

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 17.01.2012

Decided On : 24.02.2012

+ W.P. (Crl.) No. 1629 /2011 & Crl.M.A.No. 18497/2011

RAJESH VERMA & ANR

..... Petitioners

Through : Mr. Atul Nanda, Sr. Advocate with Mr. Saurabh
Kirpal, Mr. Sanjay aggarwal & Ms. Jyoti Taneja,
Advocates

Versus

UOI & ANR

..... Respondents

Through : Mr. Sumeet Pushkarna with Mr. Gaurav Varma and
Ms. Meenakshi, Advocates for respondent/UOI.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S. P. GARG

MR. JUSTICE S. RAVINDRA BHAT

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1. The Petitioners seek quashing of a detention order dated 07.10.2004 issued by the second respondent 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 detention order has not been served on the subject, i.e. the second petitioner (the *detenu*), till date.

2. At the outset, this court notices that the present Petitioners had challenged the detention order impugned in this case in a previous writ petition filed in 2005

(WP (Crl) 566/2005), alleging that it was *mala fide*, issued without application of mind, and arbitrary, as well as liable to be set aside on various other grounds. This court, through a Division Bench judgment dated 02.01.2007, in WP (Crl.) 566/2005, negated the challenge to the detention order. The court, importantly, also held that a pre-detention challenge to the order could not have been maintained by the present Petitioner, on an application of the law declared by the Supreme Court. The material portion of the said judgment reads as follows:

“13. Having heard learned Counsel for the parties and having noted the respective contentions as above and having gone through the pleadings on record as also the record produced, we find merit in the contention of the respondents that the mis-declaration or wrong declaration of the port of discharge in the shipping bill and the bill of lading in the present case, considering the exports being under the Repayment of State Credit Scheme and its provision would fall within the category of mis-declaration with regard to a material particular within the meaning of Section 113(i) of Customs Act and would be actionable.

14. We are, thus, of the view that the present case cannot be said to be one falling within the five situations outlined in the case of Additional Secretary, Government of India v. Alka Subhash Gadia reported at 1992 Suppl.(1) SCC 496 where challenge at the pre-execution stage is permissible. The five situations are being reproduced herein for the facility of reference:

- (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;*
- (v) That the authority which passed it had no authority to do so.”*

The court thereafter held that the detention order could not be impeached, on merits, as well, finding that:

“...the subjective satisfaction reached by the detaining authority was based on sufficient and cogent material and the same cannot be said to be based on extraneous or irrelevant considerations. The nature and gravity of the charges, the role of the petitioner as well as his past conduct and statement of various employees of the petitioner were all considered. The case does not appear to be falling in the categories where pre-execution challenge to the Detention Order ought to be permissible. The Supreme Court after a comprehensive review of the case law and noticing the principles laid down in Alka Subhash Gadia's case (supra), also referred to [Sayed Taher Bawamiya v. Joint Secretary](#) to the Government of India and Ors. Reported at wherein it was held that the Court in Alka Gadia's case (supra) was also concerned with the matter where the detention order had not been served but the High Court had entertained the petition under Article 226 of the Constitution of India. The Court held that equitable jurisdiction under Article 226 and Article 32, which is discretionary in nature, would not be exercised in a case where the proposed detenu successfully evades the service of the order. If in every case the detenu is permitted to challenge and seek the stay of the operation of the order before its execution, the very purpose of the order and the law under which it is made, will be frustrated since the orders are in operation for a limited period. The Court, however, noted that the courts have necessary power in appropriate cases to interfere with the detention order at the pre-execution stage but the scope of interference is very limited. It was held that the courts would interfere at the pre-execution stage with detention orders only after they were satisfied of the existence of the five situations enumerated earlier. In the instant case, it is the petitioner's own contention that he has not allowed the detention order to be served on him. There have been adjudication proceedings where a fine has been imposed. Petitioner has also been declared a Proclaimed Offender and as noted earlier, it cannot be said that the respondents do not have a prima facie case or that the grounds set up by them are wholly irrelevant or extraneous.”

3. After dismissal of the writ petition, the judgment of the Division Bench was sought to be challenged in a special leave petition under Article 136 of the

Constitution, before the Supreme Court. That petition (SLP 3132/2007) was dismissed on 10.07.2007.

4. The second petitioner (i.e. the detenu) in this case, appears to be residing in the United States; the *vakalatnama* filed in this case, authorizing his counsel to act on his behalf is silent regarding his whereabouts; it has been attested by a New York Notary, Mr. Antonietta J. Pereiradasilva. The *vakalatnama* indicates no address of the proposed detenu. Curiously, that document also contains the signature of his Advocate, Mr. Nikhil Jain. A submission was however made by learned senior counsel that the second petitioner lives in the United States. Interestingly, the first petitioner, the brother of the second petitioner, alone has affirmed to the contents of the writ petition, through an affidavit. He does not mention anywhere that he was instructed to file this petition. We record these facts, because the submission made was that the detention order has been rendered stale, and thus arbitrary.

5. There was a lull of over four years after dismissal of the Petitioners' special leave petition. In 2011, two petitions were filed before the Supreme Court. In one, (WP [Crl.] 219/2011) it was contended that the initiation of proceedings under the Customs Act against the second petitioner was contrary to Section 155 Cr. PC and therefore, unsustainable in law. In the second, a declaration that the detention order, impugned in this case (dated 07.10.2004, which was upheld by the Division Bench ruling in the earlier proceeding, i.e. WP (Crl.) 566/2005, by a judgment dated 02.01.2007, and in respect of which the present writ petitioners' special leave petition was rejected by the Supreme Court on 10.07.2007) was illegal, due to initiation of proceedings under the Customs Act contrary to Section 155 Cr. PC,

was sought. The latter writ petition was WP (Crl) 224/2011 before the Supreme Court. Both these writ petitions were disposed of by the order dated 24.11.2011, in the following terms:

“ WP (C) No. 219/2011

The issue in this matter has since been settled in the case of Om Prakash & Another v Union of India and Another [Writ Petition (Crl) No. 66 of 2011] decided on 30th September, 2011.

The petitioners will therefore, be at liberty to proceed before the appropriate forum for the relief sought. However, the petitioners will be at liberty to raise the contentions raised in WP (Cr) 219/2011 inter alia, relating to non compliance of the provisions of Section 155 Cr. PC before any other appropriate Court or Tribunal.

The writ petition is disposed of with the above observations.

WP (C) No. 224/2011

In our view, the petitioners ought to have approached the High Court under Article 226 of the Constitution instead of moving this Court under Article 32 of the Constitution. Accordingly, the writ petition is treated as withdrawn with liberty to the petitioners to approach the High Court for the same relief.”

6. The judgment in *Om Prakash (supra)* considered the question as to whether offences under the Central Excise Act and under the Customs Act were bailable, though they were not cognizable. The court considered, in this context, the impact of Section 155 Cr. PC, and other provisions under the said two enactments, conferring powers of arrest. The Supreme Court, *inter alia*, held (in *Om Prakash v Union of India* (WP (Crl) 66/2011, decided on 30.09.2011) that:

“The common question in these two sets of matters is that since all offences under the Central Excise Act, 1944 and the Customs Act, 1962, are non-cognizable, are such offences bailable?.....

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11. As will be evident from the aforesaid provisions of Section 155 Cr.P.C., no police officer in charge of a police station is entitled to investigate a non-cognizable case without the order of a Magistrate having the power to try such case or to commit the case for trial. Furthermore, no such police officer is entitled to effect arrest in a non-cognizable case without a warrant to effect such arrest. According to Mr. Rohatgi, since all offences under the 1944 Act, irrespective of the length of punishment are deemed to be non-cognizable, the aforesaid provisions would fully apply to all such cases. This now brings us to the question as to whether all offences under the 1944 Act are bailable or not.

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43. The provisions of Section 104(3) of the Customs Act, 1962, and Section 13 of the Central Excise Act, 1944, vest Customs Officers and Excise Officers with the same powers as that of a Police Officer in charge of a Police Station, which include the power to release on bail upon arrest in respect of offences committed under the two enactments which are uniformly non-cognizable. Both Section 9A of the 1944 Act and Section 104(4) of the Customs Act, 1962, provide that notwithstanding anything in the Code of Criminal Procedure, offences under both the Acts would be non-cognizable. The arguments advanced on behalf of respective parties in Om Prakash & Anr. Vs. Union of India & Anr. (Writ Petition (Crl) No.66 of 2011) and other similar cases under the Central Excise Act, 1944, are equally applicable in the case of Choith Nanikram Harchandani Vs. Union of India & Ors. (Writ Petition (Crl) No.74 of 2010 and the other connected Writ Petitions in respect of the Customs Act, 1962.

44. Accordingly, on the same reasoning, the offences under the Customs Act, 1962 must also be held to be bailable and the Writ Petitions must, therefore, succeed...”

7. The writ petitioners contend that in view of the above decision, there is a change or subsequent development, which warrants a fresh look at the legality of the detention order impugned in this case. Since the Customs authorities had not followed the procedure mandated by Section 155 Cr. PC, while instituting the complaint on 13.12.2007, the materials gathered by them and which formed the basis of the detention order, could not be legally used. The detention order is therefore illegal. Besides it was urged that the filing of the above complaint itself indicated that the authorities wished to avail of other remedies, such as a prosecution, which obviated the necessity of a preventive detention order. These fresh developments, coupled with the fact that the detention order had been rendered stale, because of the intervening delay in execution, demanded this court's intervention.

8. The Petitioners' counsel relied on *Om Prakash*; they also relied on the ruling reported in *Maqsood Yusuf Merchant v. Union of India*, (2008) 16 SCC 31. In *Merchant* it was observed that:

“On 28-12-2001, the applicant was arrested by the Directorate of Revenue Intelligence at Mumbai on the allegation that he, along with one Yusuf Dhanani, had fraudulently prepared bills of lading and cheated the Revenue of a huge amount.

2. On 2-1-2002, the appellant was admitted to bail by the High Court. On 22-2-2002, Yusuf Dhanani was arrested and thereafter detained under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as “COFEPOSA”). The order of bail granted to the appellant was challenged in this Court by the State but such challenge was rejected. In between, on 19-3-2002 an order of detention was also passed against the appellant under the aforesaid provisions of the COFEPOSA Act.

3. It appears that the order of detention could not be executed against the appellant and in July 2006, the appellant challenged the same before the Delhi High Court and while the matter was pending, the appellant and the other

detenu approached the Settlement Commission appointed under the Customs Act, 1962 on 13-7-2007 and, ultimately, the matter was settled by an order passed by the Settlement Commission on 11-9-2007.

4. In the said order of the Settlement Commission it was also observed that immunity from prosecution could not be granted to the appellant without imposing conditions, and, accordingly, while granting immunity the Settlement Commission took note of the fact that dues amounting to Rs 7,64,224 had been deposited. An additional penalty of Rs 50,000 was also imposed by the said Settlement Commission, against which the appellant moved the High Court in its writ jurisdiction and the matter was ultimately remitted to the Settlement Commission which set aside its own order insofar as the penalty was concerned.

5. Subsequently, the appellant moved the High Court against the order of detention and the same was disposed of with an observation that the petition was not maintainable at the pre-arrest stage and it was not open to the appellant to challenge the detention order on the grounds raised till such time as it was served or executed on the appellant. Aggrieved by the said order the appellant has moved the present appeal.

6. There is no dispute that despite the fact that the order of detention was passed as far back as on 19-3-2002, the same could not be or has not been executed against the appellant till date. The detention order was in respect of the activities indulged in or said to have been indulged in by the appellant as far back as in 2002. In fact, on behalf of the Union of India it has been very fairly submitted on instruction that since the order of detention was passed, the appellant has not indulged in similar activities.

7. Having regard to the above, we are of the view that continuing the order of detention today is an exercise in futility and the same should not, therefore, be given effect to any further. This will not prevent the respondents in future to pass any similar order in the event similar allegations are raised against the appellant.”

9. Counsel also submitted that the decision in *Rekha v. State of Tamil Nadu*, (2011) 5 SCC 244 has ruled that if any individual is accused of committing an offence and faces legal proceedings, there would be no useful purpose in continuing the preventive detention order. Reliance was placed on the following extracts of the judgment:

“The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him an opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (the Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.”

10. Mr. Sumeet Pushkarna, learned counsel for the respondents, urged that the writ petition is bereft of merits and constitutes a gross abuse of process of court. It was argued that the petitioner has approached the courts time and again challenging the detention order, which was upheld as far back as in January 2007. The first attempt to assail its legality was unsuccessful, as was the case with the move to secure relief from the Supreme Court, in 2007. Again, two writ petitions were filed, without any new grounds, taking advantage of the second petitioner's deliberate move to escape the clutches of the law. However, the Supreme Court did not grant relief. In this fourth attempt, the petitioners are seeking adjudication of the same questions, by giving a gloss of subsequent developments in law. It was also argued that the customs authorities' determination in the present case has led to imposition of duty to the extent of ₹ 20.90 crores on account of wrongful draw back claimed, and a further amount of ₹ 50 lakhs against the present petitioner against whom the detention order was issued. Further, the court, in the complaint filed by the customs authorities declared him a proclaimed offender due to his persistent absence, by its order dated 09.01.2007, and has issued open warrants of arrest. A RED CORNER notice was issued for his arrest by the INTERPOL on 24.01.2008. Also, the Additional Chief Metropolitan Magistrate has taken cognizance of the complaint filed by the customs authorities on 14.12.2007. It is also alleged that the first petitioner had informed the respondents that the proposed *detenu*, i.e the second petitioner had left for the USA, and is living and running a business in New York since 2004.

11. It can be gathered from the above narration that the detention order in this case had been unsuccessfully challenged by filing a petition in 2005; it was dismissed in January, 2007 by a reasoned judgment. The petitioner's special leave petition was rejected by the Supreme Court. The petition was challenged at the pre-detention stage, as is the position even now. The detenu fled the country – presumably to escape the detention order, and other legal processes, in 2004; he is safely ensconced in the United States in an undisclosed address. Yet he contends that the detention order has been rendered “stale” because of delay – to which he is the sole contributor. During the intervening period, the customs authorities have determined his liability; even criminal proceedings were initiated. It is not as if the petitioner was arrested, and detained; his absence made it impossible to ensure that he was brought to trial. He was declared and continues to be declared an absconder, one who has evaded the legal process. During the intervening period, the INTERPOL has also issued a RED ALERT notice for nabbing him. These facts have to be kept in mind while dealing with the contentions urged in support of the present petition.

12. As regards the question of delay in execution of the detention order, or the argument that once criminal proceedings are initiated the courts have to adopt a different approach, this court has to defer to the decision in *N.K. Bapna v. Union of India* (1992 (3) SCC 512), a three judge ruling of the Supreme Court, which had affirmed the principles in *Alka Subhash Gadia*, relied on by the previous Division Bench of this court, in the present case, while dismissing WP (Cr) 566/2005. This was further explained in *Subhash Muljimal Gandhi v. L. Himingliana* 1994 (6) SCC 14, where it was held that:

“11. The above principles laid down in Alka Subhash Gadia have been quoted with approval by another three-Judge Bench in N.K. Bapna v. Union of India (1992 (3) SCC 512). Bound as we are by the above judgments, we must hold that the other contingencies, if any, must be of the same species as

of the five contingencies referred to therein. Coming now to Mr Jethmalani's submission that the detention order was passed 'for a wrong purpose', namely, to harass and humiliate the appellant by concocting a false case of smuggling, based primarily on a confession obtained from him after subjecting him to assault, illegal detention and extortion we find that the detaining authority has denied the allegations of assault and extortion. Needless to say these are disputed questions of fact, which we cannot entertain much less delve into or decide upon. In any case, the said fact, even if true cannot vitiate the order of detention."

The above decision was quoted and the principles applied, in *State of Maharashtra v. Bhaurao Punjabrao Gawande*, (2008) 3 SCC 613. So far as the executive government's wisdom or decision to cling on to the detention order, even after initiating criminal proceeding for the offending behaviour is concerned, much would depend on the facts of the case. However, *Rekha* (relied on by the Petitioners) itself acknowledges that where "*the ordinary criminal law (the Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.*" Without drawing any conclusions or making general observations, we are satisfied that at least in this case, the test is satisfied (ordinary criminal law being unable to deal with the situation), as to persuade the court not to intervene on this ground.

13. The Petitioners' counsel had during the hearing conceded that the ground based on *Om Prakash* would not be pressed, and had expressly given it up. Yet, as that was one of the grounds upon which the Petitioners sought leave to prefer this proceeding, it would be necessary to render our findings on the point. The previous extract in *Om Prakash* containing the discussion on the nature of offences in the Central Excise Act and the Customs Act, especially the question framed for consideration, show that what the Supreme Court had to consider was whether such offences were *bailable*. After considering the various statutes, and the provisions of the Criminal Procedure Code, particularly the mandate of Section

155, that investigation of a non-cognizable offence cannot be investigated by a police officer without an order by a magistrate, it was held that the offences were bailable. The context here is that the petitioners contend that the offences the detenu is charged with are non-cognizable. It would be useful to notice Section 155:

“155. Information as to non-cognizable cases and investigation of such cases.— (1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.”

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.”

In this case, the record evidences that a magistrate had indeed taken cognizance; the petitioner did not deny this aspect. Even proceedings under Section 82/83 to enforce attendance of the accused were initiated by the court, and orders issued in that regard. Also, open warrants for his arrest were issued. Therefore, this court perceives no illegality in regard to the warrants. Furthermore, this court is also bound by the mandate of Section 460, Cr. PC, which reads as follows:

“460. Irregularities which do not vitiate proceedings.— If any Magistrate not empowered by law to do any of the following things, namely:—

(a) to issue a search warrant under Section 94;

(b) to order, under Section 155, the police to investigate an offence;

(c) to hold an inquest under Section 176;

(d) to issue process under Section 187, for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction;

(e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of Section 190;

(f) to make over a case under sub-section (2) of Section 192;

(g) to tender a pardon under Section 306;

(h) to recall a case and try it himself under Section 410; or

(i) to sell property under Section 458 or Section 459,

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.”

There is no material to suggest that the order of cognizance taken by the magistrate in this case, and police investigations were taken without good faith, as is understood in law. Furthermore, the provisions of the Criminal Procedure Code or the decision in *Om Prakash* cannot be read to imply that the materials gathered by the detaining authority, before a complaint is filed would require his cognizance. There is no legal warrant for that assumption. Also, we feel that the petitioners are smug if not naïve in assuming that the argument about cognizance having been taken allegedly without authority of law is a submission open to them; that order is not under challenge before us. We simply cannot comment on its legality.

14. In view of the above conclusions, this court is of the opinion that the present petition is without merit. In parting, we would quote the five judge Bench of the Supreme Court in *LIC v. Escorts Ltd.*, (1986) 1 SCC 264, where, the following lament was recorded how certain types of cases are prioritized at the cost of valuable judicial time and at the expense of long pending litigation of the “common man” the mute citizen patiently waiting for his day in Court:

“the name of justice, we paid due homage to the causes of the high and mighty by devoting precious time to them, reduced, as we were, at times to the position of helpless spectators. Such is the nature of our judicial process

that we do this with the knowledge that more worthy causes of lesser men who have been long waiting in the queue have been blocked thereby and the queue has consequently lengthened.”

Consequently, the criminal writ petition fails, and is dismissed.

(S.RAVINDRA BHAT)
JUDGE

February 24, 2012

(S.P. GARG)
JUDGE