Union Of India & Others vs Haji Mastan Mirza on 23 February, 1984

Equivalent citations: 1984 AIR 681, 1984 SCR (3) 1, AIR 1984 SUPREME COURT 681, 1984 (2) SCC 427, 1984 CRIAPPR(SC) 134, 1984 SCC(CRI) 271, (1984) SC CR R 133, (1984) 2 ECC 137, (1984) 2 RECCRIR 41, (1984) ALLCRIC 148, (1984) 1 CRIMES 651

Author: A. Varadarajan

Bench: A. Varadarajan, Syed Murtaza Fazalali, Misra Rangnath

PETITIONER:
UNION OF INDIA & OTHERS

Vs.

RESPONDENT:
HAJI MASTAN MIRZA

DATE OF JUDGMENT23/02/1984

BENCH:
VARADARAJAN, A. (J)
BENCH:
VARADARAJAN, A. (J)
FAZALALI, SYED MURTAZA
MISRA RANGNATH

CITATION:
1984 AIR 681 1984 SCR (3) 1
1984 SCC (2) 427 1984 SCALE (1)402

ACT:
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, Sections 2, 6 and 7 read with Section 3(1) of Conservation of Foreign and Prevention of Smuggling Activities Act, 1973 Scope of-Whether an appeal preferred and pending under the Provision of SAFEMA, a bar for the maintainability of a writ petition under Article 226 of the Constitution challenging the detention under COFEPOSA and for an incidental prayer quashing the notice issued under SAFEMA ? Non Supply of copies of material documents based on which a detention order is passed vitiates the detention and the explanation for non supply cannot be substitute for the copies of the document

HEADNOTE:

Haji Mastan Mirza was detained under Section 3(1) (c) of the Maintenance of Internal Security Act, by order dated 17-9-1974. There was a formal release of the respondent from detention under the MISA on 19-12-1974, but he was immediately detained under Section 3(1) of COFEPOSA by an order dated 19-12-1974 passed by the Minister of Finance of the Government of India on the basis of the materials placed before him by his Joint Secretary. The grounds of detention were served on the respondent on 23-12-1974. A declaration under Section 5(1) of COFEPOSA was served on him on 19-1-1976. Emergency was proclaimed throughout the country by the President on 25-6-1975 and it continued to be in force until 21-3-1977. The respondent was released on 23-3-1977.

Founded on the detention of the respondent under the order dated 19-12-1974, after issuing a show cause notice u/s 6(1) of SAFEMA to the respondent and his relatives and alleged associates, an order u/s 7 of SAFEMA was passed forfeiting the properties of the respondent and his relatives. Appeals preferred by all but one are pending before the Appellate Tribunal constituted under that Act. The Miscellaneous Petition No. 548/77 filed by these affected parties challenging the vires of certain provisions of COFEPOSA and SAFEMA in the Bombay High Court are still pending.

A criminal Application No. 780/1977 was filed by the respondent under Article 226 of the Constitution and under Section 482 of the Code of Criminal Procedure in the Bombay High Court in April 1981, challenging the validity
2
of the impugned order of detention dated 19-12-1974 and the declaration dated 18-1-1975 under COFEPOSA for holding that the action taken under SAFEMA is unsustainable. The High Court of Bombay, accepted the plea that non supply of copies of the material documents affected the making of effective representation and thus held that the action taken under Sections 6(1) and 7 of SAFEMA was invalid. The High Court restrained the appellants from taking any action under SAFEMA based on the said order dated 19-12-1974. Hence the appeal by special leave.

Dismissing the appeal, the Court
^

HELD : 1.2 : The respondent's petition under Art. 226 of the Constitution and S. 482 of the Code of Criminal Procedure is maintainable. [6D]

1.2 : The pendency of the appeal filed under the provisions of SAFEMA against the order for forfeiture of the respondent's properties made under the provisions of that Act is not a bar to the present proceding. [6A]

1.3 : The fact that the respondent did not challenge his detention under COFEPOSA before his release cannot operate as estoppel against his right of moving the court

for having the order of detention quashed when that order was sought to be used as a basis for taking action against him under ss. 6 and 7 of SAFEMA. The respondent was in detention under MISA from 17-9-1974 to 19-12-1974 and thereafter under COFEPOSA until 23-3-1977. During the period of his detention under COFEPOSA from 19-12-1974 to 23-3-1977 proclamation of emergency in the country was in force from 25-6-1975 to 21-3-1977. Therefore, for a major part of the respondent's detention under COFEPOSA he could not move any court of law for redress against his detention and he was released on 23-3-1977 soon after the emergency was lifted on 21-3-1977. [6C; B]

2.1 : A reading of Section 6(1) of SAFEMA would show that action under Sections 6 and 7 can be taken against only persons to whom that Act applies, that is as specified in section 2(1). Sub-section 2 of section 2 says that the Act applies to every person in respect of whom an order for detention has been made under COFEPOSA provided that such order of detention has not been set aside by a court of competent jurisdiction. In the present case action has been taken against the respondent under Sections 6(1) and 7 read only with Section 2(2) of the Act. Therefore, a valid order of detention under COFEPOSA is a condition precedent to proceedings being taken under Sections 6 and 7 of SAFEMA. If the impugned order of detention dated 19-12-1974 is set aside for any reason, the proceedings taken under Sections 6 and 7 of SAFEMA cannot stand. [7G-H ; 8A]

2.2 : The failure to supply copies of documents referred to and relied upon in the grounds of detention under COFEPOSA vitiates the detention itself, as the detenu could not make any effective representation in the absence of those documents. [8E]

Gurdip Singh v. Union of India & Others, [1981] I.S.C.C. 419, referred to.

2.3 : The explanation offered through the counter-affidavit by the
3
detaining Authority for the non supply of the copies of the material documents cannot be a substitute for the copies of the documents without which the detenu could not have made any effective representation against his detention. [8D]

3. In the present case also copies of documents which were indisputably material documents and were referred to in the grounds of detention were admittedly not supplied to the respondent. Therefore, the detention of the respondent was bad in law and the order of detention could not be sustained Consequently, action taken under Sections 6 and 7 of SAFEMA is baseless and unsustainable in law. [8H ; 9A-B]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 305 of 1982.

Appeal by Special leave from the Judgment and Order dated the 20th/24th/25th November, 1981 of the Bombay High Court in Criminal Application No. 780 of 1981.

K. G. Bhagat, Addl. Sol. General, N. C. Talukdar and Miss A. Subhashini for the Appellants.

Ram Jethamalani, M. G. Karmal, Madhu Patel, Shri Narain Mathur, K. V. Desai and Miss Rani Jethamalani for the Respondent.

The Judgment of the Court was delivered by VARADARAJAN, J. This appeal by special leave is directed against the judgment of the Bombay High Court in Criminal Application No. 780 of 1981 filed by the respondent Haji Mastan Mirza, allowing the criminal appeal and declaring that the order of detention dated 19.12.1974 passed by the Minister of Finance, Government of India under s. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1973, (COFEPOSA) is illegal, null and void ab initio and inoperative, and quashing that order as well as the declaration under s. 5(1) of the COFEPOSA made on 18.1.1975 and also consequently quashing the notice under s. 6(1) and the order made under s. 7 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, (SAFEMA) 1976 and restraining the appellant from taking any action whatsoever on the basis of the order of detention dated 19.12.1974 and the declaration dated 18.1.1975 were quashed by the learned Judges of the High Court is that the respondent was not served with copies of documents referred to and relied upon in the grounds of detention served on the respondent on 19.12. 1974.

An order dated 17.9.1974 was passed for detention of the respondent under s. 3(1)(c) of the Maintenance of Internal Security Act (MISA) and the grounds of detention were served on him on 23.9.1974 after he surrendered on 18.9.1974. There was a formal release of the respondent from detention under the MISA on 19.12.1974, and he was immediately detained under s. 3(1) of the COFEPOSA by the aforesaid order dated 19.12.1974 passed by the Minister of Finance of the Government of India on the basis of the materials placed before him by his Joint Secretary. The grounds of detention were served on the respondent on 23.12.1974. A declaration under s. 5(1) of COFEPOSA was served on the respondent on 19.1.1975. Emergency was proclaimed through out the country by the President on 25.6.1975 and it continued to be in force until 21.3.1977. The respondent was released on 23.3. 1977.

A show cause notice under s. 6(1) of SAFEMA was issued to the respondent and his relatives and alleged associates founded on the respondent's detention under the aforesaid order dated 19.12.1974 made under s. 3(1) of COFEPOSA. Pursuant to that notice an order under s. 7 of SAFEMA was passed forfeiting the properties of the respondent and his relatives. The respondent and all the other aggrieved persons except one filed appeals against that order before the Appellate Tribunal constituted under the provisions of that Act. Those appeals are said to be still pending. The persons who filed those appeals have filed Miscellaneous Petition No. 548 of 1977 on or about 25.4.1977 in the Bombay High Court, challenging the vires of certain provisions of COFEPOSA and SAFEMA. That petition is pending even now.

The respondent filed the criminal application No. 780 of 1981 under Art. 226 of the Constitution and s. 482 of the Code of Criminal Procedure in the Bombay High Court in April 1981, challenging the validity of the impugned order of detention dated 19.12.1974 and the declaration dated 18.1.1975, passed and made under s. 3(1) and s. 5(1) of COFEPOSA for showing that the action taken under s. 6(1) and s. 7 of SAFEMA is unsustainable.

The learned counsel for the respondent conceded before us that the respondent is not challenging the vires of any of the provisions of COFEPOSA and SAFEMA in the present appeal.

The said petition under Art. 226 of the Constitution and s. 482 of the Code of Criminal Procedure challenging the validity of the order of detention and declaration passed under COFEPOSA and the notice and order issued under s. 6(1) and 7 of SAFEMA was heard by Gadgil and Kotwal, JJ constituting the Division Bench of the Bombay High Court. Kotwal, J considered all the grounds urged before him and accepted most of them including two grounds viz. non- application of mind of the Detaining Authority to the material placed before him before he passed the impugned order of detention dated 19.12.1974 and the failure of the appellant to supply copies of the documents clearly and unmistakably relied upon for arriving at the subjective satisfaction that the respondent's detention under COFEPOSA is necessary and referred to in the grounds of detention served upon him for holding that the order of detention passed under s. 3(1) and declaration made under s. 5(1) of COFEPOSA is void ab initio and that the action taken under s, 6(1) and s. 7 of SAFEMA pursuant to that order of detention is liable to be struck down while holding that the petition under Art. 226 of the Constitution and s. 482 of the Code of Criminal Procedure is maintainable and that the effect of the order of detention dated 19.12.1974 could not said to be no longer in force after the respondent had been released from detention on 23.3.1977 inasmuch as action under s. 6(1) and s. 7 of SAFEMA has been taken only pursuant to that order of detention.

Gadgil, J while disagreeing with Kotwal, J on the question of the application of the mind of the Detaining Authority to the materials placed before him before he passed the impugned order of detention clearly agreed with Kotwal, J that the respondent was not supplied with the copies of the documents relied upon in the grounds of detention supplied to him and consequently Gadgil, J also held that the respondent is entitled to the relief claimed by him before the High Court. Thus both the learned Judges agreed in holding that the impugned order of detention dated 19.12.1974 and the declaration dated 18.1. 1975 passed and made under ss. 3(1) and 5(1) respectively of COFEPOSA and the notice and order for forfeiture of the respondent's properties issued and made under s. 6(1) and s. 7 respectively of SAFEMA are invalid and restrained the appellants from taking any action under SAFEMA based on the said order of detention dated 19.12.1974.

The pendency of the appeal filed under the provisions of SAFEMA against the order for forfeiture of the respondent's properties made under the provisions of that Act is not a bar to the present proceeding. The respondent was in detention under MISA from 17.9.1974 to 19.12.1974 and thereafter under COFEPOSA until 23.3.1977. During the period of his detention under COFEPOSA from 19.12.1974 to 23.3.1977 proclamation of emergency in the country was in force from 25.6.1975 to 21.3.1977. Therefore, for a major part of the period of the respondent's detention under COFEPOSA he could not move any court of law for redress against his detention and he was

released on 23.3.1977 soon after the emergency was lifted on 21.3.1977. In these circumstances the fact that the respondent did not challenge his detention under COFEPOSA before his release cannot operate as estoppel against his right of moving the court for having the order of detention quashed when that order was sought to be used as a basis for taking action against him under ss. 6 and 7 of SAFEMA. We therefore hold that the respondent's petition under Art. 226 of the Constitution and s. 482 of the Code of Criminal Procedure is maintainable, We may state that this question of maintainability of the respondent's petition was not disputed by the learned counsel for the appellant before us.

S. 6(1) of SAFEMA providing for the issue of notice before proceedings can be taken for forfeiture of properties of the persons governed by the provisions of that Act reads thus :

> "If, having regard to the value of the properties held by any person to whom this Act applies, either by himself or through any other person on his behalf, his known sources of income, earnings or assets, and any other information or material available to it as a result of action taken under section 18 or otherwise, the competent authority has reason to believe (the reasons for such belief to be recorded in writing) that all or any of such properties are illegally acquired properties, it may serve a notice upon such person (hereinafter referred to as the person affected) calling upon him, within such time as may be specified in the notice, which shall not be ordinarily less than thirty days, to indicate the sources of his income, earnings or assets, out of which or by means of which he has acquired such property, the evidence on which he relied and other relevant information and particulars, and to show cause why all or any of such properties, as the case may be, should not be declared to be illegally acquired properties and forefeited to the Central Government under this Act,"

S. 7 the Act which empowers the competent authority to the Central Government any property held by the competent authority to have been illegally acquired reads thus :

> "7(1) The competent authority may, after considering the explanation, if any, to the show-cause notice issued under section 6, and the materials available before it and after giving to the person affected and in a case where the person affected holds any property specified in the notice through any other person, to such other person also a reasonable opportunity of being heard, by order, record a finding whether all or any of the properties in question are illegally acquired properties.
>
> (2) Where the competent authority is satisfied that some of the properties referred to in the show-

cause notice are illegally acquired properties but is not able to identify specifically such properties, then, it shall be lawful for the competent authority to specify the properties which, to the best of its judgment, are illegally acquired properties and record a finding accordingly under sub-section(1) (3) Where the competent authority records a finding under this section to the effect that any property is illegally acquired property, it shall declare that such property shall, subject to the provisions of this

Act, stand forfeited to the Central Government free from all encumbrances."

A reading of s. 6(1) of SAFEMA would show that action under ss. 6 and 7 can be taken against only persons to whom that Act applies. S. 2(1) of that Act specifies the persons to whom the Act applies. Sub-section 2 of s. 2 says that the' Act applies to every person in respect of whom an order for detention has been made under COFEPOSA provided that such order of detention has not been set aside by a court of competent jurisdiction. In the present case action has been taken against the respondent under ss. 6(1) and 7 read only with s. 2(2) of the Act. Therefore, a valid order of detention under COFEPOSA is a condition precedent to proceedings being taken under ss. 6 and 7 of SAFEMA. If the impugned order of detention dated 19.12.1974 is set aside for any reason, the proceedings taken under ss. 6 and 7 of SAFEMA cannot stand. Therefore, we have to consider whether the impugned order of detention dated 19.12.1974 under COFEPOSA is void and has to be quashed, It is seen from para 17 of the judgment of Kotwal, J that it was not disputed before the learned Judges of the High Court that no copy of any of the documents was ever supplied to the respondent. That fact was admitted in unmistakable terms not only in the counter-affidavit filed on behalf of the respondents before the High Court but also in the course of the arguments of their learned counsel. Kotwal, J has held that the documents referred to in the grounds and relied upon for the purpose of the respondent's detention are such that without copies thereof being supplied to the respondent he could not have been in at position to make any effective representation against his detention. There was no dispute before the learned Judges of the High Court that the documents referred to in the grounds of detention and relied upon for the purpose of detention are material documents and that the respondent could not have made any effective representation without copies of those documents. The respondents before the High Court however sought by their counter-affidavit to justify the non-supply of the copies of the documents. The explanation for the non-supply of the documents cannot be a substitute for the copies of the documents without which the respondent could not have made any effective representation against his detention. This Court has repeatedly held in several decisions that the failure to supply copies of documents referred to and relied upon in the grounds of detention for the purpose of detention under COFEPOSA vitiates the detention itself. In Gurdip Singh v. Union of India and Others(1) the person detained under s. 3(1) of COFEPOSA applied for the supply of copies of the documents forming the material on which the order of detention had been made but they were refused to be supplied to him. Nor were the grounds supplied to the detenu accompanied by the copies of documents forming the basis thereof. It was held in that decision to which one of us is a party that the detention was bad in law.

In the present case also copies of documents which were indisputably material documents and were referred to in the grounds of detention and relied upon for the purpose of detention Were admittedly not supplied to the respondent. Therefore, the detention of the respondent was bad in law and the order of detention could not be sustained and is liable to be quashed. Consequently action taken under ss. 6 & 7 of SAFEMA is baseless and unsustainable in law. The conclusion reached by the learned Judges of the High Court based on that ground is correct. The appeal accordingly fails and is dismissed.

S.R. Appeal dismissed