Kimti Lal Sethi

Vs

Lt. Governor of National Capital Territory of Delhi and Others

Writ Petition (Crl.) No. 417 of 1995

(CJI A. M. Ahmadi, S. C. Sen, B. N. Kirpal JJ)

10.05.1996

ORDER

KIRPAL, J. -

1. Leave granted in SLP (Crl.) No. 2467 of 1995.

2. This judgment will dispose of the writ petition filed under Article 32 of the Constitution of India challenging an order of detention dated 25-4-1995 passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'the COFEPOSA Act') and the appeal arising by way of special leave challenging a direction given by the Delhi High Court in its judgment dated 23-11-1994 which in effect, permits the respondents to pass a fresh order of detention.

3. The petitioner was intercepted at the Indira Gandhi Airport by the Customs Officers on 31-3-1992 when he was departing for Dubai. As a result of his personal search, foreign currency valued at Rs. 1,78,286 was allegedly recovered from his possession. At that time, he made a confessional statement under Section 108 of the Customs Act, 1962 which, according to the petitioner, was obtained under coercion.

4. The petitioner was arrested and was produced before the Additional Chief Metropolitan Magistrate, New Delhi who remanded him to judicial custody. On 16-4-1992, the said Additional Chief Metropolitan Magistrate granted the petitioner bail upon his furnishing a personal bail bond in the sum of Rs. 50,000 with one surety in the like amount. The petitioner moved an application for furnishing cash security for the purpose of his bail and the same was granted. While on bail, an application was filed on 7-1-1994 by the petitioner before the Additional Chief Metropolitan Magistrate, New Delhi to the effect that due to certain circumstances, he had to withdraw the cash security and that upon such withdrawal, he was prepared to surrender. On the application being allowed, the petitioner surrendered and he was taken into judicial custody.

5. On 17-9-1992, an order of detention was passed against the petitioner under Section 3(1) of the COFEPOSA Act for a period of one year. This order was served on the petitioner on 18-1-1994 when he was still in judicial custody. He, thereupon sent a representation on 18-2-1994 to the detaining authority through the Jail Superintendent, but the same was rejected on 2-3-1994.

6. After the service of the aforesaid detention order, on 1-8-1994, the Additional Chief Metropolitan Magistrate, New Delhi discharged the petitioner from the prosecution proceedings. This order was passed because the prosecution had not been able to produce any witness in spite of several

opportunities having been granted to it.

7. The petitioner, thereafter filed Criminal Writ Petition No. 547 of 1994 challenging his detention under COFEPOSA Act pursuant to the order dated 17-9-1992. One of the contentions raised before the High Court was that before the detention order was served, the detaining authority did not consider the fact that the petitioner was not on bail and that he was in judicial custody. Under the circumstances, it was contended that the detaining authority should have considered whether there was reasonable likelihood of the petitioner being released by the criminal court and if so, whether he would involve himself in prejudicial activities under the COFEPOSA Act once again. As the detaining authority did not go into these circumstances, the petitioner contended that the detention order must be quashed. The High Court, vide its judgment dated 23-11-1994 came to the conclusion that the facts in the case were similar to the facts in the case of Binod Singh v. Distt. Magistrate, [(1986) 4 SCC 41 : 1986 SCC (Cri) 490] and as the detention order had been served when the detenu was still in custody, the said detention order dated 17-10-1992 passed against the petitioner was quashed. The following observations made by this Court in Binod Singh case [(1986) 4 SCC 41 : 1986 SCC (Cri) 490] were relied upon by the High Court : (SCC p. 421, para 9)

> "The order of detention, therefore, is set aside. The writ petition and the appeal are allowed to the extent indicated above. This, however, will not affect detenu's detention under the criminal cases. If, however, the detenu is released on bail in the aforesaid criminal cases, the matter of service of the detention order under the Act on the aforesaid materials may be reconsidered by the appropriate authority in accordance with the law. There is no statement in the petition that the detenu is on bail. There will, therefore, be no orders for release of the detenu."

8. Following the aforesaid observations, the High Court, while quashing the order of detention, observed as follows :

> "In view of the aforesaid observations of the Supreme Court, we would also say that it is open to the detaining authority to take into consideration the fact that the detenu has since been discharged by an order of the criminal court on 1-8-1994 and also that he is no longer under detention in that criminal case and on that basis decide whether it is necessary to detain the petitioner under Section 3(1) of the COFEPOSA Act."

9. It is the aforesaid observation of the High Court which, in effect, has been understood by the respondents as amounting to permitting the passing of another detention order on the same facts.

10. On 25-4-1994, a second detention order under Section 3(1) of the COFEPOSA Act was passed against the petitioner proposing to detain him for a period of one month and 25 days on the basis of the same incident which had resulted in the passing of the first detention order. Though the said detention order had not been served, the petitioner had challenged the same in the present Writ Petition (Crl.) No. 417 of 1995.

11. This fresh detention order has been challenged in the writ petition filed in this Court while the special leave petition has been filed challenging the above-noted observation of the High Court which has been relied upon by the respondent for passing a fresh detention order.

12. The only contention raised by the learned counsel for the petitioner is that the first detention order having been quashed by the High Court vide its judgment dated 23-11-1994, the High Court

could not inter alia have permitted the passing of a fresh detention order on the same facts and, in any case, the second detention order dated 25-4-1995 is a nullity in law and cannot be sustained.

13. For the view which we are taking, it is not necessary to consider whether the aforesaid observation was justified or not because the second detention order which has been challenged in the writ petition in this Court is liable to be quashed for the under-mentioned reasons.

14. The first detention order was passed in September 1992 requiring the petitioner to be detained for a period of one year. He was detained on 18-1-1994 but after the said detention order was quashed, he was released on 23-11-1994. The petitioner had, by then, been in detention for a period of more than 10 months. The passing of the new detention order on 25-4-1995 only for a period of one month and twenty-five days clearly shows that the intention was to see that the petitioner remained under preventive detention for a total period of one year, which was a period in respect of which the first detention order had been passed. Therefore, there is merit in the contention of the counsel for the petitioner that in the present case the fresh order of detention appears to be punitive in nature and has not been passed in order to prevent the petitioner from indulging in prejudicial activities in future. Where the detention takes the character of punitive rather than preventive action, the said order can be quashed as was done in the case of Harnek Singh v. State of Punjab, (1982) 1 SCC 11 : 1982 SCC (Cri) 12 : AIR 1982 SC 682. In the present case also, the passing of a fresh detention order on 25-4-1995, relating to the incident which had occurred in 1992, and for a period of only one month and twenty-five days clearly appears to be punitive in name and is, therefore, vitiated.

15. For the aforesaid reason, the writ petition filed by the petitioner is allowed and the second order of detention is quashed. In this view of the matter the criminal appeal is dismissed as having become infructuous.