

HISTORICAL PERSPECTIVE OF ROLE OF HABEAS CORPUS IN PREVENTIVE DENTENTION

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INTRODUCTION:

Preventive Detention is the arch enemy of right to personal liberty. It envisages detention without trial, at the times when the liberty of the Individuals crosses the limit and threatens the very existence of the State, and that at point of time, it fails to control the enjoyment of individuals liberty then the State uses the preventive detention measures.

The Constitution divides the Legislative power in respect of defence, foreign affairs or security of India, and a power concurrent with the State to legislate for; (a) preventive detention for reasons connected with the security of State, (b) the maintenance of public order and (c) the maintenance of essential to the community.³ In the exercise of its powers, the Parliament enacted the Preventive Detention Act 1950, as a temporary measure, but its life was extended from time to time till it was allowed to lapse, only to be replaced by a permanent measure called the Maintenance of Internal Security Act of 1971 and also provisions for preventive detention was made by State Legislature.

Under the Preventive Detention Laws, the executive has two-fold discretion. It is to determine with very broad limits the purposes for which the power is to be exercised, and secondly it has to be subjected to preventive detention. The Constitution provides for certain procedural safeguards under Article 22. The power given to the courts under Article 226 and 32 out to be exercised (a) to protect the individual liberty guaranteed under Article 21 (b) ensure observance of procedural and substantive safeguards under Article 22 through Writ of Habeas

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³ V.S. Rekh, Preventive Detention- Need for Substantive Restraints, Trends and Issues. P-126

Corpus. In short, the court is empowered to re-examine the rationale for the exercise of the power of preventive detention. The abuse of the power by the executive and the judicial response to it are analysed with reference to select cases.

Writ of Habeas Corpus acts as an adequate remedy as seen in judicial response as held by the High Courts and the Supreme Court as detailed under;

As rightly held by our Supreme Court⁴, liberty of a subject is an extremely precious right when infraction of such right is involved. Court must act as a watch dog and every benefit of the lacuna goes to the detenu. Further it was held by the Supreme Court⁵ persons detained in jail in violation of Article 22(1) will be entitled to writ of Habeas Corpus directing his release.

According to Calcutta High Court facts stated in the grounds being final, High Court cannot (i)examine the veracity of the allegations, (ii) or their sufficiency. But it can be set-aside an order if it is (a)malafide, (b) based on extraneous matters, (c) if grounds are baseless, (d) or non-existent or (f) when the material is such that it was impossible to arrive at the conclusion arrived at by the authority.

In short as rightly held by the Supreme Court⁶, Punjab⁷, Madhya Pradesh⁸ and Andhra Pradesh⁹ High Courts, satisfaction is that of detaining authority, High Court can only scrutinize the grounds furnished to see whether they are in fact relevant to the object sought to be achieved.

Grounds for Release;

The Writ of Habeas Corpus will be issued on the following grounds;

(i) **Bonafide:**

Where the detention is not bonafide, the detention is illegal and the detenu must be released. A case of bonafides may be made out not merely by proof that the order

⁴ D.A. Khan V. State of West Bengal. AIR 1976 SC734.

⁵ In Re Madhu Limaye. AIR1969, SC, 1014.

⁶ Rambali V.State of W.B AIR 1975, S.C. 623

⁷ The AIR Manual (Civil and Criminal). AIR Publication, Vol,IX, 4th Edn, AIR 1963 Punjab 408.

⁸ The AIR Manual (Civil and Criminal). AIR Publication, Vol,IX, 4th Edn, AIR 1973, Cr.l.j. 1987 Madhya Pradesh.

⁹ AIR 1957, Andhra Pradesh Page 143.

of detention was in fact made for ulterior purposes i.e., for purposes outside the order is made without taking into consideration the standard of bonafides under Penal Code as being due care and attention. Where the ground of detention is outside the purview of the Act under which the detention has been ordered the detenu must be released. Further where the detaining authority has not applied his mind to the matter at all as is evident from the fact that the ground stated for the detention has no connection with the facts on which the order purports to be used, the detenu is entitled to be released.

(ii) Malafide:

As held by the Supreme Court in *Atchutan V. Gopalan*¹⁰ where the order of detention is challenged on the ground of Malafides, what has got to be made out is not the want of bonafides on the part of the police but want of bonafides as well as the non-application of mind, on the part of the government which for this purpose must be taken to be different from the place. Further Supreme Court held that, an order of Preventive Detention cannot be said to be malafide merely because the police on investigation into cases registered against the petitioner in regard to incidents mentioned in the grounds of detention, had previously discharged the petitioner for want of evidence.

(iii) Detention on irrelevant grounds:

The Supreme Court repeatedly held in *P. Mukherjee V. Union of India*¹¹, *Dulat Chandra Majumdar V. State of W.B*¹² and *Bhupal Chandra V. Arif Ali*¹³, in case of detention under Section 3(2) of the Preventive Detention Act 1950, since at least one out of the four grounds for detention was found irrelevant, petitioner was held entitled to release.

¹⁰ AIR 1956, S.C. 531

¹¹ AIR 1970, S.C. 852

¹² AIR 1974, S.C. 156

¹³ AIR 1974, S.C. 255

(iv) Precedural Ultravirus:

Detention found to be not in accordance with the procedure established should be released. Further it was held by the Supreme Court in *Kanu Basuwar V. State of W.B.*¹⁴, what the Supreme Court has to be satisfied with in that the Mandatory provisions has been complied with. An order of detention in vernacular cannot be said to be defective for want of proper communication. This is more so when the objection was not taken at the time of making representation.

Further court would not stay its hands in directing release of detenu when technical pleas are raised by the government, when liberty of a citizen is affected and more so, when the detention itself was not in accordance with law. The Supreme Court can always examine whether the requisite satisfaction is arrived at by the authority, if it is not, the condition precedent to the exercise of the power will not be fulfilled and the exercise of the power will be considered as in violation of the rule. Wherein case of detention it was not clear as to who out of the two detaining authorities passed the detention order and who was satisfied regarding the sufficiency of the grounds, it was not possible to determine as to who made the order of detention. In such circumstances, the exercise of jurisdiction to detain the detenu had not been made with due care and caution or in a proper and fair manner and the detention order such as was quashed.

OTHER GROUNDS OF CHALLENGE:

An order of detention can also be attacked inter alia, on any of the following grounds-

- 1) The order is not by a competent authority;
- 2) The condition precedent for the exercise of power does not exist;
- 3) There is non-application of mind;
- 4) The grounds are or one of the grounds is vague, indefinite, irrelevant, extraneous, non-existent or state;

¹⁴ AIR 1972, S.C. 1653 (1956)

- 5) There is lack of bona fides in passing the order;
- 6) The person against whom an order of detentions is passed is already in jail awaiting trial in respect of alleged activities;
- 7) The order is passed by way of punishment after the detenu has been discharged or acquitted in a criminal trial;
- 8) The case of the detenu is considered by only two of the three members who constitute the Advisory Board constituted under the Act;
- 9) Failure to refer the detenu's case to the Board within the time fixed by the statute;
- 10) Where an order was revoked or quashed and again, without new facts, a fresh order or detention was made.

CONCLUSION:

Habeas corpus is a judicial remedy for an unlawful detention. The right to move the Supreme Court by an appropriate proceedings under Art.32 of the constitution for the enforcement of fundamental rights is itself a fundamental right. Similarly, the right to move a High court under Art.226 of the constitution for the enforcement of fundamental rights or for any other purpose is a constitutional right and hence remedies cannot be taken away, abridged or curtailed by a statutory provision.

Personal liberty is one of the most important right of a person, without which there is no worth or meaning in living. In international level the Universal declaration of Human Rights has played a very important role in laying foundation for many convention and treaties for the purpose of protecting the rights of the detenu, detained under preventive detention laws.

Finally the Habeas corpus which helped in establishing the rule of law is the most effective remedy where the detention is arbitrary or when the executives abuse their power. Even though preventive detention is an exception to writ habeas corpus and can be suspended or barred but still it can provide effective remedy where the detention was made with malafide intention.