

SUNIL FULCHAND SHAH
v.
UNION OF INDIA & OTHERS

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MAY 1, 1989

[R.S. PATHAK, CJ, L.M. SHARMA AND
M.N. VENKATACHALIAH, JJ.]

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Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974: Section 3—Preventive detention—Period of detention—Whether fixed—Whether automatically/correspondingly extended by period of parole or by release of detenu by erroneous decisions of High Court—Matter referred to a Bench of Five Judges.

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The petitioner filed a writ petition and a special leave petition challenging the detention order passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. It was contended on behalf of the respondents that the period of detention intended by the detention order was not a fixed one but could be correspondingly extended if the detenu absconded before he could be apprehended and detained or the period of detention was interrupted by an erroneous judgment of a High Court and the detenu was set free.

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Referring the cases to a larger Bench, this Court,

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HELD: *By the Court:* As the matter is of great public importance, these cases are referred to a Bench of five Judges of this Court. [870C]

Per Pathak, CJ:

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Preventive detention invariably, runs from the date specified in the detention order, and the period of detention is determined by the detaining authority, applying its subjective judgment to material before it. [869G-H]

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In the case of grant of parole, one possible view can be that the period of parole should be counted within the total period of detention and not outside it. As regards the problem raised by release of a detenu pursuant to an erroneous decision of the High Court, and the subsequent reversal of the decision by the Supreme Court, the remedy probably lies in the enactment of legislation analogous to s. 5(1) and s. 15(4) of the

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A Administration of Justice Act, 1960 in the United Kingdom. [870A-B]

B As the question is of great public importance affecting, on the one hand, the need for affective measures of preventive detention and, on the other, the liberty of the subject and his right to freedom from detention beyond the period intended by the statute, and since most cases of preventive detention are bound to be affected, these cases are referred to a five Judge Bench for reconsideration of the law on the point. [870B-C]

C *State of Gujarat v. Adam Kasam Bhaya*, [1982] 1 SCR 740; *State of Gujarat v. Ismail Juma & Ors.*, [1982] 1 SCR 1014; *Smt. Poonam Lata v. M.L. Wadhawan and Others*, AIR 1987 SC 1383 and *Pushpadevi M. Jatia v. M.L. Wadhawan*, AIR 1987 SC 1748; dissented from.

Per Sharma, J (Concurring):

D In view of the great public importance involved, these cases may be heard by a five Judge Bench. [870E]

State of Gujarat v. Adam Kasam Bhaya, [1982] 1 SCR 740; *State of Gujarat v. Ismail Juma & Ors.*, [1982] 1 SCR 1014; *Smt. Poonam Lata v. M.L. Wadhawan and Others*, AIR 1987 SC 1383 and *Pushpadevi M. Jatia v. M.L. Wadhawan*, AIR 1987 SC 1748; affirmed.

E ORIGINAL/CRIMINAL APPELLATE JURISDICTION: Writ Petition (Criminal) No. 248 of 1988.

(Under Article 32 of the Constitution of India).

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Special Leave Petition (Crl.) No. 1492 of 1988.

From the Judgment and Order dated 29.4.88 of the Gujarat High Court in Special Criminal Application No. 886 of 1986.

G U.R. Lalit, M.G. Karmali, J.B. Patel and K.M.M. Khan for the petitioner in W.P. Crl. No. 248/88 and S.L.P. (Crl.) No. 1492/88.

H T.U. Mehta, Mrs. Hemantika Wahi and M.N. Shroff for the State of Gujarat in W.P. Crl. No. 248/88 and S.L.P. (Crl.) No. 1492/88.

Kuldip Singh, Additional Solicitor General C.V.S. Rao and A. Subba Rao for the Respondents in W.P. CrI. No. 248/88 and S.L.P. (CrI.) No. 1492/88.

The following Orders of the Court were delivered:

PATHAK, CJ. This writ petition under Article 32 of the Constitution and the Special Leave Petition under Article 136 of the Constitution arises out of proceedings for preventive detention taken under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. One of the substantial points which arises in these cases is whether the period of detention is a fixed period running from the date specified in the detention order and ending with the expiry of that period or the period is automatically extended by any period of parole granted to the detenu. In case where the High Court allows a habeas corpus petition and directs the detenu to be released and in consequence the detenu is set free, and thereafter an appeal filed in this Court results in the setting aside of the order of the High Court, is it open to this Court to direct the arrest and detention of the detenu if meanwhile the original period of detention intended in the detention order has expired? Four decisions of this Court have been placed before us in support of the contention that the period of detention intended by the detention order is not a fixed period but can be correspondingly extended if the detenu absconds before he can be apprehended and detained or the period of detention is interrupted by an erroneous judgment of a High Court and the detenu is set free. Those cases are *State of Gujarat v. Adam Kasam Bhaya*, [1982] 1 S.C.R. 740; *State of Gujarat v. Ismail Juma & Ors.*, [1982] 1 S.C.R. 1014; *Smt. Poonam Lata v. M.L. Wadhawan and others*, A.I.R. 1987 SC 1383 and *Pushpadevi M. Jatia v. M.L. Wadhawan*, A.I.R. 1987 SC 1748. We find some difficulty in accepting the view taken by the learned Judges of this Court who decided those cases. It seems to us *prima facie* that what is important is that we are concerned with cases of preventive detention, cases where the detaining authority is required to apply its mind and decide whether, and if so for how long, a person should be detained. It is preventive detention and not punitive detention. Preventive detention invariably runs from the date specified in the detention order. In the case of punitive detention, no date is ordinarily specified from which the detention will commence, and all that is mentioned is the period of detention. In case of preventive detention the detaining authority applies its subjective judgment to the material before it and determines what should be the period for which the detenu should be detained, that is to say, the period during which he should be denied his liberty in order to prevent him from

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- A engaging in mischief. It seems to us *prima facie* that one possible view can be that if parole is granted the period of parole should be counted within the total period of detention and not outside it. As regards the problem raised by the release of a detenu pursuant to an erroneous decision of the High Court, and the subsequent reversal of that decision by this Court, the remedy probably lies in the enactment of legislation analogous to s. 5(1) and s. 15(4) of the Administration of Justice Act, 1960 in the United Kingdom. The question is an important one affecting as it does on the one hand the need for effective measures of preventive detention and on the other the liberty of the subject and his right to freedom from detention beyond the period intended by the statute. As the matter is of great public importance, and most cases of preventive detention are bound to be affected, we refer these cases to a Bench of five Hon'ble Judges for reconsideration of the law on the point.

ORDER

- D Although I agree with the view expressed in the *State of Gujarat v. Adam Kasam Bhaya*, [1982] 1 S.C.R. 740 and the other cases mentioned in the order of the learned Chief Justice, I agree that in view of the great public importance of the point involved, these cases may be heard by a Bench of five Hon'ble Judges.

- E N.P.V.