Mrugesh Jaykrishna Vs State of Maharashtra

Court: Bombay High Court

Date of Decision: March 13, 1986

Acts Referred: Bombay High Court (Original Side) Rules, 1980 â€" Rule 1, 636
Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 â€" Section 11, 11(2), 8
Constitution of India, 1950 â€" Article 226

Citation: (1987) 1 BomCR 262 : (1986) 88 BOMLR 182 : (1986) 10 ECC 303

Hon'ble Judges: S.P. Bharucha, J

Bench: Single Bench

Advocate: D.N. Canteenwala, M.R. Kotwal, S.J. Thakhar, M.M. Patel and Tushar Shah, for the Appellant; V.H. Gumaste, S.M. Shah and Ranjana Desai, for the Respondent

Judgement

S.P. Bharucha, J.
This petition seeks a writ to quash the order of detention dated 18th December, 1985 (now called ''the impugned

order'') issued against the petitioner under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974,

(hereinafter called the ''''the Act'''').

2. On 19th March, 1985 the petitioner was arrested by the Customs authorities in connection with the seizure of foreign exchange from one Amin

and one Nanavati at the Sahara Airport at Bombay. On 20th March, 1985 he was produced before the Additional Chief Metropolitan Magistrate,

Esplanade Court, Bombay, and remanded to judicial custody. On 9th April, 1985 an order of detention (now called the earlier order) bearing the

same date was issued by the State of Maharashtra (the respondent) under the Act and was served on the petitioner while he was in judicial

custody. On 13th April, 1985 the grounds of detention and the documents in support thereof were served upon the petitioner. The grounds were

based upon the seizure of foreign exchange on 19th March, 1985.

3. On 30th May, 1985 a habeas corpus petition (being Criminal Writ Petition No. 347 of 1985 was filed in this Court by the petitioner''s uncle

challenging the earlier order. In September, 1985 the petitioner was heard by the Advisory Board constituted under the Act. On 23rd September,

1985, pursuant to the report of the Advisory Board, the respondent revoked the earlier order.

4. The petitioner was permitted by the Magistrate concerned to go abroad. He returned on or about 9th December, 1985. In the middle of

December, 1985 the petitioner left Ahmedabad, where he normally resides, for, it is his case, a holiday.

5. On 18th December, 1985 the impugned order was issued by the respondent under the Act. On 23rd January, 1986 an order was issued by the

respondent u/s 7(1)(b) of the Act. Pursuant thereto, on 28th January, 1986 newspapers in Bombay reported that the petitioner was required to

report in connection with the impugned order. It is the petitioner''s case that he was unaware of the impugned order, the order u/s 7(1)(b) and the

newspaper reports until 2nd February, 1986 when he returned from holiday to Bombay. On 2nd February, 1986 the petitioner made a

representation to the respondent calling upon it to revoke the impugned order and the order u/s 7(1)(b).

6. On 5th February, 1986 this petition was filed. On 6th February, 1986 a statement was made on behalf of the respondent that the impugned

order would not be executed until a stated date and a statement was made on behalf of the petitioner that he would not leave this Court''s

jurisdiction until then. These statements were repeated from time to time until 5th March, 1986. On 5th March, 1986 the petition was admitted to

be heard peremptorily after one week. The statements were reiterated, to operate until the disposal of the petition. The impugned order has, thus,

to date not been executed.

7. It was urged by Mr. Gumaste, learned Counsel for the respondent, that this petition deals essentially with a criminal matter and ought, therefore,

to have been so filed as to be heard by the Division Bench of this Court hearing original matters. He relied in this behalf upon the judgment of a

Division Bench of this Court in Criminal Application No. 1319 of 1975, Shivshankar Lal Gupta v. C.T. Pillai, delivered on 1st/2nd April, 1985.

The judgment was delivered in the context of two petitions. The petitioners in these two petitions were detained u/s 3(a) of the Act. The petitions

read as a whole were found to be for the release of the petitioners from custody, therefore, for a writ of habeas corpus. The petitions were

however, filed as Special Civil Applications and were sought to be moved before the Bench taking constitutional matters. The question arose as to

whether they could be entertained by that Bench or whether they ought to be marked as Criminal Applications and directed to be presented before

the Bench doing Criminal business on the Appellate Side. Upon a reference made by the Chief Justice, this question was decided by the Division

Bench. Mr. Gumaste relied upon the paragraphs in the judgment wherein Rule 1 of Chapter XXVIII of this Court''s Appellate Side Rules was

discussed. The rule says that all applications for writs or orders in the nature of writs of habeas corpus under Article 226 of the Constitution of

India shall be made to the Division Bench taking criminal business on the Appellate Side of the High Court. It was clear to the Court, therefore,

that all applications where writs of habeas corpus were claimed must be presented before a Division Bench doing criminal business on the

Appellate Side. The Court found, looking to the history of the exercise of the habeas corpus jurisdiction by High Courts in this country that the rule

requiring such petitions to be filed before a Division Bench taking criminal business on the Appellate Side was in consonance with the historical

back-ground as also with the nature of processes that were asserted in the enforcement of the preventive law. The Court also noted the Rule on

the Original Side which provided for all constitutional applications under Article 226, except those of habeas corpus, when the cause of action had

arisen in Greater Bombay. These had to be presented before a Single Judge on the Original Side of the High Court.

8. It will be noted that in the matter before the Division Bench, the detentions had already been effected and the petitions were essentially for writs

of habeas corpus. In these circumstances, it was imperative that they be filed as required by Chapter XXVIII of the Appellate Side Rules.

9. In the instant case, the detention has not been effected. The writ sought for is to quash what is alleged to be an illegal detention order. In

Jayantilal Bhagwandas Shah v. State of Maharashtra, 1981 Maharashtra Law Journal 487, a Division Bench of this Court, held that the writ of

habeas corpus could be issued only where there was an actual illegal detention, but that was not to say that an illegal order of detention could not

be successfully challenged. The High Courts could, under the provisions of Article 226, issue directions, orders and writs in the nature of

mandamus and certiorari quashing an illegal order of detention. The present petition is such a petition. Such a petition has, by virtue of the present

Rule 636 of the Original Side Rules, since the matter in dispute has arisen substantially within Greater Bombay, to be heard and disposed of by a

Single Judge sitting on the Original Side. In my view, therefore, Mr. Gumaste''s submission that this petition is not maintainable on the Original Side

cannot be upheld.

10. The next contentions that I must consider are those on behalf of the petitioner. Mr. Canteenwala contended that the impugned order was bad

inasmuch as there was no power under the Act to issue it. It was also contended that, in any event, no re-detention order could be issued when

consequent upon the report of the Advisory Board under the Act, an earlier detention order had been revoked.

11. The relevant provisions in this behalf are these:

8. For the purposes of sub-clause (a) of Clause (4), and sub-clause (c) of Clause (7), of Article 22 of the Constitution---

(a) The Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards each of which shall

consist of a Chairman and two other persons possessing the qualifications specified in sub-clause (a) of Clause (4) of Article 22 of the

Constitution; .....

(c) The Advisory Board to which a reference is made under Clause (b) shall after considering the reference and the materials placed before it and

after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose

through the Appropriate Government or form the person concerned, and it, in any particular case, it considers it essential so to do or if the person

concerned desires to be heard in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinions as to

whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks form the date of

detention of the person concerned;

....

(f) in every case where the Advisory Board has reported that there is in its opinions sufficient cause for the detention of a person, the appropriate

Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case

where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate

Government shall revoke the detention order and cause the person to be released forthwith.

.....

11. (i) Without prejudice to the provisions of section 21 of the General Clauses Act, 1897, a detention order may at any time, be revoked or

modified ....

(a) notwithstanding that the order has been made by an officer of a State Government, by that State Government or by the Central Government;

(b) notwithstanding that the order has been made by an Officer of Central Government or by a State Government by the Central Government.

(2) The revocation of a detention order shall not bar the making of another detention order u/s 3 against the same person.

12. These contentions on behalf of the petitioner must be upheld because they are squarely covered by the judgment of a Division Bench of this

Court (comprised of Jahagirdar and Tated, JJ.) dated 22nd January, 1986 in Criminal Writ Petition No. 26 of 1986, Amritlal Shah v. State of

Maharashtra.

13. By the judgment in Amritlal Shah''s case, two petitions, were decided. In the first petition the question was thus: where an order of detention

has been passed by the State Government and where, subsequently, the same authority had revoked it, whether a fresh order of detention could

be passed against the same detenu on the same grounds. In the second petition the question was thus: whether after a detenu had been released

under an order of revocation passed pursuant to the report of the Advisory Board u/s 8(f), the same authority could pass a fresh order of detention

against the same detenu on the same grounds. The Division Bench noted that the question, put another way, was whether the State Government,

which had revoked an order of detention u/s 21 of the General Clauses Act, could pass a fresh order of detention by virtue of the provisions

contained in section 11(2) of the Act. Since there were no words of limitation in section 11(2), prima facia, the Division Bench said, it would have

been inclined to take their view that a fresh order of detention could be passed against a person in respect of whom an order of revocation of

detention had been passed either u/s 21 of the General Clauses Act or u/s 11 of the Act. The observations of the Supreme Court in Ibrahim Bachu

Bafan Vs. State of Gujarat and Ors, , made the Division Bench take a different view. These observations were that the power under sub-section

(2) of section 11 was exercisable in cases covered by sub-section (1) thereof and that Parliament, while making the provision in sub-section (2) of

section 11 must be taken to have been aware of the pronounced judicial view of the Supreme Court that repeated orders of detention were not to

be made and, on conferring the power of making repeated orders, had provided safe-guarded under sub-section (1) by confining the exercise of

power to limited situations. Having regard to these observations, the Division Bench was, it said, compelled to hold that the power of revocation

contained in sub-section (2) of section 11 must be confined to situations mentioned in sub-section (1) of section 11. On the assumption that its

view in this regard was wrong, the Division Bench held that, in any event, sub-section (2) of section 11 would not apply to a situation arising

consequent upon the revocation of a detention order made after the Advisory Board had given its opinion.

14. Mr. Gumaste argued that the view taken by the Division Bench in Amritlal Shah''s case was erroneous on both the counts. Even if I were to

agree, I would be abound to follow the judgment in Amritlal Shah''s case.

15. The affidavit made on behalf of the respondent states that the impugned order is based on the material on which the earlier order was based

plus additional material collected after the earlier order was passed. The judgment in Amritlal Shah''s case, therefore, applies to the facts of the

case before me.

16. Following the judgment, I hold that the impugned order, issued after the respondent had revoked the earlier order consequent upon the report

made by the Advisory Board u/s 8(f), is bad and set it aside.

17. Accordingly, the petition is made absolute in terms of prayer (a).

18. No order as to costs.