

SUBHASH MULJIMAL GANDHI

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v.

L. HIMINGLIANA AND ANR.

AUGUST 26, 1994

[P.B. SAWANT AND M.K. MUKHERJEE, JJ.]

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Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 :

Detention order—Challenge at pre-execution stage—When permissible—Power of court to interfere with detention order prior to execution—Scope and extent of—Detention order—Delay in execution—Effect of.

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The respondent passed an order on August 23, 1990 under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 to detain the appellant with a view to preventing him from smuggling goods. On getting the information about the making of the order the appellant filed a writ petition in the High Court challenging the same and it was dismissed.

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In appeal to this Court it was contended on behalf of the appellant that the grounds of detention, and scope of challenging detention order at pre-execution stage, given by this Court in *Addl. Secretary, Govt. of India v. Alka Subhash Gadia*, [1992] Supp. 1 S.C.C. 496 were not exhaustive but illustrative; (ii) 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 to him to assault, illegal detention and extortion; (iii) there was abuse of extraordinary constitutional power by the State machinery because the appellant was not produced before the Magistrate within 24 hours and (iv) the detention order was passed long back and the maximum period of detention which the appellant would have undergone i.e. 2 years was long over and therefore his detention now would be punitive and not preventive.

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Dismissing the appeal, this Court

HELD : 1. The order of detention is not made for a purpose ex-

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A transeous to the provisions of COFEPOSA. The detaining authority has denied the allegation of assault and extortion and have stated in their affidavit-in-reply that there was no breach of constitutional or legal provision as the petitioner was produced before a competent court within 24 hours of his formal arrest. Needless to say these are disputed questions of fact, which this Court cannot entertain much less delve into or decide upon. In any case, the said fact even if true cannot vitiate the order of detention. [791-F-C, 792-A]

2. Even if it is held that the explanation offered by the respondents for delayed production is not a satisfactory one and that the Customs Officers have failed to comply with constitutional and statutory requirements, the order of detention, which has been made by the detaining authority on the basis of its satisfaction that the petitioner was smuggling gold, would not be bad on that score. The appellant, however, would be certainly entitled to seek appropriate relief by way of compensation or otherwise in case he succeeds in proving that he was wrongfully and illegally detained. [791-G-H]

3. In *Alka Subhash Gadia's* case this Court has expressly laid down that the grounds of interference with detention orders at pre-execution stage have to be limited in scope and number as mentioned therein. However, the other contingencies, if any, must be of the same species as of the five contingencies referred to therein. [790-F, 791-B]

Addl. Secy. Govt. of India v. Alka Subhash Gadia, [1992] Supp. 1 S.C.C. 496 and *N.K. Bapna v. Union of India*, [1992] 3 S.C.C. 512, relied on.

4. It is undoubtedly true that an unusual delay in execution of an order of detention if not satisfactorily explained, may persuade the Court to draw an inference that the order is punitive and not preventive. There is, however, no scope for drawing such an inference in this case as the delay here has been occasioned not by any omission or commission on the part of the detaining authority. On the contrary, it is the appellant who has delayed the execution by first moving the High Court and then this Court. [792-F]

Bhawarlal v. State of T.N., [1979] 1 S.C.C. 465, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. A
540 of 1994.

From the Judgment and Order dated 1.10.90 of the Bombay High Court in W.P. CrI. No. 1083 of 1990.

Ram Jethmalani, Ms. Lata krishnamoorthy and Abani Kumar Saha B
for the Appellant.

N.N. Goswami, A. Subba Rao, C.V. Subba Rao and Ms. Sushma Suri
for the Respondents.

The Judgment of the Court was delivered by C

M.K. MUKHERJEE, J. Special leave granted.

This appeal is directed against the order dated October 1, 1990
passed by the Bombay High Court in Writ Petition (CrI.) No. 1083 of 1990.

On August 23, 1990, the Secretary (Preventive Detention) to the
Gvoernment of Maharashtra, the respondent No.1 herein, made an order
under section 3(1) of the Conservation of Foreign Exchange and Preven-
tion of Smuggling Activities Act, 1974 ('COFEPOSA' for short) to detain
the appellant with a view to preventing him from smuggling goods. On
getting information about the making of the order the appellant filed a writ
petition in the Bombay High Court challenging the same and having failed
there moved this Court by filing the special leave petition. To the petition
the appellant has annexed, amongst other documents, purported copies of
the order of detention and the grounds on which it is based though it is
not quite clear how he came by them. The respondents, however, contend F
that the appellant obtained those copies clandestinely for they were to be
served upon him only on detention. However, this aspect of the matter
need not detain us as the respondents have not assailed the authenticity of
those copies.

Before we proceed to consider the contentions raised by Mr. Jeth- G
malani, the learned senior counsel appearing in support of the appeal, we
may profitably refer to the factual allegations made in the grounds of
detention so far as they are relevant for our present purposes. It is first
stated therein that in the early hours of May 22, 1990 when Cathay Pacific
Flight No. CX 750 arrived at the Sahar Airport, Bombay, some Customs H

- A Officers accosted the appellant, who had come from Dubai, inside the aircraft in presence of two panchas and asked whether he was carrying gold. Initially he answered the question in the negative but when the Officers touched his person and felt some hard substance below his waist belt he admitted having concealed gold bars tied around his waist. He was then taken down to the Customs Baggage Examination Hall and from there
- B to the S.D.O.'s room in the Hall. There, on search, three cotton belts tied around his body were recovered. Each of the three belts was found to contain 60 gold bars, each weighing 10 tolas, and bearing foreign markings.

- C The grounds of detention then detail the statement, the appellant made to the Customs Officers on that day wherefrom it appears that he not only admitted that he brought the seized 180 gold bars from Dubai but earlier also on May 15, 1990 he had illegally imported 120 gold bars from Dubai. In the statement he also disclosed the names of the persons who were involved in the transactions. Another statment made by the appellant
- D on May 24, 1990 regarding his *modus operandi* of smuggling the gold has next been incorporated in the grounds of detention. The grounds of detention then recite that on May 24, 1990 the appellant was arrested and on May 25, 1990, when he was produced before the Addl. Chief Metropolitan Magistrate, Bombay, he made a statement. The statement so made has also been reproduced in the grounds of detention.

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- F The appellant's version of the incident as disclosed in that statement is that after he was brought down from the aircraft, he was allowed to take out his baggage and then leave the airport. While he was waiting outside he was brought back and taken to the S.D.O.'s office where he found cotton belts lying on the table. Then and there the Customs Officers asked the appellant about the gold to which he replied that it did not belong to him. Then the Officers started assaulting him and tying the belts around his body. During the process he became unconscious. It is next stated in the grounds that Addl. Chief Metropolitan Magistrate while remanding the appellant into judicial custody ordered his medical examination. Pursuant
- G thereto he was examined by the Chief Medical Officer of the Bombay Central Prison Hosptial and his report indicated that he had suffered injuries. The Customs authorities, however, denied the allegations of assault made by the appellant.

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According to the detaining authority, from all the facts stated in the

grounds of detention, it was evident that the appellant smuggled massive quantity of gold to India for the second time and he was likely to continue to do so for which it was necessary to detain him.

The question as to whether a detenu or anyone on his behalf is entitled to challenge an order of detention without the detenu submitting or surrendering to it and, if so, what will be the nature, scope and extent of such challenge came up for consideration before a three-Judge Bench of this Court, of which one of us (Swant J.) was a member, in *Addl. Secy., Govt. of India v. Alka Subhash Gadia*, [1992] Suppl. 1 SCC 496. The Court, after striking a balance between the competing claims of the individual to his liberty and of the State to detain an individual to safeguard the interest of the society and on a conspectus of the decisions of this Court and of different High Courts on the subject, answered the question with the following words :

"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 the 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 orders 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 and other ground 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)

Mr. Jethmalani first contended that the five contingencies referred to in the above quoted passage were not exhaustive but illustrative as there

- A might well be other contingencies in which- pre-execution challenge to the order of detention would be permitted. In elaborating his contention Mr. Jethmalani submitted that in the case in hand there were sufficient materials to prove that the Customs Officers concocted a false case of smuggling against the appellant after beating him, keeping him in illegal custody for three days and coercing him to make a confessional statement.
- B In support of this submission, Mr. Jethmalani first drew our attention to the report of the doctor of the Jail Hospital submitted on June 2, 1990 to the Chief Metropolitan Magistrate regarding medical examination of the appellant which indicate that the doctor found some bruises and abrasions on his person and he complained of pain on his body. Mr. Jethmalani then
- C drew our attention to the fact that though the appellant was apprehended in the early hours of May 22, 1990 and was thus constitutionally and statutorily required to be produced before the nearest Magistrate latest by May 23, 1990 he was kept unlawfully detained till May 25, 1990 when the Customs authorities produced him in Court. Mr. Jethmalani submitted that
- D as these facts unmistakably demonstrated the misuse and abuse of extraordinary constitutional powers by the State machinery this Court would not allow the liberty of a victim of exercise of such powers to be taken away even if the parameters mentioned in *Alka Subhash Gadia* did not apply in this case. Even otherwise, Mr. Jethmalani urged, the facts herein clearly
- E made out a case for interference by this Court under category (iii) mentioned in the above quoted passage in *Alka Subhash Gadia*, namely that the impugned order was passed for a wrong purpose.

- F Having given our anxious consideration to the above contention of Mr. Jethmalani, we are unable to accept the same. In the passage, earlier quoted from *Alka Subhash Gadia*, this Court has expressly laid down that the interference with detention orders at pre-execution stage has to be limited in scope and number as mentioned therein. The Court has reiterated the same view as well be evident from the following further observations made in that case :

- G "..... in the rare cases where the detenue, before being served with them, learns of the detention order and the grounds on which it is made, and satisfies the Court of their existence by proper affirmation, the Court does not decline to entertain the writ petition even at the pre-execution stage, of course, on the very limited
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grounds stated abvoe."

(Emphasis supplied)

The abvoe 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 to 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. As regards the allegation of illegal detention, the respondents have drawn our attention to the following lines in paragraphs 10 of their affidavit-in-reply :

"..... the petitioner was allowed to stay in the Air Intelligence Office as the investigation had to be done to find out the whereabouts of the receiver of the contraband gold, the information of which was given by the petitioner to me and other investigating officers during the course of interrogation. The petitioner was interrogated only and not arrested as alleged by him. The petitioner was arrested only on 24.5.90 and produced before Chief Metropolitan Magistrate on 25.5.90."

to contend that there was no breach of constitutional or legal provision as the petitioner was produced before a competent court within 24 hours of his formal arrest. In our considered view, even if it is held that the above explanation offered by the respondents for delayed production is not a satisfactory one and that the Customs Officers have failed to comply with constitutional and statutory requirements, the order of detention, which has been made by the detaining authority on the basis of its satisfaction that the petitioner was smuggling gold, would not be bad on that score. The appellant, however, would be certainly entitled to seek appropriate relief by way of compensation or otherwise in case he succeeds in proving that he was wrongfully and illegally detained. For the foregoing discussion, we

- A are unable to hold that the order of detention is made for a purpose extraneous to the provisions of COFEPOSA.

B Mr. Jathmalani next contended that the utter absurdity of the allegation of smuggling made against the appellant would be borne out by the photographs which were taken at the instance of the Customs Officers at the time of the appellant's apprehension as they would clearly show that it was impossible for him to zip up his trousers, with three belts, tied, each containing 60 pieces of gold, weighing 10 tolas each, around his waist. Though this factual submission was not a relevant consideration at this stage in the context of the principles laid down in *Alka Subhash Gadia* we had, to satisfy our judicial conscience, called for and saw all the photographs carefully. Having done so we are constrained to say that Mr. Jethmalani's submission in this regard was based on wrong instructions.

D Mr. Jethmalani lastly submitted that having regard to the fact that the order of detention was passed as far back as in 1990 and the maximum period of detention, which the appellant would have to undergo under the order was two years, was long over, his detention at this distant point of time would be punitive and not preventive. It is undoubtedly true that an unusual delay in execution of an order of detention if not satisfactorily explained, may persuade the Court to draw such an inference. There is, however, no scope for drawing such an inference in this case as the delay here has been occasioned not by any omission or commission on the part of the detaining authority. On the contrary, it is the appellant who has delayed the execution by first moving the Bombay High Court and then this Court. That apart, the respondents have asserted that though this Court had not passed any interim order against execution of the order, it could not be served as the appellant was absconding. It is pertinent to point out here that an identical contention raised by Mr. Jethmalani on similar facts was negated by this Court in *Bhawarlal v. State of T.N.*, [1979] 1 SCC 465.

G On the conclusions as above, we dismiss the appeal.

T.N.A.

Appeal dismissed.