

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.01.2021

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.(MD)No.189 of 2021

and

W.M.P.(MD)Nos.153 & 154 of 2021

Sabeer Ahamed Sayeed

... Petitioner

Vs.

1. The State of Tamil Nadu,
Rep. By the Principal Secretary to
Government(FAC) Public(S.C.) Department,
Secretariat, Chennai – 600 009.

2. D.Anil,
The Commissioner of Customs (Preventive),
O/o.The Commissioner of Customs (Preventive),
No.1, Williams Road, Cantonment,
Tiruchirappalli – 620 001.

... Respondents

Prayer: Writ petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records relating to the sanction order of the second respondent in C.No.VIII/48/2/2020-CIU(COFEPOSA) dated 07.10.2020 to detain the petitioner under COFEPOSA Act vide impugned communication of the first respondent in Letter No.SR.I/78-2/2020 dated 08.12.2020 and quash the same.

For Petitioner : Mr.T.Gowthaman

For R-1 : Mr.V.Anand,
Government Advocate.

For R-2 : Mr.B.Vijaya Karthikeyan

ORDER

Heard the learned counsel appearing for the petitioner and the learned Government Advocate appearing for the first respondent and the learned Standing counsel appearing for the second respondent.

2.The second respondent is said to have sent a proposal to the first respondent for detaining the petitioner under the provisions of the Conservation of Foreign Exchange and Prevention Of Smuggling Activities Act, 1974. The first respondent has written to the second respondent seeking certain details about the writ petitioner. At this stage, this writ petition has been filed challenging the recommendatory proposal of the second respondent. The petitioner also wants this Court to quash the communication sent by the first respondent to the second respondent. In effect, the petitioner seeks relief at the hands of this Court at the pre-execution stage.

3.I wanted to know from the learned counsel for the petitioner as to whether the petitioner's case fell within the five parameters laid down in *Alka Subhash Gadia* case. The learned counsel responded that it is not necessary that he should bring his case within the five contingencies laid down therein. The question as to whether the detenu or any one on his behalf is entitled to challenge an order of detention without the detenu submitting or surrendering came up for consideration before the Three-Judges Bench of the Hon'ble Supreme Court in the decision reported in ***1992 Supp(1) SCC 496 (Additional Secretary, Government of India V. Smt. Alka Subhash Gadia)***. It was held that the Courts can interfere at the pre-execution stage when they 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. Subsequently, debate arose as to whether the five grounds laid down in *Alka Subhash Gadia* case are illustrative or exhaustive. In other words, the question was whether interference with detention order at

pre-execution stage is limited to the five contingencies mentioned in *Alka Subhash Gadia* case. It was argued that there will be other contingencies in which the pre-execution challenge to the order of detention could be permitted. But in the decision reported in **(1994) 6 SCC 14 (Subhash Muljimal Gandhi V. L.Himingliana)** it was held that the parameters laid down in *Alka Subhash Gadia* case are exhaustive.

4.The issue was firmly settled by a subsequent Three-Judges Bench of the Hon'ble Supreme Court in **Sayed Taher Bawamiya V. Joint Secretary** reported in **(2000) 8 SCC 630**. The Hon'ble Supreme Court following *Alka Subhash Gadia* case affirmed that it is only in the five types of instances set out in *Alka Subhash Gadia* case, the Court may exercise its discretionary jurisdiction under Article 226 or Article 32 of the Constitution of India at the pre-execution stage. However, a Two-Judges Bench in **Deepak Bajaj V. State of Maharashtra** reported in **AIR 2009 SC 628** cast doubts on the proposition that Alka grounds are exhaustive and not illustrative. They wondered as to why if a person against whom the preventive detention order has been passed comes to the Court at the pre-execution stage and satisfies the Court that

the detention order is clearly illegal, the Court should stay its hands and compel the petitioner to go to jail, if he is bound to be released subsequently. They observed that the legal position regarding the power of the Courts to set aside the preventive detention order at the pre-execution stage may have to be revisited.

5.The issue was taken up for consideration again in **Subhash Popatlal Dave V. Union of India** reported in **(2012) 7 SCC 533**. It was argued that the decision rendered in *Alka Subhash Gadia* case that a preventive detention order could be challenged at the pre-execution stage only on the five grounds enumerated in the Judgment was no longer good law on account of the subsequent enactment of the Right to Information Act, 2005. It was also contended that the five instances indicated in *Alka Subhash Gadia* case were only illustrative and not exhaustive. After holding that the provisions of the Right to Information Act cannot be applied to cases relating to preventive detention at the pre-execution stage, it was observed that the question as to whether the five instances mentioned in *Alka Subhash Gadia* case are exhaustive or not required consideration. It was also noted

that it is only in *Sayed Taher Bawamiya* case, an earlier Three-Judges Bench held that the Court's power to interfere at the pre-execution stage was only on the aforesaid five limited grounds. The Hon'ble Three-Judges Bench observed as follows:-

“29.In such circumstances, while rejecting Mr. Rohatgi's contention regarding the right of a detenu to be provided with the grounds of detention prior to his arrest, we are of the view that the right of a detenu to challenge his detention at the pre-execution stage on grounds other than those set out in paragraph 30 of the judgment in Alka Subhash Gadia's case (supra), requires further examination. There are various pronouncements of the law by this Court, wherein detention orders have been struck down, even without the apprehension of the detenu, on the ground of absence of any live link between the incident for which the detenu was being sought to be detained and the detention order and also on grounds of staleness. These are issues which were not before the Hon'ble Judges deciding Alka Subhash Gadia's case (supra). Law is never static but dynamic, and to hold otherwise, would prevent the growth of law, especially in matters involving the right of freedom guaranteed to a citizen under Article 19 of the Constitution, which is sought to be taken away by orders of preventive detention, where a citizen may be held and detained not to punish him for any offence, but to prevent him from committing such offence. As we have often repeated, the most precious right of a citizen is his right to freedom and if the same is to be interfered with, albeit in the public interest, such powers have to be exercised with extra

caution and not as an alternative to the ordinary laws of the land.

30.In the light of the above, let the various Special Leave Petitions and the Writ Petitions be listed for final hearing and disposal on 7 th August, 2012 at 3.00 p.m. This Bench be reconstituted on the said date, for the aforesaid purpose.”

6.The Bench disposed of the writ petitions on 16.07.2013. The Three Hon'ble Judges rendered separate opinions. Hon'ble Mrs.Justice Gyan Sudha Misra even while dismissing the writ petition, opined as follows:-

“57.A common question initially arose in all these matters as to whether detention order passed under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (shortly referred to as 'the COFEPOSA Act 1974) could be challenged at the pre-execution stage confined to the five exceptions carved out by this Court in the case of Additional Secretary to the Govt. of India and Ors. v. Alka Subhash Gadia and Anr. : 1992 Supp (1) SCC 496 or whether such challenge could be maintained inter alia on other grounds. This Court (Bench) has already delivered a judgment on this question vide judgment and order dated 10.07.2012 reported in (2012) 7 SCC 533 that the

right of a proposed detenu to challenge a preventive detention order passed against him may be challenged at the pre-execution stage on grounds other than those set out in paragraph 30 of the judgment in Alka Subhash Gadia's case and it was held therein that the order of preventive detention can be challenged beyond the five conditions enumerated in Alka Subhash Gadia's case. To make it explicitly clear it may be reiterated that this Court has already held that the order of preventive detention can be challenged beyond the five grounds which have been enumerated in the case of Alka Subhash Gadia's case even at the pre-execution stage."

7.Hon'ble Mr.Justice Jasti Chelameswar also proceeded on the premise that the issue as to whether the five circumstances specified in *Alka Subhash Gadia* case are exhaustive had already been considered vide order dated 10.07.2012 and that they had held that the grounds are not exhaustive. His Lordship Mr.Justice Altamas Kabir, Hon'ble Chief Justice, also took the same view.

8.The head notes read that the decision in *Sayed Taher Bawamiya* case has been overruled. When *Sayed Taher Bawamiya* case was by a Three-Judges Bench, a coordinate Bench of the same strength cannot overrule the same. I already extracted the

relevant paragraphs from the order dated 10.07.2012. They clearly indicate that the Three-Judges wanted to reexamine the issue. They specifically held that the issue requires further examination. The Bench was ordered to be reconstituted only for the purpose of conducting further examination. But when the very same Bench sat again, they proceeded on the premise that the issue had already been decided!

9. Thus before me, there are two decisions, namely, *Sayed Taher Bawamiya V. Joint Secretary* reported in (2000) 8 SCC 630 and *Subhash Popatlal Dave V. Union of India* reported in (2014) 1 SCC 280. Of course, the easier and convenient course would be to say that the later decision must be followed. However, I have been spared the dilemma. The learned Government Advocate appearing for the first respondent informs me that as on date, no detention order has been passed against the writ petitioner. Only if a detention order has been passed, the question of considering whether the pre-execution challenge will lie or not will arise. The stage is yet to come. The petitioner pre-maturely moved this Court. No Court can restrain the statutory authority from exercising her statutory powers.

10.I therefore dismiss this writ petition. I make it clear that all the contentions of the petitioner are left open. Liberty is given to the petitioner to submit a pre-detention representation to the first respondent. If the first respondent still passes detention order against the petitioner, it is always open to the petitioner to move the Court again.

11.With this liberty, this writ petition stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

08.01.2021

Index : Yes / No
Internet : Yes/ No
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Note: 1.Issue order copy expeditiously.

2.In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Principal Secretary to
Government(FAC) Public(S.C.) Department,
Secretariat, Chennai – 600 009.
2. D.Anil,
The Commissioner of Customs(Preventive),
O/o.The Commissioner of Customs(Preventive),
No.1, Williams Road, Cantonment,
Tiruchirappalli – 620 001.



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G.R.SWAMINATHAN, J.

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