
(2010) 10 DEL CK 0266
In the Delhi High Court
Case No : Writ Petition (C) 4800 of 2008

Shahid Parvez

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 27-10-2010

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 9, 9(2)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 10(2), 68A, 68A(2), 68B, 68F(2)

Citation : (2010) 120 DRJ 366 : (2011) 1 ILR Delhi 297 : (2011) 6 RCR(Criminal) 1005

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Vinoo Bhagat and M.R. Mishra, for the Appellant; Atul Nanda, for R-1 to R-3, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—This writ petition has been filed against an order dated 1st February 2006 passed by the Appellate Tribunal for Forfeited Property ("Appellate Tribunal") dismissing the Petitioner's appeal against an order dated 7th July 1999 passed by the Competent Authority ("CA") u/s 68I(3) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act").

Background facts

2. The Petitioner's brother Mohd. Azad Parvez of Balasore Town, Orissa was detained on 10th July 1991 for the alleged offence of indulging in illicit trafficking of drugs punishable under the NDPS Act. This was subsequent to an order of detention passed against Mohd. Azad on 26th July 1989 passed by the Joint Secretary to the Government of India. After Mohd Azad was arrested, he was served with the order of detention and grounds of detention on 10th July 1991. On 30th July 1991, a reference was made to the Advisory Board u/s 9(1) of the

NDPS Act. The Advisory Board held that there was sufficient cause for the detention and a confirming order was passed by the Central Government u/s 9(1) read with Section 10(2) of the NDPS Act for a period of two years with effect from 10th July 1991.

3. It is stated that Mohd. Azad served out the entire detention period. However, while under detention, Mohd. Azad filed a Writ Petition (Criminal) No. 315 of 1992 in this Court challenging the said order of detention. However, the said writ petition was not taken up for hearing for many years and not before he completed the period of detention.

4. Meanwhile, the property belonging to the Petitioner Shahid Parvez, brother of Mohd. Azad being immovable property located in Balasore Town, which was purchased in his name under a sale deed dated 11th February 1998, was frozen by the Inspector In-charge, Police Station (PS) Balasore on 18th January 1999. This was confirmed by the CA on 12th February 1999. The said action was taken on the ground that the order of detention dated 26th July 1989 against Mohd. Azad had not been revoked by any Court and the Petitioner being his brother was a person covered u/s 68A(2)(d) of the NDPS Act. It was suspected that the source of the above immovable property at Balasore in the name of the Petitioner as well as another motor parts shop belonging to the Petitioner also located at Balasore, Orissa were illegally acquired properties in terms of Section 68B(g) of the NDPS Act.

5. According to the Respondents, on 17th February 1999 and 9th March 1999, notices were issued to the Petitioner u/s 68H(1) of the NDPS Act calling upon him to indicate the sources of his income, earnings or assets, out of which or by means of which he had acquired the said two properties, the evidence on which he relies and other relevant information and particulars. It is stated that the above notices were served on the Petitioner on 13th May 1999. However, there was no response to the above notice. Thereafter, a notice u/s 68I(1) of the NDPS Act was issued to the Petitioner on 14th June 1999, which was served on him on 23rd June 1999, informing him of the date of hearing of 5th July 1999 before the CA. It is stated by Respondents that despite service of notice the Petitioner did not appear before the CA. Consequently, the proceedings were concluded ex parte with a presumption being drawn against the Petitioner that the assets mentioned in the Schedule were the illegally acquired properties of his brother Mohd. Azad u/s 68B(g) of the NDPS Act. The said properties were declared to have been forfeited to the Central Government free from all encumbrances. Thereafter, the Petitioner filed an appeal before the Appellate Tribunal which was pending before it.

6. In the meanwhile, on 16th May 2002 the petition of Mohd. Azad being Writ Petition (Criminal) No. 315 of 1992 was taken up for hearing by this Court and disposed of on that date by the following order:

Crl.W. No. 315/92

It is agreed between the parties that this matter is covered by the decision of this Court in *Akhilesh Kumar Tyagi v. Union of India* reported in 1995 IV AD (Delhi) 107. The writ petition is allowed in terms thereof. The initial period of detention of three months is sustained.

It is contended by learned Counsel for the Petitioner that the original detention for a period of three months is only valid and any detention subsequent thereto is vitiated. On the contrary, the learned ASG submits that even if there is no declaration of continued detention yet detention of a period of one year would not suffice but further detention would be bad. I have heard the learned Counsel, it appears to me that the contention raised by Mr. Sood, learned ASG is not borne out from the law laid down by the Supreme Court. I, therefore, hold that the detention for a period of three months is valid and continue detention is vitiated.

The writ petition is allowed accordingly.

7. Meanwhile the Appellate Tribunal, on 1st October 1999, directed that the Petitioner "should be given an opportunity to produce his evidence and submit his contentions before the CA." The CA was asked to consider the documents and submissions and pass fresh orders. Pursuant thereto, on 11th October 1999 the Petitioner appeared before the CA and presented documents. The CA informed the Appellate Tribunal on 15th October 1999 that the certificates produced by the Petitioner about receipt of salary and commission from the three different firms in Calcutta could not be verified as such firms did not exist at the addresses given. However, before the Appellate Tribunal the Petitioner pointed out that he was an employee in these concerns during the period 1979-80 to 1985-86 and that the inquiry was made after a long time-gap of 15-20 years during which time his employers might have shifted to other places and, therefore, mere non-availability of the concerns at the addresses given should not have been a ground for the CA to disbelieve the Petitioner. The Appellate Tribunal, on 3rd December 2002, passed an order directing the CA to give a further opportunity to the Petitioner to prove the genuineness of those concerns. The CA was directed to make further enquiries. The proceedings were directed to be completed within three months. The appeal was again taken up before the Appellate Tribunal on 18th August 2005. It was noted that the supplementary findings of the CA that were called for by the Appellate Authority in its order dated 3rd December 2002 had not been submitted. Accordingly, a direction was issued to CA to submit the additional findings.

8. Subsequently, the appeal was taken up for hearing on 1st February 2006 before the Appellate Tribunal. None appeared for the Appellant (Petitioner herein). The Appellate Tribunal was informed of the order passed by this Court on 16th May 2002 setting aside the continued detention of the Petitioner's brother. The further findings of the CA had been submitted to the Appellate Tribunal. The CA reiterated that the Petitioner had not been able to produce any fresh document and, therefore, was unable to discharge the burden u/s 68J of

the NDPS Act. The Appellate Tribunal then concurred with the findings of the CA that the evidentiary documents filed by the Petitioner could not be believed. It was further concluded that the firms which issued the receipts of salary income and the commission to the Petitioner were shown as not existing at the given addresses. Consequently, it was difficult to believe that the Petitioner was having his own valid source of income. The Appellate Tribunal observed that as regards the second forfeited property, the Petitioner had taken a plea that he was a tenant. However, in the absence of any documentary evidence to prove the same, the Appellate Tribunal refrained itself from making any observations on that plea.

9. Since the appeal was decided ex parte, the Petitioner filed application MP-ND-29 & ND-30/CAL/2006 before the Appellate Tribunal for recalling of its order dated 1st February 2006. By order dated 4th October 2007, the Appellate Tribunal held that there is no explicit provision in the Appellate Tribunal for Forfeited Property Rules, 1989 for recalling of any order of the Appellate Tribunal passed on merits and no case was made out for recalling of the order dated 1st February 2006. It was also observed that since the detention for a period of three months was upheld, "the provisions of Chapter V-A will continue to apply to the Petitioner."

10. It was noticed by the Appellate Tribunal in the order dated 4th October 2007 that the Petitioner had initially challenged the order dated 1st February 2006 of the Appellate Tribunal before the High Court of Orissa, but he withdrew the petition which was dismissed as withdrawn on 17th July 2006. Therefore, the CA took the physical possession of the forfeited property in terms of the order dated 7th July 1999 of the CA.

11. While directing notice to issue in the present petition on 15th October 2008, this Court directed that the impugned order dated 1st February 2006 of the Appellate Tribunal shall remain stayed till the next date of hearing. The said interim order was continued on 7th August 2009, 26th November 2009 and 5th April 2010.

Submissions of Counsel

12. Mr. Vinoo Bhagat, learned Counsel appearing for the Petitioner first submitted that for the operation of Section 68A(2)(d) of the NDPS Act, there has to be a subsisting valid order of detention. The consequence of this Court's order dated 16th May 2002 setting aside the detention order of the Petitioner's brother Mohd. Azad, was that in terms of the decision of the Full Bench of this Court in Akhilesh Kumar Tyagi Vs. Union of India and Others, the detention order was void ab initio. It is submitted that though the initial period of detention of three months was sustained, the detention order itself was being set aside from the date of its passing. It is further submitted that the Respondents had failed to discharge the initial burden of showing nexus between the properties acquired by the Petitioner in 1998 with the alleged illegal earnings of the Petitioner's brother

for which the detention order was passed at least nine years prior to the said acquisition and for which the Petitioner's brother had served term in jail for two years between 1991 and 1993. It is submitted that unless there was a prima facie material linking the alleged illegal earnings of the Petitioner's brother and the acquisition of the property in question by the Petitioner, the impugned order cannot be sustained.

13. On the other hand, it is submitted by Mr. Atul Nanda, learned Counsel appearing for Respondents that as explained by the Supreme Court in *Meena Jayendra Thakur Vs. Union of India and Others*, and *Union of India (UOI) and Another Vs. Harish Kumar*, the entire detention order was not held to be illegal by this Court in its order dated 16th May 2002. That being the position, the burden shifted on the Petitioner to show that the property was acquired by him from his own sources of income.

Effect of this Court's order dated 16th May 2002 quashing the detention.

14. First the effect of this Court's order dated 16th May 2002 quashing the detention of the Petitioner's brother's detention requires to be considered. The decision of the Full Bench of this Court in *Akhilesh Kumar Tyagi*, was in the context of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1975 ("COFEPOSA Act"). The relevant provisions of COFEPOSA Act are more or less similar to the corresponding provisions in Chapter V-A of the NDPS Act with which the present case is concerned. In *Maqudoo Meera Hameem v. Joint Secretary to Govt. of India* CrI. Writ Petition No. 83 of 1995 decided on 17th August 1995, the Division Bench of this Court had held that in case where the reference to the Advisory Board was made beyond 5 weeks and the Advisory Board gave its opinion beyond 11 weeks, the continued detention during the extended period became bad. In *Akhilesh Kumar Tyagi*, the correctness of the decision in *Maqudoo Meera Hameem* was questioned by the Union of India. It was contended that till such time the detention order was quashed, it remained valid. It was urged by the Union of India that the respective periods of 5 weeks and 11 weeks in *Maqudoo Meera Hameem* which got extended to "4 months and 2 weeks" and "5 months and 3 weeks" respectively, did not get contracted or reduced back to 5 weeks and 11 weeks respectively when the declaration u/s 9 COFEPOSA Act was quashed. Consequently, it was contended by the Union of India that the detention beyond three months did not become illegal automatically.

15. It may be recalled that in *Akhilesh Kumar Tyagi* the detention was set aside on the ground that the Petitioner had not been informed by the declaring authority that he had a right to make a representation against the order of detention to the Advisory Board and the Central Government and also to the declaring authority. In answering the question whether the declaration made u/s 9 of the COFEPOSA Act was valid till it was quashed or whether it becomes void ab initio, the Full Bench of this Court in *Akhilesh Kumar Tyagi v. Union of India* held in para 30 as under (DLT@ p. 213):

30. If, therefore, there is a violation of Article 22(5) in not informing the detenu that he had an opportunity to represent to the declaring authority, upon the Court quashing the Section 9 declaration, the order is impliedly declared void from its inception and on that basis, the benefit of extension of the period of 5 weeks to 4 months and 2 weeks, and the benefit of extension of 11 weeks to 5 months and 3 weeks in Section 9(2), cease to apply. It is indeed not a case of extension of the periods and a later contraction but the order quashing the Section 9 declaration would make the declaration ineffective from the date it was issued and in case either the reference to the Board is beyond 5 weeks and/or the report of the Board is beyond 11 weeks, then the "continued detention" beyond three months would be invalid.

(emphasis supplied)

16. Analysing the order dated 16th May 2002 passed by this Court in the present case, the opening line appears to indicate that this Court held the initial period of three months' detention of the Petitioner's brother to be valid but the remaining period of detention to be invalid in terms of the judgment in Akhilesh Kumar Tyagi. What is also significant is that the contention of the learned ASG to the contrary was negatived and it was held that "the detention for a period of three months is valid and continued detention is vitiated." Extending the logic of the decision in Akhilesh Kumar Tyagi to the order dated 16th May 2002, while the detention for a period of three months was held to be valid, the detention order itself was held to be void ab initio. It must be noted that the order dated 16th May 2002 passed by this Court attained finality with the Respondents accepting it. Further, while the period of three months of detention was held valid, the detention order was itself held to be void ab initio, i.e. from the date it was issued.

17. The resultant position is that, the order dated 16th May 2002 related back to the date of passing of the detention order i.e. 7th July 1989. Even if one were to extend the ratio of Meena Jayendra Thakur or Harish Kumar the detention order became void three months after the actual date of the detention of the Petitioner's brother on 10th July 1991. The show cause notice was issued to the Petitioner on 17th February 1999. In terms of this Court's order dated 16th May 2002 the detention order of the Petitioner's brother had been rendered void ab initio, i.e. void from 7th July 1989 or in any event from a date three months after 10th July 1991. Viewed from any angle, there was on 17th February 1999 no valid detention order against the Petitioner's brother. Consequently, the essential condition for invoking Section 68A of the NDPS Act, had been rendered non-existent on account of the subsequent development of the passing of the order dated 16th May 2002 by this Court. The Petitioner is, therefore, entitled to succeed on this ground.

Impugned order of CA bad even on merits

18. The impugned order of the CA, affirmed by the Appellate Tribunal, cannot be

sustained even on merits. The records of the CA have been perused by this Court. The relevant period is the one immediately preceding issuance of show cause notice to the Petitioner u/s 68H(1) of the NDPS Act. It appears that following certain letters received from the Income Tax Office, Balasore, on 1st November 1996, the Investigating Officer/CA at Calcutta made a noting directing the Department "to ascertain the existence of Shri Shahid Parvez." He advised: "We may as well write to Branch Manager, Central Bank of India, Brahamansahi Branch, Soro, Balasore to furnish details of Bank Account No. 263 such as name of holder and address, name of introducer and address, date of opening and present position of the account."

19. This was followed by several reminders and the noting dated 17th June 1997 where it was acknowledged that the Branch Manager, Central Bank of India had furnished address of the brother of the Petitioner and other required information. However, the notice sent u/s 68H(1) NDPS Act appears to have been returned with the remark "left". It appears that previous to this, an order was already passed against the Petitioner on 10th August 1992 u/s 68F(2) of the NDPS Act. The noting in the file CA/CAL/NDPS-86/92/93 do not show any investigation having been conducted to co-relate the details received from the Income Tax office in respect of source of the Petitioner's income to even form a prima facie view that the properties in question were acquired by him from the earnings of his brother Mohd. Azad on account of illicit trafficking in drugs. In file CA/Cal/NDPS/31/98-99, there are two identical notings dated 17th February 1999 and 9th March 1999 by the CA, Calcutta which reads as under:

I have perused the relevant records. I have applied my mind to all the facts and circumstances of the case. I have today recorded my reasons in terms of Section 68H(1) of the NDPS Act, 1985 and I am satisfied that this is a fit case for issue of notice u/s 68H(1) of the NDPS Act, 1985.

Issue notice u/s 68H(1) of the NDPS Act.

20. It is not known what records were perused by the CA before issuing the above orders. As far as this Court can find, there was no systematic enquiry or investigation preceding the passing of the above orders. It appears that prior to issuing a show-cause notice to the Petitioner u/s 68H(1) of the NDPS Act, no effort was made by the CA to be prima facie satisfied that the essential conditions existed to attract that provision. Even before the CA or the Appellate Tribunal, the initial burden was on the office of the CA to show that the properties in the name of the Petitioner were acquired by him through the illegal earnings of his brother. The Petitioner on his part produced a 1998 sale deed in his favour in respect of one of the properties. However, the opinion formed by the CA, as extracted hereinbefore, fails to establish even prima facie any casual link existing between the Petitioner's properties and the illegal earnings of the Petitioner's brother. The order of the CA is a mere reproduction of the language of the statute which is inadequate for demonstrating application of mind to arrive at even a prima facie satisfaction that the essential ingredients of Section 68H(1)

NDPS act stood attracted.

Conclusion

21. The impugned order passed by the CA dated 7th July 1999 against the Petitioner and the order dated 1st February 2006 passed by the Appellate Tribunal affirming the CA's order dated 7th July 1999 are hereby set aside. The Petitioner will be restored the possession of the forfeited properties within four weeks.

22. The writ petition is allowed in the above terms with costs of Rs. 5,000/- which will be paid by Respondents to the Petitioner within four weeks from today.