

(1996) 12 CAL CK 0024
In the Calcutta High Court
Case No : C.O. No. 17983 (W) of 1996

Ananda Damani

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 09-12-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3
Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 7, 7(1)
Constitution of India, 1950 — Article 22
Penal Code, 1860 (IPC) — Section 307, 411, 414
Writ Proceedings Rules, 1977 — Rule 53

Citation : (1998) 2 CALLT 52

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : Balai Chandra Roy, Y. Dastoor and Om Prakash Chowdhury, for the Appellant; R.K. Chowdhury and Prantosh Mookerjee, for the Respondent

Judgement

S.B. Sinha, J.—The petitioner in this application has, inter alia, prayed for issuance of a writ of and/ or in the nature of Mandamus directing the respondents to forebear from giving effect to the purported order dated 5th January, 1995, whereby and whereunder the petitioner was directed to be detained under the provisions of The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. It is an admitted fact that the petitioner filed an application for self-same reliefs on 7th December, 1995 and by an order dated 8th December, 1995, this Court passed the following order :-

Having heard the learned counsel for the parties, this application is permitted to be withdrawn as has been prayed for by Mr. Panja, learned Senior Counsel - appearing on behalf of the petitioner. However, the petitioner shall be at liberty to move this Court afresh in the event any fresh cause of action arises. This order also shall not stand in the way of the concerned respondents to consider the petitioner's representation, as it is stated by Mr. Panja that the

representation of the persons similarly situated have already been allowed by the concerned respondents and a Division Bench of this Court has also quashed the detention orders passed against the persons similarly situated.

2. Mr. Roy, learned Senior Counsel appearing on behalf of the petitioner, submits that the fresh application has been filed keeping in view the subsequent events namely receipt of a ground of detention as also parawise comments of the department to the petitioner's father's representation, from a perusal whereof it would appear that the purported order of detention was passed wholly mala fide as also for a wrong cause. It has been pointed out that a Division Bench of this Court in the case of Narayan Das Bhaiya quashed the selfsame detention order in Criminal Misc. Case No. 1433 of 1995 by a judgment and order dated 4th May, 1995. Mr. Roy further submits that two other orders of detention passed by the detaining authority out of six persons including the petitioner have been quashed. The learned Counsel further submits that there has been an abnormal delay in passing the impugned order of detention and in support of his aforementioned contention, ray attention has been drawn to the findings of the Division Bench in Narayan Das Bhaiya's case. Relying upon or on the basis of the decisions of the Supreme Court in *The Addl. Secretary to the Govt. of India v. Smt. Alka Subhash Gadia*, reported in 1991 Cal Cri LR (SC) 89; *Subhash Muljimal Gandhi Vs. L. Himingliana and Another*, and *Kimti Lal Sethi Vs. Lt. Governor of National Capital Territory of Delhi and others*, the learned counsel contends that there are enough materials on record to show that the order of detention suffers from legal malice and the same has been passed for a wrong purpose. It was submitted that while passing the order on 8-12-95, despite the fact that this Court directed the respondents to consider the petitioner's representation, but although three representations have been filed, none of them had been taken into consideration. Mr. Chowdhury, learned Counsel appearing on behalf of the respondents, however, submits that in view of the earlier order passed by this Court, no interference is necessary inasmuch as there is no fresh cause of action therefore. The learned Counsel has pointed out that fresh cause of action, if any, are (1) rejection of representation, and (2) application filed by the respondents u/s 7 of the Act and a notification issued as against the petitioner. Relying on a recent decision of the Bombay High Court in *Deepesh Mahesh Zaveri Vs. Union of India and others*, it has been submitted that non-consideration of a representation cannot vitiate the order of detention which is subsequently executed. It has further been stated that the petitioner has not approached this Court with clean hands as he has been absconding all along. The learned Counsel contends that as the order of detention is still subsisting, it cannot be said that any fresh cause of action has arisen in the matter. Mr. Roy very fairly has pointed out that although this Court has the requisite jurisdiction to issue a writ of or in the nature of *Mandamus* as has been prayed for by the petitioner, the scope of such order is limited. In *Subhas Mujimal Gandhi v. L. Himingliana* (1994 AIR SCW 4975) (*supra*), the Apex Court relying on its earlier decision in *The Additional Secretary to the Government of India v. Smt. Alka*

Subhash Gadia (1991 Cal Cri LR (SC) 89) (supra) stated the law thus:-

8. The question as to whether a detenu or anyone on his behalf is entitled to challenge an order of detention without the detenu submitting or surrendering to it and, if so, what will be the nature, scope and extent of such challenge came up for consideration before a three-Judge Bench of this Court, of which one of us (Sawant, J.) was a member, in *Addl. Secy., Govt. of India v. Alka Subhash Gadia*. The Court, after striking a balance between the competing claims of the individual to his liberty and of the State to detain an individual to safeguard the interest of the society and on a conspectus of the decision of this Court and of different High Courts on the subject, answered the question with the following words (SCC pp 520-221, para 30):

...it is not correct to say that the Courts have no power to entertain grievances against any detention order prior to its execution. 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.

In the aforementioned case the Apex Court rejected the contention of the learned Counsel for the petitioner that the said grounds are merely illustrative in nature. It has further been stated that other grounds, if any, must be on the same species as of the five contingencies referred to therein. However, in paragraph 13 of the said judgment it has been stated that:

13. Mr. Jethmalani lastly submitted that having regard to the fact that the order of detention was passed as far back as in 1990 and the maximum period of detention, which the appellant would have to undergo under the order was two years, was long over, his detention at this distant point of time would be punitive and not preventive. It is undoubtedly true that an unusual delay in execution of an order of detention if not satisfactorily explained, may persuade the court to draw such an inference. There is, however, no scope for drawing such an inference in this case as the delay here has been occasioned not by any omission of commission on the part of the detaining authority. On the contrary, it is the appellant who has delayed the execution by first moving the Bombay High Court and then this Court. That apart, the respondents have asserted that though this Court had not passed any interim order against execution of the order, it could

not be served as the appellant was absconding. It is pertinent to point out here that an identical contention raised by Mr. Jethmalani on similar facts was negative by this Court in *Bhawarlal Ganeshmalji v. State of T. N.* (1979 Cri LJ 4622).

In *Kimti Lal Sethi Vs. Lt. Governor of National Capital Territory of Delhi and others*, the Apex Court was considering a case where an order of detention was quashed after the detenu was in detention for a period of more than ten years, but despite the same another order was passed for a period of one month and twenty-five days and in that situation, the Court held that the order was punitive in nature. The Apex Court, however observed that (Para 14):-

...Therefore, there is merit in the contention of the counsel for the petitioner that in the present case the fresh order of detention appears to be punitive in nature and has not been passed in order to prevent the petitioner from indulging in prejudicial activities in future. Where the detention takes the character of punitive rather than preventive action, the said order can be quashed as was done in the case of *Harnek Singh Vs. State of Punjab and Others*, In the present case also the passing of a fresh detention order on 25th April, 1995, relating to the incident which had occurred in 1992, and for a period of only one month and twenty five days clearly appears to be punitive in nature and is, therefore, vitiated.

In *Harnek Singh v. State of Punjab* (1982 Cri LJ 420), to which reference has been made by the Apex Court in *Harnek Singh Vs. State of Punjab and Others*, *Kimti Lal Sethi Vs. Lt. Governor of National Capital Territory of Delhi and others*, there had been proceeding u/s 307, 411 and 414 of the Indian Penal Code. During those proceeding the detenu was on bail and was appearing in Court on every hearing till he was put behind bars by reason of the said order of detention. The detaining authority did not put forward any reason for the detenu not being taken in custody in pursuance of the order of detention right from 2nd January, 1981 till 10th July, 1981, although he appeared regularly on all the date of hearing fixed during the said period and in the aforementioned circumstances, the Apex Court held that the detention took the character of punitive rather than preventive action and, was, therefore, vitiated.

3. In the instant case, as noticed hereinbefore the petitioner has not been apprehended despite the fact that the order of detention has been passed as far back as on 5th January, 1995, and the other persons against whom the order of the same date had been passed, filed representations before the Government of India as also the Advisory Board and when their representations were rejected, they moved this Court for issuance of a writ of habeas corpus which had been allowed. In the instant case, evidently the petitioner could not be arrested and he filed the writ application on the earlier occasion being C. O. 1979 3(W) of 1995, which was disposed of by this Court by an order dated 8-12-1995. Thereafter it appears that notification had been issued in the Official Gazette on 28th March, 1995, in terms of clause (b) of Sub-section (1) of Section 7 of the

said Act, whereby and whereunder the petitioner was directed to appear before the Commissioner of Police, Calcutta within seven days from the date of publication of the said order. As despite the publication of the said notification the petitioner did not appear, an application was filed u/s 7 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, which is contained in annexure "F" to the writ application. In the said application, an order dated 4-5-96, was issued. It appears that the petitioner had questioned the legality of the said order by filing a criminal revision application and N. K. Batabyal, J., has passed an order dated 6th November, 1996, whereby His Lordship was pleased to direct the petitioner to serve copies of the said application upon the respondents and in the meanwhile, stayed all further proceedings in connection with the said case without prejudice to the rights and contentions of the petitioner in other proceedings whether pending or to be contemplated.

4. As noticed hereinbefore, the jurisdiction of this Court in issuing a Writ of or in the nature of Mandamus is very limited. Before this Court, some of the points which have been argued by Mr. Roy, were also argued earlier but the counsel sought for permission to withdraw the said case with liberty to move the Court afresh in the event any fresh cause of action arises. As indicated hereinbefore, although it is evident that the petitioner was beyond the reach of the detaining authority, he could procure grounds of detention which are yet to be served on him and also procured the para wise comments made by the department to the representation made on behalf of his father. In view of the fact that no new cause of action as such has arisen this Court is not in position to consider the grounds upon which the order of detention could be challenged, which can be done, when the petitioner is taken in detention, I am of the opinion that only because the petitioner has been able to obtain the ground of detention and some other documents, that would not constitute a fresh cause of action. In view of Rule 53 of the Writ Rules of this Court, the CPC are applicable to a writ proceeding. Order 23 Rule 3 of the Code of Civil Procedure, permits the petitioner to withdraw an application with liberty to file a fresh application on the self-same cause of action. In the instant case, as noticed hereinbefore, the liberty was sought for to file a fresh application in the event any fresh cause of action arises. As taking steps to arrest the petitioner for the purpose of execution of the aforementioned order dated 5th January, 1995, cannot be said to be a fresh cause of action, in my opinion, the public policy as adumbrated in Order 23 Rule 3 of the Code of Civil Procedure, comes in the way of the petitioner in having selfsame reliefs which he could get in the other case. Although this Court could have dealt with the submission made by Mr. Roy on merits, but keeping in view the fact that if some adverse order, on merits is passed, the petitioner would be precluded from raising the same contention as and when he is detained, the said points are not being dealt with specifically. Suffice it to say that by reason of this Court's earlier order dated 8-12-95, merely the respondents were at liberty to consider the petitioner's representation inasmuch

as it is well known that the Central Government is entitled to revoke the order of detention. As has rightly been pointed out by Mr. Chowdhary that the non-consideration of such a representation by itself cannot vitiate the order of detention which is subsequently executed inasmuch as the petitioner at this juncture cannot invoke his constitutional right as contained in Clause 5 of Article 22 of the Constitution of India. As regards the question of delay, suffice it to point out that if the petitioner had been absconding, the question of not implementation of the order of detention for a long time will not arise. It is not within the province of this Court at this stage to consider as to whether there had been a delay in passing the order of detention which can be taken into consideration by this Court while hearing a writ of or in the nature of habeas corpus, in the event the petitioner is placed under detention. As regards the submission of Mr. Roy to the effect that the proposal of the detention is bad in law as the same was passed on the ground that the petitioner had been absconding and did not answer the show cause notice is concerned, the relevant para wise comments by the department may be noticed :

On examining the entire documents Show-Cause Notice was issued to Shri Anand Damani on 12-8-94, in reply to which Shri Damani asked for time and inspection of documents only to adopt a dilatory tactics in giving reply to Show Cause Notice. In spite of repeated reminders he failed to give reply to Show Cause Notice to prove his innocence. When no reply was received from him after giving sufficient time proposal for detention under Cofeposa was forwarded.

A para wise comments dated 10th June, 1996, on the representation of the petitioner's father was not a ground. What impelled the detaining authority to pass an order of detention would be documents which had been placed before him and not the motive of any other officer to make a proposal for detention. Further, this Court, keeping in view the decision of the Supreme Court aforementioned, is also not in a position to consider the submission of Mr. Roy to the effect that the allegations as against the petitioner that he had been absconding or had not replied to the show-cause notice are not correct.

5. For the reasons aforementioned, I do not find any merit in this application which is dismissed subject to the observations made hereinbefore.

6. In view of the prayer made by the petitioner in the writ application, the question of granting of stay of operation of this judgment as has been prayed for by Mr. Roy, does not arise and is refused as such. It may, however, be mentioned that this Court had passed an order on 29-11-96, on an unusual circumstance inasmuch as although this Court was not in a position to take up the matter, an application was filed before the Court in the late hours stating that the petitioner apprehends that he may be arrested in the Court premises. In fact on that ground alone, this case had been taken up by this Court out of turn today so that the matter may be finally disposed of.

7. The learned counsel for the parties are permitted to take down the gist of the

order.

8. Urgent xerox certified copy of this order if applied for urgently, may be given on priority basis.