

(2011) 10 DEL CK 0063
In the Delhi High Court
Case No : Writ Petition (C) No. 5607 of 1999

Zahid Parwez

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 21-10-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 10(1), 3(1), 68A(2), 68B, 68F
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 — Section 2(2), 6, 6(1), 8

Citation : (2011) 184 DLT 543 : (2012) 1 ILR Delhi 566

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Vishal Arun, for the Appellant; A.S. Chandhiok, ASG with Mr. Ruchir Mishra, Advocate for the respondents No. 1 to 4., for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.—One Md. Azad @ Avid Parwiz S/o Abdul Rouf was sought to be detained vide detention order dated 26.07.1989 issued by the Joint Secretary to the Government of India u/s 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (PITNDPS Act) with a view to prevent him from engaging in manufacture, possession, sale, purchase, transportation, warehousing, import and export inter-State of narcotic drugs. This detention order became effective on 10.07.1991, when the detainee was detained. On 12.08.1991, the Special Secretary to the Government of India sought to issue a declaration u/s 10(1) of the PITNDPS Act. The purpose of issuing the said declaration was to justify the detention beyond the initial period of three months.

2. The admitted position is that the detainee unsuccessfully challenged the detention order dated 26.07.1989 before the Calcutta High Court vide Crl. Misc. No. 1244/1992. The SLP (SLP) preferred by the detainee before the Supreme

Court was also dismissed. However, the challenge to the declaration made u/s 10(1) of the PITNDPS Act was successful before this Court vide W.P.(Crl.) No. 315/1992. This Court while disposing of W.P.(Crl.) No. 315/1992, inter alia, passed the following order:

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.

..... I, therefore, hold that the detention for a period of three months is valid and continue detention is vitiated.

3. The petitioner is the brother of the detainee Md. Azad @ Avid Parwiz. A show cause notice was issued to the petitioner u/s 68H(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) on 20.04.1994. It was contended that the petitioner is a person covered u/s 68A(2)(d) of the NDPS Act. The petitioner was granted the opportunity to show cause in response to the said notice. The said notice pertained to the following properties:

Deep No.

Date of Regn.

Mouza

Vol.No.

Khata No.

Plot No.

4178 of 1985

16.8.85

Samakona, Balasore

67

6

44

4990 of 1985

11.8.85

Kasaba, Balasore.

79

147

1342 1343 1344

4991 of 1985

14.8.85

Kasaba, Balasore.

79

174

1342 1343 1344

The reply was sent by the petitioner, but the same has not been placed before this Court.

4. The competent authority vide order dated 16.10.1997 held that it was conclusively established that the aforesaid properties are illegally acquired within the meaning of Section 68B(g) of the NDPS Act. A declaration was issued that the said properties are illegally acquired within the meaning of the said provision and they were forfeited by the Central Government, free from all encumbrances. The petitioner preferred an appeal before the appellate authority for forfeited properties. Before the appellate authority, it appears, the mother of the petitioner filed an affidavit, wherein it was claimed that the properties had been acquired by her husband, i.e., the late father of the petitioner, in the name of the petitioner. It was claimed that the detainee Md. Azad @ Avid Parwiz had no concern with the said properties and they did not belong to him.

5. The appeal preferred by the petitioner was dismissed vide order dated 07.06.1999 upholding the forfeiture of the said properties. Consequently, the petitioner has preferred this writ petition under Article 226 of the Constitution of India to assail the aforesaid orders of the competent authority as well as the appellate authority. The petitioner has also sought to assail the detention order dated 26.07.1989 and the declaration dated 12.08.1991 in respect of his brother Md. Azad @ Avid Parwiz.

6. At the outset, I may note that the prayer in relation to the detention order dated 26.07.1989 and the declaration dated 12.08.1991 made in the present petition is misconceived for the reason that the detention order dated 26.07.1989 was unsuccessfully challenged by the detainee before the Calcutta High Court and thereafter before the Supreme Court. The said challenge has attained finality and the petitioner cannot seek to reopen the same. So far as the declaration dated 12.08.1991 is concerned, the same already stands quashed by this Court in W.P.(Crl.) No. 315/1992. Moreover, it is not open to the petitioner in these proceedings to challenge the detention order in the light of the judgment of the Supreme Court in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, .

7. The first submission of the learned counsel for the petitioner is that the show cause notice was incompetent inasmuch as the petitioner is not covered under Chapter V-A of the NDPS Act. He submits that in the present case, the detention

beyond the period of three months was held to be illegal. Consequently, Section 68Z came into play, which provides that where the detention order of the detinue is set aside or withdrawn, properties seized or frozen under this Chapter shall stand released. In this regard, he places reliance on the order dated 16.05.2002 in W.P.(Crl.) No. 315/1992 as also the judgment of this Court in *Shahid Parvez v. Union of India and Others*, 175 (2010) DLT 547. He submits that in *Shahid Parvez (supra)*, this Court had considered the effect of the order passed on 16.05.2002 in W.P.(Crl.) No. 315/1992 and in paragraph 16 held that the detention order itself was void ab initio. Para 16 of the decision in *Shahid Parvez (supra)* reads as follows:

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 negated 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.

8. I do not find any merit in this submission of the learned counsel for the petitioner. The dismissal of the petitioner's writ petition before the Calcutta High Court and the affirmation of the said dismissal by the Supreme Court coupled with the order dated 16.05.2002 passed in W.P.(Crl.) No. 315/1992, leaves no manner of doubt that so far as the initial detention order dated 26.07.1989 is concerned, the same remained intact and was not quashed or set aside in any judicial proceeding. The detention of the detinue in pursuance of the said detention order for the initial period of three months was held to be legal and valid. However, on account of the fact that the declaration No. 13/91 dated 12.08.1991 was held to be illegal by this Court in W.P.(Crl.) No. 315/1992, the effect was that the act of detention of the detinue beyond the period of three months became illegal.

9. A careful examination of the order dated 16.05.2002 in W.P.(Crl.) No. 315/1992, the judgment of the Full Bench of this Court in *Akhilesh Kumar Tyagi v. Union of India and Others*, 60 (1995) DLT 203 (FB), and the judgment of this Court in *Shahid Parvez (supra)* would show that there is a typographical error in the aforesaid extract inasmuch, as, the word "detention" existing in the 13th line of the said paragraph has wrongly been typed in place of the word "declaration". The learned Judge in *Shahid Parvez (supra)* has extracted in para 14 the position

in law as it existed in the light of the decision in *Maqudoom Meera Hameem Vs. Joint Secretary to Government of India*, W.P.(Crl.) No. 83/1995 decided on 17th August, 1995, wherein it was held by the Division Bench 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" (emphasis supplied). In *Akhilesh Kumar Tyagi* (supra) the correctness of the decision in *Maqudoom Meera Hameem* (supra) was questioned by the Union of India. It was contended that till such time as detention order was quashed it remain valid. Consequently, it was contended by the UOI that the detention beyond three months did not become illegal automatically. This contention of the Union of India was rejected in *Akhilesh Kumar Tyagi* (supra), wherein the Full Bench observed that the continued detention beyond three months would be invalid. [see para 30 of the *Akhilesh Kumar Tyagi* (supra) which has been extracted in *Shahid Pervez* (supra)]. The Court, in *Akhilesh Kumar Tyagi* (supra) did not hold that merely because the declaration u/s 9 of COFEPOSA was illegal, the initial detention order, or the initial detention was also ipso facto illegal. I am, therefore of the opinion that the word "detention" used in para 16 before the words "order" and after the words "for a period of three months was held to be valid" in *Shahid Pervez* (supra) should be read as "declaration". Consequently, section 68Z has no application to this case as the original detention order has not been quashed or set aside or withdrawn at any stage by any competent authority. Therefore, the respondents were entitled to invoke the provisions of Chapter V-A of the NDPS Act.

10. A perusal of Section 68A would show that the provisions of Chapter V-A, which deal with forfeiture of properties derived from, or used in illicit traffic applies to every person in respect of whom an order of detention has been made under the PITNDPS Act. (see Section 68A(2)(c)). By virtue of Section 68A(2)(d) the said Chapter has been made applicable to every person who is a relative of a person referred to in clause (a) or clause (b) or Clause (c). The expression "relative" has been defined in Section 68B(i) to mean, inter alia, brother or sister of the person. Therefore, it is amply clear that the petitioner is covered by Chapter V-A of the NDPS Act, as he is the brother of the detainee, and his contention to the contrary cannot be accepted.

11. It is next contended by the learned counsel for the petitioner that the show cause notice was issued to the petitioner without any inquiry or prima-facie appreciation of any relevant material by the respondent. He submits that there is absolutely no nexus established by the respondent between the petitioner's property and the detainee or his income allegedly derived from his alleged dealing in narcotics drugs and psychotropic substances. He submits that the onus to establish the said nexus lay upon the respondents, which they have completely failed to discharge. He submits that the orders passed by the competent authority and the appellate authority proceed on a presumption. Since the exercise undertaken has penal consequences, the onus lay upon the respondents. In this regard, he again places reliance on the decision in *Shahid*

Parvez (supra), and, in particular, paragraphs 18 to 20 of the said decision, which read as follows:

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 68-H(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 68-H(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 68-F(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 68-H(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 68-H(1) NDPS act stood attracted.

(emphasis supplied)

12. Once again I do not find any merit in the submission of the learned counsel for the petitioner. It is not in dispute that the petitioner was minor of about 12 years at the time when the aforesaid properties are stated to have been acquired in the year 1985. He did not have any independent source of income of his own at that time. This is not even his case. The case set up by the petitioner at the appellate stage was that his father had acquired the said properties for him. He did not produce any material or evidence before the competent authority or the appellate authority, and none has been produced even in these proceedings, to show as to what was his father's avocation, income and how he cornered the resources to acquire the said properties.

13. I may note that, for the first time, in the present writ petition the petitioner has made an assertion that his father was having liquor vends; that he was an income tax assessee, and; that he had rental income. None of this was stated before the competent authority or the appellate authority. No evidence/document was filed either before the competent authority, or the appellate authority, and none has been filed in these proceedings. It is not permissible for the petitioner to raise such pleas before this Court for the first time in these proceedings.

14. The impugned orders have to be tested on the basis of the materials produced before the authorities who have passed these orders. The said plea is clearly an afterthought and is an attempt to improve his case by petitioner. From the known source of income of the petitioner or his father, the aforesaid properties have not been established to have been acquired. It has not even been argued that the competent authority did not have, or did not record the reasons for issuance of the show cause notice.

15. On the other hand, the principle of law contained in the aforesaid observations made by this Court in Shahid Parvez (supra), with due respect, appears to be per incuriam. I may refer to the provision contained in Section 68J of the NDPS Act which provides that "in any proceedings under this Chapter, the burden of proving that any property u/s 68H is not illegally acquired property shall be on the person affected." Therefore, the observation of the learned Judge that the onus would be on the respondent authorities is in the teeth of the said statutory provision. I may note that Section 68J has not been noticed by the learned Judge in Shahid Parvez (supra).

16. So far as the competent authorities "reason" to believe that the aforesaid properties are illegally acquired is concerned, the acquisition of immovable properties by a minor of 12 years itself furnishes reason to entertain the said belief. The consequence of the said belief is only that an enquiry is set into

motion by issuance of a show cause notice to grant the person concerned an opportunity to disclose his income, earnings or assets, out of which or by means of which he has acquired the property in question.

17. While deciding Shahid Pervez (supra), the learned Judge has also not noticed the judgment of the Supreme Court in Smt. Kesar Devi Vs. Union of India (UOI) and Others, . This was a case dealing with the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA). The provisions of SAFEMA, dealt with by the Supreme Court in para 10 of the judgment, are similar to the provisions of the NDPS Act with which I am concerned. Section 6(1) of SAFEMA is similar to section 68H of NDPS Act. Section 8 of SAFEMA is similar to section 68J of NDPS Act. The Supreme Court, inter alia, observed as follows:

The condition precedent for issuing a notice by the competent authority u/s 6(1) is that he should have reason to believe that all or any of such properties are illegally acquired properties and the reasons for such belief have to be recorded in writing. The language of the Section does not show that there is any requirement of mentioning any link or nexus between the convict or detenu and the property ostensibly standing in the name of the person to whom the notice has been issued. Section 8 of the Act which deals with burden of proof is very important. It lays down that in any proceedings under the Act, the burden of proving that any property specified in the notice served u/s 6 is not illegally acquired property, shall be on the person affected. The combined effect of Section 6(1) and Section 8 is that the competent authority should have reason to believe (which reasons have to be recorded in writing) that properties ostensibly standing in the name of a person to whom the Act applies are illegally acquired properties, he can issue a notice to such a person. Thereafter, the burden of proving that such property is not illegally acquired property will be upon the person to whom notice has been issued. The statutory provisions do not show that the competent authority, in addition to recording reasons for his belief, has to further mention any nexus or link between the convict or detenu (as described in Sub-section (2) of Section 2) and the property which is sought to be forfeited in the sense that money or consideration for the same was provided by such convict or detenu. If a further requirement regarding establishing any link or nexus is imposed upon the competent authority, the provisions of Section 8 regarding burden of proof will become otiose and the very purpose of enacting such a Section would be defeated.

18. The statutory framework appears to be founded upon the fact that the details and particulars as to how a particular property has been acquired by a person are within his special knowledge. It is for him to explain as to how he has acquired it, and the source of the funds from which the property had been acquired.

19. The petitioner was a minor in the year 1985 when the properties were acquired. He is a younger brother of the detenu. This being the position, the

consistent conclusions and findings of fact reached by the competent authority as well as the appellate authority do not call for any interference in these proceedings.

20. Accordingly the present petition is dismissed with costs of Rs.50,000/-.