IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : **02.02.2021**

PRONOUNCING ORDERS ON : **04.02.2021**

CORAM

THE HONOURABLE JUSTICE **MR.N.ANAND VENKATESH**

W.P.No.1664 of 2021
and
WMP No.1871 of 2021

D.Aswin Rao ...Petitioner

.Vs.

1.The State rep.by its
Additional Chief Secretary,
Home Department,
Government of Tamilnadu,
Fort St.George,
Chennai 600 009.

2.The Commissioner of Police,
Greater Chennai,
Vepery,
Chennai 600 007.

3.The State rep.by
The Inspector of Police,
CCB-IPS,
Chennai-CCB District-EDF-I Team-II. ..Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Mandamus, to forbear the 2nd and 3rd respondents from passing order against the petitioner now confining at Central Prison, Puzhal by detaining him under the preventive Detention in particularly Tamil Nadu Act No.14 of 1982.

For Petitioner : Mr.S.Prabhakaran
Senior Counsel
for Mr.R.Krishna Kumar

For Respondents : Mr.M.Mohamed Riyaz
Additional Public Prosecutor

ORDER

This Writ Petition has been filed for the issue of a Writ of Mandamus forbearing the Respondents from invoking Act 14 of 1982, against the Petitioner.

2.The case of the Petitioner is that a complaint was lodged by one Mr. Kurian Poulose before the 3rd Respondent to the effect that the accused persons were involved in a fraudulent

financial scheme and had unjustly enriched themselves to the tune of nearly Rupees Forty-Five crores. Based on the complaint, an FIR came to be registered in Crime No. 453 of 2017 for offences under Sections 406, 420 and 506(i) IPC. The FIR named one Mr. Jayaraj as the accused person and he is A1 in the present case. In the course of investigation, the involvement of the Petitioner also came to surface and he was enquired and on collecting necessary materials, the Petitioner was arrested and he was remanded to judicial custody on 02.01.2021.

3.The case of the Petitioner is that he has nothing to do with the entire transaction and he has been falsely roped in this case. According to the Petitioner, A1 has already been detained under Act 14 of 1982 and effective steps are being taken to detain the Petitioner also under the said Act. Therefore, the Petitioner made a representation to the Respondents in this regard on 21.01.2021 and he explained his position and requested the Respondents not to issue any detention order against him.

Since the same was not considered, the present Writ Petition has been filed before this Court.

4.Mr.S.Prabhakaran, learned Senior Counsel for the Petitioner submitted that there is a strong apprehension for the Petitioner that he will be detained under Act 14 of 1982 and there are absolutely no grounds to detain the Petitioner since he is not a habitual offender. The learned Senior Counsel further submitted that there is already a Criminal Case registered by the 3rd Respondent in which the Petitioner has been added as A2 and he has been remanded to judicial custody and the Petitioner will establish his innocence in this case. The learned Senior Counsel submitted that detaining the Petitioner under Act 14 of 1982, will be in direct violation of Article 21 of the Constitution of India, 1950 (hereinafter referred to as "the Constitution"), since such a detention will be illegal and it will have adverse consequences on the life and liberty of the Petitioner.

5.The learned Senior Counsel, in order to substantiate his submissions relied upon the following judgements:

(i) ***S.M.D. Kiran Pasha v. Government of Andhra Pradesh and Ors.*** reported in ***1990 (1) SCC 328;***

(ii)***Selva Kumar v. State of Tamil Nadu*** **reported in** ***1991 (3) MLJ Crl 516;*** and

(iii) ***Addl. Secy. To the Govt. of India v. Alka Subhash Gadia (Smt)*** **reported in** ***1992 SCC Supp 496***

6.Per contra, the learned Government Advocate appearing on behalf of the Respondents submitted that a Writ Petition can never be entertained merely based on apprehensions. The learned Government Advocate further submitted that a writ of mandamus cannot be issued forbearing a statutory authority from performing his function. It was further contended that the Petitioner cannot anticipate that an illegal detention order will be passed against him and such anticipation cannot give raise to a cause of action to file the present Writ Petition.

7.This Court has carefully considered the submission made on either side and the materials available on record.

8.The Petitioner has been arrayed as A2 in the present case and he was arrested and remanded to judicial custody on 02.01.2021. The Petitioner apprehends that a detention order will be passed against him under Act 14 of 1982, only on the ground that A1 has already been detained under the said Act. The Petitioner has also given a representation in this regard to the Respondents.

9.The only issue that requires the consideration of this Court is as to whether a writ of mandamus can be issued merely based on the apprehension raised by the Petitioner that he will be detained under Act 14 of 1982?

10.To answer this issue, it will be more beneficial to take note of certain judgments which have dealt with the right

available to an accused person at the pre-detention stage.

11.The Hon'ble Supreme Court in ***Alka Subhash Gadia (Smt)'s case*** referred *supra* dealt with the issue of pre-execution challenge before a detention order is issued against a detenue. The relevant portions in the judgement are extracted hereinunder:

> "***30.*** *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. 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 extend 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. 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 it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is 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 their

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

12. A reference can also be made to the judgement of the Hon'ble Supreme Court in ***Kiran Pasha's case*** referred *supra.* The relevant portions in the judgement are extracted hereinunder:

"***14.****Article 226(1) of the Constitution of India notwithstanding anything in Article 32, empowers the High Court throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any government within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose; and it also envisages making of interim orders, whether by way of injunction or stay or in any other manner in such a proceeding. Article 21 giving protection of life and personal liberty provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. For enforcement of one's right to life and personal liberty resort to Article 226(1) has thus been provided for. What is the ambit of enforcement of*

the right? The word 'enforcement' has also been used in Article 32 of the Constitution which provides the remedy for enforcement of rights conferred by Part III of the Constitution. The word 'enforcement' has not been defined by the Constitution. According to Collins English Dictionary to enforce means to ensure observance of or obedience to a law, decision etc. Enforcement, according to Webster's Comprehensive Dictionary, means the act of enforcing, or the state of being enforced, compulsory execution; compulsion. Enforce means to compel obedience to laws; to compel performance, obedience by physical or moral force. If enforcement means to impose or compel obedience to law or to compel observance of law, we have to see what it does precisely mean. The right to life and personal liberty has been guaranteed as a fundamental right and for its enforcement one could resort to Article 226 of the Constitution for issuance of appropriate writ, order or direction. Precisely at what stage resort to Article 226 has been envisaged in the Constitution? When a right is so guaranteed, it has to be understood in relation to its orbit and its infringement. Conferring the right to life and liberty imposes a corresponding duty on the rest of the society, including the State, to observe that right, that is to say, not to act or do anything which would amount to infringement of that

right, except in accordance with the procedure prescribed by law. In other words, conferring the right on a citizen involves the compulsion on the rest of the society, including the State, not to infringe that right. The question is at what stage the right can be enforced? Does a citizen have to wait till the right is infringed? Is there no way of enforcement of the right before it is actually infringed? Can the obligation or compulsion on the part of the State to observe the right be made effective only after the right is violated or in other words can there be enforcement of a right to life and personal liberty before it is actually infringed? What remedy will be left to a person when his right to life is violated? When a right is yet to be violated, but is threatened with violation can the citizen move the court for protection of the right? The protection of the right is to be distinguished from its restoration or remedy after violation. When right to personal liberty is guaranteed and the rest of the society, including the State, is compelled or obligated not to violate that right, and if someone has threatened to violate it or its violation is imminent, and the person whose right is so threatened or its violation so imminent resorts to Article 226 of the Constitution, could not the court protect observance of his right by restraining those who threatened to violate it until the court examines the legality of the action? Resort

to Article 226 after the right to personal liberty is already violated is different from the pre-violation protection. Post-violation resort to Article 226 is for remedy against violation and for restoration of the right, while pre-violation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled. To surrender and apply for a writ of habeas corpus is a post-violation remedy for restoration of the right which is not the same as restraining potential violators in case of threatened violation of the right. The question may arise what precisely may amount to threat or imminence of violation. Law surely cannot take action for internal thoughts but can act only after overt acts. If overt acts towards violation have already been done and the same has come to the knowledge of the person threatened with that violation and he approaches the court under Article 226 giving sufficient particulars of proximate actions as would imminently lead to violation of right, should not the court call upon those alleged to have taken those steps to appear and show cause why they should not be restrained from violating that right? Instead of doing so would it be the proper course to be adopted to tell the petitioner that the court cannot take any action towards preventive justice until his right is actually violated where after alone he could petition

for a writ of habeas corpus? In the instant case when the writ petition was pending in court and the appellant's right to personal liberty happened to be violated by taking him into custody in preventive detention, though he was released after four days, but could be taken into custody again, would it be proper for the court to reject the earlier writ petition and tell him that his petition has become infructuous and he had no alternative but to surrender and then petition for a writ of habeas corpus? The difference of the two situations, as we have seen, have different legal significance. If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restoration of the right.

20. In Hans Kelsen's analysis it is usual to oppose the concept of right to the concept of obligation and to cede priority of rank to the former as we speak of rights and duties. The behaviour of one individual that corresponds to the obligated behaviour of the other is usually designated as a content of a 'right' — as an object of a 'claim' that corresponds to the obligation. "The behaviour of the one individual that corresponds to the obligated behaviour of the other, particularly the claiming of the obligated behaviour,

is designated as exercising a right". In case of an obligation to tolerate something, the behaviour of the one corresponding to the obligation of the other is spoken of as 'enjoyment' of the right. According to Kelsen the 'right' or a 'claim' of an individual, is merely the obligation of the other individual or individuals. When we speak of a right as a legally protected interest, in the words of Kelsen, it refers to a right as the "reflex of a legal obligation". Right is often understood as a will power conferred by law. A 'right' in the sense is present if the conditions of the sanction that constitutes a legal obligation includes a motion, normally of the individual in relation to whom the obligation exists; the motion is aimed at the execution of the sanction and has the form of a legal action brought before the law applying organ. Then this organ may apply the general norm to effectuate the right, which is the reflex of the legal obligation by executing the sanction. The right which is the reflex of legal obligation is equipped with the legal power of the entitled individual to bring about by a legal action the execution of a sanction as a reaction against the non-fulfilment of the obligation whose reflex is his right; or as it is sometimes called, the enforcement of the fulfilment of this obligation. To make use of this legal power of motion is exercise of the right. In this sense each right of an individual contains a

claim to the behaviour of another individual — namely to that behaviour to which the second individual is obligated toward the first; the behaviour that constitutes the content of the legal obligation identical with the reflex right. If an individual, towards which another individual is obligated to a certain behaviour, does not have the legal power to bring about by a legal action the execution of a sanction as a reaction against the non-fulfilment of the obligation, then the act by which he demands fulfilment of the obligation has no specific legal effect; the act is legally irrelevant, except for not being legally prohibited. Therefore, a 'claim' as legally effective act exists only when a law exists, which means that an individual has the legal power. The subject of a right may be not only one individual but two or several individuals, including the State.

21. In the language of Kelsen the right of an individual is either a mere reflex right — the reflex of a legal obligation existing towards this individual; or a private right in the technical sense — the legal power bestowed upon an individual to bring about by legal action the enforcement of the fulfilment of an obligation existing toward him, that is, the legal power. From the above analysis it is clear that in the instant case the appellant's fundamental right to liberty is the reflex of a legal obligation of the rest of the society, including the State, and it is the

appellant's legal power bestowed upon him to bring about by a legal action the enforcement of the fulfilment of that obligation existing towards him. Denial of the legal action would, therefore, amount to denial of his right of enforcement of his right to liberty. A petition for a writ of habeas corpus would not be a substitute for this enforcement."

13. The Hon'ble Supreme Court after taking into consideration all the earlier judgements again dealt with the scope of pre-execution challenge in ***Subash Popatlal Dave v. Union of India and Anr.*** reported in ***(2012) 7 SCC 533***. The relevant portions in the judgement are extracted hereinunder:

"***45.*** *Nowhere in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] has it been indicated that challenge to the detention order at the pre-execution stage, can be made mainly on the aforesaid exceptions referred to hereinabove. By prefacing the five exceptions in which the courts could interfere with an order of detention at the pre-execution stage, with the expression "viz." Their Lordships possibly never intended that the said five examples were to be exclusive (sic exhaustive). In common usage or parlance the expression "viz." means "in other*

words". There is no aura of finality attached to the said expression. The use of the expression suggests that the five examples were intended to be exemplars and not exclusive (sic exhaustive). On the other hand, the Hon'ble Judges clearly indicated that the refusal to interfere on any other ground did not amount to the abandonment of the said power.

46. It is only in Sayed Taher Bawamiya case [(2000) 8 SCC 630 : 2001 SCC (Cri) 56] that another three-Judge Bench considered the ratio of the decision of this Court in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] and observed that the courts have the power in appropriate cases to interfere with the detention orders at the pre-execution stage, but that the scope of interference was very limited. It was in such context that the Hon'ble Judges observed that while the detention orders could be challenged at the pre-execution stage, that such challenge could be made only after being prima facie satisfied that the five exceptions indicated in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] had been fulfilled. Their Lordships in para 7 of the judgment in Sayed Taher case [(2000) 8 SCC 630 : 2001 SCC (Cri) 56] held that the case before them did not fall under any of the five exceptions to enable the Court to interfere. Their Lordships also rejected the contention that the exceptions were not

exhaustive and that the decision in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] indicated that it is only in the five types of instances indicated in the judgment in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] that the courts may exercise their discretionary jurisdiction under Articles 226 and 32 of the Constitution at the pre-execution stage.

47. With due respect to the Hon'ble Judges in Sayed Taher Bawamiya case [(2000) 8 SCC 630 : 2001 SCC (Cri) 56] , we have not been able to read into the judgment in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] any intention on the part of the Hon'ble Judges, who rendered the decision in that case, that challenge at the pre-execution stage would have to be confined to the five exceptions only and not in any other case. Both the State and the Hon'ble Judges relied on the decision in Sayed Taher Bawamiya case [(2000) 8 SCC 630 : 2001 SCC (Cri) 56] . As submitted by Mr Rohatgi, to accept that it was the intention of the Hon'ble Judges in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] to confine the challenge to a detention at the pre-execution stage, only on the five exceptions mentioned therein, would amount to imposing restrictions on the powers of judicial review vested

in the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution. The exercise of powers vested in the superior courts in judicially reviewing executive decisions and orders cannot be subjected to any restrictions by an order of the court of law. Such powers are untrammelled and vested in the superior courts to protect all citizens and even non-citizens, under the Constitution, and may require further examination.

48. 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 para 30 of the judgment in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] , 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 case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] .

49. The 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."

14. A reading of the above judgements makes it clear that Article 226 of the Constitution empowers the High Court to exercise its Writ Jurisdiction even at a pre-detention stage where this Court finds that there is a threat of a potential violation of the fundamental right under Article 21 of the Constitution. This Court in order to satisfy itself that there is a potential threat of violation of Article 21 of the Constitution, must have some materials before

it. In other words, it cannot be based on mere apprehensions and this Court can only act on some overt acts.

15.The Hon'ble Supreme Court in the above judgements has broadly identified certain grounds where this Court can interfere at a pre-execution stage. Even in these cases, the Hon'ble Supreme Court has made a specific reference to pre-detention order which is yet to be executed and which can be interfered with, in any of the following contingencies:

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.

16.The Hon'ble Supreme Court in ***Subash Popatlal Dave*** also made it clear that the above five grounds are merely illustrative and not exhaustive. The Hon'ble Supreme Court recognized the fact that the power exercised under Article 226 and Article 32 of the Constitution while reviewing an executive decision can never be subjected to any restrictions and such powers are untrammeled to protect the rights of the citizens.

17.In the present case, the only apprehension in the mind of the Petitioner is that since A1 has been detained under Act 14 of 1982, there are all chances of the Petitioner also getting roped in and detained under the said Act. This ground is too farfetched for this Court to exercise its jurisdiction under Article 226 of the Constitution. There is absolutely no overt act that is available for this Court to even prima facie satisfy itself that there is a potential threat of violation of Article 21 of the

Constitution against the Petitioner. This Court must keep in mind that a writ of mandamus should not be issued where it indirectly restrains an authority from performing or exercising their statutory function. This Court must perform a balancing act in cases of this nature and interfering at a pre-detention stage must be far and few depending upon the exigencies in a given case. In other words, only in exceptional cases, this Court can exercise such a power.

18.In view of the above discussion, this Court does not find any ground to grant the relief as sought for by the Petitioner in the present Writ Petition. The Petitioner has already given a representation in this regard to the Respondents and the same will be taken into consideration by the Respondents, if at all any action is taken against the Petitioner.

19.This Writ Petition is accordingly dismissed. No costs. Consequently, connected miscellaneous petition is closed.

04.02.2021

Index : Yes
Internet : Yes
Speaking Order/Non Speaking Order
KP
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To

1.The Additional Chief Secretary,
Home Department,
Government of Tamilnadu,
Fort St.George,
Chennai 600 009.

2.The Commissioner of Police,
Greater Chennai,
Vepery,
Chennai 600 007.

3. The Inspector of Police,
CCB-IPS,
Chennai-CCB District-EDF-I Team-II

4.The Public Prosecutor,
High Court, Madras.

N.ANAND VENKATESH, J.

KP

Pre Delivery Order in
W.P.No.1664 of 2021

04.02.2021