
(2009) 05 DEL CK 0009

In the Delhi High Court

Case No : Writ Petition (Criminal) 1052 of 2008 and C.M. No. 8585 of 2008

Charan Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-05-2009

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)

Citation : (2009) 05 DEL CK 0009

Hon'ble Judges : Badar Durrez Ahmed, J;Ajit Bharihoke, J

Bench : Division Bench

Advocate : Arvind Nigam, Anindya Malhotra Raghu Tandon and Rohit Singh, for the Appellant; Baldev Malik, for the Respondent

Judgement

Badar Durrez Ahmed, J.—By way of the present writ petition, the petitioner seeks the quashing of the detention order No. 673/37/92-CUS.VIII dated 12.02.1992 passed by Shri Mahendra Prasad, Joint Secretary to the Govt. of India in purported exercise of powers conferred u/s 3(1) of The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA").

2. This case has a chequered history. As stated above, the detention order which is impugned herein was passed on 12.02.1992. Virtually identical detention orders were passed in respect of two other persons, namely, Naresh Chand Jain and Hazari Lal Jain by the same detaining authority on 12.02.1992 itself. In so far as the detention order pertaining to Naresh Chand Jain was concerned, the same was revoked by the Advisory Board on 30.04.1992. The detention order in respect of Hazari Lal Jain was set aside by a Division Bench of the Bombay High Court on 15.09.1992. The same was set aside on the solitary ground that the detaining authority had passed the detention order on the same day on which he had received the voluminous documents in support of the proposal for detention. According to the Bombay High Court, this clearly implied non-application of mind

on the part of the detaining authority inasmuch as the said authority could not have had enough time to go through the voluminous record and then to arrive at a conclusion as to whether the detention order be passed or not. The learned Counsel for the petitioner submits that it is the same detaining authority who has passed the detention order in respect of the present petitioner also and on the basis of the same voluminous record. He also submitted that the case for detention arises out of the same incident of 22.11.1991 in which Hazari Lal Jain was also said to be involved. The incident which took place on 22.11.1991 was that Hazari Lal Jain was found in possession of foreign exchange comprising of Traveller cheques of US dollars, UK pounds and Canadian dollars as well as cash in US currency. The said foreign exchange was said to be carried by Hazari Lal Jain to be delivered to the petitioner Charan Singh. The said Hazari Lal Jain was allegedly arrested outside the petitioner's house while he was in possession of the said foreign exchange. The learned Counsel further pointed out that the petitioner's house was immediately thereafter searched but no foreign exchange was found. He also submitted that till date the petitioner has not been prosecuted for the said incident which took place on 22.11.1991 although there are other prosecutions pending against the petitioner with regard to foreign exchange violations for a prior period.

3. The petitioner filed a writ petition before this Court in April 1992 being W.P. (Crl.) No. 183/1992 challenging the detention order dated 12.02.1992 at the pre-execution stage. By an order dated 10.08.1992, the execution of the detention order had been stayed by this Court. However, the stay was vacated by a subsequent order dated 19.10.1992 and the writ petition itself was dismissed by a learned single Judge, on merits, on 02.02.1993. Being aggrieved by the dismissal of the writ petition, the petitioner preferred a Letters Patent Appeal being LPA No. 9/1993 in March 1993 before a Division Bench of this Court. The said LPA was admitted by an order dated 12.05.1993 and interim protection was granted to the Petitioner by directing that he need not be arrested in the meanwhile.

4. The writ petition [W.P.(Crl.) No. 183/1992] preferred by the petitioner had been filed through Mr. N.C. Chawla, Advocate. Mr. N.C. Chawla, Advocate was keeping indifferent health and ultimately passed away sometime in 2003. In the meanwhile, however, the Letters Patent Appeal was listed on 22.03.2001 before an alternate Bench. Nobody appeared on behalf of either of the parties and the said appeal was dismissed for non-prosecution and the Bench, while dismissing the appeal, observed that it appeared that the same had become infructuous in course of time. The learned Counsel appearing for the petitioner submitted that in connection with certain other prosecutions pending before the learned Additional Chief Metropolitan Magistrate (for short "ACMM"), Delhi, the petitioner appeared in those matters on 50 different occasions between 2001 to 2006. The respondents did not even attempt to serve the detention order on the petitioners. However, suddenly, on 12.07.2006, the petitioner was taken into custody but as the respondents could not find the detention order, the same

could not be served upon the petitioner and he had ultimately to be released on that day itself. Immediately thereafter on 12.07.2006 itself, the petitioner filed a representation. That representation was for the purposes of protesting against the manner in which he was taken into custody and then released without being served with any detention order. Thereafter, the petitioner contacted the clerk of Mr. N.C. Chawla, Advocate and came to learn that he had passed away. Another advocate was engaged, who inspected the file and from such inspection, it was revealed that the Letters Patent Appeal had, in fact, been dismissed on 22.03.2001.

5. Consequently, on 19.07.2006 two applications were moved on behalf of the petitioner. One was for condonation of delay and the other was for restoration of the said Letters Patent Appeal. On 24.07.2006, the said applications came up before the Court and notice was issued on the same. As an interim measure, it was directed that the petitioner need not be arrested in the meanwhile. Thereafter, by an order dated 27.05.2008 the delay was condoned and the Letters Patent Appeal was restored. The following order was passed by the Division Bench on that date:

CRL.M.A.9852 (delay) and 9851/2006 (restoration)

For the reasons stated in the Application the delay in filing the Application is condoned and the Appeal which was dismissed on 22.3.2001 is restored to its original number.

LPA 9/1993 and CRL.M.A.15959/2006

The Appeal concerns a challenge to preventive detention at the pre execution stage. The facts and events go back to 1991. According to the Respondents, the Order could not be executed because the Appellant had adopted methods whereby service could not be effected. According to the Appellant he had not adopted any methods to defeat service upon him of the detention Order. We do not propose to go into these rival stands, at this stage. In these circumstances we had put to learned Counsel for the Appellant that if the Appellant appeared in Court the restrictions placed on the hearing of Petitions at the present stage, inter alia in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, ; may no longer be an impediment for him. The Appellant is present in Court today.

Without prejudice to the contentions of either parties, we direct the Appellant to appear before the Deputy Director, Directorate of Enforcement, 10-A, Jam Nagar House, Akbar Road, New Delhi on 30.5.2008 at 11.00 AM. Counsel for the Respondent states that the Order together with the reasons and other documents shall be served on the Appellant on that date. In this manner the order which could not be served on the Appellant for last over 15 years shall stand served on the Appellant. For a period of 10 days thereafter the Respondents are directed to refrain from taking any coercive steps against the Appellant. Whatever remedies are available to the Appellant, he may take

recourse of. Appeal as well as CRL.M.A. 15959/2006 stand disposed of in these terms. A copy of this Order be given dasti, as prayed.

Vikramajit Sen, J

Rajiv Sahai Endlaw, J

MAY 27, 2008

6. In view of the direction given by the Division Bench on 27.05.2008, the detention order was served upon the petitioner on 30.05.2008. Immediately thereafter on 01.06.2008, the petitioner made two representations. One representation was for the supply of deficient material and the other representation was for the revocation of the detention order primarily on the ground that there was no purpose left in detaining the petitioner in 2008 when there was no indication of any prejudicial activity in the past 16 years i.e., from the date of the detention order of 12.02.1992.

7. Awaiting the result of the representations filed by the petitioner, the petitioner moved the present writ petition on 02.06.2008. By virtue of the order dated 06.06.2008 passed in the present writ petition the period of 10 days granted by the earlier order dated 27.05.2008 whereunder no coercive steps were to be taken against the petitioner was extended to the next date and thereafter it was continued from time to time. We may also note that the Union of India, being aggrieved by the order dated 27.05.2008 passed in the said Letters Patent Appeal preferred two Special Leave Petitions being SLP (Crl.) Nos. 5157-5158/2008 before the Supreme Court. Those Special Leave Petitions were however dismissed by the Supreme Court on 28.07.2008. In the meanwhile, the representation preferred by the petitioner on 01.06.2008 also came to be rejected by the respondents on 17.06.2008. The petitioner moved another representation on 25.06.2008 for revocation of the detention order in view of the fact that no purpose would be served by detaining the petitioner. The said representation was also rejected on 22.07.2008. This is where the matter stands today.

8. Mr. Arvind Nigam, senior advocate appearing for the petitioner submitted on the strength of the decision in Deepak Bajaj v. State of Maharashtra and Anr. 2008 (14) SCALE 52 that no useful purpose would be served by first requiring the petitioner to be taken into custody and then setting aside the detention order. He submitted that the setting aside of the detention order was imminent particularly because of the view taken by the Bombay High Court in the case of the co-detenu. He submitted that the setting aside of the detention order was imminent also because of the fact that there has been no allegation of any prejudicial activity on the part of the petitioner after 1992. The third reason as to why the detention order, according to the learned Counsel for the petitioner, is liable to be set aside, is the fact that there has been no explanation as to why there has been such a long delay in the service of the detention order even subsequent to the dismissal of the Letters Patent Appeal on 22.03.2001 till its

restoration on 24.07.2006 particularly when the petitioner had been appearing before the learned ACMM in connection with other prosecutions on the complaints of the Enforcement Directorate itself.

9. Mr. Nigam also placed reliance on the judgment of this Court in the case of Smt. Gopa Manish Vora v. Union of India. and Anr. passed in W.P.(Crl.) No. 2444/2006 decided on 10.02.2009.

10. The learned Counsel for the respondents submitted that the petitioner is an absconder and should not be treated leniently. He submitted that the petitioner has been evading the service of notice since 1992 and the case of the petitioner does not fall within the exceptions provided in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, . Consequently, he submitted that this petition which has been filed at the pre-execution stage of the detention order cannot be entertained by this Court and ought to be dismissed on this ground alone. Apart from this, the learned Counsel also submitted that the petitioner is an habitual offender and there are nine cases pending against the petitioner in respect of which prosecutions are pending. The learned Counsel for the respondents submitted that in the incident which took place on 22.11.1991, which we have already noticed above, the adjudication proceedings have culminated into a penalty order to the extent of Rs. 10 lakhs. The said penalty order dated 01.10.1996 was passed by the Special Director (Enforcement). Since the said amount was not paid by the petitioner, a prosecution was lodged against him for which he was also convicted by the learned ACMM on 07.10.2006 and a further fine of Rs. 3 lakhs was also imposed. The learned Counsel for the respondents also submitted that the conduct of the petitioner does not entitle him to any leniency from the Court.

11. In rejoinder the learned Counsel for the petitioner submitted that while it is true that there were adjudication proceedings against the petitioner in respect of the incident on 22.11.1991 which culminated in the said penalty order whereby penalty of Rs. 10 lakhs was imposed on the petitioner, it also cannot be denied that no criminal prosecution as such was lodged against the petitioner in respect of the said incident of 22.11.1991. With regard to the conviction and further penalty of Rs. 3 lakhs as indicated by the learned Counsel for the respondent, the learned Counsel for the petitioner submitted that the entire penalty amount of Rs. 10 lakhs as well as the additional penalty amount of Rs. 3 lakhs has been paid and nothing remains due on that account.

12. We have heard learned Counsel for the parties and considered the submissions made by them. We may straightaway point out that at pages 23 and 24 of the paper book the petitioner has categorically stated that in the present case except for the alleged incident of 22.11.1991 in which also there is no criminal prosecution against the petitioner, there is no other allegation during the last more than 17 years against the petitioner. The reply given by the respondents in their counter affidavit does not specifically controvert this fact. The inference that can be drawn for this is that no prejudicial activity of the

petitioner is within the knowledge of the respondent after 1991 or at least after the passing of the detention order dated 12.02.1992. In fact, on a pointed question being put to the learned Counsel for the respondents, he admitted that as per the counter affidavit no specific incident of prejudicial activity of the petitioner after the passing of the detention order has been pointed out. However, he had drawn our attention to paragraph 3(xiii) of the counter affidavit wherein it is noted that the petitioner is an habitual offender and a list of prosecutions filed against the petitioner before the learned ACMM, Patiala House, New Delhi has been indicated. The said list comprises of nine cases, all of 30.06.1986. No other incident has been pointed out. From this, it is apparent that there is nothing on record to show that the petitioner has indulged in any prejudicial activity after the passing of the detention order dated 12.02.1992.

13. Apart from this, we also note that the respondents had ample opportunity to serve the detention order upon the petitioner after the dismissal of the Letters Patent Appeal on 22.03.2001 and prior to its restoration on 24.07.2006. There was at least 50 occasions on which the petitioner appeared before the learned ACMM in prosecutions launched by the very same respondents but they made no attempt to serve the detention order on the petitioner. Finally and most importantly, the Bombay High Court has taken a view in the case of the co-detenu that the detaining authority did not have the requisite time to have applied its mind to the facts of the case before the detention order was passed. This is so because the documents that were received by the detaining authority were voluminous and on the same day he passed the detention order in respect of the co-detenu as well as the present petitioner. The same reasons would apply to the present case also. We may also note that the Supreme Court in *Deepak Bajaj* (supra) had clearly indicated that the instances mentioned in *Alka Subhash Gadia* (supra) whereunder detention orders could be challenged prior to their execution, were not exhaustive but illustrative. In the very same decision i.e. in *Deepak Bajaj* (supra), the Supreme Court took the view that no useful purpose would be served by first requiring the person to be taken into custody and thereafter quashing the detention order when it is clear that the detention order is liable to be quashed in the first instance. In *Smt. Gopa Manish Vora* (supra), this Court had, inter alia, placed reliance on two other decisions of the Supreme Court in the case of *Maqsood Yusuf Merchant v. Union of India and Anr.* in *Crl. Appeal No. 1337/2008* decided on 22.08.2008 and *Yusuf Razak Dhanani v. Union of India and Ors.* in *W.P.(Crl.) 132/2008* decided on 21.11.2008, where a similar sentiment is expressed. The detention order has also lost its relevance inasmuch as over 17 years have elapsed since the passing of the detention order and the respondents have been unable to point out that the petitioner has been indulging in any prejudicial activity during this period. It is axiomatic that preventive detention is a preventive measure and is not punitive. When nothing prejudicial has even been alleged concerning the time that has elapsed since the passing of the detention order, what is it that would be prevented by executing the detention order by taking the petitioner into custody? It is obvious that the

detention order has lost its relevance today and continuing the same would be an exercise in futility.

14. For all these reasons, we set aside the detention order. The writ petition is allowed to this extent. There shall be no order as to costs.