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**(2016) 04 CAL CK 0077**  
**In the Calcutta High Court**  
**Case No : W.P. No. 20689 (W) of 2015**

Suresh Kumar Ray @ Raj Kumar Ray APPELLANT  
Vs  
Investigating Officer, Narcotics Control Bureau & Ors. RESPONDENT

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**Date of Decision :** 12-04-2016

**Acts Referred:**

Constitution of India, 1950 — Article 22(5)  
Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 —  
Section 3(1), 8

**Citation :** (2016) 3 CalHCN 583 : (2016) 3 CalLT 1

**Hon'ble Judges :** Mr. Dipankar Datta, J.

**Bench :** Single Bench

**Advocate :** Mr. Joydeep Kar, Mr. Debnath Ghosh and Ms. Monika Ghosh, Advocates, for the Appellant; Mr. Arabinda Sen, Advocate, Mr. Pranab Kumar Dutta and Mr. Tulsi Das Ray, Advocates, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Mr. Dipankar Datta, J.—The Joint Secretary to the Government of India specially empowered under sub-section (1) of Section 3 of the Prevention of Illicit Traffic in Narcotics Drugs and Psychotropic Substances Act, 1988 (hereafter the 1988 Act) issued a detention order dated 22.09.2014 directing that the petitioner be detained and kept in custody in Dum Dum Correctional Home, Kolkata with a view to preventing him from engaging in illicit trafficking of narcotic drugs & psychotropic substances. The said detention order could not be served on the petitioner. The Central Government had reasons to believe that the petitioner had absconded or concealed himself to evade service of the detention order and execution thereof. Consequently, an order dated 01.12.2014 was issued by the under-Secretary to the Government of India, Ministry of Finance (Department of Revenue), in exercise of power conferred by clause (b) of sub-section (1) of Section 8 of the 1988 Act, requiring the petitioner to appear before Shri Swarup Samanta, Investigating Officer, Narcotics Control Bureau, Kolkata Zonal Unit, 4/2, Karaya Road, 3rd Floor, Kolkata ? 700017 within 10 days of publication of

the order in the Official Gazette.

2. Section 3(3) of the 1988 Act mandates the authority passing an order of detention to communicate the order of detention to the detenu. It is clearly mentioned therein that for the purposes of clause (5) of Article 22 of the Constitution, the person detained in pursuance of a detention order shall be communicated the grounds on which the order has been made soon after this detention but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention.

3. Since the order of detention could not be executed and consequently the petitioner not detained, compliance of the provision of sub-section (3) of Section 3 did not arise.

4. The petitioner having successfully evaded execution of the order of detention, had an application dated 15.07.2015 under Section 6 of the Right to Information Act, 2005 filed by his constituted attorney seeking a copy of the detention order dated 22.09.2014. The application was not responded resulting in presentation of this writ petition dated 19.08.2015 seeking, inter alia, the following relief:

"(a) A writ of Mandamus do issue directing the respondent no.1 to 6 to forthwith forward a copy of the order being F. No.U- 11011/01/2014-PITNDPS dated 22.09.2014 to the petitioner with immediate effect.

(b) The respondent no.1 to 4 be restrained from taking any steps and/or further steps pursuant to the purported order being F. No.U-11011/01/2014-PITNDPS dated 22.09.2014 in any manner whatsoever;

(c) The respondent authorities be restrained from giving any effect or further effect to the notification no.1 to 4 in any manner whatsoever:

(d) A writ and/or writs in the nature of Certiorari do issue calling upon the respondents to forthwith transmit the record pertaining to this case so that the same can be rectified, corrected and modified so that conscionable justice can be done between the parties:"

5. The grounds urged in support of the relief claimed in the writ petition would reveal the petitioner's anxiety to have his liberty protected. It seems to be the petitioner's perception that without service of the order of detention, the respondents have no right to curtail his personal liberty and that would be in clear breach of Article 21 of the Constitution.

6. Obviously, the grounds urged not being sufficient to attract judicial intervention for protection of the petitioner's liberty, and Mr. Kar, learned senior advocate appearing for the petitioner having realised the same, raised a point which is not traceable in the writ petition. The said point is, however, traceable in the affidavit-in-reply of the petitioner (paragraph 2 thereof). In fine, it is the petitioner's claim that there is no live and/or proximate link between the

detention order and the antecedent activities and the order of detention is liable to be set aside on such ground. The other point, which is incidental to the first point, is the ground of delay in execution of the order of detention.

7. Mr. Kar has cited various authorities in support of his contention that the order of detention is liable to judicial scrutiny and on such scrutiny should be quashed. This Bench is, however, of the considered view, upon hearing Mr. Kar as well as Mr. Sen, learned advocate and Mr. Dutta, learned senior standing counsel representing the Union of India and the State of West Bengal respectively that no case for judicial intervention has been set up by the petitioner.

8. In its decision reported in 1992 Supp. (1) SCC 496 (Additional Secretary to the Government of India v. Smt. Alka Subhash Gadia), the Supreme Court had the occasion to observe that:

"30.\*\*\*\*\* 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 it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so.\*\*\*\*\*".

9. While considering the question as to whether the aforesaid five exceptions are exhaustive or not, the Supreme Court in its decision reported in (2000) 8 SCC 630 (Sayed Taher Bawamiya v. Joint Secretary to the Government of India) held in paragraph 7 that the contention of the five exceptions being not exhaustive, was not acceptable and that Alka Subhash Gadia (supra) "shows that it is only in those five types of instances that the Court may exercise its discretionary jurisdiction under Article 226 or Article 32 at the pre-execution stage".

10. However, subsequently, the Supreme Court in its decision reported in (2012) 7 SCC 533 (Subhash Popatlal Dave v. Union of India) held that an order of detention could be challenged on any ground beyond the five exceptions carved out in Alka Subhash Gadia (supra) at the pre-execution stage, since nowhere "it has been indicated that challenge to the detention order at the pre-execution stage, can be made only in the five exceptions referred to therein". The Bench, while disagreeing with the view expressed in Sayed Taher Bawamiya (supra), also held that "to confine the challenge to a detention at the pre-execution stage, only on the five exceptions mentioned therein, would amount to imposing restrictions on the powers of judicial review vested in the High Court and the Supreme Court under Articles 226 and 32 of the Constitution".

11. All these decisions referred to above have been rendered by Benches of co-equal strength. The views expressed in the last two decisions on consideration of the first decision are at variance. However, since the last decision has considered the second decision, this Bench would be bound by it and, therefore, allow a challenge to an order of detention on any legal and valid ground over and above the five exceptions.

12. Having regard to Section 3(3) of the 1988 Act, there is no question of making any direction as prayed for vide prayer clause (a) extracted supra. It is settled law that a writ court would not issue mandamus to a public authority to act contrary to law. Such prayer stands rejected.

13. Insofar as prayers (b) and (c) are concerned, i.e. the prayer to restrain the respondents from giving effect to the detention order, the same cannot sustain in view of the fact that the order of detention is neither a part of the record nor the subject matter of challenge in this writ petition. In the absence of the detention order being on record, the legality/propriety of the same cannot be examined in the light of the five exceptions in *Alka Subhas Gadia* (supra) and this Bench would be precluded to touch it having regard to the law laid down in the decision reported in (2001) 9 SCC 344 (*Hindustan Petroleum Corpn. Ltd. v. Sunita Mehra & Ors.*). In view thereof, no relief as claimed ought to be granted.

14. Although vide prayer clause (d) the petitioner has prayed for certiorari to certify and transmit the relevant records, no prayer for quashing of the detention order has been made. The prayer is inherently defective. However, since exercise of power by a writ court may not be fettered because of a defective prayer, prayer clause (d) needs consideration having regard to one other decision of the Supreme Court.

15. The petitioner is not entitled to succeed having regard to the law laid down in the decision reported in (2014) 1 SCC 280 (*Subhash Popatlal Dave v. Union of India & Anr.*). The Bench of three learned judges differed in their views. The majority view of two learned judges is important and needs to be considered. It would be profitable to set out below relevant passages from the majority view expressed by Hon<sup>ble</sup> Gyan Sudha Misra, J. (as Her Ladyship then was) and Hon<sup>ble</sup> J. Chelameswar, J. in their concurring opinions.

16. Hon<sup>ble</sup> Misra, J. held:

"16???????..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 detenu even at a later stage, it would be open for the proposed detenu 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 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 detenu 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.

20. It is also not possible to lose sight of the fact that if the petitioners and the appellants had preferred not to challenge the order of detention at the pre-execution stage or had not evaded arrest, the grounds of detention would have been served on them giving them a chance to challenge the same but if the petitioners and the appellants have taken recourse to the legal remedy to challenge the order of detention even before it was executed, it is not open for them to contend that it should be quashed because there is no live link between the existing/subsequent situation and the previous situation when the order of detention was passed overlooking that they succeeded in pre-empting the order by challenging it at the pre-execution stage never allowing the matter to proceed so as to examine the most crucial question whether there were sufficient material or grounds to pass the order of detention.

22. A fallout and consequence of the aforesaid discussion, therefore, in my view, is that the order of detention cannot be quashed and set aside merely due to long lapse of time on the specious plea that there is no live link between the order of detention and the subsequent situation. I am, therefore, of the considered opinion that the order of detention is not fit to be quashed merely due to long lapse of time specially when the orders of detention have been allowed to be challenged even at the pre-execution stage on any ground.

23. It is, therefore, legally appropriate to serve the order of detention on the proposed detenu leaving it open to them to challenge the same after the grounds are served on them so as to appreciate whether there had been sufficient materials before the detaining authorities to pass the orders of detention which were existing at the relevant time and approve or disapprove the same."

17. Hon<sup>ble</sup> Chelameswar, J. proceeded to observe as follows:

"46. Therefore, I am of the opinion that those who have evaded the process of law shall not be heard by this Court to say that their fundamental rights are in jeopardy. At least, in all those cases, where proceedings such as the one contemplated under Section 7 of the COFEPOSA Act were initiated consequent upon absconding of the proposed detenu, the challenge to the detention orders on the live nexus theory is impermissible. Permitting such an argument would amount to enabling the law-breaker to take advantage of his own conduct which is contrary to law.

47. ??????..Permitting an absconder to raise such questions at the pre-execution

stage, I am afraid would render the jurisdiction of this Court a heaven for characters of doubtful respect for law.

49. ????????We held that the grounds are not exhaustive. But that does not persuade me to hold that such a scrutiny ought to be undertaken with reference to the cases of those who evaded the process of law."

18. In view of the aforesaid authoritative pronouncement of the Supreme Court, even the ground raised by Mr. Kar based on snapping of live link and/or delay in execution of the order of detention is not an available ground on which judicial review would be permissible, should the detenu be found to be a person having scant respect for the rule of law and evading arrest thereby abusing the process of law.

19. Once it is concluded that the extraordinary writ power ought not to be exercised in favour of a party who evades the process of law, there is no question of calling upon the respondents to produce the order of detention.

20. There is no merit in the writ petition. It stands dismissed. There shall be no order as to costs.

21. Urgent photostat certified copy of this order, if applied for, be furnished to the parties as early as possible.