CHAPTER VI
PREVENTIVE DETENTION AND
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Preventive detention is a measure against drug traffickers who mastermind and finance illicit drug transactions and earn huge profits but still escape punishment due to the lack of evidence. As they do not themselves possess or carry the drugs, it becomes difficult to prove their involvement in such transactions. Due to the enormous resources at their command, they are also able to scuttle the efforts of enforcement agencies to secure evidence against them, and hence, the enforcement agencies are obliged to seek preventive detention of such persons. Preventive detention laws are also necessary for preventing the habitual drug offenders from engaging in illicit trafficking after their release from jail custody on bail or otherwise.

As no specific preventive detention laws to deal exclusively with the illicit trafficking in drugs had been enacted till 1988, the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPBOSA for short) were invoked for preventive detention of persons engaged in 'smuggling' of contraband drugs. However, as most of the activities of illicit drug trafficking e.g. illegal cultivation of narcotic plants, indigenous manufacture and sale of narcotics, and financing of local drug transactions etc. did not fall within the ambit of 'smuggling', these provisions could be invoked only in a few cases. To take care of this situation, the Cabinet Committee of the Central Government, constituted for the purposes
of combatting drug traffic and preventing drug abuse, recommended that preventive detention laws covering all aspects of drug trafficking may be enacted. Consequently, an ordinance called the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 was promulgated under Article 123 of the Constitution on the 4th July, 1988. This Ordinance was later replaced by the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (PITNDPS Act for short). This Act extends to the whole of India except the State of Jammu and Kashmir, where the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, enacted by the J&K State Legislature, is applicable. In this Chapter, the 'Act' refers only to the PITNDPS Act, 1988.

Any officer of the Central Government, not below the rank of a Joint Secretary, or any officer of the State Government, not below the rank of a Secretary, specially authorised for the purposes of the PITNDPS Act, 1988, may pass an order under the Act for detention of any person if such an officer is satisfied that it is necessary to do so with a view to preventing such person from engaging in illicit traffic in narcotic drugs and psychotropic substances. The grounds for such detention are required to be communicated to the detained person within five days after detention, but this period is extendable to fifteen days in exceptional circumstances to be recorded in writing. The Act further provides that the grounds of detention will be severable, and that the detention order will not get invalidated or rendered inoperative merely because one or some of the grounds is or are not sustainable for any reason.
The concerned Government is required to make a reference to the Advisory Board, constituted for the purposes of the Act, within five weeks of detention for its report under sub-clause (a) of clause (4) of Article 22 of the Constitution of India. The Advisory Board is required to submit its report, after hearing the person concerned if he so desires, within eleven weeks from the date of detention. If the Advisory Board reports that there is, in its opinion, sufficient cause for detention, the concerned Government may confirm the detention order and continue the detention for any period not exceeding one year from the date of detention. The Government has to revoke the detention order if the Advisory Board does not find sufficient cause for detention of the person concerned.

A departure from the general rules mentioned above, has been made in respect of cases where the detention order has been passed at any time before the 31st July, 1996 against a person who engages or is likely to engage in illicit traffic in narcotic drugs and psychotropic substances into, out of, through or within any area highly vulnerable to such traffic. The areas which are highly vulnerable to illicit traffic have been explicitly specified in Sec. 10 of the Act. In such cases, a person can be detained for a maximum period of two years subject to the conditions specified in Sec. 10(1) and confirmation of the order by the Advisory Board. Further, a reference to the Advisory Board has to be made within "four months and two weeks" from the date of detention, and the Advisory Board is required to submit its report within "five months and three weeks" from the date of detention. In these cases, it is permissible to keep a person under detention even beyond the period of three months, but not
A detention order may be revoked or modified at any time, by the Central Government if it has been made by an officer of a State Government or the Central Government, and by a State Government if it was made by an officer of that State Government. A detained person can also be temporarily released by the concerned Government for any specified period with or without any conditions. However, release of such person on bail is barred notwithstanding anything contained in any other law.

ENFORCEMENT OF DETENTION LAWS

A study of 68 cases, reported during the period from January 1989 to February 1993, where detention orders passed under the PITNDPS Act, 1988 were challenged before a High Court or the Supreme Court, reveals that majority of such orders are set aside by the courts on one ground or the other, as indicated in the following Table:

**TABLE No.6.1**

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Number of detention orders challenged</td>
<td>68</td>
</tr>
<tr>
<td>II. Number of detention orders quashed</td>
<td>57</td>
</tr>
<tr>
<td>III. Main grounds on which detention orders got quashed: (a) Inordinate delay between the last prejudicial activity and the passing of detention order,</td>
<td></td>
</tr>
</tbody>
</table>
(b) Detenu already in judicial custody at the time of passing of detention order, and no material on record to indicate that there was any likelihood of his being released on bail or of his reverting to criminal activities even if released from such custody on bail or otherwise

(c) Non-application of mind while passing the detention order

(d) Undue delay in considering the representation of the detenu in terms of Art. 22(5) of the Constitution

(e) Successive detention order, issued merely to regularise detention after revoking the earlier detention order which had become invalid due to some irregularity attributable to the Government itself, also becoming illegal due to being passed in a manner as to render the protection of Art. 22(4) of the Constitution ineffective

(f) Non-supply or delayed supply of all or some of the documents relied upon in the grounds of detention, or supply of documents without translating these into a language known to the detenu

(g) Material facts not brought to the notice of the Detaining Authority by the concerned sponsoring agency, resulting in the non-application of mind to the relevant facts by such Authority

(h) Consideration of the representation of the detenu by an authority other than that authorised for that purpose
Table 6.1 (contd.)

(i) Request of the detenu to the Advisory Board for examining co-detenus as witnesses not acceded to : 1 case

(j) Unexplained delay in executing the detention order : 1 case

Total : 57

IV. Number of detention orders upheld : 11

Another revelation from this study is that all the persons, against whom detention orders were passed in the above-mentioned 68 cases, had already been arrested and charged with the commission of specific offences under the NDPS Act, 1985, and were still facing trial at the time of passing of these detention orders. In 35 cases, the persons sought to be detained under the PITNDPS Act were already in jail custody for the commission of offences under the NDPS Act. In 24 cases, the detained persons were on bail when detention orders were passed against them. In the rest of 9 cases, it was not ascertainable from the relevant judgements as to whether the concerned persons were in jail custody or on bail at the material time.

Preventive detention of persons already in judicial custody

The validity of detention orders issued under various preventive detention statutes against persons already in judicial custody has often been challenged before the courts on the ground that there was no justification for such orders. This issue was examined by the Supreme Court in a number of cases e.g. Shashi Aggarwal Vs. State of U.P. and others, Ramesh Yadav Vs. District Magistrate, Abdul Tazak Abdul Wahab Sheikh Vs. Shri S.N.Sinha, Suraj Pal Sahu Vs. State of
Maharashtra, and Binod Singh Vs. District Magistrate. In all these cases, the apex court had held that if a person was already in custody and there was no imminent possibility of his being released on bail or otherwise, the power of preventive detention should not be exercised. As the law on the subject continued to be uncertain in spite of these pronouncements, the Supreme Court reconsidered its past judgements on the issue in Vijay Kumar Vs. Union of India, and held that detention order passed against a person already in detention for an offence, whether bailable or non-bailable, would be valid only if the detaining authority was aware of such detention and there were compelling reasons to justify his preventive detention in spite of the fact that he was already under detention on the charge of a criminal offence.

The expression "compelling reasons" had not been defined by the Supreme Court in Vijay Kumar case. However, the opportunity to do so came later in Dharmendra Suganchand Chelewat Vs. Union of India wherein the Court held that the expression 'compelling reasons' in the context of making an order for detention of a person already in custody "implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities".
In a more recent case *Kamarunissa Vs. Union of India*\(^2\)\(^5\)
the Supreme Court, after referring to its earlier decisions on the issue, observed that a detention order can be passed against a person in custody:

1. if the authority passing the order is aware of the fact that he is actually in custody;
2. if the detaining authority has reason to believe on the basis of reliable material placed before him:
   a. that there is a real possibility of his being released on bail, and
   b. that on being so released he would in all probability indulge in prejudicial activity, and
3. if it is felt essential to detain him to prevent him from so doing.

The apex Court further held in this case: "If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher Court".

There is still a lot of intricacy in the preventive detention laws, particularly under the PITNDFS Act, 1988, in spite of the pronouncements of the Supreme Court in the aforesaid cases. For example, it is still very difficult to say as to what sort of material may justify the satisfaction of the detaining authority that there is a probability of the accused
getting released on bail, and that on such release, there is a further probability of his indulging in prejudicial activities. In fact, the conditions for release of drug offenders on bail are so stringent by virtue of Sec. 37 of the NDPS Act, 1985, that grant of bail in such cases should be, as the Madras High Court puts it, more of a mirage than a reality. However, the discussion in the previous chapter of this work shows that release of drug offenders on bail on technical grounds is not very uncommon. Therefore, it may be difficult for the detaining authority to visualize all the technical grounds, or procedural lapses committed during the investigation, which may ultimately lead to the release of an accused on bail by a court.

Regarding the probability of a person indulging in prejudicial activity after being released on bail by a court, it may again be difficult to say as to what type of evidence may justify the satisfaction of the detaining authority about the future conduct of a person.

It is thus clear that in spite of various attempts made by the courts to clarify the law on the subject, the validity of any order passed under Sec. 3(1) of the PITNDPS Act, 1988 in respect of a person already in jail custody remains a matter of speculation till it is tested in a court of law.

Approach of the government agencies

As indicated in Table 6.1, inordinate delay in issuing detention order after the prejudicial activity came to notice, non-application of mind by the detaining authority, delay in
considering the representation of the detenu, successive detention order to replace defective order, non-supply of the relevant documents to the detenu, and failure to place all material facts before the detaining authority, etc. are the reasons which render the enforcement of preventive laws ineffective. Some of the glaring instances of this casual approach are indicated below:

(i) In Harinder Singh Vs. Union of India, there was a time lag of 11 months between the prejudicial activities attributed to the petitioner and the date of order of detention. Similarly, the delay in issue of detention order was about 10 months in the case of Charan Singh Vs. Secretary to the Government of Punjab, about 11 months in the cases of Mohan Singh Vs. State of Punjab, Khushia Bai Vs. State of Punjab and Mohamed Yusuf Haji Mohammed Khasim Vs. L. Hmingliana and about 7 to 9 months in the case of Gurmukh Singh Vs. State of Punjab.

(ii) In Surinder Mehta Vs. Shri K.L. Verma, the first detention order passed against the petitioner had been revoked by the Government itself, on being challenged by a writ petition, as the relevant documents had not been supplied contemporaneously with the grounds of detention and thus the detention order suffered from serious infirmity. The successive detention order passed to cure this infirmity was also set aside by the Delhi High Court on the ground that it rendered the protection of Art. 22 of the Constitution ineffective. In Pradeep Nath Nathur Vs. Union of India and Gurbax Bhityani Vs.
Union of India also, the Government itself revoked the detention orders due to the procedural omissions, and substituted these with fresh orders which were quashed by the Delhi High Court again on the ground of being violative of Art.22(4) of the Constitution. In Gurbax Bhirvani case, it was argued on behalf of the Government that the finer points of law regarding the compliance with the mandatory provisions of Art. 22(4) and Art.22(5) of the Constitution were not known to the functionaries of the Government in this case.

(iii) In Smt. Amar Sang Vs. Union of India and others, there was more than four months unexplained delay in executing the detention order after it had been passed. In Gurnukh Singh Vs. State of Punjab, there had been a delay of 19 months in executing the detention order after its having been passed.

(vi) In Sansar Chand Vs. Union of India, there was unexplained delay of at least 10 days in considering the representation of the detenu. Similarly, in Smt. Laiphrakpam Ungbi Geeta Devi Vs. State of Manipur, no justification was offered for a long delay of 59 days in disposal of the representation of the accused.

(v) In Manju Narula Vs. Shri K.L. Venna and others, the detenu had asked for copies of some documents on 18.8.88 but these were supplied only on 11.10.88. Similarly, detention order was set aside in Shambhu Nath Singh Vs. Union of India as one of the documents connected with the grounds of detention was not
supplied to the detenu in spite of his specific request for the same. In Mrs. Hina Khan Vs. Superintendent, Gauhati District Jail, while the grounds of detention were communicated to the detenu in Assamese language, the supporting documents and materials were in English language with which the detenu was not familiar.

The provisions of the PITNPS Act, 1988 have thus apparently been invoked often in a casual and cavalier fashion. As almost all the detention orders are passed against the persons already facing trial for specific offences under the NDPS Act, 1985, it appears that such orders are aimed either at interdicting their release on bail or at rendering the bail orders, already issued, ineffective. As explained in the preceding Chapter, speedy trial can make the release of offenders on bail by the courts unnecessary in most cases. This will in turn take away the need for invoking the provisions of the PITNPS Act, 1988 in such cases. However, it is still desirable that the matters relating to preventive detention should be entrusted to trained personnel as suggested by the Supreme Court also in Birendra Kumar Rai Vs Union of India. In this case, the apex court observed: "If the Government takes care that the detention cases arising under the preventive detention laws are handled by persons fully trained and having experience in such matters, the rights of the citizens can be safeguarded and the precious time of this court can be saved."
FORFEITURE OF ILLEGALLY ACQUIRED PROPERTY

The enormous profits earned by the drug traffickers are often laundered and invested in the legitimate business, thereby creating an unfair competition for the legitimate businessmen, ultimately leading to the deterioration of the national economy. The people behind the business run on such ill-gotten wealth have no regard for fiscal or legal regulations. The profits generated are used again to corrupt public officials and political leaders for unfair gains. There is always a danger of such profits being used to create alternative economies and to undermine legislative and political system in a country. Briefly stated, there is no end to the damage that the illegitimate drug money may cause to the society.

With a view to providing for the forfeiture of any income, earning or assets, derived or obtained from or attributable to illicit traffic, and held by the trafficker himself or by his relatives or associates, the NDPS Act, 1985 was amended in 1989 by inserting Chapter VA in the Act. For the purposes of this study, it is not proposed to go into the detailed procedure for such forfeiture. However, the important provisions are briefly analysed herein before indicating the reasons for lack of any achievements on this front.

By virtue of Sec. 68 A of the NDPS Act, 1985, the provisions relating to the forfeiture of property, as contained in Chapter VA of the Act, are applicable to every person:

(i) who has been convicted of an offence under the NDPS Act, 1985 with imprisonment for a term of five years or more;
(ii) who has been convicted of a similar offence outside India;

(iii) against whom an order of detention has been made under the PITNDPS Act, 1988 or the J & K PITNDPS Act, 1988 provided that such order has not been revoked or set aside by a competent authority;

(iv) who is a relative or associate of persons referred to in (i), (ii) or (iii) above.

In addition to the above categories of persons, these provisions are also applicable to a person holding any property which was previously held by a person referred to in (i), (ii) or (iii) above, unless the person presently holding the property had acquired it in good faith for adequate consideration.

Any property earned by means of illicit traffic in drugs, and held by any person, to whom Chapter VA applies, either by himself or through any other person on his behalf, is liable to be confiscated by the Competent Authority provided that such property has not been acquired before a period of six years from the date on which such person was charged for an offence relating to illicit traffic. The Central Government can authorise any Collector of Customs or Collector of Central Excise or Commissioner of Income-tax or any other Central Government officer of equivalent rank to perform the functions of the 'Competent Authority'.

For the purpose of tracing and identifying illegally acquired property, the Act provides that every enforcement officer empowered under Sec. 53 and every officer-in-charge of a police station shall, on receipt of information that any person,
to whom Chapter VA applies, has been charged with any offence punishable under the JDPS Act, 1985; whether committed in India or outside, proceed to take all steps necessary for tracing and identifying any property illegally acquired by such person. If the officer conducting such inquiry or investigation has reason to believe that any property is an illegally acquired property, and such property is likely to be concealed, transferred or dealt with in any other manner to frustrate the proceedings relating to its forfeiture, he may seize such property. Where it is not practicable to seize such property, he may freeze the property by making an order that the said property shall not be transferred or otherwise dealt with pending further proceedings or orders. To prevent the abuse of these wide powers by the enforcement officials, it has been provided further that such order shall be communicated to the Competent Authority within 48 hours of its being made, and also that such order will cease to have any effect unless it is confirmed by the Competent Authority within 30 days of its being passed.

A show cause notice has to be given to the persons concerned before declaring any property to be liable to confiscation. The Competent Authority may, after considering the explanation to such show cause notice, and the materials available before it and after giving to the persons affected a reasonable opportunity of being heard, record a finding whether all or any of the properties in question are illegally acquired properties. The Competent Authority shall then declare that the illegally acquired property shall stand forfeited to the Central
Government free from all encumbrances. The burden of proving that the property, in respect of which proceedings have been initiated, is not an illegally acquired property, has been put on the person to be affected by its forfeiture.

Any person aggrieved by an order of the Competent Authority can prefer an appeal to the Appellate Tribunal constituted for the purpose by the Central Government. The Act bars the civil courts from dealing with any matter falling within the powers of the Appellate Tribunal or any Competent Authority. The civil courts are also prohibited from granting any injunction in such matters.

The law relating to the forfeiture of property has failed to attain its goal due to the faulty drafting of some of the provisions, as analysed hereafter.

Sec. 68E empowers an enforcement official to take steps for tracing and identifying the illegally acquired property held by a person only when "any person to whom this chapter applies has been charged with an offence punishable under this Act". But the Chapter itself applies to such a person, according to Sec. 68A, only when he has already been convicted under the NDPS Act, 1985 or is detained under the PITNDPS Act, 1988 or the J&K PITNDPS Act, 1988. Thus, the action regarding tracing and identifying the illegal property under Sec. 68E, and also the action relating to seizing or freezing of such property under Sec. 68F, cannot be initiated unless a person already convicted under the NDPS Act, 1985 is once again charged with the commission of a similar offence, or is under preventive detention and gets charged with the commission of an offence under the NDPS Act, 1985.
after the issue of order for his preventive detention. It was apparently not the intention of the legislature to condone the possession of drug-related property and prohibit the enforcement agencies from taking any steps whatsoever for its forfeiture till the drug trafficker, who has already been convicted previously, gets charged once more with the commission of a drug offence. This drafting lacuna came into sharp focus in the case of Jillani Kassam Hingwala Vs. The Competent Authority, Bombay, which was decided by the Appellate Tribunal For Forfeited Property, New Delhi.

In Jillani Kassam Hingwala case, the appellant was allegedly found carrying a bag containing 5 Kgs. of brown sugar on the 6th October, 1990. The raiding party recovered Rs.12,50,000/- in cash and a Maruti Van from his possession. He was charged under the NDPS Act, 1985 for his being in possession of the said narcotic drug. During further investigation, the police officers came to know about a shop owned by the accused, and an order freezing this property was issued under Section 68?(1) of the Act. The order was subsequently confirmed by the Competent Authority under Section 68F(2). This order of freezing of the shop was assailed in appeal before the Appellate Tribunal on the ground that the appellant was not covered by any category of persons specified in Sec. 68A of the Act, and hence, orders under Sec. 68E and Sec. 68F could not have been issued in respect of his property. It was an admitted fact that the appellant had not been convicted previously under the Act. He had, of course, been detained under the PUDPS Act, 1988 but the detention order had later been quashed by the High Court.
The Government Counsel tried to defend the order of freezing of the property by arguing that it was the intention of the Legislature that every person who is charged with an offence punishable under the Act should be brought within the ambit of the provisions contained in Chapter VA including Sec. 68E and Sec. 68F. He further argued that it could not be the intention of the Legislature that Secs. 68E and 68F should only apply to such persons who are first covered under Sec. 68A and are again charged with an offence punishable under the Act. He pleaded that the Appellate Tribunal should, therefore, interpret the provisions contained in Secs. 68E and 68F in such manner that even a person strictly not covered under Sec. 68A should be within the reach of authorities under Secs. 68E and 68F. The Appellate Tribunal rejected these arguments on the ground that the provisions of Sec. 68A were clear and, by virtue thereof, the provisions contained in Chapter VA could not be invoked against the appellant. The Tribunal further held that there was no ambiguity in the existing law which needed to be rectified by rendering a particular interpretation.

In view of the judgement in *Jilani Kassam Hingwala*, no action regarding forfeiture of the property of a drug trafficker is possible till he is charged again for commission of an offence after having been convicted previously in India or abroad, or till he is put under preventive detention and is charged for a drug offence thereafter. While the cases against some major drug traffickers are still pending in the courts, there has been no report in the media or any official claim in the
last five years regarding any such trafficker having been convicted so far. The chances of such persons getting charged again for commission of a drug offence, after having been convicted previously, are thus too remote. Regarding drug traffickers under preventive detention, the provisions of Chapter VA of the NDPS Act, 1985 are not applicable if the detention order has been revoked on the report of the Advisory Board or has been set aside by a court of competent jurisdiction. As explained earlier in this Chapter, a vast majority of detention orders get quashed by the courts. Therefore, the possibilities of forfeiture of the property of the drug offender are remote in such cases too.

To sum up, it can be said that the drug-related property remains, for all practical purposes, beyond the reach of law. There is a need to plug the loopholes pointed out above, and to strengthen the enforcement machinery for tracing and identification of such illegally acquired property.62

2. Sec. 3 (1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. The expression 'illicit traffic' is defined in Sec. 2(e) of the Act. (See Appendix 'B').

3. Sec. 3(3), ibid.

4. Sec. 6, ibid.

5. Sec. 9 (b), ibid.

6. Sec. 9 (c), ibid.

7. Sec. 9(f), ibid.

8. Sec. 9(f) read with Sec. 11, ibid.

9. Sec. 9(f), ibid.

10. Sec. 11, ibid.

11. Sec. 10(2), ibid.

12. Sec. 10(1), ibid.

13. Sec. 12, ibid.

14. Sec. 13, ibid.

15. Id.


1993 DC 12, 1993 DC 37 (4 cases).

"DC" stands for "Drugs Cases".

22. AIR 1988 SC 934.
23. Id.
24. 1990 Drugs Cases 197.
26. Id.
27. Rukumani Devi Balasingam Vs. Joint Secretary to the Government of India, 1992 Cri. L.J. 2505(Mad.).
29. 1990 Drugs Cases 297.
30. 1991 Drugs Cases 92.
31. 1991 Drugs Cases 118.
32. 1991 Drugs Cases 134.
34. 1992 Drugs Cases 248.
35. 1989 Drugs Cases 139.
36. 1989 Drugs Cases 143.
37. 1989 Drugs Cases 145.
38. Id.
40. 1992 Drugs Cases 248.
41. 1991 Drugs Cases 256.
42. 1992 Drugs Cases 42.
43. 1989 Drugs Cases 173.
44. 1989 Drugs Cases 228.
45. 1989 Drugs Cases 464.
46. 1992 Drugs Cases 322.

48. Sec. 68 C of the Narcotic Drugs and Psychotropic Substances Act, 1985.

49. Sec. 68D, ibid.

50. Sec. 68E, ibid.

51. Sec. 68F, ibid.

52. Id.

53. Sec. 68H, ibid.

54. Sec. 68I, ibid.

55. Sec. 68J, ibid.

56. Sec. 68N and Sec. 68O, ibid.

57. Sec. 68 Q, ibid.

58. Id.

59. Unreported judgement dated 24.3.92 in Appeal No. 1/BuN/91 against order No. CA/BOM/FOP/1/91 dated 18.3.1991 passed by the Competent Authority, Bombay.

60. Id.

61. Id.