(2002) 08 DEL CK 0226

In the Delhi High Court

Case No : C.W.P. No. 2522 of 1991

Baij Nath Agarwalla APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 13-08-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21, 31B
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 — Section 12A, 12A(6), 2(2), 3, 4(1)

Citation : (2002) 99 DLT 684 : (2002) 84 ECC 219 : (2003) 1 RCR(Criminal) 43

Hon'ble Judges : S.B. Sinha, C.J;A.K. Sikri, J

Bench : Division Bench

Advocate : Harjinder Singh and N.S. Brar, for the Appellant; Prem Lata Bansal, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.

1.The short question, which arises for consideration in this writ petition is as to whether the property of relative of a detenu under the provisions of smugglers and Foreign Exchange Manipulators (Forfeiture of Properties) Act, 1976 (in short, ''the said Act'') can be confiscated without establishing a nexus with the purported illegal acquired properties and the earnings out of the activities which are prohibited by law.

2. The fact of the matter is undisputed.

Mr. Sawarmal Agarwalla, brother of the writ petitioner herein was detained under the said Act for a period of about 20 months during 1995-97. The writ petitioner herein was treated as an "affected person" u/s 2(2)(c) of the said Act. Notice u/s 6(1) of the said Act was issued on 15.10.1980 thereby calling upon the writ petitioner herein as to why the properties specified therein should not be declared to be illegally acquired propertied and forfeited to the Central

Government. The new incumbents of the Offices of the competent authority also issued notices for forfeiture of the said properties on 08.11.1985 and 12.10.1987.

Yet again, another notice was issued with a view to extend the proceedings under the said Act purported to be as regard newly discovered properties of the petitioner consequent upon the petitioner''s filing his returns of income and wealth under the Amnesty Scheme of the Central Government.

Upon completion of investigation and trial, the properties of the writ petitioner were forfeited by the competent authority by an order dated 29.08.1989. Where against an appeal was preferred. The said appeal vide order dated 17.01.1992 was allowed only in relation to the life insurance policy, but was rejected in relation to the other forfeited properties.

Aggrieved thereby, the writ petitioner has filed the present writ petitioner inter alias praying for the following reliefs:-

"It is, Therefore, respectfully prayed that this Hon''ble Court may be pleased to:-

a) issue an appropriate Writ quashing the 39th, 40th and 42nd Amendment to the Constitution of India;

b) issue an appropriate Writ striking down the provisions of Smugglers & Foreign Exchange Manipulators (Forfeiture of Property) act, 1976, as unconstitutional and invalid;

c) issue an appropriate Writ striking down the provisions of Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974, as unconstitutional and invalid;

d) issue an appropriate Writ, Order or direction quashing the detentions of the petitioner''s brother Shri Sawarmal Agarwalla and treating the same as invalid/ illegal;

e) issue an appropriate Writ, Order or direction quashing the proceedings and the notices and orders issued by authorities under the SAFEMA and to direct the respondent No.3 to drop further proceedings against the petitioner;

f) issue an appropriate Writ or Order/ Direction treating the appellate proceedings before the respondents Nos. 2 (viz. Appellate Tribunal for Forfeited Property, New Delhi) as infructuous; and

g) pass such further and other orders as the nature and circumstances of the case may require."

3. Shri Harjinder Singh, the learned counsel appearing for the petitioner, at the outset very fairly stated that in view of the decision of the Apex Court in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, the writ petition has to kept confined only to prayer (f) aforementioned.

The learned counsel would contend that keeping in view the purport and object of the said Act, it was obligatory on the part of the respondents herein to establish a nexus between the purported illegal acquired properties of the petitioner and the earnings out of the activities of the detenue, which are prohibited by law.

4. The said Act was enacted to provide for the forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators and for matters connected therewith or incidental thereto.

Clause (b) of Sub-section (2) of Section 2 of the said Act, reads thus:-

"2. Application.--

2(b) every person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974;

Provided that-

(i) such order of detention, being an order to which the provisions of Section 9 or Section 12-A of the said Act do not apply, has not been revoked on the report of the Advisory Board u/s 8 of the said Act or before the receipt of the report of the Advisory Board or before making a reference to the Advisory Board; or

(ii) such order of detention, being an order to which the provisions of Section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the review under Sub-section (3) of Section 9, or on the report of the Advisory Board u/s 8, read with Sub-section (2) of Section 9, of the said Act; or

(iii) such order of detention, being an order to which the provisions of Section 12-A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under Sub-section (3) of that section, or on the basis of the report of the Advisory Board u/s 8, read with Sub-section (6) of Section 12-A, of that Act; or

(iv) such order of detention has not been set aside by a court of competent jurisdiction;"

Clause (c) of Section 3 thereof defines "illegally acquired property" in the following terms:-

"(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 of or by means of any income, earning or assets, derived or obtained form 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 the 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 holder 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;"

Sub-section (1) of Section 4 of the said Act prohibits holding of illegally acquired property and Sub-section (2) thereof empowers the Central Government to forfeit such property acquired in contravention of the provisions of Sub-section (1) of Section 5 of the said Act.

Section 6 of the said Act provides for issuance of notice for forfeiture

Section 8 of the said Act places the burden of proof to the effect that a property is not illegally acquired property would be upon the person affected.

The said Act lay down a scheme for forfeiture of illegally acquired property.

Properties, which are liable to be forfeited, must answer the description as defined in Section 3(c) of the Act.

Unless the property, in other words, comes within the mischief of the said provision, it cannot be subject matter of any forfeiture. It is axiomatic that independent properties of the "affected person" which otherwise may be acquired illegally cannot be subject matter of a proceeding under the said Act.

Only when a property is found to be "illegally acquired property", the burden of proof lies upon the "affected person" to show that it is not.

5. The petitioner herein had disclosed the properties before the Income Tax Authorities. The Income Tax Authorities appear to have been satisfied with such disclosure. The appellate authority, however, adopted a wrong approach insofar as it purported to sit in appeal over the order of the Income Tax Authorities.

6. The appellate authority further failed to apply the provisions of the said Act in their proper perspective. The question as regards forfeiture of the property of the relatives and associates of the detenu would be vocative of Articles 14, 19 and 21 of the Constitution of India came up for consideration in Attorney General of India''s case (Supra).

One of the contentions, which had been raised on behalf of the petitioner therein before the Supreme Court, was that the relative or associate of a detenu or a convicted person may acquire property of his own even by illegal means, but only because he happens to be the affected person within the meaning of the said Act, his property cannot be forfeited without establishing a nexus between the earnings from the illegal activity and acquisition of the property.

In that case, the Apex Court observed:-

"The language of Section 2(2) is indicative of the ambit of the Act. Clauses (c) and (d) in Section 2(2) and the Explanations (2) and (3) occurring therein shall have to be construed and understood in the light of the overall scheme and purpose of the enactment. The idea is to forfeit the illegally acquired properties of the convict/detenu irrespective of the fact that such properties are held by or kept in the name of or screened in the name of any relative or associate as defined in the said two Explanations. The idea is not to forfeit the independent which they may have acquired illegally but only to reach the properties of the convict/detenu or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties.

There is no basis for the apprehension that the independently acquired properties of such relatives and associates will also be forfeited even if they are in no way connected with the convict/detenu. So far as the holders (not being relatives and associates) mentioned in Section 2(2) are concerned, they are dealt with on a separate footing. If such person proves that he is a transferee in good faith for consideration, his property - even though purchased from a convict/detenu -- is not liable to be forfeited. It is equally necessary to reiterate that the burden of establishing that the properties mentioned in the show cause notice issued u/s 6, and which are held on that date by a relative or an associate of the convict/ detenu, are not the illegally acquired properties of the convict/detenu, lies upon such relative/associate. He must establish that the said property has not been acquired with the monies or assets provided by the detune/convict or that they in fact did not or do not belong to such detune/convict. The Parliament never intended to say that the properties of all the relatives and associates, may be illegally acquired, will be forfeited just because they happen to be the relatives or associates of the convict/detenu. There ought to be the connecting link between those properties and the convict/detenu, the burden of disproving, which, as mentioned above, is upon the relative/associate. In this view of the matter, the apprehension in this behalf must be held to be based upon a mistaken premise. The bringing in of the relatives and associates or of the persons mentioned in Clause (e) of Section 2(2) is thus neither discriminatory nor incompetent part from the protection of Article 31-B."

(Emphasis supplied)

7. From a perusal of aforementioned findings of the Apex Court, there cannot be any doubt whatsoever that a connecting link must exist between a property and the detune/convict. A link, Therefore, must be established by the Department, where after only the burden of proof in terms of Section 8 of the said Act would shift on the persons affected.

8. As noticed hereinbefore, the competent authority and the appellate authority had proceeded on the basis that the petitioner herein was failed to satisfactorily explain his sources of income to show that the properties standing in his name were not illegally acquired, despite disclosure of his income under the Amnesty Scheme. Despite an objection raised in this behalf, the competent authority or the appellate authority did not apply their mind to the provisions of the Act and in that view of the matter, we are of the opinion that the respondents have misdirected themselves in law. The views, we have taken, stand fortified by a division bench judgment of this Court in Shri Ajit Singh (deceased) v. Union of India (C.W.P. No. 4786 of 1996) decided on 21.3.2002.

9. For the reasons aforementioned, the impugned orders cannot be sustained, which are not set aside accordingly and the matter is remitted back to the competent authority for consideration of the matter afresh in the light of the decision of the Apex Court in Attorney General of India''s case (Supra). This writ petition is, Therefore, allowed. However, in the facts and circumstances of the case, there shall be no orders as to costs.