

(1992) 04 RAJ CK 0011

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) No. 162 of 1992

Kishori Sharan Garg

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 13-04-1992

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 226, 32
Customs Act, 1962 — Section 108

Citation : (1992) 1 RLW 148 : (1992) 1 WLN 522

Hon'ble Judges : N.C. Sharma, J;Farooq Hasan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

N.C. Sharma, J.—This is a special appeal by Kishori Sharan Garg, u/s 18 of Rajasthan High Court Ordinance, 1949, against the order dated the 25th February, 1992, passed by a learned Single Judge of this Court in S.B. Civil Writ Petition No. 1199/1992, dismissing the said writ petition.

2. Kishori Sharan Garg [appellant) is a resident of Jaipur City and according to him, since the time of his fore-fathers, he has been carrying on business of manufacturing silver ornaments under the name & style of M/s Jamnalal Sarraf & Cg., 18-B, Ramganj Bazar, Jaipur, and these days, he deals in silver antique ornaments. According to him he has nothing to do with any smuggling or any anti-national activity.

3. Hari Narain S/o Phool Chand, according to the appellant, was formerly an employee in the said firm, but he left the service of the said firm in the month of April, 19.91. On July 2, 1991, the Custom Authorities seized 10 pieces of gold weighing 1166.650 gms., from the possession of Hari Narain, and recorded his statement u/s 108 of the Customs Act. Hari Narain allegedly stated in his statement that the recovered gold was smuggled and his employer, namely, the

appellant was engaged in smuggling gold. On that very day, the house & shop of the appellant were searched, but nothing incriminating was found. However, cash amount of Rs. 80,100/- was found in the shop in respect of which, there was corresponding entry in the cash-book of the appellant. Apprehending his arrest, the appellant moved an application for pre-arrest bail which was granted by the Sessions Judge, Jaipur City on July 5, 1991. Hari Narain was released on bail on July 3, 1991 by Special Judge, Economic Offences, Jaipur. Thereafter, Hari Narain gave his statement on oath on July 3, 1991, retracting from his previous statement, and stated before the custom authorities that he was no more in the employment of the appellant's firm, and that, the gold seized was not smuggled gold but was his personal property.

4. The appellant states that neither he himself, nor through anybody else, had been engaged in any activity prejudicial to the conservation or augmentation of foreign exchange. However, to his utter dismay and shock, the appellant received authenticated information about passing of detention order against him u/s 3 of the COFEPOSA Act. The order of the appellant's detention has not been served upon him, as yet. The detention order has also been passed against Hari Narain.

5. The appellant challenged the order of his detention as per se arbitrary, illegal & unconstitutional allegedly having been passed without application of mind and emanated from extraneous, irrelevant & stale considerations on various grounds urged in his writ petition. The appellant prayed a writ of mandamus or any other appropriate writ, order or direction restraining the respondents from proceeding, further in the matter of detention of the appellants under COFEPOSA Act, and further from creating any false, evidence to implicate him. His writ petition has been opposed by the respondents. The respondents have stated that the writ petition is pre-mature, as the petitioner has not so far been detained. It has been stated that the statement of Hari Narain was recorded u/s 108 of the Customs Act immediately after seizure of the ten gold pieces in the form of biscuits on July 2, 1991. Hari Narain stated that he was an employee of the appellant who carried on business under the name & style of M/s. Jamnalal Sarraf & Company. It has been stated that subsequent statements given in the affidavit by the Hari Narain, are totally contrary to his previous statements so far as the appellant, himself was concerned he was...found and did not co-operate in the prosecution and, therefore, his statement was only compliance on August 13, 1991. For ascertaining the purity of gold biscuit from the Mint, the samples thereof were drawn, Hari Narain, after his release on bail, never assisted the investigating agency. After sending the samples to the Mint, its report was awaited which could only be received on February 6, 1992. Meanwhile, the department sponsored proposals, and as the passing of detention order was an act of the State Government, it required consideration/examination of the matter at various levels in the government machinery. Therefore, according to the respondents, there was no inordinate delay in passing the detention order. It has further been pleaded by the respondents that the petitioner-appellant was engaged in smuggling activities prejudicial to the National interest, and the

challenge to the order of detention is pre-mature. Reliance was placed upon the decision of the Supreme Court in the Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, It has also been submitted by the respondents that Hari Narain had categorically stated in his statement u/s 108 of the Customs Act that he was servant of the petitioner, and his statement has been supported by the brother of the appellant, named Devki Nandan, whose statement was also recorded u/s 108 of the Customs Act. On behalf of the respondent-State Government, also, reliance has been placed upon the aforesaid decision of the Supreme Court.

6. The learned Single Judge held that the High Court has jurisdiction under Article 226 of the Constitution of India pre- execution stage, and such orders can be subject matter of judicial review but, it held, while doing so, the High Court has to keep in mind self imposed restraints. The learned Single Judge examined the case in the light of the proposition of law laid down in Alka Gadia's case [supra], and he referred to the statement made by Hari Narain on July 2, 1991 that he was the employee of M/s. Jamnalal Sarraf & Company belonging to the appellant. The learned Single Judge also mentioned that the report of the Mint has been received and that the custom authorities recorded statements of the persons including the appellant and his brother, Devki Nandan. The learned Single Judge also referred to the decision of this Court in Shyamlal Gupta v. State of Rajasthan S.B. Criminal Revision Petition No. 19/89 decided on August 29, 1990 per MB. Sharma, J., and held that it could not be said that there was no material available as against the appellant. On the question of delay in passing order of detention, the learned Single Judge held that the explanation offered by the respondents could not be construed to be unsatisfactory explanation. In the result, the learned Single Judge did not find any justification for restraining the respondents from passing or executing the order of detention against the appellant.

7. Let us at once come to the latest decision of the Supreme Court in Alka Gadia's case [supra], wherein the question involved in this case was considered. The neat question of law that fail for consideration in Alka Gadia's case [supra] was, whether the detenu or any one on his behalf was entitled to challenge the detention order without the detenu submitting or surrendering to it. As a corollary to this question, the incidental question which was needed to be answered was, whether the detenu or the petitioner on his behalf, as the case may be was entitled to the detention order and the grounds on which the detention order was made before the detenu submitted to the order.

8. His Lordship, P.B. Sawant, J., speaking for the Court, stated that it is to be remembered that the Constitution permits both punitive and preventive detention provided it is according to procedure established by law made for the purpose and if both the law and the procedure laid down by it, are valid. According to his Lordship, this is not to say that the jurisdiction of the High Court and the Supreme Court under Articles 226 & 32 respectively has no role to play

once the detention punitive or preventive-is shown to have been made under the law so made for the purpose.

9. However, it was pointed out that there are certain limitations which the High Court and the Supreme Court had to observe while exercising their respective jurisdiction in such cases. These limitations are normal and well-known, and are self- imposed as a matter of prudence, propriety, policy and practice. These self-imposed limitations which are normal and well-known in the cases of exercise of extra ordinary jurisdiction of the High Court & the Supreme Court were enumerated by his Lordship in para 12 of the judgment (see page JT 555 1991(1) SC). It would be useful to extract below and refer to the observations made by his Lordship in para 28-

... Howsoever repugnant the notion of preventive detention may be to the champions of individual liberty, it has also to be remembered that the power to make such a law even during peace time has been incorporated in the Constitution by the framers of the Constitution many of whom had tasted the bitter fruits of such detention law during the struggle for freedom. Whatever may, therefore, be one's own notions about the dimensions of individual liberty one must accept the provisions of the Constitution as enacted by the mature vision and seasoned experience of the Constitution-makers. We must also not lose sight of the fact that over the years, by and large, the judiciary has interpreted the Act and the orders made thereunder strictly so as to give to the detenu the benefit of every unexplained error of omission and commission and has either struck down the order, itself, or has held its further operation illegal.

It was urged on behalf of the respondent before the Supreme Court that to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution. This contention was rejected by his Lordship and while doing so, his Lordship stated that the Court have over the year evolved certain self-restraints for exercising these powers. These restraints extend to the orders passed and the decisions made under all laws. Secondly, it was stated that if in every case, a detenu is allowed to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, it was not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. We may quote crux of the observations made by his Lordship in para 30 as under:

... The courts have 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 not authority to do so. The refusal by the courts to use their extra-ordinary 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.

10. Thus, this decision (*supra*) makes it very clear that in a case of challenge to the detention order at its pre-execution stage, it can be done only when (i) the detention order is not passed under the Act under which it is purported to have been passed; (ii) it is sought to be executed against wrong person; (iii) it is passed for a wrong purpose (iv) it is passed on vague, extraneous or irrelevant grounds; or (v) the authority passing it has no authority to do so.

In the present case before us, only ground on which the order of detention can be challenged is that it is based on vague, extraneous and irrelevant grounds. We may mention here that the learned Counsel for the appellant referred to the ground mentioned at S.No. (vii) in para 12 of the decision in *Alka Gadia's case* (*supra*). Suffice it to state that the observations made in Serial No. (vii) of para 12, *ibid*, are concerned with the jurisdiction of the High Court & the Supreme Court under Articles 226 & 32 of the Constitution, respectively, when the order has been passed and executed and is subject to a habeas corpus petition. The very wording of grounds mentioned at S.No. (vii) of para 12, *ibid*, goes to show that, where the satisfaction of the authority is acted under the dictates of another body or when the conclusion is arrived at by the application of a wrong test or misconstruction of a statute or it is not based on material which is of a rationally probative value and relevant to the subject matter in respect of which the authority is to satisfy itself. Further, Clause (vii) of para 12 of the decision, *ibid*, states that if again the satisfaction is arrived at by taking into consideration material which the authority properly could not, or by omitting to consider matters which it ought to have, the Court interferes with the resultant order.

11. On the aforesaid ground, an order can be challenged only when the order is produced before the court and that happens only after it is executed upon the detenu. Only limited grounds on which criminal trials. So far as preventive detention and concerned, we may say that their Lordships of the Supreme Court in *Alka Gadia's case* (*supra*), have in para 17 of the decision, referred to the decision in *Khudiram Das Vs. The State of West Bengal and Others*, wherein at page 842, it has been observed that since every preventive measure is based on the principle that person should be prevented from doing something which, if left free and unfettered, it is reasonable probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof. That being the nature of the proceeding, it is impossible to conceive how it can possibly be regarded as capable of objective assessment. These are not

matters susceptible of objective determination and they could not be intended to be judged by objective standards. The power of detention is not quasi-judicial power. It is an administrative power.

12. As to the question of delay in passing the detention order, we may observe that it is well settled that there is no hard and fast rule that merely because there was a time-leg of some months between the offending acts and the date of the order of detention, the casual link must be taken to be broken and the satisfaction claimed to have been arrived at the detaining authority must be regarded as sham or unreal. No mechanical test by counting the months of the interval is sound. It all depends on the notice of the acts relied on, grave or determined or less serious and corrigible in the length of the gap, short or long, on the reasons for delay in taking preventive action information of participation available in the course of investigation. It has to be investigated, whether the casual connection has been broken in the circumstances of the case. There is, therefore, no hard and fast rule that merely because there is a time-leg of some months or so, between the offending acts" and the date of the order of detention, the casual link must be taken to be broken, and the satisfaction claimed to have been arrived at by the detaining authority must be regarded as sham or unreal. The test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the "offending acts" and the order of detention. It is a subsidiary test evolved by the court for the purpose of determining the main question whether the past activities of the detenu is such that from it a reasonable prognosis can be made as to the future conduct of the detenu and its utility, therefore, lies only in so far as it subesrves that purpose and it cannot be allowed to dominate or drown it. Reference in this connection can also be made of the decisions in-

- (i) Ujagar Singh Vs. The State of The Punjab,
- (ii) Haradhan Saha v. State of West Bengal AIR 1974 SC 2
- (iii) Gora Vs. State of West Bengal,
- (iv) Golam Hussain alias Gama Vs. The Commissioner of Police Calcutta and Others,
- (v) Sk. Serajul Vs. State of West Bengal,
- (vi) Smt. Rekhaben Virendra Kapadia Vs. State of Gujarat and Others,
- (vii) Smt. Hemlata Kantilal Shah Vs. State of Maharashtra and another,
- (viii) Harnek Singh Vs. State of Punjab and Others,
- (ix) Shiv Ratan Makim Vs. Union of India (UOI) and Others,
- (x) Smt. K. Aruna Kumari Vs. Government of Andhra Pradesh and Others,
- (xi) Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others,

(xii) Yogendra Murari Vs. State of U.P. and Others, &

(xiii) T.A. Abdul Rahaman Vs. State of Kerala and others,

13. It is true that the report of Mint was not received when the order of detention was passed but, as already observed, there were statements of Hari Narain and the appellant's brother, Devki Nandan, and the recovery of the gold pieces from the possession of Hari Narain and they were relevant materials to pass by order of detention. Thus, no grounds relevant to be considered in the case of preventive detention order at its pre-execution stage, have been satisfied in the case at hand and that being so, the learned Single Judge of this Court has rightly not exercised the extra-ordinary jurisdiction to interfere in the detention order against the appellant at its pre-execution stage. We do not find any merit in this special appeal and do hereby dismiss the same.

14. In the result, this special appeal is dismissed with no order as to cost.