

(2008) 05 CAL CK 0014

In the Calcutta High Court

Case No : G.A. No. 929 of 2008 and W.P. No. 1219 of 2007 with G.A. No. 1246 of 2008

Bimal Khemka

APPELLANT

Vs

A.L.K.B. Chand and Others

RESPONDENT

Date of Decision : 13-05-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Constitution of India, 1950 — Article 226
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 —
Section 12(4), 19(1), 3(1), 6(1), 7(1)

Citation : (2008) 3 CALLT 211 : (2008) 3 CHN 194

Hon'ble Judges : Soumitra Pal, J

Bench : Single Bench

Advocate : Ajit Panja, Bhaskar Sen and Animesh Kanti Ghosal, A. Chakraborty and B. Das, for the Appellant; Pradip Tarafder and S. Nandy, for the Respondent

Final Decision : Dismissed

Judgement

Soumitra Pal, J.—This writ petition was filed on 9th October, 2007 challenging the order dated 7th September, 2007 passed u/s 7(1) and Section 7(3) as also u/s 19(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 ("SAFEMA" for short). During its pendency, on 25th March, 2008, the wife of the petitioner filed an application being G.A. No. 929 of 2008 for addition of party and also challenging the notice u/s 6(1) of SAFEMA dated 3rd March, 2008. Subsequently, on 16th April, 2008, the writ petitioner filed an application being G.A. No. 1246 of 2008 for amendment of the writ petition for incorporating statements, and grounds challenging the order of detention dated 22nd August, 1995 passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA") and for consequential reliefs.

2. The facts of the case are as follows:

The petitioner was served with an order of detention dated 22nd August, 1995 under COFEPOSA issued by the Joint Secretary, Ministry of Finance, Government of India. Pursuant to the order of detention, the petitioner on 28th August, 1995 was put under detention. On 16th November, 1995 the wife of the petitioner challenged the said order of detention by filing Habeas Corpus application being Criminal Misc. Case No. 5039 of 1995 under Article 226 of the Constitution of India on several grounds. The matter was heard. By judgment delivered on 19th December, 1995 the order of detention was set aside and the writ petitioner, the detenu, was directed to be released. The relevant portion of the order is as under:

...In this view of the matter we are constrained to hold in the facts and circumstances of the present case that the order of detention has been rendered otiose in view of the non-consideration of all the representation by all the three Authorities on account of which the detenu is liable to be released from detention. In view of the findings as aforesaid, we, accordingly, set aside the order of detention and direct the release of the detenu Bimal Khemka alias Bimal Chandra Khemka with a mandate on the superintendent, Presidency Jail to release the detenu forthwith let the order of release be communicated to the Superintendent, Presidency Jail through a Special Messenger at the cost of the petitioner. The detenu Bimal Khemka is also described as Bimal Chandra Khemka in order No. F. 673/89/95-Cust VIII.

3. Being aggrieved, the authorities had preferred an appeal before the Apex Court. On 23rd January, 2004 the Supreme Court set aside the said Judgment and order passed by the High Court. The relevant portion of the judgment and order is as under:

The impugned judgment and order, therefore, cannot be sustained, which is set aside accordingly.

However, ordinarily we would have remitted the matter back to the High Court for consideration on other questions raised in the writ petition by the respondent herein but as the period of detention has long expired, we do not intend to do so. We, therefore, do not wish to express any opinion on the validity or otherwise of the order of detention.

4. Thereafter, on 22nd December, 2006 the competent authority, respondent No. I issued a notice u/s 6(1) of the SAFEMA. The petitioner replied by filing written submission. During hearing, as it appears from the impugned order dated 7th September, 2007 the petitioner was represented by his learned advocate. On 7th September, 2007 the Competent authority and the Administrator passed an order under Sections 7(1) and 7(3) of the SAFEMA declaring the properties mentioned in the order impugned to be illegally acquired properties within the meaning of Section 3(1) of the SAFEMA and hence, were directed to be forfeited free from all encumbrances. On the same day order was also passed u/s 19(1) of the SAFEMA directing the petitioner to surrender the properties as described in column 2 of

the schedule to the order.

5. The present writ petition has been filed, as it appears from the prayers, challenging the orders passed under Sections 7(1) and 7(3) and 19(1) of the SAFEMA by the respondent No. 1. It appears that on 12th October, 2007 the petitioner preferred an appeal u/s 12(4) of the SAFEMA challenging the order dated 7th September, 2007 passed by the respondent No. 1.

The issues to be considered are:

a) Whether the application for amendment of the writ petition, praying for incorporating the grounds of challenge to the detention order, is permissible.

b) Since the petitioner has availed himself of the alternative remedy whether the writ petition is maintainable.

6. So far as the issue regarding the amendment of the writ petition is concerned, relying on the principles of Order VI Rule 17 of the Code of Civil Procedure, 1908 it was submitted by the learned senior advocate that amendment as prayed should not be refused merely on the ground of delay or negligence on the part of the applicant. Courts should try on the merits of the case and as a consequence all amendments that may be necessary for determining the real question in controversy between the parties should be allowed. Though amendment cannot be claimed as a matter of right and under all circumstances, however, a liberal and not a hypertechnical approach should be adopted. Since the dominant purpose of allowing such amendment is to minimise litigation, technicalities should not come in the way of administration of Justice. Moreover, a party cannot be refused relief or penalised because of some mistake or negligence of his lawyer or even for the infraction of the rules of procedure. Therefore, challenge to the order of detention which goes to the very root or foundation of the proceedings under SAFEMA should be allowed by way of amendment. Regarding the maintainability of the writ petition relying on the Judgment of the Supreme Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, it has been submitted that if an effective and efficacious remedy is available High Court would not normally exercise its jurisdiction. However, such restriction by the High Court is self-imposed and does not act as an absolute bar. In the instant case as the proceedings are without jurisdiction, the writ petition is maintainable.

7. In support of his contentions reliance has been placed on the following other judgments of the Supreme Court and High Court:

1. Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon,
2. Debasish Ghosh v. Smt. Soma Ghosh Cal LT (1994)1 HC 150
3. V Competent Authority, Ahmedabad Vs. Amritlal Chandmal Jain and Others,
4. Labha Ram and Sons and Others Vs. State of Punjab and Others,
5. Karimaben K. Bagad Vs. State of Gujarat and Ors,

6. Shyamal Mitra Mustafi v. J.G. Saggi 1988(2) CLJ 429
7. T.M. Jacob v. C. Poullose and Ors. AIR 1998 SC 2939
8. Ragu Thilak D. John v. S. Rayappan and Ors. (2001) 2 SCC 472
9. Hindustan Lever Ltd. v. Director General (Investigation & Registration) and Anr. (2001) 2 SCC 474
10. Union of India (UOI) and Others Vs. Mohanlal Likumal Punjabi and Others,
11. Sajjan Kumar v. Ram Kishan (2005) 13 SCC 89
12. Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others,
13. T. Madhava Kurup Vs. T.C. Madhava Kurup (D) by Lrs. and Others,
14. Andhra Bank Vs. ABN Amro Bank N.V. and Others,
15. Kashinath Mondal and Others Vs. State of West Bengal and Others,

8. Opposing the prayer for amendment learned advocate for the respondent has submitted that since in the writ petition the petitioner has challenged the impugned order of forfeiture, a cause of action subsequent to the order of detention, the prayer for amendment if allowed would change the nature and character of the writ petition and would alter the cause of action. So far as the maintainability of the petition is concerned as the order of detention is valid, the assumption of jurisdiction is legal. As there is no allegation of denial of natural justice and the vires of any provision of SAFEMA is not under challenge and since the petitioner has availed himself of the statutory alternative remedy under the Act by preferring appeal against the order passed by the respondent No. 1, the writ petition is not maintainable. The learned advocate for the respondent has relied on the following judgments in support of his contentions:

1. Kesho Ram and Co. and Others etc. Vs. Union of India (UOI) and Others,
2. Attorney General for India and Others Vs. Amratlal Prajivandas and Others,
3. Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others,
4. B.K.N. Narayana Pillai Vs. P. Pillai and Another,
5. Commissioner of Endowments and Others Vs. Vittal Rao and Others,
6. State of Haryana and Others Vs. M.P. Mohla,
7. A.K. Gupta and Sons Vs. Damodar Valley Corporation,
8. A.R. Antulay Vs. R.S. Nayak and Another,
9. Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and Another,
9. The law regarding amendment, as it appears from the Judgments cited, is well settled. The power to allow the amendment is wide and can be exercised at any

stage of the proceedings. The object of amendment is that Courts should adjudicate on merits. Relief cannot be refused because of some mistake, negligence or even infraction of the rules of procedure. Courts should not be hypertechnical and technicalities of law should not be permitted in dispensation of justice between the parties and for determining the real controversy between the parties. However, it has been held that "amendment cannot be claimed as a matter of right and under all circumstances. " B.K.N. Narayana Pillai Vs. P. Pillai and Another, . In the instant writ petition that the petitioner has challenged the order of forfeiture dated 7th September, 2007 passed u/s 7(1) and 7(3) and the consequent order u/s 19(1) of the SAFEMA is evident from a perusal of the statements, grounds and the prayers in the writ petition. Therefore, the cause of action which arose on 7th September, 2007 is under test. Now the question is since the validity of the order of detention under COFEPOSA is a condition precedent for initiating proceeding under SAFEMA, whether by way of an amendment the petitioner can be permitted to challenge the order of detention dated 22nd August, 1995 by incorporating statements, grounds and reliefs as prayed for in the application for amendment. For obvious reasons the answer has to be in the negative. The order of detention dated 22nd August, 1995 is an anterior act to the order of forfeiture dated 7th September, 2007. The order of detention is the foundation of the subsequent proceeding culminating in the order of forfeiture dated 7th September, 2007. Therefore, if amendment is allowed, the cause of action which arose on 7th September, 2007, which is under challenge in the writ petition, would be wholly replaced by a cause of action which arose on 22nd August, 1995. The application for amendment challenging the order of detention cannot be allowed in this writ petition where the order of forfeiture, a subsequent cause of action, is under challenge. The argument on behalf of the petitioner that the order of detention finds mention in some of the paragraphs of the writ petition and is, therefore, under challenge and thus the application for amendment should be allowed is not tenable as even assuming such argument holds good the question is why detailed statements pertaining to and challenging the order of detention have been pleaded in paragraphs 7A, 7B, 7C, 7D, 7E, 7F, 7G, 7H, 8A, 8B, 11A, 11B, 11C, 12A, 12B, 12C in the application, not to speak of the grounds challenging the order of detention and prayers in the application which are totally absent in the writ petition. It goes to demonstrate that the writ petition is in no uncertain terms is a challenge to the order of forfeiture dated 7th September, 2007. Therefore, if amendment is allowed it would mean incorporating a cause of action, an anterior act which, under the circumstances, cannot be permitted. In that event, it would be putting the cart before the horse. Hence, the application for amendment is rejected.

10. So far as the maintainability of the writ petition is concerned, it is to be noted that the Supreme Court in Whirlpool (supra) held as follows:

Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if

an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been any violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged....

(Emphasis supplied)

11. Now, in view of the law laid down by the Apex Court, it is to be considered whether the contingencies exist. Since the petitioner during adjudication submitted written submission and was heard through his learned advocate, the question of denial of natural justice does not arise. Further, there is no challenge to the vires of the Act. So far as the assumption of jurisdiction by the respondent No. 1 is concerned the submission of the learned advocate for the respondent is accepted. Therefore, none of the "three contingencies" as noted exist. Thus, in such backdrop, as he has availed himself of the alternative remedy under the Act by preferring appeal against the order dated 7th September, 2007 passed by the respondent No. 1, the petitioner cannot pursue two parallel proceedings. Hence, the writ petition is not maintainable and is, thus, dismissed. Accordingly, no order is passed on the application for addition of party.

No order as to costs.

Later:

Learned Senior Advocate appearing on behalf of the petitioner prays for stay of operation of this judgment and order since, if proceedings commence, it would cause hardship to the petitioner. Such prayer is opposed by the learned advocate for the respondent. Prayer is considered and is refused.

Urgent certified copy of this judgment and order, if applied for, be given to the appearing parties on priority basis.