

(1997) 08 AHC CK 0011
In the Allahabad High Court
Case No : C.M.W.P. No. 16187 of 1993

Virendra Kumar Rai

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 20-08-1997

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 68, 68H

Citation : (1997) 21 ACR 957

Hon'ble Judges : G.P. Mathur, J;D.C. Srivastava, J

Bench : Division Bench

Advocate : Daya Shanker Misra, for the Appellant; U.N. Sharma and S.C., for the Respondent

Judgement

G.P. Mathur, J.—These ten petitions have been filed for quashing the notices dated 2.9.1992 and 28.10.1992 issued to the Petitioners under Sections 68H and 68-I of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to as the Act) by the Competent Authority.

2. The controversy involved in all the writ petitions is identical and, therefore, they are being disposed of by a common order. Writ Petition No. 16187 of 1993, Virendra Kumar Rai v. Union of India and Anr., shall be treated as the leading case.

3. The facts leading to the passing of the impugned notices are that the Officers of Narcotics Control Bureau (for short N.C.B.) intercepted Shanti Swaroop and A.K. Chaudhary alias P.P. Singh on the night intervening 12th/ 13th August, 1990 at the Indira Gandhi International Airport. New Delhi when they reported for boarding a flight to Amsterdam. During the search of the baggage of P.P. Singh, 975 grams of heroin was found concealed in the false bottom of his shoulder bag. P.P. Singh was travelling in the false name of A.K. Chaudhary and the passport carried by him was in the name of Ashwani Kumar Chaudhary. On the basis of the statement and disclosures made by these persons, house of the Petitioner Virendra Kumar Rai was searched where 855.25 grams of foreign marked gold biscuits and some incriminating documents were recovered. On 4.12.1990 Joint

Secretary to the Government of India passed an order of detention u/s 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (for short P.I.T.N.D.P.S. Act) for detaining the Petitioner. The detention order along with the grounds of detention was served upon the Petitioner on 10.12.1990. Subsequently, the Competent Authority issued the impugned notices under Sections 68H and 68-I to Virendra Kumar Rai and his relatives.

4. The principal submission of Shri D.S. Mishra, learned Counsel for the Petitioners is that the detention order passed against Virendra Kumar Rai had been set aside by the High Court in a Habeas Corpus Petition filed by him and, therefore, the Competent Authority had no jurisdiction to issue the impugned notices. In order to appreciate the contention raised by the learned Counsel, it will be useful to refer to the relevant statutory provisions.

5. Chapter VA which deals with forfeiture of property derived from, or used in, illicit traffic was inserted by Act 2 of 1989 in Narcotic Drugs and Psychotropic Substances Act with effect from 29.5.1989. Section 68E provides for identifying illegally acquired property and Section 68F provides for seizure or freezing of illegally acquired property. The material part of Section 68A of the Act, which is relevant for the decision of the writ petitions, is reproduced below:

68A. (1) The provisions of this Chapter shall apply only to the persons specified in Sub-section (2).

(2) The persons referred to in Sub-section (1) are the following namely:

(a) every person who has been convicted of an offence punishable under this Act with imprisonment for a term of five years or more:

(b) ...

(c) every person in respect of whom an order of detention has been made under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (46 of 1988), or under the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (J & K Act XXIII of 1988): Provided that such order of detention has not been revoked on the report of the Advisory Board constituted under the said Acts or such order of detention has not been set aside by a court of competent jurisdiction;

(d) every person who is a relative of a person referred to in Clause (a) or Clause (b) or Clause (c):

(e) ...

(f) ...

6. Section 68D is the definition clause for the purposes of Chapter VA. Sub-section (b) defines "associate" and Sub-section (i) defines "relative". In view of Sub-section (1) of Section 68A the provisions of Chapter VA are applicable to every person who is a "relative" of a person in respect of whom an order of

detention has been made under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act provided such order of detention has not been revoked on the report of the Advisory Board or such order of detention has not been set aside by a court of competent jurisdiction.

7. The affidavits exchanged by the parties show that after the detention order had been passed against Virendra Kumar Rai on 4.12.1990 and had been served upon him on 10.12.1990, he filed Habeas Corpus Petition No. 1646 of 1991 in this Court. The petition was dismissed by a Full Bench on 21.2.1992 and the judgment is reported in Birendra Kumar Rai Vs. Union of India (UOI) and Others, . The Petitioner then filed special leave to appeal (Criminal) No. 1050 of 1992 in the Supreme Court which was also dismissed on 3.9.1992. The judgment is reported in Birendra Kumar Rai alias Virendra Kumar Rai Vs. Union of India (UOI) and Others, . After decision of the Supreme Court, Smt. Roopa Rai wife of Virendra Kumar Rai filed Habeas Corpus Petition No. 37067 of 1992 challenging the detention of her husband. The petition was heard by a Division Bench (S.K. Mookerji and A.S. Tripathi, JJ.) and was disposed of by a very brief order on 3.12.1992. In the second and third paragraphs of the judgment, the date of detention of the Petitioner and the fact about the filing of the earlier Habeas Corpus petition and dismissal of appeal by the Supreme Court have been mentioned. Thereafter, the judgment reads as follows:

...Today (3.12.1992) the Habeas Corpus writ petition has come before this Court for final hearing.

From the above facts, it is clear that the impugned detention order shall lapse on 10.12.1992 almost immediately after a week. In these circumstances, without expressing any opinion on the merit of the controversy raised in this case, we direct that the detenu Virendra Kumar Rai alias Birendra Rai be set at liberty and be released forthwith unless he is required in some other case.

This Habeas Corpus petition is accordingly disposed of without passing any order as to cost.

8. The proviso to Clause (c) of Sub-section (2) and Sub-section (1) of Section 68A of the Act show that the provisions of Chapter VA shall not apply if the order of detention passed under the P.I.T.N.D.P.S. Act has been revoked on the report of the Advisory Board or has been set aside by a court of competent jurisdiction. It is not the case of the Petitioner that the order of detention passed against him had been revoked on the report of the Advisory Board and, therefore, the only question which requires consideration is whether the same had been set aside by a court of competent jurisdiction. In our opinion, the order passed by this Court on 3.12.1992 in Habeas Corpus Petition No. 37067 of 1992 did not set aside the order of detention passed against the Petitioner. The language used in the judgment--"without expressing any opinion on the merit of the controversy raised"--is very material and it clearly shows that the order of detention had not been set aside by the court. The Petitioner was released only on the ground that

he was detained for a period of two years on 10.12.1990 which detention order would have come to an end on 10.12.1990 and as on the date of hearing of the petition, i.e., 3.12.1992, only a week was left before the expiry of the detention order, the court thought it proper to pass an order directing his release. The actual issuance of certified copy of the order and the communication thereof to the authorities concerned would have taken some further time. The order was not passed on the merits of the case but merely by way of grace and some sort of mercy was shown. It is similar to an order of premature release which is passed by the State Government directing release of a prisoner either by giving him remission in sentence or on some humanitarian ground. An order of premature release of a convict does not amount to setting aside of the conviction or even reduction of sentence imposed by the court in the trial. It is noteworthy that the detention order passed against the Petitioner as well as the period of detention had been upheld by a Full Bench of High Court and also by the Supreme Court. In the second paragraph of the judgment in the Habeas Corpus petition filed by the Petitioner's wife Smt. Roopa Rai, the Division Bench took notice of the aforesaid fact, and directed his release only on the ground that detention order would lapse after a week. There is not even a whisper in the judgment to show that the Bench found any infirmity in the detention order or any illegality in the continued detention of the Petitioner. We are, therefore, clearly of the opinion that by the judgment and order dated 3.12.92 the order of detention passed against the Petitioner had not been set aside. This being the legal position, the provisions of Chapter VA of the Act shall apply to the Petitioner and also to his relatives and associates in view of Sub-section (1) of Section 68A of the Act and the notices issued by the Competent Authority under Sections 68H and 68-I of the Act are perfectly valid and do not suffer from lack of jurisdiction.

9. Sri Misra has next urged that declaration made u/s 10 of P.I.T.N.D.P.S. Act on 8.1.1991 by the Additional Secretary to the Government of India was illegal and consequently, the detention of the Petitioner beyond a period of one year was invalid. It is urged that in view of the law laid down in *Union of India v. Haji Mastan* AIR 1984 SC 631, it is open to the Petitioner to challenge the validity of the detention order passed against him, even in the present proceedings wherein the notice issued u/s 68H of the Act has been challenged even though the period of detention has expired long back and the Petitioner has been set at liberty. The learned Counsel raised several contentions to assail the validity of the order dated 8.1.1991 passed u/s 10 of P.I.T.N.D.P.S. Act by the Additional Secretary to the Government of India, a copy of which has been filed as Annexure 5 to the writ petition. In our opinion, the contention raised by the learned Counsel cannot be accepted. The decision in the case of *Haji Mastan* (supra) was rendered by a bench of three Judges and subsequently, a bench of nine Judges in *Attorney General for India and Others Vs. Amratlal Prajivandas and Others*, has specifically overruled it. In paragraphs 40 and 41 of the reports, the court observed that it was not possible to agree with the reasonings of the decision in *Haji Mastan*'s case and it was held that a person who did not challenge (either by himself or

through his next friend) the order of detention under COFEPOSA or has challenged it but failed, cannot be allowed to challenge the order of detention when action is taken against him under SAFEMA. In the present case, the Petitioner challenged the order of detention but he failed both in the High Court and also in the Supreme Court and, therefore, he cannot be permitted to assail his detention in the present proceedings which have been initiated for forfeiture of property under Chapter VA of the Act.

10. There is another aspect of the matter. What the Petitioner seeks to challenge is the declaration made u/s 10(1) of the P.I.T.N.D.P.S. Act, the consequence whereof was that he was detained for a period of two years from the date of detention. If no declaration had been made u/s 10(1) or if the same was not in accordance with law and was illegal, the Petitioner could not have been detained beyond a period of one year. Section 68A(2)(c) of the Act does not lay down any period of detention. Its only requirement is that an order of detention should have been made under P.I.T.N.D.P.S. Act which should not have been revoked on the report of Advisory Board or should not have been set aside by a Court. What is relevant is the passing of a valid detention order and not its period. Therefore, even if the declaration u/s 10(1) was not in accordance with law, it would make no difference so far as present proceedings for forfeiture of property are concerned and the impugned notice would not be rendered illegal, as it could not affect the detention order but could only make a difference with regard to the period of detention.

11. Lastly, it is urged that the Petitioner was prosecuted in Criminal Case No. 195 of 1990 under Sections 21, 27A and 29 of the Act but the learned Additional Sessions Judge. Varanasi discharged him by his judgment and order dated 17.5.1996 and, therefore, the proceedings for forfeiture of the property are illegal. In this connection, it may be pointed out that the notice issued to the Petitioner is not based upon his conviction as contemplated by Clause (a) of Sub-section (2) but is based upon Clause (c) and, therefore, the order of discharge can have no bearing. That apart, the judgment and order of the learned Additional Sessions Judge has been challenged by the Union of India by filing Criminal Revision No. 1112 of 1996 which is pending in this Court. The submission made has, therefore, no substance. It was also faintly urged by the learned Counsel that u/s 68H, the Competent Authority had not recorded reasons for his belief that properties for which notices had been issued, had been illegally acquired. The reasons have not been recorded in the notice but they have been separately recorded and a copy of the same has been filed as Annexure 3 to the writ petition. We have gone through the reasons and we are satisfied that the Competent Authority has given valid reasons for his belief that the properties which are proposed to be forfeited are illegally acquired properties.

12. Clause (d) of Sub-section (2) of Section 68A provides that provisions of Chapter VA shall apply to every person who is a relative of a person referred to in Clause (a) or Clause (b) or Clause (c). Relative has been defined in Sub-

section (i) of Section 68B and it gives a very comprehensive list of persons. It is conceded by the learned Counsel for the Petitioner that other persons who have filed the writ petitions are relatives of Virendra Kumar Rai within the meaning of Clause (i) and, therefore, the Competent Authority was fully justified in issuing the notices to them.

13. No other point was urged.

14. For the reasons mentioned above, there is no merit in these petitions and they are all dismissed. Since further proceedings in pursuance of the notices have remained stayed for more than four years on account of filing of the writ petitions, each Petitioner shall pay Rs. 2,000 as cost to the Respondents. Stay orders are vacated.