
(2000) 11 DEL CK 0109
In the Delhi High Court
Case No : Criminal W.P. 1034 of 2000

Parmod Kumar

APPELLANT

Vs

Lt. Governor and Others

RESPONDENT

Date of Decision : 28-11-2000

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)
Constitution of India, 1950 — Article 22(5), 226

Citation : (2001) 73 ECC 375

Hon'ble Judges : Dr. Arijit Pasayat, C.J.; D.K. Jain, J

Bench : Division Bench

Advocate : Akshay Anand, for the Appellant; Mukta Gupta, for the Respondent

Final Decision : Allowed

Judgement

Arijit Pasayat, C.J.—Detention of Parmod Kumar (hereinafter referred to as "detenu"), pursuant to the order of detention passed by the Deputy Secretary (Home), Government of National Capital Territory of Delhi Home (Police-II) Department of 5th April 1999, in purported exercise of power conferred under Sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the "Act"), is under challenge by this petition for issue of writ of habeas corpus by his wife Smt. Anita. By the said order, detenu was directed to be detained in custody in the Central Jail, Tihar, New Delhi. The order was passed with a view to preventing detenu from smuggling goods.

2. Though several grounds have been taken in the petition, at the time of hearing, it was urged that the grounds of detention were not served, as required under the Act, within the stipulated time. The grounds of detention and relied upon documents were supplied much after the dead-line fixed by the statute. Reference in this context is made to Sub-section (3) of Section 3 of the Act.

Learned counsel appearing for the State on the other hand, submitted that in-

spite of best efforts the requisite documents could not be served within the stipulated time. It is submitted that merely because there has been some delay in serving the document that per se does not render the detention invalid. It is pointed out that on 2nd October 2000 police officials of Police Station Chhaprauli, District Baghpat in Uttar Pradesh detained the detenu, and information to this effect was received by the Government of National Capital Territory of Delhi (in short "N.C.T.") by a fax message on 3rd October 2000. Immediately after receiving the message, a wireless message was sent on 4th October 2000 to the Sr. Superintendent of Police, District Baghpat with a request to return the acknowledged copy of detention order, grounds of detention and other relied upon documents. On 19th October, 2000 Government received undelivered and unacknowledged sets of documents Along with grounds of detention. Thereafter on 21st October, 2000 the grounds of detention and other relied upon documents were supplied to the detenu in the Central Jail, Tihar, New Delhi through the Customs authorities. In the further affidavit filed, it has been stated that on finding that no information was received from the police officials in Uttar Pradesh, notwithstanding request to return the acknowledged copy of detention Order, grounds of detention and relied upon documents, another wireless message dated 12th October, 2000 was sent to Superintendent of Police, District Baghpat and SHO, Police Station Chhaprauli. On 19th October, 2000, as indicated above, unexecuted documents were received from the Superintendent of Police, District Baghpat, U.P. Thereafter the documents were served. A plea was taken that in case a detenu refuses to accept the documents tendered that would constitute valid service.

3. In order to appreciate rival submissions, it is necessary to take note of Section 3 which deals with niter alias the time limits for service of grounds of detention etc. Said pivotal provision in this case, reads as follows.

"Section 3. Power to make orders detaining certain persons. (1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of the State Government not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from-

- (i) smuggling goods, or
- (ii) abetting the smuggling of goods, or
- (iii) engaging in transporting or concealing or keeping smuggled goods, or
- (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,

it is necessary so to do, make an order directing that such person be detained:

Provided that no order of detention shall be made on any of the grounds specified in this sub-section on which an order of detention may be made u/s 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 or u/s 3 of the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988. (J & K Ordinance, 1 of 1988).

(2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order.

(3) For the purposes of Clause (5) of article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and not reasons to be recorded in writing, not later than fifteen days, from the date of detention."

4. Article 22(5) of the Constitution of India 1950 (in short the "Constitution") requires, the ground of detention must be communicated to the detenu. The time limit for communication is contained in Sub-section (3) of Section 3 of the Act. As observed by the Apex Court in *Smt. Raziya Umar Bakshi Vs. Union of India and Others*, service of the grounds of detention on the detenu is very precious constitutional right and the basic purpose for which the communication is required to be made, is to enable the detenu to make a representation, right to which is granted by later part of Clause (5) of Article 22. (See *Mr. Kubic Dariusz v. Union of India and Ors.*, : AIR1990SC605). A communication must, Therefore, mean imparting to the detenu sufficient and effective knowledge of the facts and circumstances, on which the order of detention is passed, i.e. of the prejudicial acts which the authorities attribute to him.

5. Before dealing with the respective stands, the purpose and objective of order directing detention need to be noted so that the factual aspects can be appropriately dealt with.

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

in the following words:

"Then comes the question upon the habeas corpus. It is a general rule which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue." [Per Thomas Pelham Dales case, 1881 (6) QBD 376. It has been said that the history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is stressed in the words of Lord Denning as follows:

"Whenever one of the King's Judge taken his seat, there is one application which by long tradition has priority over all others, counsel has but to say: My Lord, I have an application which concerns the liberty of the subject and forthwith the Judge will put all other matter aside and hear it. It may be an application for a writ of habeas corpus, or an application for bail but whatever form it takes, it is heard first." (Freedom under the Law, Hamlyn Lectures, 1949).

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

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

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

"Faith in America is faith in her free institutions or it is nothing. The Constitution we adopted launched a daring and bold experiment. Under the compact we agreed to tolerate even ideas we despise. We also agreed never to prosecute people merely for their ideas or beliefs." (See: On misconception of the Judicial function and the Responsibility of the Bar, Columbia Law Review, Vol. 59 p 232)

Judge Stanley 11 Fold of the New York Court of Appeals said : "it is a delusion to think that the nation's security is advanced by the sacrifice of the individual's basic liberty. The fears and doubts of the movement may look large, but we lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional Guarantees". (Quoted by Justice Douglas at p. 233. On Misconception of the Judicial Function and the Responsibility of the Bar, Columbia Law Review, Vol 59).

7. The writ of habeas corpus was called by Blackstone as the great and efficacious writ in all manner of illegal confinement. It really represents another aspect of due process of law. As early as 1839, it was proclaimed by Lord Denman that it had been for ages effectual to an extent never known in any other country. Lord Halsbury L.C. stated in Cox v. Hakes [1890] 15 AC 506 that the right to an instant determination as to the lawfulness of an existing imprisonment is the substantial right made available by this writ. Article 22 of the Constitution confers four fundamental rights on every person, except in two cases mentioned in Clause (3), as essential requirements and safeguards to be followed when it is necessary to deprive any person, for any cause whatsoever and for, however brief a period, of high personal liberty by placing him under arrest or keeping him in detention. Those are (i) to be informed, as soon as may be, of the grounds of arrest; (ii) not to be denied the right to consult and to be

defended by a legal practitioner of his choice; (iii) to be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of the Magistrate and (iv) not to be detailed in custody beyond the said period of 24 hours without authority of a Magistrate, Clauses (1) and (2) contain the guarantee of the four fundamental rights enumerated above. Clause (3) contains two exceptions and provides that the constitutional guarantees do not apply to (a) enemy aliens and (b) persons arrested or detained under any law providing for preventive detention. The right to be informed of the grounds of detention and the right to have the earliest opportunity of making a representation against the order of detention are fundamental in character and concept Preventive detention is an anticipatory measure and does not relate to an offence while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the Executive is convinced that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by the law. The action of Executive in detaining a person being only precautionary, the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct, the failure to conform to which should lead to detention. The satisfaction of the detaining authority, Therefore is a purely subjective affair. The detaining authority may act on any material and on any information which may merely afford basis for a sufficiently strong suspicion to take action but may not satisfy the test of legal proof on which alone a conviction for offence will be tenable. In case of preventive detention of citizen, Article, 22(5) of the Constitution enjoins the obligation of appropriate Government or of detaining authority to accord the detenu earliest opportunity to make a representation and to consider that representation speedily. The right to make a representation implies the right of making an effective representation. It is the constitutional right of the detenu to get all the grounds on which the order has been made. As has been said by Benjamin Cordozo, "A constitution states or ought to state not rules for the passing hour, but the principles for an expanding future". The concept of grounds used in the context of detention in Article 22(5) has to receive an interpretation which will keep it meaningfully in tune with contemporary notions of the realities of the society and the purpose of the Act in the light of concepts of liberty and fundamental freedoms. While the expression "grounds" for that matter includes not only conclusion of fact but also all the "basic facts" on which those conclusions were founded; they are different from subsidiary facts or further particulars or the basic facts. The detenu is entitled to obtain particulars of the grounds which will enable him to make an effective representation against the order of detention.

8. In view of the high pedestal on which personal liberty is pressed, even smallest of unexplained delay in disposal of the writ petition is considered to be

breach of constitutional protection afforded to a citizen. Reading of Sub-section (3) of Section 3 of the Act, makes it clear that in the normal course communication of the grounds on which order of detention has been directed, has to be made as soon as may be after the detention, but ordinarily not later than five days. Only in exceptional circumstances and for reasons to be recorded in writing, it is to be done not later than fifteen days. There can be no relaxation of the maximum period of fifteen days, even for exceptional circumstances. The time imperative is inbuilt in the provision itself and the legislative intent, is apparent even from a bare reading of the provision. The object for setting out the limits is apparent. The constitutional mandate is for grant of immediate opportunity to detenu to make a representation. It is inconceivable that any representation, much less an effective representation can be made with detenu not being communicated that grounds of detention. The utmost expedition with which representation has to be disposed of has to be preceded by expeditious communication of the grounds of detention, for which legislature has provided a time-frame. When detaining authority delays in furnishing grounds of detention to a detenu, there is denial of an opportunity of making the representation contemplated under Article 22(5) of the Constitution.

9. In the case at hand, undisputedly the grounds were served later than fifteen days. No exceptional circumstances have been highlighted even for extending the period to fifteen days. According to Fruk & Waanall's Standard Dictionary "exceptional" means "of a nature to be excepted, Constituting or relating to an exception, unusual uncommon". According to Murray's New English Dictionary "of the nature of forming an exception, out of the ordinary course, unusual, special". If the extended period up to fifteen days have to be availed, exceptions have to be spelt out and reasons why the circumstances are exceptional have to be recorded. Though a plea has been taken of deemed service due to refusal, it is to be noted that, in the additional affidavit filed by the Detaining Authority, it has been clearly stated as follows:-

"There is no mention in any of the communications received from U.P. Police that the detenu refused to accept the grounds of detention and relied upon documents."

Above being the position, even the plea of deemed service due to refusal is misconceived.

10. As the constitutional and statutory safeguards have been breached, continued detention of the detenu is per force illegal. The detenu be set at liberty forthwith unless he is required to be detained in custody in connection with any other case.

Writ application allowed.