
(1994) 04 MAD CK 0039

In the Madras High Court

Case No : Writ Petition No's. 1279 and 1280

K.M.A. Abdul Kabeer

APPELLANT

Vs

Special Directory, Enforcement Directorate and another

RESPONDENT

Date of Decision : 21-04-1994

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 3, 34, 4(1), 41, 51

Citation : (1995) 82 CompCas 526

Hon'ble Judges : V. Kanakaraj, J

Bench : Single Bench

Advocate : S.K.L. Rattan, for the Appellant; C.A. Sundaram, for the Respondent

Judgement

Kanakaraj, J.—The petitioner in both the writ petitions is one and the same and the two reliefs sought for the two petitions arise out of the

same facts. I, therefore, proceed to dispose of the writ petitions by a common order. The facts are as follows :

The Officers of Enforcement Directorate searched the residential premises of the petitioner, in exercise of the power conferred u/s 34 of the

Foreign Exchange Regulation Act, 1973 (hereinafter called the ""FERA""). They seized India currency of Rs. 1,65,000 which was kept in a wooden

almirah under a mahazar August 18, 1992. A statement is said to have been recorded from the petitioner, by using force and exercising coercion,

and the said statement was subsequently retracted by a letter dated August 21, 1992. It is not necessary for this court to go into the question as to

the character of possession of the currencies and whether the same was acquired in lawful manner or not. While Writ Petition No. 1279 of 1994

relates to the power to retain the currency u/s 41 of the Foreign Exchange Regulation Act beyond a particular period, Writ Petition No. 1280 of

1994 relates to the validity of the show-cause notice issued on August 4, 1993. For the purpose of understanding the scope of argument in W. P.

No. 1279 of 1994, the following dates are material :

1. The date of seizure of the currency 18-8-1992

2. The date of amendment to section 41 of the

Foreign Exchange Regulation Act 8-1-1993

3. The date of the show-cause notice 4-8-1993

4. The date of service of the show-cause notice 24-8-1993

2. The argument is that after January 8, 1993, section 41 of the Foreign Exchange Regulation Act, empower the authorities to retain the currency

only for a period six months, unless of course proceedings had been initiated as per sub-clauses (i) and (ii) of section 41 of the Foreign Exchange

Regulation Act. Prior to the amendment, the authorities had power to retain the documents for a period of one year. If a period of one year is

available, the power to retain the documents can be upheld because within the period of year from August 18, 1992, a show-cause notice was

issued, on August 4, 1993. If the amended provision of law applies, the respondent will have only six months from August 18, 1992, and the

period of six months had expired on February 17, 1993. Consequently, the show-cause notice issued on August 4, 1993, will not enable the

authorities to retain the documents being the currency notes after February 17, 1993. The prayer in Writ Petition No. 1279 of 1994 is for the issue

of a writ of mandamus to direct the respondent to return the seized documents, namely currency notes to the tune of Rs. 1,65,000, to the

petitioner.

3. In Writ Petition No. 1280 of 1994 the argument is that the first respondent, namely, the special director has no jurisdiction to issue the show-

cause notice u/s 51 of the Foreign Exchange Regulation Act, and the delegation of powers to the first respondent is illegal and contrary to sections

3 and 4 of the Foreign Exchange Regulation Act. Consequently, the prayer in Writ Petition No. 1280 of 1994 is to quash the show-cause notice

dated August 4, 1993, by the issue of a writ of certiorari.

4. Two separate counter-affidavits have been filed by the respondents. While the facts are not disputed with reference to the sequence of events, it

is contended that the amended provisions of section 41 of the Foreign Exchange Regulation Act, will not have any application to the present case and the show-cause notice having been issued within a period of one year, they are entitled to retain the seized currency. In other words, the argument is that the amended provision do not have a retrospective effect, and they can be applied only prospectively. It is also contended that the right of seizure and retention of documents is a substantive right, and, therefore, the same cannot be taken away by reducing the period of retention. It is, therefore, contended that the argument of the petitioner that the period of limitation is only procedural in nature and, therefore, the amended provisions alone should be applied, cannot be accepted. In Writ Petition No. 1280 of 1994, the argument is that by a specific notification dated September 22, 1989, the Government has exercised the power under subsection (1) of section 4 read with clause (e) of section 3 of the Foreign Regulation Act and appointed one S. S. Renhgen to be an Officer of Enforcement with the designation of Special Director of Enforcement giving him powers adjudication u/s 50 of the Act. The contention is the delegation of power to the incumbent of the first respondent is perfectly legal and in accordance with section 3 and 4 of the Foreign Exchange Regulation Act. Consequently, it is contended that the show-cause notice valid and not liable to be quashed.

5. I will first deal with the power to retain the documents, namely, the currency notes in accordance with section 41 of the Foreign Exchange Regulation Act and whether the respondent has lost the power and is bound to return the currency notes. A decision on this aspect will depend on the question whether the amended provisions of section 41 of the Foreign Exchange Regulation Act, which came into force on January 8, 1993, are prospective or retrospective. The argument of the petitioner that even after the amended provisions came into effect on January 8, 1993, the respondents had about 23 days in January and 16 days in February, 1993, to initiate proceeding like the issue of a show-cause notice and continue to retain the documents. On the other hand, the respondents failed to avail of this period and save themselves from the bar of limitation prescribed by the amended Act. Therefore, it is contended that by no stretch of imagination can the respondent seek to claim the period of one year granted

under the unamended section 41 of the Foreign Exchange Regulation Act. It is pointed out that there is a line of authority on the manner of

interpreting the statute of limitation when the period is shortened or reduced by an amendment. It is also not disputed that the question will depend

upon the nature of the right which is sought to be reduced, namely, whether it is a procedural right or a vested right. The well-accepted principle of

law is that in the case of a vested right, the same cannot be taken away by an amendment of the law which is silent with regard to its applicability

prospectively or retrospectively. On the other hand, if the amended provision only relates to procedure, then it can be applied retrospectively

subject to one or two well accepted exceptions. These principles of law can very well be deduced from the following judgments cited at the Bar.

In *Mt. Begam Sultan Vs. Sarvi Begam* , the court was considering a case where a decree was passed at a time when the old CPC of 1882 was in

force. The application for execution was made at a time when the new Civil Procedure Code, 1908, had come into force. It was held that the law

of procedure and limitation applicable to an application for execution would be the law actually in force at the time when the time when the

application was made, namely, the new Civil Procedure Code, 1908. The following passage is relied upon (at page 94) :

The new Code did not in any way affect his right to execute the decree which he had obtained. It has in no way curtailed his right; it has merely

placed a bar of limitation as to the period of time during which he can apply. There was no vested right in the decree-holder to wait for an indefinite

period of time in order to order to apply for execution. The learned judges who decided the case above mentioned were led away by the

supposition that the decree-holder acquires a vested right not only to apply for execution but also in the period within which he can apply.

6. In *Khondkar Mahomed Saleh and Others Vs. Chandra Kumar Mukerji and Others* , , a Division Bench of the Calcutta High Court has analysed

all the aspects of the case relating to the alternation of the period of limitation and the circumstances under which the amended provisions will or

will not apply. In that case, the due date under a mortgage deed, for payment of the mortgage money, was April 12, 1904. The original mortgagee

died in December, 1905. The only legal representative being his minor son brought the suit in 1906 and a preliminary decree was passed on

November 30, 1906. A final decree was passed on January 7, 1907. After the sale of the mortgaged property, there was still a balance to be paid

to the mortgagee. The minor legal representative of the mortgagee attained majority on September 23, 1924, and applied under Order 34, rule 6,

Civil Procedure Code, for a personal decree against the mortgagor. The mortgagor pleaded that the application was barred by limitation. The trial

court had overruled the plea of limitation and granted a personal decree against the mortgagor. The appeal against the said order was decided by

the Division Bench of the Calcutta High Court. The issue arose before the Division Bench in the following manner :

Under the Limitation Act 15 of 1877, the mortgagee had a right to apply for a personal decree after attainment of minority and thereafter within the

period of limitation. Under the new Limitation Act 9 of 1908 which was passed in August 1908, but came into operation on January 1, 1909, the

minor must make the application within the period of limitation prescribed under article 181 of the Schedule to the Limitation Act. In other words,

the period of limitation was three years from the time when the right to apply accrued. The right to apply accrued in the said case in September,

1908, it was contended that the application filed in September, 1924, was barred by limitation. The argument which was accepted by the trial

court was that the Limitation Act 15 of 1877 would alone apply and even though the right to apply accrued in September, 1908, the mortgagee

was under a disability of minority till September 23, 1923. It was, therefore, argued that he was entitled to make his application within three years

from the date when he attained minority. The trial court in that case had held that the 1908 Act affected the vested right of the mortgagee and,

therefore, it was only 1877 Act which applied. The Calcutta High Court, as I have already pointed out, has analysed all the aspects of the case on

the issue in question and held that the 1908 Act only cut down the period of limitation and did not take away any vested right. In this view of the

matter, it was held that the application for a personal decree was barred by limitation. The following passages are strongly relied upon by learned

counsel for the petitioner (at page 37) :

Now, applying this rule to the present case there cannot be any doubt that the plaintiff might have made his application within the period of

limitation, prescribed under the Act 9 of 1908. The time when the right accrued was September, 1908, and three years would expire in

September, 1911. Therefore, the mortgagee had about two years nine month's time after the passing of the Act of 1908 to make his application

and hence there was no hardship which was discussed in the cases of Towler v. Chatterton [1829] 6 Bing. 258; 21 L. J. M. C. 193 and R. v.

Leeds and Bradford Ry. Co. [1852] 18 Q. B. 343. It is not necessary in this case to lay any stress upon the fact that the Limitation Act of 1908

was passed in August, 1908, and it was to come into operation on January 1, 1909. That fact might have been important if the position of the

plaintiff was such that he would have no time under the new law to make any application after the Act came into operation. But as a matter of fact,

as I have already pointed out, he had two years nine months under the new law within which he could make his application. Therefore, in my

judgment, it cannot be doubted that the rule of limitation applicable to the present case should be that laid down by the Act 9 of 1908.

7. However, the Calcutta High Court referred to and distinguished the case of Promotha Nath v. Sourav Dasi [1920] Cri. L. J. 463, in the

following words (at page 37 of AIR 1930 Cal) :

The learned judges held that section 66 of the Code had no retrospective operation as it actually took away a right of suit which is a vested right.

8. Finally, the Calcutta High Court concluded by approving the following passage in Maxwell's Interpretation of Statutes, 6th Edition, at page 399.

In both of the above cases, however, the construction, though fatal to the enforcement of a vested right, by shortening the time for enforcing it, did

not in terms take away any such right; and in both it seems to fall within the general principle that the presumption against a retrospective

construction has no application to enactments which affect only the procedure and practice of the courts, even where the alteration which the

statute makes has been disadvantageous to one of the parties. Although to make a law for punishing that which, at the time when it was done, was

not punishable, is contrary to sound principle; a law which merely alters the procedure may, with perfect propriety, be made applicable to past as

well as future transactions; and no secondary meaning is to be sought for an enactment of such a kind. No person has a vested right in any course

of procedure.

9. Two important principles of law can be deduced from the above judgment. The first is that the law of limitation is procedural and should operate

in respect of past transactions also. The only exception is whether the law of limitation is amended in such a way as to take away the rights of a

person to bring a suit within the period of limitation prescribed by the Act before the amendment comes into operation. In such a case, the law as

laid down by the Calcutta High Court is to see whether the plaintiff has time to apply before the new law comes into operation. It is this aspect of

the case which is strongly relied upon by learned counsel for the petitioner in suggesting that the respondent had time even after the new provisions

of section 41 of the Foreign Exchange Regulation Act, came into effect on January 8, 1993, to take appropriate action before February 17, 1993.

The contention is that in view of this availability of time, it must be interpreted that the amended provisions of section 41 of the Foreign Exchange

Regulation Act will have retrospective effect. Inasmuch as the respondents did not take steps even after amendment of section 41 of the Foreign

Exchange Regulation Act before February 17, 1993, they should be debarred from withholding the documents. In my opinion, the interpretation of

a statute cannot be left to differ with the facts of each case. In other words, in this particular case, it so happens that the seizure was on August 18,

1992, and even after the amendment of section 41 of the Foreign Exchange Regulation Act, there was a short period from January 8, 1993, to

February 17, 1993, for initiating action and consequently retaining the documents. But one can easily visualise other cases where for instance a

seizure is made on or before July 8, 1992. In respect of such seizure if the new section 41 of the Foreign Exchange Regulation Act is applied the

period of six months will expire by January 8, 1993, when the new Act came into force. In other words, in respect of seizure made prior to July 8,

1993, when the authorities were contemplating action within a period of one year as per the unamended Act they are suddenly faced with a

situation that the period has been reduced to six months and, therefore, they are bound to return the documents, because no action had been

initiated. Therefore, the proper interpretation of a statute of limitation reducing or shortening the period will be to see whether the amended Act

gives an outer date by which actions should be initiated in respect of applications which get barred by the amended provisions. One can easily

advert to several such enactments like the Limitation Act, 1963, and the Land Acquisition Act 64 of 1884. These enactments say that as and from

the date of the amended act action should be initiated within a particular period failing which the action, if any, will get time barred under the

provisions of the Amended Limitation Act. In this connection reference may be made to two other judgments of the Supreme Court in Ram Prasad

Dagduram Vs. Vijay Kumar Motilal Mirakhanwala and Others, . The apex court had to consider the applicability of article 138 of the Indian

Limitation Act, 1908, which abridged the period of limitation for enforcement of a mortgage. The Supreme Court held that the abridgment did not

take away any vested right. The following passage is in line with the approach indicated by me earlier (at page 283) :

But this abridgment did not impair or take away any vested right. Section 30 of the Indian Limitation Act, 1908, inserted by the Part B States

(Laws) Act, 1951, made suitable provision safeguarding vested rights in cases where the period prescribed was shorter than that prescribed by the

corresponding law previously in force in the Part B State.

10. In Syed Yousuf Yarkhan and Others Vs. Syed Mohammed Yarkhan and Others, , the apex court was concerned with the recovery of a wakf

property and the fact that the Hyderabad Limitation Act did not contain any period of limitation for the recovery of wakf property. On the other

hand, article 142 of the Indian Limitation Act, 1908 which was made applicable to the area in question by the Part B State (Laws) Act, 1951, with

effect from April 1, 1951, provided a limited period of recovery of wakf property and the question was whether the switchover from an unlimited

period to a limited period had the effect of taking away the vested right and as to the principles which would govern the case. The Supreme Court

observed (at page 1320) :

The extension of the Indian Limitation Act, 1908, to Hyderabad and the consequential change in law prescribing a shorter period of limitation did

not confiscate the existing cause of action and must be regarded as an alteration in the law of procedure for the enforcement of the cause of action.

We must, therefore, apply the normal rule that the law of limitation applicable to

the suit is the law in force at the date of the institution of the suit.

The suit is, therefore, governed by the Indian Limitation Act, 1908. The plaintiffs did not institute the suit within two years after April 1, 1951. They

cannot, therefore, avail themselves of the benefit of section 30.

11. Let me now find out whether section 41 of the Foreign Exchange Regulation Act, which was amended to reduce the period of retention of

documents by the authorities from one year to six months contains any such salient provisions like section 30 of the Indian Limitation Act, 1908. If

there is no such safeguard in the amended provisions of section 41 of the Foreign Exchange Regulation Act, the contention of the respondents that

the substantial right of the Department to retain the documents for a period of one year cannot be reduced to six months and the documents

directed to be returned to the persons from whom they were seized, can be taken as well founded. A careful perusal of the amended provision of

section 41 of the Foreign Exchange Regulation Act shows that after reducing the period to six months a proviso was added. It is as follows :

Provided that the aforesaid period of six months may, for reasons to be recorded in writing, be extended by the Director of Enforcement for a

further period not exceeding six months.

12. It is thus clear that where in stated cases the department is faced with the situation that the period of six months expires on the date of coming

into force of the amended provisions namely on January 8, 1993, it is always open to the Director of Enforcement to come to the aid of the

authority and extend the period up to a maximum limit of six months, after recording the reasons therefor. In my opinion, this safety valve in the

amended section 41 of the Foreign Exchange Regulation Act, provides the key to solve the disputed question between the parties. Even assuming

on the particular facts of the case where even after the amendment to section 41 of the Foreign Exchange Regulation Act, the Department had a

short period from January 8, 1993, to February 17, 1993, to initiate action and continue to have possession of the seized documents, and that it

was not sufficient, it was open to the authorities to have sought for extension of time by applying to the Director of Enforcement under the proviso

above quoted.

13. The argument of the respondent is that no question of limitation is involved

in section 41 of the Foreign Exchange Regulation Act and the right to retain the documents is a substantive right and, therefore, the same cannot be taken away by the amended provisions. There is a misconception in the argument because the amended provision does not take away the substantial right to retain the documents. On the other hand, the amended provision only says that instead of a period of one year the authorities can retain documents only for a period of six months, subject of course, the authorities initiating action under sub-clauses (1) and (11) of section 41 of the Foreign Exchange Regulation Act. So far as the reduction of the period of limitation is concerned, on the basis of the voluminous authorities cited above, I have no hesitation in holding that the shortening of the period of limitation is only procedural and, therefore, the amended provisions will alone apply subject to the proviso above quoted. In this case, it is not disputed that there was no order of the Director of Enforcement extending the period of retention of the documents by the respondent.

14. The last argument of the respondents is based on section 6(e) of the General Clauses Act, 1897. In my opinion, there is no scope for resorting to section 6 of the General Clauses Act because this is not a case of repeal of a provision of law and the repeal not affecting any investigation or obligation arising out of an Act being proceeded with as if the repealing Act had not been passed. The shortening of the period of limitation and the retrospective or prospective application of the amendment will depend only upon the considerations already referred to and as decided by various courts, including the apex court.

15. The prayer in Writ Petition No. 1279 of 1994 has necessarily to be conceded based on the judgment of the Supreme Court of India in S. L.

P. (Civil No. 3997 of 1976 in Arjunan Chettiar v. Enforcement Officer [1977] 2 MLJ 5 (SC). Consequently, a writ of mandamus will issue

directing the respondents to return the seized currency to the tune of Rs. 1,65,000 to the petitioner herein within eight weeks from today. Writ

Petition No. 1279 of 1994 is allowed in the above manner.

16. The above decision will not automatically result in prayer in W. P. No. 1280 of 1994 being granted. I have already noticed the fact that in this

writ petition the challenge is to the show-cause notice dated August 4, 1993, on the ground that the Special Director, S. S. Renghen has no

jurisdiction to issue the notice. The argument of Mr. S. K. L. Rattan is as follows :

Section 3 of the Foreign Exchange Regulation Act lists the classes of officers of enforcement Sub-clause (3) of section 3 says that such other classes of officers of enforcement may be appointed for the purpose of the act. Section 4(1) of the Act empowers the Central Government to appoint any person as it thinks fit to be an Officer of Enforcement. Sub-section (2) of section 4 need not detain us because that relates to the delegation of power to certain classes of officers to appoint an Officer of Enforcement below the rank of Assistant Director of Enforcement. We are not concerned with such a case in this writ petition. The argument of the petitioner is that under G. S. R. No. 61, dated January 1, 1974, the Central Government had already authorised the Director of Enforcement to appoint officers of enforcement below the rank of an Assistant director of Enforcement. On the creation of a class designated as Enforcement Officers the power under clause (e) of section 3 read with section 4(1) gets exhausted, according to the petitioner. It is the further case of the petitioner that the Government is not empowered by section 3(e) to create a new class or a new post. The class of Enforcement Officers already created u/s 3(e) rank below the Assistant Director. Therefore, it is argued that the post of a Special Director cannot come within the class because he ranks above the Additional Director and below the director. Learned counsel for the petitioner relies on certain text books in support of his argument. In the text book written by R. Swaminathan, the following is relied on :

Special directors have not been notified by the Central Government as officers above the rank of assistant directors and hence powers of adjudication given to them may be open to question, though at present each Special Director of Enforcement is specially entrusted with adjudication powers by separate notifications.

The above passage does not conclusively prove that the delegation to special director is illegal or contrary to the provisions of section 3 and 4 of the Act. In fact, the author later on says :

The words in section 50 of the Foreign Exchange Regulation Act, say the officer in question should be specially empowered in this behalf by an order of the Central Government, would appear to require each officer to be specially empowered and not by empowering a whole class of

officers.

17. In answer to the above contention Mr. C. A. Sundaram points out that in the instant case there was a specific notification dated September 22,

1989, published in the Gazette of India which specifically authorises the Special Director to be an Officer of Enforcement for the purpose of

enforcing the provisions of the Act and to exercise the power u/s 50 of the Act. These notifications purport to have been issued in the exercise of

the power conferred by section 4(1) read with section 3(e) of the Foreign Exchange Regulation Act. I am of the opinion that the argument of the

petitioner is without any force because section 4(1) categorically says that the Central Government may appoint any person as it thinks fit to be an

Officer of Enforcement. Mr. S. S. Renghen has been specifically appointed as an Officer of Enforcement with the designation of a Special Director

of Enforcement. There can, therefore, be no dispute that the impugned show-cause notice is valid. That apart, as rightly pointed out by learned

counsel for the respondents, the doctrine of factum valet or the defect theory will apply to this case. For this proposition, learned counsel relies on

the judgment of the Supreme Court in Gokaraju Rangaraju Vs. State of Andhra Pradesh, , and Pushpadevi M. Jatia v. Wadhavan (M. L.) [1987]

12 ECC 356; [1988] 64 Comp Cas 228. The following passage in the latter decision is sufficient to uphold the contention of the respondents (at

page 244 of 64 Comp Cas) :

In any event, learned counsel further contends that R. C. Singh was clothed with the insignia of office and he was purporting to exercise the

functions and duties of a Gazetted Officer of Enforcement u/s 40(1) of the Foreign Exchange Regulation Act and, therefore, the de facto doctrine

was attracted. He relied upon the decision of this court in Gokaraju Rangaraju Vs. State of Andhra Pradesh, , enunciating the de facto doctrine,

born of necessity and public policy to prevent needless confusion and endless mischief. In other words, he contends that where an officer acts

under the law, it matters not how the appointment of the incumbent is made so far as the validity of his acts is concerned.

18. In this view of the matter, I, therefore, reject the contention of the petitioner that the first respondent has no jurisdiction to issue the subject

show-cause notice. Consequently, Writ Petition No. 1280 of 1994 is dismissed.

There will, however, be no order as to costs.