(1992) 04 P&H CK 0008

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Writ Petition No. 3897 of 1989

Ashok Kumar Malik	APPELLANT
Vs	
Union of India (UOI) and Others	RESPONDENT

Date of Decision: April 2, 1992

Acts Referred:

- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Section 3, 3(1), 7
- Constitution of India, 1950 - Article 21, 22, 226, 226(1), 32
- Foreign Exchange Regulation Act, 1973 - Section 35, 9

Citation: (1992) CriLJ 2960 : (1992) 2 RCR(Criminal) 214

Hon'ble Judges: J.S. Sekhon, J

Bench: Single Bench

Advocate: S.C. Sibal and R.K. Handa, for the Appellant; C.B.S. Sodhi and Gurdial Singh, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

J.S. Sekhon, J.
Ashok Kumar Malik petitioner has filed this writ petition under Article 226 of the Constitution of India for issuing a writ in the nature of Habeas corpus or any other writ, order or direction for quashing the detention order of the detaining authority dated 5th April, 1989 passed against the petitioner u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the ''Act'') before its service upon the petitioner or his detention inter alia on the grounds of inordinate delay in passing the detention order, inordinate delay in not serving the detention order upon the petitioner, the detaining authority having not applied its mind to the facts and circumstances of the case and on the ground that the detention of Ram Parkash, father-in-law of the petitioner on similar

grounds u/s 3(1) of the Act was not approved by the Board.

2. In brief, the facts of the case as contained in the application Annexure P2 filed by Enforcement Directorate Jalandhar for obtaining remand u/s 35 of the Foreign Exchange Regulation Act, 1973 against the petitioner are that on 17th January, 1989 Shri Surinder Kumar Saini of Jullundur City alighted from Ariana Afgan Airline which arrived at Rajasansi Airport, Amritsar from Dubai. The custom staff on Airport recovered 43 photostat copies of documents from the possession of said Surinder Kumar Saini. The said documents disclosed accounts relating to distribution of compensatory payments in India under the instructions of persons residing in Dubai. On the basis of the contents of these documents, the officers of the Enforcement Director searched the premises of said Surinder Kumar Saini at Jullundur on 20th January, 1980 which resulted in seizure of more documents. Shri Surinder Kumar in his statement recorded on that day admitted having brought the documents from Dubai at the time of his previous visit to India and also admitted that the documents contained the names and addresses of various parties and the amount of money disbursed thereto. Thereafter, one Devinder Kumar was also interrogated. On the basis of the contents of these documents, he also admitted being engaged in causing remittance into India from Dubai through channels other than Banking channels and so far as he has caused remittance of Rs. Ten Lacs from Dubai to India. Shri Devinder Kumar also disclosed the names and addresses of certain parties involved in the said transaction besides admitting having made certain payments of money in India under the instructions of person residing outside India. On the said information, residential premises of Shri Ram Parkash, father-in-law of the present petitioner located at Ali Mohalla, Jullundur were also searched on 20th January, 1989 which resulted in seizure of documents disclosing the distribution of compensatory payments in India. Ram Parkash admitted during interrogation that under the instructions of his son in-law, Ashok Kumar Malik of Dubai (the present petitioner) he received payments of money from some persons of Delhi and Jullundur and used to distribute the same to the persons residing in India. He further stated having distributed Rs. Seventeen Lacs in India under the instructions of his son-in-law residing in Dubai. Ashok Kumar Malik petitioner was also present in the house of his father-in-law Ram Parkash at the time of search and his personal search yielded the recovery of some documents disclosing the distribution of compensatory payments and India currency of Rs. 8,000/-. The Enforcement Officers then searched the premises of the petitioner located in Jullundur Cantt on that very day. The search of the house has also yielded the recovery of some documents disclosing the distribution of compensatory payments. In his statement, Ashok Kumar Malik petitioner inter alia admitted that he is engaged in causing remittance into India through channels other than Banking channels from Dubai and ensuring the distribution of money in India and that so far he has remitted Rs. Forty Lacs from Dubai to India. He also disclosed the names and particulars of the parties involved in the said transaction who are stationed at Dubai,

Delhi and Punjab. The recovery of these documents revealed that more than 350 parties were involved in the said transaction. Under these circumstance Ashok Kumar Malik petitioner as well as his father-in-law Ram Parkash, Surinder Kumar and Devinder Kumar aforesaid were arrested for contravention of the provisions of Section 9 of the Foreign Exchange Regulation Act, 1973 by the Enforcement Directorate in exercise of the powers vested in them u/s 35 of the Regulation Act. They were produced before the Chief Judicial Magistrate, Jullundur on 21st January, 1989. The petitioner was released on bail by the Chief Judicial Magistrate, Jullundur on 24th January, 1989. The petitioner also averred in the petition that he had gone to Dubai in the year 1976 and since then he is working there. The petitioner came to India on 12th January 1989 and landed at Bombay. He came over to Jullundur on 20th January, 1989 to meet his in-laws. The petitioner also averred in his petition that thereafter, he continued appearing before the Court of Chief Judicial Magistrate, Jullundur in the said complaint u/s 9 of the Foreign Exchange Regulation Act, 1973 but later on the detention order dated 5th April, 1989 (Annexure P9) was served upon his father-in-law Ram Parkash. He also averred that the grounds of detention order against Ram Parkash (Annexure P8) were also served but the above-referred order of detention against Ram Parkash was revoked on the advice of the Advisory Board on 6th October, 1989. It is noteworthy that the petitioner had failed to furnish the copy of the detention order passed against him or the grounds of detention. Under these circumstances, the petitioner had filed the writ petition for quashing the detention order before it was served upon him on various grounds contending that he has not voluntarily made any admission before the officers of the Enforcement Staff but was forced to sign some documents.

3. This petition was resisted by the respondent through return filed by Shri Kuldip Singh, Under Secretary to the Government of India, Ministry of Finance Department of Revenue, New Delhi. In the return, it is admitted that the petitioner is living in Dubai and that he came to India on 12th January, 1989. It is further stated that the aforesaid Surinder Kumar on interrogation has further stated that the documents recovered were given to him by Mrs. Aruna Malik at Dubai with the instructions to hand over the same to Ashok Kumar Malik petitioner at the residence of Ram Parkash and that under these circumstances, the residential premises of Ram Parkash were searched. It was also maintained that the petitioner in his statement voluntarily admitted being engaged in collection of payments in Dubai from the persons of Indian origin and causing their remittance in India through channels other than Banking channels. The petitioner also admitted that he arranged remittance in India from Dubai through Aziz and Qadir of Dubai and that under his instructions, the amounts in India are being distributed by Ram Parkash. It was also stated that the documents recovered included 43 photostat pages of the diary written by the petitioner in his own hand wherein the details of the payments got remitted into India through channels other than Banking channels figure. The petitioner was also interrogated on 1-2-1989 and inter alia admitted that as per

account numbers arid names of the bankers appearing in the documents recovered from Surinder Kumar, the payments had been credited to the Bank accounts under the instructions from Dubai. Under these circumstances, the detaining authority had rightly passed the order of detention u/s 3 of the Act after full application of mind as the activities of the petitioner could not be curtailed but for his detention. The remaining allegations in the petition were controverted. Later on, additional affidavit was also filed by Shri Anil Kumar, Assistant Director, Enforcement Directorate, Jullundur stating that the Joint Secretary, Ministry of Finance, New Delhi had passed the detention order on 5th April, 1989 against the petitioner u/s 3(1) of the Act and that he has been deputing the staff for mounting up surveillance and making discreet enquiries about the whereabouts of the petitioner but the petitioner was not available at his known address. He also averred having been making enquiries from the police authorities about the service of the detention order upon the petitioner but was informed that in spite of repeated raids, the petitioner is not available at his address and is avoiding detention. An affidavit of Shri Suresh Arora, Senior Superintendent Police, Jullundur was also filed to the effect that the order of detention dated 5th April, 1989 u/s 3(1) of the Act was received by his office on 17th April, 1989 for execution and that thereafter several efforts were made and raids were conducted at the given address by the local police to execute the order but the detenu was not available.

4. In replication, the petitioner has filed an affidavit contending that he never absconded from his residence and that the police or the Enforcement Staff never raided his house for his arrest.

5. I have heard the learned counsel for the parties besides perusing the record.

6. There is no force in the contention of Mr. G.B.S. Sodhi, learned counsel for the respondents that the present writ petition is not maintainable as the detention order was not served upon the petitioner and he cannot challenge the same without its service. The Apex Court in S.M.D. Kiran Pasha v. The Government of Andhra Pradesh JT 1989 (4) 366(AP) had drawn a fine distinction between pre-violation and post-violation of the right to life and personal liberty while discussing maintainability of petition under Article 226(1) of the Constitution even if the order of detention is not served upon the detenu by observing in paragraph 15 of the judgment as under :--

15. Article 226(1) of the Constitution of India notwithstanding anything in Article 32, empowers the High Court throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose; and it also envisages making of interim order, whether by way of injunction or stay or in any other manner in such a proceeding. Article 21 giving

protection of life and personal liberty provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. For enforcement of one''s right to life and personal liberty resort to Article 226(1) has thus been provided for. What is the ambit of enforcement of the right? The word ''enforcement'' has also been used in Article 32 of the Constitution which provides the remedy for enforcement of rights conferred by Part III of the Constitution. The word ''enforcement'' has not been defined by the Constitution. According to Collins English dictionary to enforce means to ensure observance of or obedience to a law, decision etc. Enforcement, according to Webster''s Comprehensive Dictionary means the act of enforcing, or the state of being enforced, compulsory execution, compulsion. Enforce means to compel obedience to laws; to compel performance, obedience by physical or moral force. If enforcement means to impose or compel obedience to law or to compel observance of law, we have to see what it does precisely mean. The right to life and personal liberty has been guaranteed as a fundamental right and for its enforcement one could resort to Article 226 of the Constitution for issuance of appropriate writ, order or direction. Precisely at what stage resort to Article 226 has been envisaged in the Constitution? When a right is so guaranteed it has to be understood in relation to its orbit and its infringement. Conferring the right to life and liberty imposes a corresponding duty on the rest of the society, including the State, to observe that right, that is to say, not to act or do anything, which would amount to infringement of that right, except in accordance with the procedure prescribed by law. In other words, conferring the right on a citizen involves the compulsion on the rest of the society, including the State not to infringe that right. The question is at what stage the right can be enforced? Does a citizen have to wait till the right is infringed? Is there no way of enforcement of the right before it is actually infringed? Can the obligation or compulsion on the part of the State to observe the right be made effective only after the right is violated or in other words can there be enforcement of a right to life and personal liberty before it is actually infringed? What remedy will be left to a person when his right to life is violated? When a right is yet to be violated, but is threatened with violation can the citizen move the Court for protection of the right? The protection of the right is to be distinguished from its restoration or remedy after violation. When right to personal liberty is guaranteed and the rest of the society, including the State, is compelled or obligated not to violate that right, and if someone has threatened to violate it or its violation is imminent, and the person whose right is so threatened or its violation so imminent resorts to Article 226 of the Constitution could not the Court protect observance of his right by restraining those who threatened to violate it until the court examines the legality of the action? Resort to Article 226 after the right to personal liberty is already violated is different from the pre-violation protection. Past-violation resort to Article 226 is for remedy against violation and for restoration of the right, while pre-violation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled, surrender and apply for a writ of habeas corpus is a

post-violation remedy for restoration of the right which is not the same as restraining potential vilators in case of threatened violation of the right. The question may arise what precisely may amount to threat or imminence of violation. Law surely cannot take action for internal thoughts but can act only after overt acts. If overt acts towards violation have already been done and the same has come to the knowledge of the person threatened with that violation and he approaches the court under Article 226 giving sufficient particulars of proximate actions as would imminently lead to violation of right, should not the court call upon those alleged to have taken those steps to appear and show cause why they should not be restrained from violating that right? Instead of doing so would it be the proper course to be adopted to tell the petitioner that the court cannot take any action towards preventive justice until his right is actually violated whereafter alone he could petition for a writ of habeas corpus? In the instant case, when the writ petition was pending in court and the appellant''s right to personal liberty happened to be violated by taking him into custody in preventive detention, though he was released after four days, but could be taken into custody again, would it be proper for the court to reject the earlier writ petition and tell him that his petition has become infructuous and he had no alternative but to surrender and then petition for a writ of habeas corpus? The difference of the situations, as we have seen, have different legal significance. If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restoration of the right.

7. Again the Apex Court in The Additional Secretary to the Government of India v. Smt. Alka Subhash Gadia JT 1991 (1) 549, after elaborate discussion whether the writ petition under Article 226 of the Constitution is maintainable before the High Court for challenging the detention order even before its execution had sounded a note of caution that ordinarily such a writ petition is not maintainable because the detenue had alternative remedy to circumscribe the grounds on which such petition is maintainable by observing in paragraph 30 of the judgment as under:--

30. As regards his last contention, viz., that to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this argument is also not well merited based as it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question place any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal

consequences. However, the courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the Courts insist that the aggrieved person first allows the due operation and implementation of the concerned law and exhausts the remedies provided by it before approaching the High Court and this Court to invoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the Courts. To accept Shri Jain''s present contention would mean that the courts should disregard all these time honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibbal for the appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. 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.

8. A bare glance through the above reproduced observations of the Apex Court leaves no doubt that such writ petition is maintainable on the limited grounds i.e.: --

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;

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

9. Thus there is no doubt that although the writ petition for habeas corpus is not maintainable, the writ petition for other reliefs like quashment is maintainable but the order can be challenged only on limited grounds.

10. In the Additional Secretary to the Government of India''s case (supra), it was also held by the Apex Court that as under Article 22 of the Constitution, as the grounds of detention are required to be served even after the service of the detention order, the order of Bombay High Court directing the detaining authority to furnish a copy of the detention order and the grounds of detention before execution of the detention order was wrong and thus the detaining authority by refusing to furnish such documents had not committed any contempt of the Court. Consequently, this Court in the petition in hand also cannot force the detaining authority to furnish grounds of detention or copy of the detention order to the detenu before clamping of the detention order. If that is so, then there is no option but to hold that in this petition the validity of the order of detention on limited grounds shall have to be gone into on the pleadings of the parties.

11. There is no force in the contention of Mr. S.C. Sibal, learned Senior counsel for the petitioners that the withdrawal of the detention order of Ram Parkash, father-in-law of the petitioner by the detaining authority on the report of the Advisory Board would ipso facto render the detention order passed against the detenu on similar ground as invalid because aforesaid Ram Parkash was simply acting as an agent of his son-in-law i.e. the present petitioner for making compensatory payments to certain persons in India under the instructions of the latter. Ram Parkash used to receive money through channels other than Banking channels from certain persons under the instructions of his son-in-law. Admittedly, the petitioner is settled in Dubai and had come to India on 12th January, 1989. Thereafter, the wife of the petitioner had sent some documents through Surinder Kumar for delivering the same to the petitioner at the house of Ram Prakash at Jullunder. These documents contained detailed instructions regarding the amount and particulars of the persons to whom such compensatory payments were required to be made. Thus the petitioner being a king pin in the collection of compensatory payments of money from the persons of Indian origin settled in Dubai for making payments to their relations in India, it cannot be said that the allegations against the petitioner are similar as that of his father-in-law Ram Prakash. On the other hand, it transpires that the aforesaid Ram Parkash was playing only a minor role in distribution of compensatory payments and that too under the instructions of his son-in-law (i.e. the petitioner). Thus the withdrawal of

the detention order of Ram Parkash is of no help to the petitioner.

12. No doubt, the passport of the petitioner was impounded and the proceedings for violation of the provisions of Section 9 of the Foreign Exchange Regulation Act are yet to be instituted against the petitioner and ordinarily the nefarious activities of person indulging in smuggling of goods can be curtailed by not allowing him to proceed abroad: But in the circumstances of the present case, there is no option but to conclude that seizing of the passport of the petitioner or institution of the above-referred proceedings u/s 9 of the Foreign Exchange Regulation Act before the Chief Judicial Magistrate, Jullundur would not curtail his activities in receiving and distributing compensatory payments of money as his wife is still residing at Dubai and would be conveying the instructions and particulars of carrying on the activities of making compensatory payments to her husband. The mere factum that no effort was made by the detaining authority to get the bail of the detenu in the proceedings u/s 9 of the Act cancelled is of no consequence under these circumstances because there is different criteria for the Judicial Court to cancel the bail like tampering with the evidence etc. and there would hardly be any evidence of the petitioner verbally giving instructions of distribution of compensatory payments through his agents.

13. The learned counsel for the petitioner also contended that the detaining authority was not serious about future propensity of the petitioner to indulge in similar activities on the basis of which the detention order was passed as no serious effort was made to execute the detention order and no coercive measures for detention of the petitioner u/s 7 of the Act were resorted to. In this regard, it is noteworthy that the petitioner was released on bail on 24th January, 1989 by the Chief Judicial Magistrate, Jullundur in proceedings u/s 35 of the Foreign Exchange Regulation Act. Thereafter, he continued appearing before the Court on 2nd February, 4th February, 8th March, 27th March, 18th May and 27th July, 1989 as is apparent from the copies of the relevant orders of the Court of those dates appended as Annexure P7, The perusal of those orders reveals that only Assistant Public Prosecutor has put in appearance on behalf of the complainant i.e. Assistant Director, Enforcement Directorate and not the counsel for the Directorate. Assistant Public Prosecutor puts in appearance on behalf of the State in State cases only. Thus it cannot be said that the detaining authority or the authority executing the detention order was aware of that the petitioner had been putting in appearance before the trial Court. On the other hand, it appears to be a case of lack of coordination between the Enforcement Staff and the local police which was entrusted with the service of the detention order upon the petitioner. It is not a case of that type where detention order was passed by the State Government and the State agency was not serving it upon the detenu even though Assistant Public Prosecutor represented the State before the Court was aware of the appearance of the detenu in the Court. Moreover, in view of the latest judgment of the Apex Court in The Additional Secretary to the Government of India case (supra), in judging the validity of the detention order before its service, the Court can go into the material

already before the detaining authority at the time of passing such detention order and cannot go into subsequent lapse on the part of the detaining authority. Consequently, even if it is taken that the detaining authority had failed to take serious steps in serving the detention order, it would be of no consequence to render the impugned order void ab initio. The observations of this Court in Rajiv Talwar Vs. Union of India (UOI) and Others, in this regard are not attracted to the facts of the case in hand because in that case detention order although not served upon the detenu was found illegal on various other grounds and the delay in execution of the detention order assumed importance along with those grounds.

14. The other contention of the learned counsel for the petitioner pertains to undue delay in passing the detention order as the petitioner was arrested on 30th January, 1989 while the detention order was passed on 5th April, 1989. In this regard, it is noteworthy that the return filed by the respondent reveals that the Enforcement Staff has to verify more than 350 persons figuring in the documents seized from the petitioner and other persons to whom the compensatory payments were made. Thus it must have taken some time as averred by the respondent in paragraph No. 12(v) of the return. Moreover, the perusal of Annexure P5 reveals that the petitioner has filed representation dated 27th January, 1989 to the Director, Directorate Enforcement of the Foreign Exchange, which was disposed of on 8th March, 1989. Thus it appears that some time was consumed in looking into the representation of the petitioner regarding his innocence. Thus it cannot be said that the delay in passing the detention order had resulted in rendering the order as illegal. There is also no force in the last contention of the learned counsel for the petitioner that the detaining authority had not applied its mind to all the facts and circumstances of the case regarding the petitioner being on bail in proceedings u/s 35 of the Foreign Exchange Regulation Act because it is specifically stated in the return filed by Shri Kuldip Singh that all these facts were placed before the detaining authority and the impugned order was passed after due application of mind.

15. Consequently, for the reasons recorded above, there being no merit in the writ petition, it is ordered to be dismissed. However, the detaining authority may consider the desirability of the execution of the detention order upon the petitioner in the light of the change in fiscal policy of the Government which is purported to have obliterated the distribution of compensatory payments of money through channels other than Banking channels by liberalizing the payment of market rate for foreign exchange.