

(2001) 02 DEL CK 0083
In the Delhi High Court
Case No : CWP 2888 of 1989

Ashok Kumar

APPELLANT

Vs

Competent Authority

RESPONDENT

Date of Decision : 09-02-2001

Acts Referred:

Citation : (2001) 3 AD 121 : (2001) 90 DLT 337 : (2001) 58 DRJ 354 : (2001) 2 RCR(Criminal) 733

Hon'ble Judges : Dr. Arijit Pasayat, C.J.; D.K. Jain, J

Bench : Division Bench

Advocate : Mr. L.P. Dhir, for the Appellant; Mr. Rajendra and Mr. R.N. Verma, for the Respondent

Judgement

Arijit Pasayat, C.J.—Challenge in this writ petition is to the order passed by the Competent Authority and the Appellate Tribunal constituted under the Smugglers & Foreign Exchange Manipulators (forfeiture of property) Act, 1976 (short the Act). According to the petitioner, the conditions requisite for application of the Act are non-existent, there was no reason for proceeding against the petitioner under the Act and the authorities have not brought on record any connecting link or nexus between holding of the property or assets by the petitioner with illegal activity of the detenu/convict.

2. Background facts leading to the filing of the petition are as follows:

Chiranji Lal, father of the petitioner was detained u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short COFEPOSA). The order of detention was passed on 19.12.1974. Reason for the detention was that on 23-10-1974 shop of Chiranji Lal was raided by the Customs authorities and during such raid certain contraband articles were found. Articles were cigarette lighters, pen knife, spray lotion, transistor, ladies sarees, T-shirts, which were seized, and a penalty of Rs. 1000/- was imposed. But the penalty order was revoked by the Collector of Customs (Appeals) taking into account the low value of the properties seized. Penalty imposed was directed to

be refunded and confiscated goods were released. Since the detention of Chirangi Lal was u/s 3(1) of COFEPOSA he was held to be covered u/s 2(2)(b) of the Act, and the petitioner being his eldest son u/s 2(2)(c). Petitioner is employed in State Bank of India, Dehradun from 1972. He purchased a plot of land on 6-1-1976 by registered sale deed in Dehradun for a consideration of Rs. 12,000/- and a house was constructed thereon. According to the petitioner, ground floor was constructed during the period 1976-78 at a cost of Rs. 50,000/- and the first floor was constructed during 1981-82 at a cost of Rs. 80,000/- approximately. The competent authority appointed u/s 3(b) of the Act issued a notice u/s 6(1) of the Act on 29.1.1988 for forfeiture of the properties i.e. right, title and interest in respect of the house referred to above i.e. No. 2/4, Rest Camp, Dehradun and in respect of life insurance policy No. 26240411 for Rs. 10,000/- and deposit in bank account No. 24482 in State Bank of India and deposit in joint bank account No. 29276 in the name of the petitioner and his wife Smt Rita Sharma. By order dated 9.2.1989, passed u/s 7(1) and 7(3) the competent authority held that the properties mentioned in the notice u/s 6(1) of the Act were illegally acquired and Therefore directed it to be forfeited to the Govt of India. Petitioner filed an appeal before the Appellate Tribunal as constituted u/s 12 of the Act. Out of three members of the Tribunal, two members held that the competent authority's order was justified in the circumstances of the case, while the third member i.e. the Chairman, took a different view. The orders of Competent Authority and the Tribunal, are under challenge in this writ petition.

3. Learned counsel for the petitioner, as indicated at the outset, has questioned the legality of the orders on various grounds noted above. Strong reliance has been placed on certain observations of the Apex Court in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, and Shanti Devi Vs. Union of India (UOI) and Others, . In essence, it is submitted that the Income Tax authorities accepted the stand of the petitioner that the constructions were made by the petitioner out of his own funds and accordingly he was assessed to Income Tax. For initiation of proceedings against any person under the Act, reasons are to exist and it has not been shown as to what reasons exist for initiation of the proceedings. With reference to Section 6 of the Act, it is stated that the Competent Authority must have reasons to believe, which are to be recorded in writing, that the properties sought to be forfeited to the Central Government were illegally acquired properties. There is no reasons for coming to such a conclusion. Additionally, it is submitted that to attract forfeiture, the property must have been acquired illegally by the detenu or convict as the case may be. The Act has no application even if a person in whose name it stands has acquired it illegally. It is further submitted that for applying the rule of evidence as contained u/s 8 casting a burden of proof on the person affected there must be some link or nexus between the holding of the property or assets by the person proceeded against and illegal activity of detenu/convict. This link or nexus has to be established by the authorities.

4. Learned counsel for the respondent on the other hand, submitted that the findings, if any, recorded by the Income Tax authority have no binding force. At the most they may have some persuasive value. Nevertheless, the authorities under the Act have power and jurisdiction to make independent examination of the materials and take their own decision. Factual findings have been recorded by the Competent Authority as well as the Tribunal (by its majority view). It has not been shown as to how THESE factual conclusions are erroneous. While dealing with application under Article 226 or 227 of the Constitution of India, 1950, (in short, Constitution) it is submitted the Court does not sit as a court of appeal and there is no scope for interference with the findings of fact, unless they are perverse. It is submitted that there is no requirement under the statute that the nexus or link between the property or assets acquired by the person proceeded against and illegal activity of detenu must be established by the authorities. This, according to him is impossible burden. With reference to the facts of Shanti Devi's case (supra), it is submitted that decision was rendered in the peculiar facts of the case and by taking out a stray sentence, the petitioner wants to read the statute in a manner it is was not intended and which is also not in line with the decision of the Apex court in Amrat Lal's case (supra) and statute itself.

5. The scope and ambit of the Act was examined by a nine Judge Bench of the Apex Court in Amrat Lal's case (supra), and the intent and purpose of enactment of the statute has been elaborately dealt with. It would be pertinent to take note of some of the provisions which throw considerable light on the controversy. They are contained in Section 2, Explanation II, Section 3(1)(b)(c)(e), Sections 4, 5, 6 and 8, which read as under :

"Section 2.....

Explanation 2.--For the purposes of clause (c), "relative", in relation to a person, means--

- (i) spouse of the person;
- (ii) brother or sister of the person;
- (iii) brother or sister of the spouse of the person;
- (iv) any lineal ascendant or descendant of the person;
- (v) any lineal ascendant or descendant of the spouse of the person;
- (vi) spouse of a person referred to in clause (ii), clause (iii), clause (iv), or clause (v)
- (vii) any lineal descendant of a person referred to in clause (ii) or clause (iii).

Explanation 3.- For the purposes of clause (d), "associate", in relation to a person, means--

- (i) any individual who had been or is residing in the residential premises

(including out-houses) of such person;

(ii) any individual who had been or is managing the affairs or keeping the accounts of such person;

(iii) any association of persons, body of individuals, partnership firm, or private company within the meaning of the Companies Act, 1956 (1 of 1956) of which such person had been or is a member, partner or director;

(iv) any individual who had been or is a member, partner or director of an association of persons, body of individuals, partnership firm, or private company within the meaning of the Companies when such person had been or is a member, partner or director of such association body, partnership firm or private company;

(v) any person who had been or is managing the affairs, or keeping the accounts, of can association of persons, body of individuals, partnership firm or private company referred to in clause (iii).

(a) the trust has been created by such person; or

(b) the value of the assets contributed by such person (including the value of the assets if any, contributed by him earlier) to the trust amounts, on the date on which the contribution is made, to not less than twenty per cent, of the value of the assets of the trust on that date.

(vii) where the competent authority, for reasons to be recorded in writing, considers that any properties of such person are held on his behalf by any other person, such other person."

3.Definitions.--(1) In this Act, unless the context otherwise requires --

(a) XXX XXX XXX (b) "competent authority" means an officer of the Central Government authorised by it under sub-section (1) of Section 5 to perform the functions of a competent authority under this Act.;

(c) "illegally acquired property", in relation to any person to whom this Act applies means--

(i) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out or by means of any income earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law for the time being in force relating to any matter in respect of which Parliament has power to make laws; or

(ii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets in respect of which any such law has been contravened, or

(iii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income,

earnings or assets the source of which cannot be proved and which cannot be shown to be attributable to any act or thing done in respect of any matter in relation to which Parliament has no power to make laws; or

(iv) any property acquired by such person, whether before or after the commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property referred to in sub-clauses (i) to (iii) or the income or earnings from such property;

and includes--

(A) any property held by such person which would have been in relation to any previous holder thereof, illegally acquired property under this clause if such previous holder had not ceased to hold it, unless such person or any other person who held the property at any time after such previous holder or where there are two or more such previous holders, the last of such previous holders is or was a transferee in good faith for adequate consideration;

(B) any property acquired by such person, whether before or after the commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property falling under item (A), or the income or earnings there from;

(d) XXX XXX XXXX (e) "property" includes any interest in property, movable or immovable.

4. Prohibition of holding illegally acquired property.--(1) As from the commencement of this Act, it shall not be lawful for any person to whom this Act applies to hold any illegally acquired property either by himself or through any other person on his behalf.

(2) Where any person holds any illegally acquired property in contravention of the provisions of sub-section (1), such property shall be liable to be forfeited to the Central Government in accordance with the provisions of this Act.

5. Competent authority.--(1) the Central Government may, by order published in the Official Gazette, authorises as many officers of the Central Government (not below the rank of a Joint Secretary to the Government), as it thinks fit, to perform the functions of the competent authority under this Act.

(2) The competent authorities shall perform their functions in respect of such persons or clauses of persons as the Central Government may, by order, direct.

6. Notice of forfeiture.--k (1) If, having regard to the value of the properties held by any person to whom this act applies, either by himself or through any other person on his behalf, his known sources of income, earnings or assets, and any other information or material available to it as a result of action taken u/s 18 or otherwise, the competent authority has reasons to believe (the reasons for such belief to be recorded in writing) that all or any of such properties are illegally acquired properties, it may serve a notice upon such person (hereinafter referred

to as the person affected) calling upon him within such time as may be specified in the notice, which shall not be ordinarily less than thirty days, to indicate the sources of his income, earnings or assets, out of which or by means of which he has acquired such property, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties, as the case may be, should not be declared to be illegally acquired properties and forfeited to the Central Government under this Act.

(2) Where a notice under sub-section (1) to any person specified any property as being held on behalf of such person by any other person, a copy of the notice shall also be served upon such other person.

8. Burden of proof.--In any proceedings under this Act, the burden of proving that any property specified in the notice served u/s 6 is not illegally acquired property shall be on the person affected."

6. The definition of "illegally acquired property" in clause (c) of Section 3(1) is quite wide. It talks of a property which may have been acquired partly out of the illegal activity, in which case provisions of Section would be attracted. Illegal activity is not confined to violation of law mentioned in Section 2, but to all laws which the Parliament has power to make. As was observed by the Apex Court in *Amrat Lal's case* (supra), the Act is directed against forfeiture of "illegally acquired property" by a person falling under clauses (a) and (b) of Section 2(2). The relatives and associates are brought in only for the purpose of ensuring that illegally acquired property of the convict/detenu acquired or kept in their names do not escape the net. It is immaterial how such relative or associate holds the properties of the detenu/convict, whether as benami or mere name lender or a bonafides transferee or in any other manner. He cannot claim those properties and must surrender them to the State under the Act. Section 4 of the Act is relevant because it declares that as from the commencement of the Act it shall not be lawful for any person to whom the Act applies to hold any illegally acquired property either by himself or through any person on his behalf. All such properties are liable to be forfeited. Language of the Section is indicative of the ambit of the Act. The idea is to forfeit the illegally acquired property irrespective of the fact that such properties are held by or kept in the name or screened in the name of relative or associate as defined in two Explanations of Section 2(2). The idea is not to forfeit the independent property of such a relative or associate which they may have acquired illegally but to reach the property of the detenu/convict or the properties traceable to him, wherever they are covered by the transaction with respect to those properties. The burden of establishing that the properties mentioned in the show cause notice issued u/s 6 and which are held on the date by a relative or an associate of a detenu/convict are not the illegally acquired property of detenu/convict lies on such relative or associate. He must establish that the said property has not been acquired with monies or assets provided by the detenu/convict or that, in fact, did not or do not belong to such detenu/convict.

7. In the background of what has been stated above, the factual scenario has to be viewed. The competent authority examined the petitioner's stand about sources of investment. It was held that the assets enumerated above came out of the earning of the smuggling activities of the affected person in collusion with his father Chirangi Lal and his brother Rakesh Kumar. As regards the investment made in the property at 2/4 Rest Camp, Dehradun is concerned, the affected person whose date of birth is 1.4.1949 became an employee of State bank of India w.e.f. June, 1972. It was his stand that from 1964-65 to 1972, he was doing repair work of electrical goods, torches etc and was earning Rs.250 to 400/- per month and around 1971-72 he passed M.Com and took up job in SBI. He claimed that from 1964 to 1971-72 he was able to save a capital of Rs. 17,000/- out of which he gave loan of Rs.10,000/- and Rs.6000/- to his father and brother respectively. Competent authority found it hard to believe that a 16 years old boy without any experience of business would be able to build up a capital of Rs. 17000/-. The plot on which the house has been constructed was purchased in 1976 for Rs. 12,000/-. Payments were made by cheques from the bank account No. 24482 and joint account No. 2876. Account no. 24482 is staff account in the name of petitioner, while the other is the savings bank account. The second account was started w.e.f. July, 1975 with a deposit of Rs. 10,000/- as transfer from the staff account. The details of salaries received for the period 1972 and 1975 were not furnished. A copy of the staff account No. 24482 for the period 25.3.1975 to January, 1982 and that of joint account for the period 26.7.1975 to 17.7.1982 were furnished. The staff account showed a credit balance of Rs. 7943.07 on 25.3.1975 but no details were furnished for the earlier period. Petitioner joined service as a clerk in 1975. As to how he could save Rs. 7943.07 during the period from 1972 to 25.3.1975 was not explained. The joint account was started on 26.7.1975, as indicated above, with the transfer of Rs. 10,000/- from the staff account. From this joint account a sum of Rs. 7000/- was paid towards cost of land. Details of the account through which the earlier payment of Rs.5000/- was made was not given. So far as investment in the house constructed is concerned, it was stated to be in the neighborhood of Rs. 50,000/- and was claimed to have come from the following source:

a) Loan against gold Rs. 9,200 b) Salary income Rs. 16,500 c) Bonus received Rs. 3,300 d) Loans i) Lalit Kumar 5000 ii) Manmohan Kumar 4000 iii) Sharda Kumar 4000 iv) Rita Sharma 2000 v) Bhagwan Devi 2000 vi) Suresh Kumar 4000

In the second phase the first floor of the house was constructed during 1981-82 for Rs. 80,000/-. The source of which was explained as follows:

ii) Loan from Rakesh Kumar 37780 brother iii) Loan from Rajesh Kumar 12500 brother iv) Bonus 2250 v) Salary income 12500 ----- 80,000 -----

The Competent Authority analysed the plea as regards each of the source claimed and found it to be untenable. In appeal also, the Tribunal examined the conclusions arrived at by the Competent Authority and found the same to be in

order.

8. So far as the plea regarding acceptance by Income Tax authorities is concerned, it was considered by the Tribunal in the background of Section 21 of the Act. It was held that the said provision clearly laid down that the finding of any officer under any other law shall not be conclusive for any proceedings under the Act.

9. We find that the Competent Authority made an elaborate analysis of the factual position to conclude that there was no evidence of the petitioner having means and sources to acquire the house property and other assets. So far as the Tribunal's order is concerned, much has been made out of the dissenting view expressed by the Chairman. According to learned counsel for the petitioner, the analysis made by the Chairman was in the right direction and that should be accepted to conclude that there was no material to link the properties with the father of the petitioner. It has to be noted that two members who constituted the majority agreed with the views expressed by the Competent Authority and the analysis made by him. They also independently analysed the factual position.

10. Scope for interference with factual finding is very limited, more so when exercising jurisdiction under Articles 226 and 227 of the Constitution. In a nutshell, it can be said that finding of fact can be interfered with by the High Court if (a) finding has been recorded acting on irrelevant material and keeping out of consideration the relevant material because it would not be possible to know as to what extent the irrelevant materials influenced mind of the adjudicating authority; (b) when it has been arrived at without taking into account relevant material; c) when it has been arrived at on partly relevant and partly irrelevant material; d) the conclusion is of such a nature that a reasonable man cannot arrive at such a conclusion; and e) the conclusions are arrived at on the basis of conjectures and surmises and on mere suspicion. The case at hand cannot be encompassed by any of the categories of circumstances enumerated above. So far as the desirability of establishing a link between holding the property or assets against person proceeded against and illegal activity of the detenu is concerned, we find that the decision in Shanti Devi's case has no application to the facts of the present case. In the said case, it was clearly established that the property was acquired before the illegal activities of the detenu/convict started. In that background observation was made by Division Bench. It is to be noted that the illegal activities carried out by the detenu/convict is within his special knowledge and as such burden cannot be cast on the authorities to establish such a link. The requirement, as has been held by the Apex Court, is that the connecting link or the nexus, as it may be called, is the holding of property or assets of the convict/detenu or traceable to such detenu/convict. This position has been dealt with in paragraph 43 of Amratlal's case (supra)/ In Shantidevi's case (supra), the position was emphasized in para 10.2 with reference to para 43 of Amratlal's case (supra). On the contrary, the person proceeded against has to establish his stand by discharging the burden to

prove as provided u/s 8 of the Act. That has clearly not been done.

Above being the position, the writ petition is without merit and is dismissed.