IN THE HIGH COURT OF DELHI AT NEW DELHI

WP(Crl.) 75/2008

Shashi Goyal ...Petitioner through
Mr. Vikram Chaudhuri with
Mr. Akshay Anand & Ms.
Sonam Nagrath, Advs.

Versus

UOI & Ors. ...Respondent through
Mr. P.P. Malhotra, ASG with
Mr. Satish Aggarwal & Ms.
Pooja Bhaskar, Advs.

Date of Hearing : February 21, 2008

Date of Decision : February 26, 2008

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE P.K. BHASIN

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

VIKRAMAJIT SEN, J.

J U D G M E N T

1. The Petitioner, Shashi Goyal, has filed this Petition for the annulment of the Detention Order bearing F.No.673/07/2007-CUS-VIII dated 27.12.2007 issued by Ms. Rashida Hussain, Joint Secretary to the Government of India, in respect of her husband Shri Bhimendra Kumar Goyal. The Detention has been ordered

"with a view to preventing him from smuggling goods in future". The Grounds of Detention narrate inter alia that the Detenu was arrested on 0200 hours on 29.10.2007 under Section 104 of the Customs Act, 1962 and on production in the Court of learned ACMM, Patiala House, New Delhi was lastly remanded to judicial custody till 28.12.2007. It appears that predicated on the impugned Order dated 27.12.2007 the Detenu was detained on that very day in Central Jail, Tihar, New Delhi. Inasmuch as the Petitioner had been arrested on 29.10.2007 he would have been statutorily entitled to be enlarged on bail under Section 167(2) of the Code of Criminal Procedure, 1973 (Cr. PC) on the expiry of sixty days of his arrest since the maximum punishment awardable to him does not exceed seven years [Reference can usefully be made to *Raj Kumar Aggarwal -vs- Director General, Central Excise*, 147(2008) DLT 1 (DB)]. Therefore, the date of the Detention Order, that is, 27.12.2007 assumes obvious importance and significance. It has not been contested that but for the impugned Detention Order Shri B.K. Goyal would not have remained incarcerated for offences within the present contemplation. Suffice it to mention that in paragraph B(ii) of the Counter Affidavit of the Respondents it has been asseverated that "the fact that the detenu was granted bail

under Section 167(2) of Cr. P.C. as mentioned by the petitioner was not in the knowledge of the Detaining Authority. It is denied that the detention order has been used as a device to scuttle the release of the detenu on bail as alleged. ..... The Detaining Authority has further shown her awareness and mentioned in the Grounds of Detention that the possibility of release of the detenu on bail in near future cannot be ruled out. This shows that the Detaining Authority was fully aware about the possibility of release of the detenu on bail in near future".

2. Article 21 of the Constitution of India enjoins that no person shall be deprived of his life or personal liberty except according to procedure established by law. Generally speaking, personal liberty can legitimately be curtailed, confined, restricted or impeded only if a person has been found guilty by a Court of law of the commission of an offence which is punishable by imprisonment. Preventive Detention is an inroad into the Fundamental Rights of a citizen. It is permissible by virtue of Article 22(5) of the Constitution of India which prescribes that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be,

communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

3. The Supreme Court of India has zealously guarded against the abusive use of Preventive Detention. Their Lordships have observed that "however well-meaning the Government may be, detention power cannot be quietly used to subvert, supplant or to substitute the punitive law of the Penal Code. The immune expedient of throwing into a prison cell one whom the ordinary law would take care of, merely because it is irksome to undertake the inconvenience of proving guilt in Court is unfair abuse. To detain a person after a court has held the charge false is to expose oneself to the criticism of absence of due care and of rational material for subjective satisfaction. After all, the responsible officer, aware of the value of civil liberty even for undesirable persons, must make a credible prediction of the species of prejudicial activity in Section 3(1) before shutting up a person. It may perilously hover around illegality, if a single act of theft or threat, for which a prosecution was launched but failed, is seized upon after, say, a year or so, for detaining the accused out of pique. The potential executive tendency to shy at

Courts for prosecution of ordinary offences and to rely generously on the easier strategy of subjective satisfaction is a danger to the democratic way of life. The large number of habeas corpus petitions and the more or less stereotyped grounds of detention and inaction by way of prosecution, induce us to voice this deeper concern. Moreover, a criminal should not get away with it as an unconvicted detenu if the rule of law is a live force" (see *Bhut Nath Mete v. State of W.B.,* (1974) 1 SCC 645). The other dimension repeatedly emphasised by the Apex Court is that the draconian power of preventive detention can be resorted to only upon a strict adherence and compliance of procedural law. In *Rajesh Gulati -vs- Govt. of NCT of Delhi,* (2002) 7 SCC 129 their Lordships clarified that "preventive detention must be meticulously followed with substantively and procedurally by the detaining authority. The object of detention under the Act is not to punish but to prevent the commission of certain offences. Section 3(1) of the Act allows the detention of a person only if the appropriate detaining authority is satisfied that with a view to preventing such person from carrying on any of the offensive activities enumerated therein, it is necessary to detain such person. The satisfaction of the detaining authority is not a subjective one based on the detaining authority's

emotions, beliefs or prejudices. There must be a real likelihood of the person being able to indulge in such activities, the inference of such likelihood being drawn from objective data".

4. In the factual matrix of the present case we cannot over-emphasise the need to explain the necessity and the expediency of the preventive detention of the Detenu, keeping in mind that he had become entitled to statutory bail under Section 167(2) of the Cr.PC as a Challan had not been filed within sixty days of his arrest. There is a plethora of precedents to the effect that such detention cannot be clamped down in pique, only because the Detenu has been enlarged on bail by a competent Court. Indeed, it would sound the death-knell of the Fundamental Right of personal liberty if preventive detention can be resorted to simply because the State is unable to complete its investigation and present a Challan within the statutory period of sixty/ninety days as the case may be. Section 167(2) of the Cr. PC would be subverted. Wherever and whenever such action manifests itself, courts of law would stamp it out swiftly and completely.

5. Mr. Vikram Chaudhuri, learned counsel appearing for the Detenu, has raised a number of points, all of which we do not

think it necessary to deal with and answer. His first contention is that the impugned Order is liable to be struck down because the Detaining Officer has taken extraneous facts into consideration, namely, the factum of the previous preventive detention of the Petitioner's husband, which was struck down by this Court, and affirmed by the Supreme Court in terms of the rejection of the Special Leave Petition filed by the Union of India. It is prudent to reproduce hereinbelow the relevant paragraphs in the Grounds of Detention in order to effectively deal with the argument of counsel for the parties:

> 21. In response to the Customs office letter dated 06.11.2007, addressed to the Assistant Director, Directorate of Revenue Intelligence (DRI), Delhi Zonal Unit, New Delhi, it has been informed by DRI, vide its letter dated 7.11.07, that you were involved in a case of smuggling of misc. goods including medicinal powder, chinese silk, cosmetics and toiletries, electronic goods etc. in a large quantity which was detected by DRI and seizure effected between 26.4.2004 and 14.5.2004 from Sanjay Gandhi Transport Nagar and Village Badli, Delhi; that you were examined on 26.8.2004 and were subsequently arrested for offences punishable under the provisions of Customs Act, 1962; that you were also detained under COFEPOSA Act on 20.02.2006 for your involvement in that case. However, the Detention

Order was set aside by the Hon'ble Delhi High Court vide judgment dated 07.08.2006. The prosecution case against you was filed by DRI, New Delhi under the Customs Act, 1962 and the trial is in progress.

....

36. Taking into consideration the foregoing facts and materials on record, I am reasonably satisfied that your activity amounts to smuggling as defined in Section 2(39) of the Customs Act, 1962 and as adopted in the COFEPOSA Act, 1974 via Section 2(e) thereof since your acts and omissions have rendered the goods involved liable to confiscation under Section 111 of the Customs Act, 1962. Considering the nature and gravity of the offence, your role therein and the deliberate planned manner in which you have engaged yourself in the aforesaid prejudicial activity as well as your detention under the COFEPOSA Act, 1974 in the past, all of which reflect your high propensity and potentiality to continue to engage yourself in such activities in future, I am satisfied that you ought to be detained under the COFEPOSA Act, 1974 with a view to preventing you from smuggling goods in future.

...

39. I have particularly given careful consideration to the nexus angle. Considering the magnitude of the operation, the consequential extent of investigation involved, the well organised manner in which such prejudicial activities have been carried on, the nature and gravity of the offence and keeping in view the

> chronological sequence of events, I am satisfied that your potentiality and propensity to indulge in such prejudicial activities have not diminished at all and hence the nexus between the date of incident and passing of this Detention Order as well as object of your detention has been well maintained.
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> 40. I am further aware that the adjudication and prosecution proceedings under the Customs Act, 1962 are likely to be initiated against you in due course. These proceedings are however, punitive in nature. Considering your potentiality and propensity to indulge in such activities in future, I am satisfied that your detention under the COFEPOSA Act, 1974 is essential.

6. Mr. Chaudhuri's contention is that the mere reference to the previous Detention Order would render the impugned Detention Order liable to be struck down. This argument is too broadly stated to be accepted by us, as it would damn the decision of the Government irrespective of whether the previous Detention Order was referred to or not. If the previous Order was ignored, the Detenu would contend that there was non-application of mind as this event must perforce weigh in the mind of the Detaining Officer. Therefore, we are of the opinion that whilst a reference to the previous Detention Order and its fate is expedient, the effect that it has on the thought process

of the Detaining Officer is of primary importance. Where the Detention Order has been struck down by the Court, reliance on it may render the next Detention Order illegal and legally inefficacious. Mr. P.P. Malhotra, learned Additional Solicitor General (ASG), who appears for the Respondents, has made a two-fold submission in this regard. Firstly that mention of the previous Detention Order and its quashing by this Court has been made purely by way of narrative. Secondly, he has contended that if the previous Detention Order has been quashed on remediable technicalities, fresh Detention Order based on the previous "cause of action" would be permissible.

7. We shall deliberate upon the second question first. In ***Chhagan Bhagwan Kahar*** *-vs- N.L. Kalna*, (1989) 2 SCC 318 one of the contentions was that "the present detaining authority took into consideration the previous grounds of detention also to establish that the petitioner was engaged in bootlegging activities since long". Their Lordships opined that "even if the order of detention comes to an end either by revocation or by expiry of the period of detention there must be fresh facts for passing a subsequent order. A fortiori when a detention order is quashed by the court issuing a high prerogative writ like habeas

corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the court strikes down an earlier order by issuing rule it nullifies the entire order". The Court drew support from their previous decision in ***Ibrahim Bachu Bafan*** *-vs- State of Gujarat*, (1985) 2 SCC 24 wherein it was observed that if the Order of Detention has been quashed by the High Court, Section 11(2) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act) is not available to the Detaining Authority enabling it to pass another order under Section 3 of that Act. In ***Jahangirkhan Fazalkhan Pathan*** *-vs- Police Commissioner, Ahmedabad*, (1989) 3 SCC 590 their Lordships categorically enunciated the law to be that an order of detention cannot be made after considering the previous grounds of detention if those have been quashed by the Court, and if such facts have been taken into consideration while affirming the subjective satisfaction of the Detaining Authority the fresh order of detention would stand vitiated. In this analysis reference to a previous detention order would be expedient in order to make the Detaining Authority cautious

before passing a fresh detention order. It is for this reason that we have mentioned above that failure to allude to the striking down of a previous Detention Order may vitiate the fresh order on the simple score of not taking into account all relevant facts. It appears to us that if a person has been previously detained, and such action has not met with the disapproval of the Court, and if such person were to continue the same illegal activity on his release, reference to the previous Detention would normally support and strengthen a fresh Detention Order. However, where the previous Detention Order has been struck down, that fact alone cannot obviously be supportive of the clamping down of a fresh Detention Order. This would render nugatory the decision of the Court, and may even constitute the commission of contempt of Court. It would be preposterous to predicate that the State could be free to resort to preventive detention even though the Detenu has succeeded in annulling a previous Detention Order. We are mindful of the decision in *Sadhu Roy -vs- The State of West Bengal*, AIR 1975 SC 919 where it was observed that the acquittal by a criminal court is not necessarily a bar to preventive detention on the same facts for 'security' purpose. In *Noor Chand Sheikh -vs- The State of West Bengal*, (1975) 3 SCC 306 it has been opined that an unsuccessful

judicial trial would not operate as a bar to a Detention Order or make it malafide if it is shown that the discharge was because witnesses were afraid to give evidence against the Detenu. The seeming divergence between the ratio of these cases and of ***Chhagan Bhagwan Kahar***, ***Jahangirkhan Fazalkhan Pathan*** and ***Ibrahim Bachu Bafan*** on the other have to be reconciled. For our purposes, we are bound by the latter and second string, which are also later in time.

8. We shall now cogitate upon the first question i.e. that reference to the previous Detention Order was only by way of narration of relevant facts. We reiterate our view that if this narration is missing it may be indicative of the failure of the Detaining Authority to consider all relevant facts. It would, however, be impermissible for the Detaining Authority to disregard the annulment, and rely on the issuance of the Detention Order to buttress a fresh order. We are also unable to accept the sagacious argument of learned ASG to the effect that mention of the previous Detention Order was only intended to complete the factual matrix. The Counter Affidavit which is a reiteration of the Grounds of Detention is to the effect that the Detaining Authority rightly placed reliance on the quashing of

the earlier Detention Order by this Court. We find that there can be no manner of doubt that the subjective satisfaction of the Detention Authority so far as the necessity and need for ordering the preventive detention of Shri B.K. Goyal is concerned, has been positively affected by the previous Detention Order despite the fact that it had been quashed.

9. Learned ASG has contended that the Court can sever the reliance by the Detaining Authority on the previous Detention Order, and if other grounds are available to sustain the Detention Order, it should not be set aside. Our attention has been drawn to Section 5A of the COFEPOSA Act. We are unable to accept this argument. No doubt, Section 5A contemplates the Grounds of Detention being severable, but it categorically refers to the preceding Section 3(1). Plainly, neither of these Sections referred to the reasons which have prevailed upon the Detaining Authority to pass an order of preventive detention.

10. It is also necessary to refer to the contention of Mr. Chaudhuri, learned counsel for the Petitioner, that Ms. Kameswari Subramanian is not competent to file the Counter Affidavit on behalf of the Respondents. The learned ASG has

filed a photocopy of the Gazette of India dated 12.5.2005 conferring upon Ms. Kameswari Subramanian with the powers under Section 3 of COFEPOSA Act. It is his submission that this empowerment continues till date. A photocopy of Gazette dated 12.5.2007 conferring similar powers on Ms. Rashida Hussain has also been filed. We have been informed by the learned ASG that Ms. Kameswari Subramanian has sworn the Counter Affidavit for the reason that Ms. Rashida Hussain is on leave. In ***Shaik Hanif*** *-vs- State of W.B.,* (1974) 1 SCC 637 one of the questions that had arisen was whether the Court should insist on the filing of a Counter Affidavit by the Magistrate who passes the order of detention. Their Lordships observed that "where mala fides or extraneous considerations are attributed to the Magistrate or the detaining authority, it may, taken in conjunction with other circumstances, assume the shape of a serious infirmity, leading the Court to declare the detention illegal" since the Counter Affidavit had been filed by another person. In the present case also the point of cogitation is the extent and manner in which the previous Detention Order affected the subjective satisfaction of the Detaining Authority in passing a Detention Order. This could only have been explained and elucidated by Ms. Rashida Hussain. Government servants

are entitled to avail of and enjoy their leave entitlement, but where the Court is to pronounce upon the legitimacy of a Preventive Detention Order, in other words where the personal liberty of a citizen has been curtailed, it would become necessary for the Counter Affidavit to be filed by the Detaining Authority, namely, Ms. Rashida Hussain herself. In ***Shaik Hanif*** 's case their Lordships found the explanation that the District Magistrate had been transferred from that District, to be “far from satisfactory”.

11. It is in these circumstances that we had put it to learned ASG that the Respondents should consider the expediency of revoking the Detention Order by exercising the powers available under Section 11 of the COFEPOSA Act. It has already been discussed above that recourse to such a revocation would palpably enable the Respondents to pass a fresh Detention Order by removing errors in the assailed one. The learned ASG has replied by saying that since the matter is sub judice, it may not be appropriate to charter this course, but we fail to perceive any obstacles in doing so. So far as the Court is concerned there may be unremediable errors or irretrievable infractions in a Detention Order such as failure or delay in furnishing copies

of documents relied upon by the Detaining Authority, or disruption of the livelink necessary for passing the Detention Order. In the present case there is a possibility that the Detaining Authority had taken into consideration extraneous factors, thereby subverting its subjective satisfaction. In ***Ibrahim Bachu Bafan*** their Lordships had laid down that it would not be possible for the Government to take recourse to Section 3 by passing a fresh Detention Order on the same grounds or facts. High prerogative writs are intended to effect complete justice. These powers are virtually unfettered. If it is open to the Government to revoke a Detention Order and thereafter make another Detention Order under Section 11(2) of COFEPOSA Act, it is beyond cavil that the same course can be chartered by the writ Court. The order that commends itself to us at this juncture, is to set aside the impugned Detention Order with liberty granted to the Government to pass a fresh order on the same facts if it considers it expedient, necessary and just to do so. We think this to be the proper path in the present case because the extent to which the previous Detention Order has affected the thought-process of the Detaining Authority is certainly nebulous.

12. We allow the writ petition. The impugned Detention Order is set aside with liberty granted to the Respondents to pass a fresh Detention Order on the same set of facts. The Detenu, namely, Shri B.K. Goyal, is set at liberty forthwith unless he is wanted in any other case. There shall be no orders as to costs.

(VIKRAMAJIT SEN)
JUDGE

February 26, 2008
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(P.K. BHASIN)
JUDGE