(1989) 05 CAL CK 0038

Calcutta High Court

Case No: Matter No. 6201 of 1988

Shiv Ratan Jalan		APPELLANT
	Vs	
The Additional Director, Enforcement Directorate and Others		RESPONDENT

Date of Decision: May 9, 1989

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: 94 CWN 272

Hon'ble Judges: G.N. Ray, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

G.N. Ray, J.

In this writ application, the petitioner Shri Shiv Ratan Jalan has prayed for a writ in the nature of Mandamus commanding the respondents to rescind, reject, withdraw and/or cancel the order of detention issued against the petitioner under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (hereinafter referred to as COFEPOSA). A prayer for writ in the nature of Prohibition for prohibiting the respondents from relying upon or acting or taking any steps pursuant to the order of detention upon COFEPOSA against the petitioner and also from relying on the self-incriminating statements recorded from the petitioner in connection with offence under Foreign Exchange Regulation Act, 1973 has also been made. It is the case of the petitioner that he carries on business of broker for sale of ready-made garments, hosiery products and other sundry goods and he resides at 263, Rabindra Sarani, in the City of Calcutta. The petitioner has contended that he also never possessed or acquired any foreign exchange in any manner and he was not connected with any transaction or dealing with foreign exchange either directly or indirectly. On August 8, 1985, some officers of the Customs Department, Calcutta

conducted a search at premises No. 263, Rabindra Sarani and it is alleged that they seized U.S. $ 15,0.00 which, according to the Customs Officers, were recovered from under the mattress of room No. 64 of the said premises. The petitioner had contended that he had never been a tenant in respect of the said room and there were about 50 other tenants in the said premises No. 263, Rabindra Sarani. The petitioner contended that unfortunately when such search and seizure was made, your petitioner, his brother Suresh Kumar Jalan and some other residents append to be present in the said room No. 64. The said room was under the tenancy of Suresh Kumar Agarwalla and he was in lawful and actual possession of the room. The said Sri Agarwalla was also present at the time of search and seizure. The petitioner has contended that the petitioner and his brother were arrested by the officers of the Customs Department and were taken to Customs House. Calcutta and the Customs Officers started interrogating the petitioner and his brother in various ways and they abused the petitioner and his brother filthily and heckled and manhandled the petitioner and his brother and even resorted to beating and physical assault to compel them to make statements implicating them in an alleged offence under Foreign Exchange Regulation Act, 1973 (hereinafter referred to as FERA). When the officers of the Customs Department resorted to third degree method against the petitioner and his brother, the petitioner and his brother in order to save themselves from humiliation had to put signatures on some statements already written down by the officers of the Customs in English. The petitioner and his brother were produced before the learned Chief Metropolitan Magistrate, Calcutta and the learned Magistrate directed the petitioner and his brother to jail custody till 12th August, 1985. Thereafter, on 12th August, 1985, the petitioner and his brother were granted bail. It may be noted here that a criminal case has been instituted against the petitioner and his brother in the Court of the Chief Metropolitan Magistrate, Calcutta in connection with the aforesaid seizure of foreign exchange and such criminal case is still pending. On 11th January. 1986, the petitioner and his brother received show cause notice dated 2nd January, 1986 from the Additional Director, Enforcement Directorate, Bombay asking them to show cause why adjudication proceeding should not be held for alleged contravention of section 8(2) of FERA and why the seized foreign currency should not be confiscated. Such adjudication proceeding was concluded and the Additional Director of Enforcement, Bombay held the petitioner guilty and imposed a penalty of Rs. 10,000/- and it was directed that the penalty should be paid within 45 days. The petitioner preferred an appeal against the said order of adjudication before the Foreign Exchange Regulation Appellate Board and had also made an application for waiver of the deposit of the said penalty of Rs. 10,000/-. The application for dispensing with the deposit of penalty of Rs. 10,000/- until the finalisation of the appeal was, however, rejected

2. Being aggrieved by the aforesaid rejection of the application for dispensing with the requirement of deposit of Rs. 10,000/-, a writ petition was moved by the

petitioner in this court and such writ petition was disposed of by directing the petitioner to furnish Bank guarantee for the said sum of Rs. 10,000/- and it is the case of the petitioner that such Bank guarantee has been furnished. It is the case of the petitioner that the petitioner had an attack of Jaundice and he prayed for adjournment of the hearing of the appeal. The learned counsel for the petitioner was also out of station and the said fact was also brought his to the notice of the Appellate Authority, but the Appellate Authority disposed of the appeal and upheld the order of adjudication. The petitioner then moved a writ petition against the order of the Appellate Board dated April 15, 1988, but such writ petition was dismissed by this Court on June 24, 1988. Against such dismissal of the writ petition, the petitioner has preferred an appeal before this Court being F.M.A.T. No. 2443 of 1988 and such appeal is still pending. The petitioner has contended that on the basis of the complaint made by the Assistant Director of Enforcement, Calcutta for an alleged offence u/s 56 read with section 64(2) of FERA, a criminal case being Case No. C/19/88 has been started and on February 27, 1988. the petitioner on his own surrendered before the learned Magistrate and was granted bail. Such criminal case was transferred by the learned Chief Metropolitan Magistrate to the Court of Sri S.K. Majumdar, the learned Metropolitan Magistrate and the petitioner and his brother were present on April 9, 1988 in the Court of the learned Magistrate but such case was adjourned. The petitioner has contended that in a local Hindi Daily viz. ''Sanmarg'', a notice was published on June 7, 1988 asking for information concerning the detention of three persons including the petitioner under the COFEPOSA. The other two persons are. however, not connected with the search and seizure in which the petitioner was implicated. The petitioner thereafter came to know from the said advertisement that the petitioner is sought to be detained under COFEPOSA and against such threatened injury, instant writ petition has been moved.

3. Mr. Nara Narayan Gooptu, the learned Advocate General of West Bengal, has appeared for the petitioner and has contended that the order of detention was passed sometime in 1985 in connection with the alleged seizure of foreign exchange comprising US dollars but such order of detention has not been served on the petitioner for a number of years. Accordingly, even if it is assumed that for good reasons such order of detention had been passed against the petitioner, the very purpose of detention had become frustrated by not executing the order of detention for any just and valid cause. Mr. Gooptu has contended that the purpose of the preventive detention must be appreciated and the distinction between a preventive order and a punitive order should not be lost sight of in deciding as to whether or not a preventive order has become stale and inoperative by lapse of time. In this connection, Mr. Gooptu has referred to a decision of the Supreme Court made to the case of Harnek Singh Vs. State of Punjab and Others, In the said case, the alleged offence was committed some time in February. 1980. The order of detention was passed in November, 1980 and the detenue was detained on 10th

July, 1981. The Supreme Court held in the said case that because of inordinate delay, the purpose of detention had become frustrated and the order of detention had become stale and inoperative. Mr. Gooptu has contended that the proximity of time between the alleged prejudicial cause warranting an order of detention and the actual detention is a very important factor in the matter of consideration as to whether or not the order of detention has spent its force and has lost importance because of inordinate delay thereby defeating the purpose of detention. Mr. Gooptu has contended that since the grounds of detention had not been served on the petitioner it is not possible for the petitioner to challenge the validity of such grounds but even if it is assumed that such ground had in fact existed on the basis of which the order of detention could be passed, the very purpose of detention sometime in July, 1988 for preventing the alleged prejudicial act committed or likely to be committed by the petitioner must be held to have been frustrated. Mr. Gooptu has contended that the petitioner had appeared in the Court of the learned Chief Metropolitan Magistrate and has obtained bail. Even thereafter he appeared before the Court of the learned Magistrate where the criminal case is now pending. In the aforesaid circumstances, it cannot be contended that the petitioner had really absconded and as such avoided the service of the order of detention. In this connection, Mr. Gooptu has referred to a bench decision of Bombay High Court reported in Tukaram Sitaram Gore Vs. State, The Bombay High Court has held in the said decision that Article 226 of the Constitution is couched in a language which is wide enough to protect a person against illegal detention and/or arrest. Mr. Gooptu has contended that in the aforesaid circumstances, the order of detention must be quashed on the finding that such order had lost its force and there cannot be any useful purpose in detaining the petitioner after such a long lapse of time in order to prevent him from indulging in any prejudicial activities.

4. Mr. R.N. Das, the learned counsel appearing for the respondents, however, contended that so long the order of detention is not served, the detenue should not be encouraged by the Writ Court to come and ask for stay of the operation of the order of detention on the score of threatened injury. Mr. Das has contended that the order of detention under COFEPOSA is made in order to prevent a person from indulging in prejudicial activities concerning the foreign exchange. He has submitted that if the authorities are restrained from effecting such detention, the very purpose of detention will be frustrated. He has also contended that at this stage the grounds of detention are not before this court and as such the validity of such ground cannot be gone into by the Court. Mr. Das has further contended that whether the grounds for detention have become stale or not cannot be decided without reference to such grounds. Accordingly, the contention of the petitioner that grounds of detention have become stale should not be taken into consideration. Mr. Das has referred to a full Bench decision of the Gujarat High Court made in the case of Vedprakash Devkinandan Chiripal and etc. Vs. State of Gujarat and Another, The question before the Full Bench was as to whether or not

an order of detention before the same is served could be challenged in a writ proceeding. The full Bench has held in the said decision that when such a challenge is made and the respondent informs the court that a valid order under preventive detention was made, unless the vires of the Act is not challenged and it is shown to the Court that the preventive Detention Act is otherwise not applicable, the Court should not proceed any further with the writ proceedings and the challenge must come, to an end at that stage. The Court is not required to make any detailed enquiry regarding the geniuses, legality, scope of the grounds supporting the detention order. All that Courts is to see whether the order is void ab initio on the fact of it. Mr. Das has contended that in the instant case, the petitioner has not challenged the vires of the Act. He has also contended that the petitioner was arrested and the seizure of foreign exchange was made from a room where the petitioner was present and the appropriate authority had passed an order of detention against the petitioner. In the aforesaid circumstances, it cannot be validly contended that the order of detention is void ab initio. Hence when the respondents have submitted before the Court that an appropriate authority has passed an order of detention the instant writ petition must be dismissed. If the petitioner is detained, he may move appropriate petition for a writ in the nature of habeas corpus. In this connection, another bench decision was relied on by Mr. Das in the case of Ishtiaq Ali Vs. The State of Uttar Pradesh and Others, It has been held in the said case that order of detention not being served on the petitioner and the petitioner not having been placed under detention, the High Court should not examine the validity of the order and give relief against the contemplated enforcement of the order of detention. In the said decision, the view of the Bombay High Court made in the case reported in Jayantilal Bhagwandas Shah and etc. Vs. State of Maharashtra and others, since relied on by Mr. Gooptu, has been dissented from the affidavit-in-opposition filed in the instant proceeding that the detaining authority requested the Commissioner of Calcutta Police to arrest the petitioner pursuant to the order of detention. The Commissioner of Calcutta Police has informed the detaining authority that since the petitioner has absconded the order of detention could not be served on him. Mr. Das has also contended that it will appear on scrutiny of the records of the criminal case that the petitioner initially did not appear in the criminal court and on a date which was not initially fixed, the petitioner on his own had surrendered and obtaiend the bail. By the aforesaid process neither the detaining authority nor the Calcutta Police authorities could keep track and apprehend the petitioner pursuant to the order of detention. Mr. Das has further contended that even it is assumed that the Calcutta Police could not have been more vigilant and could have found out the petitioner and detained him, even then simply because the arrest was not been made by the Calcutta Police, the petitioner should not be permitted to contend that by avoiding the order of detention, he has been successful to make the order of detention stale and not binding. He has, therefore, contended that the writ petition must be dismissed and the concerned authorities should not be prevented from effecting the order of detention.

5. After hearing the learned counsels appearing for the parties, it appears to me that order of detention was passed shortly after search and seizure of the foreign exchange in the presence of the petitioner. It is not necessary for this Court to go into the question as to whether or not the petitioner was in no way connected with the seizure of the foreign exchange and did not own and possess the same. It is also not possible nor it is necessary to probe into the question as to whether or not the grounds of detention had in fact existed or such grounds are otherwise valid. In my view, there is enough force in the contention of Mr. Das that the detaining authority could not serve the order of detention on the petitioner because he could not be traced and the Calcutta Police also informed the detaining authority that the petitioner had been absconding and his wherabouts on his own surrendered in Court in connection with the criminal proceedings and had obtained bail will not warrant any conclusion that the detaining authority by their own laches and negligence did not implement the order of detention and thereby allowed years to roll by and by that process allowed the detention order to be stale and the very purpose of the detention of the petitioner has become frustrated by such inordinate delay. In my view, only in a very rare and exceptional case where the court car come to the conclusion that no order of detention could have been passed against the petitioner and/or such order of detention is bound to fail for unexplained inordinate delay, the writ Court in exercise of its power under Article 226 of the Constitution may prevent execution of order of detention against the, petitioner. But is will not be correct to hold that in no case against the threatened injury by way of detention, the petitioner can come to the writ court before the order of detention is actually served on him and he is actually detained. But in the facts and circumstances of this case, I do not think that any interference by the writ court is called for at this stage. From the affidavit-in-opposition it transpires that the detaining authority had in fact intended to detain the petitioner but such attempt was not successful. In my view, the writ petitioner having succeeded to avoid the order of detention not on account of any fault on the part of the detaining authority should not be permitted to contend that because of the long delay in executing the order of detention without any just cause, the order of detention has become stale and of no effect. The writ petition therefore fails and is dismissed. Interim orders, if any, stand vacated. There will be no order as to costs.