

(2006) 03 DEL CK 0250

In the Delhi High Court

Case No : Writ Petition (Criminal) No. 647 of 1993

Sh. Ravi Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 06-03-2006

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 3(1), 68, 68(1)

Citation : (2006) 128 DLT 304 : (2006) 88 DRJ 200

Hon'ble Judges : Manmohan Sarin, J; Manju Goel, J

Bench : Division Bench

Advocate : Herjinder Singh and Shikha Tyagi, for the Appellant; Kailash Gambhir and Satinder Bawa for respondent No. 1. and Rajendra and R.K. Chawla, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Sarin, J.—This judgment decides WP(Crl.).No.647/1993, filed by Ravi Sharma and WP(Crl.).648/1993, filed by his wife Sarika Sharma. Petitioner/Ravi Sharma questions the validity of detention order dated 7th July, 1968 passed u/s 3(1) of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1985 (in short PIT NDPS Act). Notice dated 11th March, 1993 issued u/s 68(h)(1) of Narcotic Drugs and Psychotropic Substance Act, 1985 (in short NDPS Act) is also assailed. A restraint on the respondents is also sought from taking any steps pursuant to the detention order and the above notice u/s 68(h)(1) of the NDPS Act.

2. Sarika Sharma in her petition seeks quashing of the detention order passed against her husband Ravi Sharma, as also the notice u/s 68(h)(1) of the NDPS Act issued to her.

3. The relevant facts for disposal of the present petitions, may be noted:

(i) One Mrs. Amar Song was arrested on 22nd August, 1987, while attempting to

smuggle 4 Kg of heroin in a flight to Barcelona (Spain). Petitioner/Ravi Sharma was arrested, as the mastermind behind the said attempt on 11th August, 1987. A complaint for offence u/s 21 of the NDPS Act was filed on 2nd November, 1987 under the NDPS Act.

(ii)The impugned detention order dated 6th July, 1968 was passed u/s 3(1) of PIT NDPS Act. Representations against the same were rejected by the Detaining Authority as well as the Central Government. The detention order was confirmed by the Advisory Board. Ravi Sharma thereupon preferred a writ petition bearing No.489/89, challenging the order of detention. By a detailed reasoned judgment dated 24th January, 1989, the said petition was dismissed.

(iii)Petitioner/Ravi Sharma preferred a SLP bearing No.616/89 in the Supreme Court. This was also dismissed since the detention period was over with liberty to the petitioner to move the Court if and when he so desired. Petitioner and his wife, in these circumstances, filed the present writ petitions .

(iv)Petitioners contend that the order of detention is challenged in the present petitions on grounds other than those taken and dealt with in Writ Petition (criminal)No.489/89. Petitioner/Ravi Sharma in the petition sought stay of the proceedings initiated by the authorities pursuant to the notice u/s 68(h)(1) of the NDPS Act. The proceedings before the Competent Authority were stayed vide interim order dated 26th August, 1998 in the Writ Petition. The interim stay order was modified on 29th September, 1999, permitting the proceedings before the Competent Authority to go on without a final order being passed. Respondents were granted leave to seek modification of the order, if Ravi Sharma did not cooperate in the proceedings.

(v)Curiously, petitioner moved CrI.M.173/2004, seeking vacation of the interim stay granted on 26th August, 1998, as modified vide order dated 22nd September, 1999. Petitioner pleaded that evidence had been recorded and even arguments had been addressed by the parties before the Competent Authority. Petitioner, Therefore, prayed that the embargo put on the Competent Authority on passing the final order be lifted. The Court despite objections from the respondents vacated the stay, as granted, vide order dated 9th January, 2004, at the instance of petitioner.

(vi). Petitioners, thereupon, participated in the proceedings before the Competent Authority, resulting in orders bearing No.CA/DL/NDPS/62/92/Vol.II/908 dated 12th January, 2004 in case of Ravi Sharma and order bearing No.CA/DL/NDPS/NCB/26/92Vol.II/906 dated 12th January, 2004 in respect of his wife Sarika Sharma being passed. Vide the above order, the Competent Authority after considering the evidence produced as to the source of funds and valuation of the properties, held that petitioner/Ravi Sharma had been able to explain the sources for 71.05% of value of the properties. However, he had failed to show the sources to the satisfaction of the Competent Authority to the extent of 29.96% of the value of properties . The Competent Authority, accordingly, gave

an option to him to pay a fine of Rs.14,19,000/- in lieu of forfeiture of properties to that extent. Similarly, in case of Sarika Sharma, the competent authority held that she had been able to explain the sources of funds of 76.02% of the value of properties while she failed to explain sources to the extent of 23.98% of the value of properties. She was given an option to pay a fine of Rs.8,80,000/- in lieu of forfeiture of the properties to that extent.

4. It is in the above facts that the question of prosecution and maintainability of the present writ petitions filed by petitioners seeking quashing of the detention order and the notices u/s 68(h)(1) of the NDPS Act have to be considered. The detention period is already over. Petitioner Ravi Sharma's original Writ Petition (Criminal)No.489/89 had been dismissed. The SLP against the same was also dismissed but giving the liberty to the petitioner to challenge the same in later proceedings, if so desired. Petitioners availed of the said liberty and challenged the detention order and the proceedings u/s 68 of the NDPS Act.

5. Mr.Herjinder Singh on behalf of petitioners contends that in view of the liberty granted to the petitioner/Ravi Sharma, it was open to him to challenge the detention order on fresh grounds, which had not been raised in the earlier petition. He submits that the present challenge is essentially on the ground that the detaining authority and the Central Government rejected the representation on 12th/14th September, 1988, without independently applying their mind, as required. According to him, on this short ground itself, detention order was not sustainable.

6. Mr.Satinder Bawa on behalf of Union as also Mr.Rajendra, Senior Standing counsel on behalf of respondent No.3 contend that petitioners cannot now be permitted to assail a detention order, which has already expired or the proceedings u/s 68 of the NDPS Act, which have crystallized in the orders being passed by the Competent Authority, after a willing participation of the petitioners.

7. Respondents submit that petitioners themselves got the stay order vacated by the Division Bench in respect of proceedings u/s 68 of NDPS Act before the Competent Authority. They fully participated in the proceedings and took their chance therein. In fact, it is urged that petitioners obtained substantial relief to the extent of 70 to 76%. In case, petitioners have any grievance in respect of orders of the Competent Authority, the appellate remedy under the statute is still available to them. However, petitioners cannot now be permitted to challenge the detention order and to urge that the proceedings in respect of which they got the stay vacated and wherein they participated and availed of the relief as given by the Competent Authority, are nonest.

8. We may note that without prejudice, respondents submit that the grounds now sought to be raised in the writ petitions would also be barred by Principles of Constructive res judicata.

9. Mr.Herjinder Singh in rejoinder submits that petitioners have a legal right to challenge the detention order and the same is not barred by estoppel,

promissory estoppel, res judicata or waiver.

10. We find considerable merit in the submissions of the respondents. Firstly, as noted earlier, it was at the instance and behest of the petitioners that the stay against the proceedings u/s 68 of the NDPS Act was vacated. Petitioner addressed a communication dated 11th September, 2002 to the Competent Authority raising objections to the valuation report, as given by the valuation officer. In the said communication, petitioner/Ravi Sharma made the following representation:

That the affected person will withdraw the writ petition pending in the Hon'ble High Court immediately after revaluation of the property and is prepared to pay the fine in order to buy peace.

Based on the representations, as aforesaid, made by the petitioners, the Competent Authority examined their cases on merits and passed the orders referred to earlier. The fine has also been paid by the petitioners. Petitioners having availed of the benefit, flowing from the orders of the Competent Authority and despite having the remedy to challenge in appeal the orders of the Competent Authority seek to pursue the writ petitions which they had offered to withdraw upon revaluation of property as done by the respondents. The pursuit of writ petitions is intended to take a chance of having the proceedings before the Competent Authority being declared nonest, if they succeed in the writ petitions and having the detention order quashed.

11. We also find that the present writ petitions would be barred by the maxim *qui approbate non reprobate* i.e., parties cannot be permitted to approbate and reprobate. Petitioner chose to participate in the proceedings before the Competent Authority by getting the stay order vacated and undertook to withdraw the writ petition. Petitioners who took their chance before the Competent Authority and obtained the advantage of relief of over 70 to 76% in the properties, are not now willing to abide by withdrawal of the writ petitions, as assured. Petitioners cannot be permitted to approbate and reprobate. Reference may usefully be invited to the decision of the Supreme Court in *New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others*, . The Court observed:-

It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is *qui approbate non reprobate* (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction. Although a person cannot be debarred from enforcing his fundamental rights on the

ground of estoppel or waiver, the aforesaid principle which prohibits a party to a transaction from approbating a part of its conditions and reprobating the rest, is different from the doctrine of estoppel or waiver.

The aforesaid inhibitory principle squarely applies to the cases of those petitioners who had by offering highest bids at public auctions or by tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned condition (13) on the ground that this condition is violative of Articles 19(1)(g) and 14.

12. In view of the foregoing discussion, we are of the view that in the facts and circumstances and the legal position, as noted above, petitioners, who had earlier failed in the challenge to the detention order on merits, cannot now be permitted to resile from their representation regarding withdrawal of the writ petitions and prosecute the same, especially after having availed of the benefit of revaluation of the properties in the proceedings before the Competent Authority and having paid the fine. Petitioners have the statutory remedy of appeal available to them, if they so desire.

Writ petitions are, accordingly, dismissed.