
(2013) 02 BOM CK 0204

In the Bombay High Court

Case No : Criminal Writ Petition No. 1774 of 2012

Alpa Mitesh Kothari

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 04-02-2013

Acts Referred:

Citation : (2013) 02 BOM CK 0204

Hon'ble Judges : A.P. Bhangale, J.;Abhay Shreeniwas Oka, J.

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. By this writ petition under Article 226 of the Constitution of India, the petitioner has challenged THE unexecuted order of detention dated 31st March 2012 issued under sub-section 1 of section 3 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA Act"). Thus, the challenge in this petition is to the order of preventive detention at pre execution stage. The petitioner is the wife of the prospective detenu. The first submission of the learned counsel for the petitioner is that in view of subsequent decision of the Apex Court in case of Subhash Popoatlal Dave vs. Union of India and another [Writ Petition (Cri.) No. 137 of 2011] decided by the Apex Court on 10th July 2012, the scope of challenge in this petition challenging preventive detention order at pre execution stage is very wide. He submitted that in view of the said decision, the law laid down in case of the Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, is no longer a good law. He urged that the impugned order of detention is sought to be executed against a wrong person. He urged that it is passed for wrong purpose and that it is passed on vague, extraneous and irrelevant grounds. He urged that prospective detenu was granted bail on 21st November 2011 and till today, nothing adverse has been noticed about him. He pointed out that the passport of the detenu has been returned by the Sponsoring Authority on 17th February 2012. He submitted that

a recourse to the regular law can be taken even assuming that prospective detenu has done something wrong. He urged that the detenu refused to pay bribe to the person named in the petition and thereafter the action was initiated. He urged that one Miss Bhavana Bhanushali, a co-passenger of the prospective detenu was also arrested along with the prospective detenu from whom valuable goods have been seized. He urged that no order of detention has been passed against the said co-passenger. He urged that while granting bail on 25th January 2011, the learned Magistrate imposed a condition of the prospective detenu not leaving India without prior permission of the Court. He, therefore, submitted that there is no likelihood of prospective detenu indulging in smuggling. He submitted that a copy of the gate pass of the prospective detenu has not been supplied along with the show cause notice. He, therefore, urged that the impugned order of preventive detention is vitiated. The learned A.P.P produced for perusal of the Court the order of detention. She submitted that no ground for interference at pre execution stage is made out.

2. As far as the scope of challenge to the order of detention at pre execution stage is concerned, it will be necessary to refer to what was held in case of Alka Subhash Gadia (supra). The Apex Court held thus:

The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

(underline added)

3. In case of Subhash Popatlal Dave (supra) after referring to what held in case of Alka Subhash Gadia (supra), in paragraph 26 the Apex Court has held thus:

26 Nowhere has it been indicated that challenge to the detention order at the pre-execution stage, can be made mainly on the aforesaid exceptions referred to hereinabove. By prefacing the five exceptions in which the Courts could interfere with an order of detention at the pre-execution stage, with the expression "viz", Their Lordships possibly never intended that the said five examples were to be exclusive. In common usage or parlance the expression "viz" means "in other words". There is no aura of finality attached to the said expression. The use of the expression suggests that the five examples were intended to be exemplar

and not exclusive. On the other hand, the Hon''ble Judges clearly indicated that the refusal to interfere on any other ground did not amount to the abandonment of said power. It is only in *Sayed Taher Bawamiya's* case (supra) that another Three Judge Bench considered the ratio of the decision of this Court in *Alka Subhash Gadia's* case (supra) and observed that the Courts have the power in appropriate cases to interfere with the detention orders at the pre-execution stage, but that the scope of interference was very limited. It was in such context that the Hon''ble Judges observed that while the detention orders could be challenged at the pre-execution stage, that such challenge could be made only after being prima facie satisfied that the five exceptions indicated in *Alka Subhash Gadia's* case (supra) had been fulfilled.

(underline supplied)

4. Thereafter, Apex Court in paragraphs 29 and 30 observed thus:

29...we are of the view that the right of a detenu to challenge his detention at the pre-execution stage on grounds other than those set out in paragraph 30 of the judgment in *Alka Subhas Gadia's* case (supra), requires further examination. There are various pronouncements of the law by this Court, wherein detention orders have been struck down, even without the apprehension of the detenu, on the ground of absence of any live link between the incident for which the detenu was being sought to be detained and the detention order and also on grounds of staleness. These are issues which were not before the Hon''ble Judges deciding *Alka Subhash Gadia's* case (supra). Law is never static but dynamic, and to hold otherwise, would prevent the growth of law, especially in matters involving the right of freedom guaranteed to a citizen under Article 19 of the Constitution, which is sought to be taken away by orders of preventive detention, where a citizen may be held and detained not to punish him for any offence, but to prevent him from committing such offence. As we have often repeated, the most precious right of a citizen is his right to freedom and if the same is to be interfered with, albeit in the public interest, such powers have to be exercised with extra caution and not as an alternative to the ordinary laws of the land.

30. In the light of the above, let the various Special Leave Petitions and the Writ Petitions be listed for final hearing and disposal on 7th August 2012 at 3.00 p.m . This Bench be reconstituted on the said date, for the aforesaid purpose.

(underline added)

5. Thus, it is very clear that the Apex Court has made no deviation from the view taken in case of *Alka Subhash Gadia's* case (supra) read with the decision in the case of *Sayed Taher Bawamiya Vs. Joint Secretary to the Govt. of India and Others*, . In fact, in paragraph 29, the Apex Court observed that the question whether the detention can be challenged at pre-execution stage on the grounds other than the grounds set out in paragraph 30 of the Judgment in case of *Alka Subhash Gadia's* case requires further examination. In the circumstances, as of today, the view taken in case of *Alka Subhash Gadia* (supra) read with the case

of *Sayed Taher Bawamiya Vs. Joint Secretary to the Govt. of India and Others*, has not been diluted. On the contrary, paragraph 29 of the decision in case of *Subhash Popatlal Dave (supra)*, the Apex Court observed that the decision in case of *Alka Subhash Gadia* requires further examination. Hence, we will have to proceed to examine the challenge in the light of principles laid down in the case of *Alka Gadia (supra)*.

5A. The learned counsel for the petitioner has relied upon the 2nd, 3rd and 4th ground in *Alka Subhash Gadia's* case. The petitioner has invoked grounds (b), (c), (d), (g) and (i) in the petition.

6. We may note that from the perusal of the order of detention produced before us by the learned A.P.P., we noticed that same is passed with the view to prevent the prospective detenu from indulging in smuggling activities. Though there may be a condition imposed in the order granting bail of not leaving India without permission, but admittedly, before passing the order of detention, the passport of the prospective detenu was returned to him. Grounds (b) and (g) relate to said aspects. Accordingly, both the grounds do not fall in any of the categories of (ii), (iii) and (iv) of the case of *Alka Subhash Gadia (supra)*. In ground (b), the contention raised is that the order of detention ought to have been passed also as against Miss Bhavana Bhanushali who was arrested along with the prospective detenu from whom valuable goods were seized. That is no ground to say that the order of detention is sought to be executed against wrong person.

7. Even going by the case made out in the petition, when the prospective detenu arrived from Singapore at Chatrapati Shivaji Airport on 20th November 2011, it is alleged that after he refused to give bribe to a particular Officer, he forcibly took him with the baggage of the prospective detenu to the office on the first floor. It is alleged that the goods valued at Rs. 11,85,485/- (CIF) and Rs. 16,59,679/- (LMV). The said goods were seized on reasonable belief that the same were attempted to be smuggled into India in contravention of the provisions of the Customs Act, 1962. As we have noted earlier, the order of detention has been passed with a view to prevent the prospective detenu from indulging in smuggling activities. Therefore, it cannot be said that the order has been passed of vague, extraneous and irrelevant grounds. It also cannot be said at this stage that the order has been passed for a wrong purpose.

8. In the circumstances, the challenge to the order of preventive detention cannot be upheld at pre-execution stage. Hence, petition must fail.

9. However, we may observe that the findings which we have recorded in the Judgment are in the context of examining the challenge to the order of detention at pre-execution stage. After the execution of the order, it is obvious that the prospective detenu will be entitled to challenge the said order on all permissible grounds and all contentions in that behalf are expressly kept open. Subject to what is observed above, we pass the following order:

We reject the petition. Rule is discharged with no order as to costs.