

(2010) 02 DEL CK 0171

In the Delhi High Court

Case No : Writ Petition (C) 669 of 1997

Ghanshyam Dass Vaswani

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 18-02-2010

Acts Referred:

Citation : (2010) 167 DLT 434 : (2011) 7 RCR(Civil) 1089

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Riaz Mohammed, for the Appellant; Ravinder Aggarwal, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—This writ petition filed on 13th February 1997 seeks quashing of an order dated 25th July 1995 passed by the Competent Authority u/s 7(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act 1986 ("SAFEMA") whereby the properties of the Petitioner, i.e. share in investment and business assets of Vasco Enterprise, 7 Jain Market, Kashmere Gate, Delhi and a loan of Rs. 30,000/- to Smt. Godawari Devi together with up-to-date interest thereon and any other accretion thereon, were forfeited. The Petitioner also challenges an order dated 6th November 1996 passed by the Appellate Authority dismissing the appeal filed by the Petitioner u/s 12 SAFEMA against the order of the Competent Authority.

2. The Petitioner is the elder brother of Mr. Govind Vaswani who was detained twice by orders dated 31st July 1975 and 24th June 1980 passed by the Administrator of Delhi u/s 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 ("COFEPOSA"). The first order of detention dated 31st July 1975 was quashed by this Court by an order dated 24th May 1993 in Writ Petition (Criminal) No. 835 of 1978. That order, a copy of which has been enclosed with the writ petition, notes that Mr. Govind Vaswani continued to be in detention till 21st March 1977 and was released immediately

on the lifting of the Emergency by the Government of India. After Mr. Govind Vaswani was released he was served a notice u/s 6 of the SAFEMA. He then filed the aforementioned writ petition challenging his detention order. The Division Bench of this Court quashed the detention order on the ground the representation of the Petitioner's father was not disposed of by the President of India to whom it was addressed. Instead it was disposed of by the Lt. Governor of Delhi. Consequently this Court also quashed the notices dated 13th December 1977 and 28th March 1978 respectively issued to Mr. Govind Vaswani under Sections 6 and 7 SAFEMA. The above order dated 24th May 1993 of the Division Bench of this Court in Writ Petition (Criminal) No. 835 of 1978 was not challenged and attained finality.

3. The second order of detention dated 24th June 1980 against Mr. Govind Vaswani u/s 3(1) COFEPOSA was quashed by the Supreme Court by an order dated 7th October 1980.

4. The Petitioner herein filed Writ Petition (Civil) No. 1768 of 1981 challenging the constitutional validity of both SAFEMA and COFEPOSA. The constitutional validity of SAFEMA was upheld by the Supreme Court in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, . Following the said judgment this Court on 30th January 1995 held that the challenge by the petitioner to the notice u/s 6(1) of the SAFEMA did not survive. Writ Petition (Civil) No. 1768 of 1981 was accordingly dismissed.

5. After the dismissal of the aforementioned writ petition, the Competent Authority SAFEMA took up the Petitioner's case for hearing and passed the impugned order dated 25th July 1995. On behalf of the Petitioner Mr. Ghanshyam Vaswani [who was the affected person ("AP")], it was urged that with the quashing of the orders passed under SAFEMA against his brother Mr. Govind Vaswani, the proceedings against the AP also did not survive. The Competent Authority observed that the Petitioner had not offered any explanation regarding the sources of his investment in the properties under reference. As regards the quashing of the proceedings against the petitioner's younger brother Mr. Govind Vaswani, the Competent Authority referred to the observations of the Supreme Court in Amratlal Prajivandas wherein it was held that where the detenu did not choose to question the detention (either by himself or through his next friend) before the Court during the period when such order of detention was in force or was unsuccessful in his petition- then he or his relatives and associates cannot attack or question its validity when it is made the basis for applying SAFEMA to him or to his relatives or associates. It was noted by the Competent Authority that the AP neither discharged the burden u/s 8 SAFEMA to prove the legal sources of the acquisition of his properties nor chose to appear in person to explain the sources of the said two properties.

6. The Appellate Tribunal for Forfeited Property ("Appellate Tribunal"), which comprised of two technical members, dismissed the Petitioner's appeal on 6th November 1996. The Appellate Tribunal also relied upon the observations made

by the Supreme Court in Amratlal Prajivandas and held that since Govind Vaswani had not challenged the detention orders even while suffering the detention it could not be said that the proceedings under SAFEMA did not survive. Since the Petitioner did not give any explanation regarding the sources of investment in the properties under reference, his challenge to the forfeiture had to fail.

7. It is contended by the Petitioner that once the two detention orders against Govind Vaswani under COFEPOSA were quashed by this Court and the Supreme Court respectively, the very basis for invoking SAFEMA against the Petitioner was non-existent. Secondly, it is submitted that the bench of the Appellate Tribunal which heard the Petitioner's appeal comprised only two technical members and therefore lacked the requisite quorum. The Appellate Tribunal was not complete without its Chairman in terms of Section 12 SAFEMA notwithstanding Sub-section (6A) thereof. It is further submitted that the Appellate Tribunal was required to first determine if the provisions of SAFEMA were at all applicable. It was not even prima facie shown that there was any nexus between the properties belonging to the Petitioner and his brother. The said properties were in fact the independent properties of the Petitioner.

8. In the reply filed on behalf of the Respondents it is stated that since the Petitioner was the brother of Mr. Govind Vaswani, he was an affected person (A.P.) within the meaning of Section 2(2)(o) SAFEMA. It is submitted that the burden of proving that the properties specified in the notice served u/s 5 were not illegally acquired was on the AP. As the said onus was not discharged by the Petitioner, a presumption was rightly drawn against the Petitioner. Consequently the Competent Authority rightly directed forfeiture of the Petitioner's properties which included his share in the investment and business assets of M/s. Vasoo Enterprises as well as a loan of Rs. 30,000/- given by the Petitioner to his mother Smt. Godavari Devi with up-to-date interest. It is reiterated that since Govind Vaswani's detention was challenged only after he was released, the observations made in Amratlal Prajivandass would apply and it was not open to the Petitioner to question the validity of the detention.

9. As regards the quorum of the Appellate Tribunal it is stated that no objection was raised by the petitioner at the hearing before the Appellate Tribunal. It is submitted that u/s 14 SAFEMA the order of the Appellate Tribunal is final and is not appealable. Section 14 which states that no order passed or declaration made under the said Act shall be appealable or subject to the jurisdiction in the civil court. It is stated that the then Chairman had by an order dated 26th April 1996 constituted a Bench of two technical members to discharge the powers and functions of the Appellate Tribunal from 2nd May 1996 till the new Chairman took over. Therefore, the Appellate Tribunal which heard the Petitioner's appeal was properly constituted.

10. The submissions of Mr. Riaz Mohammed, learned Counsel for the Petitioner and Mr. Ravinder Aggarwal, learned Counsel for the Respondents have been

considered.

11. Learned Counsel for the parties have reiterated their submissions noted hereinbefore. With the Respondents having satisfactorily explained the constitution of the Bench of the Appellate Tribunal by the Chairman u/s 12(6A) SAFEMA, the only question that arises for consideration is whether the impugned order of the Competent Authority is valid in law.

12. The entire argument of the learned Counsel for the Respondents turns on the observations of the Supreme Court in *Amratlal Prajivandass*. The said observations para 55 (3)(b) (AIR p.2210) read as under:

An order of detention to which Section 12A is applicable as well as an order of detention to which Section 12A was not applicable can serve as the foundation, as the basis, for applying SAFEMA to such detenus and to his relatives and associates provided such order of detention does not attract any of the sub-clauses in the proviso to Section 2(2)(b). If such detenu did not choose to question the said detention (either by himself or through his next friend) before the court during the period when such order of detention was in force or is unsuccessful in his attack thereon - he, or his relatives and associates cannot attack or question its validity when it is made the basis for applying SAFEMA to him or to his relatives or associates.

13. A careful reading of the above paragraph would show that the Supreme Court had clarified that it is the order of the detention of the detenu under COFEPOSA which forms the basis of the proceedings against the relatives of detenu under SAFEMA. The Supreme Court has nevertheless added that SAFEMA would apply "provided such order of detention does not attract any of the sub-clauses in the proviso to Section 2(2)(b) of SAFEMA." In other words the Supreme Court has emphasized that SAFEMA would not be attracted in the event the detention order was set aside by a court of competent jurisdiction. This is clear from Clause (iv) to the Section 2(2)(b).

14. The Supreme Court in *Amratlal Prajivandass* then explained that if the detenu did not choose the question of detention order before the Court during the period when such order of detention was in force then he or his relatives or associates could not later assail its validity when it was made the basis for applying SAFEMA to him or his relatives or associates.

15. What the above passage purports to do so is to prevent the relative of a detenu challenging the order of detention of detenu, which has remained unchallenged at a time when it is made the basis for applying SAFEMA to such relative. In the instant case it can be argued that the Petitioner cannot challenge the validity of the detention of Mr. Govind Vaswani. However since Govind Vaswani has already successfully challenged his detention (and that order has become final) there is no need for the Petitioner, who was never detained, to challenge such detention. Even by the time the proceedings against the Petitioner revived i.e. by the decision dated 30th January 1995, his brother's

detention already stood quashed by the High Court by its decision dated 24th May 1993.

16. Had the Respondents, after the judgment dated 12th May 1994 in Amratlal Prajivandass, sought a review of the order dated 24th May 1993 of the High Court in Govind Vaswani's case on the ground that he did not challenge his detention during the period it continued, and the said judgment of the High Court had been recalled on that basis, then it can possibly be argued that the proceedings under SAFEMA against the Petitioner can continue since in that event even the proceedings against Mr. Govind Vaswani under SAFEMA would have continued. However, the position here is different. The Respondents have not challenged the orders of the High Court and the Supreme Court quashing Mr. Govind Vaswani's detention under COFEPOSA and consequently, the orders under SAFEMA.

17. The resultant position is that there is no order of detention vis-a-vis the petitioner's brother under the COFEPOSA. It therefore cannot form the basis for applying SAFEMA to him. This Court cannot be asked to turn blind eye to the order dated 24th May 1993 passed by the Division Bench of this Court as well as the order dated 7th October 1980 passed by the Supreme Court which quashed Mr. Govind Vaswani's detention orders. The Division Bench of this Court had by the said order dated 24th May 1993 also quashed the order against Mr. Govind Vaswani passed under SAFEMA. In the circumstances there exists no legal basis for continuation of the proceedings under SAFEMA against the Petitioner.

18. For the aforementioned reasons, the impugned order dated 25th July 1995 of the Competent Authority and the order dated 6th November 1996 of the Appellate Tribunal are hereby set aside.

19. The writ petition is accordingly allowed with the above directions with no order as to costs.