HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on 17.10.2022
Pronounced on 14 .12.2022

LPA No. 33/2020(O&M)

Harvinder Pal Singh alias Rambo ...Appellant/Petitioner(s)

Through :- Mr. Aseem Sawhney, Advocate and
Mr. M. A. Dar, Advocate

v/s

Union Territory of J&K and others .....Respondent (s)

Through :- Mr. Raman Sharma, AAG

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE
HON'BLE MR. JUSTICE PUNEET GUPTA, JUDGE

JUDGMENT

Per Oswal-J

1. This *intra court* appeal is arising out of judgment dated 10.02.2020, whereby the writ petition for issuance of writ of certiorari to quash the order of detention No. 17 of 2019 dated 23.10.2019 issued by respondent No. 2 has been dismissed by the learned writ court. The appellant has framed the following questions for consideration of this court:

(i) Whether the writ court without even putting other side to notice and examining the record of detention could have dismissed the petition on the ground that the case of the petitioner does not fall within the parameters of the judgments of the Hon'ble Apex Court in **Additional Secretary to the Government o India vs. Alka Subash Gadia** and **Deepak Bajaj v State of Maharashtra?**

(ii) Whether the learned writ court was correct in dismissing the petition and taking a view contrary to the judgment of the Coordinate Bench

in **Ghulam Qadir Ganaie vs. State of Jammu and Kashmir, 2011 (2) JKJ871?**

(iii) Whether the life of the detention warrant stands expired in case the execution of the detention has not taken place ?

2. Mr. Assem Sawhney, learned counsel for the appellant vehemently submitted that the case of the appellant fell within the parameters laid down by the Apex Court in **Alka Subash Gadia and Deepak Bajaj** (supra) and further that the learned Single Judge could not have taken a view contrary to the Coordinate Bench in **Ghulam Qadir Ganie's case** (supra). He further argued that the life of the detention warrant stood expired and as such, the detention warrant cannot be executed after an inordinate delay.

3. On the contrary, Raman Sharma learned AAG vehemently argued that the detention warrant was issued on 23.10.2019 and the appellant evaded the execution of warrant. Thereafter, the appellant filed the writ petition for challenging the detention order. He further argued that the learned writ court was correct in dismissing the writ petition as the case of the appellant did not fall within the parameters laid down by the Apex Court for exercising the powers of judicial review to examine the validity of the detention order at a pre-execution stage. He further argued that the judgment passed by the Coordinate Bench in Ghulam Qadir Ganai's case (supra) was not applicable in the present facts and circumstances of the case.

4. Heard and perused the record.

5. The first contention raised by the appellant is with regard to the scope of the judicial review for the purpose of examining the validity of order of detention at pre-execution stage.

6. The Apex Court in Alka Subash Gadia's case (supra) reported in 1992 Supp (1) SCC 496 has held that the detention order can be interfered at pre execution stage under following circumstances:

(a) that the order is not passed under the Act under which it is purported to have been passed;

(b) that it is sought to be executed against a wrong person;

(c) that it is passed for a wrong purpose;

(d) that it is passed on vague, extraneous and irrelevant grounds; or

(e) that the authority which has passed it has no authority to do so.

7. Further, these circumstances were reiterated by Hon'ble Apex Court in Deepak Bajaj's case reported in (2008) 16 SCC 14 but the Hon'ble Apex Court at the same time held that these are only illustrative but not exhaustive. The same view was echoed by the Apex Court **in Subash Popat Lal Dave v Union of India (2014) (1) SCC 280**. In this judgment, the Hon'ble Apex Court has observed that enquiry to examine the validity of detention order has been undertaken by the Apex Court in a very limited number of cases and in circumstances glaringly untenable at the pre execution stage. In nutshell, what emerges out from the judgments as mentioned above, is that a preventive detention order can be challenged at the pre execution stage, provided the petitioner/detenue satisfies the court that the detention order is clearly illegal and if it is found that it is clearly illegal then certainly he cannot be asked to go to jail and then challenge the detention order. The appellant must be able to demonstrate that the order of detention is *ex facie* illegal on the grounds as mentioned in the Alka Subash Gadia's case (supra) but also on other grounds of like nature.

8. Now, if we examine the grounds raised by the appellant in his writ petition, we find that the only ground on which the order impugned could have been quashed was the ignorance on the part of the respondent No. 2 with regard to the quashing of the earlier detention order dated 17.07.2010 by the writ court vide its judgment dated 16.12.2010 but from the record, we find that there were two more FIRs those were registered against the appellant bearing FIR No. 177/2016 for commission of offences under sections 409, 403, 120-B RPC registered with Police Station, Gandhi Nagar, Jammu and FIR No. 159/2019 for commission of offences under sections 147, 341 307 RPC and 4/25 Arms Act registered with Police Station Bakshi Nagar, Jammu. The learned writ court in its judgment has taken note of these two FIRs and has come to the conclusion that the case of the appellant does not fall within the parameters laid by the Apex Court in Alka Subash Gadia's case (supra). There is no force in the contention raised by the appellant that the learned writ court was required to put notice to other side for examining the validity of the order of detention, particularly when in the detention order the necessary facts were mentioned by the detaining authority. Thus, this contention of the appellant is rejected.

9. The second issue raised by the appellant is that the learned Single Judge could not have taken a view contrary to the judgment passed by the Coordinate Bench in Ghulam Qadir Ganaie's case (supra). In the case relied upon by the appellant, the order of detention was not executed for two years and the petitioner therein filed writ petition after two years. There is no force in this contention also, particularly in view of the fact that the learned Single Judge has distinguished the said judgment on facts and the same cannot be said to be wrong on facts or impermissible in law.

10. The third contention raised by the appellant is with regard to the expiry of the life of detention warrant. In the instant case, the detention order was issued on 23.10.2019 and the appellant challenged the same in the month of February, 2020 and even no such plea was taken by the appellant before the writ court as such, this contention too deserves to be rejected. Otherwise also, the plea of the respondents is that the appellant had been evading execution of the detention warrant.

11. It is apt to take note of observations made in **Subhash Popatlal Dave v. Union of India, (2014) 1 SCC 280,** wherein Apex Court has held as under:

> "46. Therefore, I am of the opinion that those who have evaded the process of law shall not be heard by this Court to say that their fundamental rights are in jeopardy. At least, in all those cases, where proceedings such as the one contemplated under Section 7 of the COFEPOSA Act were initiated consequent upon absconding of the proposed detenu, the challenge to the detention orders on the live nexus theory is impermissible. Permitting such an argument would amount to enabling the law-breaker to take advantage of his own conduct which is contrary to law.
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> **47. Even in those cases where action such as the one contemplated under Section 7 of the COFEPOSA Act is not initiated, the same may not be the only consideration for holding the order of preventive detention illegal.** This Court in *Shafiq Ahmad* v. *District Magistrate, Meerut* [(1989) 4 SCC 556], held so and the principle was followed subsequently in *M. Ahamedkutty* v. *Union of India* [(1990) 2 SCC 1], wherein this Court opined that in such cases, the surrounding circumstances must be examined ["*14.* In *Shafiq Ahmad* v. *District Magistrate, Meerut*, (1989) 4 SCC 556 relied on by the appellant, it has been clearly held that what amounts to unreasonable delay depends on facts and circumstances of each case. Where reason for the delay was stated to be abscondence of the detenu, mere failure on the part of the authorities to take action under Section 7 of the National Security Act by itself was not sufficient to vitiate the order in view of the fact that the police force remained extremely busy in tackling the serious law and order problem. However, it was not accepted as a proper 8 WP (Crl) No. 02/2022 explanation for the delay in arresting the detenu. In that case the alleged incidents were on 2-4-1988/3-4-1988/9-4-1988. The detention order was passed on 15-4-1988 and the detenu was arrested on 2-10-1988. The submission was that there was inordinate delay in arresting the petitioner pursuant to the order and that it indicated that the order was not based on a bona fide and genuine belief that the action or conduct of the petitioner were such that the same were prejudicial to the maintenance of public order. Sabyasachi Mukharji, J., as my Lord the Chief Justice then was, observed that whether there was unreasonable delay or not would depend upon the facts and circumstances of a particular situation and if in a situation the person concerned was not available and could not be served, then the mere fact that the action under Section 7 of the Act had not been taken, would not be a ground for holding that the detention order was bad. Failure to take action even if there was no scope for action under Section 7 of the COFEPOSA Act, would not by itself be decisive

> or determinative of the question whether there was undue delay in serving the order of detention." (*M. Ahamedkutty case*, p. 10, para 14)] . In both *Shafiq Ahmad* [(1989) 4 SCC 556] and *Ahamedkutty* [(1990) 2 SCC 1] cases, these questions were examined after the execution of the detention order. Permitting an absconder to raise such questions at the pre-execution stage, I am afraid would render the jurisdiction of this Court a heaven for characters of doubtful respect for law.
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> **48.** This Court in *Alka Subhash Gadia* [*Govt. of India* v. *Alka Subhash Gadia*, 1992 Supp (1) SCC 496 :] , emphatically asserted that "it is not correct to say that the courts have no power to entertain grievances against detention order prior to its execution". **This Court also took note of the fact that such an inquiry had indeed been undertaken by the courts in a very limited number of cases and in circumstances glaringly untenable at the pre-execution stage.** ["*30.* … 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."
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> **49.** The question whether the five circumstances specified in *Alka Subhash Gadia case* [*Govt. of India* v. *Alka Subhash Gadia*, 1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] are exhaustive of the grounds on which a pre-execution scrutiny of the legality of preventive detention order can be undertaken was considered by us earlier in the instant case. We held that the grounds are not exhaustive. [*Subhash Popatlal Dave* v. *Union of India*, (2012) 7 SCC 533] **But that does not persuade me to hold that such a scrutiny ought to be undertaken with reference to the cases of those who evaded the process of law."**

12. In view of all what has been discussed above, we do not find any reason, whatsoever, to interfere with the judgment of the writ court, as such, the present LPA is found to be misconceived, the same is, accordingly, dismissed.

(PUNEET GUPTA) (RAJNESH OSWAL)
JUDGE JUDGE

JAMMU
14 .12.2022
Rakesh

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No