

K. Narayanan Vs. Collector of Customs and Central Excise

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Court : Chennai

Decided On : Mar-28-1989

Reported in : 1990(26)ECC134; 1990(47)ELT346(Mad)

Judge : K.S. Bhakthavatsalam, J.

Acts : [Customs Act, 1962](#) - Sections 2(11), 2(39), 104, 107, 108, 138B

Appeal No. : Writ Petition Nos. 4054 and 4218/88

Appellant : K. Narayanan

Respondent : Collector of Customs and Central Excise

Advocate for Def. : S. Veeraraghavan, Additional Central Government Standing Counsel

Advocate for Pet/Ap. : M. Abdul Kareem, Adv. for M. Abdul Nazeer, Adv.

Judgement :

ORDER

1. This Writ Petition coming on for hearing on Friday, the 2nd day of December, 1989 and Thursday, the 16th day of February, 1989 upon perusing the Petition and the affidavit filed in support thereof, the order of the High Court dated 11-4-1988 and 12-4-1988 and made herein respectively, and the Counter affidavits filed herein and the records relevant to the prayer as aforesaid respective files of the

Respondent comprised in the return of Respondents to the Writ made by the High Court, and upon hearing the arguments of Mr. M. Abdul Kareem, for M. Abdul Nazeer, Advocate for the Petitioner, in both and of Mr. S. Veeraraghavan, Additional Central Government Standing Counsel on behalf of the Respondents, in each of the Petitions, and having stood over for consideration till this day, the Court made the following Order :-

When M.M.P. Nos. 6003 and 6215 of 1988 in W.P. Nos. 4054 and 4218 of 1988 came up for hearing, by consent of both parties, the main writ petitions were taken up for disposal.

2. W.P. No. 4054 of 1988 is filed praying for the issuance of a Writ of mandamus directing the respondents or their men or agent or any officers acting on behalf of them or under their direction to forbear from making use of the statements obtained from (1) the petitioner's wife Vadivammal, (2) Kamalanathan and (3) Gopalakrishnan Chettiar and any one else in connection with the alleged seizure of gold from the premises of Suriya Murthy Chettiar of Chairman Muthuramalingam Street, East Madurai on 1-4-1988 and the seizure of Indian Currency of Rs. 2,13,000/- from the Petitioner's house on 2-4-1988 by the respondents Officials in any proceedings against the Petitioner under the Customs Act or any other Act or Acts including the arrest of the Petitioner herein.

3. W.P. No. 4218 of 1988 is filed praying for the issuance of a Writ of mandamus to direct the respondents or their men or their agent or any officers acting on behalf of them or under their direction to forbear from making use of the statements from (1) the Petitioner's wife Mrs. Mangaiyarkkarasi, (2) Kamalanathan and (3) Gopalakrishnan Chettiar and any one else in connection with the alleged seizure of gold from the Petitioner's premises on 1/2-4-1988 by the officials of the respondents 1 to 3 in any proceedings against the Petitioner under the Customs Act or any other Act or Acts.

4. The facts leading to the Writ Petition No. 4054 of 1988 are as follows :-

According to the Petitioner, the respondents Officials raided his premises on 2-4-1988 at about 11.00 A.M. when his wife Vadivammal and daughter-in-law were

present. It seems that they had searched the previous night the house of one Suryamurthy Chettiar and found some contraband gold and had arrested two person namely, Gopalakrishnan Chettiar and Kamalanathan who were in their Custody. After obtaining some statements from those persons, the Petitioner alleges that the officials of the Department wanted to arrest him also. It is alleged in the affidavit that they found nothing incriminatory in the house and that they seized Indian Currency notes of Rs. 2,13,000/- even without giving a copy of the seizure memo. It is further alleged that the officials had threatened his wife to give a statement that the money seized were sale proceeds of smuggled gold. It is alleged that the officials took her to their office and obtained a statement with her thumb impression that the money represented the sale proceeds of smuggled gold, and asked her to produce the petitioner before them. It is alleged in the affidavit that the entire proceedings of the respondents are illegal, as the Indian currency notes without any legal notice cannot be seized by respondents and that the statements have been obtained from other persons while they were in lock-up in their own handwriting and obtained their signatures. It is further alleged in the affidavit, that the statements are illegal and should not be used for any purpose under the Customs Act, that his wife has been compelled to declare falsely to suit the convenience of the respondents, that the respondents have declared their intention to arrest the petitioner on the false charge based on the statement obtained illegally from his wife and from others and that his wife has sent a telegram to the respondents about the falsity of the statement obtained from her. In these circumstances, the petitioner has come up before this Court with the above writ petition.

5. A further affidavit was also filed by the Petitioner stating that on the basis of the statement obtained from Kamalanathan and Gopalakrishnan, they have been detained under the COFEPOSA ACT, that the statements obtained from the said Kamalanathan, Gopalakrishnan, Mangayarkarasi and from the Petitioner's wife Vadivu are irrelevant under Section 138-B of the Customs Act for all proceedings whether prosecution or adjudication or merely executive or merely administrative proceedings and the conditions prescribed in Section 138-B are not satisfied in the case of any of the persons from whom the Statements are obtained. It is further alleged that the COFEPOSA ACT is inseparable part of Customs Act and Sections

138-B, 107 and 108 of the Customs Act forms parts of a scheme under the Customs Act and that the statements in Sections 107 and 108 of the Customs Act are Subject to Section 138-B of the Customs Act and therefore all the three sections are integral part of the same scheme and the operation of Sections 107 and 108 cannot be severed from Section 138-B of the Customs Act. It is further alleged that the statements were obtained under Section 108 of the Customs Act. It is further alleged that since the entire grounds of detention of Kamalanathan and Gopalakrishnan Chettiar made all allegations against the Petitioner and the Petitioner in W.P. No. 4218 of 1988 and such as there is threat of arrest, the Petitioner has come before this Court. It is further stated that the prayer in the writ petition is confined to the legality of the use of the statements of four persons for the purpose of Customs Act or COFEPOSA Act.

6. The Petitioner in W.P. No. 4218 of 1988 alleges in his affidavit that he was not in Madurai on 1-4-1988 as he had to go various places for distributing invitation cards for celebrating his daughter's attaining puberty which was fixed on 6-4-1988. It is stated that he came to understand that a large posse of officials of the respondents 1 to 3 at 7.30 P.M. on 1-4-1988 raided his house and searched the same until 2.30 a.m. on 2nd April 1988. It is further alleged in the affidavit that though nothing incriminating was found they purported to write a paper in which they obtained the petitioner's wife's signature at about 2.30 a.m. and they called some person in the opposite house also to sign the same. It is further alleged in the affidavit that neither at the time of the entry of the respondents' officials nor during the search or the writing of the papers, the abovesaid persons of the opposite house who signed the paper were present, and that no copy of the paper was given to the Petitioner's wife. It is further alleged in the affidavit that in the morning of 2-4-1988, his wife and two other persons, one Kamalanathan and Gopalakrishnan were forcibly taken to the Customs office of the third respondent, inspite of their protest that by compulsion, they were produced before the residence of the Additional Chief Judicial Magistrate, Madurai at 8.30 p.m. and that they did not show any search warrant before or during the search except that they took some signatures at 2.30 a.m. on 2-4-1988 in some papers. It is further alleged that the Petitioner's people were told that some contraband gold was seized from the Petitioner's house during their search, that they obtained

statements to that effect from the Petitioner's wife and from Kamalanathan and Gopalakrishnan and that in that connection, they wanted to arrest the Petitioner. It is further alleged that the Statements have been obtained from other persons while they were in lock-up and it is illegal and should not be used for any purposes under the Customs Act or any other Act. It is further alleged that the Petitioner's wife and others were compelled to declare the falsehood to suit the convenience of the respondent and that it is illegal and high-handed act of the officials of the respondents to compel a house wife to give incriminating statement against her husband. It is further alleged that the Petitioner's wife had sent a telegram at 10.30 P.M. on the same day about the falsity of the statement obtained from her. It is further alleged in the affidavit that the search itself is illegal because there was numerous guests and friends who might have brought some gift articles and anything seized in the house cannot be attributed to him. It is further alleged that no search warrant was shown to the people who were in the petitioner's house before search and there was no mahazar witness at all before entry into the house of the petitioner or during search, and that it is wholly illegal to say that anything seized belonged to him.

7. A further affidavit was filed in this case also, reiterating the very same contentions making the very same allegations which are contained in the further affidavit of the Petitioner filed in W.P. No. 4054 of 1988 and as such, it is not necessary to repeat the same.

8. Three counter-affidavits have been filed in W.M.P. No. 6003 of 1988, in W.M.P. No. 6215 of 1988 and in W.P. No. 4218 of 1988 respectively by the Respondents.

9. In the counter affidavit filed in W.M.P. No. 6003/1988 in W.P. No. 4054 of 1988, it is claimed that one Kamalanathan and one Gopalakrishnan Chettiar have clearly admitted in their statements dated 2-4-1988 that only the petitioner is dealing in foreign marked goldbars and that he used to send them through Kamalanathan to one Suriyamoorthy's (Petitioner in W.P. No. 4218 of 1988) house, from where the gold bars were seized. It is further claimed that in fact, from the statement of the said Gopalakrishnan, it is very much evident that the petitioner obtained FMG bars and gave them to Suriyamoorthy (Petitioner in W.P. No. 4218 of 1988) through

Gopalakrishnan, for his business and as such the Officers searched the Petitioner's house and a sum of Rs. 2,13,858/- was found concealed in his house and the same was seized under mahazar, on the reasonable belief that they constituted sale proceeds of FMG bars. It is further stated in the counter affidavit that on investigation, the Petitioner's wife admitted in her statement that the seized amount was only sale proceeds of FMG bars and that her husband used to conceal FMG bars and sale proceeds in the secret cavity in his house. It is further claimed that the Petitioner's wife gave her statement voluntarily without coercion. It is further claimed that on the reasonable belief that they constitute sale proceeds of FMG bars, as the petitioner's wife informed the Officers that the petitioner used to conceal the FMG bars sale proceeds in the specially made cavity in the Pooja room. It is further stated that the statements were not recorded in the lock-up and they were recorded as admitted by the accused under Section 108 of the [Customs Act, 1962](#). It is further stated that the petitioner's wife was not compelled to declare and she voluntarily gave it, after being summoned. It is stated that only on the basis of the statements made by Kamalanathan and Gopalakrishnan, action was taken against them.

10. In the counters filed in W.P. No. 4218 and W.M.P. No. 6215 of 1988, it is stated that Kamalanathan and Gopalakrishnan have been detained under the COFEPOSA ACT for the reasons stated in the grounds of detention, that the petitioner's contention that the statements obtained from the said Kamalanathan, Gopalakrishnan, this Petitioner's wife Mangayarkarasi and Vadivu (wife of the Petitioner in W.P. No. 4054 of 1988) are irrelevant under Section 138-B of the Customs Act for all proceedings whether prosecution or adjudication or merely executive or merely administrative proceedings and if the conditions prescribed in Section 138-B are not satisfied in the case of any of the persons from whom the statements were obtained are unwarranted. It is claimed in the counter affidavit that the statements of all the above four persons were recorded during the course of enquiry. It is stated in the counter affidavit that the grounds of detention Kamalanathan and Gopalakrishnan just narrated the statements of Kamalanathan and Gopalakrishnan as stated by them wherein they clearly stated that the petitioners in these writ petitions are the main offenders in the cases and that no proposals against the petitioners under COFEPOSA ACT are pending. It is further

stated that as no action is initiated either under prosecution or under the COFEPOSA ACT against the Petitioners, the apprehension of the Petitioners that fundamental rights are threatened is without any basis.

11. It is claimed in W.M.P. No. 6215 of 1988 that when they saw two persons entering the house of the Petitioner in W.P. No. 4218 of 1988 at about 7.00 p.m. the Officers rushed to the house, that after showing the warrant issued by the Assistant Collector, C.I.U. Madurai the house of the Petitioner was searched in the presence of independent witnesses, that 82 gold bars were seized in the presence of the Petitioner's wife, Kamalanathan and Gopalakrishnan and independent witnesses, that at the time of search only inmates of the house were available there and not any guests and friends except the persons involved in the offence, that the Petitioner's wife was not at all compelled and she gave her statement voluntarily before Superintendent, Customs, that after the arrest the Petitioner's wife was produced before ACJM, Madurai for remand and at that time, she did not make any complaint about the coercion, and that she was neither coerced nor threatened. It is further claimed in the counter affidavit that the mahazar witnesses were present before the search was conducted and the search was conducted in the presence of Assistant Collector, Customs, Madurai, that the personal search of officers before entry into the house is warranted and that the seizure is legal since the contraband gold bars were recovered and seized from the secret chamber in the house of the Petitioner.

12. Mr. M. R. Abdul Kareem, the learned counsel for Petitioners contends that Sections 107, 108 and 138-B of the Customs Act form part of a scheme with regard to mode of enquiry to be made under the Customs Act, and unless the statements are obtained satisfying the conditions under Section 138-B of the Customs Act, they cannot be used. The learned counsel further contends that Section 104 of the Customs Act cannot be invoked for arrest, on the basis of the statements made under the Customs Act. The learned counsel also contends that the proceedings under the COFEPOSA ACT are also part and parcel of Customs Act and as such all the proceedings under the COFEPOSA ACT must flow only from the provisions of the Customs Act. The learned counsel further refers to Section 2(e) and 9 of the Act and Section 2(11) and 2(39) of the Customs Act and

argues that the Customs Act should be applied to other provisions of the COFEPOSA ACT and as such the Customs Act should be taken as a parent Act. The learned counsel further contends that there is no provision under the Customs Act to send a proposal to the Government for arrest under COFEPOSA ACT. The learned counsel also contends that the power of taking statements without legal assistance cannot be relied upon. The further argument of the learned counsel for the Petitioners is that even before the arrest is made, a lawyer's assistance is necessary. The learned counsel further contends that for coming before this Court, no order of arrest is necessary and even a mere threat of arrest is sufficient. The sum and substance of the argument of the learned counsel for the Petitioners is that a person who cannot be arrested under Section 104 of the Customs Act, cannot be detained under the COFEPOSA ACT also.

13. Mr. Veeraraghavan, the learned Additional Central Government Standing Counsel for Customs contends on the other hand, that the writ petitions are premature relying upon an unreported decision in C.M.P. No. 13203 of 1987 in W.A. No. 1353 of 1987 (NAZEEM v. STATE OF TAMILNADU) dated 12-10-1988, to which I am a party, for the proposition that no court has any power to say that a person shall not be detained under the provisions of the COFEPOSA ACT, 1974 as it has been repeatedly pointed out that there is a vital distinction between punitive detention and preventive detention. The learned counsel further submits the points raised are caused by a recent unreported judgment of this Court in THE DEPUTY DIRECTOR, ENFORCEMENT DIRECTORATE, MADRAS v. MANSOOR MOHAMED ALI JINNAH AND OTHERS (W.A. NO. 891 TO 893 of 1988 dated 11-11-1988) and contends that all the grounds raised by the learned counsel for petitioners should be raised in a habeas corpus petition and not in a writ petition.

14. I have considered the elaborate arguments of the learned counsel for Petitioners in both petitions citing various authorities and the contentions of the learned Additional Central Government Standing Counsel. Firstly, I do not think it is necessary to advert to the various decisions cited by the learned counsel for petitioners, since I take the view that the writ petitions are premature. A Division Bench of this Court has considered the aspects raised by the Petitioners in the unreported decision in THE DEPUTY DIRECTOR, ENFORCEMENT

DIRECTORATE, MADRAS v. P. MANSOOR MOHAMED ALI JINNAH AND OTHERS (W.A. Nos. 891 to 893 of 1988 dated 11-11-1988) and held that the action taken under the provisions of the COFEPOSA ACT is not punitive in character, but only preventive. As such I am not able to agree with the arguments of the Petitioners' counsel that the provisions of the Customs Act have to be read into the COFEPOSA ACT. The Division Bench has held that regarding the reliance to be placed upon the confessional statements of the Petitioners or others, it is for the petitioners to raise objections if the confessional statements are relied upon by the detaining authority while passing the order of detention, without considering their retraction, only in proceedings arising out of the detention order, and not in the writ petitions. As such, the contention of Mr. Abdul Kareem, the learned counsel for Petitioners that the confessional statements which are retracted now, should not be used for taking any action against the Petitioners in any proceedings has to fail. I am not examining the cases with reference to any proceeding before any Court or any proceeding of adjudication before an authority. Further it is well settled that no finding could be given in the writ proceedings with regard to the admissibility or otherwise of the statements in a Judicial Proceedings before court or in a proceeding for adjudication before an Authority. If any question arises in such proceedings, it is open to the petitioners to raise their objections before the said Court or authority. The Division Bench has further held that if it is proceeding under the COFEPOSA ACT, it is not a judicial proceeding and the detaining authority while passing the order of detention has to subjectively satisfy himself whether there is sufficient material before him for passing such orders and as such the argument of the learned counsel for petitioners with regard to the veracity or reliability of the statements made by certain persons cannot be gone into in these writ petitions. There is no justification on the part of the Petitioners in asking this Court to express its views at this stage with regard to the validity of any detention order passed or may be passed under the COFEPOSA ACT based on the statements recorded under the respective Acts. In my view, it can be done only in the appropriate proceedings as rightly contended by the learned counsel for the respondents. In my view, the unreported judgment rendered by the Division Bench of this Court recently in THE DEPUTY DIRECTOR, ENFORCEMENT DIRECTORATE, MADRAS v. P. MANSOOR MOHAMED ALI JINNAH AND

OTHERS (W.A. Nos 891 to 893 of 1988 dated 11-11-1988) is binding on me and I am not inclined to issue the writs as prayed for. More so, the Petitioners cannot get a blanket order from this Court, in the nature of an injunction against the authorities from taking action under some other enactment. Though the order in C.M.P. No. 13203 of 1987 in W.A. No. 1353 of 1987 dated 12-10-1988, to which I am also a party, is passed in an interim application, I am of the view that the principle is the same even with regard to the main question raised by the learned counsel for petitioners herein. As a party to the order cited supra, I feel the principle behind that order applies to the question posed by Mr. Abdul Kareem, the learned counsel for the Petitioners.

15. For the reasons stated above, there are no merits in these petitions and they are dismissed accordingly. However, there will be no order as to cost.

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