(1991) 05 CAL CK 0003

Calcutta High Court

Case No: C.O. No. 2710 (W) of 1990

Arun Kumar Bajoria		APPELLANT
	Vs	
Union of India (UOI) and Others		RESPONDENT

Date of Decision: May 10, 1991

Acts Referred:

- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Section 3
- Constitution of India, 1950 - Article 136, 14, 22, 22(5), 226
- Foreign Exchange Regulation Act, 1973 - Section 15, 18(2), 18(3), 37, 40
- Maintenance of Internal Security Act, 1971 - Section 3(1), 3(3)

Citation: (1993) CriLJ 128

Hon'ble Judges: Susanta Chatterji, J

Bench: Single Bench

Advocate: Balai Roy, G. Mitra, A.N. Dawn and Asoke Ganguly, for the Appellant; Aryan Mukherjee and S.K. Kundu, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Susanta Chatterji, J.
The writ petition has been filed challenging the threat of detention of the petitioner under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1973 popularly known as (COFEPOSA Act). There is a prayer for issuance of a Writ of Mandamus commanding the respondents to withdraw, recall and/or rescind the recommendation of issuance of an order of detention under the COFEPOSA Act and other consequential reliefs by way of injunction restraining the respondents from issuing any order of detention under the said Act upon declaration that the COFEPOSA Act itself is unconstitutional, illegal and null and void. It is stated in details that the petitioner is a businessman of repute being a Director of several Jute

Mills, It is alleged that on 16th March, 1990 the officers of the Enforcement Directorate, Foreign Exchange Regulation Act in purported exercise of powers u/s 37 of the Foreign Exchange Regulation Act searched the petitioner''s residential premises and also the office at No. 10, Clive Row, Calcutta and the petitioner was interrogated closely under a circle of various officers in the office of the respondent No. 4, the Deputy Director of Enforcement Directorate and the respondent No. 5 Chief Enforcement Officer. There are allegations that under duress and coercion, the petitioner and his wife made statements relating to maintaining of 2 (two) Foreign Currency Bank Account Nos. 570 and 67470 for more than 10 years with Discount Bank, 3, Quai-De Lile, Geneva, Switzerland. The said account stands in the joint names of the petitioner Arun Kumar Bajoria and his wife Srnt. Lata Bajoria both residing in India, without any previous or special permission of the Reserve Bank of India. The statement discloses further that the petitioner and his wife have certain fixed deposits in the two Foreign Currency Bank Accounts and they are holding a locker in the said overseas bank of Switzerland. Certain incriminating documents have been seized disclosing inter alia that the petitioner and his wife have accounts with an overseas bank and there is substantial holding in Foreign Exchange to the tune of Rs. 35 Crores approximately. The petitioner has alleged that the said statement has been procured by force and the steps taken by the respondent authorities are nothing but an abuse of process of law. A Supplementary Affidavit has been filed disclosing further that the petitioner was arrested and he has, however, been enlarged on bail by the Division Bench of this Court by imposing certain conditions. However, on or about October 26, 1990, 26 separate notices dated 12th October, 1990 were issued by Mr. S.C. Ghose, Enforcement Directorate, FERA wherein Messrs. Hooghly Mills Company Limited, Bhabani Roychowdhury, a Senior Office Assistant of the Company and the petitioner were called to show cause why adjudication proceedings as contemplated u/s 15 of the Foreign Exchange Regulation Act, 1973 should not be held against them for violation of Sections 18(2) and 18(3) of the said Act for failure to take action or reasonable steps or refraining from taking any action or all reasonable steps to secure them as to the receipt of the full export value of the goods exported from the country within six months from the date of shipment within the time extended by the Reserve Bank of India. Subsequently, 6 (six) more similar notices were served by the FERA Authorities. On April 18, 1991 a notice to show cause bearing No. T.4/F-C/91 Sc No. 1 dated March 8, 1991 under the signature of the Special Director, Enforcement Directorate, Foreign Exchange Regulation Act, Government of India had been served by Special Messenger. According to the petitioner, the notice to show cause has been formulated on the selfsame facts and grounds upon which the threatened order of detention has been made and the writ petition has been moved. The adjudication proceedings have been initiated with a view to impose penalty and during the long period the petitioner is on bail with relaxed conditions made time to time by the appropriate Benches.

2. Stating all these facts in details, the petitioner has tried to make out a case that the threat of detention is in excess of jurisdiction and/or by wrongful usurpation of the power inasmuch as the COFEPOSA Act itself is violative of the Fundamental Rights and all the acts done or caused to have done by the respondent authorities are wholly unguided and consequence of uncanalized power to detain any person arbitrarily. It is also alleged that any power without proper guideline and without any basis or standard is likely to infringe the fundamental right of the petitioner and as such the provisions of the said COFEPOSA Act are illegal and ultra vires.

3. The writ petition is strongly contested by the respondent authorities by filing an affidavit-in-opposition. It is placed on record that on 16th of March, 1990 during the course of searches at the office premises of Messrs. Hooghly Mills Company Limited and Messrs. Hooghly Mills Projects Limited and the Directors Office situated at No. 10, Clive Row, Calcutta and at the residential premises under occupation of Sri Arun Kumar Bajoria one of the Directors of the aforesaid Companies, under the provision of Section 37 of the Foreign Exchange Regulation Act, 1973, some incriminating documents were recovered and seized by the officers of Enforcement Directorate, Calcutta as per seizure Memo dated 16th March, 1990. After completion of searches, statements of the petitioner were recorded u/s 40 of the said Act with reference to the documents seized from the above office premises. The petitioner is alleged to have disclosed in the said statements that he has been maintaining 2 (two) Foreign Currency Bank Accounts for more than 10 (ten) years with the Foreign Banks and it is further revealed that the petitioner along with his wife have Fixed Deposits in the Foreign Banks in Switzerland and both the petitioner and his wife are alleged to have given a letter to the said Overseas Bank to repatriate the deposited amount in India through proper banking channel. It is also alleged that the petitioner Arun Kumar Bajoria is engaged in illegal transaction in Foreign Exchange in contravention of the provisions of the said Act in a systematic and calculated manner and thereby he is avoiding and evading the provisions of the said Act. It is further placed on record that on perusal of the said statement of one Bhabani Roy-chowdhury associated with the aforesaid Companies, there is a failure to realize export proceeds to the tune of Rs. 80 lakhs approximately without having any extension of time from the Reserve Bank of India. The petitioner was arrested on 16th of March, 1990 and he was enlarged on bail by the order of the Division Bench of this Court by imposing certain conditions. There are denials of the allegations of the petitioner and it is alleged that the present writ petition is thoroughly misconceived and filed for the specific purpose to frustrate investigation and to cause delay in smooth progress of the investigation.

4. The writ petitioner has, however, filed an affidavit-in-reply controverting the statements made in the affidavit-in-opposition and by reiterating the facts already stated in the writ petition and also a supplementary affidavit has been filed as indicated.

5. Mr. Balai Roy, learned Senior Advocate appearing for the writ petitioner has mainly argued that the petitioner can very well move the writ jurisdiction of this Court as there is a serious threat to detain the petitioner by invoking the provision of COFE-POSA Act. If the petitioner has committed any offence under Foreign Exchange Regulation Act, specific cases may be proceeded but there is no reason to detain him under COFEPOSA Act. He has relied upon a recent decision of the Hon''ble Supreme Court reported in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, , The Additional Secretary to the Government of India v. Smt. Alka Subhas Gadia. The Hon''ble Supreme Court considered the scope of exercising jurisdiction under Arts. 32 and 226 of the Constitution of India during the pre-execution stage of any order of detention - punitive or preventive. Mr. Roy has drawn the attention of the Court that it would plainly be the duty of the Court to examine the merits of the detention and to consider as to whether the personal liberty of the citizens has been taken away according to the procedure established by law. Mr. Roy has emphasized that any aggrieved person may move the writ Court to seek reliefs before the execution of the order of detention. This view has fully been supported in the judgment of the case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another,

6. Mr. Roy further developed his argument by referring to the decision reported in Bhut Nath Mete Vs. The State of West Bengal, . The Hon''ble Supreme Court considered the scope of Maintenance of Internal Security Act, MISA (1971) and its Section 3(1) as to powers under, its nature thereof and the detention orders vis-a-vis Criminal prosecution against detenu having failed and the question of detention order. It was found there that the fundamental constitutional mandates are that the authority (a) shall communicate to the detenu of the material grounds on which the order has been made and which create that satisfaction in the authority which spells suspension of the citizen''s liberty - and (b) shall afford him the earliest opportunity of making a representation against the order - no avoidable delay, no shortfall in the material communicated shall disable the prisoner making an early, yet comprehensive say on every particular or fact. Such is the fairness and justice ''untouchably ''entrenched in Article 22(5) when administrative action drowns a sacred human right in the name of public good and organised society. It is recorded that the soul of Article 22 is the fair chance to be heard on all particulars relied on to condemn the detenu to preventive confinement. Section 3(3) MISA (1971) does not and cannot transcend this trammel and never states that particulars conveyed to Government and eventually to the Board may be behind the back of the detenue. All particulars transmitted u/s 3(3) beyond the grounds of detention must, if they have a bearing on the determination to detain, in no way detract from the effectiveness of the detenu''s right of representation about them. The guarantee of Article 22(5) colours, the construction of Section 3. So viewed, there is no inconsistence with or erosion of the ''opportunity of making a representation against the order''. In the

self-same Volume of Biram Chand Vs. State of Uttar Pradesh and Others, has been recorded. Considering further scope of MISA (1971) the Hon''ble Supreme Court found that it is well-settled that in case of preventive detention the grounds must be clear and definite to enable the detenu to make an effective representation to the Government to induce the authorities to take a view in his favour. The detenu must have, a real opportunity to make a representation to establish his innocence. It is equally settled that in an order under the MISA Act, the decision of the authority is a subjective one and if one of the grounds for the order is non-existent or irrelevant or is not available under the law, the entire detention order will fall since it is not to predicate as to whether the detaining authority would have made an order for detention even in the absence of non-existence or irrelevant ground. It was observed that as too many cooks spoil the broth so also too many grounds may vitiate an order of detention if any one of them is irrelevant and non-existent. The authority, therefore, has to be careful enough to see that only relevant and valid grounds are selected having a nexus with the object of the order of detention. Although the aim and object of the order of detention be laudable and the antecedents of a detenu be extremely reapproachable yet it is essential that if it is desired to detain a person without trial, the authorities concerned should conform to the requirements of the law. The shady antecedents of the detenu cannot provide a justification for non-compliance with the mandatory provisions. The scope of the inquiry in the case of preventive detention based upon subjective satisfaction being necessarily narrow and limited, the scrutiny of the court has to be even stricter than in a normal case of punitive trial. Reference was made to a decision reported in Smt. Hemlata Kantilal Shah Vs. State of Maharashtra and another, In Head Note (E) the scope of Arts. 32, 226, 136 and 22(5) of the Constitution of India vis-a-vis the order of detention under preventive detention law and duty of Courts have been considered. It has been observed that the High Court under Article 226 and the Supreme Court either under Article 32 or under Article 136 do not sit on appeal on the orders of preventive detention. The normal law is that when an isolated offence or isolated offences is or are committed, the offender is to be prosecuted. But, if there be a law of preventive detention empowering the authority to detain a particular offender in order to disable him to repeat his offences, it can do so, but it will be obligatory on the part of the detaining authority to formally comply with the provisions of sub-art. (5) of Article 22, The High Court under Article 226 and the Supreme Court under Article 32 has to see whether the formalities enjoined by Article 22(5) have been complied with by the detaining authority. If the formalities have been complied with, the Court cannot examine the materials before it and find that the detaining authority should not have been satisfied on the materials before it and detained the detenu under the Preventive Detention Act, for, that is the function of an appellate Court. The thrust of the argument of Mr. Roy is that regard being had to the materials on record, the threat of detention is unwarranted and uncalled for while there is a scope move the writ Court before execution of the order of detention, the present writ petition is all the more justified and the petitioner is otherwise entitled

to reliefs as sought for. He has, however, adopted the argument of Mr. Bholanath Sen, a Senior Counsel in another case under COFEPOSA Act where a submission has been made challenging the vires of COFEPOSA Act itself by referring to the decision of Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others, The Judicial Review of legislation or of any order passed by the Administrative Authority is a part of the basic structure of the Constitution as held in the case of Minerva Mills Limited (supra). The same view has been reiterated in S.P. Sampath Kumar and Others Vs. Union of India (UOI) and Others, and P. Sambamurthy v. State of Andhra Pradesh, AIR 1987 SC 663 .

7. Mr. Anjan Mukherjee, learned Advocate appearing for the respondent Union of India, has strongly argued that the writ petition is thoroughly misconceived. He has also relief upon the case of Additional Secretary to the Government of India v. Alka Subhash Gadia, 1990 (supra). Although he has conceded that in a proper case, the Court has a right to adjudicate a matter before execution of the order of detention, yet in the facts and circumstances of the present case, the petitioner cannot come to the Court when there is no averment in the writ petition that any order of detention is in existence. In the absence of any order of detention, the Court cannot consider its legality and/or its susceptibility. There cannot be any issuance of a Writ by granting relief in anticipation of an order of detention. He has, however, drawn the attention of the Court to a case reported in Haradhan Saha Vs. The State of West Bengal and Others, Debu Mahato Vs. The State of West Bengal, Debu Mahato v. State of West Bengal and Biram Chand Vs. State of Uttar Pradesh and Others, Biram Chand v. State of Uttar Pradesh. The attention of this Court has been drawn to the observation of the Hon''ble Supreme Court that the power of preventive detention is quantitatively different from unity of detention. The power of preventive detention is a precautionary power exercised any reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap that prosecution even if it relates to certain facts for which prosecution may be launched or may have been launched and/or preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is not a bar of prosecution. The Article 14 is inapplicable because preventive and prosecution are not synonymous. The purposes are different. The denials are different. The nature of proceedings is different. In a prosecution an accused is sought to be punished for a past act. In any preventive detention, the past act is merely the material for inference about future course of probable conduct the operational detenu. The decision made in the case of Debu Mahato v. State of W.B. and Biram Chand v. State of U.P. have been overruled. Mr. Mukherjee has further referred to a case reported in 80 CWN 312 Union of India v. Dhirubhai Gokuldas Vora. The scope of a proclamation of emergency under Article 352 of the Constitution and the action taken under COFEPOSA Act were considered which are

not found very relevant for the purpose of adjudicating the matter in dispute. Another decision has been referred being reported in 1984 (1) CHN 422 Union of India v. Abdul Sattar. The Division Bench presided by Anil Kumar Sen J. (as his Lordship then was) held that it appears from the petition that the petitioner was not sure that there had been any order of detention for less he is sure that any order if so made had not been made in accordance with law. When there is no prima facie case with regard to the claim of unconstitutionality of the Act and when the challenge is to be alleged exercise of powers u/s 3 of the Act is based entirely upon speculation, no court should proceed to act upon such a case and restrain the Central Government from exercising its powers u/s 3 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The Division Bench recorded that the principle laid down by the Hon''ble Supreme Court in two cases viz. D.A.V. College Bhatinda v. State of Punjab AIR 1977 SC 1731 and State of Madhya Pradesh Vs. Bhailal Bhai and Others, are authorities for a principle which is now settled viz. a citizen is entitled to move this Court in writ jurisdiction not only when his right is infringed but also when it is threatened to be infringed. Bombay High Court followed the same principle when it held that a person against whom an order of detention has been made can challenge the order even before its execution. By referring all these aforesaid decisions Mr. Mukherjee submitted that the present writ petition has not made out any case for necessary interference.

8. Considering the submissions made on behalf of the respective parties patiently and diligently, this Court finds that both the sides have relied heavily upon the case reported in 1990 Scale 1352, Additional Secretary to the Government of India v. Smt. Alka Subhash Gadia. It is now well-settled, that even before execution of the order of detention, the same may be challenged and considered either under Article 32 or under Article 226 of the Constitution of India. The Hon''ble Supreme Court has succinctly been pointed out that the Courts have the necessary power and they have used it in proper cases as have been pointed out above. Although such cases have been viewed and the grounds on which the Courts have interfered with them at the pre-execution stage are necessarily very limited in scope and principle, viz. where the Court is prima facie satisfied :--

(i) that the impugned order is not based 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.

The refusal by the Courts to use their extraordinary power of judicial review to interfere with the detention order prior to their execution on any other grounds

does not amount to the abandonment of the said power of their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question. Thus it is very clear that any aggrieved person can very well come to the Court to challenge the order of detention even before its execution. But the alleged order has to be referred and the same can be scrutinized in the 5 (five) way test as indicated above. In the present case before this Court, there is no averment either in the main writ petition or in the affidavit-in-reply or in the Supplementary Affidavit that there is really an order of detention in existence. Nothing has also been disclosed in the affidavit-in-opposition that any order of detention is in existence. Upon specific query by this Court, the learned Counsel for the respondents has not stated clearly upon instructions as to whether there is any order of detention or not. The learned counsel has not been able to satisfy this Court. In fact, this Court has not been allowed to know as to whether there is any order of detention or not. For such non-disclosure upon the query of the Court, it is presupposed that at present, there is no order of detention. The Division Bench of this Court in 1984 (1) C.H.N. 422 has found that a threat of infringement must be real and based on concrete materials. The principle laid down by the Supreme Court is based on the basic assumption that there must be some reasonable grounds to suppose the alleged threat and the Court satisfies itself about the impending threat with reference to the facts constituting the grounds, that principle cannot be extended to cover a case where on a mere apprehension in the mind of a citizen he can invoke the writ jurisdiction of this Court and obtain an anticipated relief. It is not a case where any law having been promulgated or in particular statutory order having been made there is imminent likelihood of such law or order infringing or affecting the citizen''s right on any speculation, the Court cannot act. If the Court acts on such a case then it will be difficult for the authorities vested with the powers under the statute to exercise such powers even lawfully.

9. Upon perusal of all the materials on record, this Court does not find any merit to the challenge as to the vires of the provisions of the COFEPOSA Act The points as raised, upon scrutiny do not appear to have any merit and those are accordingly overruled. Besides, on merit, this Court does not find that the investigation as made and the specific cases under Foreign Exchange Regulation Act as made out warrant any threat to issue any order of detention in the manner as alleged. The scope of preventive detention has been fully discussed in Haradhan Saha Vs. The State of West Bengal and Others, as recorded above. The investigation as initiated appear to be just and bona fide and the same cannot be stalled by filing the present case under any stretch of imagination.

10. For the aforesaid reasons, this Court does not find any ground to interfere in this matter and the petitioner is not entitled to get any relief as prayed. For the aforesaid reasons, the writ petition fails. All interim orders are vacated. This judgment does not, however, prevent the respondent authorities to pass any appropriate order of detention in accordance with law and upon service, the same can be challenged as

found by the Hon''ble Supreme Court that it is always open for the detenu or any one on his behalf to challenge the detention order by way of habeas corpus petition on any grounds available to him or even before its execution accordingly. This judgment covers all the cases as referred in the Order dated 9-8-1990 viz. C.O. No. 12998 (W) of 1989, C.O. No. 12999 (W) of 1989, C.O. No. 13450 (W) of 1989, C.O. No. 13451 (W) of 1989, C.O. No. 13452 (W) of 1989, C.O. No. 13453 (W)-54 (W) of 1989, C.O. No. 4986 (W) of 1990, C.O. No. 415 (W) of 1990, C.O. No. 2228 (W) of 1990, C.O. No. 1203 (W) of 1990, C. O. No. 4126 (W) of 1990, C.O. No. 416 (W) of 1990, C.O. No. 414 (W) of 1990, C.O. No. 413 (W) of 1990, C.O. No. 380 (W) of 1990, C.O. No. 12301 (W) of 1989, C.O. No. 6192 (W) of 1990, C.O. No. 6193-94 (W) of 1990, C.O. No. 7479 (W) of 1990, C.O. No. 12661 (W) of 1989, C.O. 13455 (W) of 1989 and C.O. No. 12090 (W) of 1989.

11. It is made clear that this Court has considered order/orders of detention which have been produced in other cases which do not appear to be unjust and unfair necessitating any interference by this Court even at the preexecution-stage.