IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.

Crl.Writ Petition No. 912 of 2007
Date of Decision: 13.2.2008

Tejinder Singh Makkar.

..... Petitioner through Shri Vikram Chaudhri, Advocate with Shri Sandeep Wadhawan, Advocate.

Versus

State of Punjab and others.

..... Respondent nos. 1, 4 and 5 through Shri I.P.S.Sidhu, Senior Deputy Advocate General.
Respondent nos. 2 and 3 through Shri P.S.Thiara, Advocate.

CORAM: HON'BLE MR.JUSTICE MAHESH GROVER

....

1. Whether Reporters of Local Newspapers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

....

Mahesh Grover,J.

In this petition filed under Article 226 of the Constitution of India, the petitioner has prayed that a writ in the nature of Habeas Corpus be issued for setting aside order of detention bearing F. No. SBIII/PSA/ 1102/02 dated 5.3.2004 passed against him by the Detaining Authority -cum- Principal Secretary to the Government of Gujarat, Gandhinagar (respondent no.3) under Section 3(1) of the Conservation of Foreign

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Exchange and Prevention of Smuggling Activities Act,1974 (for short, `the Act') as the same is illegal, unconstitutional and is based on extraneous, irrelevant and vague grounds, apart from being vitiated on account of inordinate and fatal delay in its issuance as well as non-service thereof.

Brief facts:-

In the year 2000, the Directorate of Revenue Intelligence, Ahmedabad Zonal Unit, Ahmedabad (hereinafter described as `the D.R.I.') started investigations into duty evasion by various 100% Export-Oriented Units (EOUs) by indulging in clandestine removal of duty free imported and indigenous raw materials without payment of duty. These EOUs were under an obligation to manufacture finished products and export/ deemed export the same as per provisions of the Exim Policy and Handbook of Procedure read with the provisions of the Customs Act,1962 (hereinafter described as `the 1962 Act') and the Central Excise Act,1944. To show fulfillment of export obligation, these EOUs utlized forged Advanced Licences/ AROs issued in favour of non-existing Murabad/ Kanpur based firms/ companies and showed clearance of finished goods against the forged Advance Licences/ AROs without actually removing/ selling any goods against these forged instruments, as declared by them.

On 4.12.2000, one Shri Roopchand Jain of Mumbai made statement, Annexure P1, before the Senior Intelligence Officer of the D.R.I. disclosing the involvement of the petitioner in the aforementioned illegal activities. He also made another statement, Annexure P2, on 5.12.2000,

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inter alia, bringing out the role of the petitioner in supplying such Forged Advance Licences/ AROs on commission basis. He also stated that all such transactions were only on paper and apparently no goods were being cleared by the EOUs against this paper transaction of AROs/ Advanced Licences.

On 4.1.2001, a statement (Annexure P4) of Hastimal Jeevraj Jain, resident of Mumbai was also recorded in which he stated that he was introduced by Shri Roopchand Jain with the petitioner for doing this illegal business.

Thereafter, the statement (Annexure P5) of the petitioner was recorded by the officers of the D.R.I. on 11.5.2001 wherein he is alleged to have admitted his role in the racket.

The officer of the D.R.I. then issued an advance 15 days' notice to the petitioner on the same day proposing to arrest him. He sought interim protection from this Court and was directed to join the investigation.

It appears that in or around 2002, respondent no.3 opened File No. SB/III/PSA/1102/02 to consider the preventive detention of the petitioner under the Act on receipt of proposal from the D.R.I.

On 29.9.2003, a show cause noticed was issued by the D.R.I. to the petitioner in respect of an EOU, namely, S.A. & Company in which a penalty was proposed to be imposed upon him under Section 112 of the 1962 Act read with Rule 209-A of the Central Excise Rules,1944 and on the next day, i.e. on 30.9.2003 he was arrested and produced before the Court of Additional Chief Metropolitan Magistrate, Ahmedabad.

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After a long delay and due deliberations, the order of detention was passed by respondent no.3 purportedly for the purpose of preventing the petitioner from indulging in smuggling activities.

In pursuance to the aforesaid order, the petitioner was asked to appear before the authority concerned. Representations for revocation of that order submitted on behalf of the petitioner, his relatives and friends were rejected.

Apprehending the execution of the order of detention, the petitioner has filed the present petition alleging that the same is beyond the scope of Section 3(1) of the Act; that it has been passed belatedly and that it is not based on relevant considerations.

Reply on behalf of respondent nos. 4 and 5 has been filed by way of affidavit of Shri Jatinder Singh Khaira, Deputy Superintendent of Police (Detective), Ludhiana. It has been averred that the present petition is not maintainable qua the answering respondents as the detention order has been passed by respondent no.3 at Gandhinagar, Gujarat. Moreover, the detention order is at the pre-execution stage and without service thereof, a writ petition is not maintainable. However, it has been admitted that the petitioner is a resident of Ludhiana and State of Punjab.

In their written statement, respondent nos. 2 and 3 have taken up preliminary objections that the instant petition is not maintainable in this Court as all the cause of action has arisen in the State of Gujarat or Maharasthra and that the petitioner has wrongly given the address of the

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State of Punjab and actually, he is resident of Mumbai; that since the petitioner has not surrendered, the petition for habeas corpus does not lie and that there was no delay in passing the impugned order. Details of the correspondence/ facts have been mentioned in para 6 of the preliminary objections.

On merits, respondent nos. 2 and 3 have averred that the petitioner has, in fact, indulged in illegal activities and caused loss to the revenue and it was necessary to pass the order of detention so as to prevent him from doing so. It has further been averred that in fact, the petitioner was the root cause for the entire scam of evasion of customs and central excise duties without which the other 100% EOUs could not have indulged into the evasion of the appropriate duties to be paid to the government exchequer which is running into crores of rupees.

Learned counsel for the the petitioner has assailed the order of detention, which is sought to be executed against the petitioner, on the following grounds:-

(i) that there was an inordinate delay in passing the same;

(ii) that there is non-application of mind;

(iii) that the same is beyond the scope of the Act;

(iv) that it has been made on vague and extraneous considerations; and

(v) that it is discriminatory as it has not been passed against similarly situated persons.

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On the other hand, learned counsel for respondent nos. 2 and 3 tried to justify the order of detention and repelled the arguments advanced by the learned counsel for the petitioner. He contended that this Court has no jurisdiction as the order of detention has been passed at Gandhinagar (Gujarat) and that the writ petition at the pre-execution stage is not maintainable.

I have heard the learned counsel for the parties and have perused the record.

It would be appropriate to decide the question of jurisdiction in the first instance as it strikes the very heart of the matter.

Section 4 of the Act, which deals with the jurisdictional aspect, reads as under:-

> "**4. Execution of detention orders.-** A detention order may be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure,1973 (2 of 1974)."

An analysis of the above extracted provision of law shows that an order can be executed at any place within the country and that Sections 72 to 81 of the Cr.P.C. are attracted for that purpose.

Admittedly, the order of detention is shown to have been passed at Gandhinagar (Gujarat). However, the petitioner has come up with a plea that it is being sought to be executed at Ludhiana, where he is residing.

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Respondent nos. 4 and 5 have, in their reply, stated that the petitioner is a resident of Ludhiana in the State of Punjab.

In view of the above, the order of detention, if upheld, will be sought to be executed within the jurisdiction of this Court.

In D.N.Anand Versus Union of India, Ministry of Finance, 1993(2) R.C.R.(Crl.) 104, this Court observed as under:-

> "Some effort was made by the learned counsel for the Union of India that the petitioner was a resident of Delhi and not of Ambala as claimed by him and as such no cause of action arose to him within the jurisdiction of this Court. A reference to the pleadings in paras 7 of – the return will show that summons were sent to the petitioner at his Ambala address which were stated to have been received back with the postal remarks that the addressee was not available at his shop in spite of repeated visits. Even in the detention order Annexure P1, the petitioner has been described with his two addresses one is 7/4 Roop Nagar,Delhi, and the second is 66, Mall Road, Ambala Cantt. The authorities had thus, gone after the petitioner both at his Delhi address as well as at his Ambala address. It cannot, thus, be gainfully said that no cause of action arose to the petitioner within the jurisdiction of this Court. This contention of the learned counsel is refuted."

In Tirlok Nath Mittal Versus Union of India, 1994(1) R.C.R.

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(Crl.) 247, a learned Single Judge of this Court held as under:-

> "In the instant case the petitioner contended that he had shifted his business to Ludhiana and had entered into a partnership with one Rakesh Kumar of Ludhiana, after executing a deed to that effect on 17.2.1991 copy of which was annexure P-9. He had also taken residential accommodation on rent which was situated in Dev Nagar, Ludhiana City. He moved a petition for his pre-arrest bail in this High Court, which was decided in the presence of Mr.H.S.Giani, Sr. standing counsel for Union of India and at that time no objection was taken to the jurisdiction of the court. The order allowing bail to the petitioner was annexure P-5. The respondents had taken issuing, summons to the petitioner at his Ludhiana address, copy of which was annexure P-11. He also received summons for his appearance for 6.7.1992 and then on 9.4.1992 issued by the Customs Collectorate, at Ludhiana address only. The impugned order annexure P-15 was also sent on the residential address of the petitioner at Ludhiana. In these circumstance, the present petition under Article 226 of the Constitution of India, for quashing the impugned order was rightly filed in the court. When the respondents have been sending summons to the petitioner at his Ludhiana address, it cannot be said that no cause of action arose to the petitioner within the jurisdiction of

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this Court and the contention of the learned counsel for the respondents is held without merit."

In Mrs.Arvind Shergill Versus Union of India, 1999(4) R.C.R. (Crl.) 781, again this Court observed as follows:-

"14. I have considered the rival contentions of the parties and am of the opinion that this High Court has the jurisdiction to entertain this petition. Mere residence of a person at a particular place perhaps may not furnish a cause of action but if the alleged detenu or his close relations has the apprehension that the order of detention is likely to be served upon him for the purpose of execution, certainly, the court in whose jurisdiction this order is to be executed will have the jurisdiction. It is the case of the U.O.I. itself that they raided the house of the husband of the petitioner at Jalandhar and Chandigarh, therefore, this court will have the jurisdiction to entertain this petition. The case law relied upon by the counsel for the respondents is not applicable to the facts in hand. In Manjit Singh Dhingra's case (supra), the detention order was passed by the State Government. The said order was going to be served within the jurisdiction of another State. In that light, the Hon'ble Supreme Court gave the following findings:-

`The High Court should be slow to assume jurisdiction over the matter on which a sister court can with more

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efficacy, promptitude and exactitude hold an enquiry and grant relief. It would, therefore, be the High Court in the State which passed detention order which could grant adequate relief to the proposed detenu as that Court has the necessary equipment and all the means to expand and inquire into the subject. In this view of the matter the order of detention is not liable to be quashed by the High Court.'

15. Here is a case where the detention order has been passed by the Central Govt., which has the jurisdiction over the entire country, the Central Govt. itself wanted to execute the order in the State of Punjab when its officers searched the premises of the husband of the petitioner at Jalandhar and Chandigarh."

Moreover, if the contention of the learned counsel for respondent nos. 2 and 3 is accepted, then it implies that a person, whose life and liberty is threatened by passing an order elsewhere in the country, will have to forego his liberty and right to approach the Court for a threatened violation except at the Court which has jurisdiction over the authority passing such an order. I am afraid, this interpretation can never be granted. A person, whose fundamental right to life and liberty is threatened, has every right to approach the Court where any such authority, in the garb of an order of detention, seeks to curtail such life and liberty.

Therefore, the contention that this Court has no jurisdiction to

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entertain this petition is negated.

In so far as the contention of the learned counsel for respondent nos. 2 and 3 that the writ petition is not maintainable at the pre-execution stage, is concerned, the same is also without any merit in view of the law laid down by the Supreme Court in Additional Secretary to the Government of India and others Versus Smt.Alka Subhash Gadia and another, 1992 Supp.(1) S.C.C. 496. In paragraph 30 of that judgment, their Lordships held as under:-

> "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 places 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.

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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 extent 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 allow the due operation and implementation of the concerned law and exhaust 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.

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Secondly, as has been rightly pointed out by Shri Sibal 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 is it made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this 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

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their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question."

Now, I proceed to decide the question as to whether the prayer made in the present petition can be answered in favour of the petitioner or not.

The petitioner has made the following prayer:-

"It is, therefore, respectfully prayed that the present petition may kindly be allowed and the order of detention bearing F.No.SBIII/PSA/1102/02 dated 05.03.2004 passed by respondent no.3, Detaining Authority -cum- Principal Secretary to the Government of Gujarat, under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act,1974 against the petitioner, be quashed and set aside, as the order so passed is illegal, unconstitutional and based on extraneous, irrelevant and vague grounds.

It is further prayed that any other order or direction, which this Hon'ble Court may deem fit in the facts and circumstances of the case may kindly be passed in favour of the petitioner.

It is still further prayed that during the pendency of the petition in this Hon'ble Court, execution of the impugned detention order may kindly be stayed in the interest of justice, equity and fair play."

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The petitioner has not placed on record order dated 5.3.2004, the quashing of which he ha sprayed for. The only reference to this order finds mention in Annexure P16 which is an order passed by the competent authority while apparently exercising its powers under Section 7 of the Act, which reads as under:-

> "**7. Powers in relation to absconding persons.- (1)** If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, the Government may--
>
> (a) make a report in writing of the fact to a Metropolitan Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 82, 83, 84 and 85 of the Code of Criminal Procedure,1973 (2 of 1974), shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;
>
> (b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such

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direction, he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure,1973 (2 of 1974), every offence under clause (b) of sub-section (1) shall be cognizable."

There is nothing on record further to show as to what happened subsequent thereto even though order Annexure P16 was passed on 4.6.2004 under the above extracted provisions directing the petitioner to appear before the authority concerned which had issued the same within thirty days of the publication thereof in the official gazette.

In the absence of order dated 5.3.2004 and any material to indicate as to what transpired after 4.6.2004, this Court has been left groping in the dark and has been deprived of the opportunity to test the legality and correctness thereof by applying the tests of rationality and the judicial principles as propounded by the Courts from time to time.

A somewhat similar case was dealt with by the Apex Court in Surrender Singh Versus Central Government and others, AIR

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1986 S.C. 2166. While partly reversing the judgment of this Court reported as 1972 (74) P.L.R. 749, their Lordships observed as under:-

> "Whenever an order of government or some authority is impugned before the High Court under Article 226 of the Constitution, the copy of the order must be produced before it. In the absence of the impugned order, it would not be possible to ascertain the reasons which may have impelled the authority to pass the order. It is, therefore, improper to quash the order which is not produced before the High Court in a proceeding under Article 226 of the Constitution."

In M/S Arora Soap Industries, Jind Versus State of Haryana and others, C.W.P. No. 1109 of 1998, decided on 18.9.1998, a Division Bench of this Court also rejected the prayer of the petitioner for quashing of the order impugned therein as the same was not available on the record.

In view of the law laid down by the Supreme Court and this Court, the prayer as made by the petitioner for quashing of the detention order, which is not on record, cannot be answered in his favour. Moreover, there is no material to show as to what transpired after the issuance of order dated 4.6.2004 (Annexure P16).

Hence, this petition is dismissed.

February 13,2008 **(Mahesh Grover)**
"SCM" **Judge**

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