

1

IN THE HIGH OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
CRIMINAL WRIT PETITION NO. 2432 OF 2007

Avinash Bhosale.

Aged 47 years, R/A-Ivory Estate,

Baber Road,

Pune 411 008. .... Petitioner. Versus

1. Union of India

Directorate of Revenue Intelligence,

Mumbai Zonal Unit-13,

Vithaldas Thackersey Marg,

Mumbai.

2. Enforcement Directorate,

2nd Floor, Mittal Chambers,

Nariman Point,

Mumbai.

3. State of Maharashtra. .... Respondents. Mr. V. A. Bobade, Sr. Counsel with Mr. M. R. Sathe, Mr. Hitesh Jain, Mr. Ankar Chawla, Mr. Subhash Jadhav and Mr. Dalijeet Bhatia, i/b M/s. ALMT Legal, for the Petitioner .

Mr. Gopal Subramanian, Sr. Counsel with Mr. D. N. Salvi and Mr. Rajeshkhar Rao for the Respondent Nos. 1 and 2. Mr. A. R. Patil, APP for the State.

CORAM : SWATANTER KUMAR , C.J., &

2

A.P. DESHPANDE, J.

Date of Reserving the Judgment :

17.09.2008.

Date pronouncing the Judgment.:

8th October, 2008.

J U D G M E N T : (Per A.P. DESHPANDE, J.)

1. The Petitioner's passport has been retained, initially by the respondent No.1 and thereafter by the respondent no.2 for the last 14 months and hence the Petitioner seeks a writ of mandamus to command the respondent no.2 to return the passport by filing the present petition under Article 226 of the Constitution of India. Few facts that are relevant for adjudicating the issues involved are narrated hereinbelow.

2. The Petitioner along with his wife and friends had gone abroad on holidays and when the Petitioner returned back to India on 27th May, 2007 the Petitioner was charged for carrying dutiable goods on which duty was not paid as per the provisions of the Customs Act, 1962. The Petitioner was arrested by respondent No.1 Directorate of Revenue Intelligence. The Petitioner approached the Court of Additional Chief Metropolitan Magistrate, Bombay and applied for bail. The Petitioner was released on bail by the Addl. Chief Metropolitan Magistrate on the same day. The Respondent no.1 3

moved the Magistrate on 28th May, 2007 seeking judicial custody of the Petitioner and also prayed for grant of permission by the Court to retain the passport of the Petitioner with a view to facilitate further investigation. The Respondent no.1 had also challenged the order granting bail to the Petitioner by filing a Criminal Application in the High Court. The High Court, by its order dated 7th August, 2007 allowed the said application and cancelled the bail granted to the Petitioner. Aggrieved thereby, the Petitioner moved the Apex Court by filing Criminal Appeal bearing No.1138/07. Apex Court by an order dated 27th August, 2007 set aside the order passed by the High Court by observing that the offence concerned was bailable.

3. During the course of investigation, the Respondent no.1 had retained the passport of the Petitioner . The Petitioner was served with a show cause notice on 19th November, 2007 and the Petitioner replied the show cause notice. As the Petitioner was intending to travel abroad, he moved an application before the Addl. Chief Metropolitan Magistrate, seeking permission to go abroad along with his family and also sought direction against the Respondent no.1 for return of the passport. The Respondent No.1 filed its reply and opposed the application. According to the Petitioner, during the course of hearing of the said application, the Court observed that as there was no order passed by the Magistrate to retain the passport while granting bail to the Petitioner, the Petitioner should make 4

necessary representation before the Respondent no.1 for the release of his passport. In this view of the matter, the Petitioner claims that he withdrew the application filed before the Addl. Chief M.M. seeking permission to travel abroad and for release of his passport and chose to make a representation to the Respondent no.1-Directorate of Revenue Intelligence through his advocate vide letter dated 20th December, 2007 wherein a prayer for return of the passport was made. As no decision was communicated to the Petitioner , the present Writ Petition came to be filed.

4. During the pendency of the Writ Petition, a subsequent event took place and with a view to bring the said fact on record, with leave of the Court, the petition came to be amended. By carrying out the amendment, it is averred that the Respondent no.1 informed the Petitioner vide letter dated 24th December, 2007 that the Petitioner's passport was handed over to the respondent no.2-Enforcement Directorate, Mumbai for making investigation. It is thus undisputed that as of now the Petitioner 's passport has been retained by the Respondent no.2.

5. In the above set of facts, the learned Senior Counsel Mr. V. A. Bobade appearing for the Petitioner has advanced the following contentions : a) That the authority carrying out investigation and/or inquiry 5

under the Foreign Exchange Management Act and/or under the Income Tax Act has no authority, in law, to impound the passport. The passport can only be impounded by having recourse to the provisions of the

Passport Act by the authority vested with the power under the said Act. b) Section 37 of the Foreign Exchange Management Act merely confers investing power by making reference to Section 131(3) of the Income Tax Act. Power to search and seize "documents" which is available to the authority under section 131(3) does not extend to seizure of passport. The term "documents" cannot be construed to mean and include a passport, for dealing with which a separate enactment exists viz. Passports Act. Passports Act being a special statute it shall exclude the applicability of a general provision to be found in other enactments dealing with seizure of documents. c) Placing reliance on the judgment in the case of Satwant Singh Sawhney vs. Union of India, reported in AIR 1967 S.C. 1836, and Maneka Gandhi Vs. Union of India, reported in AIR 1978 SC 597, it is contended that personal liberty within the meaning of Article 21 includes within its ambit a right to go abroad and consequently no person can be deprived of his right, except according to the procedure prescribed by law. Article 21 safeguards the right to go abroad against executive interference which is not supported by law. Thus, no person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving and the deprivation is effected strictly in accordance with such procedure. 6

d) As impounding of passport results in adverse civil consequences, the same cannot be done unless an opportunity of hearing is offered to the person concerned.

e) The procedure adopted by the Respondents for impounding the Petitioner's passport being contrary to the express provisions of the Passports Act, the Petitioner's right under Articles 19 and 21 of the Constitution of India has been violated.

6. The learned Senior Counsel appearing for the Petitioner has placed reliance on a judgment in the case of Suresh Nanda vs. Central Bureau of Investigation, reported in (2008) 3 SCC 674. The said judgment, in no uncertain terms, holds that the Passports Act is a complete code in relation to impounding of the passport and even a Court exercising powers under section 104 of the Criminal Procedure Code has no authority, power or jurisdiction to impound a passport. It is held that Passports Act is a special legislation dealing with a specific subject and hence for impounding of the passport, one has to have recourse to the provisions of the Passports Act. When there exists a special act, the general provision would yield to the specific provision. While interpreting the term "documents" appearing in section 104 of the Cr.P.C., the Apex Court has held that the term "documents" cannot be so widely read so as to include passport. The Apex Court has further clarified that the act of seizure of a document would be 7

referable to a given point of time when the document is taken possession of and retention of the document over a period of time would tantamount to impounding of document. The relevant observations are to be found in paragraphs 9,10,11 and 18 which reads thus :

"9. "Impound" means to keep in custody

of the law. There must be some distinct action which will show that documents or things have been impounded. According to Oxford Dictionary "impound" means to take legal or formal possession. In the present case, the passport of the appellant is in possession of CBI right from the date it has been seized by CBI. When we read section 104 Cr.P.C. and section 10 of the Act together, under Cr.P.C., the Court is empowered to impound any document or thing produced before it whereas the Act speaks specifically of impounding of the passport.

10. Thus the Act is a special Act relating to a matter of passport, whereas section 104 Cr.P.C., authorises the court to impound document or thing produced before it. Where there is a special Act dealing with specific subject, resort should be had to that Act instead of general Act providing for the matter connected with the Specific Act. As the Passports Act is a special Act, the rule that "general provision should yield to the specific provision" is to be applied. See Damji Valji Shah v. LIC of India, Gobind Sugar Mills Ltd. V. State of Bihar and Belsund Sugar Co. Ltd. V. State of Bihar.

8

11. The Act being a specific Act whereas Section 104 CrPC. is a general provision for impounding any document or thing, it shall prevail over that section in CrPC as regards the passport. Thus, by necessary implication, the power of Court to impound any document or thing produced before it would exclude passport.

18. In our opinion, even the Court cannot impound a passport. Though, no doubt, Section 104 CrPC states that the court may, if it things fit, impound any document or thing produced before it, in our opinion, this provision will only enable the court to impound any document or thing other than a passport. This is because impounding of a "passport" is provided for in section 10(3) of the Passports Act. The Passports Act is a special law while CrPC is a general law. It is well settled that the special law prevails over the general law vide G.P. Singh's Principles of statutory interpretation (9th Edn.p.133). This principle is expressed in the maxim generalia specialibus non derogant. Hence, impounding of a passport cannot be done by the court under section 104 Cr.P.C. though it can impound any other document or thing."

7. Per contra, the learned Solicitor General has made the following submissions :

8. In the first place, it is contended that section 23 of the Passports 9

Act itself provides that the provisions of Foreign Exchange Regulation Act and other enactments relating to foreigners and foreign exchange are in addition to and not in derogation of the provisions of the Passports Act. By placing reliance on section 37(3) of FEMA, it is submitted that the power and authority of Respondent no.2 Enforcement Directorate includes the powers which are conferred on Income Tax Authorities under section 131(3) of the Income Tax Act, 1961. Section 131(3) vests the authority with power to seize and retain in its custody any books of accounts or other documents. The term "documents" which finds place in sub section (3) of Section 131 would include a passport.

It is next submitted that right to hold a passport and travel abroad is not an unqualified and absolute right and the same can always be subjected to regulations. The Passports Act, though enacted to regulate issuance and revocation of passport, that by no means is the only statute which empowers the executive authorities to retain or impound a passport. In other words, the submission is that the passport officer's authority to impound the passport under section 10(3) is not exhaustive and if there are other statutes enabling the exercise of similar or analogous powers in relation to impounding or retention of the passport, then, those powers would also be available to the authorities for impounding the passport.

9. The learned Solicitor General has placed reliance on the 10

following judgments in support of his contentions : i) Unreported judgment in the case of Suman Sehgal vs. Union of India & anr. Dated 18.4.2006 in W.P.(c) No.1212/2006.

ii) S. Mohanraj vs. Deputy Director, Enforcement Directorate, Madras, 1995 Cri.L.J. 3018.

iii) Abdul Kader Mohamed Jhaveri vs. Union of India and ors. AIR 1987 Gujarat 176; and

iv) Mrs. Hamida Habib Jeelani @ Hamida Begum vs. The Secretary to Government, Home Department, Government of A.P. & anr., 1996 Cri. L.J. 1086.

10. For proper appreciation of the submissions, we reproduce Section 104 of Cr.P.C. which has been interpreted by the Supreme Court, so also Section 131(3) of the Income Tax Act, on which reliance is placed by the learned Solicitor General to support the action of impounding the passport. Section 104 of Cr.P.C. reads thus :

"104. Power to impound document, etc., produced. - Any Court may, if it thinks fit, impound any document or thing produced before it under this Code."

Section 131(3) of the Income Tax Act, reads thus : "131. (3) Subject to any rules made in this behalf, any authority referred to in sub-section (1) [or sub-section (1A)] 11

may impound and retain in its custody for such period as it thinks fit any books of account or other documents produced before it in any proceeding under this Act : Provided that an [Assessing] Officer [or an [Assistant Director[or Deputy Director]]] shall not -

(a) impound any books of account or other documents without recording his reasons for so doing, or

(b) retain in his custody any such books or documents for a period exceeding fifteen days (exclusive of holidays) without obtaining the approval of the [[Chief Commissioner or Director General or Commissioner or Director therefor, as the case may be.]]"

11. In Suresh Nanda's case, while interpreting Section 104 of Cr.P.C., which expressly deals with power to impound documents by the Court, the Apex Court has held that phrase "impound any document or thing" does not include a passport. After considering the relevant provisions in relation to search and seizure, the Apex Court has recorded a clear finding that the term "document" would not include a passport. What is to be borne in mind is that the Apex Court was dealing with power of a Court to impound a document and, in that context, held that "Document" does not include a passport. Section 131 of the Income Tax Act vests power in regard to search and seizure in the authorities under the Income Tax Act. The authority has been vested with power to seize documents. While interpreting section 104 of 12

Cr.P.C., which categorically deals with power of the Court to impound documents, it is held that document does not include a passport. If by an interpretative process the Apex Court has held that even a Court cannot impound a passport, then, it would be highly inappropriate to interpret the term "documents" used in section 131(3) of Income Tax Act, so as to enable the executive authorities to impound the passport. It is also to be borne in mind that power to seize cannot be equated with power to impound. Impounding tantamount the retention over a period of time after seizure is made. Thus, it is, not possible to hold that power of seizure under section 131 (3) of the Income Tax Act could be extended to validate impounding of passport.

12. In view of the clear pronouncement by the Supreme Court holding the Passports Act to be a complete code in dealing with impounding of the passport, we have no iota of doubt that the respondent's act of impounding of the Petitioner's passport is without authority of law. In the result, we cannot accept the submission made on behalf of the learned Solicitor General that impounding of the passport could be made by having recourse to general provision under the Income Tax Act, regulating the seizure of documents. The writ petition, therefore, must succeed. In view of the clear pronouncement by the Supreme Court in case of Suresh Nanda, we do not propose to deal with the High Court judgments, relied upon by the learned 13

Solicitor General.

13. Certainly the law is tilted in favour of the Petitioner but the Court cannot overlook that the Petitioner has approached this Court under Article 226 of the Constitution of India, an equitable jurisdiction. During the course of arguments, it was argued with some emphasis that there are number of accounts and some of them contain transactions of very highest magnitude which were not declared by the Petitioner despite specific directions of the Court. The only explanation that has been putforth on behalf of the Petitioner in that behalf is that he forgot to give complete statements and some of the accounts were dormant. It was stated and even mentioned in one of the affidavits filed on behalf of the Union of India that some transactions even exceeded the amount of US\$ 85,000. We are unable to accept in entirety the explanation rendered by the Petitioner for

non furnishing the details of accounts. Thus, in order to balance the equities between the parties, we consider it appropriate to direct the Petitioner to furnish to the Respondents all these statements with details of transactions within a period of one week from the date of pronouncement of this order. Besides this, the Petitioner shall also furnish to the Respondents a letter of authorization requiring them to take information from all accounts which have now been detected by the Respondents, when one of their officers had visited Dubai. He shall also furnish an undertaking that he will fully cooperate with the 14

Respondents in conducting of the inquiry that is in progress against the Petitioner. Within one week thereafter, the passport of the Petitioner shall be returned to him without any further delay.

14. We further make it clear that this order is without prejudice to the rights and contentions of the Respondents as well as of any other Competent Authority or Department including the Passport Authority under the Passport Act for impounding of passport, if they are so entitled and choose to do so.

15. We, therefore, allow the Writ Petition and direct Respondent No.2 Directorate of Enforcement to return the passport of the Petitioner within a period of 15 days from the date of pronouncement of this judgment, subject to compliance of directions stated above.

16. The Rule is made absolute in the above terms with no order as to costs.

CHIEF JUSTICE

A.P. DESHPANDE, J.

15