

(1984) 04 CAL CK 0038
In the Calcutta High Court
Case No : F.M.A.T. No. 3723 of 1983

Union of India (UOI) and Others

APPELLANT

Vs

Abdul Sattar and Others

RESPONDENT

Date of Decision : 27-04-1984

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 5, 5A, 8
Constitution of India, 1950 — Article 14, 19, 21, 22, 226
Customs Act, 1962 — Section 108

Citation : 88 CWN 811 : (1984) 3 ECC 46 : (1985) ECR 29

Hon'ble Judges : Prabir Kumar Majumdar, J; Anil K. Sen, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Anil K. Sen, J.—An application for stay in connection with the above appeal having come up for hearing on contest before us, we have, with the consent of the parties, heard the appeal and the application together. The appeal has been preferred by the Union of India. The order challenged is one dated 16th December, 1983, passed by a learned single Judge of this Court thereby extending an ad interim order of injunction earlier granted on 26th August, 1983, until disposal of the writ petition. The ad interim order of injunction that was so extended was on the following terms:

There will be an interim order of injunction to this extent that on the petitioner's undertaking to report to the Officer-in-Charge, Ekbalpore Police Station, Calcutta, once a week the authorities are restrained from putting the petitioner under detention under the provisions of the conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. In the event the petitioner fails to report as directed the interim order will stand vacated.

2. The respondent, Union of India, appeared before the learned single Judge to oppose the prayer for extension of such an order, but the learned single Judge by

his order dated 16th December, 1983, extended the said ad interim order until disposal of the writ petition. Unfortunately for us since the learned Judge has not given any reasons we are not in a position to appreciate what considerations prevailed with the learned Judge in granting or extending such an interim order.

3. Since the interim order was so passed on a writ petition moved before the learned single Judge on 26th August, 1983, we have with the assistance of the learned Counsel for the parties carefully gone through that petition to decide for ourselves whether an appropriate case for making of such an interim order having been made out, the order as passed should be sustained. It appears from the said writ petition that the customs authorities, acting on certain previous information to the effect that huge quantities of foreign goods were being regularly smuggled by an organised group of people, seized a huge quantity of smuggled goods between 21st November, 1982, and 23rd November, 1982. The value of the goods so seized, which were all smuggled, is said to be worth more than Rs. 1.50 crores. The writ petitioner in his writ petition alleged that with reference to the said seizure the custom authorities conducted simultaneous search and seizure at his residence and also at his place of business. In course of that search certain documents and a sum of Rs. 25,000 alleged to be belonging to his son were seized. Summons u/s 108 of the Customs Act was issued to him on 23rd November, 1982, but according to the petitioner, such summons was invalid in law and was issued without jurisdiction. Be that as it may, it appears that the petitioner did not appear before the authorities in answer to the summons so issued. On the other hand, on 30th November, 1982, he filed an application for anticipatory bail. That application was rejected by this Court. For months he could neither be arrested nor did he appear before the customs authorities until on 19th May, 1983, he filed a fresh application for anticipatory bail. That application was disposed of by this Court on 27th June, 1983, when a conditional order for bail was made by this Court--one of the conditions being that the writ petitioner must appear before the customs authorities in the investigation they were then conducting.

4. The petitioner's further case in the writ petition was that he had been faithfully obeying the court's order and had been appearing before the customs officials in terms of the court's order. But even then he apprehended that he would be put to detention under the COFEPOSA on the very grounds on which he was being prosecuted. Material allegations in this regard were set out in paragraph 14 and were as follows:

That while the petitioner has been regularly attending the Customs House in strict compliance with the order of this Honourable Court, the petitioner has been of late subjected to a new threat of being detained under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the said COFEPOSA). The said apprehension of your petitioner that in connection with the purported seizure of alleged smuggled goods from lorries and godowns as disclosed in the purported summons dated

23rd November, 1982, your petitioner may be detained under the said COFEPOSA has been fortified inasmuch as every movement of your petitioner, of late, is being watched and/or shadowed by the concerned officials of the customs department. Your petitioner is passing through great jitter in view of the fact that only very recently some persons in mufti came to the residential premises of your petitioner enquiring of the petitioner from the other inmates of the said premises. The said persons on being challenged, it transpired, that they were officers of the customs department, looking for the petitioner with a view to taking him under detention in terms of the provisions of the COFEPOSA.

Your petitioner has also come to know that a purported order of detention under the said COFEPOSA has been issued in connection with the self-same summons. The said fact of issuance of an order of detention fortifies the apprehension of your petitioner for being taken under the provisions of the COFEPOSA.

5. It should be pointed out here and now that this paragraph had been sworn as true to the knowledge of the petitioner though obviously much of it and at least the second sub-paragraph thereof was obviously not true to his personal knowledge but was true to his knowledge, if at all, derived from some other person which source was never disclosed. It should further be noted that all the allegations regarding threat of detention as stated in this paragraph were too vague and indefinite as the particulars had not been disclosed.

6. The writ petitioner in paragraph 15 and the paragraphs that followed the said paragraph made out a case that anticipated detention order under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the said Act) when made with reference to the goods seized as referred to in the summons dated 23rd November, 1982, would be bad in law and mala fide. It was also claimed that such an order would be illegal because the statutory provisions under which it would be so made were unconstitutional.

7. Having made out such a case of probable detention under the COFEPOSA the petitioner prayed for the following reliefs: (why)

(a) A declaration should not be issued that the provisions of the Conservation of Foreign Exchange and smuggling Activities Act, 1974, more particularly (Sections) 3, 5, 5A and 8 of the said Act, are ultra vires the provisions of Articles 14, 19, 21 and 22(4) of the Constitution of India.

(b) A writ of and/or in the nature of mandamus should not be issued commanding the respondents, more particularly, the Union of India, to enforce the amended provisions of Article 22(4) of the Constitution of India as amended by Section 4 of the Constitution Amendment Act, 1978 (44th Amendment).

(c) A writ of and/or in the nature of mandamus should not be issued commanding the respondents to forbear from giving any effect or further effect to and/or taking any step or further steps pursuant to and/or acting or further

acting or continuing to act on the basis of the purported order of detention, if any issued against the petitioner or to be issued against the petitioner, under the provisions of the COFEPOSA in any manner whatsoever and/or from detaining the petitioner under the provisions of the said COFEPOSA in any manner whatsoever.

(d) A writ of and/or in the nature of mandamus should not be issued commanding the respondents to cancel, withdraw and/or rescind the purported order of detention if any issued or to be issued against the petitioner under the provisions of the COFEPOSA.

(e) A writ of and/or in the nature of certiorari should not be issued directing the respondents to transmit the entire records of the case forming the basis of the purported move to detain the petitioner under the provisions of the COFEPOSA to this Honourable Court and to certify them, and on being so certified, quash the same including the purported order, if any, issued under the provisions of the COFEPOSA for detaining the petitioner in connection with the alleged incident forming the basis of the purported issuance of the summons u/s 108 of the Customs Act, 1962.

(f) A writ of and/or in the nature of prohibition should not be issued prohibiting the respondents from proceeding in any manner whatsoever on the basis of the purported order of detention, if any issued or to be issued against the petitioner under the provisions of the COFEPOSA in any manner whatsoever.

(g) Rule nisi in terms of prayers (a), (b), (c), (d), (e) and (f) as above.

(h) An order of injunction do issue restraining the respondents, each one of them by themselves and/or by their servants and/or subordinates and/or agents and/or assigns from giving any effect or further effect to and/or taking any step or further steps pursuant to and/or acting or further acting or continuing to act on the basis of the purported order of detention, if any already issued or to be issued under the provisions of the COFEPOSA against the petitioner in connection with the alleged incident on 23rd November, 1982, and the purported issuance of the summons dated 23rd November, 1982, u/s 108 of the Customs Act, 1962, and/or from detaining the petitioner under the provisions of the COFEPOSA, in any manner whatsoever, till the disposal of the rule.

(i) An ad interim order of injunction in terms of prayer (h) above.

(j) And such further order or orders as to Your Lordships may seem fit and proper.

8. Such an application having been moved ex parte on 26th August, 1983, the petitioner obtained an ad interim order of injunction on the terms set out hereinbefore and that having been extended until disposal of the writ petition by the order impugned the Union of India has preferred the present appeal.

9. We have heard the counsel for the appellant and we have heard Mr. Sen appearing on behalf of the writ petitioner, the respondent to this appeal. We have

heard Mr. Sen extensively over days although, in our opinion, the issue involved is a short one.

10. As there is neither any order of detention nor anything concrete before the Court on the basis whereof the petitioner can reasonably complain that any of his fundamental rights is likely to be infringed, the limited issue which arises for our consideration is as to whether the writ petitioner makes out any case for an injunction. Upon his own showing the petitioner is not in a position to say that there has been any order for detention. What he states in paragraph 14 quoted hereinbefore is purely his apprehension which becomes clear when we look to the prayers where he speaks of an order for detention, if any. Therefore, the petitioner is not sure that there has been any order of detention, far less is he sure that any order if so made had not been made in accordance with law. Section 3 of the COFEPOSA empowers the Central Government to make an order directing detention of a person in respect of whom the Central Government is satisfied that with a view to preventing him from acting in any manner specified in the section he should be so detained. In our opinion, no Court shall ever presume that a statutory power when exercised at the level of the Central Government would not be so exercised bona fide and in accordance with law. An order of injunction restraining exercise of such powers on any such presumption or on grounds based on unfounded apprehension would frustrate the very object of the Act. All the grounds made out by the petitioner in the writ petition seeking to challenge an apprehended order of detention about the very existence of which he is not sure, are purely speculative. It is no doubt true that it is also claimed that the statute, namely, COFEPOSA, itself is ultra vires the Constitution. But this Act being incorporated in the Ninth Schedule and in view of the earlier decisions of this Court, no prima facie case for issue of an injunction restraining exercise of powers under that Act can be said to have been made out merely on a challenge thrown in that regard. Thus, when there is no prima facie case with regard to the claim of unconstitutionality of the Act and when challenge to the alleged exercise of powers is based entirely upon speculation we do not think that any Court should proceed to act upon such a case and restrain the Central Government from exercising its powers u/s 3.

11. Mr. Sen appearing on behalf of the writ petitioner has strongly contended that the petitioner has a constitutional right to move this Court in the writ jurisdiction when he had made out a case of threatened infringement of fundamental right of free movement. According to Mr. Sen, it is not necessary that the petitioner must wait to have the order served upon him and then only challenge the order as violating his fundamental right. Strong reliance is placed by Mr. Sen on the decision of the Supreme Court in the cases of D.A.V. College, Bhatinda, etc. Vs. The State of Punjab and Others, , State of Madhya Pradesh Vs. Bhailal Bhai and Others, and the decision of the Bombay High Court in the case of Jayantilal Bhagwandas Shah v. State of Maharashtra 1981 CrLJ 767. The two decisions of the Supreme Court relied on by Mr. Sen are authorities for a principle which is now settled, viz., a citizen is entitled to move this Court in writ

jurisdiction not only when his right is infringed but also when it is threatened to be infringed. The Bombay High Court follows the same principle when it held that a person against whom an order of detention has been made can challenge the order even before its execution. But in all these cases threat of infringement was real and based on concrete materials. In none of these cases, the threat was an apprehended threat based on speculation as in the case now before us. Here in the present case, this Court has been moved merely on an apprehension--such an apprehension is that an order of detention may have been made against the petitioner and further that such an order may not have been made bona fide and in accordance with law. The principle laid down by the Supreme Court is based on the basic assumption that there must be some reasonable grounds to support the alleged threat and the Court can satisfy itself about the impending threat with reference to the facts constituting the grounds. That principle cannot be extended to cover a case where on a mere apprehension in the mind of a citizen, he can invoke the writ jurisdiction of this Court and obtain an anticipatory relief. It is not a case where any law having been promulgated or any particular statutory order having been made there is imminent likelihood of such law or order infringing or affecting the citizen's right. All that the petitioner makes out in his application under Article 226 of the Constitution is an apprehension which may as well turn out to be a misapprehension. He is apprehending an order of which he is not sure. He is further apprehending that such an order would not be bona fide and in accordance with law. All this is really speculation. On such speculation the Court cannot act. If the Court acts in such a case, then it will be difficult for the authorities vested with the powers under the statute to exercise such powers even lawfully. This view of ours is well supported by earlier decisions of this Court in the cases of *Union of India v. D.G. Vehra* 80 CWN 312, *D.S. Suranay v. Union of India* 80 CWN 605 and *Dayalal N. Shah v. Union of India* 1976(1) CHN 551.

12. The Bombay decision raises a wider issue, viz, whether a citizen can challenge an order of detention even before its execution. Though the Bombay High Court takes the view that it can be so challenged, what is contended before us is that in matters of preventive detention, the challenge should always come through a writ of habeas corpus. Any challenge to the order before its execution and necessarily with an order of injunction restraining its implementation may very well frustrate the very object of the order so made. Delay in the matter of disposal of these writ petitions being well-known, even where the challenge would fail, the order would become stale. The object of the statute being one of immediate detention as a preventive measure, a prior adjudication of validity of such an order before its implementation does not appear to be in consonance with the object. But it is not necessary for us to decide such a wider issue. Even on the facts before the Bombay High Court, there being an order of detention the threat of infringement of the fundamental right was based on concrete materials. It was not a case of mere apprehension as in the case now before us, Hence we think the said decision would not be of any help to the petitioner-respondent.

13. For these reasons, we hold that the petitioner had failed to make out any case for issue of an injunction on the writ petition which can support the order made by our learned brother.

14. This appeal, therefore, succeeds and is allowed. The interim orders passed are vacated.

15. Since the appeal stands disposed of, the application filed by the Union of India for interim stay of the order appealed against becomes infructuous and that too is disposed of. Mr. Sen prays for stay of operation of this order but such prayer is refused.

16. No formal decree need be drawn up in this appeal.

17. There will be no order as to costs.

Prabir Kumar Majumdar, J.

I agree.