

Sunil Fulchand Shah

Vs

Union of India and Others

Writ Petition (Criminal) No. 248 of 1988

(CJI R. S. Pathak, L. M. Sharma, M. N. Venkatachali JJ )

01.05.1989

ORDER

PATHAK, C. J. (for himself and Venkatachaliah, J.) –

This writ petition under Article 32 of the Constitution and the special leave petition under Article 136 of the Constitution arises out of proceedings for preventive detention taken under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. One of the substantial points which arises in these cases is whether the period of detention is a fixed period running from the date of specified in the detention order and ending with expiry of that period or the period is automatically extended by any period of parole granted to the detenu. In case where the High Court allows a habeas corpus petition and directs the detenu to be released and in consequence the detenu is set free, and thereafter an appeal filed in this Court results in the setting aside of the order of the High Court, is it open to this Court to direct the arrest and detention of the detenu if meanwhile the original period of detention intended in the detention order has expired ? Four decisions of this Court have been placed before us in support of the contention that the period of detention intended by the detention order is not a fixed period but can be correspondingly extended if the detenu absconds before he can be apprehended and detained or the period of detention is interrupted by an erroneous judgment of a High Court and the detenu is set free. Those cases are State of Gujarat v. Adam Kasam Bhaya ((1981) 4 SCC 216 : 1981 SCC (Cri) 823 : (1982) 1 SCR 740), State of Gujarat v. Ismail Juma ((1981) 4 SCC 609 : 1982 SCC (Cri) 1 : (1982) 1 SCR 1014), Smt. Poonam Lata v. M. L. Wadhawan ((1987) 3 SCC 347 : 1987 SCC (Cri) 506 : AIR 1987 SC 1383) and Pushpadevi M. Jatia v. M. L. Wadhawan ((1987) 3 SCC 367 : 1987 SCC (Cri) 526 : AIR 1987 SC 1748). We find some difficulty in accepting the view taken by the learned Judges of this Court who decided those cases. It seems to us prima facie that what is important is that we are concerned with cases of preventive detention, cases where the detaining authority is required to apply its mind and decide whether, and if so for how long, a person should be detained. It is preventive detention and not punitive detention. Preventive detention invariably runs from the specified in the detention order. In the case of punitive detention, no date is ordinarily specified from which the detention will commence, and all that is mentioned is the period of detention. In case of preventive detention the detaining authority applies its subjective judgment to the material before it and determines what should be the period for which the detenu should be detained, that is to say, the period during which he should be denied his liberty in order to prevent him from engaging in mischief. It seems to us prima facie that one possible view can be that if parole is granted the period should be counted within the total period of detention and not outside it. As regards the problem raised by the release of a detenu pursuant to an erroneous decision of the High Court, and the subsequent reversal of that decision by this Court, the remedy probably lies in the enactment of legislation analogous to Section 5(1) and Section 15(4) of the Administration of

Justice Act, 1960 in the United Kingdom. The question is an important one affecting as it does on the one hand the need for effective measures of preventive detention and on the other the liberty of the subject and his right to freedom from detention beyond the period intended by the statute. As the matter is of great public importance, and most cases of preventive detention are bound to be affected, we refer these cases to a bench of five Hon'ble Judges for reconsideration of the law on the point.

SHARMA, J. –

Although I agree with the view expressed in the State of Gujarat v. Adam Kasam Bhaya ((1981) 4 SCC 216 : 1981 SCC (Cri) 823 : (1982) 1 SCR 740) and the other cases mentioned in the order of the learned Chief Justice, I agree that in view of the great public importance of the point involved, these cases may be heard by a Bench of five Hon'ble Judges.

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