SUPREME COURT OF INDIA

Union of India

Vs.

Venkateshan S.

Crl.A.No.540 of 2002

(M.B. Shah and D.M. Dharmadhikari JJ.)

22.4.2002

JUDGMENT

M.B. Shah, J.

1. Leave granted.

2. By order dated 8th February, 2000, the Joint Secretary, Ministry of Finance, Department of Revenue, Government of India made a detention order under Section 3(1) of the *Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974* (hereinafter referred to as "COFEPOSA Act") directing that one B. Sankar be detained and kept in custody with a view to prevent him from acting in any manner prejudicial to the augmentation of foreign exchange. The said order was served upon detenu on 15th February, 2000 along with grounds of detention and copies of the documents relied upon by the Detaining Authority. That order was challenged by filing Writ Petition (HC) No. 41 of 2000 before the High Court of Karnataka at Bangalore. By the impugned judgment and order dated 2nd November, 2000, the High Court quashed and set aside the detention order on the ground that what was considered to be criminal violation of the *Foreign Exchange Regulation Act, 1973* (hereinafter referred to as "FERA") has ceased to be so on the repeal of FERA which is replaced by the Foreign Exchange Management Act, 1999 (hereinafter referred to as "FEMA"). That order is challenged by filing this appeal.

3. In the detention order, it has been stated that upon receipt of information that B. Sankar was indulging in receiving and making payments in India on behalf of a resident of Riyadh (Saudhi Arabia), a search was conducted at detenu's residential premises and also at this office premises on 22nd and 23rd September, 1999. As a result of the search, Indian currency of about Rs. 42,90,000/- (forty two lakhs and ninety thousand) was seized. In statement recorded by the officers, detenu stated that during the first week of June, 1999 one Rafeeq, who was his friend, met him in his office and informed that he was doing business of collecting Saudi Riyals from Indians in Saudi Arabia and in equivalent thereof he was making arrangements for delivery of Indian rupees to various persons in India; that if he assists him in this business and receives Indian rupees as per his instructions and distributes

the respective amounts to various persons as per his instructions, he would pay a commission of Rs. 200/- for every one lakh of rupees received and distributed by him. To that proposal detenu agreed and various transactions took place in pursuance of the aforesaid talks. Various documents were also seized from his office premises. It is also stated that when asked about the seized currency, detenu in his statement *inter alia* admitted that he had received it from one unknown person in Bangalore as per instructions of his friend, Mr. Rafeek, a resident of Riyadh. He also stated that his friend Rafeek from Riyadh telephonically informed him to receive a sum of Rs. 42,90,000/- in his name at Bangalore and deliver it to the persons, whose details were to be furnished by his friend Rafeek. It is alleged that in a very short span, the detenu had collected Rs. 1,67,90,000/- and had distributed Rs.1,25,00,000/- and was doing hawala transactions. On the basis of the said material, the detention order was passed.

4. At the time of hearing of this appeal, learned counsel for the parties admitted that period of detention is over. Still, however, learned counsel for the appellant Union of India submitted that the interpretation of COFEPOSA Act by the High Court is erroneous as it has not considered relevant part of Section 3 of the COFEPOSA Act. He submitted that the language of Section 3 does not provide for any pending criminal action against the person to be detained and the nature of detention being preventive, it is not necessary in law that the person sought to be detained should have committed a criminal offence punishable with imprisonment. For passing detention order, detaining authority should be satisfied that there is a possibility of the person who has committed an act which is prohibited under FERA or FEMA indulging in similar activity. He submitted that the question whether the act is punishable with fine or penalty of imprisonment is immaterial. For this purpose, he relied upon the decisions in *Khudiram Das v. The State of West Bengal and others*[1], and *Haradhan Saha v. The State of West Bengal and others*[2].

5. Learned counsel for the respondent on the order hand, submitted that in view of the fact that FERA has been repealed and in its place FEMA has been enacted by virtue of which violations of the provisions of the FEMA are now only civil wrongs, a person cannot be continued to be preventively detained under COFEPOSA Act for violation of FERA after its repeal. According to him, contravention of FEMA is not an offence and a person cannot be prosecuted or punished for violations of any of its provisions. He referred to the Preamble of FEMA which provides that "it is an Act to consolidate and amend the law relating to Foreign Exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange in India". He also placed reliance on certain decisions of this Court which, in our view, are not relevant and hence not discussed.

6. For appreciating the contentions, we would refer to relevant provision of Section 3 of the COFEPOSA Act, which reads thus:-

> "3. *Power to make orders detaining certain persons.* - (1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purpose of this

section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, *if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange* or with a view to preventing him from –

(i) smuggling goods, or

(ii) abetting the smuggling of goods, or

(iii) engaging in transporting or concealing or keeping smuggled goods, or

(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods, it is necessary so to do, make an order directing that such person be detained."

7. This section empowers the authority, if satisfied, with respect to any person (including a foreigner), that with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange may make an order directing his detention. It is true that FERA is repealed and is substituted by FEMA. One of the objectives of FEMA is also for promoting orderly development and maintenance of foreign exchange market in India. For this purpose, Chapter II provides for "Regulation and Management of Foreign Exchange". Section 3 specifically prohibits dealing in foreign exchange without the general or special permission of the Reserve Bank. It reads thus:-

"3. *Dealing in foreign exchange, etc.* - Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, *no person shall* –

(a) *deal in or transfer any foreign exchange* or foreign security to any person not being an authorised person;

(b) make any payment to or for the credit of any person resident outside India in any manner.
(c) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation. - For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

(d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Explanation. - For the purpose of this clause, "financial transaction" means making any payments to, or for the credit of any person, or receiving any payment for, by order or on behalf of any bill of exchange or promissory note, or transferring any security or acknowledging any debt".

Further, Section 4 specifically provides that no person resident in India shall acquire, hold, own or possess or transfer any foreign exchange, foreign security or any immovable property situated outside India, except as otherwise provided under the Act. For the contravention of the Act, rules and regulations, penalty is provided under Section 13 of the Act. This would certainly mean that dealing in foreign exchange *de hors* the statutory provisions, rules and regulations would be illegal. No doubt, the Act nowhere provides that such transactions constitute an offence. The High Court has arrived at the conclusion that as the act of detaining ceases to be an offence after the repeal of FERA, respondent's detention was required to be quashed.

8. Hence, the limited question would be whether a person who violates the provisions of the FEMA to a large extent can be detained under the preventive detention Act, namely, COFEPOSA Act ? As stated above, the object of FEMA is also promotion of orderly development and maintenance of foreign exchange market in India. Dealing in foreign exchange is regulated by the Act. For violation of foreign exchange regulations, penalty can be levied and such activity is certainly an illegal activity, which is prejudicial to conservation or augmentation of foreign exchange. From the objects and reasons of the COFEPOSA Act, it is apparent that the purpose of the Act is to prevent violation of foreign exchange regulations or smuggling activities which are having increasingly deleterious effect on the national economy and thereby serious effect on the security of the State. Section 3 of the COFEPOSA Act, which is not amended or repealed, empowers the authority to exercise its power of detention with a view to preventing any person *inter alia* from acting in any manner prejudicial to the conservation or augmentation of foreign exchange. If the activity of any person is prejudicial to the conservation or augmentation of foreign exchange the authority is empowered to make a detention order against such person and the Act does not contemplate that such activity should be an offence.

9. COFEPOSA Act contemplates two situations for exercise of power of preventive detention - (a) to prevent violation of foreign exchange regulations, and (b) to prevent smuggling activities. Under Section 2(e) of COFEPOSA Act, `smuggling' is to be understood as defined under clause (39) of Section 2 of the *Customs Act, 1962* which provides that `smuggling' in relation to any act or omission will render such goods liable to confiscation under Section 111 or Section 113. Section 111 contemplates confiscation of improper imported goods and Section 113 contemplates confiscation of goods attempted to be improperly exported. This has nothing to do with the penal provisions i.e. Sections 135 and

135A of the Customs Act which provide for punishment of an offence relating to smuggling activities. Hence, to contend that for exercising power under COFEPOSA Act for detaining a person, he must be involved in criminal offence is not born out by the said provisions.

10. Other important aspect is that COFEPOSA Act and the FEMA occupy different fields. COFEPOSA Act deals with preventive detention for violation of foreign exchange regulations and FEMA is for regulation and management of foreign exchange through authorised person and provides for penalty for contravention of the said provisions. The object as stated above is for promoting orderly development and maintenance of foreign exchange market in India. Preventive detention law is for effectively keeping out of circulation the detenu during a prescribed period by means of preventive detention. {*Re : Poonam Lata v. M.L. Wadhawan and others*[3]*}.* The power of detention is clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of precaution to prevent mischief to the community. {*Re : Khudiram Das v. The State of West Bengal and others*[4]*}.* The Constitution Bench while dealing with the constitutional validity of the *Maintenance of Internal Security Act, 1971* (MISA), in *Haradhan Saha v. The State of West Bengal and others*[5], held:-

> "32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. *It may or may not relate to an offence.* It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.
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> 33. Article 14 is inapplicable because preventive detention and prosecution are not synonymous. The authorities are different. The nature of proceedings is different. In a prosecution an accused is sought to be punished for a past act. In preventive detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu."

11. Hence, in our view, the order passed by the High Court holding that what was considered to be the criminal violation of FERA has ceased to be criminal offence under FEMA, the detention order cannot be continued after 1.6.2000, cannot be justified.

12. Further, if the view taken by the High Court and the contentions raised by learned counsel for the respondent are accepted, it would result in implied repeal of substantial part of section 3 of COFEPOSA Act. One of the established principles of interpretation of the statutory provisions is that courts as a rule lean against implied repeal unless the provisions are plainly repugnant to each other. There is also a presumption against repeal by implication; and the reason of this rule is based on the theory that the legislature while enacting a law has complete knowledge of the existing laws on the same subject matter and,

therefore, when it does not provide a repealing provision it gives out an intention not to repeal the existing legislation. In *Municipal Council, Palai v. T.J. Joseph*[6], the court discussed the principles with regard to the `implied repeal' and held thus :-

> "10. It must be remembered that at the basis of the doctrine of implied repeal is the presumption that the legislature which must be deemed to know the existing law did not intend to create any confusion in the law by retaining conflicting provisions on the statute book and, therefore, when the court applies this doctrine it does no more than give effect to the intention of the legislature ascertained by it in the usual way i.e., by examining the scope and the object of the two enactments, the earlier and the later."

13. Similarly, in *Municipal Corporation of Delhi v. Shiv Shanker*[7], relevant at 446, this Court observed –

> "....The Courts, as a rule, lean against implying a repeal unless the two provisions are so plainly repugnant to each other that they cannot stand together and it is not possible on any reasonable hypothesis to give effect to both at the same time. The repeal must, if not express, flow from necessary implication as the only intendment..."

14. In view of the aforesaid discussion, the judgment and order passed by the High Court cannot be sustained and is, therefore, set aside. However, next question would be whether this would be a fit case for directing the detenu to surrender to undergo the remaining period of detention ? In our view, considering the fact that detention order was passed in February, 2000 and the fact that the impugned judgment was passed by the High Court in November, 2000, this would not be fit case for directing the detenu to surrender to undergo the remaining period of detention.

In the result, the appeal is allowed to the aforesaid extent only.

Appeal partly allowed.

[1]*1975(2) SCC 81*
[2]*1975(3) SCC 198*
[3]*1987(3) SCC 347*
[4]*1975(2) SCC 81*
[5]*1975(3) SCC 198*
[6]*AIR 1963 SC 1561*
[7]*1971(1) SCC 442*