

(1988) 11 P&H CK 0067

In the Punjab And Haryana At Chandigarh

Case No : Criminal Writ Petition No. 1768 of 1988

Ajay Budhiraja

APPELLANT

Vs

Union Territory.Chandigarh and anr.

RESPONDENT

Date of Decision : 17-11-1988

Acts Referred:

Citation : (1989) 1 RCR(Criminal) 319

Hon'ble Judges : S.D.Bajaj, J

Advocate : Vijay Tiwari, Anand Sarup, A.L. Behal, S.S. Mattewal, H.S. Mattewal,
Advocates for appearing Parties

Judgement

S.D. Bajaj J.

1. Criminal writ petition No. 1768 of 1989, has been filed by Ajay Budhiraja for quashing the detention order bearing No. 16/3/9/88 H. II (5) 17594 dated August 12, 1988, on the grounds that the impugned order was passed by the detaining authority in a mechanical manner without application of mind; that the incident was of 25th May, 1988, while the detention order was made on 12th August, 1988, nearly six months thereafter that the factum of the petitioner having denied the recovery of smuggled goods and obtained an order for his release on bail was not in the knowledge of the detaining authority while making the impugned order; that the impugned order could not be made by the Home Secretary in the name of administrator, Union Territory Chandigarh; that the detention of the petitioner was not reported to the Central Government within seven days and that the case was not referred to the Advisory Board within three weeks after 12th August, 1988.

2. Union Territory Administration Chandigarh urged in reply that the detention order as also the ground of detention have not been served upon the petitioner because he is absconding since 12th August, 1988, that without knowledge of the contents thereof, all the allegations made by the petitioner are hypothetical and without basis and, therefore, the writ petition filed by the petitioner merits dismissal on this score alone.

3. I have heard Shri H.S. Mattewal, learned Senior Advocate, assisted by Shri Sukhbir Singh, Advocate for the petitioner and Shri Anand Saroop, learned Senior Advocate, assisted by Shri Ajai Tiwari, Advocate, for the respondents and have carefully gone through the pleadings of both the parties.

4. The sole point being considered in this writ petition in regarding its maintainability without the detention order as also the ground of detention being served on the petitioner and the petitioner being actually detained with reference thereto. The remaining grounds urged for quashing the detention order Annexure P1 dated 12th August, 1988 have been duly dealt with in Crl. W. P. No. 1650 of 1988 filed by Mela Ram father of the petitioner which was decided on 7th November, 1988. Decision therein as also the reasons for it, incorporated in the judgment aforesaid, would be treated as part of this order because this writ is also based on the recovery of smuggled goods allegedly made by the customs department from the premises of the petitioner and his father on 25th February, 1988.

5. Learned counsel for the Union Territory Administration read before me the observations made by a Full Bench of Gujarat High Court in Ved Prakash Devkinandan Chiripal and etc. v. State of Gujarat and another, 1988(2) Recent Criminal Reports 89 : A.I.R. 1987 Gujarat 253 and by the High Court of Kerala in Mohamed Irian v. The Home Secretary. Govt. of Kerala and another, (1988)16 Indian Judicial Report (Kerala) 594 which read.

"It is the admitted position that in these cases, there is no question of, detention itself has not been actually served upon the petitioner concerned. Considering the abovesaid decisions of the Supreme Court, it is clear that a writ of habeas corpus is not maintainable in such circumstances."

Persons against whom such detention order are issued cannot be permitted to shortcircuit these provisions and directly approach the High Court even before the order and the grounds on which the order is, based are served on him, when it comes to his knowledge that an order of detention had been passed against him. Interference at the stage when the order was not executed will only encourage people who are involved in such nefarious activities which would undermine the economy of the country to successfully evade detention orders and to approach this Court."

and urged that the petitioner is not entitled to challenge the detention order Annexure P1 without surrender and detention thereunder.

6. On behalf of the petitioner, with reference to the observations made in Ram Kishore Gupta v. Administrator U.T. of Delhi, 1988 C2) C.L.J. (Civil, Criminal and Revenue) 68; and Hiralal Somabhai Damania v. Dr. Gopal Singh and others. 1988(1) Crimes 857, it has been urged that the present writ is maintainable even without the petitioner surrendering to the authorities OR being actually detained on the basis of detention order Annexure P1. The relevant observations read :

"Mr. Karmali, the learned counsel appearing for the petitioner, however joined issue and placing reliance on the decisions of the several Division Benches of this Court of which we will make reference in due course, contended that the objections raised by Mr. Bhohe had been already set to rest and it is now well settled by this Court that a petition filed by or on behalf of a prospective detenu is maintainable, even if the said person had not surrendered to the concerned authorities and the Detention JUDGMENT and the grounds were not served on him. Equally, according to the learned counsel, the second objection raised on behalf of the respondents had been set to rest by the Division Bench of this Court in several judgments of this court, inter, alia, in Jayantilal Bhagwandas Shah and etc. v. State of Maharashtra and others and in Sayed Iqbal v. State of Maharashtra, decided on August 21, 1987.

We find no force at all in the above preliminary objections raised on behalf of the respondents. As regards the first objection, we may point out that the COFEPOSA Act is a preventive piece of legislation which affects the fundamental right of liberty of a citizen. When fundamental rights, specially the fundamental right to liberty, are involved, it is manifest that there should be no bounds for the exercise by the High Court of its extraordinary jurisdiction under Article 226 of the Constitution of India in order to protect and safeguard those fundamental rights guaranteed by the Constitution. Of course, a writ of habeas corpus cannot be entertained unless and until a person surrenders to the concerned authorities and is already under detention. But the power of the Court to examine and to adjudicate in the question of the legality of an order which affects the liberty of a citizen, cannot be limited by the fact that the prospective detenu has not surrendered to the concerned authorities or that the Detention JUDGMENT was not served on him. We are supported in this view by several decisions of the Division Benches of this Court. It is not necessary for us to make a detailed reference to all these authorities, but we may advert in particular to Jayantilal Bhagwandas Shah's case (above) for, in the said case, the law on the subject was laid down in a very expressive manner. Bhargava, J. speaking for the Court in that case, has observed as under

"Article 21 of the Constitution enshrines the most inherent fundamental of human rights, the right to life and personal liberty. It declares that no person shall be deprived of his life and personal liberty except according to the procedure established by law. Under the provisions of Article 21, as we read it, every person has the right to safeguard his freedom and to regain it if he has illegally been made to lose it. Article 226 of the Constitution clothes the High Courts with authority to issue to any person or authority throughout the territories in relation to which they exercise jurisdiction, directions, orders or writs in the nature of habeas corpus, mandamus, prohibition quo warrant and certiorari for the enforcement of the rights conferred inter alia, by Article 21. Article 226 is couched in language wide enough to protect a person against illegal invasion of his right to freedom by protecting him while still free and by regaining his freedom for him if he has already been wrongfully detained. We

cannot countenance and do not accept the Advocate General's submission that the High Courts are impotent to give relief against the prospect of illegal detention. We are satisfied that the High Courts may under the provisions of Article 226 issue a direction order, and writ in the nature of mandamus and/or certiorari quashing an illegal order of detention and may by direction, order and writ in the nature of prohibition enjoin the person threatening the illegal detention from executing the threat."

The view so expressly recorded by the Division Bench in Jyantilal's case was followed by other Division Benches of this Court, inter alia, in Lachmandas Naraindas Jiwanani v. Union of India and others, Sukhramdas Probhudas Thakur v. The State of Maharashtra and another, Mohideen Tayab Sony v. K.K. Dwivedi and others, Sayed Iqbal v. State of Maharashtra (supra), Yogesh Kanti Lal Patel v. Home Secretary and another, similarly in Manoharlal Narang v. The Union of India and others, Judgment delivered on July 8, 1980, the D. B. of this Court negated the contention that a writ petition was not maintainable and was premature, when the detention order has not yet been served on the petitioner and he was not been arrested under the same. The Division Bench observed that under a Detention JUDGMENT a person is sought to be deprived of his liberty and as laid down in Article 21 of the Constitution, such order can be made only under a law enacted for the purpose and after complying with the provisions of such law. It further observed that it may happen that an order is passed without there being a statute to support it or it may be passed without complying with the provisions of the statute, if any. The order may also be passed against a wrong person and for a wrong purpose and therefore, to insist in such cases that the person against whom the order is passed must first submit to the same and lose his valuable liberty before approaching the Court, is to insist upon an unreasonable, unwarranted and illegal condition. The Division Bench further said that there is no support for such proposition in our legal system and that on the other hand the fundamental rights guaranteed by the Constitution, particularly by Articles 14, 19 and 21 confer on any person to be likely to be affected by such order an implicit right to approach the Court and knock at its door at any time, and the Court will not and cannot refuse relief to such person by insisting that he first surrender his liberty. With respect, we are in full agreement with the above observations made in Manoharlal Narang's case (above)."

7. Learned counsel appearing for both the parties have frankly conceded at the bar that there is as yet no authoritative pronouncement of the Supreme Court clinching the issue. Keeping in view that fact that even the Full Bench of Gujarat High Court had envisaged an exception to the general rule enshrined by them of maintainability in rare of the raset cases. I feel in the interest of consistency and to accord similar treatment to both the father and the son, it would be desirable to hold in this case, in terms of the observations made by Delhi High Court in case of Ram Kishore Gupta (supra) that the petitioner is entitled to maintain the writ without surrendering to the authorities for detention in deference to the detention order Annexure P1.

In result, the criminal writ petition succeeds and is allowed. The impugned order of detention Annexure P1 is quashed.