

(2016) 07 MAD CK 0046
In the Madras High Court
Case No : W.P. No. 19184 of 2011

Competent Authority, SAFEM (FOP)

APPELLANT

Vs

M. Khader Moideen

RESPONDENT

Date of Decision : 19-07-2016

Acts Referred:

Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 —
Section 2, 2(2)(c), 6, 6(1), 7(1)

Citation : (2016) 2 CWC 481 : (2016) 387 ITR 390 : (2017) 1 LW 365 : (2017)
1 LW(Crl) 139 : (2016) 6 MLJ 239

Hon'ble Judges : Mr. Sanjay Kishan Kaul, C.J. and Mr. R. Mahadevan, J.

Bench : Division Bench

Advocate : Mr. G. Rajagopalan, ASG, assisted by Mr. B. Rabu Manohar,
Advocate, for the Appellant; Mr. A.R.L. Sundaresan, SC for Mr. N. Viswanathan,
Advocate, for the Respondent

Final Decision : Allowed

Judgement

Mr. R. Mahadevan, J.—In this writ petition, the petitioner seeks to quash the order of the 2nd respondent dated 30.7.2010, setting aside the order of forfeiture dated 30.9.2005 passed by the petitioner.

2. The facts of case, in a nutshell, of the petitioner are that the wife of the 1st respondent Halthija Maimoon was convicted for violation of Foreign Exchange Regulation Act (herein after called as FERA) for foreign currency violations by order dated 1.9.1986 of the Additional Chief Magistrate, Madurai. The 1st respondent being the spouse of the convict, comes within the definition of relative as per the explanation 2 of section 2(2)(c) of the Smugglers and Foreign Exchange Manipulator (Forfeiture of Property) Act, 1976 (herein after referred to as the act). After recording the reasons for belief, a notice under section 6(1) of the act was issued and after giving sufficient opportunities and considering the written submissions of the 1st respondent, the competent authority/the petitioner herein passed an order dated 30.9.2005 under section 7(1) of the act

for forfeiture of the properties. As against the same, the 1st respondent preferred an appeal before the 2nd respondent in FPA NO.33/MDS/2005, which was allowed by the impugned order dated 30.7.2010, setting aside the order of forfeiture passed by the petitioner. Hence, contending that the impugned order is contrary to law, weight of evidence and all probabilities of the case, this writ petition has been filed.

3. This court heard the learned counsel on either side.

4. The learned Assistant Solicitor General for the petitioner has assailed the impugned order on the following grounds:-

a. The main object of the act is to forfeit the illegally acquired properties of the convict and his/her relatives, if source of acquisition of the same cannot be proved to be out of legal sources.

b. Since as per section 6(1) of the act, the competent authority was of the belief that the properties of the 1st respondent are illegally acquired properties, a show cause notice under section 6(1) was issued, calling upon the 1st Respondent to indicate the sources of income, failing which the same would be forfeited.

c. The 2nd Respondent also failed to note that the Petitioner need not spell out any link or nexus either in the reasons recorded for the belief to issue a show cause notice or in the show cause notice issued under section 6(1). The provisions of the act in section 2(2)(c) along with explanation 2, section 3(1)(c) (iii) and section 6(1) do not speak about the illegally acquired properties of the convict. Section 3(1)(c)(iii) states that "any property acquired by such person and not that of the convict". As per section 8, the burden of proving that any property specified in the notice served under section 6 is not illegally acquired property shall be on the person affected.

d. Unless the person affected proves the legal source of income in acquiring the properties, it can be held that the properties are illegally acquired properties under the act. Therefore, while recording the reasons the competent authority rightly taken into account the presumption under section 8 and passed the order of forfeiture under section 7(1).

e. Any finding rendered by any other authorities would not bind the petitioner as contemplated under section 21, which states, "no findings of any officer or authority under any other law shall be conclusive for the purposes of any proceedings under this act. The 2nd Respondent has totally misconceived the law while setting aside the order of forfeiture of the Petitioner.

5. The learned Additional Solicitor General, in support of his contentions, relied on the decisions reported in 1994 (5) SCC 54 (Amratlal Prajivandas), 2003 (7) SCC 427 (Kesar Devi v. Union of India) and 2008 (14) SCC 186 (Aslam Merchant v. Competent Authority).

6. On the other hand, the learned senior counsel for the 1st respondent has

submitted that there is a requirement for the Petitioner to state the link or nexus of the properties of the 1st respondent that it was acquired by illegal means and that Rule 6 only requires a reasonable belief to be entertained by the competent authority as the properties held by any person to whom the Act applies are illegally acquired properties and that in section 3 no where it is stated that the illegally acquired property must be of the convict and that the properties in question do not fall within the meaning of illegally acquired property, as only illegally acquired property of the detenu/convict as defined under section 2(2)(a) and 2(2)(b) of the Act shall be forfeited, even though it is purchased in the name of relative, associate or held in the names of benamies. It was also contended that unless competent authority has declared the property to be illegally obtained, the statutory authority cannot initiate proceedings. The learned senior counsel contended that the writ petition against the highest fact finding authority, namely the tribunal is not maintainable and since the order of the Tribunal being an order considering all the aspects, the same does not warrant any interference. The learned senior counsel also placed reliance upon the Judgment reported in 2008 (14) SCC 186 (Aslam Merchant v. Competent Authority).

7. This court considered the rival submissions on either side and also perused the materials placed on record, including the relevant provisions of the act.

8. The points for determination can be narrowed down as under:-

a. Whether the Tribunal was right in holding that the notice is defective and unsustainable?

b. Whether the Tribunal was right in holding that the independent properties of a relative of a convict or detenu, cannot be forfeited?

9. Upon perusal of the notice under section 6 of the SAFEM Act dated 10.01.1992, it is evident that it is a printed proforma. In the notice, the petitioner has stated that he has reason to believe that the properties were acquired by illegal means. The 1st respondent is treated as the independent owner of the properties. There is nothing to show that these were the properties acquired by the convict in the name of the 1st respondent. The statement of reasons, which have been recorded has not been referred in the notice. A perusal of the statement of reasons indicates that the petitioner has initiated the proceedings based on the income tax proceedings of the 1st respondent, wherein certain explanations of the 1st respondent was accepted by the income tax authorities. The petitioner has in the statement of reasons concluded that the property were illegally acquired properties and proceeded to issue the notice. However, there is nothing to show that the properties acquired has a link with that of the convict/detenu.

10. It has been urged by the learned Additional Solicitor General that there is a reference to the conviction of the 1st respondent's wife under the SAFEM Act and it is not required to specifically state the link or the nexus as the 1st

respondent is none other than the husband of the convict. The learned Additional Solicitor General has also relied upon the judgement of Honourable Supreme Court reported in 2003 (7) SCC 427 cited supra, in support of his contentions. In the said decision, in paragraph 13, it has been held as under:-

"13. We are, therefore, clearly of the opinion that under the Scheme of the Act, there is no requirement on the part of the competent authority to mention or establish any nexus or link between the money of the convict or detenu and the property sought to be forfeited. In fact, if such a condition is imposed, the very purpose of enacting SAFEMA would be frustrated, as in many cases it would be almost impossible to show that the property was purchased or acquired from the money provided by the convict or detenu. In the present case, the appellant is the wife of the detenu and she has failed to establish that she had any income of her own to acquire the three properties. In such circumstances, no other inference was possible except that it was done so with the money provided by her husband."

11. The above judgement has been rendered by the apex court holding that the judgement of the constitutional bench in 1994 (5) SCC 54 does not explicitly lay down that it must be established that a link between the convict and the source must be established. However, the apex court in the subsequent judgement reported in 2008 (14) SCC 186, while dealing with similar provisions under the NDPS Act has held as follows.

"27. It is, therefore, evident that the property which is sought to be forfeited must be the one which has a direct nexus with the income etc. derived by way of contravention of any of the provisions of the Act or any property acquired therefrom. What is meant by identification of such property having regard to the definition of 'identifying' is, that the property was derived from or used in the illicit traffic.

34. Analysis of the aforementioned provisions clearly establish that a link must be found between the property sought to be forfeited and the income or assets or properties which were illegally acquired by the person concerned.

39. Section 68-H of the Act provides for two statutory requirements on the part of the authority viz. (i) he has to form an opinion in regard to his 'reason to believe'; and (ii) he must record reasons therefor.

45. Our attention, however, has been drawn to a decision of a two Judge Bench of this Court in Kesar Devi (Smt.) v. Union of India and Others [(2003) 7 SCC 427] wherein Fatima Mohd. Amin (supra) was distinguished by a Bench of this Court, inter alia, opining that no nexus or link between the money of the debt and property sought to be forfeited is required to be established under the Scheme of the Act, stating;

"10. ... The condition precedent for issuing a notice by the competent authority under section 6(1) is that he should have reason to believe that all or any of such

properties are illegally acquired properties and the reasons for such belief have to be recorded in writing. The language of the section does not show that there is any requirement of mentioning any link or nexus between the convict or detenu and the property ostensibly standing in the name of the person to whom the notice has been issued...

"13. We are, therefore, clearly of the opinion that under the scheme of the Act, there is no requirement on the part of the competent authority to mention or establish any nexus or link between the money of the convict or detenu and the property sought to be forfeited. In fact, if such a condition is imposed, the very purpose of enacting SAFEMA would be frustrated, as in many cases it would be almost impossible to show that the property was purchased or acquired from the money provided by the convict or detenu. In the present case, the appellant is the wife of the detenu and she has failed to establish that she had any income of her own to acquire the three properties. In such circumstances, no other inference was possible except that it was done so with the money provided by her husband."

We, with utmost respect to the learned Judges express our inability to agree to the said observations. The necessity of establishing link or nexus in our opinion is writ large on the face of the statutory provision as would appear from the definition of 'illegally acquired property' as also that of 'property'. The purport and object for which the Act was enacted point out to the same effect.

47. In the final order, the rule of evidence as envisaged under Section 68-I read with Section 68-J of the Act must be applied. A person affected would be called upon to discharge his burden provided a link or nexus is traced between the holder of the property proceeded against and an illegal activity of the detenu. Such a formation of belief is essential.

12. In the above judgement, the apex court has not only disagreed with the findings in Kesar Devil's case, but also followed the ratio laid down in 2003 (7) SCC 436 by a quorum of three-Judge bench following 1994 (5) SCC 54 and in the judgement reported in 2007 CrL. L.J 1449 to hold that to initiate proceedings for forfeiture of properties, a link must be established between the properties and to the convict. It has been contended that the judgement in Aslam Mohammed Merchant's case is under the NDPS Act and therefore has no application. This court is unable to accept the contention. Upon perusal of the relevant provisions under the NDPS Act, It is evident that section 68 is pari materia to section 3 and 68B to Section 2 (c) of the SAFEM Act. Also, the apex court in the Judgement referred supra, has followed the ratio laid down under the SAFEM Act, while interpreting the scope of notice under section 6. It is also pertinent to mention here that the petitioner is the competent authority both under the SAFEM Act and NDPS Act as evident from the proceedings dated 30.09.2005. Therefore, it is safe to conclude that the notice under section 6 must explicitly establish the link between the properties and the convict/detenu as per the law laid down by the apex court.

13. Reliance was also placed by the learned Additional Solicitor General on the judgement reported in CDJ 2011 MHC 3203 (The competent authority v. Hameed Abdul Kader). Upon perusal of the judgement, it is evident that the facts and the averments in the notice are different from that of the case on hand. In that case, it was not disputed that the convict also contributed to the purchase of the properties and the notice had specific reference or link to the effect of establishing the link.

14. In the case on hand, we have already held that the notice does not establish any link between the convict and the properties. It is also not the case of the petitioner that the properties were purchased out of illegal income earned in India by the convict. It is also pertinent to point out that the proceedings against the detenu was dropped on 10.02.1991. Had there been any nexus or link, the petitioner would not have dropped the proceedings. Though the burden of proof lies on the person affected under section 18, the statutory requirement for commencement of the proceedings cannot be forfeited to forfeit the properties. That stage would arise only when the notice is as per the statute. What by law requires to be express, cannot be left to be inferred. This court after careful consideration of the relevant provisions and the judgements referred to above, accepts the findings of the tribunal and holds that the notice under section 6 must establish the link or nexus and in the absence of the same, the entire proceedings would stand vitiated.

15. The next bone of contention is that the 1st respondent has failed to prove the legal source for acquiring the properties. In denial and claiming that evidence was produced, the 1st respondent has relied upon the income tax returns and his explanation. Upon perusal of the proceedings dated 30.09.2005, it is evident that the explanation and the returns under the IT Act have been rejected holding that the scope of enactments are different and the findings are not binding on the petitioner. Whereas, upon perusal of the statement of reasons along with the notice dated 10.01.1992, the entire proceedings have been initiated on the basis of income tax returns. Therefore, this court is of the view that the returns and the explanations must have been considered. The notice itself, proceeds on the basis that many properties are agricultural lands. There is also a reference to revenue records. The income tax authorities have also accepted the agricultural income. The conduct and the findings only reflect the non suiting of the legal norms by the authority. It is also not in dispute that the remittances from Malaysia was made through proper banking channel and the properties were purchased from agricultural income and remittances. Indisputably the properties are individual properties without any nexus to the convict/detenu. The object of the act is to ensure that the properties purchased out of smuggling activities or by illegal means in violation of the provision of the SAFEM Act cannot be permitted to be enjoyed by the convict/detenu or a relative holding the property as benami. The forfeiture of a relative's property has to be read in the context and objects of the Act. It is only when the link or nexus of the properties with the convict/detenu or to the income from such illegal activity is established, the

properties standing even in the name of a relative can be forfeited. Therefore, this court concurring with the view of the tribunal holds that the individual properties of a relative, as defined under section 2 of the SAFEM Act cannot be forfeited.

16. In the result, the writ petition fails and is dismissed. The miscellaneous petition is also dismissed. No costs.