
(1995) 12 KAR CK 0024
In the Karnataka High Court
Case No : Writ Petition No. 7060 of 1989

Mohammed Ajmal

APPELLANT

Vs

Assistant Director and others

RESPONDENT

Date of Decision : 12-12-1995

Acts Referred:

Customs Act, 1962 — Section 124 (a)
Foreign Exchange Regulation Act, 1973 (FERA) — Section 38

Citation : (1996) 85 CompCas 146

Hon'ble Judges : R.V. Raveendran, J

Bench : Single Bench

Advocate : G. Chander Kumar, for the Appellant; Bapu Heedur Shetty, for the Respondent

Judgement

R.V. Raveendran, J.—The petitioner, who claims to be a permanent resident of Bhatkal, has filed this petition for quashing the seizure of Indian currency of Rs. 5,55,000 by the second respondent under seizure proceedings drawn on April 4, 1989 (annexure "O") contending that such seizure amounts to re-seizure which is illegal and without jurisdiction. He also seeks a direction to respondents Nos. 1 and 2 to release and deliver back to the petitioner, the said currency of Rs. 5,55,000 seized under mahazar, dated April 4, 1989, on the ground that it is retained illegally and without jurisdiction.

2. It is necessary to refer to the facts leading to the impugned seizure.

3. The petitioner claims that he travelled from Bombay to Bhatkal by a Maharashtra luxury bus and got down at Bhatkal on February 18, 1986, at about 19.15 hours, with three packages. When he got down from the bus, certain officers of the Customs Department approached him and asked his name and address; the petitioner furnished them and also produced two tickets showing his travel from Bombay to Bhatkal. Thereupon the Superintendent of Customs informed the petitioner that he had reasonable belief that he was carrying smuggled goods and he was therefore asked to accompany them to the Customs

office for detailed examination and search. On search by the Customs Superintendent at the Customs office, it was found that the two cardboard packages carried by the petitioner contained homeopathic medicines and personal articles of domestic use and nothing else. The third package (a sack hand bag) that was being carried by the petitioner contained Indian currency notes of the value of Rs. 5,55,000, wrapped in old newspapers. The petitioner claims that he had explained to the Customs officials that the amount had been received as a loan at Bombay to be handed over to his father at Bhatkal. However, the Superintendent of Customs seized the currency notes of Rs. 5,55,000 on the ground that they were unaccounted and the petitioner had failed to produce proof for valid possession of such amount. The seizure was effected under mahazar, dated February 18, 1986 (annexure "A").

4. On February 20, 1986, the first respondent, who is an Assistant Director in the Enforcement Directorate, Bangalore, purporting to exercise his powers u/s 38 of the Foreign Exchange Regulation Act, 1973 ("the Act" or "the FERA", for short), seized the said Indian currency of Rs. 5,55,000 and documents from the possession of the Superintendent of Customs, Anti-Smuggling Unit, Bhatkal, under another mahazar, dated February 20, 1986 (annexure "B"), being under the belief that the same will be useful for and relevant to the investigation being made under the FERA. In pursuance of it, the first respondent issued a show-cause notice (memorandum), dated October 27, 1986 (annexure "L") calling upon the petitioner to show cause why adjudication proceedings as contemplated in section 51 of the Act should not be held against the petitioner for the contravention alleged therein and why the Indian currency of Rs. 5,55,000 seized on February 20, 1986, being the amount involved in the contravention should not be confiscated u/s 63 of the Act. It is alleged in the said memorandum that the petitioner had received a sum of Rs. 6,00,000 from a person, other than an authorised dealer in foreign exchange, by order of or on behalf of a person resident outside India, without the general or special permission of the Reserve Bank of India in contravention of section 9(1)(b) and had paid Rs. 40,000 out of it to persons in India by order of or on behalf of a person residing outside India and thereby contravened section 9(1)(d). It is stated that the said proceedings for confiscation are still pending.

5. In the meanwhile, the petitioner challenged the seizure made on February 18, 1986, by the Superintendent of Customs and the seizure, dated February 20, 1986, by the first respondent, in W.P. No. 18180 of 1986, and sought release and delivery of the amount. This court allowed the said petition by order dated January 4, 1989 (annexure "M"), and quashed the seizures, dated February 18, 1986, and February 20, 1986. In regard to the first seizure, dated February 18, 1986, this court held that as no notice was given u/s 124(a) of the Customs Act, 1962, informing the grounds on which it was proposed to confiscate the currency, within six months of the seizure, the person from whom the currency was seized became entitled for the return of the same, u/s 110(2) of the Customs Act, 1962. In regard to the seizure by the first respondent on February 20, 1986, this

court held, relying on the decisions of the Supreme Court in *Gian Chand and Others Vs. The State Of Punjab*, and *Commissioner of Income Tax, Haryana, Himachal Pradesh and Delhi and Others Vs. Tarsem Kumar and Another*, that seizure means taking possession against the will of the person possessing the property, and at the time of seizure on February 20, 1986, as the Indian currency had already been seized by the customs officials and was in the custody of the customs department, the said currency notes could not be once again seized and, therefore, the second seizure was illegal. Consequently, this court quashed the mahazar, dated February 20, 1986, and directed the first respondent herein to return the money to the person from whom it had been taken possession (that is the Superintendent of Customs, Anti-Smuggling Unit, Bhatkal). This court also held that the petitioner was entitled to receive the currency notes from the Superintendent of Customs, on the same being redelivered by the Enforcement Directorate subject however to the following observations :

"However, it is made clear that it is open to the Enforcement Directorate authorities to take such action as is available to them under law to pursue the matter further even by seizing the currency on return of the same to the petitioner by the customs department."

6. Feeling aggrieved by the said observations, the petitioner filed the Writ Appeal No. 356 of 1989, and the writ appeal was disposed of by a Division Bench of this court by the order dated March 2, 1989. The said order is extracted below in full :

"Learned Standing Counsel for the Central Government has no objection to the deletion of the words "even by seizing the currency on return of the same to the petitioner by the Customs Department" from the impugned judgment. Accordingly, the said words shall stand deleted from the judgment, and this appeal is disposed of with this observation that it is open to the Enforcement Directorate authorities to take such action as is available to them under law to pursue the matter further."

7. The effect of the decision of the learned single judge as modified by the Division Bench is that it was open to the Enforcement Directorate to take such action as is available to them under law to pursue the matter further. In pursuance of the said decision, the first respondent returned the Indian currency of Rs. 5,55,000 to the Superintendent of Customs, Anti-Smuggling Unit, Bhatkal, on April 4, 1989, and the Superintendent of Customs returned the Indian currency of Rs. 5,55,000 to the petitioner and obtained a receipt from him for the same amount. Immediately thereafter, the first respondent seized the said Indian currency of Rs. 5,55,000, the documents (four sheets), a sack hand bag, torn newspaper wrappers and the copy of the acknowledgment dated April 4, 1989, issued by the petitioner to the Superintendent of Customs for having received the Indian currency from the petitioner under mahazar, dated April 4, 1989, (annexure "O"), being under the reasonable belief that a contravention of the FERA existed. Feeling aggrieved by the said seizure the petitioner has filed

this petition for the reliefs mentioned in para (1) above.

8. Learned counsel for the petitioner urged the following two contentions :

(a) The seizure under annexure "O", dated April 4, 1989, amounted to re-seizure 1 and it violated the fundamental rights of the petitioner under article 19(1)(f) of the Constitution of India and contravened the decision of the Division Bench of this court in W.A. No. 356 of 1989; and

(b) The seizure was not in accordance with section 38 of the Act.

9. Re : Contention (a) :

Elaborating on the first contention, learned counsel for the petitioner contended that the deletion of the words "even by seizing the currency on return of the same to the petitioner by the customs department" by the Division Bench in appeal from the order of the learned single judge in W.P. No. 18180 of 1986, would mean that the Division Bench had given a finding that the seized currency had to be returned to the petitioner and should not be seized again by the first respondent. But a careful reading of the order of the learned single judge with the order of the Division Bench does not lead to such a finding or inference. The order of the Division Bench made it clear that it was open to the Enforcement Directorate to take such action as is available to them under law to pursue the matter further. If seizure u/s 38 of the Act is an action available to the Enforcement Directorate under law, having regard to the decision by the learned single judge and the Division Bench, the Enforcement Directorate was entitled to take such action. Hence, the contention that the seizure on April 4, 1989, was in contravention of the decision of the Division Bench cannot be accepted.

10. Learned counsel for the petitioner next contended that the seizure under annexure "O" amounted to re-seizure of the goods. He relied on the decision of the Calcutta High Court in Sri Jethanand Tahilram v. Union of India [1979] ELT 538, wherein it was held that seizure of the same goods over and over again from the possession of the same person will be a serious violation of the fundamental right to hold property guaranteed under article 19(1)(f) of the Constitution and that section 110(1) of the Customs Act, 1962, did not authorise the proper officer to re-seize the goods which were ordered to be returned to the person from whom they were seized. In that case, certain goods belonging to the petitioner were seized u/s 110(1) of the Customs Act from the possession of the petitioner therein and no notice u/s 124(a) of the said Act was given within six months from the seizure of the goods. The Assistant Collector of Customs extended the period for issue of such notice expert which was quashed by the Calcutta High Court with a direction to the customs authority to return the goods. Thereafter, the goods were returned and again re-seized, Such re-seizure was challenged in the said case and the court held that the re-seizure was bad. The facts of this case are completely different. We are not concerned with the validity of a seizure by a customs officer, but with the validity of a seizure under the FERA. The learned single judge in his order dated January 4, 1989, held that

there was no valid seizure at all by the first respondent, under the FERA as the Indian currency having already been seized by the Superintendent of Customs, there could not be a "seizure" again by the first respondent under the FERA, as it did not involve taking possession contrary to the wishes of the person in possession. When this court has specifically found that there was no seizure in the eye of the law as the authority under the FERA could not seize the currency already seized by an authority under the Customs Act and quashed such seizure on the ground that it was illegal, the seizure under memorandum dated April 4, 1989, cannot be called as a "re-seizure" at all. Secondly, this court expressly reserved liberty to the Enforcement Directorate to take action as is available to them under law and pursue the matter further. Thus this is not a case of re-seizure after an order to return unconditionally. In the Calcutta case, relied on by the petitioner, the first seizure was not found to be not a "seizure" and the court did not expressly reserve liberty to the department to take further action in accordance with law. Hence, there is no violation of any fundamental right of the petitioner and the first contention is rejected.

11. Re : Contention (b) :

Learned counsel for the petitioner contended that u/s 38 of the FERA, an authorised officer of the Enforcement Directorate may seize any document or thing, if he has reason to believe that such document or thing will be useful for, or relevant to, any investigation or proceedings under the Act or in respect of which, a contravention of any of the provisions of the Act or any rule or directions made thereunder has taken place. He contended that the impugned mahazar, dated April 4, 1989, does not disclose that the first respondent effecting the seizure had such reason to believe that the Indian currency seized was useful for or relevant to any investigation or proceeding under the Act or that there was a contravention of the Act or rules or direction, in respect of such currency. He submitted that the reasons, if any, which existed in the year 1986, when the first respondent seized the currency on February 20, 1986, cannot be considered as reasons for a seizure three years later on April 4, 1989. He contended that the authorised officer ought to have fresh reasons to effect the seizure.

12. In support of this contention, he relied on several decisions. Let me refer to them briefly. The first decision is of the Calcutta High Court in *New Central Jute Mills Co. Ltd. Vs. T.N. Kaul and Others*, In that case, while dealing with section 19D of the Foreign Exchange Regulation Act, 1947, corresponding to section 37 of the present Act, the Calcutta High Court held that reasons for formation of the belief that the document were secreted or likely to be secreted, which were obtained more than two years prior to the search, could not be considered as reasons for authorising the search. He also relied on another decision of the Calcutta High Court in *Bishnu Krishna Shrestha Vs. Union of India (UOI)*, where the court held that the words "reason to believe" occurring u/s 37 of the Act, were different from the words "reason to suspect" and only to safeguard against

abuse of power of seizure, the requirement of "having reason to believe" had been provided; "reason to believe" is not synonymous with subjective satisfaction of the officer; and such belief must be held in good faith; and it cannot merely be a pretence; the empowered officer must have reasonable grounds for formation of the requisite belief and he should record the grounds for his belief; and the belief must be his belief and cannot be on the mere direction given by some one else.

13. He next relied on the decision of the Gujarat High Court in *Bapalal Khushaldas Gosalia v. Collector of Central excise* AIR 1965 Guj 135, which dealt with a case u/s 178A of the Sea Customs Act, 1878. The Calcutta High Court held that where from the facts of the case, there was no ground to hold a reasonable belief that the gold was smuggled and the person in possession contended that he was in possession as a result of a bona fide purchase, it was for the customs authority to prove that the gold was imported contrary to law. It was held (page 140) :

"Though a court of law would not be sitting in appeal over the decision of the inquiring officer, and must be content to consider whether there is a ground which prima facie justifies such a reasonable belief, the condition precedent that there was such a reasonable belief anterior to the seizure is necessary before the presumption u/s 178A can be invoked. Where section 178A cannot be invoked and where the person against whom the order is passed contends that he was in possession of the goods as a result of a bona fide purchase by him and that the goods were not smuggled goods, it would be the customs authorities who would have to prove that the goods were imported after the restrictions against import were imposed."

14. Reliance was also placed on the decision of the Punjab and Haryana High Court in *Ramesh Chander and Others Vs. Commissioner of Income Tax and Others*, arising u/s 132 of the Income Tax Act, 1961. In that case, certain currency carried by a person was recovered by the police. The police found that the person had not committed any offence. Therefore, they contacted the Income Tax Department. The Commissioner of Income Tax issued warrants authorising certain Income Tax Officers to search and seize the money. At the time of issue of warrants of search and seizure, neither the Commissioner nor the Income Tax Officers knew anything about the person from whom the amount was to be seized or his profession or his income or whether he was arrested or whether there was any reason to believe that the amount was held as a consequence of evasion of tax. The court held that merely because the person was carrying a considerable amount that could not give rise to a presumption that there was violation of the Income Tax Act and unless there was reasonable basis and reasons to believe a violation, the seizure was bad.

15. Lastly, he relied on the decision of the Supreme Court in *K.L. Subbayya Vs. State of Karnataka*, wherein it was held that a search and seizure by the Inspector of Excise, without recording any reasons on the basis of which he had

reasonable belief that an offence under the Act was being committed, before proceeding with such seizure, was not in compliance with section 54 of the Karnataka Excise Act and, therefore, the entire search was without jurisdiction.

16. Relying on the said decisions, learned counsel for the petitioner contended that seizure on April 4, 1989, was not preceded by the first respondent having any reason to believe that the currency seized was useful for or relevant to any investigation or proceedings under the Act or that any contravention of the Act had taken place in regard to the said currency.

17. The decisions of the Gujarat High Court, Punjab and Haryana High Court and Supreme Court were rendered on the facts of those cases and are of no assistance to the petitioner.

18. In regard to the decisions of the Calcutta High Court relied on by the petitioner relating to section 37 of the FERA, it should be noticed that the principles relating to section 37 may not apply to all cases of seizure u/s 38 of the Act. Section 37 deals with search of a premises and seizure of documents, if the specified officer has reason to believe that documents are secreted in any place. Similarly, section 36 enables search of a vehicle, vessel or aircraft, if the specified officer has reason to believe that documents are secreted in any such conveyance. There cannot be a doubt that an officer who does not have any reason, in praesenti, to believe that documents are secreted in a place or conveyance, cannot direct search of a place or conveyance. The fact that several years ago, such officer had a reason to believe that sole documents were secreted in such place or conveyance may not be sufficient to effect a search unless he had a reason to believe, immediately before effecting a search, that documents are secreted in the place or conveyance to be searched. On the other hand, section 38 is differently worded. u/s 38, the time of formation of the belief may not be relevant in all circumstances. Under sections 36 and 37, having reason to believe that documents which are relevant being secreted, is the basis for the search and consequential seizure. Section 38, on the other hand, does not deal with search nor concerned with any document being "secreted". Section 38 comes into play where the authorised officer is aware of the existence of the document or thing. All that is required for seizure is reason to believe that such document or thing will be useful for or relevant to any investigation or proceeding under the Act or in respect of which a contravention of any provision of the Act, Rules, direction or order has taken place. Thus, the point of time when he obtained the reasons for the belief, becomes immaterial.

19. In this case, according to the department, the petitioner got down from a bus at Bhatkal on February 18, 1986, with some packages. One of the packages carried by the petitioner was found to contain Indian currency of Rs. 5,55,000 and two small chits which were receipts dated February 14, 1986; and when the Customs Officer asked the petitioner to produce documents to justify possession of the Indian currency of Rs. 5,55,000 the petitioner did not produce any document or give any reasons justifying possession of such a large amount in

currency notes. Further, the petitioner is stated to have told the Customs Officer that a person, whose name and address he did not know, had delivered the bag containing the currency notes to him at Bombay bus stand to be carried to Bhatkal and he was informed by the person who gave him the money that he will receive a list of persons to whom the cash had to be delivered, after he reached Bhatkal, and that he did not know anything else. These are found in the mahazar, dated February 18, 1986, drawn by the Customs Department. The said information was sufficient to give a reason to believe that Indian currency of Rs. 5,55,000 and certain documents which were seized by the Customs Department from the petitioner will be useful for and relevant to the investigation being made under FERA. Hence, the first respondent seized them on February 20, 1986. The said seizure was quashed by this court purely on a technical ground, expressly reserving a right to take action in accordance with law. As a consequence, the currency and documents which were seized on February 20, 1986, were returned to the Superintendent of Customs who in turn returned it to the petitioner and the first respondent seized them from the first respondent on April 4, 1989. In the circumstances, necessarily, the reasons which earlier existed on February 18, 1986, and February 20, 1986, can only be the reasons for the seizure on April 4, 1989, and there cannot be any fresh reasons for the seizure on April 4, 1989. There is no need to get any additional facts or additional reasons for the seizure. The reason which made the authorised officer believe that the things seized were required in connection with any investigation under the FERA or that the things seized were the subject matter of contravention of the provisions of the FERA were the very reasons which existed earlier on February 20, 1986. The seizure on April 4, 1989 was made not on account of any fresh contravention of the Act nor in connection with any fresh investigation, but on account of the very same contravention for which it was seized on February 20, 1986. The seizure on April 4, 1989, became necessary on account of this court finding that the seizure on February 20, 1986, suffered from a technical defect and this court permitting the department to take fresh steps. The seizure on April 4, 1989, is nothing but an action taken in pursuance of the Act, for doing which, express permission was given by this court while disposing of the earlier case. In the mahazar dated April 4, 1989, it is recorded that the first respondent had reasonable belief that there existed a contravention of the provisions of the FERA in regard to the Indian currency and the documents seized. Hence, the seizure under mahazar, dated April 4, 1989, is in accordance with section 38 of the FERA. Hence, the contention of the petitioner that the reasons that were available on February 20, 1986, could not be the reasons for the seizure on April 4, 1989, is rejected.

20. Learned counsel for the petitioner submitted that the petitioner had explained the possession of the currency by stating that it was a loan obtained for his father. Having regard to the fact that the petitioner was carrying Rs. 5,55,000 and the answers said to have been given to the customs officials by the petitioner to the queries regarding the possession of the said currency disclosed that there could be a contravention of the provisions of the FERA, there are

sufficient reasons to seize the currency u/s 38. The ultimate success of the case of the department is not relevant at the point of seizure; and by satisfactory explanation, it is possible that a person may even succeed in the confiscation proceedings. But that does not mean that the reasonable belief that is entertained by the officers seizing the currency, was insufficient for the purpose of section 38. Consequently, the second contention is also rejected.

21. No other point is urged. This petition is, therefore, rejected.

22. It is stated that the matter is pending for more than six years and the petitioner has been denied the use of the seized money. I am sure, the authority before whom the matter is pending will expedite the hearing and dispose of the matter in accordance with law in the near future, if the petitioner approaches him for expeditious disposal and co-operates with the authority for such early disposal.