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Veera SarIn and Ors. Vs. Uoi and Ors.

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Court : Delhi

Decided On : Dec-01-2014

Judge : S.Ravindra Bhat

Appellant : Veera SarIn and Ors.

Respondent : Uoi and Ors.

Advocate for Def. : Ms. Charu Dalal

Judgement :

$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

17. 11.2014 Pronounced on:

01. 12.2014. + W.P.(CRL) 1606/2008 VEERA SARIN & ORS. ..... Petitioners Through: Sh. Ravi Gupta, Sr. Advocate with Sh. Gaurav Kejriwal, Sh. Ajay Gulati and Sh. Sujit Kesari, Advocates. versus UOI & ORS. ..... Respondents Through: Sh. Baldev Malik with Sh. Arjun Malik, Advocates, for UOI. Sh. Saleem Ahmed, Standing Counsel (Crl), for State with Ms. Charu Dalal and Sh. Ajay Pratap, Advocates. CORAM: HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MR. JUSTICE VIPIN SANGHI JUSTICE S.RAVINDRA BHAT % 1. The petitioner in these proceedings seeks directions calling for the records relevant to the detention order dated 12.7.1975 made under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities W.P.(CRL) 1606/2008 Act, 1974 (hereafter referred to as Page 1 COFEPOSA) as well as for quashing

proceedings initiated and orders made under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereafter referred to as SAFEMA). The petitioners husband Late H.K. Sarin was carrying on business under the name Sarin Gem House.

2. Between 1974 and 1976, raids were conducted in Shri Sarin's business premises as well as that of the petitioner and proceedings were initiated under the Customs Act. He was exonerated however, in all the Customs Act proceedings. On 12.07.1975, an order was issued by the Government of NCT of Delhi authorizing the preventive detention of said Shri H.K. Sarin, under COFEPOSA. However, this order was not executed and Shri Sarin was never detained in implementation of it. The second respondent, i.e., the competent authority under the SAFEMA issued a notice under Section 6 (1) of SAFEMA upon Shri H.K. Sarin asking him to respond and disclose his source of income or the means by which he acquired the properties listed in the document. Shri Sarin filed his replies and representations on various dates between 1981 and 1982. Till 5.8.1998, nothing further was heard. Without any further proceeding or hearing - after the last representation of Shri Sarin dated 20.4.1982, an order forfeiting several properties listed out in the schedule was issued on 5.8.1998. It was in these circumstances that Shri Sarin approached this Court under Article 226 of the Constitution of India by filing W.P.(C) 1124/1999.

3. During the pendency of the proceedings, upon being served with the forfeiture order, an appeal was preferred by Shri Sarin which W.P.(CRL) 1606/2008 Page 2 was rejected on 19.12.2001. By then, Shri H.K. Sarin had passed away on 16.10.2000. Consequently, his heirs including the present petitioners were unaware about the fate of the appeal preferred by him; likewise there is no representation on his behalf in the writ proceedings. The writ petition, therefore, was dismissed for nonprosecution on 16.09.2003. Upon receiving a further Show Cause Notice dated 29.03.2005 by the competent authority proposing to execute the orders made under SAFEMA, the petitioner enquired from the authorities and was informed about the outcome of the appeal. Thereupon, she approached this Court by filing W.P. (C) 23717/2005 again challenging the validity of the detention order dated 12.07.1975 and the consequential action taken by the respondents

under SAFEMA.

4. In the counter affidavit to W.P. (C) 23717/2005, the respondents inter alia stated for the first time that the detention order had been revoked on 21.03.1977. The respondents also deposed that the file pertaining to the detention order of H.K. Sarin was untraceable. The averments made in the said counter affidavit dated 18.12.2006 inter alia read as follows:

There are unsigned entries on the relevant page of the said Register showing date of declaration as 12.07.1975 and reconsideration of the detention order every four months up to 23.02.1977. Entries made therein also show that the said Shri H.K.Sarin was not arrested and action under Section 7 of the COFEPOSA Act was initiated. There is one more entry wherein it has been mentioned that the detention order was revoked on 21.03.1977. The copy of the relevant page of the File Head Register containing aforesaid entries is annexed as ANNEXURE B. It is further submitted that W.P.(CRL) 1606/2008 Page 3 efforts were also made to trace the detention order and grounds of detention with the Commissioner of Police, Delhi Directorate of Revenue Intelligence, Competent Authority (SAFEMA), Ministry of Finance and Customs Department, however, record could not be traced.

5. In view of this development, the petitioner was permitted to withdraw W.P. (C) 23717/2005 on 14.05.2007 and granted liberty to take steps in respect of the proceedings emanating from the show cause notice. Consequently on 30.11.2007, the petitioner sought for appropriate orders to drop and close the SAFEMA proceedings. This request was, however, declined by an order dated 4/8.2.2008. The said order declining to close the proceedings reads as follows:

In this regard, it is to inform you that the requests made by you are not tenable in view of the provisions of Section 2 (2) (b) of SAFEMA (FOP) Act, 1976 which does not recognize revocation of detention made under section 11 (1) of the COFEPOSA Act, 1974. Further, the Supreme Court of India in the case of Union of India Vs. Mohan Lal Lakumal Punjabi & Ors [2004 (166) E.L.T. 296 (SC) = 2004 (3) SCC628 has observed as under:

SAFEMA applies when the revocation is based on the report of the Advisory Board. As the factual position noted goes to show that the revocation was only in terms of Section 11 (1) (b) of COFEPOSA, such revocation when done by the Central Government as in this case is really unrelated to a report of the Advisory Board.

In the case of A.P., Late Sh. H.K. Sarin detention order was issued within the Emergency period. After lifting of emergency and before proceeding with forfeiture proceedings on the basis of first show cause notice dated 20.04.1980 opinion was also sought from Law Ministry about applicability of proceedings under SAFEMA (FOP) W.P.(CRL) 1606/2008 Page 4 Act, 1976 in the cases of persons who remained absconder and detention order issued was never served on them. In response, the Law Ministry has opined that revocation of the order of detention under section 12A of the COFEPOSA Act because of the lifting of the Emergency will not render the SAFEMA inapplicable to a person in respect of whom an order of detention had been made under section 12A of the COFEPOSA Act. From the above facts and legal position, the claim that proceedings under SAFEM (FOP) Act, 1976 ceases to apply does not hold good. For your consideration, copy of the advice taken from Ministry of Law is annexed.

6. The petitioner challenges the final orders of SAFEMA and the decision of the appellate authority contending that their initiation itself was a nullity. It is firstly contended that the detention order was never executed or given effect to during the lifetime of Late Shri Sarin and instead was revoked on 21.03.1977. Learned counsel highlighted that since the detention order itself was not executed, the consequential action under SAFEMA was unsustainable. It was next urged that the effect of the revocation - by reason of Section 12A of the COFEPOSA is that proceedings under SAFEMA could not have been initiated at all. Learned counsel stated that this meant that the proceedings were a nullity. In support of this contention it was stated that Section 12A detention orders constituted a class in themselves because the ordinary statutory safeguards mandated under provisions of Section 3 of COFEPOSA, i.e., finiteness in point of time for their validity and more importantly the detaining authoritys decision being subject to review by an Advisory Board was unavailable for the duration of Emergency. Learned counsel

highlighted that the detention order in the case of Late Shri Sarin was made when the emergency was in W.P.(CRL) 1606/2008 Page 5 force, i.e., from 25.06.1975 to 21.03.1977. Since the detention order was made on 12.07.1975 and was revoked on 21.03.1977, it clearly fell into the description of detention orders for which no SAFEMA proceedings could have been validly initiated by virtue of the third proviso to Section 2 (2) (b) of the latter enactment, i.e., SAFEMA.

7. In the counter affidavit, the respondents have sought to outline the various pre-judicial activities which led to the detention order being issued against Shri Sarin on 12.07.1975. It was contended in addition that he was an individual covered by Section 2 (2) (b) of SAFEMA and that the forfeiture orders made were preceded by show cause notice and therefore, valid proceedings. It was also argued that the submission with respect to validity of the orders under SAFEMA is without any force because the revocation order of 21.03.1977 was under Section 11 of the COFEPOSA and not under Section 12A.

8. During the course of hearing, learned counsel for the respondents produced a copy of the revocation order, relevant part of which reads as follows:

DELHI ADMINISTRATION: DELHI No.F.5/15/77-Home (P.II) (V) Dated the 21st March, 1977

ORDER
In exercise of the powers conferred by sub-section (1) of Section 11 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, the Administrator of the Union Territory of Delhi, hereby revokes the detention orders in respect of the following persons: - W.P.(CRL) 1606/2008 Page 6 1. Shri Hari Kishan Sarin, S/o Late Lala Durga Parshad Sarin R/o 3378, Christian Colony, New Delhi. XXX XXX XXX By order and in the name of the Administrator Sd/(T.R. KALIA) DEPUTY SECRETARY (HOME) DELHI ADMINISTRATION: DELHI

9. For a better appreciation of the controversy, it would be necessary to extract the relevant statutory provisions. The relevant provision, Section 2 of SAFEMA, so far as relevant reads as follows: "Section 2. 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 W.P.(CRL) 1606/2008 Page 7 (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 (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): 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 (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.: W.P.(CRL) 1606/2008 Page 8 Section 9 of COFEPOSA reads as follows: "9. Cases in which and circumstances under which persons may be detained for periods longer than three months without obtaining the opinion of Advisory Board. (1) Notwithstanding anything contained in this Act, any person (including a

foreigner) in respect of whom an order of detention is made under this Act at any time before the 31st day of July, 1999, may be detained without obtaining, in accordance with the provisions of sub-clause (a) of clause (4) of Article 22 of the Constitution, the opinion of an Advisory Board for a period longer than three months but not exceeding six months from the date of his detention, where the order of detention has been made against such person with a view to preventing him from smuggling goods or abetting the smuggling of goods or engaging in transporting or concealing or keeping smuggled goods and the Central Government or any officer of the Central Government, not below the rank of an Additional Secretary to that Government, specially empowered for the purposes of this section by the Government, is satisfied that such person (a) smuggles or is likely to smuggle goods into, out of or through any area highly vulnerable to smuggling; or (b) abets or is likely to abet the smuggling of goods into, out of or through any area highly vulnerable to smuggling; or (c) engages or is likely to engage in transporting or concealing or keeping smuggled goods in any area highly vulnerable to smuggling, and makes a declaration to that effect within five weeks of the detention of such person."

Section 11(1) of COFEPOSA reads as follows:

"1. Revocation of detention orders - W.P.(CRL) 1606/2008 Page 9 (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."

Section 12-A of COFEPOSA, which is relevant for this case, reads as follows: "12A. Special provisions for dealing with emergency.

(1) Notwithstanding anything contained in this Act or any rules of natural Justice, the provisions of this section shall have effect during the period of operation of the Proclamation of Emergency issued under clause

(1) of Article 352 of the Constitution on the 3rd day of December 1971, or the Proclamation of Emergency issued under that clause on the 25th day of June, 1975, or a period of twentyfour months from the 25th day of June, 1975, whichever period is the shortest.

(2) When making an order of detention under this Act against any person after the commencement of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1975, the Central Government or the State Government or, as the case may be, the office making the order of detention shall consider whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the Proclamations referred to in subsection

(1) have been issued (hereafter in this section referred to as the emergency) and if, on such consideration, the Central Government or the State Government or, as the case may be, the officer is satisfied that it is necessary to detain such person for effectively W.P.(CRL) 1606/2008 Page 10 dealing with the emergency, that Government or officer may make a declaration to that effect and communicate a copy of the declaration to the person concerned: Provided that where such declaration is made by an officer, it shall be reviewed by the appropriate Government within fifteen days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by that Government, after such review, within the said period of fifteen days.

(3) The question whether the detention of any person in respect of whom a declaration has been made under subsection

(2) continues to be necessary for effectively dealing with the emergency shall be reconsidered by the appropriate Government within four months from the date of such declaration and thereafter at intervals not exceeding four months, and if, on such reconsideration, it appears to the appropriate Government that the detention of the person is no longer necessary for effectively dealing with the emergency, that Government may revoke the declaration.

(4) In making any consideration, review or reconsideration under sub-section

(2) or (3), the appropriate Government or officer may, if such Government or officer considers it to be against the public interest to do otherwise, act on the basis of the information and materials in its or his possession without disclosing the facts or giving an opportunity of making a representation to the person concerned.

(5) It shall not be necessary to disclose to any person detained under a detention order to which the provisions of sub-section

(2) apply, the grounds on which the order has been made during the period the declaration made in respect of such person under that sub-section is in force, and, accordingly, such period shall not be taken into account for the purposes of sub-section

(3) of section

3. W.P.(CRL) 1606/2008 Page 11

(6) In the case of every person detained under a detention order to which the provisions of sub-section

(2) apply, being a person in respect of whom a declaration has been made there under, the period during which such declaration is in force shall not be taken into account for the purpose of computing(i) the period specified in clauses (b) and (c) of section 8; (ii) the periods of "one Year" and "five weeks" specified in subsection (1), the period of "one-year" specified in subsection (2)(i), and the period of "six months" specified in sub section (3), of section 9."

10. Interpreting provisions of SAFEMA, a larger, nine judge Bench decision of the Supreme Court, in Attorney General for India and Ors. v. Amratlal Prajivandas and Ors. (1994) 5 SCC54held as follows:

"6. To summarise: (1) Parliament was perfectly competent to enact both the COFEPOSA and the SAFEMA. (2) For the reasons given in the body of this judgment, we do not express any opinion on the validity of the 39th and 40th Amendment Acts to the Constitution of India placing COFEPOSA and SAFEMA in

the Ninth Schedule. We assume them to be good and valid. No arguments have also been addressed with respect to the validity of 42nd Amendment Act to the Constitution either. (3) (a) An order of detention made under Section 3 of COFEPOSA, which was governed by Section 12-A thereof is yet an order of detention for the purpose of and within the meaning of Section 2(2)(b) of SAFEMA. Since the President had issued an order under Article 359(1) suspending Articles 14, 21 and 22, it became competent for Parliament, by virtue of clause (].-A) of Article 359 to enact Section 12-A of COFEPOSA for the duration of and limited to the period for which the Presidential Order was in force. W.P.(CRL) 1606/2008 Page 12 It was meant to achieve the purposes of emergency. Once Section 12-A is held to be a competent piece of legislation, orders of detention made thereunder (i.e. orders of detention to which the said provision applied) cannot be held to be not amounting to orders of detention for the purpose of and within the meaning of Section 2(2)(b) of SAFEMA, particularly in view of the express language of Section 2(2)(b) [including proviso (iii) thereto]. protection enjoyed by both the enactments by virtue of their inclusion in the Ninth Schedule to the Constitution."

11. The respondents' argument is that having unsuccessfully challenged the detention order (under COFEPOSA), it is not now open to the petitioner to challenge the SAFEMA proceeding and order. The petitioner, on the other hand, urges that the detention order was never served on late Shri Sarin and that the occasion for challenging it never arose; it is also argued that the revocation in this case, was made before the expiry of the original period of detention, attracting the third proviso to Section 2(2)(b) of SAFEMA, so as to exclude its operation altogether.

12. By virtue of Section 2(2) (b) of SAFEMA, jurisdiction extends to every person against whom a COFEPOSA detention order "has been made". However, the third proviso (to Section 2 (2) (b)) specifically excepts its operation those against whom orders of detention are made under Section 12-A of COFEPOSA if: (a) orders of detention are not revoked before expiry of time (for such detention); or (b) orders of detention are revoked on the basis of first review; or W.P.(CRL) 1606/2008 Page 13 (c) revocation of detention is on the basis of the report of the Advisory Board, under Section 8 read with Section 12A (6). Now, a detention order under

Section 12A - as noticed in Amritlal Prajivandas (supra) - was made under extraordinary circumstances, when Fundamental Rights were suspended. The non-obstante clause in Section 12-A overrode other safeguards which every individual was assured before a valid detention order could be issued, i.e. recommendation and review by Advisory Boards as essential preconditions. Such orders made by virtue of Section 12A, importantly, were to be in force for the duration of Emergency, i.e. till the Proclamation lasted, or for two years (twenty four months) from the date of the order, whichever was shorter. In the present case, the detention order was apparently made on 12.07.1975 i.e. after the Proclamation of Emergency was issued on 25.06.1975. Therefore, late H.K. Sarin's detention order fell into the category of those which were made under Section 12-A (1). It was to be in force, in terms of that provision, for the duration of the Emergency, or twenty four months, whichever was shorter. The Emergency was lifted and the Proclamation rescinded on 21.03.1977; the same day, pursuant to the mandate of Section 12-A, Shri Sarin's detention order was revoked. These facts show that the first contingency envisioned in the third proviso to Section 2(2) (b) of SAFEMA, "such order of detention, being an order to which the provisions of Section 12A of the said Act apply, has not been revoked before the expiry of the time for..."

was fulfilled. In other words, the detention order of Shri Sarin was an Emergency detention order, and ran its course and thus fell within the description of one which had not been revoked before the expiry of its W.P.(CRL) 1606/2008 Page 14 time. It was revoked - and got revoked by operation of law, upon the cessation of the Emergency, itself, due to Section 12A (1) - of COFEPOSA.

13. This court is also aware of the fact that Shri Sarin was never served with the detention order, nor even made aware of it ever, during the time it was in force. The respondents were unable to show any material to say that they tried to serve it upon him, and that he could have in any manner known of its existence, in order to challenge it. In these circumstances, it was impossible for him to impugn it, for the period July 1975 to March 1977. Once the Emergency was revoked, and the detention order suffered a similar fate, there was no manner for him again to challenge the detention order as it had no consequence. Another very important

aspect is that when the Emergency was in force, individuals whose personal liberty was forfeited under preventive detention laws, such as COFEPOSA, were, by reason of the Proclamation of Emergency, prevented from asserting their Fundamental Rights. Initially nine High Courts held that notwithstanding this position, orders of detention could be challenged under Article 226 of the Constitution of India. However, the Supreme Court held that such petitions were not maintainable; effectively barring even the writ remedy to those aggrieved against detention orders, in A.D.M. Jabalpur v Shiv Kant Shukla AIR 1976 SC1207 14. The submission of the respondents that the revocation order in the present case was not under Section 12-A, but under Section 11 is of not much consequence. The only power of revocation which could have been sought recourse to, by the Central Government, under W.P.(CRL) 1606/2008 Page 15 COFEPOSA, during Emergency, in respect of orders under Section 12-A, was under Section 12-A (3) after review and recommendation to release the detenu. That class of detention orders too stood excluded by virtue of Section 2 (2) (b) third proviso; however, the first category, i.e. those detention orders that had not been revoked before cessation of Emergency, could have been revoked only under Section 11 of COFEPOSA.

15. In the light of the foregoing discussion, it is held that the revocation of the detention order, in the present case, clearly fell within third proviso to Section 2 (2) (b) and was thus excluded from exercise of jurisdiction under SAFEMA. The writ petition has to consequently succeed; the orders of the competent and appellate authority are hereby quashed. The writ petition is allowed in the above terms without any order as to costs. S. RAVINDRA BHAT (JUDGE) VIPIN SANGHI (JUDGE) DECEMBER1 2014 W.P.(CRL) 1606/2008 Page 16

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