SUPREME COURT OF INDIA

Hare Ram Pandey

Vs.

State of Bihar

(Doraiswamy Raju and Arijit Pasayat JJ.)

10.12.2003

JUDGEMENT

ARIJIT PASAYAT,J

Undaunted by the non-success before the Patna High Court and this Court on selfsame issues the appellant has filed this appeal questioning correctness of a judgment of the Patna High Court which declined to interfere with an order directing his detention by order dated 14.9.1995 in terms of Section 12 of the Bihar Control of Crimes Act, 1981 (in short 'the Act'). According to the appellant the order of detention was without authority in law and, therefore, deserves to be nullified by issuance of a writ of mandamus/certiorari under Article 226 of the Constitution of India, 1950 (in short 'the Constitution'). By the impugned judgment dated 4.3.1997 the Patna High Court in Cr.W.J.C. No. 144 of 1997 repelled the contention. It was held that the Act itself provides the procedure as to how the matter should proceed if the person in respect of whom the order of detention is passed is detained. It was noted that he had a right to make representation and also to be heard before the Advisory Board constituted under the Act. The procedure indicated in the Act safeguards the rights available under Article 22 of the Constitution. Reference was made to the earlier writ petitions which were filed and it was noted that in the earlier writ petitions the challenges were on similar footings. Circumstances under which the order of detention could be quashed at the pre-detention stage were highlighted by this Court in Additional Secretary to the Government of India and Ors. v. Smt. Alka Subhash Gadia and Anr. (1992 Supp (1) SCC 496) and according to the High Court this was not a case where the order of detention could be nullified at the pre-detention stage. The Court also noticed that the appellant has tried to avoid process of law

for a long period and wanted to take advantage of that, which he cannot be permitted to do and the law has to take its own course.

In support of the appeal, learned counsel for the appellant submitted that the occurrence which formed foundation for the order of detention relates to an incident which took place during an election and with oblique motives the provisions of the Act affecting liberty of the appellant has been used. The incident which formed the background of the order of detention allegedly took place in March 1995, and since appellant tried to highlight the failure of the governmental machinery in ensuring free and fair election, out of political vendetta the order of detention has been passed at the behest of political leaders. Great emphasis was laid on the order of detention which purportedly refers to a notification dated 4.4.1994 issued by the Government which operated till 30th June, 1994. It was urged that since the District Magistrate had no authority under Section 12(2) of the Act to pass the order of detention, the order of detention was clearly without jurisdiction. In any event, after a long lapse of time stale matters should not be allowed to be rekindled. According to him the ratio in Alka Subhash's case (supra) has clear application to the facts of the case.

In response, learned counsel for the respondent-State submitted that the scope of interference at pre-detention stage is extremely limited and the area has been clearly spelt out in Alka Subhash's case (supra) and the appellant's case does not fall to the situation contemplated in said case. It is further submitted that the appellant is not correct in saying that the District Magistrate had no authority to pass the order of detention. These specific stands were taken in the earlier writ petitions and were rejected. Even the special leave petition filed before this Court was withdrawn. In any event, the notification of the Government of Bihar (Home) Police Department, dated 20th June, 1995 empowered the District Magistrate to pass an order of detention and the notification was operative till 30.9.1995 within which period the order of detention was passed.

The case at hand shows how the appellant has tried his best in taking various dilatory tactics to deflect the course of justice. There is no doubt that personal liberty is sacrosanct and has to be protected, but a person who tries to draw red herrings to deflect the course of justice and tries to take advantage of his own wrongs has to be sternly dealt with. It is relevant to note that the appellant had filed the Crl.W.J.C. No. 702 of 1995 before the Patna High Court which was dismissed on 16.2.1996. He filed SLP (Crl.) No. 941 of 1996 before this Court which was withdrawn on 15.4.1996. The second writ petition Crl.W.J.C. 369 of 1996 was filed and the same was dismissed on 26.6.1996. The appellant was declared as absconder in terms of Section 16 of the Act by order dated 12.1.1997. Thereafter writ petition to which this case relates was filed on 21.2.1997 which came to be dismissed by the impugned judgment dated 4.3.1997.

A preliminary objection has been raised by the respondent-State as noted above stating that the parameters for entertaining petition questioning legality of the order of detention before execution has been laid down in many cases, and the appellant has not made out a case for interference before execution of the detention order.

Before dealing with rival submissions, it would be appropriate to deal with the purpose and intent of preventive 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 that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by the concerned 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 in an exhaustive manner, the failure to conform to which should lead to detention. The satisfaction of the Detaining Authority, therefore, is a purely subjective affair. The Detaining Authority may act on any material and on any information that it may have before it. Such material and information may merely afford basis for a sufficiently strong suspicion to take action, but may not satisfy the tests of legal proof on which alone a conviction for offence will be tenable. The compulsions of the primordial need to maintain order in society without which the enjoyment of all rights, including the right to personal liberty would loose all their meanings are the true jurisdiction for the laws of prevention detention. The pressures of the day in regard to the imperatives of the security of the State and of public order might require the sacrifice of the personal liberty of individuals. Laws that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of State or corroding financial base provides grounds for satisfaction for a reasonable prognostication of a possible future manifestations of similar propensities on the part of the offender. This jurisdiction has been called a jurisdiction of suspicion. The compulsions of the very preservation of the values of freedom of democratic society and of social order might compel a curtailment for individual liberty. "To, lose our country by a scrupulous adherence to the written law" said Thomas Jefferson "would be to lose the law itself, with life, liberty and all those who are enjoying with us, thus absurdly sacrificing the end to the needs". This, no doubt, is the theoretical jurisdiction for the law enabling prevention detention. But the actual manner of administration of the law of preventive detention is of utmost importance. The law has to be justified by the genius of its administration so as to strike the right balance between individual liberty on the one hand and the needs of an orderly society on the other.

The question whether the detenu or any one on his behalf is entitled to challenge the detention order without the detenu submitting or surrendering to it has been examined by this Court on various occasions. One of the leading judgments on the subject is Smt. Alka Subhash's case (supra). In para 12 of the said judgment, it was observed by this Court as under:

"12. This is not to say that the jurisdiction of the High Court and the Supreme Court under Articles 226 and 32 respectively has no role to play once the detention punitive or preventive- is shown to have been made under the law so made for the purpose. This is to point out the limitations, which the High Court and the Supreme Court have to observe while exercising their respective jurisdiction in such cases. These limitations are normal and well known, and are self-imposed as a matter of prudence, propriety, policy and practice and are observed while dealing with cases under all laws. Though the Constitution does not place any restriction on these powers, the judicial decision have

evolved them over a period of years taking into consideration the nature of the legislation or of the order or decision complained of, the need to balance the rights and interests of the individual as against those of the society, the circumstances under which and the persons by whom the jurisdiction is invoked, the nature of relief sought, etc. To illustrate these limitations, (i) in the exercise of their discretionary jurisdiction the High Court and the Supreme Court do not, as Courts of appeal or revision, correct mere errors of law or of facts, (ii) the resort to the said jurisdiction is not permitted as an alternative remedy for relief which may be obtained by suit or other mode prescribed by statute. Where it is open to the aggrieved person to move another Tribunal or even itself in another jurisdiction for obtaining redress in the manner provided in the statute, the Court does not, by exercising the writ jurisdiction, permit the machinery created by the statute to be by-passed;

(iii)it does not generally enter upon the determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed; (iv) it does not interfere on the merits with the determination of the issues made by the authority invested with statutory power, particularly when they relate to matters calling for expertise, unless there are exceptional circumstances calling for judicial intervention, such as, where the determination is mala fide or is prompted by the extraneous considerations or is made in contravention of the principles of natural justice of any constitutional provision, (v) the Court may also intervene where (a) the authority acting under the concerned law does not have the requisite authority or the order which is purported to have been passed under the law is not warranted or is in breach of the provisions of the concerned law or the person against whom the action is taken is not the person against whom the order is directed, or (b) when the authority has exceeded its power or jurisdiction or has failed or refused to exercise jurisdiction vested in it; or (c) where the authority has not applied its mind at all or has exercised its power dishonestly or for an improper purpose; (vi) where the Court cannot grant a final relief, the Court does not entertain petition only for giving interim relief. If the Court is of opinion, that there is no other convenient or efficacious remedy open to the petitioner, it will proceed to investigate the case on its merit and if the Court finds that there is an infringement of the petitioner's legal rights, it will grant final relief but will not dispose of the petition only by granting interim relief (vii) where the satisfaction of the authority is subjective, the Court intervenes when the authority has acted under the dictates of another body or when the conclusion is arrived at by the application of a wrong test or misconstruction of a statute or it is not based on material which is of a rationally probative value and relevant to the subject matter in respect of which the authority is to satisfy itself. If again the satisfaction is arrived at by taking into consideration material, which the authority properly could not, or by omitting to consider matters, which it sought to have, the Court interferes with the resultant order.

(viii) In proper cases the Court also intervenes when some legal or fundamental right of the individual is seriously threatened, though not actually invaded".

It is to be noted that as rightly submitted by learned counsel for the respondent-State, that the plea that order of detention was passed beyond the period authorized by the Government notification was not taken before the High Court. Though such a plea in an appropriate case can be considered by

this Court for the first time yet in view of the documents brought on record the position is crystal clear that the District Magistrate was authorized to pass an order of detention up to 30.9.1995. The mere fact that the detention order referred to an earlier notification of delegation or source of power/Authority is no vitiating factor, when there really existed a proper notification delegating such power, on the date when the detaining authority passed the order of detention and the subsequent notification was a continuation of the former. Therefore, the stand that the District Magistrate has no authority is equally untenable.

Learned counsel for the appellant stated that various categories noted by this Court in Alka Subhash's case (supra) are not exhaustive and are illustrative of the circumstances. According to him, present case clearly makes out ground for interference even at this stage when order of detention has not been executed. We find no substance in this plea.

In Sayed Taher Bawamiya v. Joint Secretary to the Govt. of India and Ors. (2000 (8) SCC 630) it was observed by this Court as follows:

"This Court in Alka Subhash's case (supra) 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 case 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 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.

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's case (supra) 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 appellant 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 appellant does not have a copy on the same, and therefore, it is not open to the appellant to contend that the non-existent order was passed on vague, extraneous or on irrelevant grounds".

This Court's decision in Union of India and Ors. v. Parasmal Rampuria (1998 (8) SCC 402) throws considerable light as to what would be the proper course for a person to adopt when he seeks to challenge an order of detention on the available grounds like delayed execution of detention order, delay in consideration of the representation and the like. These questions are really hypothetical in nature when the order of detention has not been executed at all and challenge is made at pre-execution stage. It was observed as under:

"In our view, a very unusual order seems to have been passed in a pending appeal by the Division Bench of the High Court. It is challenged by the Union of India in these appeals. A detention order under Section 3(1) of the COFEPOSA Act was passed by the authorities on 13.9.1996 against the respondent.

The respondent before surrendering filed a writ petition in the High Court on 23.10.1996 and obtained an interim stay of the proposed order, which had remained un-served. The learned Single Judge after hearing the parties vacated the ad interim relief.

Thereafter, the respondent went in appeal before the Division Bench and again obtained ad interim relief on 10.1.1997 which was extended from time to time.

The writ appeal has not been still disposed of.

When the writ petition was filed, the respondent had not surrendered. Under these circumstances, the proper order which was required to be passed was to call upon the respondent first to surrender pursuant to the detention order and then to have all his grievances examined on merits after he had an opportunity to study the grounds of detention and to make his representation against the said grounds as required by Article 22(5) of the Constitution." In Sunil Fulchand Shah v. Union of India and Ors. (2000 (3) SCC 409) a Constitution Bench of this Court observed that a person may try to

abscond and thereafter take a stand that period for which detention was directed is over and, therefore, order of detention is infructuous.

It was clearly held that the same plea even if raised deserved to be rejected as without substance. In fact, in Sayed Taher's case (supra) the fact position shows that 16 years had elapsed yet this Court rejected the plea that the order had become stale.

In view of the legal and factual positions highlighted above, this is not a fit case where any interference is called for, before execution of the order of detention. The appellant, if so advised, may first surrender pursuant to the order of detention and thereafter have his grievances examined on merits.

The appeal is clearly without merit, deserves dismissal which we direct.