CASE NO.:
Appeal (crl.) 86 of 1999

PETITIONER:
Union of India & Ors.

RESPONDENT:
Vidya Bagaria

DATE OF JUDGMENT: 05/05/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

The Union of India, Joint Secretary COFEPOSA, Commission of Customs-II, Madras and State of Tamil Nadu question the legality of the judgment rendered by a learned Single Judge of the Punjab and Haryana High Court quashing order of detention dated 19.12.95 passed in respect of one Ratan Bagaria under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'the COFEPOSA Act'). Before the order of detention could be served on Shri Ratan Bagaria, his wife Smt. Vidya Bagaria, the respondent herein, filed Habeas Corpus writ petition under Article 226 of the Constitution of India, 1950 (in short 'the Constitution') praying for issuance of writ or any other order quashing the order of detention passed by appellant no.2 herein who was the respondent no.2 in the writ petition. Several grounds touching legality of grounds on which the order of detention was passed were raised in the writ petition. The present appellants filed a counter affidavit. Primarily an objection was taken regarding the maintainability of the writ application before the order of detention was actually served and the detenu taken into custody. The various stands regarding the legality of the grounds of detention as have been raised by the writ petitioner were also refuted and it was submitted that grounds stated were germane and relevant for directing detention. The High Court elaborately dealt with the legality of the grounds on which the order of detention was founded. But as regards the preliminary objection about the maintainability of the writ petition even before the order of detention was actually served, the same was dealt with and disposed of in a very casual and summary manner, observing without even properly adverting to the law laid down by this Court, brought specifically to its notice as follows:

"Before I proceed further into the matter, I may say that the case law which has been relied upon by Mr. Sharma

is off the point."

The writ petition was allowed holding that grounds indicated in the order of detention were not legally sustainable and order of detention was unsustainable.

Learned counsel for the appellants submitted that the High Court has not dealt with the most vital aspect regarding the very maintainability of the writ petition even before the order of detention was served and the detenu incarcerated in prison in a very cryptic manner before rejecting the plea.

Per contra, learned counsel for the respondent submitted that the reasonings given by the High Court clearly indicate that the writ petition was maintainable and the legality of grounds were also duly tested. No infirmity therefore can be found with the order of the High Court. In any event, it was submitted that the order of detention was passed nearly nine years back and the purported apprehensions and the alleged objectionable activities of Mr. Bagaria have no relevance presently.

The question whether the detenu or any one on his behalf is entitled to challenge the detention order without the detenu submitting or surrendering to it has been examined by this Court on various occasions. One of the leading judgments on the subject is Additional Secretary to the Govt. of India and Ors. v. Smt. Alka Subhash Gadia and Anr. case ((1992 Supp (1) SCC 496). In para 12 of the said judgment, it was observed by this Court as under:

"12. This is not to say that the jurisdiction of the High Court and the Supreme Court under Articles 226 and 32 respectively has no role to play once the detention \026punitive or preventive- is shown to have been made under the law so made for the purpose. This is to point out the limitations, which the High Court and the Supreme Court have to observe while exercising their respective jurisdiction in such cases. These limitations are normal and well known, and are self-imposed as a matter of prudence, propriety, policy and practice and are observed while dealing with cases under all laws. Though the Constitution does not place any restriction on these powers, the judicial decision have evolved them over a period of years taking into consideration the nature of the legislation or of the order or decision complained of, the need to balance the rights and interests of the individual as against those of the society, the circumstances under which and the persons by whom the jurisdiction is invoked, the nature of relief sought, etc. To illustrate these limitations, (i) in the exercise of their discretionary jurisdiction the High

Court and the Supreme Court do not, as Courts of appeal or revision, correct mere errors of law or of facts, (ii) the resort to the said jurisdiction is not permitted as an alternative remedy for relief which may be obtained by suit or other mode prescribed by statute. Where it is open to the aggrieved person to move another Tribunal or even itself in another jurisdiction for obtaining redress in the manner provided in the statute, the Court does not, by exercising the writ jurisdiction, permit the machinery created by the statute to be by-passed; (iii) it does not generally enter upon the determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed; (iv) it does not interfere on the merits with the determination of the issues made by the authority invested with statutory power, particularly when they relate to matters calling for expertise, unless there are exceptional circumstances calling for judicial intervention, such as, where the determination is mala fide or is prompted by the extraneous considerations or is made in contravention of the principles of natural justice of any constitutional provision, (v) the Court may also intervene where (a) the authority acting under the concerned law does not have the requisite authority or the order which is purported to have been passed under the law is not warranted or is in breach of the provisions of the concerned law or the person against whom the action is taken is not the person against whom the order is directed, or (b) when the authority has exceeded its power or jurisdiction or has failed or refused to exercise jurisdiction vested in it; or (c) where the authority has not applied its mind at all or has exercised its power dishonestly or for an improper purpose; (vi) where the Court cannot grant a final relief, the Court does not entertain petition only for giving interim relief. If the Court is of opinion, that there is no other convenient or efficacious remedy open to the petitioner, it will proceed to investigate the case on its merit and if the Court finds that there is an infringement of the petitioner’s legal rights, it will grant final relief but will not dispose of the petition only by granting interim relief (vii) where the satisfaction of the authority is subjective, the Court intervenes when the authority has acted under the dictates of another body or when the

conclusion is arrived at by the application of a wrong test or misconstruction of a statute or it is not based on material which is of a rationally probative value and relevant to the subject matter in respect of which the authority is to satisfy itself. If again the satisfaction is arrived at by taking into consideration material, which the authority properly could not, or by omitting to consider matters, which it sought to have, the Court interferes with the resultant order. (viii) In proper cases the Court also intervenes when some legal or fundamental right of the individual is seriously threatened, though not actually invaded."

In Sayed Taher Bawamiya v. Joint Secretary to the Govt. of India and Ors. (2000 (8) SCC 630), it was observed by this Court as follows:

"This Court in Alka Subhash's case (supra) was also concerned with a matter where the detention order had not been served, but the High Court had entertained the petition under Article 226 of the Constitution. This 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. The Court, however, noted that the Courts have the necessary power in appropriate case to interfere with the detention order at the pre-execution stage but the scope for interference is very limited. It was held that the Courts will interfere at the pre-execution stage with the detention orders only after they are prima facie satisfied:

(i) that the impugned order is not passed under the Act 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.

As we see it, the present case does not fall under any of the aforesaid five exceptions for the Court to interfere. It was contended that these exceptions are not exhaustive. We are unable to agree with this submission. Alka Subhash's case (supra) shows that it is only in these five types of instances that the Court may exercise its discretionary jurisdiction under Article 226 or Article 32 at the pre-execution stage. The appellant had sought to contend that the order which was passed was vague, extraneous and on irrelevant grounds but there is no material for making such an averment for the simple reason that the order of detention and the grounds on which the said order is passed has not been placed on record inasmuch as the order has not yet been executed. The appellant does not have a copy on the same, and therefore, it is not open to the appellant to contend that the non-existent order was passed on vague, extraneous or on irrelevant grounds".

This Court's decision in Union of India and Ors. v. Parasmal Rampuria (1998 (8) SCC 402) throws considerable light as to what would be the proper course for a person to adopt when he seeks to challenge an order of detention on the available grounds like delayed execution of detention order, delay in consideration of the representation and the like. These questions are really hypothetical in nature when the order of detention has not been executed at all and the detenu has avoided service and incarceration and when challenge is sought to be made at pre-execution stage. It was observed as under:

"In our view, a very unusual order seems to have been passed in a pending appeal by the Division Bench of the High Court. It is challenged by the Union of India in these appeals. A detention order under Section 3(1) of the COFEPOSA Act was passed by the authorities on 13.9.1996 against the respondent. The respondent before surrendering filed a writ petition in the High Court on 23.10.1996 and obtained an interim stay of the proposed order, which had remained un-served. The learned Single Judge after hearing the parties vacated the ad interim relief. Thereafter, the respondent went in appeal before the Division Bench and again obtained ad interim relief on 10.1.1997 which was extended from time to time. The writ appeal has not been still disposed

of.

When the writ petition was filed, the respondent had not surrendered. Under these circumstances, the proper order which was required to be 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."

In Sunil Fulchand Shah v. Union of India and Ors. (2000 (3) SCC 409) a Constitution Bench of this Court observed that a person may try to abscond and thereafter take a stand that period for which detention was directed is over and, therefore, order of detention is infructuous. It was clearly held that the same plea even if raised deserved to be rejected as without substance. It should all the more be so when the detenu stalled the service of the order and/or detention in custody by obtaining orders of Court. In fact, in Sayed Taher's case (supra) the fact position shows that 16 years had elapsed yet this Court rejected the plea that the order had become stale.

These aspects were once again highlighted recently in Hare Ram Pandey v. State of Bihar and Ors. (2003 (10) JT 114) and Union of India v. Amritlal Manchanda and Ors. (2004 (3) SCC 75) after an elaborate and exhaustive consideration of the matter.

The High Court does not appear to have considered the case in the background of whether any relief was available to the writ petitioner even before the order of detention was executed. The cryptic observation that the decision " ms off the point", seems to be not only evasive but lacks judicious application of mind. Consequently, the order is liable to be set aside. It is open to the respondent to surrender to custody as was observed in Parasmal Rampuria's case (supra) and take such pleas as are available in law to the person concerned. These aspects were once again sufficiently highlighted in Amrit Lal Manchanda's case (supra).

The appeal is allowed. The order of the High Court is set aside and the writ petition filed in the High Court shall stand dismissed.