

Krishna Kumar Modi Vs. Union of India (Uoi) and ors.

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Court : Kolkata

Decided On : Jul-24-1975

Reported in : AIR1976Cal26

Judge : B.C. Ray, J.

Acts : [Constitution of India](#) - Articles 226, 352(1) and 359; ;[Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) - Section 3

Appeal No. : C.R. No. 8058 (W) of 1975

Appellant : Krishna Kumar Modi

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : Nani Coomer Chakraborty and ;Bhagawati Banerjee, Advs.

Advocate for Pet/Ap. : S.D. banerjee and ;Ashoke Ganguly, Advs.;P.R. Roy and ;Uma Sanyal, Advs.

Judgement :

ORDER

B.C. Ray, J.

1. This is an application for vacating the interim order of injunction issued on March 20, 1975 at the time of issuance of the said rule. The interim order has

been issued in terms of prayer of the petition i.e. injunction restraining the respondents and/or their subordinates and/or servants and each one of them from passing any order of detention against the petitioner or from arresting or detaining the petitioner under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (Act 52 of 1974) or any order that may be passed under any provision of any other statute having the force of preventive detention against the petitioner on the basis of search and seizure dated October 15, 1974 for a period of eight weeks with liberty to the petitioner to apply for extension of the said interim order upon notice to the respondents Nos. 2, 4 and 6. Pursuant to the leave granted the petitioner also filed an application for extension of the interim order of injunction.

2. In paragraph 2 of the application for vacating the interim injunction it has been averred that on October 15, 1974 on the basis of an information the officers of the Customs, Preventive and Intelligence Branch, West Bengal. Calcutta visited the General Post Office, Calcutta and apprehended two persons-- the petitioner and Sri Nanik Sahani and found in their possession postal insured parcels bearing Nos. 620 and 622 Kalba Devi Koad, Bombay 564, 565, 566, 609 and 611 of Ram Wady Bombay in presence of two independent witnesses. The said parcels were found to have been despatched by one Sri S. K. Haralalka of 78 Dadi Sethi, Bombay -- addressed to Sri S. S. Kedia, C/o. Rubi General Insurance Co. Ltd. of 8, India Exchange Place, Calcutta-1. It has been further averred that on examination of the contents of the said parcels in presence of the petitioner and Sri Nanik Sahani and two independent witnesses, the said parcels were found to contain synthetic fabrics of Japan origin measuring 184.60 metres valued at Rupees 14,768. The said goods were seized on the reasonable belief that they were smuggled goods imported into India in violation of Customs Act and other laws. It has been further stated that the petitioner admitted his guilt and could not produce any evidence to prove his bona fide possession and legal importation of synthetic fabrics of foreign origin. It has also been stated that after due investigation by the officers of the Customs and Central Excise Department the petitioner was found to have been acting in an organised manner in smuggling synthetic fabric from Bombay through his associates S. S. Kedia and O. P. Lara alias Om Prakash Lara and has been doing business in Calcutta. It has been

stated that the Customs and Central Excise Department have placed the said materials before the detaining authority for their consideration whereon an order of detention under Section 3 of the [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) has been made on Feb. 24, 1975 for preventing the petitioner from indulging in transporting smuggled goods, The petitioner has absconded and has been avoiding arrest. As such the order of detention could not be served on the petitioner by the State Government. It has been submitted that after the passing of the order of detention the petitioner cannot get any relief unless the said order of detention is challenged before the appropriate forum. It has further been submitted that the petitioner is not entitled as a matter of right to get the interim bail and the court's discretion in the matter of granting bail is regulated by well established principle that the party should establish prima facie that the case is bound to succeed. The petitioner is not entitled to get any extension of the interim order nor he is entitled to get any interim order in the form in which it has been obtained.

3. In the application for extension of interim order it has been stated that the said postal parcels were with Nanik Sahani who had carried the same which were consigned to Shyam Sundar Kedia who took delivery of the same. It has been stated that on opening the said parcels only a few pieces measuring about 3 metres each in item No. 3 bore foreign markings while the rest did not have any such foreign markings at all. It is stated that such types of fabrics are manufactured in India and are available in abundance in the market. The investigation has not yet been completed and it is yet to be established that the textile in question is of foreign origin and not manufactured in India. It has been stated that the petitioner with whom there was no material had been arrested with deliberate motive of implicating him and there is no evidence to justify his arrest. It has been stated that the officers of the Customs Department were found roaming in the vicinity of the petitioner's residence and they are giving out that the petitioner will be arrested and detained under the [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#). It has been submitted that the petitioner is entitled to invoke the writ jurisdiction of this Court against any purported threat of his fundamental right and he need not wait till the threat is actually put into action. It has been submitted further that the antecedents of the

petitioner are absolutely clean and above board and he is in no way connected with any foreign exchange and/or smuggling racket and as such there is not the remotest possibility of his indulging in any act of smuggling.

It has also been submitted that there cannot be any valid satisfaction of the authorities concerned for passing an order of detention under the said Act. Petitioner has also filed an affidavit-in-opposition denying the statements and allegations in the application for vacating interim order and reiterating the statements and contentions made in the application for extension of interim order. The respondents have also filed a counter to the application for extension of interim order reiterating the statements and contentions made in the application for vacating interim order and denying the statements and contentions made in the application for extension of interim order.

4. Mr. Sankar Das Banerjee, learned Advocate appearing on behalf of the petitioner in support of the application for extension of the interim order submitted that the parcels containing the said textiles were addressed to Shyam Sundar Kedia who took delivery of the same from the General Post Office and the same were in possession of Nanik Sahani. The petitioner was never in possession of the said parcels nor he had any connection with the said parcels and as such there cannot be made any order of detention against the petitioner under the said Act. In furtherance of his aforesaid contention Mr. Banerjee has submitted that the petitioner has never indulged in any smuggling activities nor has he previously dealt with any smuggled goods and the antecedents of the petitioner are absolutely clean and above board. Mr. Banerjee has submitted that the criminal case started at the instance of the Customs Authorities is still under investigation by the Customs Authorities and the said investigation has not been finalised and no final opinion has been formed by the investigating authorities in this matter that the textiles in question are of foreign origin and as such no order of detention under the said Act can be made now inasmuch as the prerequisite for the passing of such an order i.e. the satisfaction of the detaining authority has not been nor can be made nor there is any formation of opinion. It has also been submitted that a criminal case is pending over the same matter. So an order of detention under the said Act cannot be made in respect of the self-same acts of commission or

omission which are subject-matter of the said criminal proceedings and such an order of detention, if made, will be bad. He submitted further that if an order of detention is made it will in effect prevent the adjudication of the pending criminal case for the specific offences alleged in accordance with the law. Mr. Banerjee has also contended that the petitioner is competent to move the writ jurisdiction against any purported threat of his fundamental right and as such the interim order issued is not at all bad and the same should be extended till the disposal of the rule in consideration of the balance of convenience and inconvenience of the parties,

5. Mr. Nani Kumar Chakraborty, learned Advocate appearing on behalf of the respondents Nos. 1, 4, 5, 6 and 7 has submitted that the textiles seized are found to be of foreign origin and the petitioner also admitted his guilt in smuggling those goods. The detaining authority on due consideration of the materials placed before him by the officers of the Customs and Central Excise Department and on being duly satisfied and after proper application of mind had passed an order of detention on 24-2-1975 against the petitioner in order to prevent the petitioner from indulging in smuggling goods and as such the said order of detention is a valid order. Mr. Chakraborty further submitted that after the passing of the order of detention the petitioner could not get any relief unless and until he challenges that order in the proper forum. It is therefore submitted that the interim order of injunction should be vacated and should not be extended at all. Mr. Chakraborty has also submitted that the order of detention of the petitioner was passed long before the issue of this rule and the petitioner by suppressing those facts obtained this rule and interim order and as such this interim order of injunction is liable to be vacated on the ground of suppression of material facts. Mr. Chakraborty also submitted that the order of detention has been passed by the appropriate authority after proper application of mind and after subjective satisfaction. In such a case the only remedy for the petitioner is to challenge the said detention order by way of a writ of Habeas Corpus and the interim order of injunction cannot be issued unless and until it is established prima facie that the case is bound to succeed. In support of his aforesaid contention Mr. Chakraborty referred to a decision pronounced by Chittosh Mukherjee, J. in Civil Rule No. 2102 (W) of 1975 made on March 24th, 1975. Mr Chakraborty has further submitted that Article 21 of the Constitution having been suspended the writ application for enforcement of

fundamental rights under Arts. 14, 19 and 22 is not maintainable.

6. The President of India on December 3, 1971 made a proclamation of Emergency under Article 352(1) of the Constitution. The said proclamation of emergency is in force and has not been revoked thereafter on December 23, 1974 the President has made an order under Article 359(1) of the Constitution declaring that the right to move any court for orders of detention which have already been made or which may hereafter be made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (Act 52 of 1974) or with respect to any other action (including the making of any declaration under Section 9 of the said Act) which has already been or may hereafter be, taken or omitted to be taken in respect of detention under such orders for the enforcement of the rights conferred by Article 21 and Clause (4). Clause (5) read with Clause (6) and Clause (7) of Article 22 of the Constitution and all proceedings pending in any court for the enforcement of any of the aforesaid rights with respect to orders of detention made under the said Act or any other action taken or omitted to be taken in respect of detention under such orders shall remain suspended for a period of six months from the date of issue of this order or the period during which the proclamation of emergency is in force, whichever period expires earlier. This order thus had spent its force after expiry of six months i.e. on 22nd June, 1975. Thereafter an order has been made by the President under Article 359 of the Constitution suspending the right to move any court for enforcement of the fundamental rights guaranteed by Articles 14, 21 and 22 of the Constitution, it is now well settled that during the continuance of the proclamation of emergency under Article 352(1) of the Constitution the validity of an order made under Article 359 of the Constitution suspending the right to move any court for enforcement of any of the fundamental rights cannot be challenged as it is a power vested in the President by Article 359 of the Constitution. In this connection reference may be made to decision of the Supreme Court in : 1968 CriLJ977 Mohd. Yaqub v. State of Jammu and Kashmir where it has been held:

'There is nothing in Article 359 which in any way limits the power of the president to suspend the enforcement of any of the fundamental rights conferred by Part III. It is to our mind quite clear that the President has the power to suspend the

enforcement of any of the fundamental rights conferred by Part III and there is nothing thereunder which makes a distinction between one fundamental right or another. As Article 359 stands, it seems to us, it clearly envisages that once a proclamation of emergency has been issued the security of India or any part of the territory thereof may require that the President should suspend the enforcement of any of the fundamental rights conferred by Part III. There is in our opinion no scope for inquiry into the question whether the fundamental right the enforcement of which the President has suspended under Article 359 has anything to do with the security of India which is threatened whether by war or external aggression or internal disturbance, for Article 359 posits that it may be necessary for the President to suspend any of the fundamental rights in Part III for the sake of the security of India. There is thus a basic assumption in Article 359 that it may be necessary for the President to suspend the enforcement of any of the fundamental rights conferred by Part III in the interest of the security of India, If he considers that necessary, it is unnecessary in the face of that basic assumption to inquire whether enforcement of a particular fundamental right suspended by the President has anything to do with the security of India, for that is implicit in Article 359. It follows therefore that it is open to the President to suspend the enforcement of any of the fundamental rights conferred by Part III by an order under Article 359 and this Article shows that wherever such suspension is made it is in the interest of the security of India and no further proof of it is necessary.'

7. It is also well settled that the question that there is no rule of emergency justifying the continuance of the proclamation of Emergency cannot be agitated in the writ court as it is entirely to the subjective satisfaction of the President. In : 1974 CriLJ690 Bhuth Nath Mate v. The State of West Bengal it has been held by the Supreme Court:

'It was argued that there was no rule of emergency and yet the proclamation remains unretracted with consequential peril to fundamental rights. In our view this is a political, not justiciable issue and the appeal should be to the polls and not to the courts.'

It has further been held:--

'Academic exercises in constitutional law are not for courts but jurists and we decline to hold the continuance of emergency void.'

But nonetheless this suspension of the right to move for enforcement of certain fundamental rights in court by the Presidential order does not create any embargo on the right to challenge the validity of the order of detention on other grounds. In *Emperor v. Sibnath Banerjee*, AIR 1945 PC 158 the respondent who had been detained under the Defence of India Rules 1939 moved this Court for a writ of Habeas Corpus under Section 491 of the Code of Criminal Procedure. Repelling the contention on behalf of the Crown that the court has no jurisdiction to investigate the validity of the orders it was observed

'It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of a condition necessary to the validity of making of that order. In the normal case, the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to inaccuracy be accepted by a court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish a *prime facie* case that the recital is not accurate. Hence the Court had jurisdiction to investigate the validity of the order.'

The observation of Sibnath Banerjee's case AIR 1945 PC 156 by the Privy Council was approved by the Supreme Court in *Jaichand Lal Sethia v. The State of West Bengal*, : 1967 CriLJ520 where it has been held:--

'During the pendency of the Presidential order the validity of the Ordinance or any rule or order made thereunder cannot be questioned on the ground that it contravenes Articles 14, 21 and 22. But this limitation cannot preclude a citizen from challenging the validity of the Ordinance or any rule or order made thereunder on any other ground. If a citizen seeks to challenge the validity of the Ordinance, rule or order made thereunder on any ground other than the contravention of Arts. 14, 21 and 22 the Presidential Order cannot come into operation. It is not also open to a citizen to challenge the order on the ground of contravention of Article 19, because as soon as a Proclamation of Emergency is

issued by the President, under Article 358 the provisions of Article 19 are automatically suspended. But a citizen can challenge the validity of the order on a ground other than those covered by Article 358, or the Presidential Order issued under Article 359(1).'

8. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (Act 52 of 1974) has been made to provide for preventive detention in certain cases for the purpose of conservation and augmentation of Foreign Exchange and Prevention of Smuggling Activities and for matters connected therewith. Section 3 of the said Act empowers the Central Government or the State Government or any officer of the Central Government not below the rank of a Joint Secretary to that Government specially empowered for the purpose of this section by that Government or any officer of the State Government not below the rank of the Secretary to the State Government specially empowered for the purpose of this section by that Government to make an order for detention of a person in order to prevent him from indulging in smuggling goods or engaging in transporting or cancelling or keeping smuggled goods. On December 18, 1974, the Chief Secretary to the Government of West Bengal issued an order No. 21846 H. S., which is quoted below:--

'In exercise of the powers conferred by Sub-section (1) of Section 3 of the [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) (Act 52 of 1974) the Governor is pleased hereby to specially empower the Secretary to the Government of West Bengal, Home Department, for the purpose of the said Section.

This order shall come into force on the 19th day of Dec. 1974.'

9. The contention of Mr. Banerjee, learned Advocate appearing on behalf of the petitioner that the law of Preventive Detention cannot be applied in respect of acts for which punitive laws are adequate and sufficient and which can be adequately dealt with under the punitive laws is based on a misconception of the purpose and scope of the punitive law as well as of the law of Preventive Detention. The law of Preventive Detention is designed to prevent a person from indulging in acts prejudicial to the security of the State whereas the punitive laws are designed to

prosecute a person for commission or omission of acts which makes him liable for punishment under the said law. Thus the primary objective of punitive law is to launch a prosecution to impose punishment on a person for his committing offences. It is pertinent to refer in this connection the observation of the Supreme Court in *Haradhan Saha v. State of West Bengal*, : 1974 CriLJ1479 . It has been held in the said case that the essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it the basis is the satisfaction of the Executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. The criminal conviction on the other hand is for an act already done which can only be possible by trial and legal evidence, it has also been held in the said case:--

'The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a 'bar to prosecution.'

The said decision has been relied upon in the case reported in : AIR 1975 SC1165 *Samir Chatterjee v. The State of West Bengal* and it has been observed as follows:--

'A criminal case needs evidence to establish the guilt of the accused beyond reasonable doubt. The fact that such evidence was not available does not mean that the detaining authority had not before him evidence on which he can be satisfied. This would not show that in asking for discharge of the petitioner from the criminal cases the authorities were taking the easier course of preventive detention rather than prosecuting him under the ordinary law of the land.'

In view of the premises aforesaid this contention of the learned Advocate for the petitioner is not sustainable and so fails.

10. In this case it appears from the averments made in the application for vacating interim order that an order of detention has been passed already on February 24, 1974 that is long before the issuance of the rule wherein the said interim order is issued. As such the petitioner cannot get any relief without challenging the said order of detention. The petitioner, of course, can challenge the purported threat of his legal or fundamental right in a writ court when the alleged threat is per se illegal and without jurisdiction and when there has been, in fact, no order made at the tune of moving the court against such purported threat of his right In this connection reference may be made to the decision reported in : AIR 1971 SC1731 D. A. V. College, Bhatinda v. The State of Punjab where it has been held by the Supreme Court that the petition under Article 32 of the Constitution to which the petitioners have made out the prima facie case that their fundamental rights are either threatened or violated will be entertained by this court and that it is not necessary for any person who considers himself to be aggrieved to wait till the actual threat has taken place. In this case there has already been made an order of detention long before the issuance of the said rule. Furthermore, there has been no challenge that the respondents have no power to make an order of preventive detention under Section 3 of the [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) (Act 52 of 1974) nor there is nor can there be any challenge that the said Act is ultra vires Articles 14, 19, 21 and 22 of the Constitution in view of the Proclamation of Emergency as well as of the Presidential Order made under Article 359 of the Constitution. With regard to the contention that the petitioner was not in possession of the alleged textiles of foreign origin nor he is a dealer in textiles goods and that he never indulged in smuggling in the past and there was no application of the mind of the detaining authority are questions which can only be agitated before the proper forum in an application for a writ of Habeas Corpus against the order of detention made against the petitioner. Moreover, it has been held by Chittosh Mukherjee, J. in Civil Rule No. 2102 (W) of 1975 that in an application for writ of Habeas Corpus against detention made under a law of preventive detention the detenu is not entitled as of right to get interim bail and the court's discretion in the matter of granting bail is

regulated by the well settled principle that the detenu should establish that prima facie his case is bound to succeed, In this case as the detention order has not been challenged and the same being not before the court it is not possible for this court to hold on surmises that the petitioner if challenges that order of detention will succeed.

11. In the premises aforesaid it is not just and proper that the interim order issued on March 20, 1975 should be extended any further. I, therefore, vacate the interim order. The application for vacating the interim order thus succeeds and the application for extension of the interim order is dismissed. I make it clear that I do not make any finding on the rival contentions of the parties in the main rule.

12. There will be no order as to costs.

13. The operation of this order is stayed for a period of seven days.

14. Let a plain copy of this order be handed over to the learned Advocate for the petitioner.