Union Of India And Ors vs Mohanlal Likumal Punjabi & Ors on 17 February, 2004

Equivalent citations: AIR 2004 SUPREME COURT 1704, 2004 (3) SCC 628, 2004 AIR SCW 1153, 2004 (2) ALL CJ 1556, 2004 (2) SLT 401, 2004 (1) LRI 773, 2004 (2) ACE 468, 2004 ALL CJ 2 1556, 2004 (2) SCALE 527, 2004 SCC(CRI) 844, (2004) 2 JT 528 (SC), 2004 (2) UJ (SC) 870, (2004) 18 INDLD 261, (2004) 100 FACLR 816, (2004) 106 FJR 437, (2004) 4 LABLJ 347, (2003) 108 DLT 656, (2004) 166 ELT 296, (2004) 114 ECR 16, (2004) 1 CURCRIR 379, (2004) 2 BOMCR(CRI) 236, (2004) 49 ALLCRIC 854, (2004) 1 CHANDCRIC 241, (2004) 2 ALLCRILR 506, (2004) 2 SUPREME 109, (2004) 3 ALLCRIR 2588, (2004) 2 SCALE 527, (2004) 3 GCD 1776 (SC), (2004) 2 CRIMES 82, (2006) SC CR R 827, (2004) 72 DRJ 215, 2004 (1) ALD(CRL) 739, 2004 (2) BOM LR 780, 2004 BOM LR 2 780

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Bench: Doraiswamy Raju, Arijit Pasayat

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           CASE NO.:
Appeal (crl.)  1024-1025 of 1997

PETITIONER:
Union of India and Ors.

RESPONDENT:
Mohanlal Likumal Punjabi & Ors.

DATE OF JUDGMENT: 17/02/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
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JUDGMENT ARIJIT PASAYAT, J.

Since the points involved in the criminal appeals are identical, they are taken up together for disposal.

Union of India questions legality of the judgments rendered by the Division Bench of the Bombay High Court holding that order dated 31.8.1995 passed by the Competent Authority under Section 7 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (in short

'the SAFEMA') against respondent nos. 1 and 2 was not sustainable in law. For coming to such conclusion, reference was made to orders dated 19th December, 1994 passed under Section 11(1)(b) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (in short 'the COFEPOSA') revoking the order of detention and order dated 11.1.1995 passed in earlier writ petitions filed by respondent nos. 1 and 2. Reference was made to first proviso to Clause (b) of sub-section (2) of Section 2 of SAFEMA for holding that proceedings initiated under the said statute became non est. According to learned counsel for the appellant-Union the view taken by the High Court is clearly untenable. On the facts of the case, first proviso to clause (b) of sub- section (2) had no application to the facts of the case. The revocation of the order of detention was in exercise of power conferred under Section 11(1)(b) of the COFEPOSA and not under Section 8 as stipulated in the said provision. It is further submitted that the proceedings were initiated by issuance of notice under Section 6(1) of the SAFEMA for forfeiture of property on 12.10.1994. The orders of detention under Section 3(1) of COFEPOSA were passed on 24.5.1994. The orders of detention were challenged by the respondents 1 and 2 in Writ petition nos. 1071 and 1072 of 1994. After the show-cause notice was issued in exercise of power under Section 11 (1)(b) of the COFEPOSA, the Central Government revoked the orders of detention on 19.12.1994 as indicated above. In view of the revocation of the orders of detention, the writ petitions were disposed of on 11.01.1995. By order dated 31.8.95, properties mentioned in the show-cause notice were directed to be forfeited under Section 7 of SAFEMA. The order directing forfeiture was challenged on merits before the Tribunal constituted under the SAFEMA. Thereafter writ petitions were filed on 23.11.1995 challenging the orders of detention and also challenging the order of forfeiture. The latter additional challenge was by way of amendment. By the impugned judgment dated 13.6.1996 the High Court passed the impugned order in each case.

Learned senior counsel, for the Union of India further submitted that the Tribunal did not consider that first proviso has no application to the facts of the case. The order of detention was not revoked under Section 8 of SAFEMA but on the contrary under Section 11(1)(b) thereof. There was no revocation before receipt of the report of the Advisory Board or before making reference to the Advisory Board. Since the proceedings were initiated when the order of detention was in force, and were brought to the logical end by passing the order under Section 7 of SAFEMA, no illegality existed.

It is further submitted that it was not open to the respondents to question legality of the order of detention in the subsequent writ petition after the first writ petition was disposed of as having been rendered infructuous. Reliance was placed on Constitution Bench judgment of this Court in Attorney General for India and Ors. v. Amratlal Prajivandas and Ors. (1994 (5) SCC 54), more particularly in paras 40, 41, 42 and 56 of the judgment.

In response, Mr. Huzefa Ahmadi, learned counsel for respondent nos. 1 and 2, submitted that it is not open to the appellants to question correctness of the judgment after there was concession before the High Court about applicability of the proviso, and the absence of any scope for passing of any order under Section 7 of SAFEMA.

It was further submitted that even otherwise order under Section 11(1)(b) is clearly relatable to the report of the Advisory Board under Section 8 of SAFEMA. Therefore, the proviso has application to the facts of the case. It, however, could not be disputed by the learned counsel that in case the revocation is not under Section 8 of SAFEMA, the proviso would not have any application. It is submitted that when the earlier writ petition is rendered infructuous there is no bar on filing a fresh writ petition on merits to avert the prejudice and damage caused on account of initiating proceedings under SAFEMA. Strong reliance is placed on Competent Authority, Ahmedabad v. Amritlal Chandmal Jain and Ors. (1998 (5) SCC 615) and Karimaben K. Bagad v. State of Gujarat and Ors. (1998 (6) SCC 264).

We shall first deal with the effect of concession, if any, made by learned counsel appearing for the present appellants before the High Court. Closer reading of the High Court's order shows that the High Court took the view that in view of the revocation of the order on 19th December, 1994 and the order passed by the High Court on 11th January, 1995, no further order could have been passed under Section 7 of SAFEMA. After having expressed this view, the so-called concession is recorded. In our view the concession, if any, is really of no consequence, because the wrong concession made by a counsel cannot bind the parties when statutory provisions clearly provided otherwise. It was observed by Constitution Bench of this Court Sanjeev Coke Manufacturing Company v. M/s Bharat Coking Coal Limited and Anr. (1983 (1) SCC 147) that courts are not to act on the basis of concession but with reference to the applicable provisions. The view has been reiterated in (1988 (6) SCC

538) and Central Council for Research in Ayurveda & Siddha and Another v. Dr. K. Santhakumari (2001 (5) SCC 60). In para 12 of Central Council's case (supra) it as observed as follows:

> "In the instant case, the selection was made by the Departmental Promotion Committee. The Committee must have considered all relevant facts including the inter se merit and ability of the candidates and prepared the select list on that basis. The respondent, though senior in comparison to other candidates, secured a lower place in the select list, evidently because the principle of "merit-cum-seniority" had been applied by the Departmental Promotion Committee. The respondent has no grievance that there were any mala fides on the part of the Departmental Promotion Committee. The only contention urged by the respondent is that the Departmental Promotion Committee did not follow the principle of "seniority- cum-fitness". In the High Court, the appellants herein failed to point out that the promotion is in respect of a "selection post" and the principle to be applied is "merit-cum-seniority". Had the appellants pointed out the true position, the learned Single Judge would not have granted relief in favour of the respondent. If the learned counsel has made an admission or concession inadvertently or under a mistaken impression of law, it is not binding on his client and the same cannot enure to the benefit of any party."

(underlined for emphasis) In Uptron (India) Ltd. V. Shammi Bhan and Anr. (1998 (6) SCC 538), it was held that a case decided on the basis of wrong concession of a counsel has no precedent value. That apart, the applicability of the statute or otherwise to a given situation or the question of statutory liability of a person/institution under any provision of law would invariably depend upon

the scope and meaning of the provisions concerned and has got to be adjudged not on any concession made. Any such concessions would have no acceptability or relevance while determining rights and liabilities incurred or acquired in view of the axiomatic principle, without exception, that there can be no estoppel against statute.

The respective stands on merits need careful consideration. Section 2(2) of SAFEMA, so far as relevant reads as follows:

> "Application- (1) The provisions of this Act shall apply only to the persons specified in sub-section (2).
>
> (2) The persons referred to in sub-section (1) are the following namely :-
>
> (a) every person -
>
> (i) who has been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), of an offence in relation to goods of a value exceeding one lakh of rupees; or
>
> (ii) who has been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), of an offence, the amount or value involved in which exceeds one lakh of rupees; or
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> (iii) who having been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), has been convicted subsequently under either of those Acts; or
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> (iv) who having been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), has been convicted subsequently under either of those Acts;
>
> (b) every person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974):
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> Provided that -
>
> (i) such order of detention, being an order to which the provisions of Section 9 or section 12A of the said Act do not apply, has not been revoked on the report of the Advisory Board under Section 8 of the said Act or before the receipt of the report of the Advisory Board or before making a reference to the Advisory Board; or
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> (ii) such order of detention, being an order to which the provisions of Section 9 or section 12A of the said Act do not apply, has not been revoked before the expiry of

time for, or on the basis of the review under sub-

section (3) of Section 9, or on the report of the Advisory Board under Section 8, read with sub-section (2) of Section 9, of the said Act; or

(iii) such order of detention, being an order to which the provisions of Section 9 or section 12A of the said Act do not apply, has not been revoked before the expiry of time for, or on the basis of, the first review under sub-section (3) of that Section, or on the basis of the report of the Advisory Board under Section 8, read with sub-section (6) of Section 12A, of that Act; or

(iv) such order of detention has not been set aside by a court of competent jurisdiction.:

The first sub-clause of proviso to clause (b) of sub- section (2) of Section 2 deals with three situations, when the exceptions provided by the proviso can operate. When the order of detention is one to which provisions of Section 9 or Section 12(A) of the COFEPOSA do not apply, the situations are (1) when orders of revocations on the report of the Advisory Board under Section 8, or (2) before the receipt of the report of the Advisory Board, or (3) before making a reference to the Advisory Board.

The appellants have relied on a letter dated 22.2.1995 issued by the Government of India, Ministry of Finance, Department of Revenue addressed to the Competent Authority of SAFEMA indicating as follows:

xxx xxx xxx "The orders of detention were not revoked on the report of the Advisory Board under Section 8 of the said Act or before the receipt of the report of the Advisory Board or before making a reference to the Advisory Board.

The representations of the detenus were considered by the Advisory Board which did not accept them."

Additionally, in the counter affidavit filed before the High Court it was categorically stated that the revocation under Section 8 was not done before receipt of the report of the Advisory Board, and was not also revoked before making a reference to the Advisory Board. The further contingencies which arise when the situations envisaged in relation to the orders to which also provisions of Section 9 of Section 12(A) of COFEPOSA do not apply, are not relevant for the purpose of this case and are dealt with in sub clauses (ii) and (iii) of the proviso. The order of detention was also not quashed in any judicial proceedings by a court of competent jurisdiction to attract sub-clause (iv). Section 11(1) of COFEPOSA reads as follows:

"11. Revocation of detention orders - (1) 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 the Central Government, or by a State Government by the Central Government."

The first situation envisaged in sub-clause (i) of the proviso to clause (b) of sub-section (2) of Section 2. SAFEMA applies when the revocation is based on the report of the Advisory Board. As the factual position noted above goes to show, the revocation was only in terms of Section 11(1)(b) of COFEPOSA. Such revocation when is done by the Central Government as in this case is really unrelated to a report of the Advisory Board. On the factual position, none of the three situations indicated in the first sub-clause of the said proviso are applicable.

The inevitable position is, therefore, crystal clear that the proviso to clause (b) of sub-section (2) of Section 2 SAFEMA had no application to the facts of the case as held by the High Court. To that extent the judgment of the High Court is indefensible and is set aside.

That brings us to the residual question as to whether the order of detention could be challenged subsequent to the disposal of the earlier writ petition on the ground that it had become unfructuous. According to learned counsel for appellants position has been settled beyond doubt that it is impermissible in view of what has been stated in Attorney General's case. This submission deserves no serious consideration, being one made in disregard of the view taken already by this Court. We find that the effect of said decision was considered in the two decisions relied upon by learned counsel for respondent nos. 1 and 2. The view taken in Amritlal Chandmal Jain's case (supra) and Karimaben K. Bagad's case (supra) does not call for any further or fresh look or consideration - the same being not only just and reasonable but quite in conformity with the basic tenets of Rule of Law but commends for our respectful acceptance, as well.

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 SAFEMA. Otherwise it would amount to the Government concerned being allowed/enabled to by their action disable and denude the person aggrieved from questioning the very applicability of SAFEMA to him or his properties de hors his other rights to challenge the same otherwise on merits as well. In any event, this aspect as to the legality and validity of the order of detention does not appear to have been considered and decided on merits by the High Court. We, therefore, remit the matter back to the High Court for fresh adjudication on merits as to the legality and validity of the orders of detention, for the purpose of applying the provisions of SAFEMA against the respondents or the properties concerned.

Since the matter is pending for a long time, it would be appropriate and in the interests of both parties as well, if the writ petitions are disposed of according to law after hearing parties within a period of six months from the date of judgment.

Parties are directed to maintain status quo in respect of the properties covered by the order under Section 7 of SAFEMA. The respondents 1 and 2 shall not transfer or in any manner encumber the properties till the disposal of the writ petitions. Similarly, the order under Section 7 of SAFEMA shall not be given effect till the disposal of the writ petitions and its implementation and enforcement would abide by the outcome of decision in the writ petition. We make it clear that we are not expressing any opinion on of any of the contentions regarding the respective stands taken by the parties by way of challenge made to the legality and validity of order of detention or proceedings/orders passed on merits, except to the extent undertaken for setting aside the order of the High Court and the reasons assigned therefor.

The appeals are allowed to the extent indicated.