

(1968) 07 KL CK 0012
In the High Court Of Kerala
Case No : O.P. No. 1632/67

G. K. Ambady

APPELLANT

Vs

The Union of India and another

RESPONDENT

Date of Decision : 10-07-1968

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)(f)
Foreign Exchange Regulation Act, 1973 — Section 27, 4

Citation : (1968) KLJ 708

Hon'ble Judges : K. K. Mathew, J

Bench : Single Bench

Advocate : P. H. Sankaranarayana Iyer, for the Appellant; C. Samkaran Nair For 1st respondent, K. V. Surianarayana Iyer, C. M. Devan For 2nd respondent, for the Respondent

Final Decision : Dismissed

Judgement

K. K. Mathew, J.—This is an application for the issue of a writ of mandamus or other appropriate Writ or order directing the respondents to release to the petitioner the foreign exchange requested for by him for the purpose of meeting the expenses of his trip to Japan and to issue Form P required for the trip. The petitioner joined the North-Western Railway as an Assistant Electrical Engineer. He was employed as Chief Technical Officer to three manufacturing concerns in Calcutta. He relinquished the post in March 1964 with a view to study the possibilities of industrial development in Kerala. He says that he wants to start a concern for the production of exportable items which would particularly meet the demands of the Indian market and reduce the import of such items. He submits that he is closely associated with Messrs. Keen Entrepreneurs, Ernakulam, a concern specializing in fabrication and steel structures, pressings, and in the production of pesticides and chemicals, that he has formally agreed to associate himself with them after his tour to Japan, and that Messrs. Sudarsana Iyengar & Sons, Ernakulam who are interested in the development of timber export, also have proposed to associate him with their concern. The petitioner had obtained a

passport for his trip to Japan. He states that Messrs. Abdulla Sayid Hashim Al-Gharabally of Tokyo have agreed to help him the negotiation of the various matters with the concerned manufacturers in Japan by their letter dated 26-5-1966 and that they have also agreed to meet all the expenses of his stay at Tokyo. Petitioner submits that although he is not in need of any foreign exchange for his stay in Japan, he stands in need of a small amount to meet the expenses of the voyage. He requested the Reserve Bank, hereinafter called the Bank, to release ₹30 for his expenses during the journey by his letter dated 11-8-1966 (Ex. P3). In reply (Ex.P4) the Bank told him to renew the application after obtaining an industrial license and a letter of indent. On receipt of Ex. P4 petitioner wrote to the Bank a letter dated 6-9-1966 (Ex. P5) stating that the preliminaries required in their letter were not relevant in the circumstances. On receipt of Ex. P5 the Bank indicated the petitioner by their letter dated 20-9-1966 (Ex. P6) that they can do nothing unless the documents called for in Ex. P4 are furnished. Thereafter the petitioner requested the Bank to let him have a copy of the rules relating to foreign exchange by his letter Ex. P7. This request was not complied with. So the petitioner wrote again on 1-10-1966 (Ex. P8) enclosing a letter from Messrs. Keen Entrepreneurs (Ex. P1), and also a letter from Messrs. Sudarsana Iyengar & Sons, Timber Exporters, Ernakulam, authorizing him to explore possibilities of export of timber logs to Japan, and requested release of the exchange. In their reply (Ex. P9) the Bank reiterated their position as stated in Ex. P4. Petitioner wrote to the Bank on 31-10-1966 Ex. (P10) asking if the decision of the Bank was not appealable. On receipt of Ex. P10 the Bank sent a letter on 18-11-1966 (Ex. P11). By Ex. P11 the petitioner was asked to get a letter from Messrs. Keen Entrepreneurs, Ernakulam, showing that the petitioner is being deputed to Japan by them and that the entire cost will be met by them, and enclosing a fresh questionnaire. Petitioner thereupon sent a communication on 3-12-1966 (Ex. P12) enclosing a letter from Messrs. Keen Entrepreneurs, Ernakulam, and also the questionnaire duly answered. A copy of the letter from Messrs. Keen Entrepreneurs is marked Ex. P12(a) and the enclosed questionnaire is marked Ex. P12(b). The Bank by their letter dated 13-12-1966 (Ex. P13) called for the particulars regarding the capacity in which the petitioner would represent Messrs. Keen Entrepreneurs and the details of the business to be transacted in Japan. The petitioner sent a reply to the Bank on 23-1-1967 (Ex. P14) giving a resume of the facts and circumstances which would entitle him to get release of the foreign exchange requested for. The Bank by their letter dated 1-4-1967 (Ex. P15) intimated their inability to release any foreign exchange or approve the petitioner's journey to Japan.. This in short, is the correspondence which took place between the petitioner and the Bank,

2. The petitioner contends that u/s 4 of the Foreign Exchange Regulation Act the Bank have no power to withhold release of foreign exchange, as the contemplated trip is in connection with a business enterprise which will promote export. The Bank have issued a Press Note marked Ex. R9 in which they have stated the circumstances under which they will release foreign exchange for

foreign travel. They are:

1. Business travel specially for promotion of exports, if a personal visit is shown to be necessary.
2. Medical treatment, if a certificate in the prescribed form from the Surgeon-General or the Chief Administrative Medical Officer of the State in which the applicant is residing is produced to the Bank.
3. Travelling salesman when their visit is calculated to increase exports.
4. Business/Technical/Scientific/Medical Conferences-Exchange for small number of delegates is released for conferences, participation in which is approved.
5. Studies/Training in approved subjects.

The Bank were not prima facie satisfied that the purpose of the petitioner's travel to Japan is in connection with a business which will promote export. So they wanted further information from the petitioner whether the proposed travel to Japan was for a business purpose which would promote export. They asked the petitioner to produce an industrial license and a letter of indent from the appropriate Ministry of the Central Government conveying their "no objection" in principle to the petitioner negotiating with the Japanese collaborators in the proposed venture. The petitioner could not produce the documents. In Ex. P5 letter dated 6-9-1966 he reaffirmed the position that the object of his visit was exploratory and that "to apply for industrial license at this stage will be putting the cart before the horse". In Ex. P12(b) the purpose of the visit to Japan is stated as,

To survey for this purposes of regular production in India the latest designs and manufacturing techniques for:

- (i) Agro-industrial equipments such as compact threshers, hullers, winnowers and polishers.
- (ii) Surgical instruments.
- (iii) Insecticides and Pesticides
- (iv) Protective coatings for metal and wood etc.

From Ex. P12 and the enclosure Ex. P12 (a) it is not very clear that Messrs. Keen Entrepreneurs have unambiguously certified that it is as their representative that the petitioner proposes to travel to Japan or what their business commitments are.

3. In view of the acute scarcity of foreign exchange one cannot say that the power vested in the Bank to impose restrictions in the master of releasing, foreign exchange for the purpose of travel to a foreign country is unreasonable. The Bank have been vested with authority to control and regulate the monetary policy in India and the working of banks, and they have statutory duties and

powers in respect of transactions in foreign exchange. Any transaction or act which has repercussion on the foreign exchange resources or the potential reserves of this country direct or indirect is a matter of great concern for the country and has to be dealt with by the Bank in the interests of the foreign exchange position of the country and in accordance with the policy laid down by the Government of India in that behalf. The Bank are an expert body with full knowledge of the conditions regarding the operations in foreign exchange so that the entrustment to them of the power u/s 4 of the Foreign Exchange Regulation Act cannot be said to be illegal or unconstitutional. I cannot assume that they will exercise their power arbitrarily. A discretionary power need not necessarily be discriminatory. There is no allegation in this case that the petitioner was discriminated against or that his case was dealt with differently from that of any other person or persons similarly situated. Exchange control is monopolistic control of the foreign exchange market. Like many other forms of monopoly, it is generally condemned and abhorred. Practical men of affairs continue to utilize exchange control because of its demonstrated effectiveness for maintaining order in disorganized markets. Economic analysts protest, correctly that exchange control is also used to control the pattern of foreign trade, to discriminate, and to protect an over-valued currency. However, much of the critical literature on this topic fails to grapple with the real economic issues because of an apparent preconception that free trade and free markets provide the best of all possible worlds and that any departure from free impersonal market reduces the economic welfare of each and every nation. Exchange control is a useful and flexibly instrument of commercial policy and that appropriate regulation will, for any one nation, increase or even maximize the gain from external trade. The shortage of foreign exchange is likely to continue in view of the disruption of the internal economy of so many nations, and the interruption of established channels of trade. It may therefore be necessary that the system of exchange control should be continued in the general interests of the country. Also, the adherence of India to the International Monetary Fund requires her to take certain measures to regulate transactions in foreign exchange in order to fulfill the obligations of the membership. India still continues to be short of foreign exchange and control is necessary to ensure that our foreign exchange resources are conserved in the national interest. The trend of events in this and other countries further indicates that the shortage is likely to continue for an indefinite period, and it is difficult to visualize at this stage that in any foreseeable future it will be possible to dispense with the exchange control altogether. I am not satisfied that there is any ground for interference with the decision of the Bank refusing to release foreign exchange to the petitioner for the proposed travel.

4. The next contention of the petitioner which is closely linked with his main submission is that he was prepared to waive his demand for foreign exchange if the Bank were ready to issue Form P. The necessity to obtain Form P for foreign travel stems from Section 18B of the Foreign Exchange Regulation Act. Section 18B reads:

No airline, shipping company or travel agent, shall except with the general or special permission of the Reserve Bank and subject to such conditions, if any, as may be specified therein, book for any person a passage for a journey the whole or any part of which is outside India.

The petitioner contends that the section gives no guidance to the Bank as to the circumstances under which they may issue or withhold Form P, and therefore, the section is bad as offending Art. 14 and 19 of the Constitution. The circumstances under which Form P will be issued are stated in Ex. R.10, a Press Note issued by the Bank for the information of the public. The issue of Form P depends on the question whether the petitioner's travel will entail unnecessary loss of foreign exchange to the country. The Bank reserve to themselves the exclusive authority to decide that question and to issue or refuse to issue Form P. Ex. R10 states:

A survey of travel for which no exchange permit was issued showed that more than half the persons went to neighboring countries with large Indian communities. These latter people used to make remittances to India through authorized channels and it appeared that these remittances had dropped because they have been replaced by the sale of exchange to Indian travellers in the free market.

In order to prevent such leakage of foreign exchange it was considered necessary to take steps to control the booking of passages for travel abroad in cases where no exchange was released. A form of application, viz., Form P was devised for the purpose of collecting necessary particulars to enable the Bank to scrutinize the case and decide whether or not to grant passage clearance. On June 8 1962, the Bank accordingly issued instructions to all steamship and airline companies in India that passages can be booked by them only if-

- (a) the traveller had been granted foreign exchange for his travel abroad or
- (b) the traveller had obtained specific approval of the Reserve Bank on "P" Form or
- (c) the traveller was in the category of persons covered by any general permission granted by the Bank.

It may be clarified here that the "P" form is required only in cases where the traveller wishes to go abroad without obtaining a release of foreign exchange. Simultaneously the Bank also the facility of booking passages under the "Guest Scheme" which was applicable for travel to the USA and Philippines in terms of which persons were allowed to go to these countries on the basis of hospitality extended by friends or relatives.

Approvals on form "P" for bookings of passages against invitations were granted in cases where the invitations were from foreign governments or noncommercial organizations of repute or from close relatives residing abroad. The position was kept under review and the Bank had reasons to suspect that the facility of obtaining "P" form approval on the basis of invitations from relatives was being

misused. It was, therefore, considered necessary to further restrict the categories of relatives whose hospitality alone could be a ground for approval of the "P" form".

This would indicate that by and large the discretion of the Bank to issue Form P depends upon the question whether foreign exchange that would be available to the country otherwise would be lost by the visit of a person to a foreign country. The petitioner contended that no rules have been made by Government u/s 27 of the Foreign Exchange Regulation Act to guide the Bank in the matter of issue of Form P, and so the power was exercised capriciously. In support of the contention that vesting of such un-canalized power in an authority will result in discrimination, and therefore, the section itself is bad, petitioner's counsel referred me to the ruling reported in *M/s. Pennalal Binjraj v Union of India* A.1.R 1957 S.C. 397. That decision makes a distinction between fundamental right and ordinary right. That ruling says that if a discretion is vested in an authority which will have the effect of regulating the exercise of the fundamental rights of a citizen, there must be definite rules to guide the authority in the exercise of the discretion whereas in a matter affecting ordinary rights the absence of rules may not be material. The court said:

There is a broad distinction between discretion which has to be exercised with regard to a fundamental right guaranteed by the Constitution and some other right which is given by the statute. If the statute deals with a right which is not fundamental in character the statute can take it away but a fundamental right the statute cannot take away. Where, for example, a discretion is given in the matter of issuing licenses for carrying on trade, profession or business or where restrictions are imposed on freedom of speech, etc., by the imposition of censorship, the discretion must be controlled by clear rules so as to come within the category of reasonable restrictions. Discretion of that nature must be differentiated from discretion in respect of matters not involving fundamental rights such as transfers of cases. An inconvenience resulting from a change of place or venue occurs when any case is transferred from one place to another but it is not open to a party to say that a fundamental right has been infringed by such transfer. In other words, the discretion vested has to be looked at from two points of view, viz. (1) does it admit of the possibility of any real and substantial discrimination (2) does it impinge on a fundamental right guaranteed by the Constitution? Article 14 can be invoked only when both these conditions are satisfied.

Although I see great force in the submission of counsel, in the nature of the power vested in the Bank u/s 18B it may not be possible to lay down definite rules to guide the Bank in an area like this. As already indicated the international monetary position undergoes unpredictable changes and the measures taken to combat leakage of foreign exchange would depend upon the exigencies of shifting situations. The right to travel outside India is a fundamental right. If a passport for travel to foreign countries cannot be withheld on unreasonable

grounds, the Bank cannot be invested with an unguided power which will virtually have the effect of negating that right. The question, therefore, is whether in the absence of guidance by way of rules, the blanket power given to the Bank would be a reasonable restriction on the fundamental right. In *The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another*, the Supreme Court had occasion to consider the question whether the presumption u/s 178-A of the Customs Act was valid, and in considering the reasonableness of the presumption, the Court took into consideration the position created by large scale smuggling; and after referring to the report of the Taxation Enquiry Commission 1953-54 which pointed out the factual position regarding the existence of widespread smuggling in certain commodities inter alia gold, said:

The deleterious effects of smuggling as pointed out in the extract from the Report, are real and it is not in dispute that the prevention and eradication of smuggling is a proper and legally attainable objective and that this is sought to be achieved by the relevant law. If therefore for the purpose of achieving the desired objective and to ensure that the intentions of Parliament shall not be defeated a law is enacted which operates somewhat harshly on a small section of the public, taken in conjunction with the position that without a law in that form and with that amplitude smuggling might not be possible of being effectively checked, the question arises whether the law could be held to be violative of the freedom guaranteed by Art. 19(1) (f) and (g) as imposing an unreasonable restraint. That the restrictions are in the "interest of the general public" is beyond controversy. But is the social good to be achieved by the legislation so disproportionately small that on balance it could be said that it has proceeded beyond the limits of reasonableness? We would answer this in the negative. We would only add that there is authority for the position that "acts innocent in themselves may be prohibited and the restrictions in that regard would be reasonable, if the same were necessary to secure the efficient enforcement of valid provisions. The inclusion of a reasonable margin to ensure effective enforcement will not stamp a law otherwise valid as within legislative competence with the character of unconstitutionality as being unreasonable.

The Supreme Court in *Glass Chatons Importers and Users' Association Vs. Union of India (UOI)*, said:

It is obvious that if a decision has been made that imports shall be by particular agencies or channels the granting of license to any applicant outside the agency or channel would frustrate the implementation of that decision. If therefore a canalization of imports is in the interests of the general public the refusal of import licenses to applicants outside the agencies or channels or channels decided upon must necessarily be held also in the interests of the general public. The real question therefore is: Is the canalization through special or specialized agencies or channels in the interests of the general public.

A policy as regards imports forms an integral part of the general economic policy of a country which is to have due regard not only to its impact on the internal or

international trade of the country but also on monetary policy, the development of agriculture and industries and even on the political policies of the country involving questions of friendship, neutrality or hostility with other countries. It may be difficult for any court to have adequate materials to come to a proper decision whether a particular policy as regards imports is, on a consideration of all the various factors involved, in the general interests of the public. Even if the necessary materials were available it is possible that in many cases more than one view can be taken whether a particular policy as regards imports-whether one of heavy customs barrier or of total prohibition or of entrustment of imports to selected agencies or channels-is in the general interests of the public. In this state of things the burden on the person challenging that the government of the country is not right in its estimate of the effects of a policy as regards imports in the general interests of the public will be very heavy indeed and when the government decides in respect of any particular commodity that its import should be by a selected channel or through selected agencies the Court would proceed on the assumption that that decision is in the interests of the general public unless the contrary is clearly shown. Consequently, we are unable to accept the argument that a decision that imports shall be canalized, is per se not a reasonable restriction in the interests of the general public. We wish to make it clear that while the decision that import of a particular commodity will be canalized may be difficult to challenge, the selection of the particular channel or agency decided upon in implementing the decision of canalization may well be challenged on the ground that it infringes Art. 14 of the Constitution or some other fundamental rights.

Just as a court would not be in a position to pronounce on the reasonableness of import-export policy because it involves the weighing of several imponderable factors involving political judgment, and conformity with policies which command the support of the legislatures, so also, I think, the court should not be propelled into a realm, where value judgments concerning foreign exchange policies are involved.

Though the conferment of arbitrary discretionary power may expose a statute to challenge, there are certain exceptions, namely, where it is difficult or impracticable to lay down a definite or comprehensive rule; where a license is to be granted having regard to the personal fitness of the applicant; and matters involving the exercise of discretion as to details in enforcing valid statutes. (See Seervai on Constitutional Law of India page 387.)

5. The Bank were apparently satisfied that by the proposed journey of the petitioner to Japan, foreign exchange which would otherwise be earned by the country will be diverted for the expenses of the stay of the petitioner in the foreign country. On a balancing of all considerations, I am inclined to take the view that the restrictions imposed by the Bank by Ex. R10 are reasonable in the context of the international monetary position and the acute shortage of foreign exchange. It would have been better if the Bank had given the petitioner the

exact reason why they were not in a position to issue Form P. But from the tenor of the communications, I think, the Bank refused to issue Form P for the reason that the stay of the petitioner abroad would entail loss of foreign exchange which the country would otherwise earn. I think, it is not too late for the Bank to tell the petitioner the reason why they are not in a position to issue Form P. In this country, a citizen is entitled to know the reason why he is denied the means by which alone he can exercise his fundamental right to travel abroad. A change in the international monetary situation and therefore of the foreign exchange position may render section 18B of the Foreign Exchange Regulation Act unconstitutional. In *Chastleton Corporation v Sinclair* 264 U.S. 543 the Court said;

A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed

I think, Section 18B is a section whose constitutional validity is dependent upon factual backgrounds. The present international monetary situation is such that the court may not be justified in holding that the restriction imposed by the section is unreasonable. A change in that situation may make the section invalid as imposing unreasonable restriction upon the fundamental right to travel abroad.

I dismiss the petition, but in the circumstances, without any order as to costs.