
(1988) 07 BOM CK 0036

In the Bombay High Court

Case No : Criminal Writ Petition No. 503 of 1988

Khadadad Habib Memon

APPELLANT

Vs

R.C. Iyer and others

RESPONDENT

Date of Decision : 01-07-1988

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3

Citation : (1988) 07 BOM CK 0036

Hon'ble Judges : V.P. Tipnis, J;M.L. Pendse, J

Bench : Division Bench

Judgement

Pendse, J.—Shri R. C. Iyer, Secretary to the Government of Maharashtra, Home Department, by order dt. August 27, 1987 passed in exercise of powers under sub-sec. (1) of S. 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA") directed detention of Mohammed Firdous Khadadad Habib Memon with a view to preventing him from smuggling of goods. Shri R. C. Iyer was specially empowered by the Government of Maharashtra for the purpose of S. 3 of the COFEPOSA to pass the order of detention. The order of detention was served in October 1987 and the grounds of detention were furnished. It is not necessary to set out the contents of grounds of detention for the reasons which will be clear from the recital of what transpired subsequent to the order of detention.

2. The detenu challenged the order of detention by filing Criminal Writ Petition No. 109 of 1988 in this Court. The petition was duly admitted and came up for hearing before the Division Bench on April 19, 1988, Shri T. V. Mujumdar, Advocate appeared for the petitioner, and after considering all the submissions, the Division Bench by a speaking judgment dismissed the petition. After dismissal of the petition, the detenu lodged the present petition on May 5, 1988 during the Summer vacation of this Court. The detenu again challenged the order of detention on several grounds. The petition was admitted by the Vacation Judge on May 6, 1988 and is now placed before us for final hearing.

3. We inquired from Shri Irani, learned counsel appearing for the detenu, as to how the second petition is maintainable, and Shri Irani submitted that the application of doctrine of res judicata is confined to civil actions and civil proceedings, and the principle of public policy underlined with doctrine of res judicata is inapplicable to illegal detention and does not bar a subsequent petition. In support of the submission, Shri Irani relied upon decision of the Supreme Court reported in Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, It is undoubtedly true that the Supreme Court held that the application of doctrine of constructive res judicata is inapplicable to illegal detention and successive petitions under Art. 32 are maintainable. We inquired from Shri Irani as to whether this decision enables the detenu to reargue the matter before different Benches of this Court. Shri Irani very fairly submitted that a fresh petition to challenge the order of detention is maintainable provided there are fresh grounds available to the detenu and which were not taken in the earlier petition. In view of the decision of the Supreme Court, we hold that the petition is maintainable and proceed to examine whether there are fresh grounds raised in the present petition which requires quashing of the order of detention.

4. The first submission of Shri Irani is that the order of detention was passed by Shri R. C. Iyer, Secretary to the Government of Maharashtra, Home Department, who was empowered by the Government to pass the order of detention under S. 3 of the COFEPOSA Act. Shri Irani submitted that the detenu made representation on February 13, 1988 to the detaining authority that is to Shri R. C. Iyer, and received a letter dt. March 7, 1988 rejecting the representation. The communication recites that the representation was considered by L. Hmingliana, Secretary to the Government of Maharashtra, Home Department. Shri Irani submitted that as the representation was not considered by Shri Iyer but Shri Hmingliana, the detenu was deprived of the constitutional safeguards under Art. 22(5) of the Constitution of India. The representation, says Shri Irani, could have been considered only by Shri Iyer and not other person, and failure to do so vitiate the order as the detenu was deprived of an opportunity to make representation to the detaining authority. In answer to the petition Shri S. S. Kelkar, Desk Officer, Home Department, has filed return sworn on June 24, 1988, and in para 6 of this return it is claimed that Shri Iyer was transferred to other department after passing the order of detention and Shri Hmingliana was appointed in his place for the purpose of S. 3 of the COFEPOSA Act. The return further claims that the detaining authority Hmingliana considered the representation forwarded by the detenu and rejected the same.

With this factual background it is now necessary to examine the submission of Shri Irani that the representation of the detenu should have been considered only by Shri Iyer and no one else. It is not possible to accept the submission of the learned counsel. A situation cannot be overlooked where the officer, to whom the powers have been delegated by the State Government under S. 3 of the COFEPOSA Act may not be available to consider the representation for various reasons, like death, retirement, illness, or having gone abroad for Government

duty. In all these situations the mere fact that the detaining authority is not available for considering the representation would not automatically vitiate the order. The State Government can always delegate the powers under S. 3 to another officer and that officer can discharge all the functions of the detaining authority. Any other view of the matter would lead to an absurd situation that on the death or retirement of the detaining authority all the orders of detention passed by that officer would automatically come to an end. Such construction would not advance the intention of the legislature and would lead to absurdity and therefore cannot be accepted. The Division Bench of this Court took an identical view in the decision reported in 1985 Cri LJ 538, *Smt. Madhurika C. Merchant v. K. S. Dilipsinghji*. Shri Irani submitted that in that case the situation was identical and the order of detention was set aside on the ground that the representation was not considered by the detaining authority but by another officer. The submission is not correct. In that case Shri K. S. Dilipsinghji was the detaining authority and the representation of the detenu was forwarded to Shri Dilipsinghji. Instead of considering the representation, Dilipsinghji placed the papers before Shri V. N. Rao, who was another detaining authority empowered by the Central Government under S. 3 of the COFEPOSA Act. Authority of Dilipsinghji did not come to an end and in that situation the Division Bench held that representation could not have been determined by Shri Rao because that amounts to abdication of duty by Dilipsinghji. The facts in the present case are entirely different. The return filed by Shri Kelkar clearly reflects that on transfer Iyer ceased to be an officer empowered under S. 3 of the COFEPOSA Act and in his place Hmingliana was appointed. The expression "is his place" in the return leaves no manner of doubt that the authorisation of Iyer came to an end and fresh authorisation was conferred on Hmingliana in substitution of authorisation of Iyer. It is therefore obvious that Iyer could not have examined the representation and determined the same and it was only Hmingliana whom could have done so. In our judgment the examination of the representation and determination by Hmingliana suffers from no infirmity and the grievance of the detenu on this count is entirely ill-founded. In our judgment, on this ground the order of detention could be disturbed.

5. The second contention, and which according to Shri Irani is a fresh ground raised by the detenu, is that the vital and material document was not placed before the detaining authority and therefore the order of detention stands vitiated. The vital and material document, according to Shri Irani, is an application made by one Gulam Rasul Aboo, who was involved in the incident along with the present detenu as per the grounds of detention furnished. This application, being Criminal Application No. 64 of 1987 was filed by the Gulam Rasul Aboo before the Sessions Court, Greater Bombay for grant of bail, and the Sessions Court directed to release said Gulam on bail of Rs. 20,000/- with one surety in like amount. Shri Irani submitted that the application filed by the Gulam Rasul Aboo and the order passed by the Sessions Judge releasing him on bail is a vital and material document and ought to have been placed before the

detaining authority. Shri Irani submitted that the said Gulam filed Criminal Writ Petition No. 101 of 1988 in this Court to challenge the order of his detention and in accordance with the judgment delivered by the Division Bench on April 30, 1988, the application filed by Gulam Rasul and the order of the Sessions Court was a vital document and failure to place that document before the detaining authority has vitiated the order of detention. Shri Irani submitted that as in respect of the co-detenu the document has been held to be vital and relevant, it should be so held in respect of the present detenu. It is impossible to accede to the submission of the learned counsel. The application for bail and the order passed thereon by the Sessions Court was filed only by Gulam Rasul Aboo and not by the present detenu. The application and the order of granting bail may be a vital and relevant document as far as Gulam Rasul Aboo is concerned, but by no stretch of imagination it could be suggested that it is a relevant document as far as the detention of the present detenu is concerned. Shri Irani submitted that as both Gulam Rasul Aboo and the present detenu were involved in the same incident, what is vital and relevant to Gulam Rasul must equally be held to be vital and relevant for the present detenu. It is impossible to accede to this submission. The present detenu never applied for bail and therefore there was no question of placing any documents like bail application qua the present detenu before the detaining authority. It also cannot be overlooked that the Division Bench, which decided Criminal Writ Petition No. 101 of 1988 filed by Gulam Rasul Aboo on April 13, 1988, also heard Criminal Writ Petition No. 109 of 1988 of the present detenu and dismissed the same. The Division Bench must be aware of its earlier judgment delivered six days before and never considered the application made by Gulam Rasul Aboo as the relevant document as far as the present detenu is concerned. In our judgment, the second contention of Shri Irani therefore deserves to be repelled.

6. As both the contentions raised by Shri Irani, and which according to him are the fresh grounds raised by the detenu, are turned down, the petition must fail. We hope that the detenu will not file further petitions after petitions on alleged fresh grounds, after the assignment of the work changes.

7. Accordingly, rule is discharged. There will be no order as to costs.

8. Petition dismissal.