

Pawan Kumar Agarwal Vs. District Magistrate

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Court : Orissa

Decided On : Aug-09-1991

Reported in : 1992CriLJ1732; 1992(I)OLR58

Judge : G.B. Pattnaik and ;S.K. Mohanty, JJ.

Acts : [Constitution of India](#) - Article 226; [Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980](#) - Sections 3(2)

Appeal No. : O.J.C. No. 2408 of 1991

Appellant : Pawan Kumar Agarwal

Respondent : District Magistrate

Advocate for Def. : Addl. Govt. Adv.

Advocate for Pet/Ap. : G. Rath, Adv.

Disposition : Application dismissed

Judgement :

G.B. Pattnaik, J.

1. An order of detention passed by the District Magistrate, Cuttack, under Sub-section (2)(a) of Section 3 of the [Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980](#) (hereinafter referred to as the 'Act')

has been challenged in this writ application before the said order has been executed and before the detenu has been taken to custody. The brother of the detenu is the petitioner. The main grounds on which the order has been assailed are that the order of detention has been passed against a wrong person for a wrong purpose for victimising an employee for the lapse of the employer and has been passed on vague, extraneous and irrelevant grounds. Since the writ application has been filed prior to the execution of the order of detention and consequently has not got a copy of the order of detention or the grounds of detention, this Court by order dated 8-7-1991 had called upon the State Counsel to produce the order of detention as well as the grounds of detention only for the limited purpose of perusal of the Court to be satisfied as to whether the grounds on which the order has been attacked can at all be sustained. The said order had been passed by this Court because of the observations made by their Lordships of the Supreme Court in the case of *The Additional Secretary to the Government of India and Ors. v. Smt. Alka Subhash Gadia and Anr.*, 1990 (2) SCALE, 1352, to the effect :

'.....it is not correct, to say that the Courts have no power to entertain grievances against any detention order prior to its execution. The Courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the Courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the Courts 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.....'

Pursuant to the order of this Court, the order of detention as well as the grounds of detention have been produced before us for our scrutiny.

2. Mr. Rath, the learned counsel for the petitioner, argues with vehemence that the order of detention in the present case is one which comes within the exceptional

cases indicated by their Lordships of the Supreme Court in Smt. Alka Subhash Gadia's case, referred to supra, and, therefore, can be interfered with even at the pre-execution stage.

The learned Additional Government Advocate on the other hand relying upon a Bench decision of this Court in the case of Padma Kumar Bhawsinka v. State of Orissa, represented through the Secretary, Food and Civil Supplies Department, Bhubaneswar and Anr., 1991 (I) OLR, 527, contends that the detention order not having been executed, the party cannot have any right to challenge the same.

3. In view of the rival submissions made at the Bar, the first question that crops up for our consideration is whether an order of detention can be interfered with prior to its execution and prior to the detenu surrendering himself to the custody. A Division Bench of the Bombay High Court in Special Civil Application No. 2752 of 1975 & Criminal Revision Application No. 23 of 1980 (Manoharlal Narang v. Union of India) decided on 10-7-1980 and in Jayantilal Bhagwandas Shah and etc. v. State of Maharashtra and Ors., 1981 Cr.L.J., 767: the Delhi High Court in Sh. Abdul Aziz Mohammad, v. Union of India, Cr.L.J. 1307 and Omar Ahmed Ebrahim Noormani v. Union of India and Ors., 1984 Cr.L.J. 1915 : the Kerala High Court in Yogesh Shantilal Choksi v. Home Secretary, Govt. of Kerala and another 1983 Cri.L.J. 393 and the Allahabad High Court in Simmi v. State of U. P, and Ors., 1985 All. L.J. 598, have taken the view that an order of detention is executable the moment it is passed and, therefore, a person who is likely to be affected by such order has a right to approach the Court the moment he learns about it since he is sought to be deprived of his liberty by the said order. In the Bench decision of this Court reported in 1991 (1) OLR 527 on which the learned Additional Government Advocate places reliance, their Lordships have held :

'...We do not think it legally permissible to direct the State to disclose it considering that it has the option of serving the grounds of detention within the stipulated period of five days and in case of exceptional circumstances and for reasons to be recorded in writing not later than ten days, and the protection given under Sub-section (2) authorising non-disclosure of facts when it is considered to be against the public interest.'

Their Lordships have further observed that the stage for considering whether an order of detention has been passed against a wrong person or with a wrong purpose or on vague, extraneous and irrelevant grounds has not come since the order has not been executed. In coming to the aforesaid conclusion, no doubt, our learned brother Pasayat, J. speaking for the Court has considered the decision of the Supreme Court in Smt. Alka Subhas Gadia's case (supra), but in our considered opinion, the conclusion arrived at is contrary to the decision of the Supreme Court. In Smt. Alka Subhash Gadia's case, the Supreme Court have in no uncertain terms indicated that the Courts have power to entertain grievance against any detention order even prior to its execution, but the said power has to be used only in exceptional cases, some of which have been indicated in the said judgment. It is no doubt true that a detenu cannot get hold of a copy of the order of detention or the grounds of detention by filing an application challenging the order of detention at the pre-execution stage, but there is no bar for the Court to see the order of detention for itself and to come to the conclusion whether the grounds of attack made by or on behalf of a detenu is at all sustainable being one of those exceptional cases indicated by their Lordships of the Supreme Court and whether it would be proper for the Court to quash such order of detention even at the pre-execution stage. Having carefully considered the decision of the Supreme Court in Smt. Alka Subhash Gadia's case (supra) as well as the Bench decision of this Court in Padma Kumar Bhawsinka,s case on which learned Additional Government Advocate places reliance, we have no hesitation to hold that an order of detention can be assailed even at the pre-execution stage, but at the same time a detenu cannot have a right to look at the order of detention or the grounds of detention and the Court if satisfied may peruse the order of detention as well as the grounds of detention and thereafter if the Court comes to the conclusion that the case falls under one of those exceptional cases then there will be no bar for the Court to exercise its discretionary jurisdiction in quashing the said order.

4. The next question that arises for out consideration, therefore, is whether the present case cart be said to be one of those exceptional and rare cases where this Court can invoke its extraordinary, equitable jurisdiction under Article 226 of the Constitution to quash the said order even though the order has not been executed. According to Mr. Rath the learned counsel for the petitioner, the detenu Shiv

Kumar Agarwal was an employee of Shri Mahabir Prasad Sharma and the business premises of said Shri Sharma having been, inspected, three tins-of ground-nut oil and five tins of rapeseed refined oil and 25 tonnes of cocoanut oil were found to be in excess of the book balance and further the licensee failed to produce the accounts in respect of 2,300 tonnes of Vanaspati and, therefore. Shivkumar who was merely an employee of Shri Mahabir Prasad Sharma cannot be said to be involved in any manner with the transactions in question. According to Mr. Rath, therefore, the detention of Shivkumar is obviously for a wrong purpose and against a wrong person, Mr. Rath also further relies upon the observations of this Court while dismissing the writ application filed by on behalf of Mahabir Prasad Sharma in OJC No. 4942 of 1990 (Brij Mohan Sharma v. District Magistrate, Cuttack and Ors.), decided on 21-2-1990 to the effect :

'...the undisputed position is that the detenu was the person who was proprietor of the business, and the licence to parry on trade in essential commodities was issued to him.'

It is, therefore, contended by Mr. Rath that contravention of the provisions of the Essential Commodities Act, if any, was made by the licensee Mahabir Prasad Sharma for which the employee Shivkumar cannot be held responsible. We have given our anxious consideration to the contentions raised by Mr. Rath, the learned counsel for petitioner and we have carefully scrutinised the grounds of detention against Shivkumar Agarwal which were produced before us in a sealed cover by the learned Additional Government Advocate. Having considered the grounds produced before us, we are not in a position to hold that the case would come within one of those exceptional cases wherein the Court can in exercise of its extraordinary jurisdiction under Article 226 interfere with the said order of detention even at the pre-execution stage. It is difficult for us to come to the conclusion that either a wrong person has been sought to be detained or the order of detention has been made for any wrong purpose. In the premises, as aforesaid, while we agree with Mr. Rath, the learned counsel for the petitioner, that an application is maintainable even at the pre-execution stage, but the case in hand does not reveal to be one of those exceptional cases as pointed out by their Lordships of the Supreme Court in Smt. Alka Subash Gadia's case (1930) (2) SCALE, 1352)

and, therefore, we decline to exercise our extraordinary power of judicial review to interfere with an order of detention prior to its execution.

The writ application accordingly fails and is dismissed. There will, however, be no order as to costs.

S.K. Mohanty, J.

5. I agree.

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