Rajinder Arora vs Union Of India And Ors on 10 March, 2006

Equivalent citations: AIR 2006 SUPREME COURT 1719, 2006 (4) SCC 796, AIR 2006 (NOC) 1000 (KER), 2006 AIR SCW 1510, (2006) 3 RECCIVR 218, 2006 (4) SRJ 390, (2006) 3 CIVILCOURTC 643, 2006 (2) CALCRILR 123, 2006 (2) SCC(CRI) 418, 2006 (3) SCALE 202, (2006) 131 ECR 192, 2006 CALCRILR 2 123, (2006) 2 KER LT 77, 2006 CRILR(SC&MP) 363, (2006) 44 ALLINDCAS 403 (KER), (2006) ILR(KER) 2 KER 392, (2006) 2 CURCRIR 8, (2006) 2 EFR 298, (2006) 2 MADLW(CRI) 490, (2006) 1 MAD LJ(CRI) 398, (2006) 34 OCR 18, (2006) 2 RAJ CRI C 340, (2006) 2 RECCRIR 752, (2006) 4 SCJ 140, (2006) 3 SUPREME 139, (2006) 3 SCALE 202, (2006) 3 ALLCRILR 582, (2006) 2 CURLJ(CCR) 165, (2006) 2 CHANDCRIC 132, (2006) 1 ALLCRIR 1135, (2006) 2 CRIMES 61, (2006) SC CR R 724, MANU/SC/1437/2006, (2006) 2 KER LT 61

Author: S.B. Sinha

Bench: S.B. Sinha, P.K. Balasubramanyan

```
           CASE NO.:
Appeal (crl.)  311 of 2006

PETITIONER:
Rajinder Arora

RESPONDENT:
Union of India and Ors

DATE OF JUDGMENT: 10/03/2006

BENCH:
S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:
```

J U D G M E N T [Special Leave Petition (Criminal) No.4708 of 2005] S.B. SINHA, J :

Leave granted.

The Appellant is an industrialist. He manufactures acrylic yarn, blankets and shawls. The said goods are exportable items. The units of the Appellant are recognized export houses. They were awarded the highest export performance Awards by Wool and Woolen Export Promotion Council for manufacture of the aforementioned goods. The Appellant imported some raw materials on the premise that the imported items would be utilized for manufacture of the goods which were meant for export. A raid

was conducted in his residence on 26.05.2004 by the Directorate of Revenue Intelligence (DRI) and he was taken in custody. He allegedly was continuously tortured for two days. During his detention statements under Section 108 of the Customs Act were recorded allegedly under coercion, duress and threat. He was shown arrested on 28.05.2004 and produced before a Magistrate. He was medically examined whereupon marks of multiple injuries on his person were found. After he was remanded to judicial custody by the Magistrate by an order dated 28.5.2004, he retracted his alleged confession stating that the same had been obtained under coercion, duress and torture. He remained under treatment for 45 days out of the total period of 60 days of his judicial remand (the requisite statutory period for filing a complaint). Upon failure on the part of the DRI Department to file a complaint against the Appellant within the statutory period of 60 days, he was enlarged on bail on 28.7.2004. In the meanwhile, his family members were forced to deposit a sum of Rs.60 lakhs as customs duty. Such deposit, however, was made without prejudice to the rights and contentions of the Appellant. Several representations were made by the Appellant stating the aforesaid facts.

He filed a criminal complaint on 18.02.2005. The Medical Officer concerned was examined in the said proceeding wherein he stated:

"On 28.05.2004 at 8.40 PM I examined physically Sh. Rajinder Arora vide my emergency OPD No. 6607/04. Patient was brought to me by Mr. R.K. Saini, Intelligence Officer, DRI, Ludhiana Regional Unit. I found following injuries on the person of Rajinder Arora who is present today:

1. Multiple abrasions, superficial, in an area of 4 inch x 2 inch over mid of left upper arm, antero laterally. Patient also complaint of heaviness in chest. His B.P. was 150/106 mm Hg.

In my opinion, duration of injury was about 24 hours. I have seen the certified copy of injury report which is correct according to original report and is Ex. CW2/1, which is signed by me. When Rajinder Arora was brought to me he was under the custody of DRA authorities."

In the meanwhile, a proposal was forwarded to the DRI, Delhi Zonal Unit, Delhi for his detention under COFEPOSA. A proposal was also sent to COFEPOSA Unit by the said authority. Allegedly, on 15.2.2005, the DRI Ludhiana opined that no case has been made out for his detention under COFEPOSA. A proposal, however, was made by the said authorities for determination of detention of Shital Vij, who was said to be the brain behind utilization of the unlawful import.

Only on 31.3.2005, the order of detention was issued.

A writ petition was filed by the Appellant herein before the High Court of Punjab and Haryana praying for quashing of the said order of detention. By reason of the impugned order, the writ

petition has been dismissed. The Appellant is, thus, in appeal before us.

The High Court in his impugned judgment opined:

> (i) In the grounds of detention, the detaining authority had adverted to all the evidences collected against the Appellant including his statement under Section 108 of the Customs Act as also the subsequent retraction.
>
> (ii) The activities of the Appellant come within the purview of the expression "smuggling" as defined in Section 2(39) of the Customs Act read with Section 2(e) of the COFEPOSA Act.
>
> (iii) Delay in issuing the order of detention is not fatal. Delay, per se, cannot be a circumstance to set aside an order of detention.
>
> (iv) The subjective satisfaction of the authority is based upon sufficient material and is sufficient to warrant an order of preventive detention.
>
> (v) No discrimination has been committed as against the Appellant in not recommending Shital Vij's detention as its recommendation was rejected by the Screening Committee.
>
> (vi) Only because a redemption certificate was issued by the concerned authority, it cannot be presumed that the Appellant had discharged his export obligations, without violation of the terms and conditions of his licences.
>
> (vii) The complaint petition filed by the Appellant herein, contending illegal detention and torture, by itself is not a ground for detracting from the orders passed by the detaining authority as mere filing of a criminal complaint would not lead to a conclusion that the order of detention was mala fide.

Mr. Uday U. Lalit, learned senior counsel appearing on behalf of the Appellant, would raise the following contentions:

> (i) Licences granted to the Appellant were allowed to be surrendered by the competent authorities only after an objective assessment was made in that behalf.
>
> (ii) The status report called for by the Customs Authorities from DGFT having not been considered, the detaining authority must be held to have failed to take into consideration a relevant fact, as therein it was opined that no case had been made out for detention.
>
> (iii) As the Appellant filed a complaint against the officer alleging illegal detention and torture meted out by him, the impugned order of detention has been passed

malafide.

(iv) The Appellant having deposited Rs.60 lakhs without prejudice to his rights and contentions, and, thus, the impugned order of detention having been made for unauthorized purpose, was mala fide. Had there been any material before the appropriate authority, they would have lodged a complaint against the Appellant.

(v) There was absolutely no reason as to why such a long time was taken for passing the order of detention.

Mr. K. Radhakrishnan, learned senior counsel appearing on behalf of the Respondent, on the other hand, relying on or on the basis of the findings of the High Court, as noticed supra, would support the order of detention.

It is not in dispute that the authorities in terms of Sections 9(4), 10 and 11 of the Foreign Trade Development and Regulation Act, 1994 exercise a wide jurisdiction. Although the raid was made on 26.05.2004, admittedly, till date, no prosecution has been lodged as against the Appellant by DGFT. It is also not in dispute that the statutory authorities has not yet issued any show cause notice on the Appellant on the ground that the export commitments were not fulfilled. It is furthermore not in dispute that the authorities had granted redemption certificates.

A pre-detention order can be quashed only on a limited ground. This Court in Additional Secretary to the Government of India and Others v. Smt. Alka Subhash Gadia and Another [1992 Supp (1) SCC 496] laid down the criterias therefor upon a detailed consideration of the provisions of the Preventive Detention Laws and the right of individual to assail an order of detention without surrendering in the following terms:

" 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 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."

Recently a 3-Judge Bench of this Court in Naresh Kumar Goyal v. Union of India and Others [(2005) 8 SCC 276] (in which one of us P.K. Balasubramanyan, J. was a member), opined:

> "It is trite law that an order of detention is not a curative or reformative or punitive action, but a preventive action, avowed object of which being to prevent the anti-social and subversive elements from imperiling the welfare of the country or the security of the nation or from disturbing the public tranquility or from indulging in smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances etc. Preventive detention is devised to afford protection to society. The authorities on the subject have consistently taken the view that preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it, and to prevent him from doing so. It, therefore, becomes 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 detenue 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 as a dead letter and frustrate the entire proceedings. Inordinate delay, for which no adequate explanation is furnished, led to the assumption that the live and proximate link between the grounds of detention and the purpose of detention is snapped. (See : P.U. Iqbal v. Union of India and Ors.,; Ashok Kumar v. Delhi Administration, and Bhawarlal Ganeshmalji v. State of Tamilnadu)"

In that case, however, the order of detention had not been implemented for a long time and having considered Alka Subhash Gadia (supra) and several other decisions, it was held:

> "Coming to the facts of this case, at the highest the case of the appellant is that the order of detention was belatedly passed and the State of Bihar thereafter took no steps whatsoever to implement the order of detention. Counsel for the appellant sought to bring this case under the third exception enumerated in Alka Subhash Gadia (supra), namely, that the order was passed for a wrong purpose. In the facts and circumstances of this case, it is not possible to accept the submission that the order was passed for a wrong purpose.
>
> Apparently the order has been passed with a view to prevent the appellant from smuggling goods or abetting the smuggling thereof etc. The facts of the present case are no different from the facts in Muneesh Suneja (supra). We do not find that the case falls within any of the exceptions enumerated in Alka Subhash Gadia (supra). The High Court was, therefore, justified in refusing to exercise jurisdiction under Article 226 of the Constitution of India to quash the order of detention at the pre-arrest stage. This appeal is, therefore, devoid of merit and is dismissed."

Mr. Lalit, however, is not correct in his submissions that only because a redemption certificate had been granted by DGFT, the same would itself be sufficient for quashing an order of detention as the activities of smuggling on the part of the importer may come to their notice at a later part of time.

We may, however, notice that the Appellant has categorically stated that a status report was submitted by the Respondent No. 3 to the DRI, Delhi on their request but the same had not been placed before the detaining authority.

In Ground 'U' of the SLP filed by the Appellant, herein, it is stated:

> "Because the High Court has failed to appreciate that, as per the knowledge of the petitioner, the respondent No. 3 submitted the status report of the present case vide its letter dated 15.02.2005 to the DRI Delhi on their request which was not placed before the detaining authority the respondent No. 2 herein. As per the knowledge of the petitioner, the status report had negated the passing of the order of detention. This status report/ letter has been deliberately withheld with a malafide intention. It is a settled law that the non-production of relevant and vital documents before the detaining authority renders the detention order invalid."

The said pleas raised by the Appellant has been traversed by the Respondent in the following terms:

> "In reply to the contents of Para U, it is submitted that the status report dated 15.2.2005 is an internal correspondence of the department and has not been relied upon in the detention orders dated 31.03.2005 and hence are not required to be served upon the petitioner."

It is, however, not in dispute that although the raid was conducted on 26.05.2004, no material had been brought on record for even launching a prosecution as against the Appellant as yet. When the aforementioned question was raised by the Appellant, herein before the High Court, the Respondent contended that the prosecution would be launched soon. But, when the same point was raised before us, the Respondents in their counter affidavit merely stated:

> "OO) In reply to the contents of para OO, it is submitted that the Show Cause Notice in the matter has been drafted and is being issued shortly.

Complaint in the matter will be filed only after adjudication. However, detention under the COFEPOSA Act 1974 is not a punitive action and is preventive in nature. Prevention detention under COFEPOSA Act is independent of adjudication and prosecution proceedings."

The said counter affidavit has been affirmed in November, 2005. It is beyond anybody's comprehension as to why despite a long passage of time, the Respondents have not been able to gather any material to lodge a complaint against the Appellant. It has furthermore not in dispute that even the DGFT authorities have not issued any show cause notice in exercise of their power under Foreign Trade Development and Regulation Act, 1994.

Furthermore no explanation whatsoever has been offered by the Respondent as to why the order of detention has been issued after such a long time. The said question has also not been examined by the authorities before issuing the order of detention.

The question as regard delay in issuing the order of detention has been held to be a valid ground for quashing an order of detention by this Court in T.D. Abdul Rahman v. State of Kerala and others [AIR 1990 SC 225] stating:

> "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.
>
> 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."

The delay caused in this case in issuing the order of detention has not been explained. In fact, no reason in that behalf whatsoever has been assigned at all.

Admittedly, furthermore, the status report called for from the Customs Department has not been taken into consideration by the competent authorities.

A Division Bench of this Court in K.S. Nagamuthu v. State of Tamil Nadu & Ors. [2005 (9) SCALE 534] struck down an order of detention on the ground that the relevant material had been withheld from the detaining authority; which in that case was a letter of the detenu retracting from confession made by him.

Having regard to the findings aforementioned, we are of the opinion that grounds (iii) and (iv) of the decision of this Court in Alka Subhash Gadia (supra) are attracted in the instant case.

For the reasons aforementioned, the impugned order of detention cannot be sustained, which is set aside accordingly. The appeal is allowed.