

(1989) 06 CAL CK 0029
In the Calcutta High Court
Case No : Matter No. 525 of 1987

Nanjiah Chandappa and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 21-06-1989

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1990) CriLJ 2325 : (1990) 25 ECC 417 : (1992) 62 ELT 715

Hon'ble Judges : Ajit K. Sengupta, J

Bench : Single Bench

Advocate : Bhaskar Sen, Bar-at-law, Hasmukh Kundalia and Bidyut Dutt, for the Appellant; J.N. Roy and Samir Sengupta, for the Respondent

Final Decision : Allowed

Judgement

Ajit K. Sengupta, J.—In this writ application under Article 226 of the Constitution the petitioner has challenged the order of detention dated 14th November, 1986 passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as COFEPOSA). This application was moved on February 13, 1987, affirmed by the wife of the petitioner as the petitioner was at the material time in USA in connection with his export business pursuant to the leave granted by the Karnataka High Court.

2. Upon the said application being moved an interim order was made on 19th February, 1987 restraining respondents from giving any effect to or taking any steps in pursuance of the said order of detention dated 14th November, 1986. It may be mentioned that in spite of notice of the application served upon Deputy Director of Enforcement, no one put in appearance for the Deputy Director or for any of the respondents. On 23rd February, 1987 a further order was made giving liberty to the petitioner to incorporate the date and number of the order passed under COFEPOSA Act. Earlier direction made that the petitioner should not leave West Bengal without the leave of this Court was deleted in view of the fact that pursuant to leave granted by the Karnataka High Court the petitioner had already

left India and was at the material time away from the country.

3. Curiously enough on 6th April, 1987 Mr. Somen Bose, learned counsel appearing for the Union of India asked for vacating the interim order made by this Court urging that this Court has no jurisdiction to entertain this application. But the concerned respondents did not put in appearance nor did ask for vacating or variation of the said interim order. Liberty was reserved to the Union of India to make an application for vacating interim order on the ground that this Court has no jurisdiction to entertain this application on which the said interim order had been made. It was further directed that if and when such application would be made the contentions regarding jurisdiction of this Court to entertain this application would be decided. It was also directed that until disposal of the main writ application or vacating of the interim order whichever is earlier, the petitioner shall report once in every week to the respondent No. 5, the Deputy Director of Enforcement at Madras. In default, the interim order would stand vacated. Be it recorded that the petitioner returned to Calcutta on 5th April, 1987 and on 6th April, 1987 he was present in Court and accordingly the petitioner was directed to report to the Deputy Director of Enforcement on 9th April 1987.

4. The order directing the petitioner to report once in every week to the said respondent, Deputy Director of Enforcement at Madras was vacated by the order dated 15th May, 1987 upon undertaking given by the petitioner to this Court to appear before the said authority as and when he would be required to do so.

5. The matter appeared from time to time in the list but no one appeared on behalf of the respondents. Even affidavit was not filed, although direction was obtained. The petitioner filed a supplementary affidavit, copy whereof was served upon the respondents. In the said affidavit the writ petitioner has narrated certain further facts which were not incorporated in the writ application. Having regard to the averments made in the said supplementary affidavit, the following order was made on 20th May, 1987.

6. "On a consideration of the facts and circumstances mentioned in the supplementary affidavit affirmed by the writ petitioner on 14th May, 1987, it appears that the prayer of the writ petitioner merits consideration by the appropriate authorities. It has been inter alia, stated in the supplementary affidavit that if the writ petitioner is kept under detention the Government of India will lose valuable foreign exchange. The figures of exports" and the foreign exchange earned in the last few years have also been indicated. The business which the writ petitioner expects to expand during the coming years is also of considerable magnitude. It also appears from the said supplementary affidavit that the writ petitioner has been successful in exporting Jesmine Concrete to France and other European countries. If the writ petitioner is kept under detention, it is alleged that the international Market of the said product created by the writ petitioner through his sole efforts will be lost. Under the aforesaid circumstances, the writ petitioner has asked for reconsideration of the case.

7. Having regard to the facts and circumstances narrated in the said supplementary affidavit, the Deputy Director of Enforcement, Foreign Exchange Regulation, Government of India, the Respondent No. 5 is directed to consider the case of the writ petitioner in the light of the facts and the figures mentioned in the said supplementary affidavit. He should decide afresh without being influenced by the earlier decision taken by the authorities having regard to the expression of International Trade and earning of substantial foreign exchange for the country by the writ petitioner. He shall within 8 weeks from the date of communication of this order make a report to the Secretary, Ministry of Finance, Government of India or the appropriate authority dealing with COFEPOSA matter, as to whether in the interest of the country the order of detention should be withdrawn or not. The Secretary, Ministry of Finance, Government of India or the appropriate authority dealing with COFEPOSA matter, shall consider afresh on the basis of the report or recommendation of the Respondent No. 5 whether the order of detention should be acted upon or should be withdrawn. The appropriate authorities shall communicate their decision to this Court within 8 weeks after the receipt of the report of recommendation of the Respondent No. 5.

8. In the meantime, the interim order already passed will continue until further orders.

9. Let a copy of the supplementary affidavit be sent to the respondent No. 5 along with a copy of this order."

10. On 15th February, 1988 an application for vacating the interim order was made by the respondent No. 4, Deputy Director of Enforcement, FERA, Calcutta. Direction for filing affidavit was given on 18th February, 1988. Records were directed to be produced. Time to file affidavit, however, was extended from time to time. After affidavits were filed the Court directed on 2nd August, 1988 for production of records of the case including the records of the Ministry concerned. On 25th November, 1988 when the matter was being heard, records were produced before this Court. It was submitted on behalf of the respondents that the Court might look in to the records but inspection should not be allowed to the petitioner at this stage. This prayer was not opposed by the Id. Advocate for the petitioner.

11. On 16th June, 1989 the application made for vacating interim order was heard and by the Judgment and order dated 21st June, 1989 the said application was dismissed.

12. When the writ application came up for hearing Mr. J. N. Roy, learned counsel for the respondents has submitted that he has been instructed to argue only the point that this Court has no jurisdiction to entertain this application as no part of the cause of action has arisen within the jurisdiction of this Court. This contention regarding territorial jurisdiction has already been dealt with and rejected on the application made for vacating interim order. This order has now become res judicata. It is not disputed and in fact conceded by the respondents

that the petitioner has been carrying on the business under the name and style of Encee Aromatics Limited at No. 93, Dakhindhari Road, Calcutta. The bills for municipal rates and taxes, rent bills postal receipts, Trade Licences, etc. have been produced in support of the contention that the petitioner has been carrying on business inter alia from the aforesaid address. Since admittedly the petitioner has been carrying on the business in Calcutta this Court has territorial jurisdiction and accordingly whether part of the cause of action has arisen within the jurisdiction of this Court is not at all relevant or material. In any event the respondents are not entitled to raise this contention once again.

13. It is the contention that the other aspect of jurisdiction in a broader sense is that when an order of detention has been made Court cannot quash the proceeding except in a separate writ of habeas corpus.

14. Significantly, apart from the question of jurisdiction no other contention has been urged on the merits of this case. The respondents, in spite of several opportunities given to them, chose not to file any affidavit controverting the allegations made in the writ petition. Accordingly the averments made in the petition must be taken to be admitted by the respondents. Although no other contention was raised, in any view it is necessary to deal with merits of the case for the purpose of disposing of the matter deciding whether such detention application when an order of detention has been made. When the order of detention was made on 14th November 1986, the petitioner was in USA. He came back on 6th April, 1987. On 20th June, 1987 the petitioner requested the Deputy Director of Enforcement at Madras to grant him permission to go out of India in connection with export business. The Deputy Director of Enforcement, FERA informed the petitioner in writing that he has no objection to the petitioner going abroad for export promotion. The Reserve Bank of India also granted foreign exchange equivalent to US \$ 4000. The petitioner thereafter with the permission of FERA and with the foreign exchange released by the Reserve Bank left India in connection with export promotion. He came back in February, 1988. It is not disputed that the petitioner brought orders for more than Rs. 50 lakhs for his products. The foreign buyers have also made firm commitments by establishing foreign letters of credit for US \$ 3,73,000 US \$ (approximately Rs. 50 lakhs).

15. The petitioner again moved the Deputy Director of Enforcement, FERA for visiting foreign countries for export promotion. Such permission was accorded to the petitioner in or about August, 1988. From the facts and figures incorporated by the petitioner in the petition and supplementary affidavit it is abundantly clear that the petitioner is engaged in export business and he has earned substantial foreign exchange, aggregating to several crores of rupees. Representation of the petitioner for revocation of the order of detention has been rejected by the concerned authority without any application of mind. However, the department realised that the petitioner was about 65 years old and he was a foreign exchange earner. This is precisely the reason why the petitioner was allowed

during the pendency of the writ application to visit foreign countries for export promotion. In my view the object of COFEPOSA Act is not to prevent earning foreign exchange. It is to prevent the smugglers from resorting to clandestine dealing in foreign exchange smuggling activities. The petitioner was not only permitted to go abroad for export market development which he did and earned valuable foreign exchange for the country but the adjudication proceeding for the alleged violation of FERA had been initiated and the proceedings are being pursued by the competent authority. On the facts and in the circumstances of this case, the respondents in issuing the order of detention acted without any jurisdiction inasmuch as there was no material before them to hold that the petitioner is such a person who comes within the purview of COFEPOSA Act. Had the petitioner been in detention, the country would have lost valuable foreign exchange which has been earned through his personal efforts and endeavours. By purporting to pass an order for keeping the petitioner in detention, the respondents have acted contrary to the letter and spirit of the Act. It may also be mentioned that the order of detention was also not confirmed as required under the provisions of the Act. In my view in a case like this where the order itself is without jurisdiction even though the order of detention has been made, the petitioner is entitled to challenge such an order in an application under Article 226 of the Constitution for appropriate writs and directions. It is no doubt true that Court may issue a writ of habeas corpus at the instance of a person when he is in detention. But when the detention order has not been served and the person concerned is at large, the court may in exercise of jurisdiction under Article 226 of the Constitution, strike down an illegal order of detention. If a person is illegally detained, his personal liberty will be at jeopardy and accordingly in a fit case it will be open for the Writ Court to issue writ quashing the detention order when the order of detention has not been served on the concerned person. One need not wait till he is detained to challenge the order of detention and to ask for a writ of habeas corpus. He may, before his actual detention, move the Court for appropriate writs and/or order in the nature of Mandamus, Certiorari and Prohibition.

16. In the context and setting of the facts and circumstances of this case, the order of detention of a person who is aged 65 years but admittedly earns substantial foreign exchange for the Country, cannot be sustained.

17. For the foregoing reasons this application is allowed. The rule is made absolute. The order of detention dated 14th November, 1986 is set aside and quashed. Let appropriate writs do issue.

18. This order, however, will not prevent the respondents from proceeding with the adjudication proceeding for violation or any infraction of any law. They shall give reasonable opportunity of being heard to the petitioner in the proceedings already initiated or may be initiated against the petitioner.

19. There will be no order as to costs.

20. All parties to act on the signed copy of the minutes of the operative part of the judgment on the usual undertaking.