

(2001) 05 DEL CK 0087

In the Delhi High Court

Case No : Criminal Writ No. 341 of 2001

Shri Pawan Bhartiya

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 25-05-2001

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)

Constitution of India, 1950 — Article 22(5), 226, 32

Citation : (2001) 5 AD 331 : (2001) CriLJ 3245 : (2001) 92 DLT 198 : (2001) 59 DRJ 437 : (2002) 80 ECC 459 : (2002) 1 RCR(Criminal) 52

Hon'ble Judges : Dr. Arijit Pasayat, C.J.; Surinder Kumar Aggarwal, J

Bench : Division Bench

Advocate : Mr. R.K. Anand and Mr. G.L. Sanghi and Mr. Aman Vachar, for the Appellant; Mr. Harish Chander Mr. Rajender Nishchal and Ms. Mukta Gupta, for the Respondent

Judgement

Arijit Pasayat, C.J.—By this petition under Article 226 of the Constitution of India, 1950 (in short, "the Constitution") legality, validity and virus of the order dated 30.07.1996 passed by respondent no. 1 (Union of India through its Joint Secretary, Department of Revenue, Ministry of Finance) has been challenged. The said order was passed in exercise of power u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short, "the Act") for detaining the petitioner. Prayer is for issuance of a writ in the nature of certiorari or any other appropriate writ or writs, setting aside the impugned order of detention dated 30.07.1996. Stand of the petitioner in essence is that such prayer has to be accepted as:-

- a) there has been delay in execution of the order of detention.
- b) there was no consideration of several aspects, more particularly, the fact that the duty for the alleged evasion of which action was taken has already been paid.
- c) in some cases where payments have been made, the orders of detention

passed have been revoked.

d) there has no material to link the petitioner with illegal activities such as smuggling of goods.

2. A preliminary objection has been raised by the respondent stating that the certiorari for entertaining the petition questioning legality of the order of detention before execution has been laid down in many cases, and the petitioner has not made out a case for interference before execution of the detention order.

3. Before dealing with rival submissions, it would be appropriate to deal with the purpose and intent of preventive detention. Preventive detention is an anticipatory measure and does not relate to an offence, while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. Its 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 that it may have before it. Such material and information may merely afford basis for a sufficiently strong suspicion to take action but may not satisfy the tests of legal proof on which alone a conviction for offence will be tenable. The compulsions of the primordial need to maintain order in society without which the enjoyment of all right, including the right to personal liberty would lose all their meaning are the true jurisdictions 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 or corroding financial base 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.

4. The question whether the detenu or any one on his behalf is entitled to challenge the detention order without the detenu submitting or surrendering to it has been examined by various Courts. One of the leading judgments on the subject is Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, . In para 12 of the said judgment, it was observed by the Apex Court as follows:-

"12. This is not say that the jurisdiction of High Court and the Supreme Court under Articles 226 and 32 respectively has no role to play once the detention-punitive or preventive is shown to have been made under the law so made for the purpose. This is to point out the limitations, which the High Court and the Supreme Court have to observe while exercising their respective jurisdiction in such cases. These limitations are normal and well known, and are self-imposed as a matter of prudence, propriety, policy and practice and are observed while dealing with cases under all laws. Though the Constitution does not place any restriction on these powers, the judicial decision have evolved them over a period of years taking into consideration the nature of the legislation or of the order or decision complained of, the need to balance the rights and interests of the individual as against those of the society, the circumstances under which and the persons by whom the jurisdiction is invoked, the nature of relief sought, etc. To illustrate these limitations, (i) in the exercise of their discretionary jurisdiction the High Court and the Supreme Court do not, as courts of appeal or revision, correct mere errors of law or of facts, (ii) the resort to the said jurisdiction is not permitted as an alternative remedy for relief which may be obtained by suit or other mode prescribed by statute. Where it is open to the aggrieved person to move another tribunal or even itself in another jurisdiction for obtaining redress in the manner provided in the statute, the court does not, by exercising the writ jurisdiction, permit the machinery created by the statute to be by passed; (iii) it does not generally enter upon the determination of questions which demand an elaborate examination of evidence to establish the right to enforce which, the writ is claimed; (iv) it does not interfere on the merits with the determination of the issues made by the authority invested with statutory power, particularly when they relate to matters calling for expertise, unless there are exceptional circumstances calling for judicial intervention, such as, where the determination is mala fide or is prompted by extraneous considerations or is made in contravention of the principles of natural justice or any constitutional provision, (v) the court may also intervene where (a) the authority acting under the concerned law does not have the requisite authority or the order which is purported to have been passed under the law is not warranted or is in breach of the provisions of the concerned law or the person against whom the action is taken is not the person against whom the order is directed, or (b) when the authority has exceeded its powers or jurisdiction or has failed or refused to exercise jurisdiction vested in it; or (c) where the authority has not applied its mind at all or has exercised its power dishonestly or for an improper purpose;

(vi) where the Court cannot grant a final relief, the Court does not entertain petition only for giving interim relief. If the Court is of opinion that there is no other convenient or efficacious remedy open to the petitioner, it will proceed to investigate the case on its merits and if the Court finds that there is an infringement of the petitioner's legal rights, it will grant final relief but will not dispose of the petition only by granting interim relief (vii) where the satisfaction of the authority is subjective, the Court intervenes when the authority has acted under the dictation of another body or when the conclusion is arrived at by the application of a wrong test or misconstruction of a statute or it is not based on material which is of a rationally probative value and relevant to the subject matter in respect of which the authority is to satisfy itself. If again the satisfaction is arrived at by taking into consideration material, which the authority properly could not, or by omitting to consider matters, which it sought to have, the court interferes with the resultant order. In proper cases the Court also intervenes when some legal or fundamental right of the individual is seriously threatened, though not actually invaded."

5. Petitioner has stated that action u/s 3(1) of the Act is permissible only when there is material to show about any smuggling of goods. In the petitioner's case, there was no material to link the petitioner with the goods and only the dispute related to certain duties, which have already been paid. Petitioner has also surrendered his licenses and closed his business and, Therefore, there was no scope for any smuggling activities in future, for the prevention of which the impugned order of detention has been passed.

6. Though learned counsel for the petitioner stated that various categories noted by the Apex Court in Alka Subhash's case (supra) are not exhaustive and are illustrative of the circumstances. According to him, present case clearly makes out, ground for interference even at this stage when order of detention has not been executed. We find no substance in this plea. In a recent case Sayed Taher Bawamiya Vs. Joint Secretary to the Govt. of India and Others, , it was observed by the Apex Court as follows:-

"This Court in Alka Gadia case was also concerned with a matter where the detention order had not been served, but the High Court had entertained the petition under Article 226 of the Constitution. This Court held that equitable jurisdiction under Article 226 and Article 32 which is discretionary in nature would not be exercised in a case where the proposed detenu successfully evades the service of the order. The Court, however, noted that the courts have the necessary power in appropriate case to interfere with the detention order at the pre-execution stage but the scope for interference is very limited. It was held that the courts will interfere at the pre-execution stage with the detention orders only after they are prima facie satisfied.

(i) that the impugned order is not passed under the Act which it is purported to have been passed.

- (ii) that it is sought to be executed against a wrong person.
- (iii) that it is passed for a wrong purpose.
- (iv) that it is passed on vague, extraneous and irrelevant grounds, or
- (v) that the authority which passed it had no authority to do so.

As we see it, the present case does not fall under any of the aforesaid five exceptions for the court to interfere. It was contended that these exceptions are not exhaustive. We are unable to agree with this submission. Alka Subhash Gadia case shows that it is only in these five types of instances that the court may exercise its discretionary jurisdiction under Article 226 or Article 32 at the pre-execution stage. the petitioner had sought to contend that the order which was passed was vague, extraneous and on irrelevant grounds but there is no material for making such an averment for the simple reason that the order of detention and the grounds on which the said order its passed has not been placed on record inasmuch as the order has not yet been executed. the petitioner does not have a copy on the same, and Therefore, it is not open to the petitioner to contend that the non-existent order was passed on vague, extraneous or on irrelevant grounds.

Learned counsel for the petitioner could not show as to which of the enumerated categories present case falls. As indicated above, the plea about non-consideration of relevant materials does not bring the petitioner within the enumerated categories.

7. A recent decision of the Apex Court also throws considerable light as to what would be the proper course for a person to adopt when he seeks to challenge and order of detention on the available grounds like delayed execution of detention order, delay in consideration of the representation and the like. These questions are really technical nature when the order of detention has not been executed at all and challenge is made at pre-execution stage. In Union of India and Others Vs. Parasmal Rampuria, , the Apex court observed as follows:-

"In our view, a very unusual order seems to have been passed in a pending appeal by the Division Bench of the High Court. It is challenged by the Union of India in these appeals. A detention order u/s 3(1) of the COFEPOSA Act was passed by the authorities on 13.09.1996 against the respondent. The respondent before surrendering filed a writ petition in the High Court on 23.10.1996 and obtained an interim stay of the proposed order, which had remained un-served. The learned Single Judge after haring the parties vacated the ad interim relief. Thereafter, the respondent went in appeal before the Division Bench and again obtained ad interim relief on 10.01.1997, which was extended from time to time. The writ appeal has not been still disposed of.

When the writ petition was filed, the respondent had not surrendered. Under these circumstances, 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."

8. So far as revocation of orders of detention passed in cases where duty payments have been made, in the additional affidavit filed on behalf of respondent No. 1, it has been stated that a Committee constituted by the Central Government was required to review detention orders issued prior to 01.01.1996 and which remained unexecuted till the time of consideration by the Committee. In the present case, the order of detention was issued in July, 1996, and Therefore, the notification of the Government of India relating to revocation of detention orders passed has no application. Learned counsel for the petitioner submitted that there was no rationale or logic for such cut off date, Therefore on that score also, the order of detention cannot be maintained. We find that there is no challenge whatsoever in the petition to the logic or otherwise of fixing the cut off date is a question which cannot be adjudicated in the present petition.

9. So far the material relating to smuggling of goods, surrender of license and/or payment of duty as claimed are concerned, it has to be noted that the grounds of detention are yet to be served. It is not known what are the grounds. Learned counsel for the petitioner submitted that we may call for the records and pursue them. We do not think, same is a permissible cause.

10. In view of the legal and factual positions highlighted above, this is not a fit case where any interference is called for, before execution of the order of detention. The petitioner, if so advised, may first surrender pursuant to the order of detention, and thereafter have his grievances examined on merits. Present petition is thoroughly misconceived and is dismissed.