

Om Prakash Vs. Administrator and ors.

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Court : Delhi

Decided On : Nov-29-1991

Reported in : 46(1992)DLT566

Judge : Sunanda Bhandare and; C.M. Nayar, JJ.

Acts : [Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) -
Sections 3

Appeal No. : Criminal Writ Appeal No. 233 of 1991

Appellant : Om Prakash

Respondent : Administrator and ors.

Advocate for Pet/Ap. : A.K. Nigam,; Manvinder Singh,; Atul Batra and;

Judgement :

Sunanda Bhandare, J.

(1) This petition has been filed by the petitioner challenging the detention order dated 15.6.1990 passed in the name of the Administrator, Union Territory of Delhi under Section 3(i) read with Section 2(F) of the Conservation of [Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) (hereinafter referred to as COFPPOSA).

(2) The petitioner was employed as Aerobridge Operator with the International Airport Authority of India at the Indira Gandhi International Airport, New Delhi. On 5.2.1990 one Ajit Singh was apprehended in the Immigration Hall and in his statement under Section 108 he stated that he was to hand over gold of about 1 kg. to a person in blue uniform. The petitioner who was on duty on that day was arrested by the Customs (Preventive) Officer on an allegation that he was helping Ajit Singh in smuggling gold. The petitioner in his statement under Section 108 of the Customs Act denied that he knew Ajit Singh and also denied having any connection with the smuggling of gold. The petitioner was produced before the Additional Chief Metropolitan Magistrate and was remanded to judicial custody and later on a bail application filed by the petitioner he was released on bail on 24.2.1990. The employer of the petitioner i.e., the International Airport Authority of India on 13.2.1990 suspended the petitioner w.e.f. 5.2.1990 on the ground that a criminal offence was under investigation against the petitioner and that he had been detained for more than 48 hours in police custody. A show- cause notice was also issued by the Assistant Collector of Customs on 31.5.1990 to the petitioner requiring him to explain why penalty should not be imposed upon him under Section 112 of the Customs Act. The petitioner replied to the show-cause notice on 6.8.1990. The adjudication proceedings continued and ultimately on 26.11.1990 the Deputy Collector passed an order imposing penalty of Rs. 15,000.00 against the petitioner. This order dated 26.11.1990 passed by the Deputy Collector was challenged by the petitioner by way of an appeal before the Collector (Appeal). The Collector (Appeal) insisted for pre-deposit of the penalty amount and the petitioner, therefore, filed a revision petition to the Central Government praying for dispensing with the deposit of penalty amount before the consideration of the appeal on merit. The Central Government allowed this revision petition and directed the Collector (Appeal) to hear the appeal on merits.

(3) A complaint was filed by the Collector, Customs against the petitioner under Section 135 of the Customs Act on 8.3.1990 before the Additional Chief Metropolitan Magistrate and trial in that case is proceeding and evidence of the complainant is being recorded. The petitioner apprehended that he will be detained under the Cofeposa because a Sub-Inspector of Delhi Police tried to serve a copy of the detention order on him through the Additional Chief

Metropolitan Magistrate. In fact, it is alleged that the Additional Chief Metropolitan Magistrate has issued Notice under Section 228 of the Indian Penal Code to the said Sub-Inspector for his such conduct. It was later on confirmed in Court on 22.4.1991 that a detention order had been passed against the petitioner on 15.6.1990. The petitioner, therefore, filed this present writ petition on 30.4.1991.

(4) This Court on 1st May, 1991 stayed the execution of the detention order passed against the petitioner.

(5) Learned Counsel for the petitioner challenges the detention order dated 15.6.1990 on three grounds. It is firstly submitted that the incident is alleged to have occurred on 5.2.1990 and the order of detention was passed on 15.6.1990 and yet it was not executed till the filing of the present writ petition by the petitioner in this Court. Thus, it was submitted that there is unexplained delay in execution of the detention order and the same be quashed on that ground. It was next contended that even in this Court the respondent has not explained the steps taken by the respondent to have the detention order served on the petitioner despite the fact that the respondent was aware that the petitioner was available for service in Court where the criminal proceedings are going on and before the Customs Authorities where the adjudication proceedings are pending. Learned Counsel further submitted that the petitioner being under suspension has to go to his office every month to collect his salary and the respondent could have easily ascertained the whereabouts of the petitioner either from his employer or from the Customs Authorities themselves. Thus, no attempt having been made to serve the detention order, the same deserves to be quashed. It was lastly submitted that the detaining authority did not take into consideration the fact that the petitioner had been put under suspension immediately after his arrest on 5.2.1990. Learned Counsel submitted that since the petitioner was under suspension there was no likelihood of his indulging in the same alleged activities in future. The respondent-detaining authority had, therefore, not applied its mind before passing the detention order.

(6) On the other hand, it was contended by the learned Counsel for the respondent that the writ petition filed by the petitioner in anticipation at persecution stage is not

maintainable. The petitioner ought to have first surrendered before filing the present writ petition. Learned Counsel relied on the judgment of the Supreme Court in *The Additional Secretary to the Government of India & Others v. Smt. Alka Subhash Gadia & Another*, : 1991(53)ELT481(SC) in support of his contention.

(7) We will first deal with the question of maintainability of the writ petition at pre-execution stage. The Supreme Court in *Smt Alka Subhash Gadia's case* (Supra) has observed as follows : 'The decisions and 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.

(8) Thus, it is not right to contend that the writ petition filed by the petitioner is not maintainable at pre-execution stage. Undoubtealy, this Court exercises jurisdiction under Article 226 at pre-execution stage in exceptional circumstances and where the Court is satisfied that injustice will be perpetuated if a citizen is made to surrender before his petition is heard. This very question came up for consideration before a Division Bench of this Court in *Subhash Chander v. Union of India & Others*, : 43(1991)DLT517 . The judgment of the Supreme Court was cited before the Division Bench of this Court in that case as well and it has been observed that it will depend on the facts of each case whether the Court would permit a challenge to a detention order at the persecution stage. We, thereforee, do not see any merit in the preliminary objection. 569

(9) Now, coming to the challenge made by the petitioner to the detention order dated 15.6.1990. It is not disputed by the respondents in the counter affidavit filed by them that the detention order remained unexecuted till the filing of the present writ petition by the petitioner in this Court. However, it is stated that the respondents were not aware of the attendance of the petitioner in the Court of the

Additional Chief Metropolitan Magistrate where the criminal case is pending. It is also admitted that a show cause notice was issued by the Assistant Collector of Customs to the petitioner. However, there is no Explanation forthcoming regarding non-execution of the detention order on the petitioner though he was attending to the proceedings before the Customs Authorities. The respondent has however submitted that the detention order could not be executed because he remained away from his house and was not available at his residence. The respondent has also not denied that the detaining authority had not taken into consideration the fact that the petitioner was suspended by his employer consequent to his arrest on 52 1990. It is however stated that the respondent has no knowledge of the suspension of the petitioner by his employer.

(10) Learned Counsel for the respondent produced the original file in Court and submitted that though the respondent has not given the steps taken by the respondent for executing the order in the affidavit, all possible steps were taken by the respondent to execute the order at the earliest.

(11) We have gone through the file. We find that though the respondent was in correspondence with the employer of the petitioner, at no stage, any attempt was made to ascertain from the employer whether the petitioner was under suspension or was continuing in service or whether he attended the office to collect his salary. We also find that the respondent was aware of the proceedings pending in the criminal Court and the detention order was handed over to the police for service on the petitioner. In fact, the petitioner himself has submitted in his petition that at one stage, a police officer informed the petitioner about the detention order and requested the Additional Chief Metropolitan Magistrate to serve the detention order on the petitioner. thereforee, it is not quite right to say that the petitioner was not available for execution of the order or that the petitioner was absconding. Moreover, the respondent did not take any steps under Section 7 of Cofeposa either. If the petitioner was not available at his residence, we do not understand what precluded the respondent from executing the detention order either when the petitioner attended his office or Court or before the Customs Authorities themselves. Needless to say that a person who is sought to be detained in Cofeposa, urgent and effective steps had to be taken to serve the detention order.

If the respondent fails to do that, the very purpose of detention is frustrated.

(12) In our view, this is a case of total absence of Explanationn by the respondent for the delay in executing the detention order. We also find great force in the contention of the learned Counsel for the petitioner that the detaining authority ought to have considered the question of suspension of the petitioner by his employer before the detention order was passed. The petitioner is a government servant. His involvement with the alleged smuggling was because of his availability at the Airport on the date of incident. Whether the petitioner would have been in a position to indulge in the same alleged activities even after he was suspended is a matter which ought to have been considered by the detaining authority before passing the order. Since it is specifically admitted in the counter-affidavit that the respondent was not aware of the suspension of the petitioner, obviously this question could not have been considered by the detaining authority before passing the detention order. 570

(13) For the reasons stated hereinbefore, we find that this is fit case for interference under Article 226 of the Constitution of India at the pro-execution stage and do not consider it necessary for the petitioner to surrender.

(14) In the circumstances, the writ petition is allowed. Rule is made absolute. The detention order dated 15.6.1990 is quashed. There will be however no order as to costs.

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