
(1996) 09 DEL CK 0103

In the Delhi High Court

Case No : Criminal Writ Petition No. 509 of 1996

Narendra Kumar

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-09-1996

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 12A, 3(1)
Constitution of India, 1950 — Article 141, 22, 358, 359, 359(1)
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 — Section 19(1), 6(1)

Citation : (1997) ILR Delhi 111

Hon'ble Judges : M. Jagannadha Rao, C.J; Manmohan Sarin, J

Bench : Division Bench

Advocate : R.M. Bagai, for the Appellant;

Judgement

(1) The petitioner's father Roshan Lal of Amritsar, was curlier detained on 19-12-1974 under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called COFEPOSA). He has since died in 1980. The petitioner, who is his son, is A seeking the quashing of the detention order passed against his father by respondent 3 on 19-12-1974 u/s 3(1) of the COFEPOSA. Petitioner is also seeking the quashing of the order dated 29-5-78, passed by respondent 2 u/s 19(1) of the Smugglers & Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter called SAFEMA) against the properties of his late father and. mother and to restrain respondents from dispossessing the petitioner of the said properties at Amritsar.

(2) While the detention order dated 19-12-74 was one issued against the petitioner's father the forfeiture relates to the properties of his father and mother, to whom notices under Safema were issued on 30-4-77 (Ex. P.5). The petitioner's father died in 1980 while his mother died on 31-12-91. They filed Writ Petitions 219 and 220/79 in the Supreme Court challenging the detention order dated 19-12-1974 and the Safema order dated 30-4-1977. Those writ

petitions were dismissed by a nine-Judges Bench of the Supreme Court Judges in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, . (1) The Supreme Court refused to set aside the detention order as well as the order passed under SAFEMA. After the parents death the petitioner is now once again challenging both the orders.

(3) It is to be noted that the detention order dated 19-12-74 against the petitioner's father under the Cofeposa was issued well before the coming into force of the Emergency on 25-6-75. Therefore he was given copy of the grounds of detention. It was only on 1-7-75 that the Cofeposa Act was amended. The Safema was brought into force w.e.f. 5-11-1975.

(4) Petitioner claims that his father's detention which started before the Emergency, was continued during the Emergency and that an order u/s 12A of Cofeposa was passed. The Emergency was revoked on 21-3-77 and the petitioner's father was released on, 22-3-77 (Ex. P.2), the next day.

(5) Now the detention dated 19-12-74 having taken place before the commencement of the Emergency on 25-6-75, the detenu i.e. petitioner's father was not precluded from challenging the detention and Article 359 did not come in the way till 25-6-75. The petitioner's brother filed Crl. W.P. 138/75 in the Punjab & Haryana High Court on 29-4-75 questioning his father's detention (Ex. P.3) but the same remained pending. In other words petitioner's father did not succeed in the challenge of the detention before the Emergency. Nor did he take steps to have the writ decided later. The above Crl. W.P. 138/75 filed in the High Court was dismissed as infructuous on 24-2-78 (Ex. P.4) because of the release of petitioner's father on 22-3-77.

(6) After the petitioner's father was released on 22-3-77, notices were issued to petitioner's father and mother under Safema on 30-4-77 (Ex. P.5). in respect of their properties. They filed objections before the competent authority but still, an order of forfeiture of the properties was passed on 29-5-78. They filed appeals to the Appellate Authority which were dismissed on 2-7-79 (Ex. P.7). Then they (i.e. father and mother of petitioner) filed Civil W.P. 219/79 and 220/79 in the Supreme Court of India challenging the provisions of Safema as also legality of "the aforesaid detention" u/s 3(1) of Cofeposa (see admission in para 5 of the present writ petition). Pending disposal of the two writ petitions in the Supreme Court, the father of the petitioner died in 1980 and his mother on 31-12-91. After dealing with the right of the detenu to challenge the detention order and the Safema order. Supreme Court dismissed the said writ petitions on 12-5-94 in the bath. Attorney General for India and Others Vs. Amratlal Prajivandas and Others, (2) (See case numbers given in Scc at page 54).

(7) But notwithstanding the fact that his parents were unsuccessful in Civil W.P. 219/79 and 220/79 before the Supreme Court of India the petitioner wants a fresh opportunity to challenge the self same detention and the Safema order.

(8) The following points arise for consideration : (1) Whether the Supreme

Court in Amritlal's case & batch (petitioner's father's writ petition.) merely dealt with the validity of the Safema or also rejected the challenge to the detention of petitioner's father under Cofeposa ? (2) Whether the Supreme Court in Amrit Lal's case did not accept the correctness of Union of India (UOI) and Others Vs. Haji Mastan Mirza, (3) and Union of India (UOI) and Others Vs. Manoharlal Narang, (4) ? (3) Whether the decision of the Supreme Court in the batch of Amrit Lal's case (to which petitioner's parents were also parties) operates as res judicata against the petitioner ?

(9) Point 1 : It was argued for the petitioner that in the Supreme Court judgment in Attorney General Vs. Amrit Lal's Pragivandas (5) the validity of Safema alone was gone into but not the validity of the detention order of his father dated 19-12-74 issued under Cofeposa nor the validity of the consequential forfeiture orders of relative's properties dated 29-5-78.

(10) We are unable to agree. As we shall presently show the position is that in Attorney General Vs. Amritlal Pragivandas the Supreme Court not only upheld the Safema but it also refused to quash the detention order of the petitioner's father. The petitioner's father was released on 22-3-77 on the date next after the revocation of Emergency on 21-3-77. In the batch before the Supreme Court in Attorney General Vs. Amritlal Pragivandas the detenus were persons who were also similarly released one or two days after the cessation of the Emergency. But it appears that in that batch there were cases where the detention is u/s 3(1) of Cofeposa was made after the commencement of Emergency on 25-6-75 and where Section 12A orders were also there. There were others like the detention of the petitioner's father where the detention order was passed before the Emergency. Thus causes where the detention was before or after the Emergency are governed by the Supreme Court judgment in Amrit Lal's case.

(11) Now inasmuch as orders were issued under Article 359 of the Constitution only on 25-6-75, the petitioner's father was not precluded from approaching a Court of law before 25-6-75. The grounds of detention were served on him unlike cases of detention after 25-6-75. All grounds of attack available under Article 22 could have been availed before 25-6-75 (when the Emergency started). In other words, the detention order being one passed before 19-12-74, the detenu was in a more advantageous position than those whose detention orders were passed after 25-6-75. As stated earlier petitioner's brother filed Crl. W.P. 138/75 on 29-4-75 questioning his father's detention and the writ petition was entertained by the Punjab and Haryana High Court and was pending during the entire period of Emergency. Even after the Emergency was revoked, no decision was obtained on merits. It was dismissed as infructuous on 24-2-78.

(12) After 25-6-75, when the Emergency started, it may be that in view of order u/s 12A of Cofeposa, there was perhaps no right to challenge the detention on general grounds-as stated by the Supreme Court in Attorney General Vs. Amritlal Pragivandas but challenge could still be on limited grounds. When the Emergency was revoked on 21-3-77, the position was different. In spite of that advantage,

the writ filed in Punjab and Haryana High Court was not pursued and was dismissed as infructuous.

(13) The parents of the petitioner challenged the detention order of 1974 only much later in 1978 after the Safema proceedings were finalised on 29-5-78. They approached the Supreme Court and filed Civil W.P. 219/79 and 220/79 but they again failed in their challenge when their writ petitions were dismissed by the Supreme Court on 12-5-94 in Amrit Lal's case. There the prayers were to quash the detention order of 1974 as well as the Safema orders passed against their properties. The fact that in the batch in Amrit Lal's case, both the reliefs were refused would mean that the Supreme Court clearly refused to set aside the detention order of the petitioner's father. It is, Therefore, clear that in Amrit Lal's case the Supreme Court not only upheld the provisions of Safema but also refused to interfere with the order of detention of petitioner's father. Point-1 is held against the petitioner.

(14) Point 2. Learned counsel for the petitioner has contended that the detention order of a detenu under Cofeposa can be challenged by the detenu after orders under Safema are issued and relied upon Union of India Vs. Manoharlal Narang 1967 (2) Scc 241 He contends that such a challenge can be made by the detenu's son also. Question arises whether the Supreme Court in Attorney General Vs. Amrit Lal Pragivandas has disapproved the said ruling.

(15) In fact, in Amrit Lal's case the Court referred to two earlier rulings. In one, the detention order was passed before the Emergency-- Union of India (UOI) and Others Vs. Haji Mastan Mirza, (7) while in Union of India (UOI) and Others Vs. Manoharlal Narang, (8), (relied on for the petitioner) the relevant detention order was passed after the Emergency.

(16) As we shall presently show, both these rulings have not been accepted in Amrit Lal's case. In the first of these cases, Union of India (UOI) and Others Vs. Haji Mastan Mirza, , the facts were as follows; The order u/s (3) Cofeposa dated 19-12-74 was served on 23-12-74. Emergency was proclaimed on 25-6-75 and expired on 21-3-77. The detenu was released on 23-3-77. Notice u/s 6(1) of Safema was issued to him, his relatives and associates. He filed writ petition in Bombay on the ground that he was not supplied with relevant documents though grounds of detention were given. (At that time, Section 12A of Cofeposa was not there and Therefore grounds of detention were also given as in the case before us). It is true, the writ petition, was allowed by the Bombay High Court and the appeal of the Union of India to the Supreme Court did not succeed. But in Amrit Lal's case, the Supreme Court first summarised the facts in Union of India (UOI) and Others Vs. Haji Mastan Mirza, (9) stating as follows (at p. 85) :

"FROM the facts stated above, it is clear that the order of detention was made long prior to the proclamation of Emergency on 25-6-1975. He was served with the grounds of detention but not the documents relied upon therein. It does not appear from the judgment whether a declaration u/s 12-A of Cofeposa was made

with respect to the said respondent though it can be so presumed from the fact that his detention was continued up to 23-3-1977. In the above circumstances, this Court said that it was open to the respondent-detenu to question the validity of the order of detention when proceedings are taken against him under Sections 6 and 7 of SAFEMA."

(17) The Court then clearly disapproved the view taken there that the detention order under Cofeposa could be questioned after the passing of the order under SAFEMA. It said :-- It is not possible to agree with the reasoning of the decision. There are two ways of looking at the issue. If it is a normal order of detention (not governed by Section 12-A not protected by an order under Article 359(1) suspending the enforcement of Article 22) and if the detenu does not challenge it when he was deprived of his liberty, or challenge it unsuccessfully there is no reason why he should be allowed to challenge it when action under Safema is not automatic upon the fact of detention but only the starting point. On the other hand, if it is an order of detention governed by Section 12-A (or by a Presidential order under Article 359(1) suspending Article 22), it perhaps could still be challenged even during the period of emergency on grounds not barred by the said provisions. Secondly, even if such an order is allowed to be challenged when action under Safema is taken the challenge must be confined to grounds which were open or available during the period of emergency; otherwise, there could be no meaning behind the concluding words in Article 358(1) and Article 359(1-A). Hence, we say that a person who did not choose to challenge an order of detention during the emergency when he was detained or challenged, it unsuccessfully, cannot be allowed to challenge it when it is sought to be made the basis for applying Safema to him." The fact remains that in the Amrit Lal's case, the Supreme Court dismissed the writ petitions filed by petitioner's parents wherein the detention of petitioner's father of 1974 was challenged. The Court held that the detention could not be challenged after the Safema order was passed.

(18) As the earlier writ petition filed by the petitioner's brother in 1975 before Emergency in the Punjab & Haryana High Court was dismissed as infructuous in 1978. It is clear that the challenge never fructified in favor of petitioner's father. As pointed out in Amrit Lal's case, when the detention was before emergency and could be challenged as stated above and was not successfully challenged, it is not possible to permit a challenge to the detention after Safema orders are issued. The decision in Hazi Mastan Mirza's case permitting such a challenge after Safema orders were issued was held to be not correct.

(19) The facts before us are identical as in Union of India Vs. Hari Mastan Mirza. In that case also the detention order was anterior to the Emergency, the detenu was released 2. days after the Emergency and the Safema notices were issued thereafter against him and his relatives, and were challenged later. The Supreme Court held that challenge to both orders was permissible but this ruling has not been accepted in Amrit Lals case.

(20) Coming to Union, of India Vs. Manoharlal Narang 1967 (2) Scc 241 on which petitioner's counsel placed strong reliance, there the Safema order against Manoharlal Narang was based on a detention order passed against his brother Ram Lal-during the period of Emergency. Adverting to the said facts in great detail, the Supreme Court stated in Amrit Lal's case (at p. 87).

"FROM the facts stated above, it is clear that the basis of action under the Safema against Manohar Lal Narang was his brother Ram Lal's detention during the emergency, which detention was governed by Section 12-A of COFEPOSA. According to our opinion indicated earlier, such an order can constitute a basis for taking action under SAFEMA. So far as the reasoning of the said decision is concerned. . . , the Court. . . found that the said order is bad for non-application of mind to certain highly relevant and material circumstances. We must, however, say that the validity of an order of detention to which Section 12-A of Cofeposa applied, could yet be examined even during the emergency on the touch-stone of the law as it obtained during the operation of the Presidential order under Article 359(1)--say on the ground that the provisions of Section 12-A were not complied with or on other grounds, as may not have (been) barred during the said period."

(21) They then disapproved their earlier ruling in Manohar Lal Narang's case stating as follows :

"BUT a person who could have so challenged the order of detention and yet choose not to do, cannot be allowed to do so when such an order of detention is made the basis of applying Safema to him."

WE are Therefore, unable to accept a contention based on Union of India Vs. Manoharlal Narang as the said ruling has not been approved in Amrit Lal's case. In fact petitioner's parents were parties to Amrit Lal's case. Point 2 is held against the petitioner.

(22) Point 3.-The point here is whether the dismissal of the writ petition of the petitioner's parents operates as res judicata.

(23) We are of the view that the judgment in Amrit Lal's case to which petitioner's parents were parties clearly operates as res judicata against the petitioner. If the parents of the petitioner were alive and could not have filed a fresh writ petition after the Supreme Court judgment, questioning the detention of petitioner's father of the year 1974 and the A Safema order of 1978, then the petitioner cannot, merely because he succeeded to the properties of his parents, be permitted to reopen the same question. The said judgment of the Supreme Court is, apart from res judicata, binding on us under Article 141 of the Constitution of India. Mere fact of succession does not give him any fresh cause of action. The detention of petitioner's father dated 19-12-1974 being prior to the emergency, the case is in fact similar to Union of India Vs. Hazi Mastaa Mirza 1948 (2) Scc (11) 427 which was not accepted in Amrit Lal's case. If we proceed on the basis that there was a Section 12-A order also, then the case is again

governed by the rejection of the ruling in Union of India Vs. Manoharlal Narang in Amrit Lal's case.

(24) If petitioner's parents were alive today, and they filed writ petition in the High Court of Delhi contending that their properties are not liable to be forfeited under Safema, then this Court would have said that they are barred by "res judicata". The same principle of res judicata applies to the petitioner as well if he wants to save the properties as a successor-in-interest of his parents.

(25) It is well settled that principle of res judicata is applicable to "writ jurisdiction also-insofar as civil rights pertaining to forfeiture of properties are concerned. (So far as the detention order dated 19-12-1974 is concerned, we have already stated why that order cannot be challenged now).

(26) Learned counsel contended that in a similar case, CWP- 260/95, notice was issued by this Court and is pending. As we have decided the case before us on merits, it will not be proper for us to say whether Cwp 260/95 is similar to the one before us. Suffice it to say that on the ground that notice has been issued in CWP-260/95, we are not inclined to grant notice in the case before us.

(27) The present case is clearly covered by res judicata against the petitioner. In view of the Supreme Court judgment in Attorney General Vs. Amritlal Pragivandas. Point 3 is held against the petitioner.

In view of the above, the writ petition is dismissed.