
(1995) 07 RAJ CK 0037
In the Rajasthan High Court
Case No : Civil Writ Petition No. 1300 of 1980

Kesar Devi @ Kanti Devi

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 19-07-1995

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 12A, 3
Constitution of India, 1950 — Article 226, 359
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 — Section 17, 2, 3, 6, 7

Citation : (1995) 51 ECC 66

Hon'ble Judges : V.K. Singhal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Singhal, J.—Initially the petitioner had challenged the validity of the provision of Smugglers & foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter called as SAFEMA Act, 39th, 40th and 42nd Amendments in the Constitution, but on January 2, 1991, the relief prayed in clauses 4 and 5 of prayer was not pressed and therefore the present writ petition was listed before this Bench. The arguments restricted by the learned Counsel for the petitioner are three-fold, namely-(1)(i) that whenever challenge is made regarding forfeiture of the property under the SAFEMA Act, the court is competent to examine the orders passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called as the COFEPOSA Act), (ii) that the order of the Competent Authority for detention under the COFEPOSA Act is bad in law as the grounds on which the order has been passed are the same which were considered by the Advisory Board while acquitting the petitioner under MISA in February 1974 and thereafter there being no fresh material and application of mind, the order is vitiated and that the order of the Advisory Board was not placed before the Competent Authority and since

it was withheld there could not be any satisfaction of the said authority, (iii) copy of the grounds of detention under COFEPOSA Act was not produced and even for non-communication, there should be recording of reasons that it is so in the public interest not to provide a copy, (2) No reason for belief has been recorded under [Section] 6 of SAFEMA Act and (3) that the acquisition could be of the property which has been acquired by illegal activities as contemplated u/s 3(1) (c) of the SAFEMA Act, and when the appellate authority was satisfied that the sale of ornaments was proved in 1961, the use of sale proceeds in 1963 should have been allowed.

2. The brief facts of the case are that the petitioner is wife of Shri Jagannath Sharma who was detained under MISA on 8.10.1974. It is stated that the detaining authority placed the matter before the Advisory Board along with the representation on which the Advisory Board has not approved the order of detention and recommended to the Government that the order of detention should be revoked. The petitioner's husband was immediately released in November, 1974. On 26.6.1975 when the emergency was promulgated the petitioner's husband was detained on 4.8.1975 under the provisions of COFEPOSA Act. In the order dated 4.8.1975 passed by the Dy. Secretary it was mentioned that with a view to preventing Shri Jagannath Sharma from dealing in smuggled goods otherwise than by engaging "in transporting or concealing or keeping smuggled goods, he is to be detained. The grounds of detention were not served. A declaration to this effect u/s 12A of the COFEPOSA Act was also issued wherein it was mentioned that the detention of Shri Jagannath u/s 3(1) of the COFEPOSA Act is necessary for dealing effectively with the emergency. A copy of this declaration was served on the petitioner. Further extension by telegram dated 3.12.1975 and the order dated 2.8.1976 was made which was served on the petitioner. The emergency was lifted on 21.3.1977 and the order of detention was revoked. A notice dated 29.11.1976 was served on the petitioner u/s 6(1) of SAFEMA Act and reply was submitted by the petitioner. The competent authority issued a notice u/s 7(1) of the Act to furnish proof of acquisition. The petitioner submitted the proof with regard to sale of gold ornaments through Nand Kishore Meghraj, M/s. Roop Narain Rameshwar Lal and Shankerlal Roop Narain. Copies of the electricity and water bills were also submitted. Thereafter, another notice u/s 6(2) was issued on 27.4.1977 in respect of two other properties, namely Haldia house and Mchndi ka chowk property. The competent authority held that the properties--House No. D-48, Bapunagar is illegally acquired within the meaning of Section 3(1)(c) of SAFEMA Act and declared it to be forfeited to the Central Government free from all encumbrances. An appeal was preferred to the Tribunal which was allowed on 26.10.1977 and the matter was remanded to the competent authority for providing fresh opportunity u/s 7(1) of the Act. Fresh notices were served where certain preliminary objections were raised and reply was submitted. On 1.7.1978 Jagannath Sharma expired. The petitioner moved to the Competent Authority that the proceedings should be dropped on account of his death. Certain

documents were also submitted along with the reply. By the order dated 28.11.1978 the competent authority made certain enquiries from the petitioner and also asked to send names and complete addresses of the persons which the petitioner wanted to examine. The said information was furnished and detailed reply along with affidavit of Shri Mishrilal, certificate of Shri G.C. Lunia, Advocate and statement recorded by the Inspector were submitted. Ultimately, the order dated 7.3.1980 u/s 7 of SAFEMA Act was passed in which the three properties were forfeited. Against the said order an appeal was preferred to the Tribunal which accepted the appeal in part on 21.7.1980 and the forfeiture of the property situated at Haldia house and Mehndi Ka chowk was not sustained on technical grounds and forfeiture of property D-48, Bapunagar was upheld.

3. The first ground which the learned Counsel for the petitioner has taken is that while challenging the validity of the order of forfeiture or the property the petitioner can challenge the order of detention under COFEPOSA Act. Reliance has been placed on the decision in the case of Union of India (UOI) and Others Vs. Haji Mastan Mirza, , wherein it was observed that-(at page 141 of ECC)

A reading of Section 6(1) of the SAFEMA would show that action under Sections 6 and 7 can be taken against only persons to whom that Act applies. Section 2(1) of that Act specifies the persons to whom the Act applies. Sub-section (2) of Section 2 says that the Act applies to every person in respect of whom an order for detention has been made under COFEPOSA provided that such order of detention has not been set aside by a court of competent jurisdiction. In the present case action has been taken against the respondent under Sections 6(1) and 7 read only with Section 2(2) of the Act. Therefore, a valid order of detention under COFEPOSA is a condition precedent to proceedings being taken under Sections 6 and 7 of SAFEMA. If the impugned order of detention dated 19.12.1974 is set aside for any reason the proceedings taken under Sections 6 and 7 of SAFEMA cannot stand. Therefore, we have to consider whether the impugned order of detention dated 19.12.1974 under COFEPOSA is void and has to be quashed.

Besides the above, the decision of this Court in the case of Prakash Chandel Kaslirial v. Union of India and Ors. 1986 RLR 492 has also been relied upon wherein the Division Bench considered the decision given in the case of Haji Mastan (supra) and observations made therein that "where the proceedings [for] forfeiture of the property of the detainee were started on the basis of an order of his detention under COFEPOSA, the fact that the copies of the documents relied upon in the grounds of detention were not supplied to the detainee would vitiate his detention and consequent forfeiture of his property" were taken into consideration. The decision of Bombay High Court in the case of Mohd. Abubakar Marwari v. Union of India and Ors. 1982 Cr LJ 53 has also been relied upon. I need not refer in details the various judgments since I am of the view that in view of the observations of the Apex Court in the case of Haji Mastan (supra) existence of the valid order of detention under COFEPOSA Act is a condition

precedent for the action under Sections 6 and 7 of the SAFEMA Act. The petitioner is entitled to challenge the validity of the order which has been passed under COFEPOSA Act while the order passed under SAFEMA is challenged. This contention of the learned Counsel for the petitioner is therefore accepted and the matter with regard to the existence of a valid order under COFEPOSA is being considered in subsequent paras.

4. It may also be observed that in the case of Attorney General for India and Ors. v. Amratlal Prajivandas and Ors. 1994 SCC 1325 the Apex Court after taking into consideration the decision given in the case of Union of India v. Manoharlal Narang (1987 SCC 24) observed that--(at Para 41 ECC)

So far as the reasoning of the said decision is concerned, it is to the effect that the validity of such an order of detention can be questioned by the detainee or his relative, as and when such an order is sought to be made the foundation for taking action against them under SAFEMA. On that basis, the Court proceeded to examine the validity of the order of detention of Ram Lal and found that the said order is bad for non-application of mind to certain highly relevant and material circumstances. We must, however, say that the validity of an order of detention to which Section 12A of COFEPOSA applied, could yet be examined even during the emergency on the touchstone of the law as it obtained during the operation of the Presidential Order under Article 359(1)--say on the ground that the provisions of Section 12A were not complied with, or on other grounds, as may not have barred during the said period. But a person who could have so challenged the order of detention and yet chose not to do, cannot be allowed to do so when such an order of detention is made the basis for applying SAFEMA to him--this is for the reason that even if he is allowed to challenge the said order when he is served with the notice u/s 6 of SAFEMA, the challenge has to be examined with reference to the position of law as was obtaining at the time the said order was made and the law in force" during the period the said order of detention was in operation. Same would be the position in the case of a person who challenged the order but failed in his challenge. Even in the case of a normal order of detention under COFEPOSA, the position would be the same. A person who did not challenge (either by himself or through his next friend) the order of detention or challenged it but failed, cannot be allowed to challenge the order of detention when action is taken against him under SAFEMA.

5. Learned Counsel for the petitioner submitted that there was no fresh material after the order of the Advisory Board passed under MISA by the detaining authority under COFEPOSA Act and therefore the order suffers from non-application of mind and the record of the Advisory Board has not been placed before the detaining authority under COFEPOSA, the facts were withheld and therefore no satisfaction can be said to be of the said authority. Reliance has been placed on the decision of the case of Masood Alam etc. Vs. Union of India (UOI) and Others, where the point was raised on behalf of the petitioner that the earlier order of detention was either revoked or was expired with the result that

unless there is detention pursuant to the order dated 25.6.1972 was passed on fresh facts, it must be held to be invalid. In the present case there was no earlier order under COFEPOSA Act which was revoked or expired and the earlier order was under MISA. The distinction between the two orders is being considered separately. The petitioner was directed to be released by the Apex Court. The controversy being not the same in the present case, no assistance can be arrived from the said decision.

6. Reliance has also been placed on the decision in the case *al Har Jas Dev Singh Vs. State of Punjab and Others*, wherein it was observed that:

If the fresh facts cannot form the basis for a conclusion on which the detention order can be made, then those facts are not fresh facts which will justify the detaining authority to make an order of detention. A fresh order of detention can only be made if fresh grounds come into existence, after the expiry or revocation of the earlier order of detention. No such fresh order can be made on the ground which existed prior to the revocation or expiry of the earlier order.

In that case also the dispute was with regard to detention on the basis of fresh order being passed and the validity of such fresh order was challenged. There is no fresh order in the present case under COFEPOSA by which the detention is challenged and therefore the facts of that fact (sic case?) also cannot be of any assistance [to] the petitioner. Reliance has also been placed on the decision in the case of *Rukmini Bai Gupta Vs. State Govt. of M.P. and others*, wherein also it was observed by the Apex Court that in view of Section 14(2) of MISA Act a second detention order cannot be made without fresh facts after a revocation or expiry of the first detention order. In *Chhagan Bhagwan Kahar Vs. N.L. Kalna and Others*, it was observed that if a second order is passed taking into consideration the earlier order and the first detention order was quashed, then the second order could be invalid. In *Jahangirkhan Fazalkhan Pathan Vs. Police Commissioner, Ahmedabad and Another*, also the earlier detention order was set aside by the court and the subsequent detention order which was continuing on fresh facts has taken into consideration the earlier detention order so quashed, the ground, therefore, on that basis for detention was held illegal. The facts of this case are also not such as that of the present petitioner and therefore the judgment which has been relied upon by the learned Counsel for the petitioner are not applicable. A question was raised that the order under MISA was revoked by the Advisory Board and on that basis the subsequent order under COFEPOSA cannot be passed. This contention of the learned Counsel for the petitioner has no force since the two Acts are altogether different and having different objects. The Maintenance of Internal Security Act u/s 8 provides as under--

Power to make orders detaining certain persons.--(1) The Central Government or the State Government may, --

(a) if satisfied with respect to any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to --

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India, or with a view to making arrangements for his expulsion from India, it is necessary to do, make an order directing that such person be detained.

(2) Any of the following officers, namely--

(a) district magistrates,

(b) additional district magistrates specially empowered in this behalf by the State Government,

(c) Commissioner of Police, for Bombay, Calcutta, Madras or Hyderabad

[may also, if satisfied as provided in Sub-section (1)], exercise the power conferred by the said sub-section.

From the above it would be evident that the order under MISA could be passed for preventing a person from acting in any manner prejudicial to the security of the State or maintenance of the public order. The provisions u/s 3 of the COFEPOSA Act could be invoked with a view to prevent a person from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from (i) smuggling goods, or (ii) abetting the smuggling of goods or, (iii) engaging in transporting or concealing or keeping smuggled goods, or, (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods. The basic conditions which are to be seen under the two Acts are altogether different. It may be for the reason that the husband of the petitioner may not be a person from whom security of the State or maintenance of public order is affected, though he was involved according to the respondents in dealing with smuggled goods, otherwise than by engaging in transporting or concealing or keeping smuggled goods. The role of Advisory Board therefore was to find out whether the basic conditions as provided under the MISA Act are fulfilled. If they are not fulfilled, then the Advisory Board was competent to advice for the release of the detainee. If that is being done it does not mean that no action can be taken against him under any other Act. The order which was passed under MISA Act and revoked cannot be considered as the first order under COFEPOSA Act so that the order dated 4.8.1975 be considered as the second one. Various authorities which have been relied upon by the learned Counsel for the petitioner could not be made applicable to it. The order dated 4.8.1975 was the first order under COFEPOSA Act and not the second one and as such the contention that there was no fresh material has no substance. Even considering the order passed by the Advisory

Board under MISA could not be relevant for the purpose of the order passed under COFEPOSA Act. The decision in the case of Dharamdas Shamlal Agarwal Vs. Police Commissioner and Another, was also relied upon which was on admitted set of facts and as per that case the material facts of acquittal of detainee in two cases was not placed before the detaining authority and on that basis it was considered that the satisfaction is vitiated. In the present case it has not been argued that the cases were not mentioned in the grounds on the basis of which the detention order was passed. So is the position in the case of Ramesh Vs. State of Gujarat and Others, The petitioner, therefore cannot be said to be prejudiced with the order passed by the Advisory Board. This contention has no force.

7. Another contention raised by the learned Counsel for the petitioner is that there was no satisfaction, information or reason for belief as no reasons are recorded while passing the order dated 4.8.1975. In this regard the file of the respondents was called for. Although the reasons which were recorded the court is not bound to show to the learned Counsel for the petitioner, but in order to provide him opportunity the said order was shown to him in which the instances of dealing in smuggling goods on different dates were recorded and on that basis the satisfaction was arrived at. It may be observed that the existence of the reasons is the requirement which is duly fulfilled. Therefore, reasons having been duly recorded the satisfaction of the detaining authority has been arrived at in accordance with law. Learned Counsel for the petitioner submits that these were the same instances for which the action under MISA was taken. May be so, as observed, the consideration and requirement of the provisions of the said Act is different and if a person is tried under COFEPOSA on the instances which might be based under MISA, it cannot be said that there can be no order under COFEPOSA Act. This contention, too has no force.

8. Another contention raised by the learned Counsel for the petitioner is that for the purpose of passing the order u/s 12A of COFEPOSA Act it was further necessary that for the purpose of exercise of the powers u/s 12A(2) the detaining authority must take into consideration that it was necessary for dealing with emergency. The argument of the learned Counsel for the petitioner was also taken into consideration. By an order of even date (4.8.1975) a declaration has been made that the State Government being satisfied (on the basis of information and material in its possession) at the time of making the order of detention under Sub-section (1) of Section 3 of the COFEPOSA Act of the husband of the petitioner was considered necessary for effectively dealing with the emergency. A copy of this declaration was served on the husband of the petitioner. The requirement of Section 12A(2) was fully complied with and I do not feel that any irregularity has been committed. This contention also has no force.

9. The last contention which has been raised by the learned Counsel for the petitioner is on the merit with regard to the order of forfeiture of the properties

under SAFEMA Act, in which the house No. D-48 Bapunagar Jaipur has been directed to be forfeited. It is submitted that the competent authority has not taken into consideration the evidence which was produced and the appellate authority also erred in not quashing the order of the competent authority. First of all, it may be observed that this is a factual aspect as to what is the value of the property. Section 6 of the SAFEMA Act gives the jurisdiction to issue a notice to a person with regard to the source of his income for earning any assets or out of which or by means of which he acquired he property. The petitioner produced certain evidence. The first order u/s 7 in the present case was passed on 28.7.1977. The said order was set aside by the appellate tribunal on 10.10.1977 with the direction that fresh order may be passed in accordance with law after affording reasonable opportunity of being heard to the affected persons. The petitioner was found to be affected person and after providing full opportunity the order dated 17.3.1980 was passed. In respect of the two properties, namely Haldia house and Mehndi ka chowk property it was found that notice issued u/s 6(1) on 29.11.1976 has not included the same in the schedule to the notice and on that basis the appellate authority has quashed the forfeiture of those properties. With regard to the property of D-48 Bapunagar, the petitioner has placed certain documents on the source of which the property of Bapunagar was found to have been constructed/acquired. The Tribunal found that the plot was purchased on 4.11.1963 and therefore the alleged sale of ornaments in 1961 cannot be for purchasing of this property and no woman will part with her ornaments unless there is dire need for cash. Since the other property--Haldia house was acquired on 26.10.1961 it was considered that the ornaments sold were utilised for acquisition of the said property which was purchased only 3 days after the sale of ornaments. In respect of sale of 1047 silver coins on 15.2.1964, the original vouchers were not produced and in respect of 400 silver coins affidavit was not produced of the alleged sale to a dissolved firm. So was the position with regard to taking of loan from the father of son-in-law which was not believed. The discrepancy was found in other explanations and ultimately the Tribunal came to the conclusion that out of total amount of investment of Rs. 51,593/- the appellant has been able to explain Rs. 10,774/- and for rest of Rs. 40,849/- no explanation was given. The order of forfeiture of Bapunagar property was accordingly upheld. The contention of the learned Counsel for the petitioner that the conclusion arrived on the basis of evidence submitted is not in accordance with law cannot be considered under Article 226 of the Constitution as this Court is not sitting in appeal as appellate authority over the order of the Tribunal. Besides this, the findings which have been recorded are of facts and no other conclusion could be arrived at. This contention has no force. It may be observed that the Tribunal has found the explanation for Rs. 10,774/- as satisfactory, then what would be its effect. This point was not raised by the learned Counsel for the petitioner that on that ground the entire property is to be released and cannot be forfeited. Even such a contention could not have been of any assistance inasmuch as the provisions of Section 17 could be applied when the property in question is illegally acquired. On the opportunity being given the

petitioner could not explain the source of income and as such the order of forfeiture cannot be said to suffer from any mistake apparent on the face of record.

10. Consequently, the writ petition having no force is hereby dismissed.