SUPREME COURT OF INDIA

Union of India

Vs.

Paul Manickam

Crl.A.No.21 of 2002

(Doraiswamy Raju and A. Pasayat, JJ.)

13.10.2003

JUDGEMENT

ARIJIT PASAYAT, J.:-

1. An order of detention under Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short the 'Act') was passed on 26-4-2000 by the Secretary to Government of Tamil Nadu, Public (Law and Order) Department. As a consequence of such mittimus, Smt. Ratnamala (hereinafter referred to as 'the detenue') was interned in special Jail for Women, Vellore. In the grounds of detention it was, inter alia, stated that on 26-2-2000 she was found to be in possession of huge quantity of contraband articles. On her personal search as well as search of her baggages it was found that she was carrying gold in addition to the other articles like cellular phones etc. without any valid permission or documents for importation of goods and she was attempting to smuggle these articles by concealing them in emergency lamp and by wearing crude gold on her person and there was no declaration made. The articles were seized under the provision of Customs Act, 1962 (in short the 'Customs Act') read with Foreign Trade (Development and Regulation) Act, 1992. The detenue made voluntary statements on 26-2-2000 which were recorded under Section 108 of the Customs Act. The order of detention was passed purportedly with an idea of preventing her from carrying out smuggling activities in future. On 11-5-2000 the

respondent who is the detenue's father addressed a representation on behalf of his daughter to the President of India. Four days thereafter i.e. on 15-5-2000 a habeas corpus petition was filed before the Madras High Court challenging the detention order. When the matter was listed on 8-6-2000 notice was issued. It had been indicated in the writ petition filed by the respondent that a representation by registered post was sent to the State of Tamil Nadu and another was sent to the Union of India represented by Secretary to Government, Ministry of Finance (Department of Revenue) by speed post. They were the two respondents in the writ petition. A grievance was made in the writ petition that the said respondents were duty bound to explain to the Court that the representation had been considered without any delay and in accordance with the constitutional requirements. It was also indicated that though in the representation a request was made to supply various documents and details, nothing had in fact been furnished. The delay and the failure indicated above constituted violation of constitutional safeguards. It was brought to the notice of the High Court by the respondents before it that there was no representation made as claimed when the matter was taken up on 28-9-2000. Only three grounds were urged by the present respondent before the High Court. It was first contended that there was no material to support the conclusion that the detenue is a remand prisoner as was contended by the present appellant. Secondly, the materials/documents furnished to the detenue were illegible and this disabled the detenue from making an effective representation resulting in violation of the protection guaranteed under Article 22(5) of the Constitution of India, 1950 (in short 'the Constitution'). Finally, it was contended that the documents supplied were illegible and, therefore, the detention order was vitiated and there was no necessity of going into the question whether the documents were relied upon or material documents or otherwise. The High Court did not find any merit in the aforesaid three contentions and since no other point was pressed, the writ petition was dismissed. An application for review was filed on 8-12-2000. Notice was issued in the review application. For the first time it was stated by the respondent in the review petition that in fact no representation was filed before the concerned State Government i.e. State of Tamil Nadu or the Union of India. In fact the representation was made to the President of India. The Court considered the periods spent from the date the representation reached the President's Secretariat till its final disposal, and held that there was an unexplained delay from the stage of dispatch from the President's Secretariat till it reached the Government of Tamil Nadu and the Union of India. This according to the High Court constituted violation of the imperative requirement of dealing with the representation with utmost expedition. Accordingly, the order of detention was quashed.

2. In the present appeal the Union of India has raised several issues which need to be carefully considered. Firstly it is submitted that in the order (grounds) of detention it was specifically indicated to the detenu that she had a right to make a representation to the detaining authority/State Government and also to the Government of India, if she so desired, in writing against the order under which she was kept in detention. It was also indicated that in case she wanted to make a representation the same was to be addressed to the Secretary to the Government of Tamil Nadu, Public (Law and Order) Department, Secretariat, Chennai or to the Government of India, Ministry of Finance, Department of Revenue, (COFEPOSA Unit), Central Economic Intelligence Bureau, New Delhi, as the case may be, and it should be forwarded through Superintendent of Prison, Special Prison for Women, Vellore in which she was confined.

3. Strangely, the representation was not made to the authorities clearly indicated in the order

(grounds) of detention. For the first time in review petition a stand was taken that representation was filed before the President of India, though in the writ petition it was stated representations were made to the Government of Tamil Nadu as well as to the Union of India. This clearly constituted a suppression of fact and the High Court was not approached with clean hands and fraud was practised. Secondly, it was not open to the High Court to substitute its original order by a fresh order which is impermissible in a review application particularly on such grounds. Thirdly, the High Court having accepted that there was no delay in dealing with the representation by the State Government and the Union of India after it reached them, it ought not to have held that there was unexplained delay in dealing with the representation. A person should not be allowed to take advantage of the concern shown by the Courts to protect personal liberty resorting to dubious and fraudulent methods to gain undeserved benefits by such manipulations. He should not be permitted to gain any advantage from such acts. It was further submitted that renegades who disturb peace and tranquillity of citizens are like termites which corrode financial stability of the country with vicious designs file petitions full of falsehood and at times approach this Court under Art. 32 even without approaching the jurisdictional High Court. It was in essence submitted that prerogative writs should not be issued in such cases to encourage the deceiters from gaining any advantage.

4. In response, learned counsel for the respondent submitted that the detenue was really arrested on 27-2-2000 and the order of detention was passed after two months i.e. on 26-4-2000 and the High Court's order on review is dated 13-2-2001. Therefore, the detenue has undergone the detention for about the whole period. On that score alone, the appeal has practically be come infructuous and no decision should be rendered on academic issues. It was submitted with emphasis that representation to the President of India was sufficient and merely because the representation was not sent to any of the indicated authorities that cannot alter the position in law.

5. It was further submitted that detenue was already in custody and on presumption and surmises that she may be released on bail the order of detention was passed without proper application of mind regarding her incarceration in custody.

6. Though technically speaking the detenue has suffered detention for almost the while period for which she was directed to detained, yet considering the several important issues which have been raised by the parties we think it appropriate to deal with them.

7. The writ of habeas corpus called by Blackstone as the great and efficacious writ in all manner of illegal confinement, really represents another aspect of due process of law. As early as 1839 it was proclaimed by Lord Denman that it had been for ages effectual to an extent never known in any other country. Lord Halsbury L.C. stated in Cox v. Hakes (1890) 15 AC 506, that the right to an instant determination as to the lawfulness of an existing imprisonment is the substantial right made available by this writ. Article 22 of the Constitution confers four fundamental rights on every person, except in two cases mentioned in clause (3), as essential requirements and safeguards to be followed when it is necessary to deprive any person, for any cause whatsoever and for, however,

brief a period of his personal liberty by placing him under arrest or keeping him in detention. Those are (i) to be informed , as soon as may be, of grounds of such arrest; (ii) not to be denied the right to consult and to be defended by a legal practitioner of his choice; (iii) to be produced before the nearest Magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate, (iv) not to be detained in custody beyond the said period of twenty four hours without the authority of a Magistrate. Clauses (1) and (2) contain the guarantee of the four fundamental rights enumerated above, clause (3) contains two exceptions and provides that the constitutional guarantees do not apply to (a) enemy aliens, and (b) persons arrested or detained under any law providing for preventive detention. Clauses (4) and (7) are devoted to laying down certain fundamental principles as to preventive detention and guaranteeing certain fundamental rights to persons who are arrested under any law for preventive detention. The fundamental rights guaranteed by Clauses (4) to (7) to persons detained under any law for preventive detention relate to the maximum period of detention, the provision of an Advisory Board to consider and report on the sufficiency of the cause for detention and the right to have the earliest opportunity of making a representation , against the order of detention. Preventive detention is an anticipatory measure and does not relate to an offence while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the Executive is convinced on the materials available and placed before it that such detention is necessary in order to prevent the person detained from acting in a matter prejudicial to certain objects which are specified by the law. The action of Executive in detaining a person being only precautionary, the matter has necessarily to be left to the discretion of the Executive Authority. It is not practicable to lay down objective rules of conduct, the failure to conform to which alone should lead to detention. In case of preventive detention of a citizen, Art. 22(5) of the Constitution enjoins the obligation of the appropriate Government of the Detaining Authority to accord the detenu the earliest opportunity to make a representation and to consider that representation speedily. The right to make a representation implies right of making an effective representation. It is the constitutional right of the detenu to get all the ground on which the order has been made. As has been said by Benjamin Cardozo, "A Constitution states or ought to state not rules for the passing hour but the principles for an expanding future". The concept of grounds used in the context of detention in Art. 22(5) has to receive an interpretation which will keep it meaningful in tune with contemporary notions of the realities of the society, and the purposes of the Act in the light of concepts of liberty; and fundamental freedoms. While the expression "grounds" for that matter includes not only conclusions of fact but also all the basic facts on which those conclusions were founded; they are different from subsidiary facts or further particulars of the basic facts. The detenu is entitled to obtain particulars as to the grounds which will enable him to make an effective representation against the order of detention.

8. It has been said that the history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is stressed in the words of Lord Denning as follows:

"Whenever one of the King's Judges takes his seat, there is one application which by long tradition has priority over all other, Counsel has but to say; My Lord, I have an application which concerns

the liberty of the subject and forthwith the Judge will put all other matter aside and hear it. It may be an application for a writ of habeas corpus, or an application for bail but whatever form it takes, it is heard first." (Freedom under the Law, Hamlyn Lectures, 1949).

9. The constitutional philosophy of personal liberty is an idealistic view, the curtailments of liberty for reasons 'of States' security, public order, disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions. In Smt. Ichhu Devi v. Union of India (AIR 1980 SC 1983), this judicial commitment was highlighted in the following words :

"The Court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade".

"This is an area where the Court has been most strict and scrupulous in ensuring observance with the requirement of the law and even where a requirement of the law is breached in the slightest measure, the Court has not hesitated to strike down the order of detention."

In Vijay Narain Singh v. State of Bihar (AIR 1984 SC 1334), Justice Chinnappa Reddy in his concurring majority view said : 1984 Cri LJ 909

"..... I do not agree with the view that those who are responsible for the national security or for the maintenance of public order must be the sole Judges of what the national security or public requires. It is too perilous a proposition. Our Constitution does not give as carte blanche to any organ of the State to be the sole arbiter in such matter. ....."

[Page 1336 (of AIR)]

"..... There are two sentinels, one at either end. The legislature is required to mark the law circumscribing the limits within which persons may be preventively detained and providing for safeguards prescribed by the Constitution and the Courts are required to examine, when demanded, whether there has been any excessive detention, that is whether the limits set by the Constitution and the legislature have been transgressed ....."

In Hem Lall Bhandari v. State of Sikkim (AIR 1987 SC 762 at page 766) it was observed : 1987 Cri LJ 718, para 12

"It is not permissible in matters relating to the personal liberty and freedom of a citizen to take either a liberal or a generous view of the lapses on the part of the officers ....."

10. So far as the pivotal question whether there was delay in disposal of the representation is concerned, same has to be considered in the background of Art. 22(5) of the Constitution. A constitutional protection is given to every detenue which mandates the grant of liberty to the detenue to make a representation against detention, as imperated in Art. 22(5) of the Constitution. It also imperates the authority to whom the representation is addressed to deal with the same with utmost expedition. The representation is to be considered in its right perspective keeping in view the fact that the detention of the detenue is based on subjective satisfaction of the authority concerned, and infringement of the constitutional right conferred under Art. 22(5) invalidates the detention order. Personal liberty protected under Art. 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. The stringency and concern of the judicial vigilance that is needed was aptly described in the following words in Thomas Pacham Dales' case : (1881 (6) QBD 376:

"Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the Court will not allow the imprisonment to continue."

11. One of the points raised by the respondent was that detenue being in custody, the anticipated and apprehended acts were practical impossibilities.

12. So far as this question relating to procedure to be adopted in case the detenue is already in custody is concerned, the matter has been dealt with in several cases. Where detention orders are passed in relation to persons who are already in Jail under some other laws, the detaining authorities should apply their mind and show their awareness in this regard in the grounds of detention, the chances of release of such persons on bail. The necessity of keeping such persons in detention under the preventive detention laws has to be clearly indicated. Subsisting custody the detenue by itself does not invalidate an order of his preventive detention, and decision in this regard must depend on the facts of the particular case. Preventive detention being necessary to prevent the detenue from acting in any manner prejudicial to the security of the State or to the maintenance of public order or economic stability, etc. ordinarily, it is not needed when detenue is already in custody. The detaining authority must show its awareness to the fact of subsisting custody of the detenue and take that factor into account while making the order. If the detaining authority is reasonably satisfied on

cogent materials that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging such, prejudicial activities the detention order can be validly made. Where the detention order in respect of a person already in custody does not indicate that the detenue was likely to be released on bail, the order would be vitiated. (See N. Meera Rani v. Govt. of Tamil Nadu, (AIR 1989 SC 2027); Dharmendra Suganchand v. Union India, AIR 1990 SC 1196). The point was gone into detail in Kamarunnissa v. Union of India (AIR 1991 SC 1640). The principles were set out as follows. Even in the case of a person in custody, a detention order can be validly passed, (1) If the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him; (a) that there is a real possibility of his release on bail, and (b) that on being released, he would in all probability indulge in prejudicial activities, and (3) if it is felt essential to detain him to prevent him from so doing. If an order is passed after recording satisfaction in that regard, the order would be valid. In the case at hand the order of detention and grounds of detention show awareness of custody and/or possibility of release on bail. 1989 Cri LJ 2190

1990 Cri LJ 1232, 1991 AIR SCW 1630 : 1991 Cri LJ 2058

13. Article 21 of the Constitution having declared that no person shall be deprived of life and liberty except in accordance with the procedure established by law, a machinery was definitely needed to examine the question of illegal detention with utmost promptitude. The writ of habeas corpus is a device of this nature. Blackstone called it "the great and efficacious writ in all manner of illegal confinement." The writ has been described as a writ of right which is grantable ex debito justitae. Though a writ of right, it is not a writ of course. The applicant must show a prima facie case of his unlawful detention. Once, however, he shows such a cause and the return is not good and sufficient, he is entitled to this writ as of right.

14. In case of preventive detention no offence is proved, nor any charge is formulated 1990 Cri LJ 796, 1989 Cri LJ 991 and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. (See Rex v. Hallidey (1917 AC 260); Mr. Kubic Dariusz v. Union of India and others (AIR 1990 SC 605)). But at the same time, a person's greatest of human freedoms, i.e. personal liberty is deprived, and, therefore, the laws of preventive detention are strictly construed, and a meticulous compliance with the procedural safeguard, however, technical is mandatory. The compulsions of the primordial need to maintain order in society, without which enjoyment of all rights, including the right of personal liberty would lose all their meanings, are the true justifications for the laws of preventive detention. This jurisdiction has been described as a "jurisdiction of suspicion", and the compulsions to preserve the values of freedom of a democratic society and social order sometimes merit the curtailment of the individual liberty. (See Ayya alias Ayub v. State of U.P. and another, (AIR 1989 SC 364)). To lose our country by a scrupulous adherence to the written law, said Thomas Jafferson, would be to lose the law, absurdly sacrificing the end to the means. No law is an end itself and the curtailment of liberty for reasons of State's security and national economic discipline as a necessary evil has to be administered under strict constitutional restrictions. No carte blanche is given to any organ of the State to be the sole arbiter in such matters.

15. Coming to the question whether the representation to the President of India meets with the requirement of law it has to be noted that in Raghavendra Singh v. Superintendent, District Jail, Kanpur and others (1986 (1) SCC 650) and Rumna Begum v. State of Andhra Pradesh and another (1993 Supp (2) SCC 341) it was held that a representation to the President of India or the Governor, as the case may be, would amount to representation to the Central Government and the State Government respectively. Therefore, the presentation made to the President of India or the Governor would amount to representation to the Central Government and the State Government. But this cannot be allowed to create a smoke-screen by an unscrupulous detenu to take the authorities by surprise, acting surreptitiously or with ulterior motives. In the present case, the order (grounds) of detention specifically indicated the authority to whom the representation was to be made. Such indication is also part of the move to facilitate an expeditious consideration of the representations actually made. AIR 1986 SC 356 : 1986 Cri LJ 493 : 1986 All LJ 397

16. The respondent does not appear to have come with clean hands to the Court. In the writ petition there was no mention that the representation was made to the President; instead it was specifically stated in paragraph 23 that the representation was made by registered post to the first respondent on 11-5-2000 and a similar representation was made to the second respondent. Before the High Court in the writ petition the first and the second respondent were described as follows :

"1.State of Tamil Nadu

Rep. By its Secretary,

Government of Tamil Nadu,

Public (SC) Department,

Fort St. George,

Chennai, 600 009.

2. Union of India,

Rep. By its Secretary,

Ministry of Finance,

Department of Revenue,

New Delhi."

17. As noted supra, for the first time in the review application it was disclosed that the representation was made to the President of India and no representation was made to the State of Tamil Nadu or the Union of India who were arrayed in the writ petition as parties. This appears to

be a deliberate attempt to create confusion and reap an undeserved benefit by adopting such dubious device. The High Court also transgressed its jurisdiction in entertaining the review petition with an entirely a new substratum of issues. Considering the limited scope for review the High Court ought not to have taken into account factual aspects which were not disclosed or were concealed in the writ petition. While dealing with a habeas corpus application undue importance is not to be attached to technicalities, but at the same time where the Court is satisfied that an attempt has been made to deflect the course of justice by letting loose red herrings the Court has to taken serious note of unclean approach. Whenever a representation is made to the President and the Governor instead of the indicated authorities. It is but natural that the representation should indicate as to why the representation was made to the President or the Governor and not the indicated authorities. It should also be clearly indicated as to whom the representation has been made specifically, and not in the manner done in the case at hand. The President as well as the Governor, no doubt are constitutional Heads of the respective Governments but day to day administration at respective levels are carried on by the Heads of the Department Ministries concerned and designated officers who alone are ultimately responsible and accountable for the action taken or to be taken in a given case. It really the citizen concerned genuinely and honestly felt or interested in getting an expeditious consideration or disposal of his grievance, he would and should honestly approach the really concerned authorities and would not adopt any dubious devices with the sole aim of deliberately creating a situation for delay in consideration and cry for relief on his own manipulated ground, by directing his representation to an authority which is not directly immediately concerned with such consideration.

18. It was nowhere indicated in the representation by the respondent as to why the representation was not being made to the indicated authorities and instead was being made to the President of India. This appears to be a deliberate view to take advantage of the concern shown by this Court in protecting personal liberty of citizens. Where however, a person alleging infraction of personal liberty tries to act in a manner which is more aimed at deflecting the course of justice than for protection of his personal right, the Court has to make a deliberate balancing of the fact situation to ensure that the mere factum of some delay alone is made use of to grant relief. If a fraud has been practiced or perpetrated that may in a given case nullify the cherished goal of protecting personal liberty, which obligated this Court to device guidelines to ensure such protection by balancing individual rights and the interests of the nation, as well.

19. In R. Keshava v. M. B. Prakash and others, (2001 (2) SCC 145), it was observed by this Court as follows : AIR 2001 SC 301 : 2000 AIR SCW 4496 : 2001 Cri LJ 497, para 17

"We are satisfied that the detenu in this case was apprised of his right to make representation to the appropriate Government/authorities against his order of detention as mandated in Art. 22(5) of the Constitution. Despite knowledge, the detenu did not avail of the opportunity. Instead of making a representation to the appropriate Government or the confirming authority, the detenu chose to address a representation to the Advisory Board alone even without a request to send its copy to the authorities concerned under the Act. In the absence of representation or the knowledge of the representation having been made by the detenu, the appropriate Government was justified in

confirming the order of detention on perusal of record and documents excluding the representation made by the detenu to the Advisory Board. For this alleged failure of the appropriate Government, the order of detention of the appropriate Government is neither rendered unconstitutional nor illegal."

20. Another aspect which has been highlighted is that many unscrupulous petitioners are approaching this Court under Art. 32 of the Constitution challenging the order of detention directly without first approaching the concerned High Courts. It is appropriate that the concerned High Court under whose jurisdiction the order of detention has been passed by the State Government or Union Territory should be approached first. In order to invoke jurisdiction under Art. 32 of the Constitution to approach this Court directly, it has to be shown by the petitioner as to why the High Court has not been approached, could not be approached or it is futile to approach the High Court. Unless satisfactory reasons are indicated in this regard, filing of petition on such matters, directly under Art. 32 of the Constitution is to be discouraged.

21. In view of the fact that the detenu has suffered detention for about the whole period of detention, we do not consider this a fit case for interference. We dismiss it subject to the observations made above.

Order accordingly.