused writ petitioner and the sentence imposed upon him which needs to be corrected on the principle of ex debito justitiae. Shri Jethmalani has also pointed out the decision of this Court in Mohd. Arif alias Ashfaq Vs. Registrar, Supreme Court of India and others[2] to contend that review petitions in matters of convictions recorded under the TADA Act are required to be heard in open Court.

6. Shri R.S. Suri, learned Senior Counsel appearing for the Union of India has questioned the maintainability of the present writ petition on the ratio of the law laid down by this Court in Rupa Ashok Hurra Vs. Ashok Hurra and another[3]. Drawing the attention of the Court to the relevant paragraphs of the report in Rupa Ashok Hurra (supra) Shri Suri has urged that neither a writ petition under Article 32 of the Constitution of India nor a second review petition would be maintainable. It is also submitted that invoking the principles of ex debito justitiae, this Court in Rupa Ashok Hurra (supra) had carved out an exception permitting the Court to have a re-look at its concluded judgments on twin grounds i.e. (1) the order being in infraction of the principles of natural justice; and (2) or an order which shakes the integrity of the justice delivery system by an association of the judge with the subject matter or the litigating parties which may have escaped the attention of the learned Judge.

7. On merits, Shri Suri has submitted that what has been urged by Shri Jethmalani is not at all legally tenable and all the issues raised have been duly considered by this Court in its judgment dated 30th January, 2003 passed in Criminal Appeal No.889 of 2001. Shri Suri has further submitted that principle of open court hearing laid down by the Constitution Bench in Mohd. Arif alias Ashfaq (supra) is only in cases of death penalty cases either under the IPC or the TADA Act. The reference to TADA cases in paragraph 40 of the report in Mohd. Arif alias Ashfaq (supra) has to be understood accordingly.

8. Having heard the learned counsels for the parties we are of the view that on the strength of the Constitution Bench judgment in Rupa Ashok Hurra (supra) the present writ petition would not be maintainable. It would also not be maintainable as a review petition inasmuch as Review Petition (Criminal) No.478 of 2003 filed by the writ petitioner has been dismissed by this Court on 2nd September, 2003. Open Court hearing of review petitions in terms of the judgment of this Court in Mohd. Arif alias Ashfaq (supra) is available as of right only in death sentence cases.

9. The principle of ex debito justitiae invoked on behalf of the accused writ petitioner to attract the jurisdiction of this Court under Article 32 of the Constitution of India to set the accused writ petitioner at liberty, in our considered view, has been elaborately dealt with in the concurring judgment of Umesh C. Banerjee, J. in Rupa Ashok Hurra (supra) and holding that the doctrine of ex debito justitiae would prevail over procedural law but would be applicable only in a situation where the order of this Court had been passed without notice or where the order has the effect of eroding

the public confidence in the justice delivery system. Paragraph 69 of the report in Rupa Ashok Hurra (supra) containing the view of Umesh C. Banerjee, J. may be usefully extracted herein below:

> "69. True, due regard shall have to be had as regards opinion of the Court in Ranga Swamy [(1990) 1 SCC 288] but the situation presently centres around that in the event of there being any manifest injustice would the doctrine of ex debito justitiae be said to be having a role to play in sheer passivity or to rise above the ordinary heights as it preaches that justice is above all. The second alternative seems to be in consonance with time and the present phase of socio-economic conditions of the society. Manifest injustice is curable in nature rather than incurable and this Court would lose its sanctity and thus would belie the expectations of the founding fathers that justice is above all. There is no manner of doubt that procedural law/procedural justice cannot overreach the concept of justice and in the event an order stands out to create manifest injustice, would the same be allowed to remain in silentio so as to affect the parties perpetually or the concept of justice ought to activate the Court to find a way out to resolve the erroneous approach to the problem? Mr Attorney-General, with all the emphasis in his command, though principally agreed that justice of the situation needs to be looked into and relief be granted if so required but in the same breath submitted that the Court ought to be careful enough to tread on the path, otherwise the same will open up a Pandora's box and thus, if at all, in rarest of the rare cases, further scrutiny may be made. While it is true that law courts have overburdened themselves with the litigation and delay in disposal of matters in the subcontinent is not unknown and in the event of any further appraisal of the matter by this Court, it would brook no further delay resulting in consequences which are not far to see but that would by itself not in my view deter this Court from further appraisal of the matter in the event the same, however, deserves such an additional appraisal — the note of caution sounded by Mr. Attorney-General as regards opening up of a Pandora's box, strictly speaking, however, though may be very practical in nature but the same apparently does not seem to go well with the concept of justice as adumbrated in our Constitution. True it is, that practicability of the situation needs a serious consideration more so when this Court could do without it for more than 50 years, which by no stretch of imagination can be said to be a period not so short. I feel it necessary, however, to add that it is not that we are not concerned with the consequences of reopening of the issue but the redeeming feature of our justice delivery system, as is prevalent in the country, is adherence to proper and effective administration of justice in stricto. In the event there is any affectation of such an administration of justice either by way of infraction of natural justice or an order being passed wholly without jurisdiction or affectation of public confidence as regards the doctrine of integrity in the justice delivery system, technicality ought not to outweigh the course of justice — the same being the true effect of the doctrine of ex debito justitiae. The oft-quoted statement of law of Lord Hewart, C.J. in R. v. Sussex Justices, ex p McCarthy [(1924) 1 KB 256] that it is of fundamental importance that justice should not only be done, should manifestly and undoubtedly be seen to be done, had this doctrine underlined and administered therein. In this context, the

> decision of the House of Lords in R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)[(1999) 1 All ER 577(HL)] seems to be an epoch- making decision, wherein public confidence in the judiciary is said to be the basic criterion of the justice delivery system — any act or action even if it is a passive one, if erodes or is even likely to erode the ethics of judiciary, the matter needs a further look."

10. The principle of ex debito justitiae is founded on a recognition of a debt that the justice delivery system owes to a litigant to correct an error in a judicial dispensation. Its application, by the very nature of things, cannot be made to depend on varying perceptions of legal omissions and commissions but such recognition of the debt which have the potential of opening new vistas of exercise of jurisdiction to relook concluded cases, must rest on surer foundations which have been discerned and expressed in Rupa Ashok Hurra (supra). Frantic cries of injustice founded on perceived erroneous application of law or appreciation of facts will certainly not be enough to extend the frontiers of this jurisdiction.

11. The opinion of Syed Shah Mohammed Quadri, J. with regard to the situations in which an aggrieved litigant would be entitled to relief under the doctrine of ex debito justitiae has been set out in paragraph 51 of the report which may be reproduced herein below:

> "Nevertheless, we think that a petitioner is entitled to relief ex debito justitiae if he establishes (1) violation of the principles of natural justice in that he was not a party to the lis but the judgment adversely affected his interests or, if he was a party to the list, he was not served with notice of the proceedings and the matter proceeded as if he had notice, and (2) where in the proceedings a learned judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner." (para 51)

12. The said jurisdiction because of its very nature has attracted the terminology of curative jurisdiction. The procedural steps with regard to filing and disposal of applications invoking the curative jurisdiction, termed as curative petitions, have also been laid down in paragraphs 52 and 53 of the report of Syed Shah Mohammed Quadri, J. in Rupa Ashok Hurra (supra) which now finds mention in Order XLVIII of the Supreme Court Rules, 2013.

13. The present writ petition under Article 32 of the Constitution of India by no stretch of reasoning would fit into any of the permissible categories of post conviction exercises permissible in law as laid down by this Court. The doctrine of ex debito justitiae being circumscribed by the judgment of this Court in Rupa Ashok Hurra (supra) it is for the petitioner to exhaust the said remedy, if is he so inclined and so advised. Merely because in the comprehension of the writ petitioner the judgment of this Court is erroneous would not enable the Court to reopen the issue in departure to the established and settled norms and parameters of the extent of permissible exercise of jurisdiction as well as the procedural law governing such exercise. We, therefore, hold that the present writ petition is not maintainable and is accordingly dismissed subject to the observations as above.

.....,J.

(RANJAN GOGOI) .....,J.

(PRAFULLA C. PANT) .....,J.

(A.M. KHANWILKAR) NEW DELHI AUGUST 30, 2016.

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[1] (1994) 3 SCC 569
[2] (2014) 9 SCC 737
[3] (2002) 4 SCC 388