

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 10.02.2009

+ WP(CRL) 2444/2006

SMT. GOPA MANISH VORA

... Petitioner

- versus -

UNION OF INDIA AND ANR

... Respondents

Advocates who appeared in this case:

For the Appellant : Mr Ashok Desai, Sr Advocate with Mr Kanwal Chaudhary
and Mr C. D. Mehta

For the Respondent : Mr A. K. Panda, Sr Advocate with Mr Pankaj Batra and
Mr U. L. Watwani

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V. B. GUPTA

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| 1. Whether Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. To be referred to the Reporter or not ? | Yes |
| 3. Whether the judgment should be reported in Digest ? | Yes |

BADAR DURREZ AHMED, J

1. This writ petition was filed initially challenging the detention order dated 17.08.2001 issued by the Joint Secretary to the Government of India in purported exercise of powers conferred under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the 'COFEPOSA Act'). The said detention order was in respect of the petitioner's husband Mr Manish N. Vora and, as the recital in the said order dated

17.08.2001 indicates, the same had been issued with a view to preventing the said Mr Manish N. Vora from acting in any manner prejudicial to the augmentation of foreign exchange in future.

2. It is an admitted position that the said detention order has remained unexecuted mainly for the reason that the proposed detenu has remained outside India. When the matter came up for hearing before us on 07.01.2009, Mr Ashok Desai, the learned senior advocate appearing on behalf of the petitioner, placed before us the following three decisions of the Supreme Court:-

1. **Maqsood Yusuf Merchant v. Union of India & Anr:**
Crl. A. 1337/2008 decided on 22.08.2008;
2. **Deepak Bajaj v. State of Maharashtra & Anr:**
WP(Crl) 77/2008 decided on 12.11.2008; and
3. **Yusuf Razak Dhanani v. Union of India & Ors:**
WP(Crl) 132/2007 decided on 21.11.2008.

On the basis of these decisions, Mr Desai made two-fold submissions. First of all, he submitted that the writ petition challenging the detention order, even at the pre-execution stage, was maintainable in certain circumstances. Secondly, he submitted that as held by the Supreme Court in the case of ***Maqsood Yusuf Merchant*** (*supra*) a detention order which had been passed some time back and had not been given effect to in the meanwhile, need not be continued and if such a detention order is continued, it would be an exercise in futility.

3. In the context of the present case, Mr Desai submitted that the detention order had been passed as far back as on 17.08.2001 and that the said order had lost its relevance in 2009 when in the intervening period there has been no allegation of any prejudicial activity on the part of the proposed detenu which would justify his detention. Our

attention was drawn to ground 'C' at page 18 of the paper book where it has been stated that there is no live link and nexus for keeping the said order of detention alive as there was no prejudicial activity in the interregnum and consequently there is no necessity for execution of the said detention order. It was also stated that because of efflux of time the impugned order of detention had completely lost its efficacy in the year 2006. Of course, three more years have elapsed since then. It had also been submitted by Mr Desai that all the other persons, who had been detained with regard to the alleged activities involving the petitioner's husband, were either released pursuant to orders passed by the Advisory Board or passed by the High Court. It may also be pointed out that in the affidavit-in-reply submitted on behalf of the respondents it has been denied that the live link and nexus for keeping the detention order alive had been snapped. No instances of any prejudicial activities having been indulged in by the proposed detenu have been pointed out. However, the affidavit-in-reply states that the order of detention is still alive and that the only reason for the order of detention not having been executed was due to the recalcitrant attitude of the proposed detenu. It was also pointed out that the proposed detenu never bothered to submit before the due process of law and, therefore, cannot be allowed to take advantage of his own wrong. A further affidavit on behalf of the respondents was filed on 14.01.2009. The said affidavit was sworn by Shri Kishan Chand Rastogi, Assistant Director, Directorate of Enforcement, Department of Revenue, Ministry of Finance. In this affidavit it has been stated that all efforts made by the respondents to serve the order of detention upon Mr Manish N. Vora had proved futile as he had concealed himself in a foreign country suspected to be UAE (Dubai). It was further stated that UAE (Dubai) had emerged as a centre for *hawala* and other money laundering activities which also had severe ramifications with regard to

the safety and security of the country and it was, therefore, imperative that the petitioner's husband be directed to submit himself to the process of law especially when he had been declared a proclaimed offender under Section 7(1)(a)(b) of the COFEPOSA Act. In the said affidavit, with regard to the issue of whether the order of detention had lost its relevance due to passage of considerable time, it was stated that whether a person indulging in prejudicial activities or otherwise is a subject matter of enquiry and in the present case the proposed detenu was concealing himself in a foreign jurisdiction, therefore, this aspect remained unverifiable and the petitioner cannot be given any indulgence.

4. Mr Ashok Panda, the learned senior counsel appearing on behalf of the respondents, submitted that the present writ petition merits dismissal on two counts. First of all, the writ petition is not maintainable inasmuch as the detention order has remained unexecuted. Placing reliance on the following decisions, he submitted that the writ petition was not maintainable:-

- (1) **Additional Secretary to the Government of India & Others v. Smt. Alka Subhash Gadia and Another : 1992 Supp (1) SCC 496;**
- (2) **N. K. Bapna v. Union of India and Ors: (1992) 3 SCC 512;**
- (3) **Subhash Muljimal Gandhi v. L. Himingliana and Anr: (1994) 6 SCC 14;**
- (4) **Administration of the National Capital of Delhi, Raj Niwas v. Prem Singh: 1995 Supp (4) SCC 252;**
- (5) **Union of India & Ors v. Parasmal Rampuria: (1998) 8 SCC 402;**
- (6) **Union of India v. Amrit Lal Manchanda & Anr: (2004) 3 SCC 75;**

- (7) **Union of India & Others v. Vidya Bagaria: (2004) 5 SCC 577;**
- (8) **State of Maharashtra and Ors. v. Bhaurao Punjabrao Gawande : AIR 2008 SC 1705;** and
- (9) **Union of India & Ors v. Atam Parkash & Anr: 2009 (1) JCC 49.**

The second point urged by Mr Panda was that the live link and nexus justifying the execution of the order of detention had not been snapped.

5. On the issue of maintainability of the writ petition, the major point of controversy between the two sides was whether the circumstances mentioned in *Alka Gadia (supra)* were exhaustive or merely illustrative. According to Mr Ashok Desai, who also referred to the decision of the Supreme Court in the case of **Rajinder Arora v. Union of India & Ors: (2006) 4 SCC 796** and **T. A. Abdul Rahman v. State of Kerala & Ors: AIR 1990 SC 225**, the five instances mentioned in *Alka Gadia (supra)* as exceptions to the rule that a detention order cannot be challenged at the pre-execution stage, were merely illustrative and not exhaustive. On the other hand, Mr Panda, on the strength of the decisions relied upon by him as indicated above, submitted that the instances mentioned in *Alka Gadia (supra)* were exhaustive and not merely illustrative. It was, therefore, contended by him that unless and until a case fell within the exceptions indicated in *Alka Gadia (supra)*, a writ petition challenging a detention order at the pre-execution stage was not maintainable.

6. Since both sides have taken the decision of a Bench of three judges of the Supreme Court in the case of *Alka Gadia (supra)* to be the starting point of their submissions, it would be instructive to notice

the exact words and expressions used in that decision. The question that fell for consideration before the Supreme Court was whether the detenu or anyone on his behalf is entitled to challenge the detention order without the detenu submitting or surrendering to it. The said question was, *inter alia*, answered in the following manner:-

“Thirdly, and this is more important, 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. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other grounds does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.”

(emphasis supplied)

A plain reading of the above extract clearly indicates that the High Court in exercise of its powers under Article 226 is not precluded from entertaining grievances against any detention order prior to its execution. It is also clear that such power has been used in proper cases and that the grounds on which the courts have interfered with the detention orders at the pre-execution stage are very limited in scope and number. It is thereafter that the said five said circumstances are set out. What was said in *Alka Gadia (supra)* was that courts have the power and that they have sparingly used that power in the instances indicated therein. This did not mean that it is only in those instances that the

court could exercise its extra ordinary power to entertain grievances against detention orders prior to their execution. Such a reading would indicate that the five circumstances are not exhaustive but illustrative.

7. This, however, does not conclude the discussion. On the contrary, it is the starting point of the rival contentions of the parties. This is so because there is an apparent cleavage of opinions of different benches of the Supreme Court on the issue of whether the five instances mentioned in *Alka Gadia (supra)* are exhaustive or illustrative. This would be clear upon examining the line of decisions cited by the learned counsel appearing on both sides. First of all, we shall take up those decisions which have been relied upon by Mr Panda. The decision in *N. K. Bapna (supra)*, which is also a decision of a bench of three Hon'ble judges of the Supreme Court, relies upon the decision in *Alka Gadia (supra)*. Referring to the decision in *Alka Gadia (supra)*, the Supreme Court noted that the question of law that fell for consideration before the Court was whether the detenu or anyone on his behalf was entitled to challenge the detention order without the detenu surrendering or submitting to it and if so in what type of cases. The Supreme Court in *N. K. Bapna (supra)* observed that the question was answered by saying that the courts have power to interfere even before the detention order is served or the detention is effected “*but that such power will be exercised sparingly and in exceptional cases of the type enunciated therein.*” Thereafter, the passage from *Alka Gadia (supra)* was quoted with approval by the Supreme Court in *N. K. Bapna (supra)*. This decision also indicates that while the Court has power to interfere with the detention order even prior to its execution, such power is to be exercised sparingly and in exceptional cases “of the type enunciated” in *Alka Gadia (supra)*. The decision in *N. K. Bapna (supra)* cannot be regarded as one which

states that the list of exceptional cases mentioned in *Alka Gadia (supra)* was exhaustive. It merely specifies that the power which is available with the High Court is to be used sparingly and in exceptional cases “of the type” mentioned in *Alka Gadia (supra)*. This indicates that the Supreme Court in *N. K. Bapna (supra)* also did not construe the exceptional cases mentioned in *Alka Gadia (supra)* to be strictly exhaustive but merely indicative of the type of cases in which the power to interfere with the detention orders prior to their execution is to be exercised.

8. In *Subhash M. Gandhi (supra)* the Supreme Court, however, through a Bench of two judges, took the view that in *Alka Gadia (supra)*, it had been expressly laid down that the interference with the detention orders at pre-execution stage was limited in scope and number as mentioned therein. The said Bench further specified that the other contingencies, if any, permitting interference with a detention order at pre-execution stage, must be of the same species as of the five contingencies referred to in *Alka Gadia (supra)*.

9. In *Prem Singh (supra)*, which is also a decision of a Bench of two judges, the Supreme Court, referring to the five circumstances mentioned in *Alka Gadia (supra)* took the following view:-

“Unless and until any one of the grounds has been established, the court is powerless to interfere. In other words no interference at the pre-detention stage is permitted on any other grounds; otherwise the very object to preventive detention is thwarted.”

This decision, it is apparent, limits the exercise of power at the pre-execution stage to only the five grounds mentioned in *Alka Gadia (supra)*. The next decision relied upon by Mr Panda is the decision in *Parasmal Rampuria (supra)* wherein the Supreme Court vacated the

stay with regard to a detention order granted by the High Court and indicated that after surrendering it would be open to the respondent to amend his writ petition and to take all permissible legal grounds to challenge the detention order and these grounds would have to be considered by the High Court on their own merits after hearing the parties. The Court also observed that when the writ petition was filed the respondent had not surrendered and that under such circumstances the proper order which ought to have been 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 of India. This decision did not refer to either *Alka Gadia* (*supra*) or any of the other decisions and, therefore, cannot be relied upon by the respondents for furthering their submission that the circumstances mentioned in *Alka Gadia* (*supra*) were exhaustive and not illustrative.

10. We then come to the decision in *Amrit Lal Manchanda* (*supra*). In that decision, reference was made to the earlier decision in *Sayed Taher Bawamiya v. Joint Secretary to the Government of India*: (2000) 8 SCC 630 wherein the Court took the view that the exceptions mentioned in *Alka Gadia* (*supra*) were exhaustive and not illustrative. According to the decision in *Sayed Taher Bawamiya* (*supra*), the decision in *Alka Gadia* (*supra*) made it clear that it was only in the five type of instances mentioned therein that the Court may exercise its discretionary jurisdiction under Article 226 or Article 32 at the pre-execution stage. In *Amrit Lal Manchanda* (*supra*), the Supreme Court held that petitioner cannot be allowed to have an unfair advantage and double benefit of his own action, which delayed the execution of the

detention order. The Court observed that it is open to the proposed detenu to surrender and, as was observed in *Parasmal Rampuria (supra)*, then take such plea as was available in law. It was noted that in *Sayed Taher Bawamiya (supra)* the gap of 16 years between the order of detention and execution of the detention order was not considered enough for quashing the detention order.

11. In *Vidya Bagaria (supra)*, the Supreme Court had merely followed what has been stated in *Amrit Lal Manchanda (supra)*. In *Bhaurao Punjabrao Gawande (supra)*, another Bench of two judges of the Supreme Court, after discussing several cases starting from *Alka Gadia (supra)*, observed as under:-

“58. From the foregoing discussion, in our judgment, the law appears to be fairly well- settled and it is this. As a general rule, an order of detention passed by a Detaining Authority under the relevant 'preventive detention' law cannot be set aside by a Writ Court at the pre-execution or pre-arrest stage unless the Court is satisfied that there are exceptional circumstances specified in *Alka Subhash Gadia*. The Court must be conscious and mindful of the fact that this is a 'suspicious jurisdiction' i.e. jurisdiction based on suspicion and an action is taken 'with a view to preventing' a person from acting in any manner prejudicial to certain activities enumerated in the relevant detention law. Interference by a Court of Law at that stage must be an exception rather than a rule and such an exercise can be undertaken by a Writ Court with extreme care, caution and circumspection. A detenu cannot ordinarily seek a writ of mandamus if he does not surrender and is not served with an order of detention and the grounds in support of such order.

59. The case on hand, in our considered opinion, does not fall within the category of exceptional cases and the High Court committed an error of law in setting aside the order of detention at the pre-execution and pre-arrest stage. The said order, therefore, deserves to be set aside and is hereby set aside. It is open to the authorities to execute the order of

detention. It is equally open to the detenu to challenge the legality thereof on all available grounds.”

12. We come to the end of the sequence of decisions relied upon by Mr Panda. In *Atam Parkash (supra)*, another Bench of two judges of the Supreme Court, essentially following the decisions in *Amrit Lal Manchanda (supra)* and *Vidya Bagaria (supra)*, observed that:-

“4. In *Additional Secretary to the Government of India and Ors. v. Smt. Alka Subhash Gadia and Anr. Case (1992 Supp (1) SCC 496)*, it was held that courts under Articles 226 and 32 of the Constitution of India, 1950 (in short the ‘Constitution’) can interfere at the pre execution stage with the detention order only if they are satisfied that:-

- (i) the impugned order is not passed under the Act under which it is purported to have been passed;
- (ii) it is sought to be executed against a wrong person;
- (iii) it is passed for a wrong purpose;
- (iv) it is passed on vague, extraneous and irrelevant grounds; or
- (v) the authority which passed it had no authority to do so.”

13. These line of decisions do indicate that an order of detention can be interfered with at the pre-execution stage only if any of the five circumstances mentioned in *Alka Gadia (supra)* exist. The implication, therefore, is that the circumstances mentioned in *Alka Gadia (supra)* are exhaustive and not illustrative and that unless and until a case falls under any one of those five circumstances, the Court would be precluded from entertaining a petition challenging a detention order at the pre-execution stage.

14. We now examine the line of decisions relied upon by Mr Ashok Desai. In *T. A. Abdul Rahman (supra)*, which was a decision essentially on the point that there must be a proximate and live link between the prejudicial activities of a person and the passing of the detention order, the Court observed that when the link between the requirement of detaining a person and the prejudicial activities of such person is snapped, the detention order may not be justified. The Court observed as under:-

“11. The conspectus of the above decisions can be summarised thus: The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the Court has to investigate whether the causal connection has been broken in the circumstances of each case.

12. Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner.

13. In the light of the above proposition of law, we shall now examine the first contention which has been raised for the first time before this Court. From the reading of the counter affidavit filed on behalf of the first Respondent, it is seen that the detaining authority has attempted to explain the laxity that has occasioned in passing the impugned order, but miserably failed in explaining the delay of three months in securing the arrest of the detenu from the date of the passing of the order, and keeps stunned silence on that score. The learned Counsel appearing for the first respondent when queried by this Court whether he could give any reason for this undue delay in arresting the detenu on 18.1.1988 in pursuance of the impugned order of detention made on 7.10.1987, he has frankly admitted that he could not do so-rightly so in our view-in the absence of any explanation in the counter affidavit. The Superintendent of Police, Malapuram to whom the detention order was forwarded for execution has not filed any supporting affidavit explaining the delay in securing the arrest of the detenu. Under these circumstances, we hold that leaving apart the question of delay in passing the order of detention from the date of the seizure of the gold, the fact remains that the detaining authority has failed to explain the long delay in securing the arrest of the detenu after three months from the date of the passing of the detention order and this non-explanation in our view throws a considerable doubt on the genuineness of the subjective satisfaction of the detaining authority vitiating the validity of the order of detention.”

15. In ***Rajinder Arora*** (*supra*), the Supreme Court merely reiterated what had been stated in ***T. A. Abdul Rahman*** (*supra*) with regard to delay in the issuance of a detention order. In the case before the Supreme Court, no explanation had been offered by the respondents as to why the order of detention had been issued after a long time. The Supreme Court found that the delay in issuing the detention order being unexplained fell within exceptions (iii) and (iv) of the decision in ***Alka Gadia*** (*supra*). Consequently, the order of detention was set aside even at the pre-execution stage. It may be pointed out that in ***Rajinder Arora*** (*supra*), the Supreme Court also took note of the three-Judge

Bench decision in the case of ***Naresh Kumar Goyal v. Union of India:*** (2005) 8 SCC 276 wherein it was observed that an order of detention is not a curative or reformatory or punitive action, but a preventive action, the avowed object of which is to prevent the anti-social and subversive elements from imperiling the welfare of the country or the security of the nation or from disturbing public tranquility or from indulging in smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances etc. The object of preventive detention, it was observed, is not to punish a man for having done something but to intercept before he does it, and to prevent him from doing so. In this context, the Supreme Court observed that it, therefore, became imperative on the part of the detaining authority as well as the executing authority to be very vigilant and keep their eyes skinned but not to turn a blind eye in securing the detenu and executing the detention order because any indifferent attitude on the part of the detaining authority or executing authority will defeat the very purpose of preventive action and turn the detention order into a dead letter and frustrate the entire proceedings. It was also observed that inordinate delay, for which no adequate explanation is furnished, would lead to the assumption that the live and proximate link between the grounds of detention and the purpose of detention is snapped.

16. In ***Maqsood Yusuf Merchant*** (*supra*), a Bench of two judges of the Supreme Court took the view that the continuation of a detention order in the circumstances of that case would be an exercise in futility and the same should not be given effect to any further. The Court, of course, observed that this would not prevent the respondents in future to pass any similar order in the event similar allegations were raised against the appellant therein. In ***Maqsood Yusuf Merchant*** (*supra*) the facts were that despite the order of detention having been passed as far

back as on 19.03.2002, the same could not be or had not been executed against the appellant till the date of decision by the Supreme Court (22.08.2008). The detention order was in respect of the activities indulged in or said to have been indulged in by the appellants as far back as in 2002. Before the Supreme Court it had been fairly submitted, on instruction on behalf of the Union of India, that since the order of detention had been passed the appellant therein had not indulged in similar activities. In these circumstances, the Supreme Court felt that the continuation of the detention order would be an exercise in futility and the same should, therefore, not be given effect to any further. This decision is an instance of a case where a detention order has been discontinued, even though the same had not been executed, merely on the ground that during the period commencing from the passing of the detention order and ending on the date the Supreme Court passed the judgment, the appellant had not indulged in similar activities. It is obvious that the Supreme Court was of the view that the detention order, if it is to be executed, must continue to have a live link with the reasons for detention, in other words, the prejudicial activities of the proposed detenu. If such link is snapped, the execution of a detention order would be an exercise in futility.

17. Thereafter, the decision in ***Deepak Bajaj*** (*supra*) was rendered by a two-judge Bench of the Supreme Court. In this case the Supreme Court considered the decisions in ***Alka Gadia*** (*supra*), ***Bhaurao Punjabrao Gawande*** (*supra*), ***Rajinder Arora*** (*supra*) and ***Maqsood Yusuf Merchant*** (*supra*). A contention was raised before the Supreme Court that the five conditions mentioned in ***Alka Gadia*** (*supra*) were exhaustive and not illustrative. This contention was repelled by the Supreme Court in ***Deepak Bajaj*** (*supra*) in the following words:-

“As already stated above, a judgment is not a statute, and hence cannot be construed as such. In *Smt. Alka Subhash Gadia’s case (supra)* this Court only wanted to lay down the principle that entertaining a petition against a preventive detention order at a pre-execution stage should be an exception and not the general rule. We entirely agree with that proposition. However, it would be an altogether different thing to say that the five grounds for entertaining such a petition at a pre-execution stage mentioned in *Smt. Alka Subhash Gadia’s case (supra)* are exhaustive. In our opinion they are illustrative and not exhaustive.”

18. The last decision relied upon by Mr Desai was the case of *Yusuf Razak Dhanani (supra)*, which merely follows the decision in *Maqsood Yusuf Merchant (supra)*. It may be relevant to point out that in *Maqsood Yusuf Merchant (supra)*, the detention order was of 19.03.2002 and had remained unexecuted till the Supreme Court quashed it on 22.08.2008. In *Yusuf Razak Dhanani (supra)*, the detention order was of 19.03.2002 and had also remained unexecuted till it was set aside by the Supreme Court on 21.11.2008. In the present case, the detention order is of 17.08.2001 and more than seven years have elapsed since then. The said detention order remains unexecuted.

19. We are, therefore, faced with a situation where one line of decisions of the Supreme Court indicates that the five circumstances mentioned in *Alka Gadia (supra)* are exhaustive and another line of decisions of the Supreme Court of benches of equal strength indicates that the said circumstances are illustrative and not exhaustive. This raises the question as to what the High Court is to do in a situation where there is a conflict between decisions of the Supreme Court rendered by Benches of equal strength. In *Ganga Saran v. Civil Judge, Hapur, Ghaziabad and Others: AIR 1991 All 114*, a Full

Bench of the High Court of Allahabad considered this very question.

The Full Bench observed as under :-

“7. One line of decision is that if there is a conflict in two Supreme Court decisions, the decision which is later in point of time would be binding on the High Courts. The second line of decisions is that in case there is a conflict between the judgments of Supreme Court consisting of equal authorities, incidence of time is not a relevant factor and the High Court must follow the judgment which appears it to lay down law elaborately and accurately.”

20. The Full Bench of the Allahabad High Court referred to a Full Bench decision of the Punjab and Haryana High Court in the case of **M/s Indo Swiss Time Limited, Dundahera v. Umrao and Others: AIR 1981 P&H 213**, wherein it was observed as under :-

"Now the contention that the latest judgment of a co-ordinate Bench is to be mechanically followed and must have pre-eminence irrespective of any other consideration does not commend itself to me. When judgments of the superior Court are of co-equal Benches and therefore, of matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is manifest that when two directly conflicting judgments of the superior Court and of equal authority are extant then both of them cannot be binding on the courts below. Inevitably a choice, though a difficult one, has to be made in such a situation. On principle it appears to me that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of coequal Benches of the Superior Court are earlier later is a consideration which appears to me as hardly relevant."

21. The Allahabad High Court in ***Ganga Saran*** (*supra*) agreed with the view taken by the Full Bench of Punjab & Haryana High Court in ***M/s Indo Swiss Time Limited*** (*supra*) that when there is a conflict

between two decisions of equal Benches, which cannot be reconciled, the courts must follow the judgment which appears to them to state the law accurately and elaborately.

22. A Division Bench of this court in **Virender Kumar @ Bittoo v. State: 59 (1995) DLT 341 (DB)** also considered the question of conflict of judgments of different Benches of the Supreme Court of co-equal strength. The Division Bench noted with approval the decision of the Full Bench of the Allahabad High Court in the case of **Ganga Saran** (*supra*) as having been laid down that if there is a conflict between two decisions of equal Benches of the Supreme Court, which cannot possibly be reconciled, the courts must follow the judgment which appears to them to state the law accurately and elaborately and particularly so when the later decision of the Supreme Court did not notice the earlier decision.

23. In the present case, Mr Ashok Desai submitted that the decision in **Deepak Bajaj** (*supra*), which examined the question of whether the five conditions mentioned in **Alka Gadia** (*supra*) were exhaustive or illustrative, ought to be followed as it specifically went into the question and answered the same. He submitted that the later decision in the case of **Atam Parkash** (*supra*), which was relied upon by Mr Ashok Panda, ought not to be followed because it did not refer to the decision in **Deepak Bajaj** (*supra*).

24. We have already noted above that the decision in **Deepak Bajaj** (*supra*) considered several decisions, including the decision in **Bhaurao Punjabrao Gawande** (*supra*), which, in turn, referred to a host of decisions on the subject, including the decision in the case of **Subhash Muljimal Gandhi** (*supra*) and **N.K. Bapna** (*supra*). After considering the said decisions, the Supreme Court in **Deepak Bajaj**

(*supra*) concluded that the five grounds for entertaining a writ petition at the pre-execution stage mentioned in *Alka Gadia*'s case are illustrative and not exhaustive. We are of the view that the Supreme Court decision in *Deepak Bajaj* (*supra*) lays down the law accurately and elaborately. We have already noted that though *Atam Parkash* (*supra*) is later in point of time than the decision in *Deepak Bajaj* (*supra*), it has been rendered without noticing the decision in *Deepak Bajaj* (*supra*).

25. It may also be fruitful to remember as to what exactly was said by the Supreme Court in *Alka Gadia* (*supra*). We may refer to the passage extracted in paragraph 6 above wherein the Supreme Court observed that it is not correct to say that the courts had no power to entertain grievances against any detention order prior to its execution. The proposition is, therefore, clearly laid out that the courts have the necessary power to entertain grievances against the detention orders at the pre-execution stage. However, the court observed that such powers have been used in proper cases which have been few and that the grounds on which the courts have interfered with them at the pre-execution stage were necessarily very limited in scope and number, such as in the five situations mentioned therein. The Supreme Court decision in *Alka Gadia* (*supra*) does not indicate that it is only in those five situations that a challenge to a detention order prior to its execution can be entertained. What it mentions is that courts have the necessary power and they have used it in the five situations mentioned therein. In our humble view, the five situations mentioned in *Alka Gadia* (*supra*) are illustrative and not exhaustive and it is for this reason that we say that the decision in *Deepak Bajaj* (*supra*) lays down the law accurately. It is an unhappy situation in which the High Court is placed when it is asked to choose between decisions of different Benches of the Supreme

Court of co-equal strength. The situation is akin to the case of an unfortunate child caught in a custody battle between his parents. The child, upon being asked by the Court, has to express his or her choice of parent. It is a difficult choice, but choose, the child must. Similarly, the High Court has to decide and has to apply one opinion or the other. And, in doing so, we are merely following the salutary principles which had been adopted by the Full Bench of the Allahabad High Court and which had been relied upon by a Division Bench of this court in the case of ***Virender Kumar @ Bittoo*** (*supra*). On an examination of the decisions, we feel that the decision in ***Deepak Bajaj*** (*supra*) lays down the law on the subject accurately. It is for this reason that we follow the said decision.

26. Once we have decided that this writ petition is maintainable at the pre-execution stage even in circumstances other than those mentioned in ***Alka Gadia*** (*supra*), the next question is whether the situation prevailing in the present case is one which would warrant interference by this court. This brings us to consider the decision in ***Maqsood Yusuf Merchant*** (*supra*) where the Supreme Court observed that despite the order of detention having been passed as far back as on 19.03.2002, the same not having been executed till the date of the Supreme Court decision (22.08.2008) and there being no indication of the proposed detenu therein having indulged in any prejudicial activities after 2002, the Supreme Court felt that the continuation of the detention order would be an exercise in futility and the same, therefore, be not given any effect to any further. In that case, it is true, the Union of India had conceded that since the order of detention had been passed, the proposed detenu had not indulged in any prejudicial activity. In the present case, we find that though there is no concession on this point, there is no evidence placed before us to indicate that the proposed

detenu (Mr Manish N. Vohra) has indulged in any prejudicial activities after the passing of the detention order on 17.08.2001. There was no instance pointed out in the affidavits filed by the respondents of the said Mr Manish N. Vohra having been indulged in prejudicial activities after the passing of the detention order in 2001. It was only contended that whether a person is indulging in prejudicial activities is a subject matter of inquiry and as the proposed detenu has concealed himself in a foreign jurisdiction, this aspect remained unverifiable. The whole object of preventive detention is to detain a person in order to prevent him from indulging in prejudicial activities. The detention, however, is based on his past conduct. At the time when the detention order was passed, there may have been reason to do so, but the live link between the prejudicial activities and the purpose of detention appears to have snapped by the passage of time. It could be said that the passage of time between the date of the detention order and its execution was the result of the proposed detenu avoiding arrest and, therefore, he cannot be permitted to take advantage of his own wrong. But, we must remember that preventive detention is not by way of punishment for a past wrong and is only a means to detain a person from continuing with his prejudicial activities in the future for a specified length of time. What the proposed detenu has done in the past cannot be washed away and if the allegations against him are established in the judicial / *quasi-judicial* proceedings, he shall have to suffer the consequences thereof. The fact that he has been declared a proclaimed offender also does not get washed away. He has tried to avoid the due process of law and that is something for which he will have to suffer the consequences. But, this does not mean that he has to be detained so as to prevent him from indulging in prejudicial activities when there is no evidence of his having indulged in any such activity for over seven years. We are not saying that the detention order, when passed, was or was not valid.

What we are saying is that the requirement of executing the detention order today has lost its relevance and as observed by the Supreme Court in *Maqsood Yusuf Merchant* (*supra*), the continuation of the detention order in these circumstances would be an exercise in futility and ought not to be given effect to any further.

27. It is for these reasons that we follow the decisions of the Supreme Court in the cases of *Maqsood Yusuf Merchant* (*supra*), *Deepak Bajaj* (*supra*) and *Yusuf Razak Dhanani* (*supra*) and direct that the detention order shall not be given effect to any further. We also make it clear that this order does not, in any way, prevent the respondents from continuing with their prosecution and / or launching fresh prosecutions against Mr Manish N. Vohra in respect of his alleged wrongs. This order will also not prevent the respondents from passing any similar order in future in the event similar allegations are raised against the said Mr Manish N. Vohra. With these directions, the writ petition is allowed to the extent indicated above. There shall be no order as to costs.

BADAR DURREZ AHMED, J

V. B. GUPTA, J

February 10, 2009

SR/dutt