CASE NO.:
Appeal (crl.) 765 of 2003

PETITIONER:
SAYED ABUL ALA

RESPONDENT:
UNION OF INDIA & ORS

DATE OF JUDGMENT: 26/09/2007

BENCH:
S.B. SINHA & H.S. BEDI

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 765 OF 2003

S.B. SINHA, J.

1.Appellant herein was detained under the Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act,1988 (hereinafter referred to as the 'Act') by an order dated 15th February, 2000. The period of detention is over. He, however, questioned the validity of the said order of detention before the High Court of Delhi inter alia on the premise that unless the order of detention is set aside, a proceeding may be initiated against him under Chapter VA of Narcotic Drugs and Psychotropic Substances Act, 1985.

2. Appellant was indisputably arrested by the officers of Narcotic Control Bureau (NCB) on 29.11.1999. He was remanded to NCB custody till 8.12.1999, whereafter when he was remanded to judicial custody. Eighteen kilos and eight hundred thirty grams of heroin was alleged to have been recovered from his possession from a hotel room. Another raid was conducted in House No.995, situate at Kishanganj, Teliwara, near Azad Market, Delhi on 29/30th November,1999. In the search, which was conducted at the said place on 29/30th November, 1999, 32.305 kg. of brown powder kept in nineteen transparent polythene bags kept inside three Safari suitcases, was said to have been recovered.

3. Appellant filed an application before the special judge that he may not be transferred to Delhi. The said plea was not accepted. The order of detention was placed before the Advisory Board for confirmation. The Advisory Board was to hold its meeting on 22nd April,2000. According to the appellant on the aforementioned date neither he nor his advocate Shri S.C. Puri could appear before the Advisory Board as he was being taken to Delhi from Bengal, and his advocate received the said communication from the Advisory Board only on 25th April,2000. It is also not in dispute that upon recommendations of the Advisory Board, the order of detention was confirmed on 12.5.2000.

3. Appellant made two representations praying for revocation of the order of detention. The first representation was made on 14th March,2000 raising all legal questions. The said representation was rejected. He, however, filed another representation on 26th May,2000 inter alia on the premise that his Constitutional right to appear before the Advisory Board having been denied to him, he was entitled to revocation of the order of detention dated 15th February,2000. The said representation was also rejected. Aggrieved, he filed a writ petition before the High Court.

4. Before the High Court three contentions were raised by the appellant. Firstly, his Constitutional right to be represented before the Advisory Board having been denied to him and having regard to the second representation made by him, the appropriate Government was under a constitutional obligation to reconstitute another Advisory Board so as to enable him to make proper representation before it. It was contended that the purported letter dated 7.4.2000 issued by the appropriate Government to him was an ante-dated one and in any event his advocate having received the same only on 25th April,2000, i.e., after the Advisory Board held its meeting on 22nd April,2000, the same was

illegal and thus it was obligatory on the part of the appropriate Government to reconstitute the Advisory Board.

5. Secondly, his representation dated 26th May,2000 being based on fresh facts and new grounds, the same should have been disposed of at an early date but delay of 40 days having occurred, the order of detention should be set aside.

6. Thirdly, although the appellant was in judicial custody at the relevant point of time, the detaining authority had mechanically passed the order of detention without taking into consideration the relevant fact, namely, he was alleged to have committed serious offences under the said Act and in view of Section 37 thereof, it was unlikely that he would have been released on bail.

7. All the contentions having been rejected by the High Court by reason of impugned judgment, the appellant has preferred this appeal.

8. The contention of the respondents, on the other hand, is that a distinction must be made between the cases where the order of detention is void ab initio and a case where further detention becomes vitiated by reason of non-compliance of one or the other procedural safeguards to which the detenu would be entitled in terms of Article 22(5) of the Constitution of India.

9. From the records it appears that the contention of the appellant that the communication dated 7th April,2000 was ante-dated and his advocate Shri S.C. Puri did not receive the said communication as a result whereof the appellant is said to have been deprived of an opportunity of being represented before the Advisory Board is not correct. Our attention in this regard has been drawn to a letter dated 7.4.2000 addressed by the appellant to his counsel to Shri S.C. Puri wherein it was stated that not only he had received the said communication dated 7.4.2000 on the said date itself but had advised his counsel to attend the said meeting of the Advisory Board which was to be held on 22.4.2000 at 11.00 a.m. on his behalf as he himself was unable to attend because of his sickness. Appellant was, therefore, aware of the date of meeting of the Advisory Board much in advance.

10. Apart from that, one Mangal Dass who was an Intelligence Officer, NCB, Delhi in an affidavit categorically stated that he had himself contacted the advocate of the appellant Shri S.C. Puri over telephone on 18.4.2000 and informed him about the contents of the aforementioned letter dated 7.4.2000. As the said contention of the appellant that he had cxbeen deprived of the constitutional right to be represented before the Advisory Board is not based on factual foundation, we are of the opinion that the said contention has no merit and must be rejected.

11. Even for the sake of the argument, if it be assumed that there was some delay in considering his representation as would appear from the discussions made hereinafter the same would not vitiate the original order of detention. Before embarking however, on the said question, we may notice that in the reply affidavit filed on behalf of the respondents, affirmed by one Shri J.L. Soni, Deputy Secretary of the Government of India it was stated that there was 10 days' delay on the part of the jail authorities to forward the said representation; 22 days had been taken in calling the comments from the sponsoring authority and about 8 days had been taken in communication of the said order. Even if there had been some delay on the part of the respondents to consider the said representation of the appellant by the appropriate authority, we are of the opinion that the same would not be sufficient for the purpose of disposal of the present case.

11. Mr. B.B. Singh, in our opinion, is right in his contention that by reason thereof only further detention of the appellant became illegal and thus, the same did not vitiate the order of detention itself. The distinction between an order of detention which is void ab initio by reason of non-application of mind on the part of the detaining authority or other reason is clearly distinct and different from the case where only further detention becomes illegal. This question had been considered by a three-Judge Bench of this Court in Meena Jayendra Thakur Vs. Union of India & Ors. reported in J.T. 1999(7)SCC 336 wherein it was held:

?8. There cannot be any dispute that the right to make a representation of a detenu is the most valuable right conferred upon him under Article 22 of the Constitution and if there has been any infraction of such right then certainly the detenu is entitled to be released. The question, therefore, arises as to

whether when a declaration is made under Section 9(i) of the Act which in turn extends the period of detention without being confirmed whether the officer issuing the declaration under Section 9(i) is also required to inform the detenu that he has a right to make a representation to him. Under the constitutional scheme engrafted in Article 22, no law providing for preventing detention can authorise the detention of a person for a longer period than three months unless the Advisory Board reports before expiration of the said period of three months that there is, in its opinion, sufficient cause for such detention. When an authority issues a declaration under Section 9(i) of the Act, the said authority has the necessary powers to revoke the declaration on a representation being made by the detenu against such declaration. Consequently, if the detenu is not intimated of his right to make a representation to the authority issuing the declaration under Section 9(i) then certainly his valuable constitutional right gets infringed and the two decisions of the Full Bench relied upon by Mr. Kotwal fully support this contention. Mr. N.N. Goswami, learned senior counsel appearing for the Union of India fairly concedes this position.?

13. The said decision has been followed by this Court recently in Union of India & Anr. Vs. V. Harish Kumar reported in J.T. 2007 (10) SC 254, holding:

?In our considered opinion the decision of this Court in Meena Jayendra Thakur is an authority for the proposition that an order of detention passed by the detaining authority on the basis of material made available for its consideration and its satisfaction does not get initiated because of a subsequent infraction of the detenu's right to make a representation and its disposal by the authorities. We are unable to agree with the submissions of Dr. Singhvi, learned senior counsel for the respondent.?

14. In the case of A.K. Roy Vs. Union of India 1982 (1) SCC 271, which was relied upon by the learned counsel, this Court was examining the constitutional validity of issuance of an Ordinance providing for detention and the constitutional validity of the National Security Act. Relying upon its earlier decision in Khduram Das Vs. State of W.B. 1975 (2) SCC 81 this Court held that it is not open to anyone to contend that a law of preventive detention, which falls within Article 22, does not have to meet the requirement of Articles 14 or 19, and on the same analogy it must be held that Article 21 also would apply in case of a law of preventive detention. The proposition laid down in the aforesaid decision of the Constitution Bench cannot be doubted, but in our view the said question does not arise for consideration in the case at hand.

15. We may now consider the principal contention raised by Mr. Harjinder Singh, learned senior counsel appearing for the appellant. In the impugned order of detention it has been stated as under:

?Even though prosecution proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985 Act,1985 have been initiated against Shri Sayed Abul Ala and even though he continues to be in judicial custody, I am satisfied that there is every likelihood of his being released on bail by the Court, and on such release, he is likely to engage himself in illicit traffic in Narcotic drugs as in evident from his antecedent activities and material on record. I am therefore satisfied that there is compelling necessity to detain him under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 with a view to preventing him from engaging in such activities.?

16. It is no doubt true that in the order of detention the detaining authority had taken into consideration three factors; viz., (1) the antecedent of the appellant; (2) he had made voluntary confession on 1.6.2000 but refracted therefrom on 1.6.2000; and (3) he had filed an application for bail.

17. Mr. B.B. Singh, learned counsel submitted that once it is held that the relevant factors were considered, the same conferred jurisdiction on the detaining authority to take extraordinary procedure in passing the order of preventive detention against the appellant, and when such facts are found to have been existing, this Court should not interfere therewith.

18. An application for bail is required to be filed and considered by the appropriate Court in terms of Section 439 of the Code of Criminal Procedure but in cases involving the provisions of the NDPS Act, the detaining authority was required to take into consideration the restrictions imposed on the power of the court to grant bail having regard to the provisions of Section 37 thereof.

It reads as under:

?37. Offences to be cognizable and non-bailable.--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974) --

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under Section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless --

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii)where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.?

19. The statute, thus, puts limitation on the jurisdiction of the court in the matter of grant of bail. They cannot be ignored by any Court of Law. Several decisions of this Court and of High Court operate in the field.

20. Proper application of mind on the part of the detaining authority must, therefore, be borne out from the order of detention. In cases where the detenu is in custody, the detaining authority not only should be aware of the said fact but there should be some material on record to justify that he may be released on bail having regard to the restriction imposed on the power of the Court as it may not arrive at the conclusion that there existed reasonable grounds for believing that he was not guilty of such offence and that the detenu could not indulge in similar activity, if set at liberty.

21. The detaining authority furthermore is required to borne in mind that there exists a distinction between the ?likelihood of his moving an application for bail? and ?likelihood to be released on bail?. While arriving at his subjective satisfaction that there is likelihood of the detenu being released on bail, recording of the satisfaction on the part of the detaining authority that merely because an application for grant of bail had been filed, would not be enough. It would also not be sufficient compliance of the legal obligation that the detaining authority had informed himself that the detenu has retracted from his earlier confession.

21. So far as the 2nd retraction of confession is concerned, the same is dated 1.6.2000, and thus the same could not have been within the knowledge of the detention authority. Refraction from confession by the detenu although may be one of the grounds for arriving at the conclusion with regard to the subjective satisfaction of the detaining authority, in our opinion, the detaining authority should have also informed himself about the implication of Section 37 of the Act. If the detenu was involved in a large number of cases and the prosecution was aware of the same, it would invariably be brought to the notice of the court dealing with the application of bail filed by the detenu by the public prosecutor. Further more, the order of the Court granting bail would be passed only when the court dealing therewith forms an opinion that there are reasonable grounds for believing that he is not guilty of such offences that there was no likelihood to commit any offence while on bail.

22. In Amritlal & Ors. vs. Union Govt. through Secy., Ministry of Finance & Ors., (2001) 1 SCC 341, wherein this Court, following the decision in Binod Singh Vs. District Magistrate, Dhanbad (1986 (4) SCC 416, held as under:

6.?The requirement as noticed above in Binod Singh Case that there is ?likelihood of the petitioners being released on bail? however is not available in the reasoning as provided by the officer concerned. The reasoning available is the ?likelihood of his moving an application for bail? which is different from ?likelihood to be released on bail?. This reasoning, in our view, is not sufficient compliance with the requirements as laid down.

7.The emphasis however, in Binod Singh case that before passing the detention order the authority concerned must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail

application moved in the matter but not obtaining a bail order.?

23. The said decision is of no assistance to the learned counsel for the respondents.

24. Yet again, in Union of India vs. Paul Manickam & Anr. 2003 (8) SCC 342, whereupon Mr.B.B.Singh has placed strong reliance, noticing a large number of decisions, this Court held that:

?But at the same time, a person?s greatest of human freedoms i.e. personal liberty is deprived, and, therefore, the laws of preventive detention are strictly construed, and a meticulous compliance with the procedural safeguard, however technical, is mandatory. The compulsions of the primordial need to maintain order in society, without which enjoyment of all rights, including the right of personal liberty would lose all their meanings, are the true justifications for the laws of preventive detention. This jurisdiction has been described as a ?jurisdiction of suspicion?, and the compulsions to preserve the values of freedom of a democratic society and social order sometimes merit the curtailment of the individual liberty. (See Ayya Vs. State of U.P.) To lose our country by a scrupulous adherence to the written law, said Thomas Jefferson, would be to lose the law, absurdly sacrificing the end to the means. No law is an end in itself and the curtailment of liberty for reasons of the State's security and national economic discipline as a necessary evil has to be administered under strict constitutional restrictions. No carte Blanche is given to any organ of the State to be the sole arbiter in such matters.?

25. No doubt antecedents of the detenu would be a relevant factor but the same by itself may not be sufficient to press and order of detention in as much as the principles which govern the field so as to enable the court to arrive at a decision that the order of detention can be validly passed despite the detenu being in custody are:

(1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he had a reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being released, he would in all probability indulge in prejudicial activities; and (3) it is felt essential to detain him to prevent him from so doing.

26. Yet again, our attention has also been drawn to the decision of this Court in Smt. Azra Fatima Vs. Union of India & Ors. (1991) 1 SCC 76 wherein a Bench of this Court while considering the validity of an order of detention under the said Act had held that the likelihood of the detenu to be released on bail together with other relevant factors namely his antecedents as well as his likelihood of involvement and in continuing to commit similar offences are to be borne in mind. But therein two of the co-detenus had already been released on bail and thus, detaining authority could arise at his subjective satisfaction. However, in this case, the co-accused of the appellant had not been released on bail and in that view of the matter the detaining authority was required to apply his mind on the material on record to arrive at his subjective satisfaction.

27. In Dharmendra Suganchand Chelawat & Anr. Vs. Union of India & Ors., AIR 1990 SC 1196, this Court held:

?21.We are, however, unable to agree with the same. In the grounds of detention the detaining authority has only mentioned the fact that the appellants has been remanded to judicial custody till October 13, 1988. The grounds of detention do not show that the detaining authority apprehended that the further remand would not be granted by the Magistrate on October 13, 1988, and the appellants would be released from custody on October 13, 1988. Nor is there any material in the grounds of detention which may lend support to such an apprehension. on the other hand we find that the bail applications moved by the appellants had been rejected by the Sessions Judge a few days prior to the passing of the order of detention on October 11, 1988. The grounds of detention disclose that the appellants were engaged in activities which are offences punishable with imprisonment under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985. It cannot, therefore, be said that there was a reasonable prospect of the appellants not being further remanded to custody on October 13, 1988 and their being released from custody at the time when the order for preventive detention of that appellant was passed on October 11, 1988.

27. Having regard to the facts and circumstances of the case, we are of the opinion that on this ground alone the order of detention passed against the petitioner cannot be sustained. It is set aside accordingly.

The appeal is allowed and the impugned judgment is set aside.

JUDIS