(1994) 08 MAD CK 0037

In the Madras High Court

Case No : Writ Petition No. 4172 of 1994

S. Mohanraj APPELLANT

Vs

Deputy Director, Enforcement Directorate RESPONDENT

Date of Decision : 31-08-1994

Acts Referred:
Foreign Exchange Regulation Act, 1973 — Section 38, 41

Citation : (1996) 85 CompCas 505 : (1995) CriLJ 3018 : (1996) 53 ECC 74 : (1995) 75 ELT 251

Hon'ble Judges : D.M. Ali Mohamad, J

Bench : Single Bench

Advocate : B. Kumar, for the Appellant; V. Rangarajan, Additional Central Government Standing Counsel, for the Respondent

Judgement

S.M. Ali Mohamad, J.—The petitioner herein in the affidavit in support of the writ petition has stated that in the course of investigation, the

respondent seized the passports in H. 214990 and A. 138238 on October 15, 1992, u/s 38 of the Foreign Exchange Regulation Act, 1973

(hereinafter referred to as ""the Act""). It is further stated that the said passports have not been returned to the petitioner and the petitioner is not in

any way connected with the alleged offence under the Act. On the other hand, a counter-affidavit has been filed on behalf of the respondent

wherein it is stated that the passports were seized u/s 38 of the Act in the course of investigation and there is a prima facie case that the petitioner is

involved in violation of the provisions of the Act, and in particular, on investigation into two foreign currency accounts alleged to have been held by

the petitioner with the UCO Bank, Singapore, and the Development Bank, Singapore, and the investigation is not yet completed. It is further alleged that as the seizure as u/s 38 of the Act, the respondent is entitled to retain the seized passports with them without any time-limit.

2. Mr. B. Kumar, learned counsel appearing on behalf of the petitioner, contended that the petitioner is in no way connected with any alleged

offences under the Act and in any event, as per section 41 of the Act, the documents seized ought to be returned within a period of one year

before the Amending Act of 1993 which came into effect from January 8, 1993, and after the amendment, within six months. In support of the said

contention, learned counsel referred to a ruling of this court in K.M. Amir Abdul Kader Vs. The Deputy Director, Enforcement Directorate,

Madras, , wherein Ratnam, J. (as the learned Chief Justice then was) has observed as follows (at page 143) :

No doubt, u/s 41 of the Act, there is no clear indication regarding the return of the document seized. Despite that, in my view, that section cannot

be read as justifying the retention of the seized document beyond one year without fulfilling the other requirements. The period of retention is limited

to one not exceeding one year, unless, before the expiry of the period of one year, adjudication proceedings u/s 51 have been commenced or

proceedings u/s 56 have been initiated, in which case, the benefit of extended time would be available for the retention of the seized document.

Indeed there is no positive direction in section 41 of the Act, that the document should be returned to the person from whom they were seized.

Even so, when the retention of the seized documents cannot, under law, be extended beyond the period of one year, unless certain conditions are

satisfied, it follows that beyond the period of one year in the absence of the fulfillment of the other requirements enabling the retention even beyond

that period, whatever had been seized should be restored back and that could be only to the person from whom it as seized.''

3. It is clear from the above ruling that any documents seized by the enforcement authorities should be returned within a period of one year. As the

Act has been amended, any document seized should be returned within a period of six months unless proceedings u/s 51 of the Act were pending

before the Appellate Board or the High Court. Therefore, on the authority of the said ruling, Mr. Kumar, learned counsel submitted that the

petitioner is entitled to the return of the passports seized.

4. On the other hand, Mr. V. Rangarajan, learned Additional Central Government Standing Counsel, submitted that section 38 of the Act will not

come under the purview of section 41 of the Act and, therefore, there is no limit of period within which documents seized can be returned to the

parties within the time specified u/s 41 of the Act. In support of the said contention, the learned Additional Central Government Standing Counsel

referred to the ruling in Abdul Kader Mahomed Jhaveri Vs. Union of India and Others, , wherein a Division Bench of the Gujarat High Court,

while interpreting section 38 of the Act, has observed as follows (at page 182) :

In order to appreciate this contention, it must be kept in view that once the provisions of section 38 of the Act are validly pressed in service by the

competent authority for seizing the passport, as in the present case, how long the seizure and consequential custody of the passport will continue

with the competent authority seizing the document, becomes at once a germane question. It cannot be that seizure and consequential custody can

be of indefinite duration. Section 38 indicates that the concerned document or the thin seized u/s 38 should be relevant to the investigation or

proceedings under the Act or in connection therewith any infraction of the Act or rules or order should have been committed. It stands to reason

that the custody of the seized document or thing as a relevant or useful document or thing at least would be conterminous with the concerned

investigation or proceedings during the pendency of which such seizure is effected on the ground that the seized article is useful or relevant pending

such investigation or proceedings. In the present case, the seizure of the passport is being upheld u/s 38 read with sections 51, 50 and 29(1) of the

Act. The competent authority has seized the passport on the ground that it is relevant for the adjudication proceedings pending before it in

connection with the alleged infraction of section 29(1) of the Act by the petitioner, therefore, the said seizure cannot continue indefinitely beyond

the currency of the adjudication proceedings. In this connection, we must have a look at section 41 of the Act. The said section deals with custody

of documents, etc., which are either produced before the competent authority or seized by them in exercise of their power under various provisions

of the Act and when such documents are believed to be furnishing evidence of contravention of any of the provisions of the Act or the rules. In case of such types of documents which furnish direct evidence of contravention of the Act or the Rules, consequential custody flowing from the

seizure of such documents is permitted to be retained by the authority seizing the documents for a period not exceeding one year or if before the

expiry of the said period of one year any proceedings (i) u/s 51 have been commenced, until the disposal of those proceedings including the

proceedings, if any, before the Appellate Board and the High Court, or (ii) u/s 56 have been commenced before a court, until the document has

been filed in the court. Section 41, therefore, clearly lays down the legislative intention that in case of seized documents which are themselves

evidence of contravention of the provisions of the Act and the rules, the maximum period of custody of such documents with the authority seizing

the documents is limited to one year or till the expiry of the adjudication proceedings u/s 51 and till they reach their final culmination through all the

hierarchy of proceedings up to the High Court, or if there are any criminal proceedings, till the document is filed in the competent court, It,

therefore, stands to reason that if the documents are evidence of contravention of the provisions of the Act or the rules, a fixed period is provided

for their custody with the authority seizing the documents. Therefore, of necessity, the period of custody of those documents which are not

themselves any evidence of infraction of the Act or the rules but are merely relevant or useful for any such inquiry or proceedings under the Act and

which are seized u/s 38, cannot be as large as contemplated by section 41. it is obvious that section 41 does not apply to those documents which

are seized u/s 38. However, that does not mean that power to retain custody of seized documents u/s 38 as relevant or useful documents can be

exercised for any indefinite period which may go even beyond what is contemplated for more drastic types of documents dealt with by section 41.

As we have already seen above, section 38 nowhere contemplates the period during which custody of the seized article as relevant or useful for

investigation or inquiry can be retained by the authority seizing the document. But implicit in the section is the indication of legislative intention that

custody of such document would remain so long as the document would remain relevant or useful to the investigation or proceedings, meaning

thereby that the custody would become conterminous with the conclusion of the concerned investigation or proceedings. However, the petitioner vehemently submitted that the adjudicating authority may take months and years for finishing such proceedings and in the meantime, if the passport

is permitted to be kept in the custody of the seizing authority, irreparable injury will be caused to the petitioner and he may not be able to go out of

the country for an indefinite period and if that happens, exercise of power u/s 38 would become unreasonable. So far as the aforesaid contention

of the petitioner is concerned, there is a lot of substance therein. We may in this connection refer to the observations of the majority judgment of

the Supreme Court in the case of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, . Bhagwati J. (as he then was), speaking for the

majority, has made the following pertinent observations in connection with impounding of passports and its effect on the holder of the passport :

We may observe that if the impugned order impounding the passport of the petitioner were violative of her right to freedom of speech and

expression or her right to carry on her profession as a journalist, it would not be saved by article 19(2) or article 19(6), because the impounding of

the passport for an indefinite length of time would clearly constitute an unreasonable restriction. The Union contended that though the period for

which the impugned order was to operate was not specified in so many terms, it was clear that it was intended to be conterminous with the

duration of the commission of inquiry, since the reason for impounding was that the presence of the petitioner was likely to be required in

connection with the proceedings before the Commission of Inquiry and the term of the Commission of Inquiry being limited up to December 31,

1977, the impounding of the passport could not continue beyond that date and hence it would not be said that the impugned order as to operate

for an indefinite period of time. Now, it is true that the passport of the petitioner was impounded on the ground that her presence was likely to be

required in connection with the proceedings before the Commission of Inquiry and the initial time limit fixed for the Commission of Inquiry to submit

its report was December 31, 1977, but the time limit could always be extended by the Government and the experience of several Commissions of

Inquiry set up in this country over the last twenty-five years shows that hardly any Commission of Inquiry has been able to complete its report

within the originally appointed time. Whatever might have been the expectation in regard to the duration of the Commission of Inquiry headed by

Mr. Justice Shah at the time when the impugned order was made, it is nor clear that it has not been possible for it to complete its labours by

December 31, 1977, which was the time limit originally fixed and in fact its term has been extended up to May 31, 1978. The period for which the

passport is impounded cannot, in the circumstances, be said to be definite and certain and it may extend to an indefinite point of time. This would

clearly make the impugned order unreasonable and the learned Attorney-General appearing on behalf of the Central Government, therefore, made

a statement that in case the decision to impound the passport of the petitioner is confirmed by the Central Government after hearing the petitioner,

the duration of the impounding will not exceed period of six months from the date of the decision that may be taken on the petitioner''s

representation"". It must be said in fairness to the Central Government that this was a very reasonable stand to adopt, because in a democratic

society governed by the rule of law, it is expected of the Government that it should act not only constitutionally and legally but also fairly and justly

towards the citizen. We hope and trust that in future also whenever the passport of any person is impounded u/s 10(3)(c), the impounding would

be for a specified period of time which is not unreasonably long, even though no contravention of any fundamental right may be involved. It is true

that the aforesaid observations have been made in connection with the impounding of the passport of an Indian citizen. However, the test of

unreasonableness of the exercise of power of impounding a passport as laid down by the Supreme Court in the aforesaid decision can well be kept

in view while deciding the present contention of the petitioner. To see that power of seizure u/s 38 may not become unreasonable on account of

prolonged and indefinite continuous seizure and consequential custody of the sized passport on the ground that it is relevant for the inquiry proper

directions have to be issued to the respondent about release of the passport to the petitioner at the proper time. The petitioner''s apprehension that

adjudication proceedings may be indefinitely delayed over years, can be taken care of by direction the respondents to finish pending adjudication

proceedings at the earliest. When this is done, exercise of power u/s 38 on the facts of the case would not become unreasonable and the

apprehension of the petitioner that his passport would indefinitely remain seized also would not survive.

5. There is force in the contention of Mr. V. Rangarajan, learned Additional Central government Standing Counsel, to the effect that seizure u/s 38

of the Act will not come within the purview of section 411 of the Act. However, it is to be observed that any seizure of document by the

respondent is only with reference to investigation of a violation or for an offence against any provisions of the Foreign Exchange Regulation Act,

and seizure for the purpose of seizure is not sustainable in law. In the instant case, the counter-affidavit filed by the respondent states that the

investigation is in progress with reference to two foreign currency accounts alleged to have been held by the petitioner with the UCO Bank,

Singapore, and the Development Bank, Singapore, and the investigation is not yet completed. The alleged offence will come u/s 8 of the Act.

Section 8 of the Act reads as follows :

Restrictions on dealing in foreign exchange. - (1) Except with the previous general or special permission of the Reserve Bank, no person other

than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, purchases or otherwise

acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange

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Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money-

changer.

Explanation. - For the purposes of this sub-section, a person, who deposits foreign exchange with another person or opens an account in foreign

exchange with another person, shall be deemed to lend foreign exchange to such other person.

(2) Except with the previous general or special permission of the Reserve bank, no person, whether an authorised dealer or a money-changer or

otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian

currency at rates of exchange other than the rates for the time being authorised by the Reserve Bank.

(3) Where any foreign exchange is acquired by any person, other than an authorised dealer or a money-exchanger, for any particular purpose, or

where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired

otherwise than for that purpose or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and

where any foreign exchange so acquired cannot be so used or the conditions cannot be complied with, the said person shall, within a period of

thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell

the foreign exchange to an authorised dealer or to a money-changer.

(4) For the avoidance of doubt, it is hereby declared that where a person acquires foreign exchange for sending or bringing into India any goods

but sends or brings no such goods or does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time

or sends or brings any goods of a kind, quality or quantity different from that specified by him at the time of acquisition on the foreign exchange,

such person shall, unless the contrary is proved, be presumed not to have been able to use the foreign exchange for the purpose for which he

acquired it or, as the case may be, to have used the foreign exchange so acquired, otherwise than for the purposes for which it was acquired.

(5) Nothing in this section shall be deemed to prevent a person from buying from any post office, in accordance with any law or rules made

thereunder for the time being in force, any foreign exchange in the form of postal orders or money orders.

6. On a reading of the above section, it is clear that no person resident in India other than an authorised dealer shall purchase or otherwise acquire

or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised officer without the permission of the

Reserve Bank and the violation of section 8 of the Act is punishable in the case of an offence the amount or value involved in which exceeds Rs. 1

lakh, with imprisonment for a term which shall not be less than six months, but which may extend to seven years and fine and apart from the

criminal proceedings, for the offence, a personal penalty also could be levied after the adjudication in the matter. It is clear that the documents

seized in the instant case, viz., the two passports can be retained by the respondent. It is clear that even though section 41 of the Act is not directly applicable to seizure u/s 38 of the Act and the documents seized u/s 338 of the Act can be retained by the respondents without any time limit, the

documents seized must be relevant to the investigation of the matter relating to any violation of the provisions of the Act and without this connection

link the documents seized u/s 38 of the Act cannot be retained for an indefinite period of time. The period is limited to the reasonable period of

investigation and the period of adjudication u/s 51 and 56 of the Act. Even though there is no time limit fixed for completion of the investigation and

the adjudication proceedings, a reasonable time should be taken by the respondent to complete both the investigation and the adjudication in the

matter and once the investigation and the adjudication are completed, the property seized should be returned to the person from whom it was

seized.

7. In the instant case, it is alleged by the petitioner that the investigation has been prolonged and on the other hand, it is alleged by the respondent

that the petitioner is not co-operating with the investigation. However, the petitioner has filed a supplementary affidavit wherein he has undertaken

to co-operate with the Department in any manner as may be reasonably required. In view of the above, I feel that the ends of justice will be served

by directing the respondent to complete the investigation within a period of four months from today and the documents seized u/s 38 of the Act,

viz., the passports shall be returned to the petitioner in accordance with law. The writ petition is ordered in the above terms.