

(1986) 04 RAJ CK 0057
In the Rajasthan High Court

Prakash Chand Kasliwal

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-04-1986

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 5A
Constitution of India, 1950 — Article 22
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 —
Section 2, 6, 7

Citation : (1987) CriLJ 598 : (1986) 1 WLN 652

Hon'ble Judges : N.M. Kasliwal, J; Mohini Kapur, J

Bench : Division Bench

Judgement

N.M. Kasliwal, J.—The petitioner carried on business of the handicrafts and jewellery at Mirza Ismail Road, Jaipur in the name of "Gem Palace", a partnership concern, till 15-11-76. On 20th and 21st Nov., 1974 a search was conducted by the I.-T.O. at the business premises of Gem Palace as well as at the residence of the petitioner and a number of documents were also seized from the residence of the petitioner (and) were taken over, by the authorities of the Enforcement Directorate under the Foreign Exchange Regulation Act, 1973 in short "FERA") from the L-T.O. on the ground that the seized documents revealed violation of the Foreign Exchange Regulation Act.

2. The case of the petitioner further is that he was arrested on 28-11-74 but on that very day he was admitted to bail by the Chief Judicial Magistrate, Jaipur in the sum of Rs. 10 lakhs. Thereafter the petitioner appeared on several dates before the learned Chief Judicial Magistrate from 3-1-75 to 19-5-76 but no complaint or charge-sheet was filed against the petitioner for any offence under the FERA and the Chief Judicial Magistrate was compelled to close the case. During this period the petitioner was examined by the Enforcement Officers and on 17-11-75 five show cause notices for initiating adjudication proceedings were issued.

3. It has been further alleged by the petitioner that in July, 1977 while the petitioner was on a religious tour, he was taken seriously ill and was admitted in the Sawai Man Singh Hospital at Jaipur as an indoor patient for retention of urine, haematuria and general failing of his health. On 17-7-1977 the petitioner learnt in the hospital that there was some warrant of arrest against him and accordingly the petitioner requested some one attending upon him to inform the Inspector General of Police, Rajasthan, Jaipur about his being an indoor patient in the urology ward of the said Hospital at Jaipur and that he was not in a position to move about.

4. In the meantime while the petitioner was in extremely bad state of health he was served on 20-7-77 with an order of detention dt. 11-11-76 along with the grounds of detention u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (hereinafter referred to as the COFEPOSA). It was directed that the petitioner be detained and kept in custody in the Central Jail at Jaipur. The petitioner was informed that a meeting of the Advisory Board in the Delhi High Court was to take place and, therefore, if the petitioner desired to appear before the Board he could so appear but the petitioner expressed that he was unable to appear on account of his serious illness which did not allow him to move out of bed at all. The case of the petitioner is that while he was so confined in the Hospital, he continued to struggle between life and death for quite a long time and it was only some time in the middle of August, 1977 that the petitioner could think of looking into the order of detention and the grounds therefor. The order of detention and the grounds were not accompanied with any documents whatsoever forming the basis thereof. However, since the petitioner was in a very bad state of health he could not represent anything against the said order of detention particularly because the documents forming basis and referred to in the grounds of detention were not supplied to the petitioner either along with the order and grounds of detention or at any time thereafter while the petitioner continued to remain under detention. However, on the Jail authorities informing the petitioner that the meeting of the Advisory Board was to take place at Delhi he should go before them or send any representation if he so liked, the petitioner being under serious ailment, requested the Jail authorities to forward the order of detention and the grounds to his wife Smt. Chand Kanwar Bai and ask her if she could get some representation prepared. The Jail authorities acceded to the petitioner's request and took the order of detention and grounds to the petitioner's wife who sent a typed representation for the signature of the petitioner and accordingly the petitioner requested the Jail Authorities to forward the same to the detaining authority.

5. It has been further alleged by the petitioner that while he was still confined in the Hospital he was on 16-12-77 served by the Jail Authorities in the Hospital with an order dt. 5-10-77 purporting to be signed by Deputy Secretary to the Government of India, that the Central Government had confirmed the said order of detention dt. 11th Nov., 1976 and directed that the petitioner would be

detained for a period of one year from the date of his detention i.e. from 20th July, 1977. Thus the petitioner remained under detention in pursuance of the order of detention dt. 11-11-76 for the full term of one year except for the later part when he was temporarily released on parole on conditions of not leaving the municipal limits of Jaipur without prior permission of the Directorate of Enforcement, New Delhi, initially for a period of two months on his executing a bond in a sum of Rs. 2 lakhs with two sureties for Rs. 1 lakhs each for the due observance of the conditions of his temporary release. Thus the temporary order of release passed in March, 1978 was continued till 19-7-78.

6. It has been further alleged by the petitioner that treating the aforesaid order of detention as alive the non-petitioner 3 the competent authority under the Smuggling and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter referred to as "the SAFEMA"), issued a notice dt. 14-10-80 u/s 6 of the SAFEMA. The petitioner submitted various applications to the competent authority to ascertain the basis of the action u/s 6 of the SAFEMA, and had also filed an answer repudiating the said notice vide his reply dt. 13-10-83. The petitioner has now challenged the proceedings taken under the SAFEMA on various grounds, but we would only deal with one objection raised by the petitioner which goes to the root of the matter that the detention of the petitioner under the COFEPOSA being illegal and without jurisdiction, no proceedings can at all be taken under the SAFEMA.

7. The contention of Mr. Agrawal, learned Counsel for the petitioner in this regard is that action Under Sections 6 and 7 of the SAFEMA can be taken only against such persons to whom that Act applies. Section 2(1) of the SAFEMA says that the Act applies to every person in respect of whom an order for detention has been made in COFEPOSA provided that such order of detention has not been set aside by a Court of competent jurisdiction. It is submitted that in the present case action has been taken against the petitioner under the provisions of the SAFEMA. In order to assume jurisdiction and to take any action under the SAFEMA it is mandatory to show that a valid order of detention had been passed under COFEPOSA. If the order of detention under COFEPOSA is set aside for any reason, the proceedings taken u/s 6 of SAFEMA cannot stand. Reliance in respect of above contention is placed on a recent decision of their Lordships of the Supreme Court in *Union of India v. Haji Mastan Mirza* AIR 1984

8. Mr. Agrawal then submitted that it remains undisputed that no documents were at all supplied to the petitioner which were made the basis of the order and grounds of detention served on the petitioner under the COFEPOSA. It was further contended that a bare perusal of the order of detention Annex. 2 dt. 11th Nov., 1976, and Annex. 3 the grounds of detention served along with order of detention would show that large number of documents forming basis of the grounds of detention has been mentioned but not a single document was supplied to the petitioner. Mr. Agrawal submitted that it was the duty of the respondents to serve the documents which form the basis of the grounds of

deteation pan passu with the order and grounds of detention and the non supply of such documents makes the order of detention totally illegal and without jurisdiction. Reliance in respect of the above contention is placed on a long catena of decisions of various High Courts and Supreme Court but we would refer to a few of such decisions namely Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, ; Kamla Kanyalal Khushalani Vs. State of Maharashtra and another, ; Mehrunissa Vs. State of Maharashtra, ; Sunil Dutt Vs. Union of India (UOI) and Others, ; Mohd. Zakir Vs. Delhi Administration and Others, and Kailash Pandey Vs. State of Uttar Pradesh and Others, .

9. Mr. Gupta learned Counsel for the Union of India on the other hand submitted that the petitioner is not entitled to challenge the order of detention under COFEPOSA after such a long time. It was further submitted that only a notice has been served on the petitioner under the provisions of SAFEMA and no order for the forfeiture of the property has been passed and the petitioner can contest the case on merits before the competent authority. It has also been submitted that the document had been supplied to the petitioner during adjudication proceedings and the petitioner was having full knowledge of such documents and could have made an effective representation against his detention under the COFEPOSA. It was also argued by Mr. Gupta that in case the petitioner while under detention wanted certain documents, he should have made a demand for the supply of such documents. It was further submitted that the writ petition is silent and does not make a mention as to which particular document had not been given to the petitioner on account of which he could not make an effective representation. It was also argued by Mr. Gupta that in view of Section 5A of COFEPOSA the grounds of detention were made severable and an order of detention shall be deemed to have been made separately on each of such grounds. The order of detention shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are:?

(i) vague,

(ii) non-existent,

(iii) not relevant,

(iv) not connected or not proximately connected with such person or,

(v) invalid for any other reason whatsoever; and it is not therefore, possible to hold that the Government or officer making such order would have been satisfied as provided in Sub-section (1) of Section 3 with reference to the remaining ground or grounds and made the order of detention;

10. Mr. Gupta thus submitted that even if there was valid justification for the detention of the petitioner on any one ground and for which no document was necessary to be supplied, the order of detention shall be valid.

11. We have given our thoughtful consideration to the entire matter. The petitioner was served with the order of detention Annexure 2 accompanied with

grounds of detention Annexure 3. The allegation of the petitioner is that he was not supplied with any document at all along with the order and grounds of detention. The respondents in reply have not denied the above position. The only explanation given by the respondent in this regard is that 11 show cause notices for contravention of various provisions of FERA were issued to M/s. Gem Palace and the petitioner on 29-3-76. In connection with the adjudication proceedings under FERA, the petitioner had made inspection of documents and photostat copies of such documents were also taken by him. The petitioner acknowledged the receipt of relevant photo stat copies of documents vide his letter dt. 16-10-75 vide Annexure R-I. The order for detention of the petitioner u/s 3 of COFEPOSA was passed on 11-11-76. The detention order as well as grounds of detention dt. 11-11-76 could not be served as the petitioner absconded or concealed himself. The petitioner remained absconded till 17-7-77 when he got himself admitted to Sawai Mansingh Hospital, Jaipur and surrendered to the custody by way of addressing a letter dated 17-7-77 to the I.G.P., Rajasthan, surrendering himself from S.M.S. Hospital, Jaipur and thus the petitioner was detained by the police authorities on 20th July, 1977. The detention order as well as grounds of detention were therefore served on the petitioner on 20th July, 1977. The Advisory Board gave the opinion in favour of detention of the petitioner and thereafter the order of detention was confirmed by the Central Government vide order dt. 5-10-77. It has been further submitted in the reply that the show cause notices issued to the petitioner- were pending adjudication and in connection with the adjudication proceedings under FERA, the petitioner had inspected these documents. It has been further submitted in the reply that he had also received photo copies of the relevant documents, as is evident from his own letter dt. 16-10-75 acknowledging the receipts of the same. The petitioner never requested for the copies of documents to enable him to make representation. In fact, bare perusal of his representations indicated that he was conversant with the documents as well as various contraventions as detailed in the grounds of detention. It has also been submitted in the reply that the wife of the petitioner had already made a representation dt. 18/21-6-77 to Shri H. M. Patel, the then Finance Minister for revocation of the said detention order and later on 17-7-77 before surrendering to the custody from Sawai Mansingh Hospital, Jaipur the petitioner also addressed the representation stating inter alia that petition moved by his wife may kindly be treated as formal petition moved by him. In view of these facts it has been submitted that the petitioner's contention that he looked into the order of the detention and grounds some time in the middle of August, 1977 is not correct. The petitioner had also filed a representation dt. 18-8-1977 which was duly considered and rejected.

12. Thus, it becomes an admitted fact that no documents at all were served along with the order of detention under COFEPOSA. So far as the non-supply of the documents along with the order of detention is concerned the law is very well settled by the Supreme Court in various decisions referred to above that it is the constitutional mandate which requires the detaining authority to give the

documents relied on or referred to in the order of detention or the grounds of detention *pari passu* in order that the detenu may make an effective representation immediately instead of waiting for the documents to be supplied with. It has also been held that there is no obligation on the detenu to demand the documents and the question of demanding the documents by the detenu is wholly irrelevant. The infirmity in this regard is violative of constitutional safeguard enshrined in Article 22(5) of the Constitution. In the present case it is an admitted fact that the documents were not at all supplied along with the order or grounds of detention nor subsequent thereto. The case of the respondents is that they had supplied documents during the course of adjudication proceedings taken under the provisions of the Foreign Exchange Regulation Act much prior to the passing of the order of detention and that should be considered as sufficient compliance of supplying the documents along with the order of detention passed under COFEPOSA. We are clearly of the view that supplying of any documents during the course of adjudication proceedings under FERA cannot be considered as compliance of the provisions of Article 22(5) of the Constitution for detention under COFEPOSA and it was the duty of the respondents to have supplied all the documents referred to or forming the basis of the grounds of detention along with the order of detention under COFEPOSA. The manner and scope of proceedings under the Foreign Exchange Regulation Act and COFEPOSA are entirely different and all the documents referred to or forming the basis of order of detention passed under COFEPOSA must be supplied to the detenu. A constitutional right is given to the detenu to make an effective representation against his detention and he cannot be expected or made to rely upon any document taken by him during adjudication proceedings under FERA. The subjective satisfaction of detaining authority while passing the order of detention under COFEPOSA may be based on the same less or more documents than what were considered during the adjudication proceedings. Even if such documents may be same, it is the duty of the detaining authority to again supply all the documents to the detenu when any order is passed for detention under COFEPOSA. In the present case number of documents have been referred and relied upon in the grounds of detention and not a single document was supplied to the petitioner along with the order of detention. Thus there was a clear non-compliance of the constitutional obligation imposed upon the respondents and the order of detention passed u/s 3 of COFEPOSA was clearly void, illegal and without jurisdiction.

13. Sub-section (1) of Section 2 of SAFEMA clearly provides that the provisions of this Act shall apply only to the persons specified in Clause (b) of Sub-section (2) of Section 2 of SAFEMA. It applies to every person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Thus in order to assume jurisdiction under SAFEMA it is necessary that a valid order of detention under COFEPOSA should exist. If any order of detention under COFEPOSA is itself illegal and without jurisdiction no action can be taken under the provisions of SAFEMA.

In Union of India (UOI) and Others Vs. Haji Mastan Mirza, their Lordships of the S.C. have held "Where the proceedings for forfeiture of the property of the detenu were started on the basis of an order of his detention under COFEPOSA, the fact that the copies of the documents relied upon in the grounds of detention were not supplied to the detenu would vitiate his detention and consequently subsequent forfeiture of his property."

14. It was submitted by Mr. Gupta learned Counsel for the Union of India that the petitioner was not entitled to challenge his order of detention made in the year 1976 after a lapse of 8 years by filing the present writ petition on Dec. 3, 1984. We find no force in this contention. The period of detention under COFEPOSA had come to end in 1978. The petitioner was served with the notice under the provisions of SAFEMA in October, 1980 and proceedings under SAFEMA are still continuing. The present writ petition is in substance a writ of prohibition and the petitioner has prayed that the respondent 3 be further prohibited by a writ of prohibition or any other writ order or direction, not to proceed with the notice issued under Sections. 6 and 7 of SAFEMA when the proceedings under SAFEMA are still going on, the question of delay is of no consequence, specially when the very jurisdiction to take proceedings under the provisions of SAFEMA are under challenge. Once it is held that the detention of the petitioner under COFEPOSA was ab initio void, illegal and without jurisdiction, no proceedings at all can be taken under SAFEMA and this objection of delay raised by the respondents cannot be sustained.

15. Mr. Gupta learned Counsel for the Union of India also raised the contention that in view of Section 5A of COFEPOSA the order of detention could not be deemed to be , invalid or inoperative, when any one of the grounds of detention can be held to be sustainable without supplying the documents. In other words the contention is that if out of several grounds of detention even if one was valid even without supplying of any documents, the grounds of detention being severable under u/s 5A of COFEPOSA, the order of detention cannot be declared as totally void and without jurisdiction.

16. In our view there is a complete fallacy in the above argument. Section 5A only provides that the ground of detention are severable and the order of detention shall not be deemed to be invalid or inoperative merely because one or some of the grounds may be vague, non-existent, not relevant not connected or not proximately connected with such person or invalid for any other reason whatsoever. That does not mean however, that if the order of detention is based on several grounds and the subjective satisfaction of the detaining authority is based on documents relied upon or referred to in the grounds, none of these documents are required to be supplied to the detenu under the umbrella of Section 5A of COFEPOSA. It is not the case of the petitioner before us that the order of detention was invalid on account of any one or more of the grounds being vague, non-existent, or irrelevant. The order has been challenged on account of non-supply of documents, which deny the constitutional right of

effective representation guaranteed under Article 22(5) of the Constitution.

17. In the result, this petition is allowed, the detention of the petitioner under COFEPOSA is held to be ab initio void illegal and without jurisdiction and as a result of which the proceedings taken Under Sections 6 and 7 of SAFEMA are also held to be illegal and are hereby quashed. In the facts and circumstances of the case parties shall bear their own costs.