Poonam Lata

Vs

M. L. Wadhawan and Another

Writ Petition (Criminal) No. 408 of 1987

(A. P. Sen, Ranganath Misra JJ)

07.08.1987

JUDGMENT

RANGANATH MISRA J. -

1. Petitioner's husband, Shital Kumar, was 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 in exercise of powers vested under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'the COFEPOSA'). The petitioner made an application to this Court under Article 32 in Writ Petition (Cri.) No. 292 of 1986 challenging that order of detention. In the earlier writ application on May 15, 1986, the learned Vacation Judge of this Court made an order for the release of the detenu on parole on the following terms :

The detenu is released on parole until further orders on the condition that he will report to the Directorate of Revenue, new Delhi, every day and the Directorate will be at liberty to direct him to explain his conduct during this time ..... 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.

On March 3, 1987, the writ petition was listed for hearing before the Bench consisting of both of us. In the writ petition, several contentions had been raised but Mr. Jethmalani, learned counsel for the petitioner confined his submissions to only one aspect namely, that the period of parole, that is, from May 15, 1986, till February 22, 1987, should not be added to the period of detention specified in the impugned order under Section 3 (1) of the COFEPOSA and the period of one year from the date of detention having expired on February 20, 1987, the impugned order has lapsed and the detenu became entitled to be freed from the impugned order of detention. That point was examined at length and by the judgment of this Court delivered on April 22, 1987 in Poonam Lata v. M. L. Wadhawan (AIR 1987 SC 1383 : (1987) 3 SCC 347 : 1987 SCC (Cri) 506 : 1987 Cri LJ 1130) the writ petition was dismissed by saying : [SCC p. 359, SCC (Cri) p. 518, para 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.

In paragraph 14 of the judgment, it was further observed : [SCC p. 360, SCC (Cri) p. 519, para 16]

For these reasons, the only contention advanced by Shri Jethmalani in 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 small be no order as to costs. We direct that the petitioner shall surrender to custody to undergo remaining period of detention. We give the detenu 10 days' time to company with this direction failing which a non-bailable warrant for his arrest shall issue.

2. This writ petition was thereafter filed on April 27, 1987. In paragraph 2 of the petition, with reference to the earlier writ petition it was averred :

> Arguments were advanced by the counsel for the petitioner only to the one point and it was clearly stated by the senior counsel, Shri Ram Jethmalani, who appeared in the hearing that he had a strong, almost unanswerable case on merits but he was very keen to have the question of exclusion of the parole period decided since it arises squarely in this case. It would have been a breach of professional duty on the part of the counsel not to raise those points against the validity of the detention order on which the court had prima facie issued notice. Shri Ram Jethmalani, senior counsel, did not give up the other points in the said writ petition. However, the Hon'ble Court has dismissed the said writ petition on April 22, 1987. Though the Hon'ble Court has rightly observed that the only point which was argued was on the question of the period of parole it was submitted that had the Hon'ble Court indicated that the petitioner's submission on this score did not find favour of the Hon'ble Court, counsel would have proceeded to argue the case.

We are surprised that in the writ petition which has been settled by Mr. Jethmalani, such allegations have been made. It is common experience that when those several contentions are advanced in the pleadings, counsel chooses to press one or some out of the several contentions at the time of the hearing. The judgment indicated that only one point was argued. The averments in paragraph 2 of the present writ petition accepts that position. It, therefore, follows that Mr. Jethmalani made submissions confined to one contention - a contention which had not been raised in the earlier writ petition but arose out of the proceedings in court therein - relating to the effect of release on parole. The fact that Mr. Jethmalani raised only one submission having been accepted, it is a matter of no consequence as to whether giving up the other pleas raised in the writ petition amounted to breach of professional duty on the part of Mr. Jethmalani. The fact remains that only one contention had been raised. There is absolutely no basis for the allegation in paragraph 2 of the writ petition that if the court had indicated to Mr. Jethmalani in course of arguments that the submission on this limited point did not find favour with the court he would have proceeded to argue the other points. That certainly was an unusual expectation. It was open to Mr. Jethmalani to make full submission on all aspects arising in the writ petition. That having not been done it was improper on the part of Mr. Jethmalani to raise such allegations in paragraph 2, as have been extracted above. We are surprised that Mr. Jethmalani who was aware of the proceedings in the court and did not dispute the fact that he had confined his arguments to one point settled the writ petition as senior counsel with the allegations quoted above in paragraph 2 of the writ petition. This writ petition was fixed for final hearing on July 31, 1987, as suggested by Mr. Jethmalani, but at the hearing he did not appear and Mr. Garg, senior counsel, appeared for the petitioner. When we pointed out to Mr. Garg about the incorrectness of the averments and that the allegations contained in paragraph 2 are without foundation against the Bench hearing the matter, he pleaded ignorance and stated that it was for Mr. Jethmalani to answer. We do not want to say anything more but we think it appropriate to point out that Mr. Jethmalani on the earlier occasion had argued the writ petition in his own way and had

raised only one contention which was dealt with by the judgment in the writ petition.

3. Mr. Garg, learned counsel for the petitioner has raised two points before us for consideration : (1) the detenu had been prejudiced in making an effective representation to the Board against his detention in the absence of the summons issued under Section 108 of the Customs Act to him. In spite of demand, that document had been supplied and (2) the petitioner was already in custody at the time the order of detention was served and since the detenu was already in custody the order of detention is liable to be quashed. In ground 4 of the writ petition, it has been alleged :

> That the most material document under the circumstances turns out to be the summons which was served on the detenu being the summons referred to in the letter dated March 21, 1986 Annexure E above mentioned. The detenu by his advocate's letter of April 12, 1986, has called upon respondent 1 to supply him with a copy of the summons because he intends to use the said summons while presenting his case to the advisory board. True copy is annexed hereto and marked as Annexure F. The request contained in the said letter has not been complied with.

In paragraph 4(iv) of the counter-affidavit, it has been stated :

> In reply to para 4, it is submitted that the summons as required by the detenu's advocate in the letter dated April 12, 1986 were not supplied as there were no written summons served on the petitioner. I say that after the completion of the search of the search of the residential premises of the petitioner on February 27, 1986 the petitioner was taken by DRI officers. As the petitioner happened to be in the presence of the empowered officers of DRI he was accordingly told that his presence was required for giving evidence and the petitioner accompanied the DRI officers on his free will. No written summons were, therefore, served on the petitioner ....

Section 108 (1) of the Customs Act provides :

> Any gazetted officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods.

No specific provision has been made for summons in the Customs Act and, therefore, the provisions of Section 61 of the Code of Criminal Procedure will be applicable. That section provides :

> Every summons issued by a court under this Code shall be in writing, in duplicate, singed by the presiding officer of such court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the court.

4. On April 12, 1986, counsel for the petitioner wrote a letter to the detaining authority wherein it was stated :

> ... I have to further request you to supply me with a copy of the summons said to have been served on client on or about February 27, 1986. The DRI has not yet supplied to my client the documents as stated in your abovementioned rejection letter.

In view of the position case of the respondents that there was no summons and the detenu had been orally directed to attend the office by the authorities concerned, we think that it would not be proper to hold that summons under Section 108 of the Customs Act was in existence. Once the summons is not in existence, there is no foundation in the submission that there is prejudice to the detenu on account of the authority's withholding the summons. The first contention fails.

5. Admittedly the petitioner was taken into custody around 2.00 p.m. on February 27, 1986, in course of investigation of the case. He was produced before the Judicial Magistrate and an order was made requiring him to be produced next day in the court. Paragraphs 7 and 8 of the grounds served on the petitioner run thus :

> (7) I have carefully gone through the facts and circumstances of the case, relevant documents and also the statements of various persons in the subject case. I have also seen and gone through the various applications moved in the court of the ACMM, New Delhi and orders passed thereon.
>
> (8) In view of the facts mentioned hereinabove, I have no hesitation in arriving at the conclusion that you have been dealing in smuggled goods otherwise than engaging in transporting or concealing or keeping smuggled goods. Even though the investigations in the subject case is in progress, prosecution and adjudication proceedings under the Customs Act, 1962, are likely to be initiated against you, I am satisfied that you should be detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, with a view to preventing you from dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods.

In paragraph 7 of the counter-affidavit, it has been stated :

> ... The petitioner, as already stated, was summoned after the search of his residential premises on February 27, 1987 and his statement recorded by the competent officer of DRI. The petitioner was arrested at 2.00 p.m. on February 27, 1986 and was produced at the residence of ACMM, New Delhi on February 27, 1986 at about 8.00 p.m. ...

In paragraph 9 of the said affidavit, it is further alleged that :

> Shri Shital Kumar was arrested at 1400 hrs. of February 27, 1986 and produced before the ACMM arount 2000 hrs. at his residence the same day. Shri Shital Kumar was then remanded to judicial custody till February 28, 1986 by the said magistrate.

The order of detention is dated February 28, 1986. It was addressed to the detenu at his residential address at Delhi and not to the jail authorities for service on the detenu.

6. From the facts and circumstances emerging in this case it is clear that the detenu had been called by the Customs Authorities for investigation. A statement had been made by him under Section 108 of the Customs Act and thereafter he was taken into custody and produced before the Additional Chief Metropolitan Magistrate who remanded him to custody and directed him to be produced on the following day in the court. By the time the order of detention came to be made the petitioner was in jail for at the most one day. Charge-sheet had not been submitted against him in the criminal case and he had been remanded to the judicial custody on February 27, 1986 with the direction to be

produced before the Metropolitan Magistrate on February 28, 1986.

7. Now it has to be seen if on these facts the order of detention would become vitiated. Strong reliance was placed by Mr. Garg on a two Judge judgment of this Court in Binod Singh v. District Magistrate, Dhanbad ((1986) 4 SCC 416 : 1986 SCC (Cri) 490). Paragraph 3 of the Judgment indicates the facts as follows : [SCC p. 418-19, SCC (Cri) pp. 492-93, para 3]

The petitioner/appellant was in detention when the petitioner/appellant was served with the order of detention. There were criminal cases against the petitioner. There was a murder case in respect of Crime No. 331 of 1985. In the said case investigation was in progress and the defence of the petitioner in the murder case was that he was falsely implicated and was not at all concerned with the murder. When the order was passed, the petitioner had not surrendered but when the order was served, the petitioner had already surrendered in respect of the criminal charge against him. At the relevant time, the petitioner was undertrial in the said criminal case.

On such facts, it was the contention of the petitioner therein that the order of preventive detention could only be justified against a person in detention if the detaining authority was satisfied that his release from detention was imminent and the order of detention was necessary for putting him back in jail. This Court therein pointed out : [SCC p. 420, SCC (Cri) p. 494, para 5]

The principles applicable in these types of preventive detention cases have been discussed in the decisions of Suraj Pal Sahu v. State of Maharashtra ((1986) 4 SCC 378 : 1986 SCC (Cri) 452) and Raj Kumar Singh v. State of Bihar ((1986) 4 SCC 407 : 1986 SCC (Cri) 481). Judged on the basis of the said principles, there is no ground for interference with the order of detention as passed. It, however, appears that after the order of detention was passed and before the actual service of the order of detention, the petitioner was taken into custody. From the affidavit of the District Magistrate it does not appear that either the prospect of immediate release of the detenu or other factors which can justify the detention of a person in detention were properly considered in the light of the principles noted in the aforesaid decision and especially in the decisions in Rameshwar Shaw v. District Magistrate, Burdwan ((1964) 4 SCR 921, 929 : AIR 1964 SC 334 : 1964 (1) Cri LJ 257) and Ramesh Yadav v. District Magistrate, Etah ((1985) 4 SCC 232 : 1985 SCC (Cri) 514). .....

> A Constitution Bench of this Court in Rameshwar Shaw v. District Magistrate, Burdwan ((1964) 4 SCR 921, 929 : AIR 1964 SC 334 : 1964 (1) Cri LJ 257) held as follows :

As an abstract proposition of law, there may not be any doubt that Section 3(1)(a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail, but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail.

The selfsame question was examined in Kartic Chandra Guha v. State of West Bengal ((1975) 3 SCC 490 : 1975 SCC (Cri) 82) where a three Judge Bench of this Court observed : [SCC p. 491, SCC (Cri) p. 83, para 4]

It is true that he had been held in custody in connection with the offences under the Arms Act which are non-bailable offences, but even so, it was open to the trying magistrate to release the petitioner on bail. The District Magistrate, on information received by him, thought that the petitioner was

likely to be released on bail in which case having regard to his past activities it was open to the District Magistrate to come to the reasonable conclusion that having regard to the desperate nature of the activities of the petitioner, his enlargement on bail would be no deterrent to his desperate activity. Hence the District Magistrate was entitled to pass the order of detention if that was necessary to prevent the petitioner from acting in a manner prejudicial to the maintenance of public order.

That very question again came before a two Judge Bench in Dr. Ramakrishna Rawat v. District Magistrate Jabalpur ((1975) 4 SCC 164 : 1975 SCC (Cri) 457) where it was observed : [SCC p. 169, SCC (Cri) p. 462, para 13]

In the case in hand, as already noticed, the petitioner was in jail custody in proceedings under Section 151 CrPC. That custody was obviously of a short duration. That mere service of the detention order on the petitioner in jail would not therefore invalidate the order. On the basis of the antecedent activities of the petitioner in the proximate past, the detaining authority could reasonably reach its subjective satisfaction about his tendency or inclination to act in a manner prejudicial to the maintenance of public order after his release on the termination of the security proceedings under the Code.

In Vijay Kumar v. State of Jammu and Kashmir ((1982) 2 SCC 43 : 1982 SCC (Cri) 348) a two Judge Bench of this Court pointed out : [SCC p. 48, SCC (Cri) p. 352, para 10]

If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. Maybe, in a given case there yes may be the need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made.

That vexed question came before a two Judge Bench of this Court in the case of Merugu Satyanarayana v. State of Andhra Pradesh ((1982) 3 SCC 301 : 1983 SCC (Cri) 18) wherein it was observed : [SCC pp. 305-06, SCC (Cri) p. 22, para 11]

Now, if the man is already detained, can a detaining authority be said to have been subjectively satisfied that a preventive detention order be made ?

The court then referred to the Constitution bench decision in Rameshwar Shaw case ((1964) 4 SCR 921, 929 : AIR 1964 SC 334 : 1964 (1) Cri LJ 257) and left it as a matter to be decided in every individual case on its own facts. The court also indicated that it was not a matter of jurisdiction but had to be decided on the facts of each case.

8. We may now refer to a recent judgment of a three Judge Bench in the case of Suraj Pal Sahu v. State of Maharashtra ((1986) 4 SCC 378 : 1986 SCC (Cri) 452). Mukharji, J. who delivered the judgment in Binod Singh case ((1986) 4 SCC 416 : 1986 SCC (Cri) 490) on which Mr. Garg has relied has also delivered the judgment in this case. Therein it was said : [SCC p. 391, SCC (Cri) p. 465, para 28]

In Ramesh Yadav v. District Magistrate, Etah ((1985) 4 SCC 232 : 1985 SCC (Cri) 514) it was held that merely on the ground that an accused in detention as an undertrial prisoner was likely to get bail, an order of detention under the National Security Act should not ordinarily be passed. If the

apprehension of the detaining authority was true, court observed, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. We respectfully agree with this conclusion. But this principle will have to be judged and applied in the facts and circumstances of each case. Where a person accused of certain offences whereunder he is undergoing trial or has been acquitted, the appeal is pending and in respect of which he may be granted bail may not in all circumstances entitle an authority to direct preventive detention and the principle enunciated by the aforesaid decision must apply but where the offences in respect of which the detenu is accused are so interlinked an continuous in character and are of such nature that these affect continuous maintenance of essential supplies and thereby jeopardise the security of the State, then subject to other conditions being fulfilled, a man being in detention would not detract from the order being passed for preventive detention.

9. It is thus clear that the fact that the detenu is already in detention does not take away the jurisdiction of the detaining authority in making an order of preventive detention. What is necessary in a case of that type is to satisfy the court when detention is challenged on that ground that the detaining authority was aware of the fact that the detenu was already in custody and yet he was subjectively satisfied that his order of detention became necessary. In the facts of the present case, there is sufficient material to show that the detaining authority was aware of the fact that the petitioner was in custody when the order was made, yet he was satisfied that his preventive detention was necessary. We do not think there is any force in this contention of Mr. Garg. Since both the contentions canvassed are rejected, the writ petition is dismissed.

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