UNION OF INDIA AND ORS.

v.

ATAM PARKASH AND ANR.

(Criminal Appeal No. 1870 of 2008)

NOVEMBER 25, 2008

[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM SHARMA, JJ.]

PREVENTIVE DETENTION:

Order of detention – Power of Courts to interfere with at pre-execution stage – Limitations upon – Explained – Order of High Court allowing detenu's writ petition challenging the detention order as infructuous by lapse of time, set aside – Government directed to decide as to whether to take the detenu back to custody – Constitution of India, 1950 – Articles 32 and 226.

The instant appeal was filed by the Union of India against the order passed by the High Court allowing the respondent's writ petition wherein he had challenged the order of his detention as infructuous by lapse of time.

Allowing the appeal, the Court

HELD: 1.1. In *Alka Subhash Gadia's* case*, this Court has held that the Courts, under Articles 226 and 32 of the Constitution of India 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 vexatious grounds; or (v) the authority which passed it had no authority to do so. [Para 4] [609-F-H; 610-A]

A *Additional Secretary to the Govt. of India and Ors. v. Smt. Alka Subhash Gadia and Anr.* **1992 Supp (1) SCC 496;** *Administration of NCT Delhi v. Prem Singh* **1995 Supp (4) SCC 252;** *Sayed Taher Bawamiya v. Joint Secretary* **2000 (8) SCC 630;** *Union of India and Ors. v. Parasmal Rampuria* **1998 (8) SCC 402;** *Sunil Fulchand Shah v. Union of India and Ors.* **2000 (3) SCC 409;** *Hare Ram Pandey v. State of Bihar and Ors.* **2003 (10) JT 114;** *Union of India v. Amritlal Manchanda and Ors.* **2004 (3) SCC 75 and** *Union of India and Ors. v. Vidya Bagaria* **2004 (5) SCC 577, relied on.**

C **1.2. The impugned judgment of the High Court is clearly unsustainable and is set aside. The question is as to whether it would be desirable to take the respondents back to custody. Such a decision shall be taken by the Government within two months. [Para 10] [613-G]**

D CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1870 of 2008

From the final Judgment and Order dated 12.9.2005 of the E High Court of Punjab and Haryana at Chandigarh in Crl. W.P. No. 1185 of 2004.

Gopal Subramaniam, A.S.G., Ms. Aruna Gupta, B.K. Prasad and P. Parmeswaran for the Appellants.

F Ravi Shankar Prasad, Chetan Dayal, Nikhil Jain and Ajay Pal for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

G

2. Challenge in this appeal is to the judgment of a learned Single Judge of the Punjab and Haryana High Court allowing the Writ Petition filed by the respondents. Prayer in the writ petition was to quash the detention order dated 10.5.1993. H Stand of the writ petitioners before the High Court was that a

petition for preventing the respondents in the writ petition from enforcing the said order was disposed of by order dated 19.7.2002 in Criminal Writ Petition No. 1408 of 1999. The respondents in the writ petition opposed the same taking the stand that in some other cases the High Court had taken the view that once the order had become infructuous by lapse of time, a different yardstick should not have been applied. In the case at hand, the writ petition was, therefore, allowed with the following observations:

> "In view of the above, this petition is allowed and the respondents are restrained from enforcing order dated 10.5.1993. They will however be at liberty to pass any fresh order, if so required, and take appropriate action thereafter in accordance with law."

3. Learned counsel for the appellants submitted that the judgment of the High Court is contrary in terms. If on one hand it was held that the order dated 10.5.1993 had become infructuous, there was no question of granting a liberty to pass a afresh order. It is pointed out that for a considerable length of time the order of stay was in operation.

4. In *Additional Secretary to the Govt. 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 vexatious grounds; or

A (v) the authority which passed it had no authority to do so.

5. The position has been re-iterated in *Administration of NCT Delhi v. Prem Singh* (1995 Supp (4) SCC 252) and *Sayed Taher Bawamiya v. Joint Secretary* (2000 (8) SCC 630).
B

6. 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
C on the subject is *Smt. Alka Subhash Gadia's* case (supra) 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
D Court and the Supreme Court under Articles 226 and 32 respectively has no role to play once the detention - punitive 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
E 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
F 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
G 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
H 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

A 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 B 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 C proper cases the Court also intervenes when some legal or fundamental right of the individual is seriously threatened, though not actually invaded."

7. This Court's decision in *Union of India and Ors. v. Parasmal Rampuria* (1998 (8) SCC 402) throws considerable D 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 E 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:

F "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 G 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

H

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."

8. 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.

9. These aspects were once again highlighted in *Hare Ram Pandey v. State of Bihar and Ors.* (2003 (10) JT 114), *Union of India v. Amritlal Manchanda and Ors.* (2004 (3) SCC 75) and *Union of India and Ors. v. Vidya Bagaria* (2004 (5) SCC 577).

10. The impugned judgment of the High Court is clearly unsustainable and is set aside. The question is as to whether it would be desirable to take the respondents back to custody. Such a decision shall be taken by the Government within two months.

11. The appeal is allowed.

R.P. Appeal allowed.