
(1996) 01 DEL CK 0055

In the Delhi High Court

Case No : Criminal Writ Appeal No. 642 of 1995

Sushma Didwania

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 01-01-1996

Acts Referred:

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

Citation : (1996) 1 AD 541 : (1996) CriLJ 2256 : (1996) 61 DLT 639 : (1996)
36 DRJ 309 : (1996) 3 RCR(Criminal) 237

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

Bench : Division Bench

Advocate : G. Ramaswamy and Mohit Mathur, for the Appellant;

Judgement

M. Jagannadha Rao, C.J.

(1) This writ petition is filed at the pre-detention stage by Smt. Sushma Didwania the wife of the proposed detenu, seeking issue of a Writ of Mandamus directing the respondents to revoke/rescind its order of detention dated 17.5.1995 said to be bearing F. No. 673/53/95, Cus Viii or to quash the same or to restrain detention pursuant to the said order. The order is said to have been passed u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called the COFEPOSA). The petitioner's husband's name is Shri Dindayal Didwania. The petitioner (i.e. the wife) has given her address as "presently r/o A-199, New Friends Colony, New Delhi."

(2) In fact, this is the second writ petition in regard to the same matter. Earlier, the petitioner filed Crl. W.P. No. 442/1995, and this Court passed an order dated 8.8.95 which (as per the amended order dated 17.8.95) read as follows:

"IN view of the submissions made by the learned counsel for the petitioner that their representation dated 17.7.95 made to the detaining authority has not been

disposed of so far, we hereby direct, the Secretary (Revenue), to dispose of the said representation expeditiously at an early date, within a period of two weeks from the date of receipt of this order. It will be open to the petitioner to canvass other grounds of detention at the appropriate stage."

(3) In other words, the petitioner's representation was directed to be disposed of.

(4) Thereafter, the said authority rejected the representation in its letter dated 31.8.95 and passed the following order:

"WITH reference to the representation dated 17.7.95 from Mrs. Sushma Didwania regarding revocation of detention order F. No. 673/53/95-Cus Viii dated 17.5.95, passed against her husband Shri Deendayal Didwania, it is hereby informed that contents of the representation including those relating to grounds of detention and allegations of abuse of power, malafide, etc. on the part of detaining authority and those of malice and bias on the part of the sponsoring authority have been looked into by the Central Government. On careful consideration of the representation, it has been found that submissions made in regard to the grounds of detention are without any merit. Allegations made against the detaining authority/sponsoring authority have also been found to be baseless. The detention order has been passed on definite and valid material. The central government has Therefore, rejected the representation dated 17.7.95.

SD/-

A.K. Sinha

Under Secy. to Govt. of India"

(5) The present writ petition has been filed on 10.11.95 again by the wife of the proposed detenu, seeking the reliefs already mentioned and furnishing her address as earlier mentioned.

(6) At the outset, it is to be noticed that no Explanation has been given anywhere in the writ petition as to why, when the petitioner's husband has not so far been arrested, the wife is filing this writ petition for issue of a writ of mandamus or certiorari. One obvious reason appears to us to be that if the petitioner's husband is to be the petitioner himself, he may have to disclose his address or place of residence. He cannot obviously give a false address. If he gives the correct address, there is danger of his being apprehended.

(7) Secondly, no details have been given as to how the petitioner secured the contents of the grounds of detention. In para 4 of the writ petition, it is merely stated that:

"A copy of the contents of the said grounds on which the order of detention is based, is annexed hereto as Annexure A".

(8) Petitioner does not state anywhere as to how and when the petitioner

obtained contents of the grounds of detention. A very peculiar attempt is made to give a colour of authenticity to the grounds as alleged. It is said that these grounds were attacked in petitioner's representation dated 17.7.1995 (which, in Crl. Wp 442/95 this Court directed the respondents to dispose of) and that in the order dated 31.8.95 rejecting the representation, referred to earlier, the correctness of the grounds as alleged by the petitioner was not disputed by the respondents and Therefore the contents of the grounds as filed in the present writ petition should be accepted .We have already extracted the order of the respondents dated 31.8.95. The words used in the above order "submissions made in regard to the grounds of detention are without any merit", cannot, in our opinion, be deemed to be an acceptance by the respondents that the grounds as filed by the petitioner are the grounds as contained in the orders proposed to be served. It is the "submissions" of the petitioner that are rejected. Those "submissions" were made by the petitioner as against grounds assumed by the petitioner to be the grounds of detention. If the submissions against the supposed grounds are rejected, it is not possible to draw an inference that the respondents accepted that the grounds as projected by the petitioner are the true grounds. After all, the petitioner "has been assuming the same grounds to be the grounds of detention both in this writ petition and in the representation. Neither there nor here has she given the source of her information. The petitioner by deliberately keeping silent on the question as to how she got at the contents of the grounds - that being information essentially in her possession - cannot resort to an inference of an implied admission by the respondents of the contents of the grounds.

(9) Learned counsel for the petitioner has placed strong reliance on certain observations of the Supreme Court in *Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another*, to say that in certain situations it is possible to approach Court at the pre-detention stage in four or five exceptional situations and to contend that the grounds as alleged in the writ petition are the true grounds. We may point out that it was observed in that case by the Supreme Court . that "in rare cases", where the "detenu", before being served with the detention order/grounds of detention, "learns of the detention order and the rounds on which it is made; and "satisfies the Court of their existence by proper affirmation," the Court would not decline to entertain the writ petition even at the pre-detention stage, of course, on the four or five very limited exceptional situations stated in the judgment. We shall come back to discuss these observations in greater detail presently. But before we do so, we shall also refer to the following further observations made by the Supreme Court, which observations act as a rider:

The court no doubt even in such cases is not obliged to interfere with the impugned order at that stage and may insist that the detenu should first submit to it. It will, however, depend on the facts of each case."

(10) The Court explained why:

"THE decisions and the orders cited above show that in some genuine cases, the Courts have exercised their powers at the pre-detention stage, though such cases have been rare. This only emphasises that fact that the Courts have power to interfere with the detention orders even at the pro-execution stage but they are not obliged to do so nor will it be proper for them to do so, save in exceptional cases. Much less Can a detenu claim such exercise of power as a matter of right. This discretion is of the Court and it has to be exercised judicially on well-settled principles."

(11) What do these observations mean? In our opinion they emphasise the distinction between the existence of power and the exercise of it. They mean that at the predetention stage, though the Court has power to interfere with a detention order or grounds of detention proposed to be served, and that too on the limited grounds mentioned in the said judgment, the Court is not "obliged" in every case to injunction the service of the detention order nor to quash the proposed order/proposed grounds. In other words, discretion could be exercised only if the proposed detenu was fair to the Court. We do not see any reason as to why Courts should extend this indulgence in a writ filed, not by the detenu, but by his wife or relative, who does not explain why the detenu himself is unable to file the writ petition seeking a writ of mandamus or certiorari. While a relative or wife can in certain circumstances certainly be permitted to seek the issuance of writ of habeas corpus for release of the person under detention, the position is not the same when mandamus or certiorari etc. are sought. Unless proper Explanation is given as to why the detenu is not filing the writ petition, a nondetenu cannot be permitted to seek relief in the Courts. Otherwise, it could, as in the present case, allow a detenu to keep his address or place of residence secret and permit his wife. or relative to espouse his cause. Even in cases where the wife/relative makes out a case for filing a writ petition for issue of a writ of mandamus or certiorari, questioning the grounds of detention, there must be facts .furnished to "satisfy the Court of their existence by proper affirmation" In other words, the wife/relative must mention acceptable facts to satisfy the Court as to how she or he was able to get at the contents of the of the order and grounds of detention. If there is no proper Explanation in that behalf - (there is none in the present case, not even a single sentence), - the Court will not exercise its discretion to interfere and issue a writ of mandamus, certiorari or other directions.

(12) It must also be noted that in Alka Subhash Gadia, the Supreme Court clearly laid down that at the pre- detention stage, the Court cannot issue any order to the detaining authority or other authorities to furnish to the detenu or his wife/relative or to his counsel, the order or the grounds of detention or the supporting documents. The order of the Bombay High Court giving such directions and following it up by a contempt notice, were set aside. The Supreme Court in fact started the discussion in Alka Subhash Gadia (see para 7) by stating that a situation has been reached in our country where "writ petitions are filed as a matter of course to challenge the detention orders and to obtain interim reliefs

restraining the authorities from enforcing them without surrendering to them, thus frustrating the orders and defeating the very purpose of the detention law." We are bound, Therefore, to lay emphasis not only that, at the predetention stage only four or five of the limited situations referred to in Alka Subhash Gadia are available but also that the wife/relative or even the detenu are required to satisfy the above conditions referred to in para 32 of Alka Subhash Gadia before he or she wants to persuade the Court to exercise its discretionary jurisdiction under Article 226 of the Constitution of India.

(13) We have already pointed out that in the present case the petition is filed not by the proposed detenu but by his wife. No Explanation whatsoever has been given as to why the proposed detenu (who is yet to be detained) is unable to swear to an affidavit or make the necessary affirmations on oath as contemplated in para 32 of the judgment in Alka Subhash Gadia. Obviously, the proposed detenu does not want to disclose his address or place of residence. The wife comes forward with no Explanation at all as to why she is coming before the Court to seek relief for her husband. She gives her address describing it cautiously as a "temporary" address. Secondly, there is not a whisper as to how the petitioner got at the contents of 11 pages of grounds of detention. There is no affirmation on oath as to the source of information at all. The facts relating to the acquisition of information are within the special knowledge of the petitioner and must have been squarely disclosed. The argument that in the order of rejection of the earlier representation by the wife the grounds are not disputed cannot be accepted, as already stated. When the petitioner has suppressed the facts within her special knowledge, such a contention cannot be permitted. A proper pleading must have been made and affirmed to satisfy the Court that the contents of the grounds as filed are the grounds which are proposed to be served.

(14) In this context, we do notice that in Subhash Chander Vs. Union of India and others, , a Division Bench of this Court observed that the jurisdiction under Article 226 is very wide and in matters relating to liberty, the Court could entertain writ petition without the petitioner surrendering. The learned Judges said so after referring to Alka Subhash Gadia's case. But the judgment of the Division Bench has since been overruled by a Full Bench of this Court in Mansukh Chhagan Lal Bhatt vs. Union of India (1994) (4) A D (Delhi) 609. The Full Bench was considering the question whether delay in passing a detention order or delay in execution of a detention order would come within the four or five exceptions mentioned in Alka Subhash Gadia. The Full Bench, however, held they did not. No doubt the Full Bench did not have occasion to explain para 32 of the judgment of the Supreme Court in Alka Subhash Gadia wherein the Supreme Court adverted to the difference between the existence of the power to interfere and conditions for its exercise. That occasion has now arisen in the present case. Jaspal Singh, J. in Sh. Inderjit Singh Chani vs. Union of India 1994 (1) A D (Delhi) 419 had occasion to advert to para 32 of Alka Subhash Gadia and the learned Judge posed the question:

"AND, which are those "settled principles" as far as the present matter is concerned?"

(15) And in our view, rightly answered the question as follows:

"THE principles clearly are those which have been enumerated by the Apex Court in Smt. Alka Subhash Gadia's case itself and which in the preceding paragraph I have taken care to reproduce verbatim ."

(16) We agree with the above observations. We have already given reasons as to why, in our opinion, this case is not one where discretion is to be exercised in favor of the petitioner. In that view, it is not permissible for us to examine the so called grounds filed in this petition and to see whether they come within the four or five exceptions mentioned in Alka Subhash Gadia's case.

(17) For the aforesaid reasons, we dismiss the writ petition.