
(1999) 10 KL CK 0062
In the High Court Of Kerala
Case No : O.P. No. 14876 of 1999-S

K. Zainaba

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 14-10-1999

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 7
Constitution of India, 1950 — Article 21, 22, 22(5)

Citation : (2000) CriLJ 968 : (2000) 1 ILR (Ker) 207

Hon'ble Judges : Arijit Pasayat, C.J.; K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : K.R. Kurup, C.R. Syam Kumar, Ajith R. Menon, Jacob Abraham and Abraham K.J, for the Appellant; K. Ramakumar, SCGSC (for Nos. 1 and 4) and Grashious Kuriakose, Govt. Pleader (for Noss 2 and 3), for the Respondent

Final Decision : Allowed

Judgement

Arijit Pasayat, C.J.—Order of detention dated 29-3-1995 passed by Government of Kerala, Home (SSA) Department in purported exercise of power conferred u/s 3(1)(ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short "the Act") is challenged in this Original Petition for writ of habeas corpus by the wife of M.C. Beeran (hereinafter referred to as "the detenu"). Ext. P-5 is the order of detention. Same was passed with a view to prevent detenu from abetting smuggling of goods. Order of detention was executed on 25-2-1999. Grounds of detention were communicated to him on same day through Superintendent of Central Prison. Thiruvananthapuram where the detenu is detained. Several activities were enumerated to indicate that there was reasonable apprehension about detenu continuing to abet smuggling of gold into country, unless he was prevented from doing so by detaining him under provisions of the Act. It is indicated in grounds of detention that though departmental adjudication proceedings were likely to be initiated against him, detaining authority was satisfied that he should be detained with a view to

prevent him from abetting in smuggling gold into India. Copies of documents and statement relied upon were enclosed and he was informed of his right to make representation to the detaining authority, Central Government and Advisory Board against detention, if he was so advised.

2. In fact, order of detention could be executed only on 25-2-1999. Representation filed before concerned authorities did not bring any relief to the detenu. This application has been filed questioning legality of detention of the sole ground that there was unusual delay in effectuating order of detention. There was a time gap of about four years between date of order and actual detention. That being the position, according to petitioner, detenu's continued detention in custody is illegal.

3. Learned counsel for opposite parties, however, submitted that detenu was absconding and in spite of best efforts, he could not be apprehended. In reply to this plea, petitioner has specifically urged that allegation of absconding is false and motivated. In fact, detenu was in his native place for considerably long time. In paragraph 15 of the writ petition, it has been specifically stated as follows:

15. The petitioner's husband -- M.C. Beeran - the detenu was in his native place considerably for a long time consequently and was not absconding or concealing. The various dates of his arrival from Sharjah, UAE as well as the departure to Sharjah, are as follows according to the entries made in his passport:

Arrival Departure 1. 6-7-1995 5-8-1995 - 1 month 2. 18-11-1995 14-5-1996 - 6 months 3. 18-5-1996 11-7-1996-1 month 3 weeks 4. 24-1-1999 Detention-25-2-1999

He had also received various letters and registers and also contested the cases against the confiscation etc.

4. Only question that arises for consideration is whether delayed execution of order of detention per se invalidates detention.

5. Before going into that question, it would be necessary to highlight the objects of preventive detention.

6. Personal liberty protected under Article 21 of the Constitution is held so sacrosanct and so high in the scale of constitutional values that courts had shown great anxiety for its protection and wherever a petition for writ of habeas corpus is brought up it has been held that the obligation of the detaining authority is not confined just to meet the specific grounds of challenge but is one of showing that the impugned detention meticulously accords with the procedure established by law. Indeed the English Courts, a century ago, echoed the stringency and concern of this judicial vigilance in matters of personal liberty in the following words:

Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures

the imprisonment of another he must take care to do so by steps, all of which are entirely regular and, that if he fails to follow every step in the process with extreme regularity the Court will not allow the imprisonment to continue.

(Thomas Pelham Dales" case 1881 (6) QBD 376)

It has been said that the history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is stressed in the words of Lord Denning:

Whenever one of the King's Judges takes his seat, there is one application which by long tradition has priority over all others. Counsel has but to say "May Lord, I have an application which concerns the liberty of the subject" and forthwith the judge will put all other matter aside and hear it. It may be an application for a writ of habeas corpus, or an application for bail, but whatever form it takes, it is heard first.

(Freedom under the Law, Hamlyn Lectures, 1949)

7-8. Personal liberty, it by every reckoning, the greatest of human freedoms and the laws of preventive detention are strictly construed and a meticulous compliance with the procedural safeguards, however, technical, is strictly insisted upon by the Courts. The law on the matter did not start on a clean slate. The power of Courts against the harsh incongruities and unpredictabilities of preventive detention is not a merely "a page of history" but a whole volume. The compulsions of the primordial need to maintain order in society, without which the enjoyment of all rights, including the right to personal liberty, would lose all their meaning are the true justifications for the laws of preventive detention. The pressures of the day in regard to the imperatives of the security of the State and of public order might it is true, require the sacrifice of the personal liberty of individuals. Laws that provide for preventive detention posit that an individual's conduct of prejudicial to the maintenance of public order or to the security of State provides grounds for a satisfaction for a reasonable prognostication of a possible future manifestations of similar propensities on the part of the offender. This jurisdiction has been called a jurisdiction of suspicion; but the compulsions of the very preservation of the values of freedom, of democratic society and of social order might compel a curtailment of individual liberty. "To lose our country by a scrupulous adherence to the written law" said Thomas Jefferson "would be to lose the law itself, with life, liberty and all those who are enjoying with us, thus absurdly sacrificing the end to the needs." This is, no doubt, the theoretical jurisdiction for the law enabling preventive detention.

But the actual manner of administration of the law of preventive detention is of utmost importance. The law has to be justified by the genius of its administration so as to strike the right balance between individual liberty on the one hand and the needs of an orderly society on the other. But the realities of executive

excesses in the actual enforcement of the law have put the Courts on the alert, ever ready to intervene and confine the power within strict limits of the law both substantive and procedural. The paradigms and value judgments of the maintenance of a right balance are not static but very according as the "pressures of the day" and according as the intensity of the imperative that justify both the need for and the extent of the curtailment of individual liberty. Adjustments and readjustments are constantly to be made and reviewed, No law is an end in itself. The Inn that shelters for the night is no journey's end and the law, like the traveller, must be ready for the morrow.

As to the approach to such laws which deprive personal liberty without trial, the libertarian judicial faith has made its choice between the pragmatic view and the idealistic or doctrinaire view. The approach to the curtailment of personal liberty which is an axiom of democratic faith and of all civilised life is an idealistic one for, loss of personal liberty deprives a man of all that is worth living for and builds up deep resentments. Liberty belongs what correspond to man's inmost self. Of this idealistic view in the judicial traditions of the free-world, Justice Douglas said:

Faith in America is faith in her free institutions or it is nothing. The Constitution we adopted launched a daring and bold experiment. Under the compact we agreed to tolerate even ideas we despise. We also agreed never to prosecute people merely for their ideas or beliefs....

(see: On Misconception of the Judicial Function and the Responsibility of the Bar, Columbia Law Review, Vol. 59, p. 232)

Judge Stanley H. Fuld of the New York Court of Appeals said:

It is a delusion of think that the nation's security is advanced by the sacrifice of the individual's basic liberty. The fears and doubts of the movement may loom large, but we lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees.

(Quoted by Justice Douglas at p. 233 - On Misconception of the Judicial Function and the Responsibility of the Bar, Columbia Law Review. Vol. 59)

It was a part of the American Judicial faith that the Constitution and Nation are one and that it was not possible to believe that national security did require what the Constitution appeared to condemn.

Under our Constitution also, the mandate is clear and the envoy is left under no dilemma. The constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of State's security, public order disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions.

In Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, , Bhagwati, J. spoke of this judicial commitment:

... The Court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade.

(Para 1988)

"This is an area where the Court has been most strict and scrupulous in ensuring observance with the requirements of the law and even where a requirement of the law is breached in the slightest measures, the Court has not hesitated to strike down the order of detention....

(Page 1988)

In *Vijay Narain Singh Vs. State of Bihar and Others*, Justice Chinnappa Reddy in his concurring majority view said:

...I do not agree with the view that those who are responsible for the national security or for the maintenance of public order must be the sole judges of what the national security or public order requires. It is too perilous a proposition. Our Constitution does not give a carte blanche to any organ of the State to be the sole arbiter in such matter....

(Page 1336 (of AIR): (at P. 911 of Cri LJ)

...There are two sentinels, one at either end. The legislature is required to make the law circumscribing the limits within which persons may be preventively detained and providing for the safeguards prescribed by the Constitution and the Courts are required to examine, when demanded, whether there has been any excessive detention, that is, whether the limits set by the Constitution and the legislature have been transgressed.

AIR 1336 : 911 CriLJ

In *Hem Lall Bhandari Vs. State of Sikkim and Others*, at Page 766 : 1987 Cri LJ 718 at P. 722 it was observed:

It is not permissible in matters relating to the personal liberty and freedom of a citizen to take either a liberal or a generous view of the lapses on the part of the officers?

9. The writ of habeas corpus was called by Blackstone as "the great and efficacious writ in all manner of illegal confinement." It really represents another aspect of due process of law." As early as 1839, it was proclaimed by Lord Denman that "it had been for ages effectual to an extent never known in any other country." Lord Halsbury L.C. stated in *Cox v. Hakes* (1890) 15 AC 506 that "the right to an instant determination as to the lawfulness of an existing imprisonment" is the substantial right made available by this writ. Article 22 of the Constitution confers four fundamental rights on every person, except in two cases mentioned in Clause (3), as essential requirements and safeguards to be followed when it is necessary to deprive any person, for any cause whatsoever

and for, however, brief a period of high personal liberty by placing him under arrest or keeping him in detention. Those are: (i) to be informed, as soon as may be, of the grounds of such arrest; (ii) not to be denied the right to consult and to be defended by a legal practitioner of his choice; (iii) to be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of the Magistrate; and (iv) not to be detained in custody beyond the said period of 24 hours without authority of a Magistrate. Clauses (1) and (2) contain the guarantee of the four fundamental rights enumerated above. Clause (3) contains two exceptions and provides that the constitutional guarantees do not apply to (a) enemy aliens and (b) persons arrested or detained under any law providing for preventive detention. Clauses (4) to (7) are devoted to laying down certain fundamental principles as to preventive detention and guaranteeing certain fundamental rights to persons who are arrested under any law for preventive detention. The fundamental rights guaranteed by Clauses (4) to (7) to persons detained under any law for preventive detention relate to the maximum period of detention, the provisions of any Advisory Board to consider any report on the sufficiency of the cause for detention in certain cases, the right to be informed the grounds of detention and the right to have the earliest opportunity of making a representation against the order of detention. Preventive detention is an anticipatory measure and does not relate to an offence while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the Executive is convicted that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by the law. The action of Executive in detaining a person being only precautionary, the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct, the failure to conform to which should lead to detention. The satisfaction of the detaining authority, therefore, is a purely subjective affair. The detaining authority may act on any material and on any information may merely afford basis for a sufficiently strong suspicion to take action but may not satisfy the tests of legal proof on which alone a conviction for offence will be tenable. In case of preventive detention of citizen, Article 22(5) of the Constitution enjoins the obligation of appropriate government or of detaining authority to accord the detenu earliest opportunity to make a representation and to consider that representation speedily. The right to make a representation implies "the right of making an effective representation." It is the constitutional right of the detenu to get all the grounds on which the order has been made. As has been said by Benjamin Cordozo, "A Constitution states or ought to state not rules for the passing hour but the principles for an expanding future." The concept of "grounds" used in the context of detention in Article 22(5) has to receive an interpretation which will keep it meaningfully in tune with contemporary notions of the realities of the society and the purpose of the Act in the light of concepts of liberty and fundamental freedoms. While the

expression "grounds" for that matter includes not only conclusion of fact but also all the "basic facts" on which those conclusions were founded; they are different from subsidiary facts or further particulars or the basic facts. The detenu is entitled to obtain particulars of the grounds which will enable him to make an effective representation against the order of detention.

10. In view of the above of preventive detention, it becomes very imperative on the part of the detaining authority as well as the executing authorities to be very vigilant and keep their eyes skinned but not to turn a blind eye in securing the detenu and executing the detention order because any indifferent attitude on the part of the detaining authority or executing authority will defeat the very purpose of the preventive action and turn the detention order as a dead letter and frustrate entire proceedings. There must be a live and proximate link between the grounds of detention alleged by the detaining authority and avowed purpose of detention, namely, prevention of smuggling activities. The link is snapped if there is long and unexplained delay between date of order of detention and arrest of the detenu. In such cases, an order of detention can be struck down unless grounds indicate a fresh application of mind of the detaining authority to the new situation and changed circumstances. But where delay is not only adequately explained but is found to be the result of recalcitrant or refractory conduct of the detenu in evading arrest, there is warrant to consider the link not snapped but strengthened. See: *Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another*, . Whether delay was unreasonable depends on the facts and circumstances of each case. If there is unreasonable delay between date of order of detention and date of arrest of the detenu, such delay unless satisfactorily explained throws a considerable doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing detention order and consequently render detention order bad and invalid because the live and proximate link between grounds of detention and the purpose of detention is snapped in not arresting the detenu.

11. The fact situation here needs to be noticed. As contended by petitioner in paragraph 15 of the petition quoted above, detenu was not only available in his home address but also was appearing before various authorities. This aspect has not been specifically denied in the counter-affidavits filed. This, prima facie, leads to a belief that the detenu was not an absconder as contended to justify delay in execution of order of detention.

12. It is stated that action u/s 7 was taken, but it is not explained as to what steps were taken up. The inevitable conclusion is that authorities did not act with the promptitude required in a case of this nature thereby invalidating order of detention.

The original Petition is allowed. The detenu is set at liberty unless required in connection with any other cases.