

SUPREME COURT OF INDIA

Sayed Taher Bawamiya

Vs.

Joint Secretary To The Govt. Of India

(B.N. Kirpal, A.P. Mishra and Ruma Pal JJ.)

03.08.2000

ORDER

1. Leave granted.

2. An order of detention dated 29-6-1984 bearing No. 673/137/84-Customs (A) was passed against Sayed Mohammad Arif Bawamiya, the brother of the petitioner under Section 3 of the COFEPOSA Act. Though over 16 years have elapsed, this order has not been served on the proposed detenu because according to the petitioner he left India on 25-5-1976 and has not returned since that day.

3. A notice under Section 6(1) of the SAFEMA Act was issued on 21-10-1986 to the proposed detenu, the fear of losing the property led the petitioner to filing a writ petition in the High Court seeking to challenge the detention order dated 29-6-1984 issued against his brother.

4. By the impugned judgment the High Court applied the ratio of the decision of this Court in the case of Addl. Secy, to the Govt. of India v. Alka Subhash Gadia and came to the conclusion that in exercise of his discretion under Article 226 of the Constitution it would not be appropriate to entertain the writ petition inasmuch as the proposed detenu had not surrendered and the detention order had not been served on him.

5. Against the said judgment an appeal by special leave petition has been filed. An independent writ petition under Article 32 in Writ Petition No. 1351 of 1991 challenging the aforesaid detention order dated 29-6-1984, has also been filed. This judgment will dispose of both the writ petition as well as the said appeal.

6. this Court in Alka Subhash Gadia case was also concerned with a matter where the detention order had not been served but the High Court had entertained the petition under Article 226 of the Constitution. this Court held that equitable jurisdiction under Article 226 and Article 32 which is discretionary in nature would not be exercised in a case where the proposed detenu successfully evades the service of the order. The Court, however, noted that the courts have the necessary power in appropriate cases to interfere with the detention order at the pre-execution stage but the scope for interference is very limited. It was held that the courts will interfere at the pre-execution stage with the detention orders only after they are prima facie satisfied:

(i) that the impugned order is not passed under the Act under which it is purported to have been passed,

- (ii) that it is sought to be executed against a wrong person,
- (iii) that it is passed for a wrong purpose,
- (iv) that it is passed on vague, extraneous and irrelevant grounds, or
- (v) that the authority which passed it had no authority to do so.

7. As we see it, the present case does not fall under any of the aforesaid five exceptions for the court to interfere. It was contended that these exceptions are not exhaustive. We are unable to agree with, this submission. Alka Subhash Gadia case shows that it is only in these five types of instances that the court may exercise its discretionary jurisdiction under Article 226 or Article 32 at the pre-execution stage. The petitioner had sought to contend that the order which was passed was vague, extraneous and on irrelevant grounds but there is no material for making such an averment for the simple reason that the order of detention and the grounds on which the said order is passed has not been placed on record inasmuch as the order has not yet been executed. The petitioner does not have a copy of the same and therefore it is not open to the petitioner to contend that the non-existent order was passed on vague, extraneous or on irrelevant grounds.

8. For the aforesaid reasons, we do not find any merit in this case. While upholding the judgment of the Bombay High Court, the appeal and the writ petition are dismissed.

9. We make it clear that we are not deciding the issue raised by the respondent that prior to the issuance of the notice under the SAFEMA Act, a writ petition had been filed on behalf of the proposed detenu in the Bombay High Court and the same was withdrawn and therefore the present proceedings in any case are barred by res judicata.