
(1982) 12 AHC CK 0024
In the Allahabad High Court

Ishtiaq Ali

APPELLANT

Vs

The State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 15-12-1982

Acts Referred:

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

Constitution of India, 1950 — Article 21, 22, 226

Citation : (1983) CriLJ 1180

Hon'ble Judges : K.S. Varma, J;K.N. Misra, J

Bench : Division Bench

Judgement

K.S. Varma, J.—For the reasons to be stated later on we dismissed the writ petition on 15-12-1982. We now propose to give reasons for dismissing the petition.

2. The petitioner in this petition has challenged the order passed by the State Government. Annexure 6 to the writ petition. By this order the petitioner has to be detained u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974. The prayer made in the writ petition is that a writ, order or direction in the nature of mandamus be issued commanding the respondents not to arrest the petitioner in "pursuance of the impugned order dated 16-6-1982. It has also been prayed that respondent No. 3 be directed to return to the petitioner the seized amount of Rs. 14,700/- and the 11 watches details of which are given in Annexure 7 to the writ petition. During the course of arguments, it was conceded that the petitioner has not been arrested so far.

3. The Deputy Government Advocate appearing on behalf of the opposite parties raised a preliminary objection that the writ petition is not maintainable as the petitioner is not under detention as he has not surrendered in pursuance of the order of detention. The contention is that the petitioner is not in detention actually or constructively and the question of setting him at liberty does not arise. It is contended that the words "detain and arrest" in Article 22 of the

Constitution imply some sort of confinement or physical restraint on the liberty of movements of the detenus. As long as the petitioner is not under arrest and has not been actually detained in the sense that he is not in confinement or there is no physical restraint on the liberty of movements of the petitioner, he cannot be said to have been detained so as to enable him to move a petition under Article 226 of the Constitution for the issue of a writ of habeas corpus,

4. Article 22(5) of the Constitution provides that when any person is detained, in pursuance of, an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. The implication is that if grounds of detention are illegal or irrelevant for the purposes for which the detention of the petitioner is sought, the petitioner would be liable to be released. The protection afforded under Article 22(5) of the Constitution is afforded to a person who is detained i. e. a person who is in some sort of confinement or physical restraint on the liberty of movement of the detenu has been imposed. If the petitioner is not in detention under any law providing for preventive detention, he cannot invoke the aid of Article 22(5) of the Constitution. On a correct interpretation of Articles 21 and 22 of the Constitution of India, it appears that the grounds of detention may be communicated to a person who is in detention i.e. he is in confinement or his liberty of movement is restricted. If that is not so, the protection under Article 22(5) of the Constitution will not be available to such a person. In *Purshottam Singh Vs. Superintendent, Central Prison*, this Court in a case arising u/s 491 of Criminal P.C. observed as follows:

The mere fact that an illegal order, assuming that the order passed was illegal, had been passed against a person, does not give him a right to apply for a writ of habeas corpus unless he had been taken in custody or his movements had been restricted by reason of that order. A writ of habeas corpus can only be asked for on the ground that a person has been kept under illegal detention.

A similar view has been taken by this Court in writ petition No. 3124 of 1981 decided on 29-1-1982 (*Krishan Khanna v. State of U.P.*). In the said petition, the prayer was that the order of detention passed against the petitioner be quashed and that a writ of mandamus be issued directing the respondents not to execute the order of detention. The Division Bench in that case while dealing with this matter observed as follows:

We however, wish to note that the present "writ petition has been filed for mandamus directing the District Magistrate not to enforce the detention order made against the petitioner under Sub-section (2) of Section 3 of the Act. The relief claimed appears to us to be misconceived. A person sought to be detained should not know the grounds on which the detention order has been passed against him, without receiving the order.

learned Counsel for the petitioner, placing reliance upon *State of West Bengal and Others Vs. Swapan Kumar Guha and Others*, submitted that the view taken by this Court in the two decisions referred to above needs reconsideration. In our opinion, the said decisions are distinguishable from the facts of the instant case. It may be noted that the Supreme Court in the above referred case was not dealing with a petition for the issue of a writ of habeas corpus. In that case, prosecution in respect of offences punishable under Prize Chits and Money Circulation Schemes (Running) Act was sought to be launched against the respondents and in that respect a first information was lodged.. The respondents contended that the facts stated in the first information report did not make out any offence under the said Act. The Supreme Court deciding the case, on a close scrutiny of the contents of the first information report, held that no prosecution could be launched against the respondents under the said Act. The learned Counsel for the petitioner referred to certain observations in the said judgment which, according to him, supported his contention. It is unnecessary to pursue the matter further as the cases arising out of petitions for the issue of a writ of habeas corpus stand on a different footing and in such cases unless the petitioner is actually detained, he has no cause of action for approaching the High Court for the issue of a writ of habeas corpus. In the instant case it is an admitted position that the petitioner is not in detention and the detention order has not been served upon him.

5. learned Counsel for the petitioner, placing reliance upon *Jayantilal Bhagwandas Shah and etc. Vs. State of Maharashtra and others*, urged that the validity of the order of detention can be challenged before this Court in a writ petition under Article 226 of the Constitution of India although the petitioner has not been arrested and detained and that this Court can issue a writ of mandamus directing the concerned authorities not to arrest the petitioner. By referring to the said decision the learned Counsel argued that in exercise of powers under Article 226 of the Constitution of India, the High Court is not impotent to give relief against the prospects of illegal detention and it is not necessary that it must first require the intended detenu to surrender to an illegal detention order.

6. We have carefully gone through the aforesaid decision, but we are unable to persuade ourselves to adopt the view taken in the said decision as we find no good reason to depart from the view expressed in two Division Bench decisions of this Court referred to above. Since the grounds of detention are to be disclosed to the detenu only on his arrest, we find it difficult to subscribe to the view that this Court, in exercise of its writ jurisdiction, can proceed to compel the administration to disclose the grounds and pronounce upon the validity and the desirability of the order of detention on those grounds. This Court, in our opinion, will not sit in a fact-finding enquiry for the purposes of considering the desirability and justification of the order of detention passed against the petitioner under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (hereinafter to be referred as COFEPOSA). which has not been as yet served upon the petitioner and the

petitioner has not been detained in pursuance of that order. In these circumstances, it cannot be legitimately urged that this Court should proceed to pronounce upon the validity, desirability and justification of the order of detention passed under COFEPOSA and its contemplated enforcement. This, however, should not be understood to mean that this Court would hesitate to safeguard violation of the fundamental rights and to protect the life and liberty of a citizen, who is deprived of it as a consequence of enforcement of an invalid order. If, on the basis of an illegal order of detention, a person has been arrested and detained, the detenu can certainly approach this Court challenging his detention to be illegal and unwarranted in law and if his detention is found to be illegal in any manner whatsoever, this Court will not hesitate in issuing a writ of Habeas Corpus setting at liberty the detenu, illegally detained. But such a writ can be issued only when the person is put under illegal detention and not on a contemplated arrest and detention.

7. Thus, in our opinion unless and until the petitioner is actually detained, he is not entitled to the Constitutional guarantee provided by Article 22(5) of the Constitution of India. In our view, the instant writ petition is premature, it may, however, be entertainable after the petitioner, in pursuance of the order of detention, has been detained. The petitioner at this stage is not entitled to the relief of writ of mandamus prayed for, The relief claimed by the petitioner for the return of article cannot be entertained in this writ petition as it involves determination of controversial and disputed questions of fact,

8. For the reasons stated above, we are of the view that the writ petition falls and is, accordingly dismissed.