

Pawan Kumar Didwani Vs. Union of India (Uoi) and ors.

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Court : Kolkata

Decided On : Aug-30-1994

Reported in : 1994(48)ECC177,1995LC268(Calcutta)

Judge : T.K. Chatterjee, J.

Appeal No. : C.O. No. 28(W) of 1994

Appellant : Pawan Kumar Didwani

Respondent : Union of India (Uoi) and ors.

Disposition : Appeal dismissed

Judgement :

T.K. Chatterjee, J.

1. On or about 4th of May, 1993, in the residence of Sri Pawan Kumar Didwani, who is the writ petitioner, some officers from the Enforcement Department came and conducted a search. After search they took the writ petitioner along with them to the office of the Enforcement Directorate at about 9.30 P.M. on 4th of May, 1993. The respondent No. 5, Sri Samir Mukherjee, interrogated the writ petitioner on 4th of May, 1993. According to the writ petitioner, the writ petitioner was forced to write a statement as per the dictate of the officers of the Enforcement Directorate, particularly, Sri Samir Mukherjee. According to the writ petitioner, the

said statement was obtained from the writ petitioner at night under duress, threat and physical assault and it was not his voluntary statement and physical torture on the writ petitioner continued throughout the night of 4th of May, 1993 which resulted in injuries on his body and on 5th of May, 1993 the writ petitioner was produced before the learned Chief Metropolitan Magistrate, Calcutta making allegations that the writ petitioner had violated the provisions of Section 9(1)(d) of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the 'FERA'). A bail petition was moved before that Chief Metropolitan Magistrate, Calcutta on behalf of the writ petitioner on the same day mainly on the ground that the writ petitioner required immediate medical assistance and should be admitted in a nursing home and that the statements taken from him were obtained by the respondents under duress, threat and assault, and that he was falsely implicated in the case. The learned Chief Metropolitan Magistrate, Calcutta refused to release the writ petitioner on bail. On 6th of May, 1993 an application for bail was moved on behalf of the writ petitioner in this Court. On the said application for bail, a Division Bench of this Court directed the Chief Metropolitan Magistrate to forward a medical report regarding the injuries sustained by the writ petitioner to them on 7th of May, 1993. On 7th of May, 1993 the medical report was submitted on behalf of the Chief Metropolitan Magistrate, Calcutta. After going through the medical report, the Division Bench, on 7th of May, 1993, only directed that the writ petitioner be kept in the jail hospital and necessary medical attention be provided to him. The Division Bench, therefore, on 7th of May, 1993, refused to release the writ petitioner on bail even after going through the medical report of the writ petitioner. In terms of the direction made by the Division Bench, the writ petitioner was shifted to the jail hospital. Subsequently, on being complained of acute chest pain, the writ petitioner was, thereafter, removed to SSKM Hospital under police protection. According to the writ petitioner, the Cardiology Department of SSKM Hospital was of the view that the writ petitioner had suffered a mio-cardiac infraction due to prolonged brutal physical assault coupled with most menacing intimidation and psychological torture on the writ petitioner. The writ petitioner, thereafter, filed another application for his release on bail before a Division Bench of this Court. This time, by an order dated 10th of May, 1993, the Division Bench released the writ petitioner on bail mainly on the ground that there could not be

any apprehension of the writ petitioner's absconding or his jumping the bail. Subsequently, at the instance of Enforcement Directorate, an application for cancellation of bail had been filed before the Division Bench which is, I am informed, still pending. It is alleged in the application for cancellation of bail that the claim of suffering from mio-cardiac infraction was found to be absolutely false as per report dated 29th May, 1993 of the doctor who had examined him in SSKM Hospital. Subsequent to this, the writ petitioner, made an application before the Chief Metropolitan Magistrate, Calcutta for retraction of his statements as they were obtained by the respondents from him under duress, threat and physical assault. On 20th May, 1993, the writ petitioner filed a petition for starting a criminal proceedings under Sections 330, 331, 234, 504 and 506 of the Indian Penal Code against Sri Samir Mukherjee, Assistant Director, Enforcement Directorate, before the Chief Metropolitan Magistrate, Calcutta. Sri Samir Mukherjee, however, made an application for quashing the said criminal proceeding and on rejection, Sri Mukherjee has moved a criminal revisional application in this Court and has obtained an interim order of stay of all further proceedings in the said case which is now pending. The respondents have since issued show cause notice to the writ petitioner with regard to the said matter which has been the subject matter of the Criminal Miscellaneous Case No. 2200 of 1993 arising out of the case started against the writ petitioner for alleged violation of Section 9(1)(d) under the FERA.

2. The grounds alleged by the writ petitioner in this writ petition for moving the writ Court are that the officers of the respondents, and in particular, Sri Samir Mukherjee, against whom the writ petitioner has filed a criminal case praying for issuance of process under Sections 324, 504 and 506 of the Indian Penal Code and in view of the order of rejection, passed on the application filed by the respondent No. 5 for quashing the said case, have hatched up a conspiracy to teach the writ petitioner a lesson by falsely implicating the writ petitioner in various cases and that the writ petitioner has been threatened by the officers of the Enforcement Directorate that they would further implicate the writ petitioner in other false cases and thereby put the writ petitioner behind the bar. It has also been alleged in paragraphs 21 and 23 of the writ petition that the officers of the respondents tried to meet the writ petitioner either in his residence or in his office on different dates but since the writ petitioner was not available, they could not

meet him. A grievance has also been put forward by the writ petitioner against the officers of the Enforcement Directorate that since the writ petitioner has been thoroughly examined in the above referred case and in view of the fact that the respondents have already issued show cause notice with regard to the said case, there was no reason for the officers of the respondents to visit the office and the residence of the writ petitioner. The writ petitioner has also alleged that by wrongfully and illegally threatening the writ petitioner to implicate him in false cases, the respondents are seeking to deprive the writ petitioner of his personal liberty and are thus trying to violate the fundamental right of the writ petitioner under Article 21 of the Constitution. Accordingly, in the facts and circumstances stated hereinabove, this writ application was moved by the writ petitioner for a direction upon the respondents (i) not to implicate the writ petitioner in any case under FERA; (ii) not to arrest or detain the writ petitioner without any basis; and (in) not to take any further or other coercive step against the writ petitioner and/or giving threat of arrest and/or detention in connection with false cases under the FERA.

3. An order of injunction was also prayed for restraining the respondents from implicating the writ petitioner falsely in any case under the FERA or from arresting or detaining the writ petitioner and from giving threat of arrest or detention in any case in any manner whatsoever without the leave of this Court.

4. A.N. Ray, J. on 4th of January, 1994 passed the following interim under:

Under these circumstances, the principal officer, being respondent No. 5, as well as all the other respondents are restrained from effecting any arrest of the writ petitioner again or taking any step for removing him from his residence or in any manner interfere with his free travelling anywhere within the country without his obtaining leave of this Court.

5. Mr. Roy appearing on behalf of the Enforcement Directorate raised a preliminary objection as to the entertainability of the writ petition at this stage on the facts alleged and the nature of reliefs claimed in the writ petition. Mr. Roy submitted that in the absence of any notice under Section 40 of the FERA served on the writ petitioner and in the absence of any averments made in the writ

application that any proceeding for interrogation under FERA has been started against the writ petitioner, there could not be any reasonable complaint that any of the fundamental rights of the writ petitioner was likely to be infringed. In support of this contention, a Division Bench decision of this Court, reported in 1984(1) CHN 422 (Union of India v. Abdul Sattar and Ors.) was relied by Mr. Roy. In my view, this Division Bench decision is clearly distinguishable on facts. In that decision also it is true that there was neither any order of detention nor anything concrete before the Court on the basis whereof the writ petitioner could reasonably complain that any of his fundamental rights was likely to be infringed. In paragraph 10 of the said decision at page 427 (Pages 50-51 of 3 ECC) it was observed as follows:

10 ...Upon his own showing the petitioner is not in a position to say that there has been any order for detention. What he states in paragraph 14 quoted hereinbefore is purely his apprehension which becomes clear when we look to the prayers where he speaks of an order for detention, if any. Therefore the petitioner is not sure that there has been any order of detention, far less is he sure that any order if so made had not been made in accordance with law....

Again in paragraph 11 at page 428 of the said decision (pages 51-52 of 3 ECC), it has been observed as follows:

11. Mr. Sen appearing on behalf of the writ petitioner has strongly contended that the petitioner has a constitutional right to move this Court in the writ jurisdiction when he had made out a case of threatened infringement of fundamental right of free movement. According to Mr. Sen, it is not necessary that the petitioner must wait to have the order served upon him and then only challenge the order as violating his fundamental right. Strong reliance is placed by Mr. Sen on the decision of the Supreme Court in the cases of D.A.V. College, Bhatinda v. State of Punjab : AIR 1971 SC1731 , State of Madhya Pradesh v. Bhailal Bhai : [1964]6SCR261 and the decision of the Bombay High Court in the case of Jayantilal Bhagwandas Shah and Ors. v. State of Maharashtra and Ors 1981 Cri LJ 767. The two decisions of the Supreme Court relied on by Mr. Sen are authorities for a principle which is now settled, viz., a citizen is entitled to move this

Court in writ jurisdiction not only when his right is infringed but also when it is threatened to be infringed. The Bombay High Court follows the same principle when it held that a person against whom an order of detention has been made can challenge the order even before its execution. But in all these cases threat of infringement was real and based on concrete materials. In none of these cases, the threat was an apprehended threat based on speculation as in the case now before us ...All that the petitioner makes out in his application under Article 226 of the Constitution is an apprehension which may as well turn out to be misapprehension. He is apprehending an order of which he is not sure. He is further apprehending that such an order would not be bona fide and in accordance with law. All this is really speculation. On such speculation the court cannot act. If the court acts on such a case, then it will be difficult for the authorities vested with the powers under the statute to exercise such powers even lawfully. This view of ours is well supported by earlier decisions of this Court in the cases of *Union of India v. D.G. Vohra* 80 CWN 312, *D.S. Surana v. Union of India* 80 CWN 605 and *Dayalal N. Shah v. Union of India* 1976(1) CHN 551.

From the aforesaid observation of the Division Bench of this Court, it is evident that in that decision, it was held that the writ jurisdiction can be invoked when there is threat of infringement of right, but such right cannot be exercised when the writ petition is based on speculation as there is no reasonable ground to support the alleged threat of detention. In the present case in hand, however, in view of the facts which are now on record, as disclosed by the respondents, in their affidavit-in-opposition that in respect of another case under FERA notice for interrogation of the writ petitioner under Section 40 of the FERA could not be served in view of the ad interim order of injunction granted by this Court, it cannot be said that investigation or proceedings is not going to be started against the writ petitioner under Section 40 of the FERA and, therefore, in view of disclosure of facts by the respondents, it must be held that there is reasonable ground for the writ petitioner to move this Court against the alleged threat of detention and arrest. Another decision of the Supreme Court reported in AIR 1993 SC 1224 (*Mohan Pandey and Anr. v. Usha Rani Rajbharja and Ors.*) has been cited on behalf of the respondents on the question of entertainability of the writ petition. In that decision, the Supreme Court held that if the real grievance of any private individual is against the initiation

of a criminal proceeding and the orders passed and steps taken thereto, he must avail of the remedy under the general law including the Criminal Procedure Code and not the constitutional jurisdiction of High Courts. As noted earlier, in the present case, such situation has not yet reached. No order has been passed under Section 40 of the FERA and no criminal proceeding has been initiated against the writ petitioner nor any steps taken thereto. Therefore, the question of taking steps under the general law including Criminal Procedure Code at this stage cannot arise at all. As held earlier, a writ petition can be maintainable on an apprehended injury. In my view, when it has been disclosed in the affidavit-in-opposition that a notice for interrogating the writ petitioner in another case under the FERA is required to be served on the writ petitioner, this writ petition should not be thrown out only on the ground that the reliefs claimed in this writ petition are not available to the writ petitioner at this stage as it is always open to the writ Court to mould the reliefs and to pass certain directions on the authorities on the basis of the facts and materials placed before it. Therefore, I am not in agreement with Mr. Roy that the writ petition should be rejected as the facts disclosed and the reliefs claimed cannot give rise to the writ petitioner to obtain any relief from the writ Court.

6. So far as the reliefs, prayed for by the writ petitioner, in the writ petition are concerned, Mr. Sen, appearing for the writ petitioner, had taken a very fair stand. He clearly conceded that the reliefs claimed in this writ application are not available to the writ petitioner. In view of such stand being taken on behalf of the writ petitioner, it would not be necessary for me to go into the question as to whether the nature of reliefs claimed by the writ petitioner in this writ petition can be granted by the writ Court.

7. Mr. Sen, appearing for the writ petitioner, however, has submitted that in view of the facts, alleged in the writ application and as the Enforcement Directorate, in their affidavit-in-opposition has disclosed that in view of the interim injunction granted by this Court no notice for interrogation in respect of another case under FERA could be served as the writ petitioner was required to be interrogated, the writ Court must be said to have jurisdiction to mould the reliefs which are available to the writ petitioner on the material placed before it and to pass necessary

directions on the officers of the Enforcement Directorate to hold the interrogation of the writ petitioner under the FERA in presence of a lawyer or any other person and also to direct the said officers to hold such interrogation during the office hours. Mr. Sen contended that in view of the charges made by the writ petitioner against the officers of the Enforcement Directorate in this writ petition and as the writ petitioner has filed the criminal case against the respondent No. 5 on the allegation of physical torture, etc., this Court shall give certain directions to the officers of the Enforcement Directorate to hold interrogation of the writ petitioner, if he is required to be interrogated in any case under the FERA or under the Customs Act in presence of a lawyer or any other person who is only to watch the proceedings for interrogation otherwise, Mr. Sen submitted that the writ petitioner would be subject to physical torture. Mr. Sen further submitted that the writ petitioner is entitled of right to ask for presence of a lawyer or any other person during such interrogation under the law. Mr. Sen further submitted that since allegations have been made about detention and physical torture throughout the night in the office of the Enforcement Directorate meted out to the writ petitioner by the respondents for interrogation of the writ petitioner, the writ petitioner should be interrogated during the office hours only.

8. So far as the second submission of Mr. Sen is concerned, Mr. Roy, appearing on behalf of the respondents, however, expressed no objection if such direction is made by this Court regarding holding of interrogation of the writ petitioner, in respect of any case under the FERA or under the Customs Act during the office hours. In view of this stand having been taken by the respondents, so far as this prayer of the writ petitioner is concerned, there is, therefore, no impediment for this Court to make such direction.

9. So far as the first submission of Mr. Sen i.e., presence of a lawyer during interrogation of the writ petitioner in any case under FERA, is concerned, Mr. Roy, the learned Counsel for the respondents, strongly contested the contention of Mr. Sen.

10. So far as the presence of a lawyer during interrogation of the writ petitioner in any case under the FERA or under the Customs Act is concerned, after hearing

the learned Counsel for the parties and after taking into consideration their submissions and after considering the relevant materials on record, I am of the view that the prayer of the writ petitioner to permit a lawyer to be present during interrogation, cannot be allowed. Mr. Sen, however, in support of his contention that presence of a lawyer can be asked by a private individual during interrogation under the FERA, relied on decisions of Supreme Court and of different High Courts. They are reported in [: 1987(30)ELT390(Del) (K.T. Advani, New Delhi v. The State, New Delhi), : 1986(25)ELT305(Bom) (Abdul Rajak Haji Mohammad v. Union of India), : 1978 CriLJ968 (Smt. Nandini Satpathy v. P.L. Dani) and Judgment Today 1992(3) SC 129 (K.T. M.S. Mohammad and Anr. v. Union of India).

11. It is true that in the case of K.T. Advani v. The State 1985 Cri U Delhi 1325, it was held that while making an investigation under Section 40 of the FERA, a suspect is entitled to presence of his lawyer. This decision was mainly based on the ground that if a suspect is entitled to presence of counsel during investigation, which is to be held under the provisions of the Code of Criminal Procedure, there is nothing in the provisions of the FERA, which purport, explicitly or impliedly, to oust such a right. If the right to the presence of counsel be fundamental to the rule of law, it makes little difference if the investigation is one under the Code of Criminal Procedure or independently of it in view of Article 22(1) of the Constitution. It was also held in that decision that even apart from Article 22(1) of the Constitution, in situations to which Article 22(1) does not in terms apply, there is no doubt that the right to presence of counsel in an enquiry or investigation under the FERA would still be there in the absence of any provisions to the contrary in the FERA and, therefore, such a right would naturally flow from the duty of the authorities under the Act to follow only such procedure in a matter which involves the deprivation of personal liberty. The said decision was, however, delivered relying on the Supreme Court decision in the case of Smt. Nandini Satpathy v. P.L. Dani : 1978 CriLJ968 It is beyond dispute that in the said case, the Supreme Court was dealing with Section 161 of the Cr. PC and not with the provisions under FERA. On this point the other decision which was relied by Mr. Sen, is the decision reported in : 1986(25)ELT305(Bom) (Abdul Rajak Haji Mohammad v. Union of India). It is true that in that decision of the Bombay High

Court also it was held that it was permissible for a suspect under the FERA to have his lawyer remain present during the interrogation by the officers of the Enforcement Directorate under Section 40 of the Act itself and that even otherwise the right to the presence of a lawyer during interrogation was conferred by Article 22(1) of the Constitution by implication. But in view of the recent decision of the Supreme Court reported in : 1992 CriLJ2761 (Poolpandi and Ors v. Suptdt. Central Excise and Ors.), the aforesaid two decisions cannot now be said to be a good law. In the decision reported in : 1992 CriLJ2761 the decision of the Bombay High Court was duly considered and after considering the said decision of the Bombay High Court the Supreme Court could not accept the view expressed by the Bombay High Court regarding the presence of a lawyer during interrogation under Section 40 of FERA. The Supreme Court in paragraph 11 at page 266 (ECC Para 11 at pages 253-254) observed as follows:

11. We do not find any force in the arguments of Mr. Salve and Mr. Lalit that if a person is called away from his own house and questioned in the atmosphere of the Customs office without the assistance of his lawyer or his friends his constitutional right under Article 21 is violated. The argument proceeds thus: if the person who is used to certain comforts and convenience is asked to come by himself to the Department for answering questions it amounts to mental torture. We are unable to agree. It is true that large majority of persons connected with illegal trade and evasion of taxes and duties are in a position to afford luxuries on lavish scale of which an honest ordinary citizen of this country cannot dream of and they are surrounded by persons similarly involved either directly or indirectly in such pursuits. But that cannot be a ground for holding that he has a constitutional right to claim similar luxuries and company of his choice. Mr. Salve was fair enough not to pursue his argument with reference to the comfort part, but continued to maintain that the appellant is entitled to the company of his choice during the questioning. The purpose of the enquiry under the Customs Act and the other similar statutes will be completely frustrated if the whims of the persons in possession of useful information for the departments are allowed to prevail. For achieving the object of such an enquiry, if the appropriate authorities be of the view that such persons should dissociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-cooperative

attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits thereunder should not be 'expanded' to favour exploiters engaged in tax evasion at the cost of public exchequer. Applying the 'just, fair and reasonable test' we hold that there is not merit in the stand of appellant before us.

(Emphasis supplied).

12. In view of the aforesaid observation of the Supreme Court, therefore, it would not be permissible to the writ Court to allow a lawyer to be present at the time of interrogation of the writ petitioner to be made by the Enforcement Directorate under Section 40 of the FERA. So far as the decision of S.C. Sen, J in 1987 Cri U 60 (Bishnu Krishna Shreatha v. Union of India) on which Mr. Sen relied, is concerned, I do not find that the said decision is of any help to the Court for the purpose of holding that lawyer's presence can be permitted during interrogation to be made by the Enforcement Directorate of the respondents under Section 40 of the FERA. The said decision was only dealing with the question as to when the search and seizure could be done by the Enforcement Directorate and in the facts and circumstances of that case whether direction can be made to the Enforcement Directorate to return the seized documents to the person from whom they were seized when the search and seizure was found to be illegal, invalid and without jurisdiction. In this case I am not concerned at all with search and seizure and here I am only concerned whether a suspect can ask for presence of his lawyer during his interrogation to be made by the Enforcement Directorate under Section 40 of the FERA. Before parting with this point, I would be failing in my duties if I do not deal with the other two decisions on which Mr. Sen, appearing for the writ petitioner, had relied in order to persuade me to hold that presence of a lawyer during interrogation of a suspect under Section 40 of the FERA is permissible. One of such decisions is reported in Judgment Today 1992(3) SC 129 (K.T.M.S. Mohammed and Anr. v. Union of India). This decision of the Supreme Court was relied by Mr. Sen only to convince me that as the investigation or proceeding under Section 40 of the FERA is deemed to be a judicial proceeding by a legal fiction embodied under Section 40(4) of the FERA, it must be construed that

presence of a lawyer for such judicial proceeding cannot be ruled out. This decision of the Supreme Court, in my view, has no manner of application in the facts and circumstances of this case. Firstly, in that decision the Supreme Court was dealing with a case under the Income Tax Act, 1961 and was not at all concerned with the question that is now in hand. Mr. Sen relied on paragraph 22 of the said decision to show that since an investigation or proceeding under Section 40 of the FERA is deemed to be a judicial proceeding, therefore, there is no bar that a lawyer cannot be permitted to be present during interrogation under Section 40 of the FERA. Paragraph 22 (Para 21 at page 361 of 40 ECC) of the said judgment reads as follows:

22. Every investigation or proceeding under Section 40 is deemed to be a judicial proceeding by a legal fiction embodied in Sub-section (4) of that section though the proceedings are neither in nor before any Court at that stage. But there is no such deeming provision under Section 39 of FERA bringing every investigation or proceeding in its ambit as 'a judicial proceeding' within the meaning of Sections 193 and 228 of the Indian Penal Code. When it is so, as rightly pointed out by Mr. A.T.M. Sampath, the statements recorded under Exhs. P 39 and P 40 cannot be treated as having been recorded in 'a judicial proceeding' so as to make use of them as the basis for fastening the makers of those statements with the criminality of the offences under Sections 193 and/or 228 of the Indian Penal Code on the ground that the deponents of those statements have retracted from their earlier statements in a subsequent proceeding which is deemed to be 'a judicial proceeding'.

In my view, this observation of the Supreme Court was given in the facts and circumstances of that case. The Supreme Court in that decision, for the purpose of holding that the statements recorded from the suspect by the officers of the Enforcement Directorate fell only within the meaning of Section 39 of the FERA and those statements, therefore, cannot be made use of for initiating a criminal case of perjury in the absence of any legal fiction bringing the investigation or proceeding as a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code, as contemplated under Section 40(4) of the FERA and for the purpose of holding that the Income Tax Officer in the exercise of his power

under Section 136 of the Income Tax Act cannot make use of the statements recorded by the Enforcement Directorate under the provisions of the FERA for prosecuting the deponents of those statements in a separate and independent proceeding under another special Act, namely, the Income Tax Act, on the ground that the deponents have retracted their statements given before the authorities of the Enforcement Directorate. In the said decision, it was also observed that the FERA and the Income Tax Act are two separate and independent special Acts operating in two different fields. Therefore, in the context of that situation, as observed by the Supreme Court noted hereinabove, the Supreme Court felt that an investigation or a proceeding under Section 40 of the FERA is deemed to be a judicial proceeding. Leave apart, in view of the fact that in the said decision, the question as to whether the presence of a lawyer, during interrogation under Section 40 of the FERA, is permissible or not was not at all at issue before the Supreme Court. In that decision neither such question was raised before the Supreme Court nor such question was decided by the Supreme Court. In view of the decision reported in : 1992 CriLJ2761 (Poolpandi and Ors. v. Superintendent, Central Excise and Ors.), as already referred to hereinbefore, which applies to the facts of this case with all its four corners, I must hold that a suspect is not entitled to presence of a lawyer or any person during his interrogation under Section 40 of the FERA.

13. A Single Bench decision of Bombay High Court, reported in 1990 Cri LJ 2201 (Ashok Hussain Allah Detha and Anr. v. Assistant Collector of Customs (P), Bombay and Anr.), relied on by Mr. Sen, in my view, does not come to an aid to the writ petitioner (sic). Mr. Sen, relying on paragraph 8 of the said decision contended that under Section 40 of the FERA, Investigating Officers cannot detain a suspect for interrogation as it is not authorised in law. In paragraph 8 of the said decision at page 2205 the Bombay High Court has observed as follows:

8. The Investigating Officers may lawfully detain a suspect for an offence. But, detention in custody for interrogation is not authorised by law. The Investigating Officers may detain for an offence only. In an English case where the Customs Officers detained a person 'for helping with their inquiries', it was held that there was no authority in the Customs Officers to detain a person except for an offence.

The principle that emerges is this: Any restraint on a person's liberty except for an offence is illegal. There is no authority in the Investigating Officers to detain a person for the purpose of interrogation or helping them in the enquiry.

On this principle it follows that the detention of the Applicants on the midnight of 19th July, 1989 was illegal if it was not for having committed an offence under the N.D. P.S. Act. If it was for having committed an offence, the detention was 'arrest' and it commenced at the midnight of 19th July, 1989.

I have carefully examined the aforesaid observation of the Bombay High Court. This decision, in my view, at this stage, cannot be applied to the facts and circumstances of this case. In the case in hand, a notice for interrogation under Section 40 of the FERA is yet to be served on the writ petitioner. Even assuming the law laid down in the Bombay High Court decision is correct, even then, I am convinced that at this stage the law enunciated in that decision cannot be applied in the present case as in the present case, notice for interrogation under Section 40 of the FERA is yet to be served on the writ petitioner. Accordingly, this decision of the Bombay High Court does not help the writ petitioner at all.

14. Before I conclude on this point, one more fact needs to be mentioned here. This matter was placed for judgment on 12th of August, 1994 when Mr. Sen, the learned Advocate appearing on behalf of the writ petitioner, prayed that in view of a recent decision of the Supreme Court reported in the month of August in AIR which could not be cited, as the said judgment was not printed at the time of hearing of this writ application further hearing should be given to him. In that view of the matter, I postponed the delivery of this judgment and placed the matter for hearing and subsequently, the matter was heard in presence of the learned Counsel for both the parties. Mr. Sen, appearing for the writ petitioner, relying on the aforesaid recent decision of the Supreme Court reported in : 1994 CriLJ2269 (Directorate of Enforcement v. Dipak Mahajan and Anr.) contended that 'any person is arrested' occurring in the first limb of Section 167(1) of the Code takes within its ambit 'every person arrested' under Section 35 of the FERA or Section 104 of the Customs Act also as the case may be and the 'person arrested' can be detained by the Magistrate in exercise of his power under Section 167(2) of the

Code. In other words, the 'person arrested' under FERA or Customs Act is assimilated with the characteristics of an 'accused' within the range of Section 167(1) and as such liable to be detained under Section 167(2) by a Magistrate when produced before him. Mr. Sen, therefore, contended that in view of the aforesaid decision, since the writ petitioner shall be considered as an accused, he must be given permission to have the interrogation held in presence of a lawyer or any other person. In my view, the decision cited on behalf of the writ petitioner, cannot be applied in the present case. In the said decision of the Supreme Court, the question before it was whether the Magistrate before whom a person arrested under Section 35(1) of the FERA or under Section 104(1) of the Customs Act, is produced under Section 35(2) of the FERA, has jurisdiction to authorise detention of that person under Section 167(2) of the Code of Criminal Procedure. Whereas, in the present case in hand, the contention that was raised by the learned Counsel for the parties was whether the writ petitioner can be permitted to have his interrogation under Section 40 of the FERA in presence of his lawyer or any other person. Apart from that the Supreme Court in the said decision in paragraph 98 at page 1796 (Para 96 at page 275 of 46 ECC) has clearly distinguished the said decision with other decisions in the following manner:

98. Firstly, almost all the decisions of this Court holding that 'a person arrested by an Enforcement Officer or Customs Officer, as the case may be, is not a 'person accused of an offence' have been rendered only in the context of examining the question of admissibility or otherwise of the statement of a person arrested under those Special Acts but not with reference to authorizing the detention of an arrestee under Section 167 of the Code by a Magistrate and so the dictum laid down in those decisions is clearly distinguishable.

(emphasis supplied).

From the said decision of the Supreme Court it would also appear that the decision of Poolpandi and Ors. v. Suptdt., Central Excise and Ors. : 1992 CriLJ2761 was distinguished in paragraph 94 at page 1795 (Para 91 at page 275 of 46 ECC) in the following manner:

Though this Bench is bound by the decisions of all the above Constitution Benches yet these decisions are distinguishable since none of the above decisions relates to the interpretation of Section 167 of the Code explaining the meaning of the word 'accused' or 'accused person' limited to the purpose of Section 167. On the other hand, all those decisions are rendered only on the question of admissibility or otherwise of the statement of a person arrested under the provisions of the general Act or special Acts concerned and recorded while in the custody of the arrester.

(emphasis supplied).

In view of the aforesaid observation of the Supreme Court, it is patently clear that the Supreme Court in that decision was not unmindful of the aforesaid decision of the Poolpandi and distinguished the case on the grounds mentioned hereinabove. Accordingly, I do not find any reason to hold that the aforesaid decision of the Supreme Court reported in : 1994 CriLJ2269 (Directorate of Enforcement v. Deepak Mahajan and Anr.) can be said to have helped the writ petitioner in any manner.

Accordingly, this submission of Mr. Sen, that the writ petitioner, during interrogation under Section 40 of the FERA is entitled to presence of a lawyer or any other person, must be rejected.

15. There is yet another aspect of this matter. The writ petitioner has alleged in this writ petition that as the writ petitioner was physically and mentally tortured by the officials of the Enforcement Directorate during interrogation under Section 40 of the FERA in a case for which a criminal proceeding has been initiated against the writ petitioner and as a complaint case has been filed against Sri Samir Mukherjee by the writ petitioner, the writ petitioner strongly apprehends that he would be subjected to further mental and physical torture during interrogation, if such interrogation is required to be done by the officers of the Enforcement Directorate in any other case under Section 40 of the FERA. This statement of the writ petitioner has been emphatically denied by the officers of the Enforcement Directorate in their affidavit-in-opposition. The Supreme Court in : 1992 CriLJ2761 (Poolpandi and Ors. v. Supdt., Central Excise and Ors.) in paragraph 10 at page

266 (Para 10 at pages 252-253 of 46 ECC) has observed as follows:

10...There is no question of whisking away the persons concerned in the cases before us for secret interrogation, and there is no reason for us to impute the motive of preparing the groundwork of false cases for securing conviction of innocent persons, to the officers of the State duly engaged in performing their duty of prevention and detection of economic crimes and recovering misappropriated money justly belonging to the public....

In view of the aforesaid observation of the Supreme Court, it should not be taken that only because a complaint case has been filed against Sri Samir Mukherjee, all the officers of the Enforcement Directorate, including Mr. Mukherjee, would harass the writ petitioner unnecessarily and physically torture him for that reason. Apart from that, the complaint case filed against Sri Samir Mukherjee, has now been stayed by this Court and at this stage, it would not be fair on my part to hold that the apprehension of the writ petitioner against Sri Mukherjee is justified. In any view of the matter, in my view, that should not be the cause for apprehension of the writ petitioner not to face interrogation in the absence of a lawyer or any other person under Section 40 of the FERA, if such interrogation is required to be taken by the official of the Enforcement Directorate under Section 40 of the FERA. That apart, when it is an admitted position that no notice under Section 40 of the FERA, for interrogation of the writ petitioner in any case other than the case which has now been filed under Section 9(1)(d) of the FERA has yet been served on the writ petitioner, at this stage, it cannot be held that if the writ petitioner appears before the officials of the Enforcement Directorate, he would be subject to physical and mental torture by them. Therefore, before issuance of a notice under Section 40 of the FERA for interrogation and before the writ petitioner appears before the officials of the Enforcement Directorate for interrogation under Section 40 of the FERA, it would not be safe to hold that the writ petitioner would be subject to physical and mental torture if such appearance is made.

16. In view of the discussions made hereinabove, it cannot be held that the writ petitioner would be physically and mentally tortured if, during the interrogation, presence of a lawyer is not permitted. For the reasons, aforesaid, I reject the

contention of Mr. Sen that during interrogation a lawyer or a person should be permitted to be present.

17. As Mr. Roy, learned Counsel appearing on behalf of the respondent, took a stand on behalf of the respondents before me that the interrogation of the writ petitioner, under Section 40 of the FERA, would be made during the office hours, I dismiss this writ petition subject to this that if the writ petitioner is required for interrogation in any case under Section 40 of the FERA, such interrogation must be done by the officials of the Enforcement Directorate during office hours.

18. Subject to the aforesaid observation, the writ petition is dismissed. Interim order is vacated.

There will be as order as to costs.

Prayer of stay of operation of the order is rejected.

Let Xerox copies of the order be given to the learned advocates appearing for the parties on usual terms.

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