Poonam Lata

Vs

M. L. Wadhawan and Others

Writ Petition (Criminal) No. 292 of 1986

(Ranganath Misra, A. P. Sen JJ)

22.04.1987

JUDGMENT

SEN J. -

1. By this petition under Article 32 of the Constitution, the petitioner Smt. Poonam Lata has asked for the issue of a writ of habeas corpus for the release of her husband, Shital Kumar, who has been detained by an order passed by the Additional Secretary to the Government of India, Ministry of Finance, Department of Revenue, dated February 28, 1986, made under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the Act"), on being satisfied that it was necessary to detain him "with a view to preventing him from dealing in smuggled goods".

2. Put very briefly, the essential facts are these. The Directorate of Enforcement, New Delhi, gathered intelligence over a period of time before making the impugned order of detention which revealed that the detenu was engaged in receiving smuggled gold from across the Indo-Nepal Border and was making payments in foreign currency and remitting the sale proceeds of such smuggled gold out of the country in the shape of U.S. dollars with the help of carries. On February 26, 1986, the Directorate received information that the three carriers, namely, Ram Deo Thakur, Shyam Thakur and Bhushan Thakur would be leaving under the assumed names of Dalip, Mukesh and Rajesh respectively by 154 Dn. Jayanti Janata Express leaving New Delhi Railway Station 6.45 p.m. Accordingly, the officers of the Delhi Zones of the Directorate mounted surveillance at Platform No. 5 of the Railway Station from which the train was to steam off. The said carriers were detrained and upon search of their baggage, the officers recovered $29,750 and Rs. 1500 from Ram Deo Thakur alias Dalip, $28,900 and Rs. 650 from Shyam Thakur alias Mukesh and $20,000 and Rs. 1000 from Bhushan Thakur alias Rajesh. The same were seized under section 110(1) of the Customs Act, 1962. The total value of the seized foreign currency was equivalent to Rs. 10,25000 in round figure. During interrogation by the officers under section 108 of the Customs Act, these persons stated that the seized foreign currency totaling $78,650 had been paid by the detenu towards the price of 48 gold biscuits of foreign origin brought by them from Darbhanga to New Delhi and made over to him and accordingly the detenu was taken into custody on February 27, 1986. He too made a statement under Section 108 of the Act confessing that he was dealing in smuggled gold bring across the Indo-Nepal border and has been remitting the price of such gold in U. S. dollars through different carriers.

3. On February, 28, 1986, the detenu was served with the impugned order of detention along with the grounds thereof and copies of the relevant documents relied upon in the grounds. On March 25, 1986, the detenu submitted a representation under section 8(b) of the Act and the detaining authority

by its order of April, 1986 rejected the same. On April 12, 1986, the detenue made a representation to the Advisory Board through the Superintendent of the Central Jail, Tihar. The representation together with the comments of the detaining authority and the relevant documents were forwarded by the Ministry of Finance, Department of Revenue to the Advisory Board. On the same day the detenu appears to have made a representation to the Central Government and it was received in the Ministry of Finance on April 24, 1986. The Minister of State for Finance rejected the said representation on April 29, 1986 and the detenu was informed about it the following day. The Advisory Board had its sittings on April 28 and 29, 1986, and came to the conclusion that there was sufficient cause for the detention and sent its report on May 8, 1986. The Minister considered the report of the Advisory Board and confirmed the order of detention on May 14, 1986 and the Central Government's order the confirmation was duly communicated on May 26, 1986.

4. The representation of the detenu was still there before the Advisory Board when the petitioner moved this Court under Article 32 of the Constitution on April 23, 1986. On April 29, 1986, notice was ordered by the Court returnable on May 3, 1986, and it directed that the matter may be placed before the Vacation Judge on May 15, 1986. On that date, the learned Vacation Judge made an order for the release of the detenu on parole in the following terms :

> "The detenue is released on parole until further orders on the condition that he will report to the Directorate of Revenue Intelligence, New Delhi, every day and the Directorate will be at liberty to ask him to explain his conduct during this time.
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> Reply affidavit may be filed within two weeks. The matter will be listed two weeks after reopening of the court after summer vacation.
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> In the meantime, the respondents will be at liberty to make an application for the revocation of the parole if any misconduct or any other activity comes to their notice which requires the revocation of the parole."

5. Notwithstanding the order of the learned Vacation Judge that the matter should be listed within two weeks reopening of the court after the long vacation - it should have been some time in early August of 1986 - the case was not listed till January 14, 1987. The respondents also took no steps to apply for early listing of the matter. On January 14, 1987, a prayer was made by learned counsel appearing for the Union of India seeking two weeks' time to file an additional affidavit and the case was ordered to be listed on March 3, 1987. During all these months, the detenue has been out of jail.

6. Indisputably, the detention was for one year. When the matter came up for hearing on 3rd of March, 1987, Shri Jethmalani, learned counsel for the petitioner, confined his submissions to only one aspect, namely, that the period of parole, i.e. From May 15, 1986 till February 28, 1987, could not be added to the period of detention specified in the impugned order under sub-section (1) of Section 3 of the Act and the period of one year from the date of detention having expired on February 26, 1987, the impugned order had lapsed and the detenu became entitled to be freed from the shackles of the order of detention. According to learned counsel, Section 10 of the Act prescribes the maximum period of detention to be one year or two years, as the case may be, from the date of detention or the specified period, whichever expires earlier. Admittedly, in respect of the detenu, no declaration under Section 9 of the Act has been made and, therefore, the maximum period of detention so far as he is concerned is one year and it has to be reckoned as prescribed under Section 10 of the Act. That section indicates not only the starting point but also the outer limit. In other words, the argument is that once the detenu is taken into custody under the Act

pursuant to an order of detention, the running of time would not be arrested merely because the court directs release of the detenu on parole.

7. Shri Jethmalani drew a distinction between 'bail' and 'parole'; he contended that preventive detention was not a sentence by way of punishment and, therefore, the concept of serving out which pertains to punitive jurisprudence cannot be imported into the realm of preventive detention. According to him, the grant of parole to a detenu amounts to a provisional release from confinement, yet the detenu continues to be under judicial detention; release from jail custody subject to restrictions imposed on free and unfettered movement transfers the detenu to judicial custody. Since there is no provision to authorise interruption of running of the period of detention, release on parole does not bring about any change in the situation. It has further been argued that when the court change in the situation. It has further been argued that when the court entertains a wit petition for grant of habeas corpus and issues a rule nisi, the detenu is deemed to have come into judicial custody and the effect of grant of parole does not terminate such custody but merely allows greater freedom of movement to the detenu. Conditions imposed on detenu during parole impinge upon his freedom and liberty; therefore, the period during which a detenu is released on parole cannot be taken as a period during which the detention is not operative. Shri Jethmalani placed reliance on the ratio of the Privy Council decision in Lala Jairam Das v. Emperor (AIR 1945 PC 94 : 49 CWN 477 : (1945) 2 MLJ 40 : 72 IA 120) to contend that but for the special provision contained in sub-section (3) of Section 426 of the old Code of Criminal Procedure, 1898 [corresponding to section 389(4) of the Code of 1973], the power of the court to grant bail to a convicted person or accused would not include the power to exclude the period of bail from the term of the sentence. The same principle ought to apply in the case of release of a detenu on bail or parole and the court, therefore, cannot be general principles add the period of bail or parole to the period of detention. In the absence of any provision regarding the grant of parole and the computation of the period thereof and in view of the special provisions contained regarding commencement of the computation of the period of detention of one year, the period of parole cannot be deducted while computing the period of one year of detention. Learned counsel also relied upon the direction made by a Bench of three judges in the case of Amritlal Channumal Jain v. State of Gujrat (Writ Petitions Nos. 1342-43, 1345-48 and 1362 of 1982 and 162 of 1983, decided on July 10, 1985) where this Court directed that the period during which a detenu was on parole should be taken into account while calculating the total period of detention. According to learned counsel the direction in Amritlal Channumal Jain case (Write Petitions Nos. 1342-43, 1345-48 and 1362 of 1982 and 162 of 1983, decided on July 10, 1985) was given after a Bench of two judges in Harish Mackijani v. State of U. P. held on June 11, 1985 (Sic Harish Makhila v. State of U. P., decided on February 11, 1985, ((1987) 3 SCC 432). That the period of parole cannot be counted towards the period of detention. Shri Jethmalani has submitted that in view of the direction of the larger Bench of this Court, the ratio laid down in Amritlal Channumal Jain case (Writ Petitions Nos. 1342-43, 1345-48 and 1362 of 1982 and 162 of 1983, decided on July 10, 1985) has to prevail and must be taken as binding on us.

8. There is no denying the fact that preventive detention is not punishment and the concept of serving out a sentence would not legitimately be within the purview of preventive detention. The grant of parole is essentially an executive function and instances of release of detenu on parole were literally unknown until this Court and some of the High Courts in India in recent years made orders of release on parole on humanitarian considerations. Historically, 'parole' is a concept known only to military law and denotes release of a prisoner of war on promise to return. Parole has become an integral part of the English and American systems of criminal justice intertwined with the evolution of changing attitude of the society towards crime and criminals. As a consequence of the

introduction of parole into the penal system, all fixed-term sentences of imprisonment of above 18 months are subject to release on licence, that is, parole after a third of the period of sentence has been served. In those countries, parole is taken as an act of grace and not as an act of grace and not as a matter of right and the convict prisoner may be released on condition that he abides by the promise. It is a provisional release from confinement but is deemed to be a part of the imprisonment. Release on parole is a wing of the reformative process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is thus a grant of partial liberty or lessening of restrictions to a convict prisoner, but release on parole does not change the status of the prisoner. Rules are framed providing supervision by parole authorities of the convicts released on parole and in case of failure to perform the promise, the convict released on parole is directed to surrender to custody. (See The Oxford Companion to Law, edited by Walker, 1980 edition, page 931; Black's Law Dictionary, 5th edition, page 1006, Jowitt's Dictionary of English Law, 2nd edition, volume 2, page 1320; Kenny's Outlines of Criminal Law, 17th edition., pages 574-576; The English Sentencing System by Sir Rupert Cross at pages 31-34, 87 et. seq.; American Jurisprudence, 2nd edition, volume 59, pages 53-61; Corpus Juris Secundum, volume 67; Probation and Parole, Legal and Social Dimensions by Louis P. Carney). It follows from these authorities that parole is the release of a very long term prisoner from a penal or correctional institution after he has served a part of his sentence under the continuous custody of the State and under conditions that permit his incarceration in the event of misbehaviour.

9. There is a abundance of authority that High Courts in exercise of their jurisdiction under article 226 of the Constitution do not release a detenu on bail or parole. There is no reason why a different view should be taken in regard to exercise of jurisdiction under article 32 of the Constitution particularly when the power to grant relief to a detenu in such proceedings is exercisable on very narrow and limited grounds. In State of Bihar v. Rambalak Singh ((1966) 3 SCR 344 : AIR 1966 SC 1441 : 1966 Cri LJ 1076) a Constitution Bench laid down that the release of a detenu placed under detention under rule 30 of the Defence of India Rules, 1962, on bail pending the hearing of a petition for grant of a writ of habeas corpus was an improper exercise of jurisdiction. It was observed in that case that if the High Court was of the view that prima facie the impugned order of detention was patently illegal in that there was a serious defect in the order of detention which would justify the release of the detenu, the proper and more sensible and reasonable course would invariably be to expedite the hearing of the writ petition and deal with the merits without any delay rather than direct release of the detenu on bail. Again, in State of U. P. v. Jairam ((1982) 1 SCC 176 : 1982 SCC (Cri) 149), a three Judge Bench, speaking through Chandrachud C.J., referred to Rambalak Singh's case ((1966) 3 SCR 344 : AIR 1966 SC 1441 : 1966 Cri LJ 1076) and set aside the order passed by the learned Single Judge of the High Court admitting the detenu to bail on the ground that it was an improper exercise of jurisdiction. As to grant of parole, it is worthy of note that in none of the cases this Court made a direction under Article 32 of the Constitution for grant of parole to the detenu but left it to the executive to consider whether it should make an order in terms of the relevant provision for temporary release of the person detained under Section 12 of the COFEPOSA, in the facts and circumstances of a particular case. In Samir Chatterjee v. State of West Bengal ((1975) 1 SCC 801 : 1975 SCC (Cri) 340), the court set aside the order of the Calcutta High Court releasing on parole a person detained under Section 3(1) of the Maintenance of Internal Security Act, 1971 and unequivocally viewed with disfavour the observations made by Krishan Iyer, J. in Babulal v. State of West Bengal ((1975) 1 SCC 311 : 1975 SCC (Cri) 138 : (1975) 3 SCR 193 : AIR 1975 SC 606 : 1975 Cri LJ 585) to the effect : (SCC p. 313, para 4)

While discharging the rule issued and dismissing the petition, we wish to emphasize that Section 15 is often lost sight of by the Government is such situations, as long-term preventive detention can be

self defeating or criminal counter-productive. Section 15 reads :

> 15. Temporary release of persons detained -
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> (1) The appropriate Government may, at any time, direct that any person detained in pursuance of a detention order may be released for any specified period either without conditions specified in the direction as that person accepts, at any time, cancel his release.
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> (2) In directing the release of any person under sub-section (1), the appropriate Government may require him to enter into a bond with or without sureties for the due observance of the conditions specified in the direction.
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> (3) Any person released under sub-section (1) shall surrender himself at the time and place, and to the authority, specified in the order directing his release or cancelling his release, as the case may be.
>
> (4) If any person fails without sufficient cause to surrender himself in the manner specified in sub-section (3), he shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.
>
> (5) If any person released under sub-section (1) fails to fulfil any of the conditions imposed upon him under the said sub-section or in the bond entered into by him, shall be declared to be forfeited and any person bound thereby shall be liable to pay the penalty thereof.

We consider that it is fair that persons kept incarcerated and embittered without trial should be given some chance to reform themselves by reasonable recourse to the parole power under section 15. Calculated risks, by release for short periods may, perhaps, be a social gain, the beneficent jurisdiction being wisely exercised.

10. Alagiriswamy J. speaking for the Court, observed in no uncertain terms : [SCC pp. 809-10, SCC (Cri) 348-49, Para 13]

We fail to see that these observations lay down any principle of law. Section 15 merely confers a power on the Government. The power and duty of this Court is to decide cases coming before it according to law. In so doing it may take various consideration into account. But to advise the Government as to how they should exercise their functions or powers conferred on them but statue is not one of the Court's functions. Where the Court is able to give effect to its views in the form of a valid and binding order, that is a different matter. Furthermore, Section 15 deals with release on parole and there is nothing to show that the petitioner applied for to be released on parole for any specific purpose. As far as we are able to see, release on parole is made only on the request of the party and for a specific purpose.

11. The innovative view expressed by Krishna Iyer, J. in Anil Dey v. State of West Bengal ((1974) 4 SCC 514 : 1974 SCC (Cri) 550), which he tried to reiterate in Golden Hussain v. Commissioner of Police, Calcutta ((1974) 4 SCC 530 : 1974 SCC (Cri) 566), and in Babulal case ((1975) 1 SCC 311 : 1975 SCC (Cri) 138 : (1975) 3 SCR 193 : AIR 1975 SC 606 : 1975 Cri LJ 585), therefore, no longer holds the field; and rightly so, because the Court cannot usurp the functions of the Government.

12. Section 10 of the Act provides that the maximum period for which any person may be detained in pursuance of an order of detention to which the provisions of section 9 do not apply shall be for a period of one year from the date of detention or the specified period whichever expires earlier. The key to the interpretation of Section 10 of the Act is in the words 'may be detained'. The subsequent words 'from the date of detention' which follow the words 'maximum period of one year' merely define the starting point from which the maximum period of detention of one year is to be reckoned in a case not falling under Section 9. There is no justifiable reason why the word 'detain' should not receive its plain and natural meaning. According to the Shorter Oxford English Dictionary, Volume 1, page 531, the word 'detain' means "to keep in confinement or custody". Webster's Comprehensive Dictionary, International Edition, at page 349, gives the meaning as "to hold in custody". The purpose and object of section 10 is to prescribe a maximum period for which a person against whom a detention order under the Act is made may be held in actual custody pursuant to the said order. It would not be violated if a person against whom an order of detention is passed is held in actual custody in jail for the period prescribed by the section. The period during which the detenu is on parole cannot be said to be a period during which he has been held in custody pursuant to the order of his detention, for, in such a case he was not in actual custody. The order of detention prescribes the place where the detenu is to be detained. Parole brings him out of confinement from that place. Whatever may be the terms and conditions imposed for grant of parole, detention as contemplated by the Act is interrupted when release on parole is obtained. The position would be well met by an appropriate answer to the question "how long has the detenu been in actual custody pursuant to the order ?" According to its plain construction, the purpose and object of Section 10 is to prescribe not only the maximum period but also the method by which the period is to be computed. The computation has to commence from the date on which the detenu is taken into actual custody but if it is interrupted by an order of parole, the detention would not continue when parole operates and until the detenu is put back into custody. The running of the period recommences then and a total period of one year has to be counted by putting the different periods of actual detention together. We see no force in Shri Jethmalani's submission that the period during which the detenu was on parole has to be taken into consideration in computing the maximum period of detention authorised by Section 10 of the Act.

13. It is pertinent to observe that the court has no power to substitute the period of detention either by abridging or enlarging it. The only power that is available to the court is to quash the order in case it is found to be illegal. That being so, it would not be open to the court to reduce the period of detention by admitting the detenu on parole. What in a given situation should be the sufficient period for a person to be detained for the purposes of the Act is one for the subjective satisfaction of the detaining authority. Preventive detention jurisprudence in this regard is very different from regular conviction followed by sentence that an accused is to suffer. Whether it be under Article 226 or Article 32 of the Constitution, the court would, therefore, have no jurisdiction either under the Act or under the general principles of law or in exercise of extraordinary jurisdiction to deal with the duration of the period of detention.

14. Parliament has authorised the detention of persons under the COFEPOSA to serve two purposes :

> "(1) To prevent the person concerned from engaging himself in an activity prejudicial to the conservation of foreign exchange and also preventing him from smuggling activities and thereby to render him immobile for the period considered necessary by the detaining authority so that during that period the society is protected from such prejudicial activities on the part of the detenu. And

> (2) In order to break the links between the person so engaged and the source of such activity and from his associates engaged in that activity or to break the continuity of such prejudicial activities so that it would become difficult, if not impossible, for him to resume the activities.

Release of a detenu on parole after an order of detention has been made and the detenu lodged in custody for achieving one or other of the aforesaid legislative objects is thus contrary to the purpose of the statue. There is a statutory prohibition against release of a detenu during the period of detention in sub-section (6) of Section 12 of the Act. That sub-section which was inserted by Amending Act 39 of 1975 with effect from July 1, 1975, reads :

> Notwithstanding anything contained in any other law and save as otherwise provided in this section, no person against whom a detention order made under this Act is in force shall be released whether on bail or bail bond or otherwise.

Sub-section (6) puts a statutory bar to the release of the detenu during the period of detention in a manner otherwise than the one provided in Section 12. Section 12 authorises either the Central Government or the State Government to temporarily release the detenu on such terms and conditions as the appropriate Government considers necessary to impose. The scheme of Section 12, unless release by the appropriate Government is taken to be one of parole, keeps parole away from the subject of preventive detention. At any rate, it is the appropriate Government and not the court which deals with a case of temporary release of the detenu. Since the Act authorises the appropriate Government to make an order of temporary release, invariably, the detenu seeking to have the benefit of temporary relief must go to the appropriate Government first. It may be that in given case the court may be required to consider the propriety of an adverse order by the Government in exercise of the jurisdiction under Section 12 of the Act. On the principle that exercise of administrative jurisdiction is open to judicial review by the superior court, the High Court under Article 226 or this Court under Article 32 may be called upon in a suitable case to examine the legality and propriety of the governmental action. There is no scope for entertaining an application for parole by the court straightaway. The legislative scheme, keeping the purpose of the statute and the manner of its fulfilment provided thereunder, would not justify entertaining of an application for release of a detenu on parole. Since in our view release on parole is not a matter of judicial determination, apparently no provision as contained in the Code of Criminal Procedure relating to the computation of the period of bail was thought necessary in the Act. But we would like to point out to the Government the desirability of inserting a provision like sub-section (4) of section 389 of the Code of Criminal Procedure, 1973 that when an action is taken under Section 12 of the Act and the appropriate Government makes a temporary release order, the period of such temporary release, whether on bail or parole, has to be excluded in computing the period of detention. Either the statute or the rules made thereunder should provide for this eventuality.

15. In the premises, it must accordingly be held that the period of parole has to be excluded in reckoning the period of detention under sub-section (1) of Section 3 of the Act. We find it difficult from the observations made by the three Judge Bench in Amritlal Channumal Jain case (Writ Petitions Nos. 1342-43, 1345-48 and 1362 of 1982 and 162 of 1983, decided on July 10, 1985) to infer a direction by this Court that the period of parole shall not be added to the period of detention. The words used 'shall be taken into account' are susceptible of an interpretation to the contrary. We find that an order made by a Bench of two Judges of this Court in Harish Mackijani's case (supra) unequivocally laid down that the period of parole cannot be counted towards the period of detention. This accords with the view taken by this Court in Bench of two Judges in State of Gujarat

v. Adam Kasam Bhaya ((1982) 1 SCR 740 : (1981) 4 SCC 216 : 1981 SCC (Cri) 823 : AIR 1981 SC 2005) and State of Gujarat v. Ismail Juma ((1982) 1 SCR 1014 : (1981) 4 SCC 609 : 1982 SCC (Cri) 1 : AIR 1982 SC 683). In view of these authorities which appear to be in consonance with the object and purpose of the Act and the statutory provisions and also having regard to the fact that the direction made in Amritlal Channumal Jain case (Writ Petitions Nos. 1342-43, 1345-48 and 1362 of 1982 and 162 of 1983, decided on July 10, 1985) is capable of another construction as well, we do not find Shri Jethmalani's contention on this score as acceptable.

16. For these reasons, the only contention advanced by Shri Jethmalani in the course of the hearing, namely, that the period of parole from May 15, 1986 to February 28, 1987 could not be added to the maximum period of detention of the detenu Shital Kumar for one year as specified in the impugned order of detention passed under sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, must fail. The writ petition is accordingly dismissed. There shall be no order as to costs. We direct that the petitioner shall surrender to custody to undergo the remaining period of detention. We give the detenu ten days' time to comply with this direction failing which a non-bailable warrant for his arrest shall issue.

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