

(2015) 05 DEL CK 0040

In the Delhi High Court

Case No : Writ Petition (CRL) 827 of 2015

Pankaj Kumar Shukla

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 29-05-2015

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 22(5), 226, 227

Criminal Procedure Code, 1973 (CrPC) — Section 482, 82

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 22, 23, 25, 29

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 — Section 3, 3(1), 8(1)(a)

Citation : (2015) CriLJ 3987 : (2015) 150 DRJ 354

Hon'ble Judges : G.S. Sistani, J; Sangita Dhingra Sehgal, J

Bench : Division Bench

Advocate : Ashutosh and Dalip Singh, for the Appellant; Anurag Ahluwalia, CGSC, Prashant Ghai, Advocate and Om Prakash, Dy. Secretary, Advocates for the Respondent

Final Decision : Allowed

Judgement

G.S. Sistani, J.—Rule DB.

2. With the consent of counsel for the parties present writ petition is set down for final hearing and disposal.

3. Present petition has been filed by petitioner under Articles 226 and 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure seeking a writ of mandamus or any other appropriate writ, order or direction thereby directing the respondents to place on record the detention order dated 10.9.2013, passed by respondent No. 2 under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, against the petitioner herein together with the grounds of detention and relied upon documents, besides the similar material in respect of other co-accused/detenus, who were detained earlier on the same set of facts and circumstances. It is also

prayed that the detention order dated 10.9.2013 passed by respondent No. 2 be quashed.

4. At the very outset, we may notice that this criminal writ petition has been filed at the pre-execution stage.

5. As per the writ petition, similar detention orders dated 10.9.2013, issued against the co-accused persons, namely, Nilesh Shukla and Virender Singh, stand revoked on the recommendation of the Advisory Board. A copy of the detention order dated 10.9.2013 in respect of co-accused, Nilesh Shukla, has been filed along with the writ petition. Copies of the grounds of detention passed in support of the detention order have also been filed. The writ petition also discloses, based on the grounds of detention of the co-accused, that the petitioner and other co-accused persons were involved in activities of acquiring, possessing, hoarding, selling and exporting NDPS items.

6. The first ground urged by counsel for the petitioner is that the order of detention dated 10.9.2013 is liable to be quashed as the same was passed on 10.9.2013 but till date the same has not been executed despite the fact that the petitioner was throughout available at his home and was attending all his daily routine activities.

7. The second ground raised before us is that the incident took place on 23/24.10.2011 whereas the detention order was passed on 10.9.2013 i.e. after a long and undue delay thus the nexus between the purpose of detention and the allegations made in the grounds of detention, stand snapped.

8. It is the case of the petitioner that in view of the delay, the detention order has become stale and similar detention orders passed under similar circumstances, have already been revoked by respondent No. 2 on the recommendation of the Advisory Board, which did not find sufficient cause for issuance of detention orders.

9. Another ground raised before us by counsel for the petitioner is that the sponsoring authority did not place before the detaining authority the documents which are vital and material which could have influenced the mind of the detaining authority one way or the other at the time of passing of the detention order.

10. No other ground has been pressed before us.

11. Mr. Ahluwalia, learned counsel for respondents No. 1 and 2, has raised a preliminary objection with regard to the maintainability of the writ petition while relying on the decision of the Full Bench of the Supreme Court of India in the case of Subhash Popatlal Dave Vs. Union of India (UOI) and Another, (2013) CriLJ 4166 : (2013) 298 ELT 3 : (2013) 3 RCR(Criminal) 858 : (2013) 9 SCALE 295 : (2014) 1 SCC 280 . Counsel further submits that in the case of Subhash Popatlal Dave (supra) it has been held that a petitioner who is an absconder is not entitled to challenge the detention order at the pre-execution stage.

12. Mr. Ahluwalia, while further relying on Subhash Popatlal Dave (supra) submits that in this case also the petitioner is an absconder and thus Court should not exercise the jurisdiction conferred under Article 226 of the Constitution of India in favour of a person, who is an absconder.

13. Reliance is placed by counsel for respondents No. 1 and 2 on paragraphs 2(a) to (f) of the counter affidavit, which read as under:

"2a. The Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue had issued detention order No. U-11011/04/2012-PITNDPS dated 10.9.2013 under the provisions of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter referred to as "the PIT NDPS Act" for brevity and convenience) against the petitioner. The respondent No. 3 was aware of the address of the petitioner in Delhi, i.e. E- 135, Room No. 2, Street No. 3, Vinod Nagar (West), near Manglam Hospital, New Delhi, which had come to the notice during the investigation and from where 47.318 kg. (net) Ketamine, one hard disc and Rs. 1,00,000/- in cash, had been recovered and seized. The officers of respondent No. 3 made attempt to execute the detention order at the said Delhi premises of the petitioner on 18.9.2013. But the petitioner was not available there. The landlord of the premises informed the officers that the petitioner had left the premises long back. On 30.10.2013, 13.7.2014, 15.10.2014 and 29.12.2014, the officers of Directorate of Revenue Intelligence, Lucknow Zonal Unit visited at the premises of the petitioner situated at 73, Village Bashara, P.O. Sotipur, P.S. Varsathi, Distt. Jaunpur, U.P., but the petitioner was not found available at the said address.

b. An order dated 20.11.2013 issued under F.No. U- 11011/04/2012-PITNDPS, in this regard, was published in the Gazette of India (Extraordinary), Part-II, Section 3-Sub section (ii) vide S.O.3457(E) dated 22.11.2013. The contents of the said gazette order were also published in local Lucknow edition of English and Hindi newspapers on 9.1.2014. A copy of the publication of the said order in the Gazette of India and local Lucknow edition of English and Hindi newspapers on 9.1.2014 is Annexure-A.

Despite publication of order dated 20.11.2013, the petitioner did not surrender. Union of India had no option but to file reports dated 8.1.2014 and 28.2.2014 under Section 8(1)(a) of PIT NDPS Act before the Ld. CMM, New Delhi. A copy of the reports dated 8.1.2014 and 28.2.2014 is Annexure-B.

On 14.3.2014, the Ld. CMM, New Delhi passed orders for issuing process under Section 82 Cr.P.C. qua the petitioner herein. The process under Section 82 Cr.P.C. was published in Indian Express dated 22.5.2014. A copy of the publication of the citation under Section 82 Cr.P.C, returnable on 28.5.2014 is Annexure-C.

The said order under Section 82 Cr.P.C. qua the petitioner herein was repeated on 28.5.2014, returnable on 30.8.2014. The process under Section 82 Cr.P.C. was published in Indian Express dated 9.8.2014. A copy of the publication of the citation dated 9.8.2014 under Section 82 Cr.P.C. is Annexure-D.

The said process under Section 82 Cr.P.C. qua the petitioner herein was repeated on 2.9.2014. It may be added here that on 29.12.2014 the officers of DRI, DZU had visited at the premises of the petitioner, but the petitioner was not found available. The process issued under Section 82 Cr.P.C. had been pasted at the conspicuous part of the said premises. The report in this regard had been submitted to the Ld. CMM, New Delhi. The process dated 2.9.2014 with report is Annexure-E.

The order of issuance of fresh process under Section 82 Cr.P.C. was again repeated on 31.3.2015, returnable on 1.6.2015. A copy of order dated 31.3.2015 is Annexure-F.

c. It is respectfully submitted that the petitioner is not available at his addresses which he has also declared in his petition. On 13.7.2014, 15.10.2014 and 29.12.2014 the officers of Directorate of Revenue Intelligence, Lucknow Zonal Unit visited the premises i.e. Village Bashara, Post Sotipur, P.S. Varsathi, Jaunpur, U.P. to execute the process under Section 82 Cr.P.C. But the petitioner was never found present at the said premises. However, the uncle of the petitioner, Shri Ramesh Chand Shukla, who was available there, informed that the petitioner alongwith family was residing in Mumbai, but he was neither aware of his address nor any of his contract number. He further informed that he was not in contact with him for the last two years.

d. The petitioner is also one of the accused in the prosecution filed by Directorate of Revenue Intelligence before the special court of NDPS, Patiala House Court, New Delhi for offences punishable under Sections 22, 23, 25 and 29 of the NDPS Act, 1985.

e. On 13.5.2014 when the matter was taken up by the Ld. Trial Court, the petitioner failed to appear and the court had no option but to issue non-bailable warrants against him, returnable on 6.7.2014. The process was not served as the petitioner was not available at his native address. A copy of order dated 13.5.2014 is Annexure-G.

f. The petitioner did not appear before the Ld. Trial Court on 14.10.2013, 3.2.2014 and 13.5.2014. The court had to issue non-bailable warrants against the petitioner on 13.5.2014. However, on 15.7.2014 the petitioner moved an application for recall of order dated non-bailable warrants and the application was allowed. A copy of order dated 15.7.2014 is Annexure-H."

14. While relying on the judgment rendered by the Supreme Court of India in the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, (1991) 72 CompCas 336 : (1991) 53 ELT 481 : (1991) 1 JT 549 : (1990) 2 SCALE 1352 : (1992) 1 SCC 496 Supp : (1990) 3 SCR 583 Supp , more particularly para 13, learned counsel for respondents No. 1 and 2 submits that jurisdiction under Articles 226 and 32 of the Constitution in pre-execution stage is to be used sparingly and in circumstances where no other efficacious remedy is available and the Supreme Court has limited five grounds

where the Court would exercise its extra-ordinary jurisdiction.

15. Learned counsel for the petitioner submits that there is no universal rule that a writ petition is not maintainable at the pre-execution stage and it would be open for the Court to entertain the writ petition.

16. At the outset, we shall first decide whether the present writ petition is maintainable or not at the pre-execution stage.

17. It is no longer *res integra* that pre-execution challenge in a writ petition is maintainable, however, the power is to be exercised sparingly.

18. In the case of *Additional Secretary to the Government of India and Others (supra)*, the Full Bench of the Supreme Court has held as under:

"30. As regards his last contention, viz, 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, we find that this argument is also not well merited based it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the powers of the High Court and this court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the Courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the courts. To accept Shri Jain's present contention would mean that the court should disregard all these time-honoured and well-tested judicial self restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibal for the appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the

order before it is executed, the very purpose of the order and the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important, it is not correct to say that the Courts have no power to entertain grievances against any detention order prior to its execution. The courts have the 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 the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary 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.

31. Lastly, it is always open for the detenu or anyone on his behalf to challenge the detention order by way of habeas corpus petition on any of the grounds available to him. It is not, therefore, correct to say that no judicial review of the detention order is available. In the view we are taking which applies also to the cases under other laws, the stage at which the judicial review is made by the Court only stands deferred till after the order is executed. A ground on which a detention order is challenged which requires investigation and cannot be adjudicated without hearing the other side and without proper material, has necessarily to await decision till the final hearing. In such cases the operation of the order of detention by its very nature cannot be stayed pending the final outcome. The only proper course in such cases it to hear the petition as expeditiously as possible."

19. In the case of Deepak Bajaj Vs. State of Maharashtra and Another, AIR 2009 SC 628 : (2008) 11 JT 609 the Supreme Court has held that the five grounds mentioned in the case of Additional Secretary to the Government of India and Others (supra) on which the Court can set aside the detention order at the pre-existing stage are only illustrative and non-exhaustive.

20. The Supreme Court in the case of Deepak Bajaj Vs. State of Maharashtra and Another, AIR 2009 SC 628 : (2008) 11 JT 609 , has held that the five grounds mentioned in the case of Alka Subhash Gadia (Supra), on which the Court can set aside the detention order at the pre-execution stage, are only illustrative and not exhaustive. It was held as under:

"9. If a person against whom a prevention detention order has been passed can show to the Court that the said detention order is clearly illegal why should he be compelled to go to jail? To tell such a person that although such a detention order is illegal he must yet go to jail though he will be released later is a meaningless and futile exercise.

10. It must be remembered that every person has a fundamental right of liberty vide Article 21 of the Constitution. Article 21, which gives the right of life and liberty, is the most fundamental of all the Fundamental Rights in the Constitution. Though, no doubt, restrictions can be placed on these rights in the interest of public order, security of the State, etc. but they are not to be lightly transgressed.

11. In Ghani vs. Jones (1970) 1 Q.B. 693 (709) Lord Denning observed :

".....A man's liberty of movement is regarded so highly by the law of England that it is not to be hindered or prevented except on the surest ground"

20. The above observation has been quoted with approval by this Court in Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi, AIR 2008 SC 1640 : (2008) 2 JT 639 : (2008) 3 SCALE 45 : (2008) 4 SCC 720 : (2008) AIRSCW 1826 : (2008) 2 Supreme 472 (vide para 90).

15. If a person against whom a preventive detention order has been passed comes to Court at the pre execution stage and satisfies the Court that the detention order is clearly illegal, there is no reason why the Court should stay its hands and compel the petitioner to go to jail even though he is bound to be released subsequently (since the detention order was illegal). As already mentioned above, the liberty of a person is a precious fundamental right under Article 21 of the Constitution and should not be lightly transgressed. Hence in our opinion Smt. Alka Subhash Gadia's case (supra) cannot be construed to mean that the five grounds mentioned therein for quashing the detention order at the pre execution stage are exhaustive.

16. In Francis Coralie Mullin Vs. Administrator, Union Territory of Delhi and Others, AIR 1981 SC 746(1) : (1982) 52 CompCas 554 : (1981) CriLJ 306 : (1981) 1 SCALE 79 : (1981) 1 SCC 608 : (1981) SCC(Cri) 212 : (1981) 2 SCR 516 this Court observed (vide para 3) :

"4.....the power of preventive detention is a frightful and awesome power with drastic consequences affecting personal liberty, which is the most cherished and prized possession of man in a civilized society. It is a power to be exercised with the greatest care and caution and the courts have to be ever vigilant to see that this power is not abused or misused."

17. In Frances Coralie Mullin Vs. W.C. Khambra and Others, AIR 1980 SC 849 : (1981) 51 CompCas 343 : (1980) CriLJ 548 : (1980) 2 SCC 275 : (1980) SCC(Cri) 419 : (1980) 2 SCR 1095 this Court observed (vide para 5) :

"5.... No freedom is higher than personal freedom and no duty higher than to maintain it unimpaired"

19. Learned counsel for the respondent submitted that a writ of habeas corpus lies only when there is illegal detention, and in the present case since the petitioner has not yet been arrested, no writ of habeas corpus can be issued. We

regret we cannot agree, and that for two reasons. Firstly, Article 226 and Article 32 of the Constitution permit the High Court and the Supreme Court to not only issue the writs which were traditionally issued by British Courts but these Articles give much wider powers to this Court and the High Court. This is because Article 32 and Article 226 state that the Supreme Court and High Court can issue writs in the nature of habeas corpus, mandamus, certiorari, etc. and they can also issue orders and directions apart from issuing writs.

20. The words "in the nature of" imply that the powers of this Court or the High Court are not subject to the traditional restrictions on the powers of the British Courts to issue writs. Thus the powers of this Court and the High Court are much wider than those of the British Courts vide *Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another*, AIR 1966 SC 81 : (1965) 57 ITR 349 : (1965) 3 SCR 536 (vide para 4), *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, AIR 1989 SC 1607 : (1989) JT 129 Supp : (1989) 2 LLJ 324 : (1989) 1 SCALE 1116 : (1989) 2 SCC 691 : (1989) 2 SCR 697 : (1989) 2 UJ 130 , etc.

21. Secondly, what the petitioner really prays for is a writ in the nature of certiorari to quash the impugned detention order and/or a writ in the nature of mandamus for restraining the respondents from arresting him. Hence even if the petitioner is not in detention a writ of certiorari and/or mandamus can be issued.

22. The celebrated writ of habeas corpus has been described as "a great constitutional privilege of the citizen" or "the first security of civil liberty". The writ provides a prompt and effective remedy against illegal detention and its purpose is to safeguard the liberty of the citizen which is a precious right not to be lightly transgressed by anyone. The imperative necessity to protect those precious rights is a lesson taught by all history and all human experience. Our founding fathers have lived through bitter years of the freedom struggle and seen an alien government trample upon the human rights of our citizens. It is for this reason that they introduced Article 21 in the Constitution and provided for the writs of habeas corpus, etc.

23. In *R. v. Secy. of State for Home Affairs, ex p O'Brien* (1923) 2 KB 361 Scrutton, L.J. observed: (KB p. 382)

"... "... The law in the country has been very zealous of any infringement of personal liberty...." This case is not to be exercised less vigilantly, because the subject whose liberty is in question may not be particularly meritorious. It is indeed one test of belief in principles if you apply them to cases with which you have no sympathy at all. You really believe in freedom of speech if you are willing to allow it to men whose opinion seem to you wrong and even dangerous; and the subject is entitled only to be deprived of his liberty by due process of law, although that due process if taken will probably send him to prison. A man undoubtedly guilty of murder must yet be released if due forms of law have not

been followed in his conviction. It is quite possible, even probable, that the subject in this case is guilty of high treason; he is still entitled only to be deprived of his liberty by due process of law."

(emphasis supplied)

24. As early as in 1627, the following memorable observations were made by Hyde, C.J. in *Darnel, Re* (1627) 3 St Tr. 1:

"Whether the commitment be by the King or others, this Court is a place where the King doth sit in person, and we have power to examine it, and if it appears that any man hath injury or wrong by his imprisonment, we have power to deliver and discharge him, if otherwise, he is to be remanded by us to prison."

25. In Halsbury's Laws of England, (4th Edn., Vol.11, para 1454, p.769), it is stated:

"In any matter involving the liberty of the subject the action of the Crown or its ministers or officials is subject to the supervision and control of the judges on habeas corpus. The judges owe a duty to safeguard the liberty of the subject not only to the subjects of the Crown, but also to all persons within the realm who are under the protection of the Crown and entitled to resort to the courts to secure any rights which they may have, and this whether they are alien friends or alien enemies. It is this fact which makes the prerogative writ of the highest constitutional importance, it being a remedy available to the lowliest subject against the most powerful. The writ has frequently been used to test the validity of acts of the executive and, in particular, to test the legality of detention under emergency legislation. No peer or lord of Parliament has privilege of peerage or Parliament against being compelled to render obedience to a writ of habeas corpus directed to him."

21. In para 2 of *Subhash Popatlal Dave* (supra) it has been held as under:

"2. A common question initially arose in all these matters as to whether detention order passed under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (shortly referred to as "the COFEPOSA Act 1974) could be challenged at the pre-execution stage confined to the five exceptions carved out by this Court in the case of *Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another*, (1991) 72 CompCas 336 : (1991) 53 ELT 481 : (1991) 1 JT 549 : (1990) 2 SCALE 1352 : (1992) 1 SCC 496 Supp : (1990) 3 SCR 583 Supp or whether such challenge could be maintained inter alia on other grounds. This Court (Bench) has already delivered a judgment on this question vide judgment and order *Subhash Popatlal Dave Vs. Union of India (UOI) and Another*, AIR 2012 SC 3370 : (2012) CriLJ 3848 : (2012) 281 ELT 641 : (2012) 6 JT 314 : (2012) 6 SCALE 367 : (2012) 7 SCC 533 : (2012) AIRSCW 4267 that the right of a proposed detenu to challenge a preventive detention order passed against him may be challenged at the pre-execution stage on grounds other than those set

out in paragraph 30 of the judgment in Alka Subhash Gadia's case and it was held therein that the order of preventive detention can be challenged beyond the five conditions enumerated in Alka Subhash Gadia's case. To make it explicitly clear it may be reiterated that this Court has already held that the order of preventive detention can be challenged beyond the five grounds which have been enumerated in the case of Alka Subhash Gadia's case even at the pre-execution stage."

22. In view of the settled position of law, we thus hold that the writ petition is maintainable and a detenu may challenge the detention order at the pre-execution stage.

23. The next question which arises for consideration is whether the three grounds urged by learned counsel for the petitioner can be considered by this court at the pre-execution stage in this writ petition.

24. The first argument raised by Mr. Ashutosh, counsel for the petitioner is that the detention order was passed on 10.9.2013 but till date has not been executed, despite the fact that throughout this period the petitioner was available at home and was attending all his daily routine activities.

25. A similar question had arisen before the Full Bench in the case of Subhash Popatlal (Supra). Para 3 of the judgment summarises the question which came up for consideration before the Court, reads as under:

"3. However, the next important question that has cropped up in all these petitions/appeals is as to whether the proposed detenu having absconded or evaded the execution of the detention order, who subsequently challenged the order of their detention even at the pre-execution stage after a long lapse of time could take advantage of non-execution and challenge the detention order which remained unexecuted. For the sake of brevity, I refrain from repeating the facts of each writ petition, appeals and transfer petition herein which have been consolidated and heard as a batch, as they have already been recorded in the judgment and order of the Hon'ble the Chief Justice Atlamas Kabr."

26. Based on the averments made in the counter affidavit and the supporting documents to show the publication and citation under Section 82 of the Code of Criminal Procedure, we hold that the petitioner is an absconder and he has been intentionally evading the execution of the detention order. In the case of Subhash Popatlal (Supra), the writ petitions which came up for hearing before the Supreme Court of India, pertained to those detenus, who had absconded or evaded the execution of the detention order and subsequently challenged the detention order raising a ground at the pre-execution stage that after a long lapse of time there would be no live link between the incident and the detention order and, thus, sought quashing of the detention order. The Supreme Court has lucidly dealt with the law in the case of Subhash Popatlal (Supra) and held that an absconder or a person who evades the execution of the detention order would not be entitled to challenge the detention order at the pre-execution stage on the

ground that the detention order has taken a long time for execution. In the case of Subhash Popatlal (Supra) it was held:

"6..... This Court in a series of decisions, some of which have been referred to hereinafter have consistently dealt with this question and have been pleased to hold that merely because the execution of the detention order has taken long years before it could be executed, the proposed detainee cannot be allowed to take advantage of the passage of time during which the detention order remain pending and thereafter take the plea that the order of detention is fit to be quashed due to its pendency on which the authorities had no control specially when the order of detention is allowed to be challenged before the appropriate court even at the pre-execution stage on any ground that may be available to him except of course the materials which has weighed with the authorities to pass the order of detention as it is obvious that justifiability of the material cannot be gone into at the pre- execution stage since the order of detention and the ground for such order is yet to be served on the proposed detainee as the proposed detainee was absconding or evading the execution of the order on him for one reason or the other. "

7. It would be worthwhile to refer to some of the authorities relied upon by the respondent- Union of India and the State of Maharashtra which clearly addresses the issues on the point involved herein.

8. A judgment and order of the Constitution Bench may be cited as the first and foremost authority on the issue involved which is the matter of Sunil Fulchand Shah Vs. Union of India and Others, AIR 2000 SC 1023 : (2000) CriLJ 1444 : (2000) 1 CTC 694 : (2000) 68 ECC 209 : (2000) 2 JT 230 : (2000) 1 SCALE 660 : (2000) 3 SCC 409 : (2000) 1 SCR 945 : (2000) AIRSCW 582 : (2000) 4 Supreme 682 wherein the Constitution Bench observed that a person may try to abscond and thereafter take a stand that period for which detention was directed is over and, therefore, order of detention is infructuous. It was clearly held that the same plea even if raised deserved to be rejected as without substance. It should all the more be so when the detenu stalled the service of the order and/or detention in custody by obtaining orders of the court. In fact, in Sayed Taher Bawamiya Vs. Joint Secretary to the Govt. of India and Others, (2002) CriLJ 259 : (2004) 2 SCALE 543 : (2000) 8 SCC 630 , the factual position shows that 16 years had elapsed yet this Court rejected the plea that the order had become stale.

9. These aspects were once again highlighted in Hare Ram Pandey Vs. State of Bihar and Others, (2003) 10 JT 114 : (2003) 10 SCALE 57 : (2004) 3 SCC 289 : (2003) 6 SCR 627 Supp , Union of India (UOI) Vs. Amrit Lal Manchanda and Another, AIR 2004 SC 1625 : (2004) CriLJ 1426 : (2004) 92 ECC 65 : (2004) 2 JT 378 : (2004) 2 SCALE 480 : (2004) 3 SCC 75 : (2004) 51 SCL 488 : (2004) 3 SCR 422 : (2004) AIRSCW 944 : (2004) 2 Supreme 150 and Union of India (UOI) and Others Vs. Vidya Bagaria, AIR 2004 SC 2220 : (2004) CriLJ 2480 : (2004) 93 ECC 689 : (2004) 5 SCALE 326 : (2004) 5 SCC 577 : (2004) 52 SCL

273 : (2004) 2 SCR 949 Supp : (2004) AIRSCW 2637 : (2004) 3 Supreme 727 . In yet another matter of Union of India (UOI) and Others Vs. Atam Parkash and Another, (2009) 1 SCC 585 , the detention order was challenged at the preexecution stage which remained pending for long and the High Court had allowed the writ petition filed by the respondents detenu therein and quashed the detention order restraining the appellants from enforcing the order. But, this Court overruled it and held that the judgment of the High Court was clearly unsustainable and hence was set aside. It was further held therein that the question as to whether it would be desirable to take the respondents (detenu) back to custody shall be taken by the Government within two months and appeal filed by the Union of India was allowed.

10. Similarly, in the case of Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another, AIR 1979 SC 541 : (1979) CENCUS 181 : (1979) CriLJ 462 : (1979) 1 SCC 465 : (1979) SCC(Cri) 318 : (1979) 2 SCR 633 , the appellant had evaded arrest and surrendered 3 years after making of the order of detention but this Court had held that the order was still effective if detenu himself were to be blamed for delay. It is no doubt true that in this matter, the Court had further held that the purpose of detention under the COFEPOSA is not punitive but preventive and there must be a "live and proximate link" so that if there is a long and unexplained delay between the order of detention and arrest of the detenu, the order of detention may be struck down unless the grounds indicate a fresh application of mind of the detaining authority to the new situation and the changed circumstances. But where the delay is adequately explained and is found to be the result of recalcitrant or refractory conduct of the detenu in evading the arrest, there is warrant to consider that the link is not snapped. On the contrary, it could be strengthened and that was what precisely happened in the said case.

11. In yet another case of Vinod K. Chawla Vs. Union of India (UOI) and Others, AIR 2006 SC 2864 : (2006) CriLJ 4079 : (2006) 7 JT 469 : (2006) 8 SCALE 86 : (2006) 7 SCC 337 : (2006) 5 SCR 651 Supp : (2006) AIRSCW 4080 : (2006) 6 Supreme 351 , this Court had occasion to consider regarding the effect of delay in execution of the detention order wherein their Lordships held that detenu evaded arrest and absconded and in spite of best possible efforts made by the authorities to serve the order, the order could not be executed. Taking the circumstances into consideration under which the order of detention could not be served, it was held that in view of detenu's own act of evading arrest, delay in execution of the order did not render the detention invalid.

13. In the matter of Hare Ram Pandey Vs. State of Bihar and Others, (2003) 10 JT 114 : (2003) 10 SCALE 57 : (2004) 3 SCC 289 : (2003) 6 SCR 627 Supp , effect of delay in execution of detention order was the principal issue for consideration before the court. This Court held that :

"... [the] plea of delay taken by the person who himself was responsible for the delay having adopted various dilatory tactics cannot be accepted."

In this matter, the question regarding service of the detention order after expiry of the period specified therein was a subject matter of consideration wherein it was contended that the order was yet to be executed. This Court held that the grounds like delay in execution of the order, delay in consideration of the representation etc. are hypothetical in nature. Where a person against whom detention order passed was absconding, plea taken by him or on his behalf that the period for which detention was directed expired, deserved to be rejected. While considering this question, it was held that although the nature and object of the preventive detention order is anticipatory and non-punitive in nature, object is to maintain public order and security of State. This gives jurisdiction to curtail individual liberty by passing the detention order. Order of detention is passed on the basis of subjective satisfaction of detaining authority.

14. The legal position was reiterated in the matter of Dropti Devi and Another Vs. Union of India (UOI) and Others, AIR 2012 SC 2550 : (2012) 4 CTC 858 : (2012) 6 JT 159 : (2012) 6 SCALE 80 : (2012) 7 SCC 499 wherein one of the questions which arose for consideration was whether the detainee could be allowed to take advantage of his own wrong on the plea that the maximum period of detention prescribed having expired and the detainee in the said case having failed to join investigation despite High Court's order would justify questioning of such order. This Court held that the detainee could not take advantage of his own wrong and challenge the detention order on the plea that the purpose of execution of detention order no longer survived as maximum statutory period of detention would have lapsed by then.

15. From the ratio of the aforesaid authoritative pronouncements of the Supreme Court which also includes a Constitution Bench judgment having a bearing and impact on the instant matters, the question which emerges is that if the order of detention is allowed to be challenged on any ground by not keeping it confined to the five conditions enumerated in the case of Alka Subhash Gadia except the fact that there had been sufficient materials and justification for passing the order of detention which could not be gone into for want of its execution, then whether it is open for the proposed detainee to contend that there is no live link between the order of detention and the purpose for which it had been issued at the relevant time. In the light of ratio of the decisions referred to hereinabove and the law on preventive detention, it is essentially the sufficiency of materials relied upon for passing the order of detention which ought to weigh as to whether the order of detention was fit to be quashed and set aside and merely the length of time and liberty to challenge the same at the preexecution stage which obviated the execution of the order of preventive detention cannot be the sole consideration for holding that the same is fit to be quashed. When a proposed detainee is allowed to challenge the order of detention at the pre-execution stage on any ground whatsoever contending that the order of detention was legally unsustainable, the Court will have an occasion to examine all grounds except sufficiency of the material relied upon by the detaining authorities in passing the order of detention which legally is the most important

aspect of the matter but cannot be gone into by the Court as it has been allowed to be challenged at the pre-execution stage when the grounds of detention has not even been served on him.

16. Thus, if it is held that howsoever the grounds of detention might be weighty and sustainable which persuaded the authorities to pass the order of detention, the same is fit to be quashed merely due to long lapse of time specially when the detainee is allowed to challenge the order of detention even before the order of detention is served on him, he would clearly be offered with a double-edged weapon to use to his advantage circumventing the order of detention. On the one hand, he can challenge the order of detention at the pre-execution stage on any ground, evade the detention in the process and subsequently would be allowed to raise the plea of long pendency of the detention order which could not be served and finally seek its quashing on the plea that it has lost its live link with the order of detention. This, in my view, would render the very purpose of preventive detention laws as redundant and nugatory which cannot be permitted. On the contrary, if the order of detention is allowed to be served on the proposed detainee even at a later stage, it would be open for the proposed detainee to confront the materials or sufficiency of the material relied upon by the authorities for passing the order of detention so as to contend that at the relevant time when the order of detention was passed, the same was based on non-existent or unsustainable grounds so as to quash the same. But to hold that the same is fit to be quashed merely because the same could not be executed for one reason or the other specially when the proposed detainee was evading the detention order and indulging in forum shopping, the laws of preventive detention would surely be reduced into a hollow piece of legislation which is surely not the purpose and object of the Act.

17. Therefore, in my view, the order of detention is not fit to be quashed and should not be quashed merely due to long lapse of time but the grounds of detention ought to be served on him once he gains knowledge that the order of detention is in existence so as to offer him a plank to challenge even the grounds of detention after which the courts will have to examine whether the order of detention which was passed at the relevant time but could not be served was based on sufficient material justifying the order of detention. Remedy to this situation has already been offered by this Court in the matter of *Union of India and Others Vs. Parasmal Rampuria*, (1998) 2 Crimes 23 : (1998) 2 JT 531 : (1998) 2 SCALE 367 : (1998) 8 SCC 402 : (1998) 1 UJ 717 : (1998) AIRSCW 2292 : (1998) 3 Supreme 139 wherein it was observed as under:

"5..., the proper order which was required to be passed was to call upon the Respondent first to surrender pursuant to the detention order and then to have all his grievances examined on merits after he had an opportunity to study the grounds of detention and to make his representation against the said grounds as required by Article 22(5) of the Constitution of India."

18. The consequence that follows from the above is that each individual/

proposed detainee will have to be served with the order of detention which had been passed against them alongwith the grounds and the materials relied upon by the authorities to pass the order of detention leaving it open to them to challenge the correctness of the order by way of a representation before the appropriate Authority or Court as per procedure prescribed. It is no doubt true that the materials relied upon at the relevant time would be on the basis of which the order of detention was passed so as to hold whether the materials were sufficient and justified or not but when the correctness of the order of detention is challenged in a court of law at the pre-execution stage, then setting aside the order of detention merely on the ground of long lapse of time might lead to grave consequences which would clearly clash with the object and purpose of the preventive detention laws."

27. In paragraph 13 aforegoing, we have extracted the relevant paragraph of the counter affidavit filed by the respondents. As per the counter affidavit, the officers of respondent No. 3 made an attempt to execute the detention order at the Delhi premises of the petitioner on 18.9.2013, however, the landlord informed the officers that the petitioner had left the premises long back. It is contended that on 30.10.2013, 13.7.2014, 15.10.2014 and 29.12.2014, the officers of Directorate of Revenue Intelligence, Lucknow Zonal Unit visited the premises of the petitioner situated at 73, Village Bashara, P.O. Sotipur, P.S. Varsathi, Distt. Jaunpur, U.P., but the petitioner was not found available at the said address. An order dated 20.11.2013 issued under F.No. U- 11011/04/2012-PITNDPS, in this regard, was published in the Gazette of India (Extraordinary), Part-II, Section 3-Sub section (ii) vide S.O.3457(E) dated 22.11.2013; and the contents of the said gazette order were also published in local Lucknow edition of English and Hindi newspapers on 9.1.2014. It is also contended that despite publication of order dated 20.11.2013, the petitioner did not surrender; thereafter the respondents had no option but to file reports dated 8.1.2014 and 28.2.2014 under Section 8(1)(a) of PIT NDPS Act before the Ld. CMM, New Delhi. On 14.3.2014, the Ld. CMM, New Delhi passed orders for issuing process under Section 82 of the Code of Criminal Procedure qua the petitioner. The process under Section 82 of the Code of Criminal Procedure was published in Indian Express dated 22.5.2014. The said order under Section 82 of the Code of Criminal Procedure qua the petitioner was repeated on 28.5.2014, returnable on 30.8.2014. The process under Section 82 Cr.P.C. was published in Indian Express dated 9.8.2014. The said process under Section 82 of the Code of Criminal Procedure qua the petitioner was again repeated on 2.9.2014. Counsel also submits that on 29.12.2014 the officers of DRI, DZU had visited at the premises of the petitioner, but the petitioner was not found available. The process issued under Section 82 of the Code of Criminal Procedure had been pasted at the conspicuous part of the said premises. Thereafter again order of issuance of fresh process under Section 82 of the Code of Criminal Procedure was repeated on 31.3.2015, returnable on 1.6.2015.

28. In view of the detailed discussion by the Supreme Court and having regard to

the fact that the petitioner is an absconder, the first ground raised by the petitioner is without any force and the same is rejected.

29. Another ground raised before us is that the sponsoring authority did not place before the detaining authority the documents which were vital and material and could have influenced the mind of the detaining authority one way or the other at the time of passing the detention order. In our view, this question also stands decided by the full Bench in the case of Subhash Popatlal (Supra), in paragraph 15, which has been reproduced above, wherein it has been held that in the pre-execution stage, the court can examine all grounds except the ground regarding sufficiency of all material relied upon by the detaining authority in passing the order of detention. It has been held "When a proposed detenu is allowed to challenge the order of detention at the pre-execution stage on any ground whatsoever contending that the order of detention was legally unsustainable, the Court will have an occasion to examine all grounds except sufficiency of the material relied upon by the detaining authorities in passing the order of detention which legally is the most important aspect of the matter but cannot be gone into by the Court as it has been allowed to be challenged at the pre-execution stage when the grounds of detention have not even been served on him".

30. Mr. Ashutosh, counsel for the petitioner has also contended that identical detention orders dated 10.9.2013 have been passed in respect to the petitioner and the co-accused persons, namely, Nilesh Shukla and Virender Singh. The orders so passed stand revoked on the recommendation of the Advisory Board.

31. It is submitted that the detention orders were revoked, as the incident took place on 23 / 24th October, 2011, whereas the detention order were passed on 10.9.2013 after a long and undue delay, thus the live link between the incident and the passing of the detention order stands snapped.

32. In the case of Rajinder Arora Vs. Union of India (UOI) and Others, AIR 2006 SC 1719 : (2006) CriLJ 2102 : (2006) 3 JT 518 : (2006) 3 SCALE 202 : (2006) 4 SCC 796 : (2006) AIRSCW 3692 : (2006) AIRSCW 1510 : (2006) 3 Supreme 139 : (2006) 5 Supreme 3659 : (2006) 5 Supreme 659 , it was held that:

"19. The said counter affidavit has been affirmed in November, 2005. It is beyond anybody's comprehension as to why despite a long passage of time, the Respondents have not been able to gather any material to lodge a complaint against the Appellant. It has furthermore not in dispute that even the DGFT authorities have not issued any show cause notice in exercise of their power under Foreign Trade (Development and Regulation) Act, 1994.

20. Furthermore no explanation whatsoever has been offered by the Respondent as to why the order of detention has been issued after such a long time. The said question has also not been examined by the authorities before issuing the order of detention.

21. The question as regard delay in issuing the order of detention has been held to be a valid ground for quashing an order of detention by this Court in T.A. Abdul Rahaman Vs. State of Kerala and others, AIR 1990 SC 225 : (1991) 70 CompCas 578 : (1990) CriLJ 578 : (1989) 3 Crimes 186 : (1990) 25 ECC 55 : (1989) 25 ECR 296 : (1989) 3 JT 444 : (1989) 2 SCALE 388 : (1989) 4 SCC 741 : (1989) 3 SCR 945 : (1990) 1 UJ 116 stating:

"10. The conspectus of the above decisions can be summarised thus: The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case.

11. Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner."

22. The delay caused in this case in issuing the order of detention has not been explained. In fact, no reason in that behalf whatsoever has been assigned at all."

33. In the case of SumitraDey Bhattacharya vs. Union of India, W.P. (Crl.) No. 2118/2014 dated 22.01.2015, this court has held as under:

"59.. The petition must succeed even on the ground of not passing the detention order for a period of 8 months, after the proposal was accepted on 28.6.2013. The sole purpose of passing the detention order is that the live link between the occurrence and the order should not become stale. By the time the proposal is sent it is deemed that the investigation is complete, which is enough to detain a person, and any additional investigation which may have been carried out, cannot be a ground to explain the delay The department itself in its Circular bearing F.No. 671/6/2001- Cus.VIII, Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, has taken note of this. Accordingly, the petition is allowed."

34. A careful reading of the judgments of Rajinder Arora and Subhash Popatlal Dave (supra) leads to the conclusion that a writ petition at the pre-existing stage or pre-execution of the detention order stage is maintainable, and the Courts are entitled to examine all grounds except the ground relating to sufficiency of material relied upon by the detaining authorities in passing the order of detention, which has been held to be legally the most important aspect of the matter, but cannot be gone into by the Court at the pre-execution stage when the grounds of detention have not even been served on the detenu, as emphasised in para 15 of the judgment reproduced above.

35. We have perused the counter affidavit filed by the respondents. The counter affidavit is bereft of any explanation with regard to delay in passing the detention order dated 10.9.2013. The matter has been adjourned from time to time, but no additional affidavit has been filed nor any record has been produced to explain the delay in passing the detention order. We are conscious that entertaining a writ petition against a preventive detention order at a pre-execution stage should be an exception and not the general rule. In this case also the petitioner has successfully evaded the service of the detention order. The Apex Court of India in the case of Deepak Bajaj (Supra) has held that the celebrated writ of habeas corpus has been described as "a great constitutional privilege of the citizen" or "the first security of civil liberty"; and has also held that it is a remedy to safeguard the liberty of the citizen which is a precious right and is not to be transgressed by anyone. In this case the liberty of the petitioner cannot be curtailed by sending him to jail when the detention order of co-accused persons, who are identically placed as the petitioner, stands revoked on the recommendation of the Advisory Board.

36. In view of the settled position of law and in the peculiar facts of this case and the fact that the detention order of the co-accused persons have already been revoked based on the opinion of the Advisory Board, sending the petitioner herein to jail only for release subsequently, cannot be permitted. Resultantly, the writ petition is allowed. The order of detention stands quashed.

37. Rule is made absolute.