
(1994) 10 DEL CK 0042

In the Delhi High Court

Case No : Criminal Writ Petition No's. 222, 279, 393 and 473 of 1994 and Civil Writ Petition No's. 1320 and 1321 of 1994 and Letters Patent Appeal No. 28 of 1994

Mansukh Chhagan Lal Bhatt

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 20-10-1994

Acts Referred:

Citation : (1994) 4 AD 609 : (1995) CriLJ 1097 : (1994) 3 Crimes 1093 : (1994) 56 DLT 561 : (1994) 31 DRJ 304 : (1995) 1 RCR(Criminal) 274

Hon'ble Judges : M. Jagannadha Rao, C.J.;Devinder Gupta, J;A.D. Singh, J

Bench : Full Bench

Advocate : Arun Jaitley, H.A. Ahmadi, Suparna Julka, Shirish Sanjanwala, R.M. Bagai, Rakesh Tikku, Sangeeta Nanchaha, Ashok Arora, N.C. Chawla, V.K. Shall, P.S. Sharma, Madan Lokur, Alapana Poddar, Nandini Ramachandran, Meera Bhatia and Gajendra Kumar, for the Appellant;

Judgement

M. Jagannadha Rao, C.J.

(1) These matters have been referred to a Full Bench for the purpose of considering the correctness of the decision of the Division Bench in Subhash Chander Vs. Union of India and others, . The said Division Bench there held that apart from the five contingencies mentioned in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, by the Supreme Court, there could be other grounds which could be urged by a person proposed to be detained under the Conservation of Foreign Exchange and Prevention of Smuggling Act (hereinafter called the COFEPOSA). On that basis, it was held by the Division Bench that delay in the execution of the detention order could be an additional ground upon which the detention order could be challenged by a person before the service of the detention order.

(2) In the cases before us the main question is whether the grounds stated in Alka Subhash Gadia are exhaustive and if so whether delay in execution of

detention order or delay in the passing of the detention order could be an additional ground upon which the detention order could be challenged at a pre-detention stage.

(3) So far as the point before us is concerned, it is sufficient to notice that the order of detention in the first case was passed on 31.7.1989 and that it still remains to be executed even in September,1994. The writ petition was filed on 18.3.94. In the second case (Cr. W. P 279 of 1994) the incident took place on 18.5.93 and the order of detention was passed on 7.10.93 and still remains to be executed in September,1994. According to the petitioners, on account of the delay in passing the order or the delay in the execution of the order, the purpose of detention has gone and the nexus between the grounds of detention and the detention order stands snapped and the petitioner can challenge the order without surrendering. It is argued that the case comes within the third ground stated in Alka Subhash Gadia case, namely, that the detention order is "passed " for a wrong purpose and the Court could quash it on the ground that the order was "passed for a wrong purpose."

(4) After Alka Subhash Gadia, there have been two more decisions of the Supreme Court, namely N.K. Bapna Vs. Union of India (UOI) and Others, and State of Tamil Nadu Vs. P.K. Shamsudeen, . Now there are two more decisions, Administration of the National Capital of Delhi, Raj Niwas, Delhi Vs. Prem Singh, and Subhash Muljimal Gandhi's Jt 1994 (5) 358. The last of these was delivered by the Supreme court on 3.9.1994. We have to decide the main point arising before us, on the basis of Alka Subhash Gadia in the light of Bapna, Shamsudeen, Prem Singh and Subhash Muljimal Gandhi cases.

(5) PRE-DETENTION challenges to preventive detention orders are on the increase. As pointed out by Sawant J. in Alka Subhash Gadia, they are assuming considerable "volume" and this requires to be curbed by elucidating the correct legal position.(see para 7 of Alka Subhash Gadia Jt 1991 (1) 549. Sawant},., after an exhaustive review of the case-law, enumerated five contingencies upon which an order of detention could be challenged at the pre- detention stage. The relevant passage reads as follows:

"THE Courts have the necessary power and they have used it in proper cases as has been pointed above, although such cases have been few and the grounds on which the Courts have interfered with them at the pre-execution stages are necessarily very limited in scope and number viz. where the Courts are prima face 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 the wrong persons (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 no authority to do so."

(6) Two other passages from Alka Subhash Gadia require mention for considering whether there could be grounds other than these five. Sawant J. again observed:

"THE refusal by the Courts to use their extraordinarily 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 denials to the proposed detenu. But prevents their abuses and the prevention of law in question."

(7) Adverting to the question whether at the pre- detention stage the detenu can have a copy of the order at least to verify the existence of the limited grounds (see para 32 of JT), the Supreme Court observed:

"IN view of the discussion aforesaid, the answer to this question has to be firmly in the negative for various reasons"

(8) From the aforesaid observations in Alka Subhash Gadia it prima facie appears to be clear that there are five limited grounds of attack at the pre-detention stage and the Court deliberately used the words limited in number", and limited in scope".

(9) The above decision was followed in two cases namely Bapnas case and Shamsudeen"s case. As to whether there could be more grounds of attack than the five grounds enumerated in Alka Subhash Gadia, these two decisions are not of much help.

(10) But in the recent case of Prem Singh 1994 (2) Scale 741, a Division Bench of the Supreme Court consisting of Mohan and M.K. Mukherjee Jj observed that, at the pre-detention stage the five grounds mentioned in Alka Subhash Gadia are the only grounds and it is not permissible to add any more grounds thereto. They observed:

"UNLESS and until any one of the grounds has been established, the Court is powerless to interfere. In other words, no interference at the pre- detention stage is permitted on any other grounds; Otherwise, the very object to preventive detention is thwarted".

(11) That would mean that the five contingencies in Alka Subhash Gadia are exhaustive and there could be no more contingencies.

(12) If the matter rested there, it would not have been difficult for us to hold that apart from the five contingencies in Alka Subhash Gadia, there could be no other grounds available at the pre-detention stage. The learned counsel for the respective petitioners contend that in yet another recent case, namely. Subhash Muljimal Gandhi Vs. L. Himingliana and Another, decided by Sawant and M.K. Mukherjee, Jj, the Supreme Court has held that some more contingencies are available apart from these five at the pre-detention stage. Reliance is placed for the petitioners upon the following observations in Subhash Muljimal Gandhi"s case:

"BOUND as we are by the above judgments, we must hold that the other contingencies, if any, must be of the same species as of the five contingencies

mentioned therein"

(13) In other words, this decision does not exclude possibility of there being more than the five contingencies but they must belong to the same "species". The word "if any" shows that such further contingencies though presently unknown, could arise at some future point of time.

(14) The question naturally arises as to what extent the last decision of the Supreme Court in Subhash Muljimal Gandhi's case expands Alka Subhash Gadia or cuts across Prem Singh's case ? What did their Lordships mean by using the words "the other contingencies, if any, of the same species"?

(15) In our view. Subhash Muljimal Gandhi's case lays down that the five contingencies mentioned in Alka Subhash Gadia are not exhaustive but there can be other rare contingencies belonging to the same "species" as the said five. Obviously, in matters relating to personal liberty, the Court cannot rule out the possibilities of some other rare exception cropping up in future. The use of the word "same" before the word "species" by the Supreme Court is an indication that the five enumerated contingencies themselves belong to the same species.

(16) If, Therefore, there is some remote probability of there being more than the five contingencies, the question is whether (i) delay in the execution of the detention order or (ii) delay in the passing of the detention order could be assimilated into the "same species". For that purpose, we have to examine the five grounds of attack referred to in Alka Subhash Gadia a little more closely.

(17) The first ground of attack referred to in Alka Subhash Gadia is that the unserved detention order is not passed under the Cofeposa though it purports to be so passed. This ground, it is easy to understand, is based on the principle of colourable exercise of power by the detaining authority at the time of passing of the detention order. In other words, it raises a question of exercise of jurisdiction not vested. The second ground of attack is that the order is being executed against a wrong person. This ground relates to mistake in the identity of the person proposed to be detained and again raises a question of jurisdiction of the detaining authority at the time the order was passed. The fifth ground is easy to deal with, namely, that the order is passed by a person not having authority. This also raises a question of jurisdiction. That leaves the third and fourth grounds of attack which give considerable scope for argument. We shall take them up separately. Now the third ground of attack is that the order was passed for a "wrong purpose. Does it mean that the detenu can ask the Court to call for the detention order and look into the unserved order of detention and say that it is passed for a wrong purpose? The fourth ground of attack is that the order when it was passed was based on collateral, irrelevant or vague material. Does it also mean that the detenu can ask the Court to call for the detention order and record and examine the existence of these factors? The answer to this question is found in Alka Subhash Gadia and Prem Singh's case.

(18) In Alka Subhash Gadia's case, the Court squarely posed the question

whether the petitioner could, at the pre-detention stage, seek disclosure of the grounds of detention without surrendering. It was held that the grounds cannot be revealed. They need not be disclosed even in the counter. It was held that at the pre- detention stage, the petitioner had no such right to seek disclosure of grounds. Again in Prem Singh's case. when the High Court proceeded on the basis that the grounds of detention were common between the petitioner (who was not under detention) and another person who was under detention but was released by the Advisory Board, the Supreme Court held that merely because the later was released by the Advisory Board, the Court could not assume that the grounds were the same and then release him from detention. This is because the grounds, so far as the petitioner is concerned, are yet to be disclosed. They could not be inferred from the case of the co-detenu.

(19) In the light of the aforesaid two decisions, it is clear firstly that at the pre-detention stage the petitioner cannot ask for the grounds of detention to be produced before the Court. Secondly it is also clear that he cannot ask the Court to refer to the grounds of another detenu, for the purpose of finding out on merits whether the detention order in his own case, though unserved, is issued for a "wrong purpose" or is based on "irrelevant, vague or extraneous grounds". Obviously, the Supreme Court in Alka Subhash Gadia , when it laid down contingencies three and four, was not contemplating an attack on the detention order by calling for it and looking into it. In other words "wrong purpose" under the third contingency and the "irrelevant purpose", under the fourth contingency must be gathered from something outside the order and not from within. That would mean that these purposes must be established by the petitioner from evidence aliunde.

(20) Now the question of delay in issuing the detention order and the question of delay in execution of the detention order are facts outside the order when it was issued and are not attacks on the merits of the detention order. They come within the scope of evidence aliunde.

(21) But then it must also be established that these two contingencies fall within the third and fourth exceptions stated in Alka Subhash Gadia and that "wrong purpose" or "irrelevant purpose" was the basis of the order at the time it was passed.

(22) It is argued for the petitioners that once there is unexplained delay, the nexus between the grounds and the order snaps and the "purpose" of preventive detention is now no longer served and Therefore the case would come under the third contingency of "wrong purpose". It is also argued for petitioners by referring to some rulings of the Supreme Court that unexplained delay makes the grounds "irrelevant" at a later date and the case would come under the fourth contingency.

(23) Now if we read the third and fourth contingencies mentioned in Alka Subhash Gadia closely, it will be seen that the Supreme Court said that the order

must be proved to have been passed for a "wrong purpose or on irrelevant, vague or extraneous grounds". In other words these contingencies three and four must relate to certain vitiating factors existing at the time of the passing of the detention order. They do not, in our opinion, relate to situations where at the time when the order was passed, it was for a proper purpose or was based upon "relevant grounds" but where, by lapse of time, the purpose is not served or becomes irrelevant? In other words, contingencies three and four in Alka Subhash Gadia do not relate to situations where by sheer lapse of time, either in serving the detention order or in the passing the detention order, the nexus between the grounds and the order breaks down at a later point of time. Passing an order for a "wrong purpose" or on "vague, irrelevant and extraneous grounds" is different from a situation where the original order is for a valid purpose but has become wrong or irrelevant by lapse of time. The important characteristic of the "species" referred to in Alka Subhash Gadia is that, at the time the order is passed, it must suffer from the infirmities mentioned in contingencies three and four. The cases where, the order originally passed, fails outside the contingencies three and four but subsequently on account of delay, the nexus between the grounds of detention and the detention order gets snapped, cannot be assimilated into the five species of orders mentioned in Alka Subhash Gadia. We are, Therefore, of the view that cases of unexplained delay in passing the order of detention or in the execution of the order, were not intended by the Supreme Court to fall within the third and fourth contingencies in Alka Subhash Gadia.

(24) Our view above stated gains support from the following observations of the Supreme Court in State of Tamil Nadu Vs. P.K. Shamsudeen, which is a pre-detention case. Bharucha J observed:-

"RELIANCE was placed upon this Court's Judgment in K.P.M. Basheer Vs. State of Karnataka and another, and it was submitted that the live and proximate link between the grounds and the purpose of detention had been snapped by the undue and unreasonable delay. The delay in detention in K.P.M. Basheer's case was of 5 months and 11 days but, it is important to note, detention had been effected before the writ petition was filed. Clearly, the present case does not fall within the parameters outlined in the case of Alka Subhash Gadia ..."

(25) It is however argued by the counsel Mr. Arun Jaitely and Mr. H. Ahmadi" in Cri. Wp 222/94, Mr. R.M. Bagai in Cri. W.P 279 of 1994, Mr. Chawla in Cri. Wp 473 of 1994, Mr Ashok Arora in Cri. Wp 393 of 1994, and Ms. Sangeeta Nanchaha in Lpa 28/94 that in view of the observations of the Supreme Court in Sk. Serajul Vs. State of West Bengal, , Shafiq Ahmad vs. District Magistrate, Meerut & Others (1989] (3) T 659 Niranjana Singh Karam Singh Punjabi and Others Vs. Jitendra Bhimraj Bijja and others, and of the Delhi High Court in Mohammed Masoom Vs. Union of India and Others, and other cases that delay in the issuance of the detention order and in the execution of the detention, order is indicative of the anterior state of mind of the detaining authority, - even at the

time of the issuance of the order, - that the detention order is not indeed intended for "preventive" purposes. It is also argued that if it is not for "preventive purposes" it must be treated as one for "punitive purposes". We, no doubt, find that there are observations of the Supreme Court in the above cases which, read in the context of the detention orders passed in those cases, could give rise to such an inference. But, the fact remains that all the above cases are cases where the persons concerned were under detention and were not pre-detention cases. In these post-detention cases, the Court was not dealing with any exceptions meant for pre-detention cases such as the contingencies three and four in Alka Subhash Gadia. In our view, the said observations have to be properly understood. We further explain the aspect as follows.

(26) Mere delay, in our opinion, does not amount to the order having been passed for a "wrongful purpose" or for a "collateral purpose". In other words, the said purposes must be established by the petitioner not by way of an implication but by positive material. If certain purposes viz. A, are treated as the proper purposes of preventive detention it must be established that, on account of certain other positive material or evidence, that the express purpose of the order was a "wrong purpose viz. "X" or "Y" or "Z". Likewise, it must be positively established by evidence or material that the purpose viz. L or M or N or P was one totally "irrelevant" to preventive detention. This, in our opinion, is the meaning of the words "order passed for a wrong purpose" or "order passed for an irrelevant purpose. " Proof is by affirmative material and evidence and not by a negative inference drawn from subsequent delay in the issuance of the order or execution of the order that because of the delay, we must go back to an anterior point of time and hold that it was not for "preventive" purposes. That is precisely the reason why we say that observations of the Supreme Court in post-detention cases are not on point. It is true that in these cases, the Court observed that unexplained delay could lead to an inference that the order was not, at the time it was passed, intended for a preventive purpose. That, in our view, is different from affirmatively proving by positive evidence that it was expressly passed for a "wrong purpose" or an "irrelevant purpose" when it was passed. Therefore, all these cases cited are clearly distinguishable.

(27) In this Court, a Division Bench in Shri Joginder Sharma vs. The Administrator, Union Territory of Delhi 1992 (3) DL 198 consisting of D.P. Wadhwa and R.L. Gupta, JJ and a learned Single Judge, Jaspal Singh, J in Sh. Inderjit Singh Chani vs. Union of India 1994 1 AD 419 and Satpal, J in Sunil Kumar Kamra Vs. Union of India and Others, Crl. W. No. 326 of 1992 decided on 15.4.1993 (All India Crl. Law 579) have taken the view that delay in execution is not a ground which can be urged at the pre-detention stage. One of us (Chief Justice) has also taken such a view in two Division Bench Judgments of the Kerala High Court in O.P. 2242/94 and Lpa 1397/93. To the extent Jaspal Singh, J has held in the case referred to above that contingencies three and four in Alka Subhash Gadia have to be understood in the context of facts obtaining on the date of the detention order and not to events coming into being after the order,

we agree this view. Other Judgments of this Court such as Subhash Chander Vs. Union of India and others, CrI. W . 184/91, CrI. W. 312/92 dt. 13.8.1990, CrI. W. 243/91, 233/91 dated 29.11.1991 are overruled.

(28) We hold that delay in the passing of the detention order or delay in the execution of the detention order do not fall within contingencies three and four mentioned in Alka Subhash Gadia. They do not also fall within the words "same species" used in Subhash Muljimal Gandhi" s case. We decide the point accordingly.

(29) The Writ Petitions and the appeal before the Full Bench shall go back to the Division Bench for disposal in accordance with the above principles.

(30) The writ petitions and the appeal will be posted before the Division Bench for further orders in the light of our opinion.