Saeed Zakir Hussain Malik vs State Of Maharashtra & Ors on 9 August, 2012

Equivalent citations: 2012 AIR SCW 4449, 2012 (8) SCC 233, 2012 CRI. L. J. 4297, AIR 2012 SC(CRI) 1465, 2012 (6) AIR BOM R 52, (2012) 3 CURCRIR 370, (2012) 4 MH LJ (CRI) 496, (2012) 3 CHANDCRIC 116, (2012) 4 ALLCRILR 182, (2012) 3 ALLCRIR 2399, (2012) 7 SCALE 285, (2012) 3 DLT(CRL) 477, (2012) 78 ALLCRIC 986, (2012) 3 KER LJ 468, (2012) 53 OCR 348, (2012) 4 CRILR(RAJ) 1033, (2012) 117 ALLINDCAS 26 (SC), (2013) 1 BOMCR(CRI) 146, 2012 CALCRILR 3 653, 2012 (3) SCC (CRI) 830, 2012 (95) ALR SOC 36 (SC), AIR 2012 SUPREME COURT 3235

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Bench: P. Sathasivam, Ranjan Gogoi

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

1 CRIMINAL APPEAL NO. 1187 OF 2012

(Arising out of S.L.P. (Crl.) No. 6985 of 2008)

Saeed Zakir Hussain Malik .... Appellant(s)

Versus

State of Maharashtra & Ors. .... Respondent(s)

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J U D G M E N T

P.Sathasivam,J.

1) Leave granted.

2) This appeal is directed against the final judgment and order dated 14.08.2008 passed by the High Court of Bombay in Criminal Writ Petition No. 455 of 2008 whereby the High Court dismissed the petition filed by the appellant herein.

3) Brief facts:

(a) The appellant herein is the brother of the detenu-Shahroz Zakir Hussain Malik. According to the appellant, the Directorate of Revenue Intelligence (DRI), Mumbai Zonal Unit, on the basis of information, initiated investigation into the claim of fraudulent exports allegedly made from Nhava Sheva Port under the Drawback Scheme of the Customs Act, 1962 by a syndicate of persons in the name of fictitious firms.

(b) During the course of investigation, several fictitious firms were identified which had availed the drawback allegedly running into several crores. The DRI, Mumbai arrested about 10 persons and several records/incriminating documents including copies of Shipping bills, Import Export Codes (IEC) etc., were seized.

(c) The role of the appellant's brother-the detenu also came to light as one of the racketeers who was involved in using fictitious IECs and forged documents for fraudulent exports under the said Scheme and he was arrested on 21.10.2005. All the abovesaid persons were subsequently released on bail and the detenu was also released on bail on 11.11.2005.

(d) While the detenu was on bail, on 14.11.2006, a Detention Order was issued against him by the Principal Secretary (Appeals and Security) to the Government of Maharashtra, Home Department and Detaining Authority exercising powers under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short 'COFEPOSA') and on the same day, the detention order was received by the executing authority.

(e) On 01.02.2008, i.e., after a delay of 14 ½ (fourteen and a half) months, the said Order was served upon the detenu. Challenging the detention order, the appellant herein-brother of the detenu filed Criminal Writ Petition being No. 455 of 2008 before the High Court. The High Court, by impugned judgment dated 14.08.2008, dismissed the said petition.

(f) Aggrieved by the said judgment, the appellant has filed this appeal by way of special leave before this Court.

4) Heard Mr. K.K. Mani, learned counsel for the appellant and Ms. Asha Gopalan Nair, learned counsel for the respondent-State. Contentions of the appellant:

> 5) a) Though the detention order was passed on 14.11.2006 and the detenu was available on the address known to the authorities, the authorities have chosen to execute the order only on 01.02.2008. Pursuant to the same, there was an inordinate

and unreasonable delay of 14 ½ months in executing the detention order which vitiates the detention itself;

b) Though the DRI came to know of the incident by recording the statement of one Vijay Mehta on 03.08.2005 and the detenu was also arrested on 21.10.2005, the detention order was issued only on 14.11.2006 after an inordinate and unreasonable delay of 15 months which vitiates the detention itself.

Contentions of the respondent-State:

6) a) Since the detenu was absconding, in spite of repeated attempts by the Executing Authority for executing the detention order, all the efforts were in vain as the detenu had rendered himself non-traceable.

b) The delay has been properly explained by filing an affidavit not only by the Detaining Authority but also by the Executing Authority.

c) After realizing that the detenu has absconded an action was also taken under Section 7(1)(b) and additionally under Section 7(1)(a) of COFEPOSA that the detenu did not comply with the same. It is pointed out that once appropriate action has been taken under Section 7(1)(a)(b) of COFEPOSA, the burden shifts on the detenu.

7) We have considered the rival contentions, perused the grounds of detention and all other connected materials.

Discussion:

8) In order to consider the first contention raised by learned counsel for the appellant, it is useful to refer Article 22(5) of the Constitution of India which reads as under:-

"(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order." The above provision mandates that in the case of preventive detention, it is incumbent on the authority making such order to communicate to the person concerned/detenu the grounds on which the order has been made. It is also clear that after proper communication without delay, the detenu shall be afforded the earliest opportunity for making a representation against the said order. In the light of the above mandate, let us consider the first submission with reference to the various earlier decisions of this Court.

9) In P.M. Hari Kumar vs. Union of India and Others, (1995) 5 SCC 691, which is almost similar to the case on hand, the only reason for delay in execution of the detention order was that the detenu was absconding and they could not serve the detention order on him because of his own fault.

Rejecting the said contention, this Court held:

"13. If the respondents were really sincere and anxious to serve the order of detention without any delay it was expected of them, in the fitness of things, 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 as the case might be. Surprisingly, however, no such steps were taken and instead thereof it is now claimed that a communication was sent to his residence which was returned undelivered. Apart from the fact that no such communication has been produced before us in support of such claim, it has not been stated that any follow-up action was taken till 3-8-1990, when Section 7 of the Act was invoked. Similarly inexplicable is the respondents' failure to insist upon the personal presence of the petitioner in the criminal case (CC No. 2 of 1993) filed at the instance of the Customs Authorities, more so when the carriage of its proceeding was with them and the order of detention was passed at their instance. On the contrary, he was allowed to remain absent, which necessarily raises the inference that the Customs Authorities did not oppose his prayer, much less bring to the notice of the Court about the order of detention passed against the detenu." After finding that the respondent-authorities did not make sincere and earnest efforts and take urgent and effective steps which were available to them to serve the order of detention on the petitioner therein, this Court quashed the order of detention holding that the unusual delay in serving the order of detention has not been properly and satisfactorily explained.

10) In SMF Sultan Abdul Kader vs. Jt. Secy., to Govt. of India and Others, (1998) 8 SCC 343, the order of detention was passed on 14.03.1996 but the detenu was detained only on 07.08.1997. After finding that no serious efforts were made by the police authorities to apprehend the detenu and the Joint Secretary himself had not made any efforts to find out from the police authorities as to why they were not able to apprehend the detenu, quashed the order of detention.

11) In A. Mohammed Farook vs. Jt. Secy. to G.O.I and Others, (2000) 2 SCC 360, the only contention before the Court was that of delay in executing the order of detention. In that case, the detention order was passed on 25.02.1999 but the authorities have chosen to execute the detention order only on 06.04.1999 after an inordinate and unreasonable delay of nearly 40 days. In the absence of proper and acceptable reasons for the delay of 40 days in executing the detention order, this Court concluded that the subjective satisfaction of the Detaining Authority in issuing the detention order dated 25.02.1999 gets vitiated and on this ground quashed the

same.

12) It is clear that in the light of sub-section (5) of Article 22, it is incumbent on the Detaining Authority as well as the Executing Authority to serve the detention order at the earliest point of time. If there is any delay, it is the duty of the said authorities to afford proper explanation.

13) Now, let us consider the delay in the case on hand in serving the order of detention. Though the detention order was passed on 14.11.2006, the same was served only on 01.02.2008. Ms. Asha Gopalan Nair, learned counsel appearing for the State contended that since the detenu himself was absconding, in spite of repeated attempts made by the Executing Authority, the same were not materialized. She also brought to our notice the affidavits filed by the concerned authorities explaining the efforts made in serving the order of detention. By giving details about their efforts, she pointed out that the detenu absconded after release from the prison on 11.11.2005 and actions were also taken under Sections 7(1)(b) and 7 (1)(a) of COFEPOSA and that the detenu did not comply with the same. It is pointed out from the other side that during this period, the bail order dated 11.11.2005 was not cancelled nor an attempt was made to forfeit the amount which was deposited by the detenu. When this Court posed a specific question to the learned counsel for the State about the delay, particularly, when the detenu was released on bail on 11.11.2005 and no proper steps have been taken for cancellation of the bail and forfeiture of the amount which was deposited by the detenu, it is not disputed that such recourse has not been taken. In such circumstances, the reasons stated in the affidavit filed by the Detaining and Executing Authorities that, on several occasions, their officers visited the residential address of the detenu and he could not be traced, are all unacceptable. We hold that the respondent-authorities did not make any sincere and earnest efforts in taking urgent effective steps which were available to them, particularly, when the detenu was on bail by orders of the court. We are satisfied that the unusual delay in serving the order of detention has not been properly and satisfactorily explained. In view of the same, we hold that the authorities have not executed the detention order promptly as required under Article 22(5) of the Constitution.

14) Now, coming to the second contention, namely, delay in passing the Detention Order, it is the claim of the appellant that there was a delay of 15 months in passing the order of detention. It is pointed out that though the DRI came to know of the incident by recording the statement of one Vijay Mehta on 03.08.2005 and the detenu was also arrested on 21.10.2005 and all the documents had also come into existence including the documents annexed with the grounds of detention, but still the authorities passed the order of detention only on 14.11.2006 after an unreasonable and inordinate delay of 15 months. It is also highlighted that during this period the detenu had not come into any adverse notice of the authorities and was also not alleged to have indulged in any similar illegal activities. Considering this, it is contended that the alleged incident has become stale and it is too remote in point of time. It is further submitted that there is no nexus or proximity between the alleged incident and the detention order. Finally, it is pointed out that the alleged incident has

become irrelevant due to long lapse of time. Hence, the inordinate and unreasonable delay in passing the detention order against the detenu vitiates the detention itself. These aspects have been highlighted by this Court in several decisions.

15) In Lakshman Khatik vs. The State of West Bengal, (1974) 4 SCC 1, a three-Judge Bench of this Court, while considering the detention order under the Maintenance of Internal Security Act, 1971 has concluded that prompt action in such matters should be taken as soon as the incident like those which are referred to in the grounds have taken place. In the said decision, it was pointed out that all the three grounds on which the District Magistrate purports to have reached the required satisfaction are based on incidents which took place in rapid succession in the month of August, 1971. The first incident of unloading five bags of rice took place in the afternoon of August 3, 1971. The second incident took place on August 5, 1971 also in the afternoon practically at the same place as the first incident. This time also some rice was removed from the trucks carrying rice. The third incident took place in the afternoon of August 20, 1971 also at the same place. That also related to the removal of some rice from loaded trucks. In this factual scenario, this Court concluded that the District Magistrate could not have been possibly satisfied about the need for detention on March 22, 1972 having regard to the detenu's conduct some seven months earlier. The following conclusion is very relevant.

"5.....Indeed mere delay in passing a detention order is not conclusive, but we have to see the type of grounds given and consider whether such grounds could really weigh with an officer some 7 months later in coming to the conclusion that it was necessary to detain the petitioner to prevent him from acting in a manner preiudicial to the maintenance of essential supplies of foodgrains. It is not explained why there was such a long delay in passing the order. The District Magistrate appears almost to have passed an order of conviction and sentence for offences committed about 7 months earlier. The authorities concerned must have due regard to the object with which the order is passed, and if the object was to prevent disruption of supplies of foodgrains one should think that prompt action in such matters should be taken as soon as incidents like those which are referred to in the grounds have taken place. In our opinion, the order of detention is invalid."

16) In T.V. Abdul Rahman vs. State of Kerala and Others, (1989) 4 SCC 741, in similar circumstance, this Court held:

> "10.....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 scrutinise 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.
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> 11. 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." After holding so, this Court quashed the order of detention.

17) In Pradeep Nilkanth Paturkar vs. S. Ramamurthi and Others, 1993 Supp (2) SCC 61, the effect of delay in passing the detention order has been considered in detail. After analyzing various earlier decisions, this Court held that delay ipso facto in passing an order of detention after an incident is not fatal to the detention of a person, in certain cases delay may be unavoidable and reasonable. However, what is required by law is that the delay must be satisfactorily explained by the Detaining Authority.

18) In Manju Ramesh Nahar vs. Union of India and Others, (1999) 4 SCC 116, there was a delay of more than one year in arresting the detenu. This Court, while rejecting the vague explanation that the detenu was absconding, found that the detention order is vitiated.

19) In Adishwar Jain vs. Union of India and Another, (2006) 11 SCC 339, this Court held that delay must be sufficiently explained. In that case, lapse of four months between proposal for detention and order of detention was not explained properly, hence, this Court quashed the detention order.

20) It is clear that if the delay is sufficiently explained, the same would not be a ground for quashing an order of detention under COFEPOSA. However, delay at both stages has to be explained and the Court is required to consider the question having regard to the overall picture. In Adishwar Jain's case (supra), since a major part of delay remains unexplained, this Court quashed the detention order.

21) In Rajinder Arora vs. Union of India and Others, (2006) 4 SCC 796, this Court considered the effect of passing the detention order after about ten months of the alleged illegal act. Basing reliance on the decision in T.A. Abdul Rahman (supra), the detention order was quashed on the ground of delay in passing the same.

Summary:

> 22) It is clear that if there is unreasonable delay in execution of the detention order, the same vitiates the order of detention. In the case on hand, though the detenu was released on bail on 11.11.2005, the detention order was passed only on 14.11.2006, actually, if the detenu was absconding and was not available for the service of the

> detention order, the authorities could have taken steps for cancellation of the bail and for forfeiture of the amount deposited. Admittedly, no such recourse has been taken. If the respondents were really sincere and anxious to serve the order of detention without any delay, it was expected of them to approach the court concerned which granted bail for its cancellation, by pointing out that the detenu had violated the conditions imposed and thereby enforce his appearance or production as the case may be. Admittedly, no such steps were taken instead it was explained that several attempts were made to serve copy by visiting his house on many occasions.
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> 23) Mr. K.K. Mani, learned counsel for the appellant has brought to our notice a detailed representation in the form of a petition sent to the Government of Maharashtra, Home Department, Detaining Authority, Fifth Floor, Mantralaya, Mumbai on 07.08.2007. It is also seen that the same has been acknowledged by them which is clear from the endorsement therein. The said representation contains the address of the detenu and his whereabouts.

There is no explanation about any attempt made to verify the said address at least after 07.08.2007. We are satisfied that the reasons stated in the affidavit of the respondents explaining the delay are unacceptable and unsatisfactory.

24) In this regard, we reiterate that the Detaining Authority must explain satisfactorily the inordinate delay in executing the detention order, otherwise the subjective satisfaction gets vitiated. In the case on hand, in the absence of any satisfactory explanation explaining the delay of 14 ½ months, we are of the opinion that the detention order must stand vitiated by reason of non-execution thereof within a reasonable time.

25) We are also satisfied that no serious efforts were made by the Police Authorities to apprehend the detenu. Hence the unreasonable delay in executing the order creates a serious doubt regarding the genuineness of the Detention Authority as regards the immediate necessity of detaining the detenu in order to prevent him from carrying on the prejudicial activity referred to in the grounds of detention. We hold that the order of detention passed by the Detaining Authority was not in lawful exercise of power vested in it.

26) As regards the second contention, as rightly pointed out by learned counsel for the appellant, the delay in passing the detention order, namely, after 15 months vitiates the detention itself. 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. Though there is no hard and fast rule and no exhaustive guidelines can be laid down in that behalf, however, when there is undue and long delay between the prejudicial activities and the passing of detention order, it is incumbent on the part of the court to scrutinize whether the Detaining Authority has satisfactorily examined such a delay and afforded a reasonable and acceptable explanation as to why such a delay has occasioned.

27) It is also the duty of the court to investigate whether casual connection has been broken in the circumstance of each case. We are satisfied that in the absence of proper explanation for a period of 15 months in issuing the order of detention, the same has to be set aside. Since, we are in agreement with the contentions relating to delay in passing the Detention Order and serving the same on detenu, there is no need to go into the factual details.

28) Though Ms. Asha Gopalan Nair has raised an objection stating that the second contention, namely, delay in passing the order has not been raised before the High Court, since it goes against the constitutional mandate as provided in Article 22(5), we permitted the counsel for the appellant and also discussed the same.

29) In the light of the above discussion and conclusion, we are unable to accept the reasoning of the High Court. Consequently, we set aside the judgment dated 14.08.2008 in Criminal Writ Petition No. 455 of 2008 and quash the detention order dated 14.11.2006. Inasmuch as the detention period has already expired, no further direction is required for his release. The appeal is allowed.

……..J. (P. SATHASIVAM) ……..J. (RANJAN GOGOI) NEW DELHI;

AUGUST 09, 2012.
