(1995) 12 KAR CK 0022

In the Karnataka High Court

Case No : Writ Petition No. 7060 of 1989

Mohammed Ajmal APPELLANT

Vs

The Assistant Director Enforcement Directorate and others RESPONDENT

Date of Decision : 12-12-1995

Acts Referred:

Constitution of India, 1950 — Article 19 (1) (f)
Foreign Exchange Regulation Act, 1973 (FERA) — Section 38

Citation : (1998) 91 CompCas 499(1) : (1996) CriLJ 3644 : (1995) 6 KarLJ 281

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

Bench : Single Bench

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

Judgement

1. The petitioner, who claims to be a permanent resident of Bhatkal, has filed this petition for quashing the seizure of India currency of Rs. 5,55,000/- by the second respondent under seizure proceedings drawn on 4-4-1989 (Annexure-0) contending that such seizure amounts to re-seizure which is illegal and without jurisdiction. He also seek a direction to respondents 1 and 2 to release and deliver bank to the petitioner the said currency of Rs. 5,55,000/- seized under mahazar dated 4-4-1989, 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.

2.1. The petitioner claims that he travelled from Bombay to Bhatkal by a Maharashtra Luxury Bus and got down at Bhatkal on 18-2-1986 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; 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 card board 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 news papers. 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 petitioner had failed to produce proof for valid possession of such amount. The seizure was effected under Mahazar dated 18-2-1986 (Annexure-A).

2.2. On 20-2-1986, 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, (''Act'' or ''FERA'' for short) seized the said Indian Currency of Rs. 5,55,000/- and documents from the possession of Superintendent of Customs, Anti Smuggling Unit, Bhatkal, under another Mahazar dated 20-2-1986 (Annexure-B), being under the belief that the same will be useful for and relevant to the investigation being made under FERA. In pursuance of it, the first respondent issued a show-cause notice (memorandum) dated 27-10-1986 (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 20-2-1986 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 petitioner had received a sum of Rs. 6,00,000/- from a person, other than an authorised dealer in foreign exchange, by order or on behalf of a person resident outside India, without the general or special permission of 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)(b). It is stated that the said proceedings for confiscation is still pending.

2.3. In the meanwhile, the petitioner challenged the seizure made on 18-2-1986 by the Superintendent of Customs and the seizure dated 20-2-1986 by the first respondent, in W.P. No. 18180/1986 and sought release and delivery of the amount. This Court allowed the said petition by order dated 4-1-1989 (Annexure-M) and quashed the seizures dated 18-2-1986 and 20-2-1986. In regard to the first seizure dated 18-2-1986, 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 20-2-1986 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 20-2-1986, 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 20-2-1986 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."

2.4. Feeling aggrieved by the said observations, petitioner filed Writ Appeal No. 356/1989 and the Writ Appeal was disposed of by a Division Bench of this Court by the order dated 2-3-1989. The said order is extracted below in full :

"Learned Standing Counsel for 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."

2.5. 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. 5,50,000/- to the Superintendent of Customs, Anti-Smuggling Unit, Bhatkal, on 4-4-1989 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 news paper wrappers and the copy of acknowledgment dated 4-4-1989 issued by petitioner to the Superintendent of Customs for having received the Indian currency from the petitioner under Mahazar dated 4-4-1989 (Annexure-0), being under the reasonable belief that a contravention of FERA existed. Feeling aggrieved, by the said seizure the petitioner has filed this petition for the reliefs mentioned in para (1) above.

3. The learned counsel for the petitioner urged the following two contentions :

(a) The seizure under Annexure ''O'' dated 4-4-1989 amounted to re-seizure; 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. 356/1989; and

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

4. Re : Contention (a)

4.1 Elaborating on the first contention, the 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. 18180/1986, 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 under Sec. 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 4-4-1989 was in contravention of the decision of the Division Bench cannot be accepted.

4.2 The 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 Jethanand Tahilram Vs. Union of India (UOI) and Others, 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 ex parte 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 reseized. 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 validity of seizure by a customs officer, but with the validity of a seizure under FERA. The learned Single Judge in his order dated 4-1-1989 held that there was no valid seizure at all by the first respondent, under 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 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 FERA could not seize the currency already seized by an authority - the Customs Act and quashed such seizure on the ground that it was illegal, the seizure under memorandum dated 4-4-1989 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.

5. Re : Contention (b)

5.1 The learned counsel for the petitioner contended that u/s 38 of 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 4-4-1989 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 20-2-1986 cannot be considered as reasons for a seizure three years later on 4-4-1989. He contended that the authorised officer ought to have fresh reasons, to effect the seizure.

5.2 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 delaying with Section 19(d) of the Foreign Exchange Regulation Act, 1947 correspondent 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 of his belief; and the belief must be his belief and cannot be on the mere direction given by some one else.

5.3 He next relied on the decision of Gujarat High Court in Bapalal Khushaldas Gosalia v. Collector of Central Excise in 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 :

"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 under Sec. 178-A can be invoked. Where Sec. 178-A 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."

5.4 Reliance was also placed on the decision of Punjab and Haryana High Court in Ramesh Chander and Others Vs. Commissioner of Income Tax and Others, arising u/s 132 of 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 Officer 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 possession 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.

5.5 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 offence under the Act was being committed, before proceeding with such seizure, was not in compliance with Section 54 of Karnataka Excise Act and therefore the entire search was without jurisdiction.

5.6 Relying on the said decisions, the learned Counsel for the petitioner contended that seizure on 4-4-1989 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.

5.7 The decisions of 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 petitioner.

5.8 In regard to the decisions of the Calcutta High Court relied on by the petitioner relating to Section 37 of 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 Sec. 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 presenti, 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 some 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, 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 come into play where the Authorised Officer is aware of the existence of the document or thing. All that it required for seizure is a reason to believe that such document or thing will be useful or relevant to any investigation or proceeding under the Act or in respect of which a contravention of any provision of the Act, Rule, direction or order has taken place. Thus, the point of time when he obtained the reasons for the belief, becomes immaterial.

5.9 In this case, according to the Department, the petitioner got down from a bus at Bhatkal on 18-2-1986 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 14-2-1986; and when the Customs Officer asked the petitioner to produce documents to justify possession of the Indian currency of Rs. 5,55,000/- petitioner did not produce any document or give any reasons justifying possession of such 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 18-2-1986 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 20-2-1986. The said seizure was quashed by his 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 20-2-1986 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 4-4-1989. In the circumstances, necessarily, the reasons which earlier existed on 18-2-1986 and 20-2-1986, can only be the reasons for the seizure on 4-4-1989 and there cannot be any fresh reasons for the seizure on 4-4-1989. There is no need to get any additional facts or additional reasons for the seizure. The reason which made the Authorised Officer to believe that the things seized were required in connection with any investigation under FERA or that the things seized were the subject matter of contravention of the provisions of FERA were the very reasons which existed earlier on 20-2-1986. The seizure on 4-4-1989 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 20-2-1986. The seizure on 4-4-1989 became necessary on account of this Court finding that the seizure on 20-2-1986 suffered from a technical defect and this Court permitting the Department to take fresh steps. The seizure on 4-4-1989 is nothing but an action take in permission was given by this Court while disposing the earlier case. In the mahazar dated 4-4-1989 it is recorded that the first respondent had reasonable belief that there existed a contravention of the provisions of FERA in regard to the Indian Currency and the documents seized. Hence the seizure under Mahazar dated 4-4-1989 is in accordance with Section 38 of FERA. Hence the contention of the petitioner that the reasons that were available on 20-2-1986 could not be the reasons for the seizure on 4-1-1989, is rejected.

5.10 The learned counsel for petitioner submitted the petitioner had explained the possession of currency by stating that it was a loan obtained for his father. Having regard to the fact 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 FERA, 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 is also rejected.

6. No other point is urged. This petition is therefore rejected.

7. It is stated that the matter is pending for more than 6 years and 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.

8. Petitioner dismissed.