Yogesh Daulat Rai Mehta Vs Union of India (UOI) and Others

Court: Delhi High Court

Date of Decision: July 11, 2008

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 23 Rule 1
Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 â€" Section 11, 12A, 3
Constitution of India, 1950 â€" Article 22, 359(1)
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 â€" Section 2(2), 3(1), 6(1)

Hon'ble Judges: Vikramajit Sen, J; Rajiv Sahai Endlaw, J

Bench: Division Bench

Advocate: Sunil Kumar Verma and B.S. Rajesh, for the Appellant; Najmi Waziri, for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Sahai Endlaw, J.
The challenge in this petition, got listed for the first time on 1st February, 2008, is to the order dated 3rd February,

1997 of the detention of the Petitioner u/s 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974

(COFEPOSA). The petition has been filed after eleven years of the order. It is the case in the petition itself that the Petitioner had earlier preferred

a petition challenging the same order of detention in this Court being Criminal Writ Petition No. 566/1997 which came up for hearing on 18th July,

2002 when the following order was made.

Learned Counsel for the petitioner states that the petition, as such, has become infructuous. The petitioner has since been released.

Dismissed as withdrawn.

It is contended that the Petitioner was not in the knowledge of the order dated 18th July 2002 and whenever the Petitioner enquired from his

counsel about the status of the said writ petition, he was informed that the writ petition had been admitted and was pending for final hearing.

2. The petition further states that in view of the detention order under COFEPOSA having been passed, show cause notice was issued to the

Petitioner by the Competent Authority u/s 6(1) of Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA)

covering the Petitioner u/s 2(2)(b) of SAFEMA. From the record we find that the said show cause notices under SAFEMA were issued to the

Petitioner on 25th April, 1997 and 27th February, 1998 and the Petitioner had been appearing before the office of the Competent Authority,

SAFEMA in pursuance to the said show cause notices from 9th July, 1999 onwards. We further find from the record that it was inter alia the case

of the Petitioner before the Competent Authority, SAFEMA that since the detention order on the basis of which proceedings under SAFEMA had

been initiated, was under challenge in Criminal Writ Petition No. 566/1997, the proceedings under SAFEMA may be kept pending. We find from

the order dated 22nd October, 2007 of the Competent Authority, SAFEMA that the Petitioner appeared before the Competent Authority,

SAFEMA inter alia on 11th August, 2003 and 5th September, 2003. The Competent Authority has in the order dated 22nd October, 2007 noted

that in spite of the order dated 18th July, 2002 of dismissal of the writ petition as withdrawn, the Petitioner did not hesitate to give a wrong picture

about the status of the writ petition and somehow managed to keep the proceedings before the Competent Authority, SAFEMA pending till 2007.

3. The Competent Authority, SAFEMA as aforesaid, ultimately, vide order dated 22nd October, 2007 declared the properties to have been

illegally acquired in terms of Section 3(1)(c) of SAFEMA and ordered the forfeiture of the properties. The Petitioner claims to have preferred an

appeal to the Appellate Tribunal for Forfeited Property.

4. The Petitioner has sought to justify the maintainability of the present petition in spite of dismissal as withdrawn of the earlier petition challenging

the same order on the basis of the judgments of the Apex court in Competent Authority, Ahmedabad Vs. Amritlal Chandmal Jain and Others, and

Union of India (UOI) and Others Vs. Mohanlal Likumal Punjabi and Others, and Karimaben K. Bagad Vs. State of Gujarat and Ors, .

5. On merits the detention order is challenged on the grounds (i) that the detention order was issued after about one and a half year of the incident,

(ii) that there was no ground for the detention order and no proof that the Petitioner was at the time of the issuance of the detention order involved

in the activity for reason of which the detention order was issued, (iii) that the order had been issued mechanically, (iv) that because there was no

evidence that the Petitioner had indulged in any illegal transaction relating to foreign exchange, (v) because the detention order against the main

accused Shri Harshad P. Mehta had been revoked u/s 11 of the Act and a co-accused Shri Dilip Doshi was ordered to be released by the

Advisory Board., (vi) that the case against the petitioner was of abetting the said Harshad P. Mehta and Dilip Doshi and not of any active

participation, (vii) that the relevant material had not been served on the petitioner.

6. The counsel for the Respondents has urged that the petition is not maintainable for the reason of delay and latches, having been preferred after

eleven years of the detention order and is liable to be dismissed on this ground alone.

7. The Apex court in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, of the judgment has held:

41. If it is normal order of detention [not governed by Section 12-A nor protected by an order under Article 359(1) suspending the enforcement

of Article 22] and if the detenu does not challenge it when he was deprived of his liberty, or challenges it unsuccessfully, there is no reason why he

should be allowed to challenge it when action under SAFEMA is taken against him - for action under SAFEMA is not automatic upon the fact of

detention but only the starting point.

Hence, we say that a person who did not choose to challenge such an order of detention during the emergency when he was detained, or

challenged it unsuccessfully, cannot be allowed to challenge it when it is sought to be made the basis for applying SAFEMA to him. In either of the

two situations mentioned above, i.e., whether the challenge is made during the period of detention or later when proceedings under SAFEMA are

taken against him, the grounds of challenge and scope of judicial scrutiny would be the same. Failure to challenge the detention directly when he

was detained, precludes him from challenging it after the cessation of detention, where it is made the basis for initiating action under SAFEMA.

Thus the law laid down by the nine judge Bench of the Apex court in Amratlal Prajivandas is that the detention order cannot be challenged when

action under SAFEMA is taken, if the same was not challenged earlier or if the earlier challenge was unsuccessful.

8. In the present case the detention order which is now challenged was in fact challenged earlier but as aforesaid the writ petition was withdrawn

on 18th July, 2002. Not only so, we find that the Petitioner in 2007, perhaps after the order dated 22nd October, 2007 of the Competent

Authority, SAFEMA applied for revival of the earlier writ petition challenging the detention order. The said application was also dismissed. The

said order attained finality. With that, the position is unassailable that the earlier petition challenging the detention order was dismissed as

withdrawn, even if for the reason of the counsel for the Petitioner being of the view that the same had become infructuous. The question is, whether

the Petitioner can have a second chance/second turn?

9. As far as the reliance by the Petitioner on Amrutlal Chandmal Jain and Mohanlal Likumal Punjabi is concerned, a Division Bench of this Court

speaking through one of us (Sen, J.), in Criminal Writ Petition No. 509/1996 Narender Kumar v. UOI and Ors., decided on 2nd May, 2008, has

already held that notwithstanding nine judge decision in Amratlal Prajivandas, the Apex court in Amrutlal Chandmal Jain and Mohanlal Likumal

Punjabi allowed the detention order to be challenged because the show cause notice under SAFEMA in both the cases came to be issued after the

disposal of the writ petitions as infructuous. The Division Bench thus, notwithstanding Amrutlal Chandmal Jain and Mohanlal Likumal Punjabi held

the petitions in which show cause notices under SAFEMA had been issued prior to withdrawal of petitions, challenging the detention order to be

not maintainable. Same was the factual position in Karimaben K. Bagad; there also, the show cause notice under SAFEMA was received after the

withdrawal/disposal as infructuous of the writ petition challenging detention order.

10. The reasoning for the view taken in Mohanlal Likumal Punjabi in spite of the authoritative law laid down by the nine judge Bench in Amratlal

Prajivandas is borne out from para 17 of the judgment as under:

17. In both these cases, it was held that the subsequent writ petition is maintainable and it should rightly be so having regard to the consequential

action taken at any rate under the SAFEMA. Otherwise it would amount to the Government concerned being allowed/enabled by their action to

disable and denude the person aggrieved from questioning the very applicability of the SAFEMA to him or his properties dehors his other rights to

challenge the same otherwise on merits as well.

What appears to have prevailed in the facts of the said case was that, if on the date of the withdrawal of the petition challenging the detention

order, SAFEMA had not been invoked, the department would get an unfair advantage if the second petition was not held maintainable.

11. However, the facts in the present case are entirely different. The show cause notice under SAFEMA was issued soon after the detention order

and the proceedings under SAFEMA were pending throughout. The Petitioner was contesting the validity of detention order and proceedings

under SAFEMA side by side. The Petitioner was thus well aware that the challenge to the detention order already made in the earlier writ petition

was relevant vis-a-vis the proceedings under SAFEMA also. Notwithstanding that, the Petitioner withdrew the earlier petition as infructuous. The

law does not provide a second chance/second round and the present petition is not maintainable on the ground of resjudicata and constructive

resjudicata also.

12. The Apex court in Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others, , M/s. Upadhyay and Co. Vs. State of U.P. and Others, and

Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, has laid down that the principles of 23 Rule 1 of

C.P.C. apply to writs also and that withdrawal of a writ petition tantamounts to abandonment of the cause of action relied on in the writ petition

and the second writ petition in respect of the same subject matter is not maintainable. No question of personal liberty is involved at the present.

13. The Petitioner set up a case of the earlier petition having been withdrawn by his advocate without his knowledge. Though the said matter was

also relevant only in the application filed by the Petitioner for revival of the earlier petition and which was unsuccessful but we may note that the

said version of the Petitioner does not appear to be correct. No particulars whatsoever have been stated as to what action, if any, was taken by

the Petitioner against the advocate engaged by him in the earlier petition, if the withdrawal of the earlier petition was without the knowledge of the

Petitioner. It is not believable that when the Petitioner at the same time was contesting the proceedings under SAFEMA, the Petitioner would not

be in touch with the advocate conducting the proceedings challenging the detention order and which proceedings would have a vital bearing on the

proceedings under SAFEMA also. We feel that the Petitioner is merely blaming his advocate, to avail of a second chance before this Court. Had

the Petitioner really been aggrieved by any action of his advocate, he would have taken action against the advocate and we would then have had

before us the version of the advocate also. However, no particulars whatsoever in this regard have been stated. The Apex court in Salil Dutta Vs.

T.M. and M.C. Private Ltd., has held that ""The advocate is the agent of the party. His acts and statements, made within the limits of authority given

to him, are the acts and statements of the principal i.e. the party who engaged him."" The Apex court further laid down ""that in certain situations, the

Court may, in the interest of justice, set aside a dismissal order or an ex-parte decree notwithstanding the negligence and/or misdemeanour of the

advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and

seek relief."" The Apex court laid down ""No such absolute immunity can be recognised. Such an absolute rule would make the working of the

system extremely difficult.

14. This Court speaking through one of us (Sen, J.) has applied the aforesaid principle laid down by the Apex court in Naimat Kaur Anand and

Others Vs. M/s. Decon Company, . The same principles were also applied in Gloria Chemicals Vs. R.K. Cables and Others, , New Delhi

Municipal Council and Ors. v. Sohan Lal 122 (2005) DLT 653 and New Bank of India Vs. M/s. Marvels (India), and the blame on the advocate

was not accepted as a ground when in the facts and circumstances, no negligence or misdemeanour on the part of the advocate and lack of due

negligence on the part of the party was found. In the present case also, no misdemeanour on the part of the advocate has been borne out from the

record.

15. We also find merit in the contention of the counsel for the Respondents that the petition is also barred on the principles of latches, waiver and

acquiescence.

16. Since the petition is found to be not maintainable, we are not returning any finding on the merits of the detention order. The petition is

accordingly dismissed.