

High Court Of Judicature At Madras

Writ Petition No. 4172 Of 1994

Judgment Date:

31-08-1994

S. Mohanraj

..Petitioner

Deputy Director, Enforcement Directorate, Madras

..Respondent

Bench :

{ HON'BLE MR. JUSTICE S.M. ALI MOHAMED }

Citation :

LQ 1994 HC 5460

Judgment

The petitioner herein in the affidavit in support of the writ petition has stated that in the course of investigation, the respondent seized the passports in H. 214990 and A-138238 on 15-10-1992 under Section 38 of the Foreign Exchange Regulation Act 1973 (hereinafter referred to as the 'Act'). It is further stated that the said passports have not been returned to the petitioner and the petitioner is not in any way connected with the alleged offences under the Act. On the other hand, a counter-affidavit has been filed on behalf of the respondent wherein it is stated that the passports were seized under Section 38 of the Act in the course of investigation and there is a prima facie case that the petitioner is involved in violation of the provisions of the Act, and in particular, on investigation into two foreign currency accounts alleged to have been held by the petitioner with UCO Bank, Singapore and the Development Bank, Singapore, and the investigation is not yet completed. It is further alleged that as the seizure was under Section 38 of the Act, the respondent is entitled to retain the seized passports with them without any time limit.

2. Mr. B. Kumar, learned counsel appearing on behalf of the petitioner contended that the petitioner is in no way connected with any alleged offences under the Act and in any event, as per Section 41 of the Act, the documents seized ought to be returned within a period of one year before the amending Act of 1993 which came into effect from 8-1-1993 and after the amendment, within six months. In support of the said contention, learned counsel referred to a ruling of this court in K. M. Amir Abdul Kader v. Dy. Director Enforcement Directorate, AIR 1986 Madras 140 wherein Ratnam, J. (as the learned Chief Justice then was) has observed as follows (At pp. 143-44) :

"No doubt, under Section 41 of the Act, there is no clear indication regarding the return of the document seized. Despite that, in my view, that section cannot be read as justifying the retention of the seized document beyond one year without fulfilling the other requirements. The period of retention is limited to one not exceeding one year, unless, before the expiry of the period of one year, adjudication proceedings under S. 51 have been commenced or proceedings under S. 56 have been commenced or proceedings under S. 56 have been initiated, in which case, the benefit of extended time would be available for the retention of the seized document. Indeed there is no positive direction in S. 41 of the Act, that the document should be returned to the person from whom they were seized. Even so, when the retention of the seized documents cannot, under law be extended beyond the period of one year, unless certain conditions are satisfied, it follows that beyond the period of one year in the absence of the fulfilment of the other requirements enabling

the retention even beyond that period, whatever had been seized should be restored back and that could be only to the person from whom it was seized."

3. It is clear from the above ruling that any documents seized by the enforcement authorities should be returned within a period of one year. As the Act has been amended, any document seized should be returned within a period of six months unless proceedings under Section 51 of the Act were pending before the appellate Board or the High Court. Therefore, on the authority of the said ruling, Mr. Kumar, learned counsel submitted that the petitioner is entitled to return of the passports seized.

4. On the other hand, Mr. V. Rangarajan, learned Additional Central Government Standing Counsel submitted that Section 38 of the Act will not come under the purview of Section 41 of the Act and, therefore; there is no limit of period within which documents seized can be returned to the parties within the time specified under Section 41 of the Act. In support of the said contention, the learned Additional Central Government Standing Counsel referred to the ruling in Abdul Kader v. Union of India, AIR 1987 Gujarat 176, wherein a Division Bench of the Gujarat High Court while interpreting Section 38 of the Act has observed as follows (Para 14) :

"In order to appreciate this contention it must be kept in view that once the provisions of S. 38 of the Act are validly pressed in to service by the competent authority for seizing the passport, as in the present case, how long the seizure and consequential custody of the passport will continue with the competent authority seizing the document, becomes at once a germane question. It cannot be that seizure and consequential custody can be of indefinite duration. Section 38 indicates that the concerned document or the thing seized under S. 38 should be relevant to the investigation or proceedings under the Act or in connection therewith any infraction of the Act or Rules or Order should have been committed. It stands to reason that the custody of the seized document or thing as a relevant or useful document or thing atleast would be conterminous with the concerned investigation or proceedings during the pendency of which such seizure is effected on the ground that the seized article is useful or relevant pending such investigation or proceedings. In the present case, the seizure of the passport is being upheld under S. 38 read with Ss. 51, 50 and 29(1) of the Act. The competent authority has seized the passport on the ground that it is relevant for the adjudication proceedings pending before at in connection with the alleged infraction of S. 29(1) of the Act by the petitioner, therefore, the said seizure cannot continue indefinitely beyond the currency of the adjudication proceedings. In this connection, we must have a look at S. 41 of the Act. The said Section deals with custody of documents etc. which are either produced before the competent authority or seized by them in exercise of their power under various provisions of the Act and when such documents are believed to be furnishing evidence of contravention of any of the provisions of the Act or the rules. In case of such types of documents which furnish direct evidence of contravention of the Act or the Rules, consequential custody flowing from the seizure of such documents is permitted to be retained by the authority seizing the documents for a period not exceeding one year or if before the expiry of the said period of one year any proceedings (1) under S. 51 have been commenced, until the disposal of those proceedings including the proceedings if any, before the appellate board and the High Court or (ii) under S. 56 have been commenced before a Court, until the document has been filed in the Court. Section 41, therefore, clearly lays down the legislative intention that in cases of seized documents which are themselves evidence of contravention of the provisions of the Act and the rules, maximum period of custody of such documents with the authority seizing the documents is limited to one year or till the expiry of the adjudication proceedings under S. 51 and till they reach their final culmination through all the hierarchy of proceedings upto the High Court, or if there are any criminal proceedings, till the document is filed in the competent Court. It, therefore, stands to reason that if the documents are evidence of contravention of the provisions of the Act or the rules, fixed period is provided for their custody with the authority seizing the documents. Therefore, of necessity, the period of custody of those documents which are not themselves any evidence of infraction of the Act or the rules but are merely relevant or useful for any such inquiry or proceedings under the Act and which are seized under S. 38, cannot be as large as contemplated by S. 41. It is obvious that S. 41 does not apply to those documents which are seized under S. 38. However, that does not mean that power to retain custody of seized documents can be exercised for any or useful documents can be exercised for any indefinite period which may go even beyond what is contemplated for more drastic types of documents dealt with by S. 41. As we have already seen above, S. 38

contemplates the period during which custody of the seized article as relevant or useful for investigation or inquiry can be retained by the authority seizing the document. But implicit in the section is the indication of legislative intention that custody of such document would remain so long as the document would remain relevant or useful to the investigation or proceedings, meaning thereby, that the custody would become conterminous with the conclusion of the concerned investigation or proceedings. However, the petitioner vehemently submitted that the adjudicating authority may take months and years for finishing such proceedings and in the meantime, if the passport is permitted to be kept in the custody of the seizing authority, irreparable injury will be caused to the petitioner and he may not be able to go out of the country for indefinite period and if that happens, exercise of power under S. 38 would become unreasonable. So far as the aforesaid contention of the petitioner is concerned, there is lot of substance therein. We may in this connection refer to the observations of the majority judgment of the Supreme Court in the case of Menaka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597, Bhagawati, J. (as he then was) speaking for the majority has made the following pertinent observations in connection with impounding of passport and its effect on the holder of the passport :-

"We may observe that if the impugned order impounding the passport of the petitioner were violative of her right to freedom of speech and expression or her right to carry on her profession as a journalist, it would not be saved by Art. 19(2) or Art. 19(6), because the impounding of the passport for an indefinite length of time would clearly constitute an unreasonable restriction. The Union contended that though the period for which the impugned order was to operate was not specified in so many terms, it was clear that it was intended to be conterminous with the duration of the commission of inquiry, since the reason for impounding was that the presence of the petitioner was likely to be required in connection with the proceedings before the Commission of Inquiry and the term of the Commission of Inquiry being limited upto December, 31, 1977, the impounding of the passport could not continue beyond that date and hence it would not be said that the impugned order was to operate for an indefinite period of time. How, it is true that the passport of the petitioner was impounded on the ground that her presence was likely to be required in connection with the proceedings before the commission of enquiry and the initial time limit fixed for the Commission of Inquiry to submit its report was December 31, 1977, but the time limit could always be extended by the Government and the experience of several Commissions of Inquiry set up in this country over the last twenty five years shows that hardly any Commission of Inquiry has been able to complete its report within the originally appointed time. Whatever might have been the expectation in regard to the duration of the Commission of Inquiry headed by Mr. Justice Shah at the time when the impugned order was made, it is now clear that it has not been possible for it to complete its labours by December, 31, 1977 which was the time limit originally fixed and in fact its term has been extended upto May 31, 1978. The period for which the passport is impounded cannot, in the circumstances be said to be definite and certain and it may extend to an indefinite point of time. This would clearly make the impugned order unreasonable and the learned Attorney General appearing on behalf of the Central Government, therefore, made a statement that in case the decision to impound the passport of the petitioner is confirmed by the Central Government after hearing the petitioner, "the duration of the impounding will not exceed a period of six months from the date of the decision that may be taken on the petitioner's representation." It must be said in fairness to the Central Government that this was a very reasonable stand to adopt, because in a democratic society governed by the rule of law, it is expected of the Government that it should act not only constitutionally and legally but also fairly and justly towards the citizen. We hope and trust that in future also whenever the passport of any person is impounded under S. 10(3)(c), the impounding would be for a specified period of time which is not unreasonably long, even though no contravention of any fundamental right may be involved." It is true that the aforesaid observations have been made in connection with impounding of passport of an Indian citizen. However, the rest of unreasonableness of the exercise of power of impounding a passport as laid down by the Supreme Court in the aforesaid decision can well be kept in view while deciding the present contention of the petitioner. To see that power of seizure under S. 38 may not become unreasonable on account of prolonged and indefinite continuous seizure and consequential custody of the seized passport on the ground that it is relevant for the inquiry proper directions have to be issued to the respondent about release of the passport to the petitioner at proper time. The petitioner's apprehension that adjudication proceedings may be indefinitely delayed over years, can be taken care of by directing the respondents to finish pending adjudicating proceedings at the earliest. When this is done, exercise of power under S. 38 on the facts of the case would

not become unreasonable and the apprehension of the petitioner that his passport would indefinitely remain seized also would not survive."

5. There is force in the contention of Mr. V. Rangarajan, learned Additional Central Government Standing Counsel to the effect that seizure under Section 38 of the Act will not come without the purview of Section 41 of the Act. However, it is to be observed that any seizure of document by the respondent is only with reference to investigation of a violation or for an offence against any provisions of the Foreign Exchange Regulation Act, and seizure for the purpose of seizure is not sustainable in law. In the instant case, the counter-affidavit filed by the respondent states that the investigation is in progress with reference to two foreign current accounts alleged to have been held by the petitioner with UCO Bank, Singapore and the Development Bank, Singapore and the investigation is not yet completed. The alleged offence will come under Section 8 of the Act. Section 8 of the Act reads as follows :

"Restrictions on dealing in foreign Exchange :

(1) Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, purchase or otherwise acquire or borrow from or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange :

Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money-changer.

Explanation : For the purpose of this sub-section, a person, who deposits foreign exchange with another person or opens an account in foreign exchange with another person, shall be deemed to lend foreign exchange to such other person.

(2) Except with the previous general or special Permission of the Reserve Bank, no person, whether an authorised dealer or a money-changer or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorised by the Reserve Bank.

(3) Where any foreign exchange is acquired by any person, other than an authorised dealer or a money-changer, for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or the conditions cannot be complied with, the said person shall, within a period of thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell the foreign exchange to an authorised dealer or to a money-changer.

(4) For the avoidance of doubt, it is hereby declared that where a person acquires foreign exchange for sending or bringing into India any goods but sends or brings no such goods or does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time or sends or brings any goods of a kind, quality or quantity different from that specified by him at the time of acquisition of the foreign exchange, such person shall, unless the contrary is proved, be presumed not to have been able to use the foreign exchange for the purpose for which he acquired it or, as the case may be, to have used the foreign exchange so acquired, otherwise than for the purpose for which it was acquired.

(5) Nothing in this section shall be deemed to prevent a person from buying from any post office, in accordance with any law or rules made thereunder for the time being in force, any foreign exchange in the form of postal orders or money orders."

6. On a reading of the above section, it is clear that no person resident in India other than an authorised

dealer shall purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised officer without the permission of the Reserve Bank and the violation of Section 8 of the Act is punishable in the case of an offence the amount or value involved in which exceeds Rs. 1 lakh, with imprisonment for a term which shall not be less than six months, but which may extend to seven years and fine and apart from the criminal proceedings, for the offence, a personal penalty also could be levied after the adjudication in the matter. It is clear that the documents seized in the instant case, viz., two passports can be retained by the respondent. It is clear even though Section 41 of the Act is not directly applicable to seizure under Section 38 of the Act and the documents seized under Section 38 of the Act, can be retained by the respondents without any time limit, the documents seized must be relevant to the investigation of the matter relating to any violation of provisions of the Act and without this connecting link the document seized under Section 38 of the Act cannot be retained for an indefinite period of time. The period is limited to the reasonable period of investigation and the period of adjudication under Sections 51 and 56 of the Act. Even though, there is no time limit fixed for completion of the investigation and the adjudication proceedings, a reasonable time should be taken by the respondent to complete both the investigation and the adjudication in the matter and once the investigation and the adjudication are completed, the property seized should be returned to the person from whom it was seized.

7. In the instant case, it is alleged by the petitioner that the investigation has been prolonged and on the other hand, it is alleged by the respondent that the petitioner is not co-operating with the investigation. However, the petitioner has filed a supplementary affidavit wherein he has undertaken to co-operate with the Department in any manner as may be reasonably required. In view of that above, I feel that the ends of justice will be reserved by directing the respondents to complete the investigation within a period of four months from today and the documents seized under Section 38 of the Act viz., the passports shall be returned to the petitioner in accordance with law. The, writ petition is ordered in the above terms. No costs.

Order accordingly.