

(1984) 10 DEL CK 0018

In the Delhi High Court

Case No : Criminal Writ Appeal No. 107 of 1984

Hira Lal

APPELLANT

Vs

M.V.N. Rao and Another

RESPONDENT

Date of Decision : 23-10-1984

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 22

Citation : (1985) 1 Crimes 936(1) : (1985) ILR Delhi 335

Hon'ble Judges : Prakash Narain, J;B.N. Kirpal, J

Bench : Division Bench

Advocate : Soli J. Sorabjee, H.N. Salve, V.B. Aggarwal, P.G. Gokhale, Bhaskar Metha, Lakshmi Menon, Sushma Manchanda and Madan Lokur, for the Appellant;

Judgement

B.N. Kirpal, J.

(1) The challenge in this petition for issue of writ of habeas corpus is to the detention of Krishan Lal Udayalal Bhora (hereinafter referred to as the detenu) pursuant to an order dated 28th June, 1984 having been passed by respondent No. I u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA").

(2) The detenu admittedly was carrying on business in the name and style of M/s. Girish Stores at 59(A, Karwar Street, Fort, Bombay. On 24th and 25th January, 1984 the business and residential premises of the detenu were searched by the Officers of the Enforcement Directorate. From the aforesaid shop Indian Currency of Rs. 30,000 was seized Along with following foreign exchange : U. S. \$. 376, Stg. ? 40, Kuwait Dinar 640, Oman Baisa 900, Oman Riyals 155, Bahrain Dinar 215, Saudi Riyala 281, U. A. E. Dhms. 3565, Singapore \$ 140, Australian \$ 18, Canadian S 267, Qatar Riyala 100, Iraqi Dinar 29i, Scotland ? 15, Egyptian ? 6, South African Rands 125, Nigerian Nairs 498, Italian Lira 163000, Japanese Yen 4000, Cyprus Mils 250, IT. S. S in T. Cs. 1000, U. S. \$ in Dd 400, Canadian \$ in

Dd 150, British Postal Orders 105, Irish Postal Orders ? 9, Nigerian Postal Orders Nairs 28.

(3) On 24th January, 1984 statement of the detenu was recorded in which he, inter alia, stated that he had purchased, at the prevailing market rate, the seized foreign exchange from different customers who had come to his shop. On 23rd February, 1984 further statement of the detenu was recorded. It was admitted by the detenu that he had no license for sale and purchase of the foreign exchange. Subsequently, another statement of the detenu was recorded on 9th April, 1984. It is not necessary to deal with all these statements except to note that the detenu admitted having purchased the aforesaid foreign exchange.

(4) In the meantime, on 25th January, 1984, the detenu was arrested but was leased on bail in the sum of Rs. 30,000.

(5) On 28th June, 1984 the impugned order u/s 3(a) of the Cofeposa was passed. In the said order it was stated that it was necessary to pass the order detaining the detenu "with a view to preventing him from acting in any manner prejudicial to the augmentation of foreign exchange." In the grounds of detention, which were served on the detenu along with the detention order, reference was made to the aforesaid search and seizure of foreign exchange and to the various statements of the detenu which were recorded. It was, inter alia, stated that from the statements and documents the detaining authority had no hesitation in arriving at the conclusion that the detenu had been indulging in buying and selling foreign exchange in violation of the provisions of the Foreign Exchange Regulation Act, 1973 and that it was necessary to detain him under Cofeposa with a view to prevent him from indulging in activities prejudicial to the augmentation of the country's foreign exchange resources.

(6) As already noted, in the present petition, filed by the brother of the detenu, the challenge is to the validity of the aforesaid order dated 28th June, 1984. Two main contentions which were raised in the petition were to the effect that the impugned grounds of detention were State and were liable to be set aside and, furthermore, the machinery of preventive detention could be invoked only in extraordinary circumstances and was not as a substitute for ordinary criminal trial and there was no need to invoke the provisions of Cofeposa in the present case. In the return filed by the respondents it has been contended that there is no delay in passing the impugned order and the detention order was passed after application of mind and after the detaining authority had satisfied itself that it was necessary to pass such an order.

(7) He first submission of Shri Sorabjee, appearing on behalf of the detenu, was that there was delay in the passing of the impugned order. During the course of hearing the relevant record was placed before the Court. An additional affidavit dated 9th October, 1984 of Shri R. Mukhopadhyay, Deputy Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi was also filed. The facts which emerged from the said files and affidavit are that

on 9th March, 1984 proposal for preventive detention of the D detenu was forwarded by the Enforcement Directorate, Bombay to its Headquarters at New Delhi. This proposal was received at New Delhi on 13th March, 1984. Between 15th March, 1984 and 20th March, 1984 the proposal was examined at various levels and the same was approved by the Special Director of Enforcement. Draft grounds were prepared and placed turn approval of the Special Director of Enforcement. After he had approved the same on 24th March, 1984, the same were forwarded by the Enforcement Directorate on 27th March, 1984 to the Ministry of Finance, for consideration.

(8) On 6th April, 1984 the proposal was considered by a Screening Committee which consisted of Senior Officers from the Central Bureau of Investigation and the Law Ministry, the Special Director of Enforcement and the Director of Revenue Intelligence. The said Screening Committee considered the proposal but directed that further investigation should take place in order to verify as to how the detenu had purchased the foreign exchange and as to whether he had any associates. A letter to this effect was written on 7th April, 1984 to the Deputy Director of Enforcement, Bombay.

(9) On 9th, 10th and 19th April, 1984 further statements of the detenu and others were recorded by the Enforcement Directorate, Bombay. On the basis of the further statements, a report was prepared and the same along with copies of the statements was forwarded to the Enforcement Directorate Headquarters at New Delhi to 23rd April, 1984. On 25th April, 1984 the said report and further statements were sent to the Ministry of Finance.

(10) According to the respondents, the Screening Committee could not meet immediately as the Special Director of Enforcement was out of Delhi on official work on 26th April, 1984 and from 14th May, 1984 to 20th May, 1984. One other member of the Screening Committee, namely, the Director of Revenue Intelligence was out of Delhi between 26th April and 28th April, 1984. It is also averred by Shri Mukhopadhyay that since senior officers are involved, the Screening Committee meets to consider, whenever possible, more than one case and it takes time to prepare all the relevant documents. Furthermore, during a part of this period the Parliament was in session and, it is alleged, the officers of the Ministry of Finance were busy in the budget session with Parliamentary work. For the said reasons the Committee could not meet earlier and on 17th May, 1984 letter was issued for holding the meeting of the Screening Committee on 30th May, 1984. This meeting could not be held as the Director of Revenue Intelligence went out of Delhi between 30th Mar, 1984 and 1st June, 1984 and the said meeting was postponed to 4th June, 1984. On 4th June, 1984 the meeting was adjourned to 14th June, 1984 as the Director of Revenue Intelligence was required to go to Kathmandu from 4th June to 8th June, 1984. On 14th June, 1984, the Screening Committee met and it approved the proposal for detention of 8 persons on 14th June, 1984 and of 11 persons on 15th June, 1984. Pursuant to the said approval of 14th June, 1984, the Ministry of Finance

called for the documents which were sought to be relied upon and it required the same to be submitted to the Ministry both in English and in Hindi. On 15th June, 1984 draft grounds of detention were prepared and sent for translation into Hindi which were received back on 18th June, 1984. On 21st June, 1984 copies of all the documents, both in English and in Hindi, were sent by the Enforcement Directorate to the Ministry of Finance. Between 22nd June and 27th June, 1984 the relevant documents were placed before the detaining authority along with the draft grounds and on 28th June, 1984, after he had satisfied himself, the detaining authority issued the impugned order of detention.

(11) There is no dispute with regard to the aforesaid sequence of events. The contention of Shri Sorabjee, however, is that there is no valid Explanation as to why delay after 28th April, 1984, when the Director of Revenue Intelligence had come back to Delhi, occurred and no meeting of the Screening Committee was fixed till 30th May, 1984. In our opinion, there is no merit in this submission. Shri Mukhopadhyay in his affidavit has clearly averred and explained that during a part of this period the Budget Session was on and the officers of the Ministry of Finance were busy with Parliament work. We see no reason to disbelieve this averment. The Budget is presented to the Parliament by the Ministry of Finance. It is reasonable to assume that the office of the Ministry of Finance would, to some extent, be pre-occupied with the Parliamentary work connected with the said Budget. Moreover, though the Director of Revenue Intelligence had returned to Delhi on 28th April, 1984 but between 14th May, 1984 and 20th May, 1984 the Special Director of Enforcement was out of Delhi. In view of the circumstances explained by Shri Mukhopadhyay in his affidavit, we are satisfied that there was no undue delay on the part of the respondents.

(12) It was then submitted by Shri Sorabjee that though the prosecution, or the possibility thereof, of a detenu under the ordinary law does not bar an order of preventive detention being passed but, nevertheless, before passing such an order it is incumbent upon the detaining authority to apply its mind and to decide whether it is necessary to detain a person under the special law rather than to allow the normal law to take its course. It was submitted that, in the present case, neither in the order nor in the grounds is there anything to show that the detaining authority had applied its mind that there was a need to invoke the extraordinary jurisdiction for detaining the detenu under the provisions of Cofeposa Act notwithstanding the fact that adjudication proceedings had already been launched against him and there was a likelihood that he may even be prosecuted.

(13) In support of his contention, the learned counsel cited a few decisions. Our attention was drawn to the case of Kanchanlal Maneklal Chokshi Vs. State of Gujarat and Others, of the report, after reviewing the decisions on this aspect, the Supreme Court observed as follows : "The principles emerging from a review of the above

CASES may be summarised in the following way: The ordinary criminal process is

not to be circumvented or short-circuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute bar to an order of preventive detention. Nor is it correct to say that if such possibility is not present to the mind of the detaining authority the order of detention is necessarily bad. However, the failure of the detaining authority to consider the possibility of launching a criminal prosecution may, in the circumstances of a case, lead to the conclusion that the detaining authority had not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Where an express allegation is made that the order of detention was issued in a mechanical fashion without keeping present to its mind the question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose, the detaining authority must satisfy the Court that the question too was borne in mind before the order of detention was made. If the detaining authority fails to satisfy the Court that the detaining authority so bore the question in mind the Court would be justified in drawing the inference that there was no application of the mind by the detaining authority to the vital question whether it was necessary to preventively detain the detenu."

In the case of *Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others*, . The Supreme Court observed that "every minor infraction of law cannot be upgraded to the height of an activity prejudicial to the maintenance of public order." In that case it was not clear from the return which was filed as to why the normal procedure of investigation, arrest and trial had not been found adequate but thwart the criminal activities of the detenu. The principles enunciated by the Supreme Court in *Kanchanlal Maneklal Chokshi's* case (*supra*) were reiterated by that Court in the case of *Smt. Hemlata Kantilal Shah Vs. State of Maharashtra* and another, . Lastly, in the case of *Vijay Narain Singh Vs. State of Bihar and Others*, it was held that the law of preventive detention was not intended to keep a man under detention when under ordinary criminal law it is not possible to resist the issue of orders of bail, unless the material available is such as would justify the requirement of law authorising preventive detention..

(14) What emerges from the aforesaid decisions is very clearly this that the preventive detention of a person is not to be a substitute for his prosecution and possible conviction. under the ordinary law. Whereas the ordinary laws are meant to punish for the infraction of law which has already taken place, preventive detention is meant not to be by way of punishment but is intended to prevent a person from violating law in future. Resort is taken to prevention detention in order to remove a person from the Society so that he is incapacitated from taking the law in his own hands and violating the same with impunity.

(15) The freedom of the people from lawlessness, tyranny and oppression has to be zealously guarded. There is always an endeavor to protect the freedom of an

individual from an illegal detention or conviction. Procedural and other safeguards are provided in the normal laws of the land to ensure this. But it may become necessary, at a certain stage in the history of the country, when special laws have to be enacted which do away with such procedural protections and provide for detention of persons on subjective satisfaction of the detaining authorities that it is necessary to detain those persons in order to prevent them from carrying out their illegal activities. The philosophy behind such detention laws is that detention of one person ensures the freedom of a larger number of members of the Society. Keeping this in view, the framers of the Constitution recognised that it may be necessary to enact such laws. The minimum safeguard which was to be provided by such laws was specified in Article 22 of the Constitution. It is contended by Shri Sorabjee that at the time when this Article was enacted the country was in a state of turmoil. The scars of rioting which had taken place in 1947 had not been forgotten. It was primarily with this in view that enactment of preventive detention laws was not prohibited by the Constitution. This may be so, but even with the passage of time the Parliament has not thought it fit to amend Article 22 and the relevant entries in the Seventh schedule. The Constitution has been amended time and again but the provisions providing for preventive detention has not been amended. This shows that the Parliament considers it necessary to retain such extraordinary laws.

(16) The provisions of preventive detention are extraordinary in nature. Before a person is detained he is not given an opportunity of representing his case. It is for this reason that the Courts have held that the said provisions have to be strictly applied. The freedom of a person should not be lightly interfered with by the State but, as already observed, circumstances may arise which make it incumbent upon the State to curb the freedom of one person in order to ensure the freedom of others. It is the duty of the State to protect its citizens from person who are prone to commit illegal acts. Merely providing for prosecution of the persons who have violated the law may not be sufficient in this regard. For example, if a person is accused in a number of cases for threatening people in locality, it would be the duty of the State to protect the residents of that locality. Looking at the realities of the situation, and keeping the laws delays in mind, the State would be failing to carry out its obligations if it does not curb the anti-social activities of such a person. It may, Therefore, be compelled to restrict his movements by detaining him whereby the residents of that locality can possibly sleep in peace.

(17) In our opinion, Therefore, it will be wrong to equate the detention laws with the ordinary laws of the land. While passing an order of detention, the detaining authority has to see only one thing, namely, that if a person is not detained, is he likely to commit criminal acts in future or not. If the detaining authority validly comes to the conclusion that there is every likelihood of a person continuing to violate, the specified laws of the land, it would be justified in passing an order of detention, notwithstanding that person may be facing trial in one or more cases and may have been enlarged on bail. The nature of such

detention laws was succinctly brought out by the Supreme Court in the case of Mohd. Subrati alias Mohd. Karim Vs. State of West Bengal, Dealing with the case of detention wider the provisions of Maintenance of Internal Security Act, 1971, and Section 3 of the said Act in particular, it was observed as follow :

"IT is quite clear that this section carries out the statutory purpose of preventive detention and it has nothing to do with trial and punishment of persons for commission of offences. Indeed, it is precisely because the existing law providing, for the punishment of persons accused of commission of offences and, for prevention of offences, is not found adequate for dealing with the situation for effectively preventing, in the interest of national security, etc. the commission of prejudicial acts in future, that the provisions of this Act were enacted and are intended to be utilised. If, Therefore, for any reason it is not possible to successfully try and secure the conviction and imprisonment of the persons concerned for their past activities, which amount to an offence, but which are also relevant for the satisfaction of the detaining authority for considering necessary that a detention order u/s 3 be made for preventing such persons from acting in prejudicial manner as contemplated by that section, then, the Act, would disputably be attracted and a detention order can appropriately be made. The detention order in such a case cannot be challenged on the ground that the person ordered to be detained was liable to be tried for the commission of the offence or offences founded on his conduct, on the basis of which, the detention order has been made or that proceedings under Chapter VIII, Criminal Procedure Code . could be initiated against him. The object, scheme and language of the Act is clearly against the petitioner's submission. The Act creates in the authorities concerned a new jurisdiction to make orders for preventive detention on their subjective satisfaction on grounds of suspicion of commission in future of acts prejudicial to the community in general. This jurisdiction is different from that of judicial trial in courts for offences and of judicial order for prevention of offences. Even unsuccessful judicial trial or proceeding would, Therefore not operate as a bar to a detention order, or render it mala fide."

To the same effect are the observations of Ray, C. J. in the case of Haradhan Saha Vs. The State of West Bengal and Others, , in which the detention under Maintenance of Internal Security Act, 1971 was challenged. It was observed as follows:

"THE essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the Executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between prosecution in court of law and a detention order under the Act. One is punitive action and the other is a preventive act. In one case a person is punished to prove his guilt and the

standard is proof beyond reasonable doubt whereas in preventive detention a man is prevented from doing something which is necessary for reasons mentioned in Section 3 of the Act to prevent."

(18) Before parting we would like to observe that such laws are to be interpreted and applied in such a manner that they do not become instruments of oppression of innocent persons. Though the satisfaction of the detaining authority is subjective in nature but when the same is challenged, the detaining authority has to satisfy the Court about the existence of the material on the basis of which it could form a bona fide opinion that it was necessary to detain the person concerned. A mere statement in the affidavit, to this effect, may not be enough. The detaining authority may have to show facts and circumstances which exist which would possibly lead to such a conclusion. The detaining authority must be clear in his mind that there is no alternative but to detain the person and that his prosecution, and possible conviction, cannot be a substitute for immediate action or detention which may have to be taken. Where, however, a person cannot commit any illegal acts in future then in such a case, notwithstanding his past bad record, he cannot be preventively detained. This is because such laws are not meant to be punitive, as they are preventive in nature. Furthermore, if the future illegal activities of a person can be otherwise curtailed then resort cannot be legitimately taken to the preventive detention of such a person. Preventive detention should be ordered as a last resort.

(19) In the case of economic offences, every infraction of the specified law may not justify the passing of a detention order. Whereas the normal laws are primarily concerned with the act of commission of the offence, the detention laws are concerned with the character of the person who has or is likely to commit an offence. The detaining authority has, Therefore, to be satisfied that the person sought to be detained is of such a type that he will continue to violate the laws of the land if he is not preventively detained. For example, a person who is alleged to have illegally imported some goods cannot be preventively detained on that account alone unless the detaining authorities is, inter alia, of the, opinion that the said person has the propensity to and is likely to act in similar manner in future, and it is not possible to otherwise prevent him from acting as such. Such an opinion can be formed only after all such facts and circumstances have been taken into consideration. The commission of isolated acts of infraction of law, not done in an organized or systematic manner may not be sufficient for the detaining authority to justifiably come to the conclusion that there is no alternative but to preventively detain the person.

(20) In the present case, it is obvious from the grounds of detention that the detaining authority did consider as to whether the detenu should be detained or not, notwithstanding the fact that action may be taken against him under the normal laws. In the grounds of detention it was, inter alias stated as follows :

"FROM the statements and documents mentioned hereinabove. I have no hesitation in arriving at the conclusion that you have been indulging in buying

and selling foreign exchange in violation of the provisions of the Foreign Exchange Regulation Act, 1973. I am also satisfied that these illegal transactions indulged by you, have effected the foreign exchange resources of the country adversely. Even though adjudication and prosecutions proceedings under the Foreign Exchange Regulation Act, 1973 are likely to be launched against you, I am convinced that in view of the materials referred to hereinabove, it is necessary to detain you under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a view to preventing you from indulging in activities prejudicial to the augmentation of the country's foreign exchange resources."

The aforesaid statement is fully supported by the admission of the detenu himself. He has admitted purchasing foreign exchange from different parties over a period of time. It is not as if there was a single purchase at one point, of time which was made by detenu. It appears that the detenu was acting in an organized and systematic manner over a period of time. Till the detenu was prosecuted and on conviction, imprisoned there was no other legal action which could be taken by the authorities so as to prevent the detenu from illegally dealing in foreign exchange. The detaining authority could Therefore, justifiably come to the conclusion that if he was not detained, the detenu would continue the nefarious activities at his shop. We are, Therefore, unable to agree with the learned counsel that in the present case the detaining authority did not apply its mind as to whether the detenu should be" detained or not, notwithstanding the fact that action may be taken against him under the normal laws. No other contention was raised. For the aforesaid reasons, the petition is dismissed.