Subhash Chander Vs. Union of India and Others

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Court : Delhi

Decided On : Feb-18-1991

Reported in : 1991CriLJ1541; 43(1991)DLT517; ILR1991Delhi429

Judge : Arun Kumar and; Milap Chandra Jain, JJ.

Acts : Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Sections 3; Code of Criminal Procedure (CrPC) , 1973 - Sections 7, 7(l) and 82; Constitution of India - Articles 226 and 227

Appeal No. : L.P.A. No. 131/89

Appellant : Subhash Chander

Respondent : Union of India and Others

Advocate for Def. : M/s. S.K. Tewari, ; Y.R. Sharma, ; A.P. Aggarwal and ;

Advocate for Pet/Ap. : Ashok Arora,; Ms. Manju Oberoi,;M/s. Mahinder Singh; Kamal

Judgement :

Arun Kumar, J.

1. This judgment will dispose of Letters Patent Appeals No. 131 of 1989, 132 of 1989 and Crl.W.P. No. 395 of 1989. These cases are being taken up together

since they involve common question of law and the material facts are also almost identical. So far as the L.P.As. are concerned, the detention orders under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (hereinafter referred to as the COFEPOSA Act), were passed on 9th June 1988, which in Crl.W. 395/89, the petition order is dated 14th October 1988. In all the three cases the detention orders have not been served on the petitioners and the common point urged on their behalf is that the delay in execution/service of the detention order vitiates the same. The counsel urges that the delay in service of the detention order shows lack of seriousness/anxiety on the part of the detaining authority to detain and this according to counsel, throws doubts about the genuineness of the subjective satisfaction of the detaining authority.

2. The two appeals arise from the judgment of a learned single Judge of this court dated 21st November 1989 whereby the writ petitions, filed by the appellants under Arts. 226 and 227 of the Constitution of India, for quashing the order of detention, were dismissed. The bare facts necessary for the purpose of disposing of the present appeal are that on 9th June 1988, Shri K. L. Verma, Joint Secretary, Ministry of Finance, Department of Revenue, New Delhi, passed the detention orders qua Subhash Chander and Parvesh Kumar, appellants. It is submitted by counsel for the appellants that after passing of the impugned detention order both the appellants had appeared in the court of Metropolitan Magistrate concerned on 13th June 1988 and 26th September 1988 and their personal presence is recorded in the proceedings of the court. The appearance of the appellants in the court was in connection with the cases initiated by the authorities which sponsored their detention under the COFEPOSA Act. Representations were made against the detention order by the appellants on 14th October 1988 which were rejected on 30th November 1988. Writ petitions were filed by the appellants in this court on 26th December 1988 which came up before the Vacation Judge on 28th December 1988. On the said date while issuing notices on the petitions, this court was pleased to stay execution of the detention order. This ex parte order was confirmed on 17th February 1989. Counsel for the appellants has confined his submissions in this appeal only to the question of delay in execution of the detention order. It is submitted by the counsel that the learned single Judge has based the impugned judgment on certain assumptions of fact which were not born

out by the record and secondly, it is submitted that instead of considering the Explanationn of the respondents regarding their failure to execute the detention order and their failure to give details of the steps they took in this behalf the learned single Judge has based her judgment on the conduct of the appellants which according to the learned counsel, was not a correct approach.

3. Counsel for the respondents has mainly raised the question of maintainability of the writ petitions. It is submitted that in view of the failure of the petitioners to surrender before the Court, the writ petitions ought to have been dismissed on this ground alone and ought not to have been entertained at all. This question has been considered by the learned single Judge and for reasons recorded in the judgment, the writ petitions were entertained. However, on merits, the learned single Judge was not convinced about the submissions of the petitioners and, thereforee, the writ petitions were dismissed.

4. In Crl.W.P. No. 395 of 1989 the detention order dated 14th October 1988 has not been served on the petitioner till date and, thereforee, there has been long delay which vitiates the order. In the said writ petition there was no stay granted by this Court regarding execution of the detention order. In spite of this, the same has not been served on the petitioner so far. Counsel for the petitioner submits that there is no Explanationn whatsoever in the counter-affidavits filed on behalf of the respondents to show what efforts they made to serve the detention order on the petitioner and a bare allegation that the petitioner was avoiding service is not enough. Accordingly, it is submitted that the detention, order is liable to be quashed.

5. We will first deal with the point raised by the counsel for the respondents about the maintainability of the writ petition on account of failure of the petitioners to surrender to the court. This question has been dealt with by the learned single Judge in the impugned judgment at length. The learned single Judge has quoted various judgments of this court holding that the jurisdiction of the High Court under Art. 226 of the Constitution of India being very wide and being in the nature of extraordinary jurisdiction, for such matters involving the liberty of persons, there would be no bar to the writ petitions being entertained without the petitioners

surrendering. The relevant para from the judgment of learned single Judge is reproduced as under :-

'8. Mr. Maninder Singh firstly placed reliance on a Division Bench Judgment of this Court reported as : 1984RLR298 Abdul Aziz Mohammad v. Union of India where detention order was passed without showing awareness of the position that the petitioner therein, a resident of Dubai, was not available in India. The writ petition filed to challenge the detention order, without his first surrendering to custody was entertained and allowed. The learned counsel cited two other judgments of this Court also by Division Benches; one reported as 1989 (2) Cri 32 Hem Raj Sapra v. Administrator of Delhi, and the other a very recent decision reported as 1989 (3) D L 345 1990 Cri LJ (NOC) 79 Navin Kumar Kapoor v. The Administrator, Union Territory of Delhi, where also a writ was held maintainable although the detention order had not yet been executed. The judgment in the case of Navin Kumar Kapoor (supra) also takes note of a Division Bench judgment of Bombay High Court (Panaji Branch) reported as 1988 (1) Crim 857 Hira Lal 1989 Cri LJ 131 Somabhai Damania v. Dr. Gopal Singh. The judgment in the case of Hem Raj Sapra (supra) is based in terms on an earlier judgment of this Court in the case of Ram Kishore Gupta v. Administrator. Union Territory of Delhi, Criminal Writ Petition No. 169/88, decided on 25th May 1988 and Lalit Kumar v. Union of India, Criminal Writ No. 44/ 88, decided on 16th February 1989. Mr. Maninder Singh further pointed out that in the case of Lalit Kumar (supra) (Sic) Dutt, Advocate in this case was counsel for Union of India and it is recorded that no objection even had been taken by him as to the maintainability of the writ petition. The learned counsel submitted that the position is now well recognised so far as this court is concerned that although a writ of habeas corpus is maintainable only after a person has been detained but in suitable cases the High Courts in exercise of extraordinary jurisdiction, can issue writ of Certiorari or Mandamus, as the case may be, on the petition being filed by a person anticipating detention, or threatened with action under a detention order.'

6. On consideration of the aforesaid proposition of law, the learned single Judge observed that in a number of cases, the justification as to maintainability of a writ for Mandamus or Certiorari in anticipation or apprehension of execution of a

detention order has been recognised. This apparently impelled the learned single Judge to proceed on to decide the writ petitions on merits. However, we must note here that the learned single Judge expressed her doubts about the expediency of laying down such a general proposition regarding writ petitions challenging detention orders without the petitioner's being made to surrender being entertained. The learned single Judge was of the considered view that the matter in each case ought 'to be examined on the context of nature of the challenge made to the validity or legality of the detention order'. It is further noted that the instances illustrated by the decisions of the Gujarat High Court in the case of Shri Ved Parkash v. State of Gujarat, 1987 (1) Cri 440 or by the Bombay High Court in Hiralal Somabhai Damania (supra), afford good guidelines. The learned single Judge went on to express a hope that the question may require a fresh look in a given case. We are glad to note that the Hon'ble Supreme Court in a recent decision in Criminal Appeals No. 440 & 441 of 1989. The Additional Secretary to the Government of India and Others v. Smt. Alka Subhash Gadia and Another decided on 20th December 1990 has taken a similar view. The Hon'ble Supreme Court has observed that generally it is not open to the detenu to challenge the order of detention prior to its execution. However, the apex Court has recognised that in certain cases a person sought to be detained may challenged the detention order at the pre-execution stage. It has been observed that :-

'It will, however, depend on the facts of each case. The decisions and the orders cited above show that in some genuine cases, the Courts have exercised their powers at the pre-execution stage, though such cases have been rare. This only emphasises the fact that the courts have power to interfere with the detention orders even at the pre-execution stage but they are not obliged to do so nor will it be proper for them to do so save in exceptional cases. Much less can a detenu claim such exercise of power as a matter of right. The discretion is of the Court and it has to be exercised judicially on well-settled principles.'

7. In view of the final word being expressed in this behalf by the Hon'ble Supreme Court, it will depend on the facts of each case whether the Courts would permit the detention orders being challenged at the pre-execution stage. After going into the facts and circumstances of the cases in hand, we feel that these are fit cases

where the writ petitions be allowed to be entertained at the pre-execution stage.

8. On merits the counsel for the appellants has confined his argument to the question of delay alone. This was so before the learned single Judge also as noticed in para 6 of the impugned judgment. The counsel submits that affidavits have been filed on behalf of the respondents in reply to the writ petitions. The point of delay in execution of the detention orders resulting in their validity becoming doubtful has been taken in all the writ petitions. According to the counsel, a reference to various affidavits filed on behalf of the respondents will show that except for a general allegation that the petitioners were evading service and the petitioners were not available at the given addresses, there is no Explanationn as to what steps, much less effective steps, were taken to serve the detention order on the petitioners. It is further submitted that the additional affidavits filed pursuant to the directions of the Court, after Rule was issued in the writ petitions, also miserably fail to furnish adequate details so as to justify the delay in execution of the orders of detention. It is interesting to note that in the present appeals, this Court, vide order dated 11th January 1990, directed the respondents to file a list giving the dates on which attempts have been made to serve the detenu with reference to the records. In spite of this, no affidavit or Explanationn was furnished. Only a list of dates was filed. The respondents have miserably failed to discharge, their primary duty.

9. A reference to one of the affidavits filed on behalf of the respondents shows what the respondents have to say regarding their efforts to serve the detention order on the detenu 'the facts are that the petitioner is absconding and several attempts were made to apprehend him and his whereabouts are not known to his family members which is evidenced by statements dated 29th September, 1988, 8th October, 1988 and 14th October, 1988 of Smt. Neelam Rani wife of the petitioner (in L.P.A. 131/89). It is further stated that the order under Section 7(1)(b) of the COFEPOSA have been issued against the petitioner. Regarding this affidavit, it is interesting to note that the same is of Shri S. K. Chaudhary, Under Secretary to Govt. of India, Ministry of Finance, Department of Revenue. The detaining authority was not personally executing the detention order. No affidavit of the actual person who was entrusted the task of executing the order has or

particulars of the alleged several attempts to apprehend the detenu have been given. As already stated, the petitioners had appeared in the Court of the Metropolitan Magistrate on 13th June, 1988 and 28th September, 1988 after the detention orders had been passed on 9th June 1988. The presence of the petitioner is recorded in the court proceedings. It is common knowledge that the serving agencies/officers consider appearance in court of an accused to be the best occasion or opportunity to serve an order on them. However, in the present case, apparently no such effort was made. The learned single Judge has stated in the impugned judgment about these two dates of appearance of the petitioner in court, that 13th June, 1988 was too close to 9th June, 1988 and the persons responsible for executing the detention order might not have received the same by then, while about 26th September, 1988, it has been observed that the Counsel for the Enforcement Directorate was not present in Court on that date. The Explanationn regarding non-service of the detention order, at least on 26th September, 1988, is not quite convincing. The respondents cannot be allowed to take advantage of their own default in their counsel not appearing in Court. Secondly, even if the counsel did not appear, the officers concerned ought to have known about the said date if they were at all interested in serving the detention order and ought to have seized that opportunity to accomplish their task. To our mind, this lapse on the part of the respondents is wholly unexplainable and shows their utter laxity in the matter of execution of the detention orders. From this we tend to believe that the respondents were not at all serious about the execution of the detention orders and this conduct of the respondents throws doubts about the genuineness of the subjective satisfaction of the detaining authority. The delay in this behalf has to be in the first instance explained by the State. It is the State which has to show what effective steps were taken to serve the detention order. As noticed earlier the State has totally failed to explain this. On the other hand non-execution of the detention orders on the dates of appearance of the petitioners in court, which ought to be known to the respondents, speaks volumes about their casual approach or laxity in dealing with the matter.

10. In this connection one may further note that according to the respondents, the wife of the petitioner in L.P.A. 131/89 was questioned on 29th September 1998 and she stated that the whereabout of the petitioner were not known. The veracity

of this averment of the respondents appears to be doubtful in view of the fact that on 26th September, 1988, i.e. three days before the alleged statement, petitioner had appeared in the Court of Metropolitan Magistrate, Jallandhar. The non-appearance of the counsel for the Enforcement Directorate in the court on 26th September, itself shows how casually the respondents were taking the entire matter. After all the prosecution in the court of the Metropolitan Magistrate was at the instance of the sponsoring authority itself.

11. The present is a case of preventive detention where the object is to detain a person in order to snap his links with the underworld. A reference to the objects of the COFEPOSA Act will show that for a person sought to be detained, urgent and effective steps should be taken to serve the detention order. The Act takes into consideration situations where the persons sought to be detained may be absconding and for this purpose S. 7 has been enacted. The procedure prescribed in S. 7 ensures that the person sought to be detained makes himself available in his own interest. In the present case if the petitioners were absconding or evading service of the detention order, what steps were taken by the respondents under Section 7. Except for a bare assertion that order under Section 7(1)(b) of the Act have been issued, nothing is stated as to whether the order was published which is a mandatory requirement under the Statute. Mere issuance of orders is of no consequence unless it is published in the official Gazette.

12. It is worth noting here that under S. 82 of the Code of Criminal Procedure, the Magistrate grants permission only on being fully satisfied and the permission is not granted in routine. Thus it is apparent that the respondents have not even resorted to S. 7 of the Act.

13. The learned counsel for the appellants has cited various judgments of this court and of the Hon'ble Supreme Court showing that delay in execution of the detention order can be fatal depending on the facts and circumstances of each case and the Explanationn by the State regarding delay. In these cases on account of delay ranging between 15 days to several months, the detention orders have been quashed. There is no magic in the number of days or months. The real test is the Explanationn of the State about the steps taken to serve the detention

order. As noticed earlier, in the present cases the State has miserably failed to explain the delay. Except for bald averments that the persons concerned were evading service nothing has been shown about what steps were taken to serve them. The present cases are of total absence of Explanationn by the State. It is the duty of the State to serve the detention orders and the initial onus is on the State to justify its failure to perform its duty. The cases referred to by the counsel for the appellants in this connection are Sk. Nizamuddin v. State of W.B., : 1975 CriLJ12 ; Omar Ahmed v. Union of India, 1984 Cri LJ 1915 Man Mohan Singh v. Union of India, 1988 (1) Del L 171 T. A. Abdul Rehman v. State of Kerala, Judgment Today : 1990 CriLJ578 Lalit Pataudi v. Union of India : 41(1990)DLT8 ; Ramesh Kumar Khaitan v. Union of India, Crl.WP No. 559 of 1987, decided on 27-6-1988; Anwar Ismail Aibani v. Union of India and Ors. Crl.WP No. 375 of 1986, decided on 11-12-1986.

14. We need not refer to each case in view of the legal position stated which emerges from them and with which we are in agreement.

15. While examining the question of delay on merits, the learned Judge has unfortunately proceeded on the basis of petitioner's conduct rather than examining what Explanationn the State had to offer in this behalf. Further we find that certain assumptions of the learned single Judge in this connection are not borne out from the record. Firstly, the learned single Judge has observed that the petitioners were aware of the existence of the detention orders before they came to Court by way of present writ petitions. They had also made representations in two cases to the detaining authority against the detention orders which were ultimately rejected. On the basis of the fact that the petitioners were aware of the detention orders, the learned single Judge appears to have believed the bald Explanationn given by the respondents that the petitioners made themselves unavailable and could not be traced anywhere. One may believe that on the knowledge of the detention orders, the detenu may evade detention. However, even if on that basis the petitioners were to evade arrest, the State is not absolved of its primary duty to ensure service of a detention order. The question will still remain what efforts were made by the State to execute the detention orders. We may note here that the first specific date given in L.P.A. 131/89 when the wife of the petitioner was

interrogated is 29th September, 1988. There is no Explanationn as to what representatives responsible for the execution of the detention orders were doing till that date. Not even a single date is mentioned when the visit was made to the residence of the petitioner and he was not found. The position in this respect is almost the same so far as the other appeal is concerned. As regards Crl.W. 395/89, in the counter affidavit filed on behalf of the respondents, it appears from the averments made that the officers were solely relying on the petitioner's appearance in the Magistrate's court so that the detention order could be served on him. A long list of dates when the case was fixed in the Magistrate's court has been given and it has been shown that the petitioner did not appear on any of those dates. From this it is concluded that the petitioner was evading service. The precise averment in the counter affidavit is as under :-

'Ground I : In reply to Ground I of the writ petition, it is stated that the residential premises of the petitioner was visited to serve the detention order but he was not available. The detention order was handed over to the S.H.O. of the concerned area to execute the same as and when the petitioner was available at his residence but, in fact, the petitioner is deliberately avoiding the service of order of detention on him. Thus in view of the facts stated above, it is crystal clear that there has been no delay in execution the order of detention but the petitioner is simply raising false and frivolous pleas in order to waste the time of the Hon'ble Court.'

16. Thus the respondents are taking contradictory stands about service of the detention order in court. In the L.P.As. the detenus have appeared in court, still it is of no consequence to the respondents. In the Criminal Writ the non-appearance of the detenu in court is being taken against him.

17. No affidavit of the S.H.O. concerned has been filed. No particulars of alleged visits have been given. Nothing has been stated to show if they resorted to S. 7 of the Act at all. It is worth mentioning that the learned single Judge has noted the contention on behalf of the petitioners that there is no Explanationn as to what steps were taken to serve the detention order on the petitioners. However, while examining the question of delay the learned single Judge without considering the

respondents Explanationn for delay, has proceeded practically on the basis of the conduct of the petitioners. It appears that it has heavily weighed with the learned single Judge that the petitioners allegedly concealed their residential addresses and the learned single Judge has also observed that there is not even an assertion that the petitioners were available at their residential addresses throughout the period. With due respect both these observations do not appear to be factually correct. The residential addresses of the petitioners are contained in the Panchnamas. The same were available with the respondents as is clear from the facts that raids were conducted at the residential premises of the petitioners. The residential addresses are given in the detention orders also. In the writ petitions the petitioners have disclosed their same residential addresses, in fact with the addition of their firm name also. Various affidavits have been filed on record giving their residential addresses. As regards the averments of the petitioners regarding their availability at their same residential addresses, the same are contained at pages 91 and 120 of the appeal paper book 'LPA 131/89). The precise statements are 'it is submitted that the petitioner is staying at his residence continuously', again 'in fact, it was not possible for the respondents to get any such report because the petitioner was all along available at his residence'. It appears that the aforesaid incorrect assumptions have led the learned single Judge to believe that the petitioners were really evading service of the detention orders and thereforee, were not entitled to urge the plea of delay in serving detention order and the same being liable to be quashed on that ground.

18. The State has been allowed opportunity to file various affidavits. However, the material particulars are missing in all of them. Except general assertions that repeated attempts were made and the petitioners were found missing from their houses. Nothing concrete has been stated. In none of the cases affidavits of the concerned officers who might have made repeated attempts have been filed nor any dates or particulars of visits when such attempts are alleged to have been made have been given. The reference to statements of relatives alleged to have been made towards the end of September or October 1988 does not inspire confidence and in any case it is not explained what the State was doing for more than three months before such statements were made.

19. With utmost respect to the learned single Judge, we feel that the approach as evidenced from paras 10 to 20 of the judgment under appeal was not correct. The learned single Judge has proceeded as if it was for the petitioners to justify their conduct in what the learned Judge felt preventing the respondents from serving the detention orders on them. If this was a case of evasion of arrest on the part of petitioners, the respondents were not prevented from taking appropriate steps as provided under the Act to deal with such situation. This failure on the part of the respondents, to our mind, again shows their non-seriousness and laxity in dealing with these cases. The very object or purpose of detention orders has been frustrated on account of inaction on the part of the respondents in these cases. This approach of the respondents in dealing with the matter throws grave doubts about the genuineness of the subjective satisfaction of the detaining authority. The object of the detention order is to prevent the detenu from indulging in smuggling activity. However, if the detention order is not served and the person is not detained, the object behind passing the order is lost. In the Case reported as : 1990 CriLJ578 there was three months' unexplained delay between passing of the detention order and arrest. The Supreme Court held that this throws considerable doubt on the genuineness of the subjective satisfaction of the detaining authority. Coming back to the cases in hand, the respondents could get the petitioners declared absconders and resort to S. 7 of the Act. Even this was not done. There is no Explanationn from the respondents' side for their failure to take action under Section 7(1)(a) or 7(1)(b) of the COFEPOSA Act. thereforee, no benefit can be taken from the judgment of the Supreme Court reported as : 1979 CriLJ462 because in that case the detenu had been declared absconder and steps under Section 7 of the Act had been taken. Proclamation had been published. His photographs were displayed at prominent public places.

20. Under the circumstances, we allow these appeals and quash the detention orders dated 9th June 1988 in L.P.As. Nos. 131 and 132 of 1988 and the detention order dated 14th October 1989 in Crl.W.P. No. 395 of 1989.

21. Appeals allowed.