

(1991) 04 BOM CK 0101

In the Bombay High Court

Case No : Criminal Writ Petition No. 1356 of 1990

Naresh Thakurdas Mehra

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 11-04-1991

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 14, 19, 21, 22, 226
Foreign Exchange Regulation Act, 1973 — Section 8, 9
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 — Section 2, 6

Citation : (1991) 2 BomCR 182 : (1991) 93 BOMLR 764 : (1991) 2 MhLj 1478

Hon'ble Judges : S.S. Dani, J;H.H. Kantharia, J

Bench : Division Bench

Advocate : N.H. Gursahani, Vikram Namkari and N.N. Gawankar, for the Appellant; R.M. Agrawal, A.S. Khan, Advs. and S.G. Page, Public Prosecutor, for the Respondent

Judgement

H.H. Kantharia, J.—The neat question of law that arises for our consideration in this writ petition under Article 226 of the Constitution of India is, whether a writ petition seeking to prevent the authorities who are under statutory obligations to discharge their duties under the provisions of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the COFEPOSA") from issuing detention order is maintainable.

2. The circumstances under which this petition came to be filed are, shortly stated, as under :

The petitioner, according to him, carried on business as a sole proprietor in the name and style of M/s. Brooks International, M/s. Mehra Electronics and M/s. Megha Electronics and also looks after the business of M/s. Barbara International of which Ms. Barbara D'Souza is the sole proprietress. He also contends that he is a partner of M/s. Vashi Book Centre and M/s. World Book House. Further,

according to him. M/s. Brooks International and M/s. Barbara International are engaged in the import of books which are and were, at all relevant times, freely permissible for import under Open General Licence by all persons and all consignments were cleared without any objection from the customs authorities. And M/s. Mehra Electronics and M/s. Megha Electronics are engaged in the import of electronic goods viz. integrated circuits which goods have been throughout imported against valid import licences and cleared on payment of requisite customs duty without any objection from the customs authorities, he further contended.

3. His case is that on 27-9-1990, at about 2.00 p.m. he was intercepted at Medow Street, Fort, Bombay by the officers of the Enforcement Directorate, Bombay and was forcibly taken to their office at Mittal Chambers and was detained there till 30-9-1990 when he was coerced into giving statements on 27-9-1990, 28-9-1990 and 29-9-1990. He alleged that he was physically beaten up and also a panchanama was drawn on 27-9-1990 which was concluded at about 6.00 p.m. His further allegation is that on 29-9-1990, somewhere around midnight, he was informed that he was arrested under the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "the FERA"). On the next day i.e. Sunday, the 30th September, 1990, he was produced before a Holiday Metropolitan Magistrate along with one M. D. Ruparel and one K. S. Bhasin and was remanded to police custody up to 1-10-1990. He was granted permission by the learned Magistrate for medical examination and accordingly on 30th September, 1990 he was medically examined at St. George Hospital, Bombay when it was noticed that he had injuries on his back and eye. Further, on 1-10-1990, according to him, the enforcement officer pressed his remand application wherein it was alleged that the petitioner has allegedly contravened the provisions of Sections 8(3), 8(4), 9(1)(b) and 9(1)(d) of the FERA. The petitioner on the same day filed an application for bail wherein he had retracted the statements extracted from him. By an order dated 1-10-1990, he was remanded to judicial custody for fourteen days. However, the other two persons were released on bail. On 4-10-1990, he made an interim bail application which was granted by the Additional Chief Metropolitan Magistrate, Esplanade, Bombay who by an order dated 13-10-1990 released him on bail in sum of Rs. 15,00,000/- with one surety of Rupees 12,00,000/- on a condition that he attends the office of the investigating officer once a day until further orders and surrenders his passport. He was also directed not to leave Bombay without the Court's permission. Subsequently, on an application made by the petitioner, the said order dated 13-10-1990 was modified to provide for release of the petitioner on bail of Rs. 12,00,000/- with a surety for Rupees 8,00,000/- and a cash deposit of Rupees 4,00,000/-. Thereafter the petitioner was released on bail on 15-10-1990. According to the petitioner, he abided by all the conditions of bail imposed on him.

4. The petitioner further contended that his case is absolutely not one of violation of the provisions of the FERA and the import of books and electronics by him

were in the normal course of international trade. He, therefore, urged that the allegation made against him were ill-founded and misconceived for various reasons enumerated in sub-paras (i) to (v) in para 4 of his petition.

5. Despite the aforesaid facts and circumstances, the petitioner further averred, the officers of the Enforcement Directorate have been without any justification harassing and torturing him and have been threatening him to take action under the COFEPOSA although there is not even prima facie case against him. According to him, the threat to initiate proceeding under COFEPOSA are with a view to harm and injure his reputation and goodwill as he is an honourable businessman living in Bombay with his family and has an unblemished and impeccable record and, therefore, the action of the Enforcement Directorate against him was mala fide, void ab initio, illegal and bad in law. He also alleged against the officers of the Enforcement Directorate that they have unnecessarily frozen his bank accounts without issuing a show cause notice and affording him a reasonable opportunity of being heard and did not even allow him to make a representation thus violating the principles of natural justice.

6. The submission of the petitioner in the petition is that there was no violation of the provisions of the FERA and much less a case for detaining him under the provisions of COFEPOSA and the action under COFEPOSA would have the effect of only causing humiliation to him. He also contended that since there are no immediate future imports of the books by him, the question of acting prejudicially to the conservation or augmentation of foreign exchange or smuggling of goods does not arise. He pleaded that in the month of November, 1990 when he was on a religious tour to the place like Shirdi, Tirupathi, Bangalore and Jammu with the prior permission of the learned trial Magistrate, he learnt and believed that the Customs Department wanted him to be back in Bombay so that he could be detained under the COFEPOSA. He, therefore, contended that the entire proceedings against him were without and/or in excess of jurisdiction and the preventive detention would in effect be punitive and abuse of the powers vested in the authorities under the COFEPOSA and there was an imminent danger of his detention thus violating his fundamental rights under Articles 14, 19 and 21 of the Constitution of India.

7. He accordingly prayed in this petition that a writ of prohibition or a writ in the nature of prohibition or any other appropriate writ, order or direction be issued against the respondents restraining them, their servants, agents, officers and subordinates from taking any action or initiating proceedings against him under the provisions of COFEPOSA or any other law in connection with the case in question relating to the search and seizure operations carried out by the authorities under the provisions of FERA.

8. The petitioner which was filed on November 26, 1990 came up for admission before a Division Bench of which one of us (Dani. J.) was a party on December 5, 1990. The Division Bench at that time passed the following order.

"Heard Mr. Gursahani for the petitioner. Mr. Gupta for Respondent No. 3.

Perused the affidavit in reply filed by Respondent No. 3. As regards the main averments in paras 7 and 8 of the petition, the reply affidavit appears to be either vague or silent. There is no denial to the fact that the petitioner is being threatened with detention nor to the fact that the petitioner is not being allowed to move out of Bombay. Apprehension of the petitioner that his liberty is under grave threat seems prima facie justified. Hence Rule. Interim relief to the extent that the petitioner do co-operate with the investigation and the adjudication proceedings, if any. No final order of detention to be issued till filing of charge-sheet in the main offence.

Rule returnable 4 weeks. Leave to appeal to Supreme Court is refused since no substantial question of law of public importance is involved."

9. When the writ petition came up for final hearing before us, Mr. Agrawal, learned Counsel appearing on behalf of respondents Nos. 1 to 3, raised a preliminary objection to the maintainability of this petition. Therefore, the said contention of Mr. Agrawal was first heard.

10. The contention of the learned Counsel of respondents Nos. 1 to 3 supported by Mr. Page, learned Public Prosecutor appearing on behalf of respondent No. 4, is that a writ petition preventing the authorities who are under the statutory obligation to discharge their duties under the provisions of Section 3 of COFEPOSA from issuing detention order on vague allegations against the investigating agency when the Supreme Court after taking a review of all the previous judgments has held that even where detention order is issued, only in five categories mentioned in the said judgment, the petition for quashing the impending detention order cannot be maintained and entertained and the pre-execution detention order cannot be stayed. In other words, the preliminary objection raised on behalf of the respondents is that a writ petition under Article 226 of the Constitution challenging the "apprehended" detention order cannot lie. The Supreme Court judgment on which Mr. Agrawal relies upon is in Criminal Appeals Nos. 440-441 of 1989 in case of Additional Secretary to the Government of India v. Smt. Alka Subhash Gadia, decided on December 20, 1990. Mr. Gursahani, learned Counsel appearing on behalf of the petitioner, countered the argument of Mr. Agrawal and submitted that he preliminary objection is absolutely untenable and not sustainable in law on the grounds that (a) the judgment of the Supreme Court relied upon by Mr. Agrawal is an authority for the proposition that powers, authority and jurisdiction of the High Court to issue writs of whatsoever nature under Article 226 of the Constitution is untrammelled and absolute without exception; (b) preventive detention law is also subject to the provisions of the Constitution of India and is not an exception to Article 226(c) when the liberty of the citizen or his fundamental right is threatened to be invaded, the High Court and the Supreme Court can interfere to protect the citizen under Articles 226 and 32 of the Constitution respectively; and (d) in order to determine, whether under Article 226, a citizen has made a out a prima

facie case, the High Court has to go into the petition and then to conclude whether the petition is maintainable or not. In support of his contentions, Mr. Gursahani relied upon the judgments of the Supreme Court in cases of In the matter of: Under Article 143 of the Constitution of India, , (ii) The State of Bihar Vs. Rambalak Singh and Others, , (iii) Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, , (iv) Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, ; (v) East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, and (vi) D.A.V. College, Bhatinda, etc. Vs. The State of Punjab and Others, .

11. Now, the important question of law involved in this writ petition, as stated above, is no more res integra. The law laid down in this regard by the apex Court in Criminal Appeals Nos. 440-441 of 1989 in the Additional Secretary to the Government of India v. Smt. Alka Subhash Gadia, decided on December 20, 1990 is the last word of the highest Court in the country. The said appeals arose from orders passed by this Court in Criminal Writ Petition No. 489 of 1989 and Criminal Application No. 1347 of 1989 respectively on June, 27 and June 30, 1989. In the said matter an order of detention was passed on 13th December, 1985 against the husband of the first respondent therein u/s 3(1) of the COFEPOSA. He could not, however, be served with the said order as he was absconding. Hence a declaration was made that he was a person who fell within the category mentioned in Section 2(b) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (for short "SAFEMA"). Thereafter a notice dated March 31, 1987 was issued to him under sub-section (1) of Section 6 of the SAFEMA to show cause as to why the properties mentioned in the schedule to the said notice should not be forfeited to the Central Government for reasons recorded in the accompaniment. A copy of the notice along with the schedule of the properties and the copy of the reasons for the forfeiture of the property was also sent to the first respondent by a letter of February 27, 1989. The first respondent therein filed the aforesaid writ petition in the Bombay High Court challenging the detention order of December 13, 1985 as well as the show cause notice of March 31, 1987. This Court by its impugned decision held that the writ petition was maintainable for challenging the detention order even though the detenu was not served with the order and he had thus not surrendered to the authorities. This Court further directed that the detention order, the grounds of detention and the documents relied upon for passing the detention order be furnished to the detenu and that they should also be produced before the Court. This Court also directed the authorities to supply the said documents to the Counsel for the first respondent. The said order was passed on June 27, 1989 and the authorities were directed to furnish the documents to the first respondent by 5.30 p.m. on June 29, 1989. Thereafter, the matter was directed to stand over till July 3, 1989 to enable the first respondent therein to consider whether any amendment to the writ petition was required. The Court also directed that the matter be posted for further direction on June 30, 1989. After the pleadings of the parties were filed, the matter came

up before this Court on June 30, 1989 when it was found that no application was made for any extension in time to carry out the orders of this Court nor was any statement made that it was difficult to comply with the order. The Court, therefore, held that the officers were guilty of contempt of Court and directed the matter to be listed on July 3, 1989 to take appropriate action for contempt of Court. It is at that stage that the SLP giving rise to the appeals in question were filed before the Supreme Court. The Supreme Court issued notice on the Special Leave Petitions and granted stay of the High Court's direction, pending the notice. By another order of July 21, 1989 the Supreme Court admitted the Special Leave Petitions and directed the appeals to be listed in the last week of August, 1989. By their order of April 5, 1990 the two learned Judges of the Supreme Court directed that since the appeals involved questions of great public interest and importance, they should be referred to a bench of three Judges. That is how the matter came up before three Judges of the Supreme Court.

12. At the hearing, the Supreme Court opined that the neat question of law that fell for consideration was whether the detenu or anyone on his behalf was entitled to challenge the detention order without the detenu submitting or surrendering to it and as a corollary, the incidental question that had to be answered was whether the detenu or the petitioner on his behalf, as the case may be, was entitled to the detention order and the grounds on which the detention order was made before the detenu submitted himself to the order. The Supreme Court was of the view that these questions may arise for consideration also when an order forfeiting the property as a consequence of the detention order was passed and when the detention order was incidentally challenged to question the validity of the order of forfeiture of the property. The Supreme Court was of the view that questions had assumed much importance because relying upon some judgments of the Supreme Court and some of the High Courts, writ petitions were filed as a matter of course to challenge the detention orders and to obtain interim reliefs restraining the authorities from enforcing them without surrendering to them, thus frustrating the orders and defeating the very purpose of the detention law. It was brought to the notice of the Supreme Court by the learned Additional Solicitor General of India that a number of such petitions had grown in volume recently and when the authorities insisted on the detenus first submitting to the detention order, they are faced with contempt action and, therefore, it has become necessary to review the law on the subject.

13. In order to answer the questions raised by them, the Supreme Court first dealt with the relevant provisions of the Constitution which permit preventive detention of an individual. In paras 7 to 15 the Supreme Court dealt with the entire history of the detention law and reviewed all the relevant judgments of the Supreme Court and the various High Courts touching the point in question. Thereafter, in the background of the well settled position in law, the Supreme Court embarked upon examining the contentions raised on behalf of the parties before them and drew its conclusions in paras 16, 17 and 18 and held :

"In the face, therefore, of the clear provisions of the Constitution and of the said Act, it is not open to contend that the provisions of Articles 14, 19 and 21 of the Constitution prevent a person being deprived of his liberty without first apprising him of the grounds of his arrest. For this very reason, it is also not open to contend that since the State has all the facts in its possession which require the arrest and detention of the person, it must first disclose the said facts before depriving him of his liberty. Since the provisions of Article 22 of the Constitution pointed out above and of the Act made thereunder permit the State to arrest and detain a person without first disclosing the grounds, even though they are in its possession before or at the time of his arrest, this argument is not tenable in law. It must further be remembered that though the provisions of the Constitution and the law enacted for the purpose enable the State or its delegate the detaining authority to detain a person without first disclosing the grounds of detention they do not preclude them from serving the grounds of detention on the detenu along with the order of detention. In fact, very often they do so. But Shri Jain's argument goes still further and requires that the order of detention and the grounds of detention should be served on the proposed detenu in advance to enable him to challenge them in a Court of law before submitting to the order. In advancing this contention, Shri Jain not only wants to secure to the proposed detenu the right to seek the judicial review of the detention order even before it is executed but also to enable him thereby to bypass the procedure laid down by the law to challenge it after it is executed. To that extent this contention requires the Court to go a step further and to do something more than what it does or would do while entertaining grievances against orders passed under other laws. The justification advanced to claim this superior right is that under the detention law what is infringed is the liberty of the individual and no individual should be required to surrender it without a prior right to challenge the order in question. As has been elaborately discussed above, however vital and sacred the liberty of the individual, for reasons which need not be discussed over again here, the responsible framers of the Constitution although fully conscious of its implications have made a provision for making a law which may deprive an individual of his liberty without first disclosing to him the grounds of such deprivation. It is not, therefore, possible for us to accept the three contentions."

Dealing with the last contention that to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, the Supreme Court found that this argument was also not well-merited based as it was on absolute assumptions. For arriving at this conclusion, the Supreme Court pointed out :

"Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Art. 22 thereof nor the Act in question places any restriction on the powers of the High Court and this Court to review judicially the

order of detention. The powers under Arts. 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the Courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the Courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary extraordinary and equitable jurisdiction under Arts. 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the Courts. To accept Shri Jain's present contention would mean that the courts should disregard all these time-honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibbal for the appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The Courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz. where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the Courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the provision of the law in question."

14. Thus, the Supreme Court held that except in the aforesaid five contingencies, the detention order at the pre-execution stage cannot be challenged under Art. 226 or 32 of the Constitution in the High Court or the Supreme Court and then said in para 21 of the judgment that the Courts have power to interfere with the

detention orders even at the pre-execution stage but they are not obliged to do so nor will it be proper for them to do so save in exceptional cases and a detenu cannot claim such exercise of power as a matter of right. The Supreme Court further pointed out that the discretion is of the Court and it has to be exercised judicially on well-settled principles. Since a contrary view was taken by the Supreme Court earlier in the case of *S. M. D. Kiran Pasha v. Government of Andhra Pradesh JT* (1989) 4 366 to that extent that decision of the Supreme Court and the decisions of all the High Courts contrary to or inconsistent with the view taken by the Supreme Court in these appeals were deemed to have been disapproved and overruled.

15. Therefore, the last word of the highest Court of the land in the latest judgment on the point is that a detention order at the pre-execution stage cannot be challenged either under Art. 226 or under Art. 32 of the Constitution of India save in the exceptional circumstances, as pointed out by the Supreme Court in the five contingencies enumerated hereinabove. In other words, a detention order cannot normally be challenged at the pre-execution stage, and so long as the instant case is concerned the position for the petitioner is still worse inasmuch as in the present case not even the detention order is formulated or passed. It is perhaps in the offing and the petitioner has a fear on account of his activities that he may be detained. The challenge here, therefore, is to an "apprehended" detention order which for all that we know, may not see the light of the day. A writ petition challenging such an "apprehended" detention order, in our opinion, cannot lie invoking the discretionary and extraordinary writ jurisdiction of this Court under Art. 226 of the Constitution. Hence, we are of the view that this writ petition is not maintainable and cannot be entertained. We thus find sufficient substance in the contentions raised on behalf of the respondents and accepting the preliminary objection raised on their behalf by Mr. Agrawal and Mr. Page we hold that on this preliminary point itself the writ petition fails and stands rejected. Rule is accordingly discharged.

16. Mr. Gursahani makes an oral application that leave be granted to appeal to the Supreme Court. Since our decision is totally governed by the latest law laid down by the Supreme Court, the leave asked for is refused. Mr. Gursahani then submits that the operation of this judgment and order be stayed for two weeks. This prayer made by Mr. Gursahani is granted.

17. Order accordingly.