

(2002) 07 GUJ CK 0022
In the Gujarat High Court

Case No : Special Civil Application No's. 11079 and 11080 of 2000

Mithu Bawa Padiyar

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 25-07-2002

Acts Referred:

Constitution of India, 1950 — Article 226
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 —
Section 24, 6, 7

Citation : (2003) 86 ECC 485 : (2003) 1 GLR 128

Hon'ble Judges : C.K. Buch, J

Bench : Single Bench

Advocate : B.B. Naik, Shirish Sanjanwala and R.S. Sanjanwala, for the
Appellant; D.N. Patel, for the Respondent

Final Decision : Allowed

Judgement

C.K. Buch, J.—Both these petitions are filed by the petitioners who are incidently husband and wife and have challenged the legality and validity of the notice to show cause issued u/s 6(1) of the Smugglers & Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter referred to as the "SAFEMA Act") and the subsequent orders of confiscation passed by the competent authority in exercise of powers vested u/s 7 of the SAFEMA Act. Both the petitioners have challenged notice containing same/ similar facts and mostly on similar grounds. So, both these petitions are heard together and they are being disposed of by this common judgment.

2. It would be necessary to state some facts reflected from the petitions. The petitioner of Spl.C.A. No. 11079 of 2000 was detained by the competent authority i.e., detaining authority, on completion of investigation by the customs authority, vide detention order dated 21-7-1982 passed by the Government of Gujarat under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the

"COFEPOSA Act"). He was taken under detention immediately but the order of detention was ultimately revoked by the State Government on 18-10-1982. However, the petitioner was again detained under a fresh order of detention under COFEPOSA passed on that very day i.e. 18-10-1982. Ultimately, the petitioner was released from the said detention on completion of period of detention on 23-7-1983. It seems that the authority empowered, issued notice to initiate further proceedings for forfeiture of the property under SAFEMA Act slating that the petitioner Mithu Bawa Padiyar is holding property purchased and/or developed by tainted money earned out of smuggling activities. So, the competent authority issued a notice under the provisions of Section 6(1) of SAFEMA Act firstly in the year 1983. Of course, the copy of the notice issued by the authority in the year 1983 is not available on record, but in view of the averments made in the affidavit-in-reply filed by the respondent-department. This set of fact is undisputed. No steps for forfeiting property mentioned in the 1983 notice were initiated and that notice was withdrawn. However, on 26-6-1986 and 7-8-1986 both these petitioners were again called upon by the competent authority by issuing notice u/s 6(1) of the SAFEMA Act. In response to these notices, both the petitioners had supplied details of their income, assets, etc. and had tried to explain that how the property shown in the notice to show-cause were acquired by them. It is averred by the petitioner-Mithu Bawa Padiyar that he is the resident of village Nudhatad, Tal. Abdasa, District Kutchh and basically he is an agriculturist and was holding agricultural lands in the sim of village Nudhatad. He was also doing the work of animal husbandry and also keeping cattles like cow, buffalo, sheeps and goats etc. Both the petitioners have produced the notice u/s 6(1) of SAFEMA Act served to them in the year 1986 vide Annexure-A. It is averred by the petitioner that though there was enough legal and probable resistance by them, the properties mentioned in the schedule to the show-cause notice were treated as illegally acquired properties and the competent authority ordered forfeiture of all the properties mentioned in the schedule on account of the order of forfeiture dated 30-6-1999 and 26-7-1999 respectively. The properties were forfeited free from all encumbrances in view of the scheme of Section 7 of the SAFEMA Act. The order passed by the competent authority u/s 7 of SAFEMA Act are produced by both the petitioners vide Annexure-D in their respective petitions. According to the petitioners, the order of forfeiture dated 30-6-1999 passed against the petitioner-Mithu Bawa Padiyar was challenged by his son claiming to be a coparcener/joint owner of the ancestral properties by filing an appeal before the Appellate Tribunal (Forfeited Properties), New Delhi. During the course of oral submissions, learned Counsel appearing for the petitioner Mr. B. B. Naik has submitted that this appeal is pending before the Appellate Tribunal. The grievance of the petitioners before this Court is that though the earlier proceedings so far as these petitioners are concerned, were over on the day on which properties mentioned in the scheduled were confiscated, the competent authority has issued another notice to show-cause on 8-8-2000 on the same grounds for confiscating the properties held by his wife-Bachibai Mithu Bawa Padiyar. According to the petitioners, this Bachibai

Mithu Bawa Padiyar and Jayshreeben Mithu is the same person, however, the competent authority has described Jayshreeben and Bachibai as two different individuals and both are described as wives of petitioner-Mithu Bawa Padiyar. These petitions challenge the legality and validity of the notice dated 8-8-2000 and it is specifically contended by the petitioners that this second/fresh notice to show-cause issued u/s 6(1) of the SAFEMA Act dated 8-8-2000 are illegal, unlawful, invalid, unjust, improper on number of grounds.

3. After service of rule, the respondent No. 1-competent authority under the SAFEMA Act has filed its affidavit-in-reply and has resisted the petition on factual as well as legal grounds. Having considered the contents of the petitions and affidavit-in-reply, in reference to the oral arguments advanced by the learned Counsel appearing for the petitioner Mr. B. B. Naik, the Court feels that the submissions advanced by Mr. B. B. Naik requires detailed consideration in view of the say of respondent No. 1 that the petitions at the show-cause stage are not maintainable and even otherwise on merits the petitioners have no case.

4. Learned Counsel Mr. B. B. Naik has concentrated his arguments mainly on three grounds. His first ground of challenge is that the second notice issued by the competent authority is a notice without application of mind and the same is not based on formation of subjective satisfaction reasonably arrived at if the same is considered in light of the facts stated in the notice itself. The second ground of challenge is that the competent authority had no authority or power whatsoever for issuing fresh second show-cause notice after lapse of several years, namely 17 years. To appreciate this aspect, according to Mr. B. B. Naik, the date of first notice to show-cause issued in the year 1983 would be relevant and the date of order of confiscation of the property passed in the year 1999 would not help the competent authority in this regard. Third ground under which the validity of the notice has been challenged is that the authority was, in view of the scheme of SAFEMA Act, is empowered to enquire into various aspects of the properties owned, occupied or enjoyed by a person against whom there exists a valid order of detention under COFEPOSA Act. The properties mentioned in the schedule of notice to show-cause issued on 8-8-2000 were very well there when the first notice in the year 1983 was issued. Therefore, the notice under challenge could not have been issued and the principle of estoppel also would apply especially when it is not the say of the competent authority that the day on which notice was issued even in the year 1986 the authority was not aware about the facts that the petitioner-Mithu Bawa Padiyar or Bachibai Mithu Bawa Padiyar were holding or owing the properties in the district Kutchh itself. While developing this point, Mr. B. B. Naik has taken this Court through the relevant provisions of the SAFEMA Act. The fourth ground pressed into service by Mr. Naik is in reference to the provisions of Sub-section (1) of Section 6 of the SAFEMA Act. Quoting the provisions of Section 6(1) of the SAFEMA Act, it is submitted that the authority is bound to record its subjective satisfaction on the ground and the reasons for such belief is recorded in writing and it provides a safeguard and in light of the two main grounds mentioned in the notice to show-cause served to

the petitioner, on available other set of facts it is apparent that the action of issuance of notice itself is a malice in law and arbitrariness in exercise of powers. As per example, the fact of earlier proceedings initiated against the petitioner by the authority and the result thereof i.e. confiscation of the properties shown in the schedule of the notice issued u/s 6(1) in the year 1983 has not been referred at all and though the authority was aware about the statutory provisions has referred the fact of conviction recorded by the Criminal Court though the value of the goods in that particular criminal case was much less than the minimum value prescribed i.e. Rs. 1 lac, and therefore, only Mr. Naik has hammered that the say of the petitioner at the show-cause notice stage should be considered and the jurisdiction vested with this Court under Article 226 of the Constitution of India requires to be exercised. In support of his submission, Mr. Naik has placed reliance on various decisions during the course of development of his arguments on all these above-referred four grounds.

5. Learned Senior Central Government Standing Counsel Mr. D. N. Patel for respondent No. 1 is also heard at length. His argument if appreciated, is mainly on two folds. The first fold of his argument deals with the maintainability of these petitions. It is submitted that the present petitioner has tried to approach this Court under Article 226 of the Constitution of India by-passing the statutory procedure provided under the SAFEMA Act and by selecting this short-cut, he cannot get the proceedings terminated especially when a burden of proof is on the petitioner to show that the properties mentioned in the notice to show-cause (relevant Paras 5 and 6 of the notice) is not purchased/acquired from the tainted money earned through illegal source and this petition should be dismissed on the ground that the same is premature when there is no decision by any competent authority, and hence, the petition cannot sustain. This aspect goes to the maintainability or say substitutability of the petition. In absence of jurisdiction to exercise, the petitioner cannot get any relief prayed for by him. Mr. Patel has taken me through the relevant clause of the petition and has pointed out that if this relief as prayed is granted, than it would amount to grant privilege to a person who is otherwise supposed to respond to the statutory authority in light of the facts reflected in the notice issued u/s 6(1) of the SAFEMA Act. In support of this submission, Mr. Patel has also placed reliance on some decisions of the Apex Court and this Court. The other fold of the argument is that while exercising the jurisdiction vested with this Court under Article 226 of the Constitution of India, the Court should think about the far-reaching effect of the decision. While exercising even a discretionary jurisdiction vested with this Court in light of the broad principle of equity, this Court should also think of various possibilities. Undisputedly, the petitioner has been convicted by a Criminal Court for violation of customs laws and once his property has been confiscated on account of valid order of detention passed under the COFEPOSA Act. In many occasions, through mistake, over-sight, lethargy or even on account of dishonesty on the part of the officer working in the department, all properties of such a smuggler may not be enlisted in the proceedings initiated for confiscation

for the first time. Therefore, only the law provides that this act by referring Section 24 of the SAFEMA Act has the overriding effect and there is no time-limit for issuing show-cause notice u/s 6(1). There may be more than one, two or three show-cause notices. The intention of the legislature and the scheme impliedly indicates that tented money and the property purchased therefrom should be totally eroded. So, this Court at this premature stage should not go into technicality. On the contrary, Mr. Patel has tried to submit that as this properties mentioned in the second notice were not noticed by the authority earlier in the year 1983 or 1986, they were able to enjoy the same till the proceedings were initiated in the year 2000. In response of the query raised by the Court, as to the confusion in the name of the wife of the petitioner, Mr. Patel responded that it is possible that Jayshreeben Mithu Bawa Padiyar and Bachibai may be the same person and not two different individuals. But this fact could have been clarified by the petitioner to the authority on his appearance before the authority and the filing of the petition on such ground would not help the petitioner. The authority is supposed to enquire into the matter and may even withdraw the notice issued to the petitioner. The subjective satisfaction recorded by the authority is reflected from the notice itself, reasons are assigned, and when the notice has been issued by the competent authority in exercise of statutory powers, this Court should not interfere with the same. When a show-cause notice u/s 6(1) has been issued, it can only be inferred that the authority is under the thinking process and no decision on the subject has been arrived at. So, no writ or direction in the nature of mandamus can be granted. The delay in issuing notice even if found, in absence of time-bound schedule, the decisions of this Court or the Apex Court on this aspect would not help the petitioner. For short, he has prayed for dismissal of this petition.

6. Having considered the rival contentions, this Court is supposed to consider three main aspects.

(1) The first point needs consideration is whether the competent authority is authorized to issue the second notice in exercise of powers as contemplated u/s 6(1) of the SAFEMA Act, especially when the first such similar notice has been issued and proceedings initiated thereunder has reached to its logical conclusion.

(2) Even if it is assumed that it is open for the authority to issue second or even more number of such notices, in spite of earlier adjudication, whether the powers exercised by the authority is properly exercised and the same is justified.

(3) If the action is prima facie found exercised after unreasonable delay and/ or there is an element of malice in law or arbitrariness in the facts and circumstances of a particular case, the Court should exercise its powers under Article 226 of the Constitution of India and can turn down the notice to show-cause issued by the competent authority without considering it on merits.

(4) The element of non-application of mind if found, on any count in issuance of notice u/s 6(1) of the SAFEMA Act, whether that by itself would give rise to

exercise of jurisdiction vested with this Court under Article 226 of the Constitution of India.

7. It would be appropriate to mention certain undisputed facts available on record.

(i) The petitioner-Mithu Bawa Padiyar was found involved in the activities of smuggling and on that allegation, he was detained on 21-7-1982 under COFEPOSA Act by the detaining authority and this order of detention was revoked on 18-10-1982. Thereafter, he was re-detained as per fresh order passed under the COFEPOSA Act on the same day by the Government of Gujarat and was released on 23-7-1983.

(ii) This release was on completion of period of detention and not on account of revocation or quashing by any Court of competence jurisdiction.

(iii) The petitioner was served with a notice u/s 6(1) of the SAFEMA Act on 26-6-1986. Prior to this notice, he was served with a similar notice on 5-12-1983, but this 1983 notice could reach to its logical end, the same was withdrawn and the fresh notice i.e., second notice came to be issued in the year 1986.

(iv) The properties referred to and mentioned therein came to be confiscated by the competent authority vide order dated 30-6-1999. The competent authority, as per the scheme of Section 7 read with Section 19 of the SAFEMA Act, ordered confiscation of following immovable properties :

Immovable Properties :

Agricultural land :

(1) Land bearing Survey No. 71 (paikee) admeasuring 4 acre, at village Nudhatad, Tal. Abdasa, District Kutchh estimated value of Rupees 20,000/-.

(2) Land bearing Survey No. 1097 admeasuring 29 acres and 16 gunthas at village Mothala, Tal. Abdasa, Dist. Kutchh.

House properties :

House properties at village Nudhatad, Tal. Abdasa, Dist. Kutchh.

House properties :

House properties at village Nudhatad, Tal. Abdasa, Dist. Kutchh.

Survey No.

Nature of property

Estiraated Market value

2/52

Residential House

Rs. 30,000/-

2/55A

-do-

Rs. 20,000/-

2/55B

-do-

Rs. 20,000/-

2/60B

-do-

Rs. 35,000/-

(v) Some movable properties also came to be forfeited to the State Government free from all encumbrances, but it is not necessary to refer the same. The present properties i.e., properties mentioned in the impugned notice dated 8-8-2000 are also situated in the district Kutchh.

(vi) The conviction of the petitioner in a Criminal Case No. 782 of 1985 is not relevant and the petitioner is not covered within the purview of Section 2(a) of SAFEMA Act as accepted by the respondents in Para 3.6 of the affidavit-in-reply. It is neither reflected in the notice issued u/s 6(1) or the reply-affidavit that the competent authority was not aware about the existence of the properties mentioned in the impugned notice even on the day on which the order of confiscation of the property owned or occupied by the petitioner was passed in the month of June, 1999. Order of forfeiture of the property in the name of Mithu Bawa Padiyar referred in order of forfeiture has been challenged by the son of the petitioner claiming it to be an ancestral properties by filing an appeal before the Appellate Tribunal (Forfeited Property), New Delhi and the said appeal is pending even today.

(vii) The properties mentioned in the impugned notice are in possession and enjoyment of the petitioner.

(viii) If the first notice withdrawn earlier is ignored, than this second notice served after approximately 17 years after the release of the petitioner from detention.

It would be appropriate to quote Section 6 of the SAFEMA Act, which reads as under :-

6. Notice of forfeiture :- (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 reason 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 specifies 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. This provision if read in reference to the provisions of Section 7 and Section 19 of the Act, there is no alternative for the person who has been served with the notice under Sub-section (1) either to go to the competent authority or to challenge the legality and validity of the notice itself. The powers vested with the authority is discretionary and the same has to be exercised on the information available to it or information gathered in exercise of powers vested with the authority u/s 16 and Section 18 of the SAFEMA Act. It is not mentioned in the impugned notice that the information qua the properties mentioned in Paras 5 and 6 were gathered by the authority after exercising the powers u/s 16 and/or Section 18 of the SAFEMA Act at any time, pending the show-cause notice earlier served and was under adjudication till the order 1999.

9. On 8-8-2000 when the impugned notices were served to the petitioners, the petitioner of Spl.C.A. No. 11079 of 2000 Mithu Bawa Padiyar was not holding any property in his name. The properties mentioned in Para 5 of the notice was and is in the name and enjoyment of AP-2-Bachibai Mithu Bawa Padiyar. The properties mentioned in Para 6 is shown to be owned and occupied by Jayshree Mithu Bawa Padiyar and she has been shown as AP-3 in the notice. For the sake of convenience, it would be appropriate to reproduce the Paras 5 and 6 of the impugned, notice served to the petitioners.

"5. Whereas investigation revealed that the AP-2 holds an agricultural land at Bhuj-Khavda Highway, Mahila Ashram, Bhuj, Kutchch. The said agricultural land is at Survey Nos. 646 and 870 (paikar) admeasuring 10 Acres 34 Gunthas and 7 Acres 1 Gunthas respectively. The said agricultural lands at Survey No. 646 & 870 (paikar) had been purchased as per document No. 467 dated 4-3-1983 for Rs./- and the same was entered in the revenue records on 2-7-1983. As AP-2 had no individual sources of income, nor the AP-1 & AP-2 had disclosed the same before Income Tax Department. As AP-1 was involved in smuggling activities, I have reasons to believe that the said properties have been purchased

by AP-1 from his illegal income and the name of AP-2 has been entered in the revenue records for namesake only.

6. Whereas investigation further revealed that AP-3 is holding a residential property at House No. 3486-B at City Survey Ward No. 3, Near Om Plaza Building, Opp. Shriram Petroleum, Lal Tekri, Jyesthanagar, Bhuj admeasuring 185.94 square metres which was also purchased during the year 1983. The purchase deed reveals that AP-3 had purchased an old house containing 3 rooms with tiles on the roof and had open space at front with one store and toilet. For this, AP-3 had paid Rs. 30,000/-. But presently, it is a big bungalow with grounds and first floor and the cost of the property would be around Rs. 10,00,000/-. As AP-3 has no ostensible source of income nor the details of the purchase of the property or its construction thereafter have been mentioned in the income tax returns filed by AP-1 although he held the property. The AP-1 had not disclosed the sources and investments made for its purchase and construction before the Income Tax Department for their scrutiny. I have reasons to believe that the said immovable property has been purchased and the construction thereafter had been made by AP-1 from his illegal sources of income and has got entered the name of AP-3 in the revenue records for name-sake only. It is further seen that AP-1 resides in the said house along with AP-3 and thus enjoys and controls the said property."

10. Mr. Naik has pointed out that non-application of mind of the authority while recording the so-called reasonable belief is apparent if the details of affected persons is scrutinised. As such there are no three affected persons. Mithu Bawa Padiyar- AP-1 technically cannot be said to be an affected person because he was not owing or enjoying the property mentioned in Para 5 and/or 6 of the notice. AP-2 and AP-3 namely Bachibai and Jayshree mentioned by the competent authority being relatives and members of the family are served with the notice in question. Now, according to the petitioners, this Jayshreeben and Bachibai are the same and they are not two different individuals. The properties mentioned in above referred Paras 5 and 6, is owned by Jayshreeben @ Baehibai. So, notice u/s 6(1) was required to be served only to AP-2 by the authority. Mr. D. N. Patel learned Senior Central Government Standing Counsel has tried to assail this part of argument by submitting that this could have been clarified by AP-1 and AP-2 immediately on service of notice. If the petitioners would have approached this Court solely on this ground, than this Court might not have given any weightage to this misdescription of affected persons, but when non-application of mind in issuing notice is being exhibited by bringing other details, this misdescription of affected persons may become relevant. It is certain that Mithu Bawa Padiyar on the relevant date, was having one wife namely Jayshree @ Bachibai and not two wives. This AP-1 and AP-2 Mithu Bawa and Bachibai have faced similar proceedings earlier and as mentioned earlier, properties owned or occupied or enjoyed by them have been forfeited. On that day or say in those proceedings there is no reference of any Jayshreeben. Plain reading of the impugned notice creates an impression that Mithu Bawa Padiyar must be having two wives, the

competent authority should not have issued notice without verifying this aspect and the properties allegedly owned and occupied by or in the name of this Jayshreeben.

11. It is rightly submitted that the competent authority was under an obligation to mention the details of earlier proceedings drawn under Sections 6, 7 and 19 of the SAFEMA Act and its ultimate outcome. This omission also indicates either haste or non-application of mind. Mr. Naik has even tried to submit that lack of bonafide also can be inferred or an impeachment of "malice" can be made because of this non-disclosure of very relevant and material aspect in the impugned notice. When safeguard has been provided in Section 6 itself and when the burden of establishing the fact that the properties owned, occupied or enjoyed have not been either purchased or received against the tented money or consideration than the competent authority is supposed to comply with the statutory obligations. For assailing the legality and validity of the notice, and the authority to issue notice at a belated stage, say after 17/18 years, the point of delay caused has been argued at length by the learned Counsel for the petitioners, but while submitting on the point of "non-application of mind of the competent authority", this point of delay in issuance of show-cause notice to the petitioners has been argued slightly from a different angle. It is submitted that the authority has not cared to explain as to why the delay has been caused in issuing the second (in reality third) notice u/s 6 of the Act. It is not the say of the authority that the department was not aware about the existence of these properties in the year 1983 or 1986 when earlier two notices were issued nor it is the case in the affidavit-in-reply that these properties were not in the name of either AP-1 or AP-2 in the year 1983 or 1986. If somebody has given a clue or information about the properties described in Paras 5 and 6 to the department any time after 30-6-1999, the day on which properties of AP-1 and AP-2 were forfeited. The case is also not of benami properties at a later stage. Any such cause or reason could have been stated in the notice under challenge. There is clear distinction between the time consumed in investigation etc. which can be said to be more than reasonable time and the time taken which can be termed to be "period unreasonable". Even from the date of verdict of forfeiture of the property in the year 1999 though the impugned notice u/s 6 have been issued after lapse of a period which can be said to be unreasonable period of time. The department has neither cared to clarify nor justify the inaction as to why it was not possible for the department to refer these very properties in the earlier notices issued in the year 1983 and/or 1986. It was possible for the department to initiate the proceedings simultaneously with the proceedings initiated for other properties in the year 1986 because even as per the notice under challenge one of the property mentioned was purchased in the year 1983 and it was mutated even on the revenue record of the village in the name of the Affected Persons and the second property referred in the notice was purchased by a registered sale-deed. On a stray inquiry from the District Registrar or District Revenue Authority, the competent authority could have gathered information as to entire

set of properties of AP-1 and AP-2 situated within the district Kutchh. Absence of this fact makes notice vague and if this vagueness has emerged because of lethargy on the part of the competent authority, than it would add into an element of non-application of mind. Whether this is deliberate and with any other motive is another question to be answered. Application of mind has a direct nexus with due care and diligence. The other point is that a ground which was not even otherwise available to the competent authority, as referred earlier, even than that ground has been mentioned in the notice under challenge. Of course, in the affidavit-in-reply, the competent authority has accepted the mistake committed in Para 3.6, It is true that a party if accepts that some wrong has been committed or the competent authority agrees with the proposition made in the petition as to the error pointed out by the petitioner by itself would not make the action legal, but its impact on action remains. A ground not available for forming an opinion or an order if passed is illegal makes material difference. Plain reading of the notice indicates that in forming the opinion or recording reasonable belief the competent authority had taken into consideration two major aspects. The first is the passing of the order of detention against the AP-1 Mithu Bawa Padiyar and the second is the conviction recorded by the Criminal Court in the offence punishable under the Customs Act. Out of these two, if the second ground for forming the opinion or say in recording the reasonable belief is not legally available than it would vitiate the belief and its reasonableness and the same in turn, would go to the root of validity of the notice. It can be argued and it has been argued by Mr. D.N. Patel that notice u/s 6 can be issued only on one ground i.e., passing of valid order of detention. But the say of the learned Counsel for the petitioner is that the entire belief and the reasons recorded by the competent authority for issuance of the notice if is passed on more than one ground, than all the grounds must be sustainable either in eye of law or being in accordance with facts of a particular case. Referring the provisions of Section 5A of COFEPOSA Act and enabling provisions of the Gujarat Prevention of Anti-Social Activities Act, 1985 known as PASA Act, it is submitted that there is no such or similar provision in SAFEMA Act. So, no legal or valid order could have been passed of forfeiture of the properties otherwise even petitioners would have appeared before the competent authority. The accepted proposition of law is that unless it is specifically provided in the statute, it should be held that the subjective satisfaction arrived at by the authority is cumulative on all the grounds mentioned in the notice to show-cause or the order passed. So, on the strength of the admission in the reply-affidavit, this Court can legitimately without dragging the proceedings any further or making the petitioners subjected to any further inquiry or proceedings, can quash the impugned notice solely on this ground. Existence of one ground may be sufficient in arriving at a subjective satisfaction, but when an extraneous or ground irrelevant has been considered in recording the reasonable belief or in recording the subjective satisfaction, it would go to the root of recording of reasonable belief or the subjective satisfaction arrived at. Therefore, the existence of a valid ground that is "passing of a valid order of detention" against AP-1 would not make the reasonable belief

recorded by the competent authority legal. In absence of specific statutory provision in the SAFEMA Act, the subjective satisfaction recorded by the authority would fail on account of consideration of one extraneous or irrelevant ground. This proposition of law is very well accepted in the law of detention when the condition precedent does not exist, the ratio can be applied here.

12. The question, therefore, would be whether the Court should be so sensitive as they are dealing with the detention matter. In the cases of preventive detention, the Courts have jealously protected the freedom of individuals but in response of the query raised by the Court, Learned Counsel appearing for the petitioner Mr. Naik, by placing reliance on certain decisions has submitted that though the right to property is not a fundamental right after the Constitution Amendment, it is still a constitutional right and no person should be deprived of his property save by authority of law. Learned Counsel Mr. Naik has placed reliance on the following decisions :

1. 1971 GLR 156 (Bhagwanji Bawanji Patel v. State of Gujarat and Anr.)
2. Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others,
3. Mohamad Kavi Mohamad Amin Vs. Fatmabai Ibrahim,
4. Bhanabhai Morarbhai Solanki Vs. State of Gujarat,

13. It is submitted that in each case where it is apparent that the authority has exercised the powers colourably than this Court can interfere even at the notice stage. In the present case, the element of malice in law is also peeping out from totality of facts and circumstances. After perusal of number of decisions, the Court feels that when a revenue authorities have tried to act in absence of bona fide or where an element of lack of bona fide is apparent or is presumable than the Courts have felt no hesitation even in quashing the notice or in terminating the proceedings pending with such revenue authorities. So, the Court is not in agreement with the say of learned Senior Central Government Standing Counsel Mr. D. N. Patel that this Court has no jurisdiction to interfere in the proceedings initiated by the statutory authority and the petitioners should be asked to succumbed to the jurisdiction of the authority. In reply of this proposition, learned Counsel appearing for the petitioner Mr. Naik has placed reliance on the following decisions :

1. Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another,
2. Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others,
3. Associated Cement Companies Limited Vs. Union of India,

14. In case of Calcutta Discount Co. Ltd. (supra), the Apex Court in Para 53 of the decision has held that :

"If the conditions precedent do not exist, the jurisdiction of the High Court to

issue high prerogative writs under Article 226 to prohibit action under the notice may be exercised. But, if the existence of the conditions is asserted by the authority entrusted with the power and the materials on the record prima facie support the existence of such conditions, an enquiry whether the authority could not have reasonably held the belief which he says he had reason to hold and he did hold, is barred. (Para 53)"

15. In the case of Associated Cement Companies Limited (supra) before the Kerala High Court, the Court has held that :

"In face of these orders of adjudication, it is difficult to imagine how the third show-cause notice can at all be served. Mr. Menon learned Counsel appearing for the department submitted that powers conferred u/s 11A are extremely wide and it is open for the authorities to reopen any order of adjudication and there is no limitation in spite of any number of proceedings be already adjudicated. It is impossible to accede to such submission. The order of adjudication must acquire finality, whether the order is passed by Assistant Collector or Collector in appeal or by CEGAT or by Supreme Court. In case, contention of Mr. Menon is accepted, then even if the order of adjudication is upheld right upto the Supreme Court, the authorities would claim that the order can be reopened under the provisions of Section 11A of the Act. Acceding to the contention of the learned Counsel would lead to unusual results and in our judgment, it is impossible to hold that the powers u/s 11A are so wide as to bypass the order of adjudication. It is not open for the Excise Authorities to claim that order of adjudication is based as mistakes, and therefore, can be reviewed and fresh show-cause notices can be served."

16. In the present case, the competent authority as mentioned earlier, has issued a second show-cause notice after lapse of 17 years on the same set of facts. The above cited decision of the Kerala High Court has been considered by this Court while dealing with the Special Civil Application No. 8376 of 2001 (Coram : Kundan Singh, J.), of course, in different context, but the fact remains that this Court can exercise the jurisdiction under Article 226 of the Constitution of India even at the show-cause notice stage. The observations made in Paras 42 and 44 of the decision are relevant for the purpose.

17. In the case of Whirlpool Corporation, (supra) the Apex Court has observed that where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been violation of the principle of natural justice or the order or proceedings are wholly without jurisdiction or the vires of the Act is challenged, the writ petition at the initial stage would be maintainable. Of course, the Apex Court was mainly dealing with the existence of other/alternative remedy but the ratio of the decision can help the present petitioners because it is the say of the petitioners that the proceedings have been initiated in violation of principles of natural justice and the competent authority has assumed the jurisdiction again though similar proceedings were already initiated by the very authority before several years and concluded much prior to the

issuance of second/third show-cause notice in the month of August, 2000.

18. Though, Mr. D.N. Patel learned Senior Central Government Standing Counsel has tried to explain the confusion as to the name of the wife of AP-1 Mithu Bawa Padiyar, but it is submitted that the papers or say facts placed before the competent authority by itself must not have been clear otherwise Jayshreeben would not have been described as different person as AP-3 in the notice issued u/s 6. This AP-3 is shown to be the owner of house No. 3486-B at City Survey Ward No. 3 in Jyesthanagar area of town Bhuj admeasuring 185.94 sq. meters and purchased in the year 1983. There is no reference of AP-2 so far as this very property is concerned. Two different properties referred to in the impugned notice if considered, according to the competent authority, one is owned and occupied by AP-2 and other by AP-3. Mr. Patel has submitted that this error could have been corrected by the competent authority on receipt of reply or clarification by AP-3 or say AP-2-Bachibai. To appreciate this submission and with a view to appreciate the submission advanced by the petitioners that the notice is issued mechanically and without application of mind, than one should think that if Bachibai or Jayshreeben remain absent in the proceedings than who would bring this aspect to the notice of the competent authority so an unambiguous order of forfeiture of the property can be passed. The notice issued by the competent authority invoking the jurisdiction/powers u/s 6 prior to formal forfeiture under Sec, 7 of the Act normally should not be equated with the powers exercised by the detaining authority under other statute like COFEPOSA or PASA or NASA but any one fundamental rights of a free citizen vested with the Constitution comes under the threat or say get paralysed and when a notice as to forfeiture as to why particular property should not be forfeited or confiscated to the State. On issuance such notice, the owner or holder of" property mentioned in the notice is equally pushed under the threat of losing of that property. Termination of right to own, occupy or enjoy the property also would be stigmatic in certain cases. So, in exceptional cases, when a citizen is under such threat, the Courts have not closed doors totally in all facts and circumstances that none can approach either High Court or Supreme Court invoking the jurisdiction/powers vested with these Courts. As in case of Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, the Apex Court after considering all the relevant aspects has laid down a principle and has categorized the cases of detention which may fall under law of preventive detention and the Apex Court has categorized five type of cases where the Court has said that there can be an adjudication of petition even at pre-execution stage of such order of detention. Applying the same analogy there is scope to carved out certain criteria whereby the citizens whose either fundamental or constitutional rights is being jeopardized can be held entitled to invoke the jurisdiction either of this Court under Article 226 of the Constitution or of the Apex Court. The case of the present petitioner whether would fall in such category or criteria or not, needs to be appreciated. This is not a case wherein by a short order, petitioner should be asked to go to the competent authority and to

represent the case. While categorizing such cases, the decisions of this Court and the Apex Court can be considered as guidelines as touch-stone in evaluating the say expressing the grievance against the authority, who attempts for forfeiture or confiscation of property.

In the cases of lack of jurisdiction or improper exercise of powers, the Courts have intervened even at show-cause notice stage.

19. In a case reported in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , where the Apex Court has observed in Para 27 of the decision that :

"It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences."

20. The existence of alternative remedy is not always sufficient reasons for refusing a party of a quick relief by a writ or order prohibiting the authority acting without jurisdiction from continuing such action. Technically, the authority who has issued the notice is authorized to issue notice u/s 6, but the jurisdiction to issue repeated notices that also after several years, whether can be said to be proper exercise of powers/jurisdiction is the question raised before the Court and in this very decision of the Apex Court has observed that when the Constitution confers on the High Courts the powers to give relief it becomes duty of the Court to give such relief in fit cases and the Courts would be failing to perform their duties if relief is refused without adequate reasons. So, this Court if intends to refuse to grant relief or any part thereof, than it shall have to assign the reasons. Because of some statutory provision an officer cannot assume jurisdiction unless he is able to exercise powers complying all legal obligations under the Statute. Certain infirmity vitiates jurisdiction also. In case of The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, , the Court had intervened at the notice stage and has held that the petition under Article 226 of the Constitution would be maintainable. In this cited decision, the say of the petitioner was that the authority has issued notice without application of mind. The notice issued without application of mind, can be equated with the improper exercise of jurisdiction and if a complaint against the arbitrariness or colourable exercise of powers is made than the Court at least should scrutinise the allegations made by the petitioner and where there is any ring of truth, than the Court in exercise of powers under Article 226 of the Constitution can held that the initiation of the proceedings itself is bad, and therefore, subsequent proceeding cannot sustain.

21. In the case of Suthar Amrutlat Parsotamdas v. Rabari Vastabhai Sartanbhai

and Ors., reported in 1994 (2) GLH 21, this Court had interfered in the proceedings initiated by the competent authority in exercise of powers u/s 84C of the Bombay Tenancy and Agricultural Lands Act, 1948. At notice stage, this Court terminated the proceedings on two counts : (i) as the proceedings were initiated after a long lapse of time; (ii) the availability of other alternative remedy of appeal is not relevant and the discretion can be exercised in favour of a party even if alternative remedy has not been exhausted fully. Merely because a person, family member or in relation with or associated of a smuggler or anti-social element etc. by itself would not make such an individual infirm. The grievance expressed by each such individual citizen seeking relief that his either fundamental or Constitutional rights or any valuable rights flowing from a Statute is being jeopardized by the State machinery or any other competent authority established under the law, than the settled principle of law is that the principle of natural justice shall have to be followed and preservation of right to represent his case should be paramount consideration. So, in each case where there is an attempt of exercise of jurisdiction colourably or arbitrary or with malice in law or with any other ulterior motive is pleaded and brought to the notice satisfactorily to the Court, than in all such cases the petitioner can be granted appropriate relief. Refuse to grant any relief in such a cases may encourage abuse of powers further.

22. A petitioner when attempts to invoke the jurisdiction of this Court under Article 226 of the Constitution of India, at a notice stage or any stage prior to passing the order, should not be construed in each case that the petitioner has approached the Court at a very premature stage. The phraseology used in most of the cases refers cases which are really premature, therefore, only in case of *Alka Gadia* (supra) the Apex Court has categorized certain case. In a given case, the petitioner can be held to be justified in approaching the Court prior to passing of an order or execution of it. Merely because some other remedy is available or an appeal against the decision is provided in Statute against the order or decision by itself would not make the action of moving the petitioner under Article 226 of the Constitution, a premature action. Issuance of notice u/s 6 of the SAFEMA Act in the present case at a very belated stage or say after lapse of several years itself is a circumstance where this Court is supposed to evaluate the rival contentions as to whether the petitioner can be said to have approached the Court at a very premature stage or at a very appropriate time.

23. It is true that in SAFEMA Act there is no time-limits prescribed if competent authority has reason to believe to serve a notice for forfeiture of property u/s 6 to whom SAFEMA Act is applicable, but it would not be correct to say, considering number of decisions of this Court and the Apex Court that where there is not lime-limit one can be served with such notice can be served or action can be taken at any time and at any number of time. Mr. Patel has tried to justify the action of issuance of notice placing certain hypothetical examples, that the officer exercising the powers u/s 7 read with Section 19 of the SAFEMA Act may be negligent at relevant point of time, that he may be inefficient or a lethargic

person, so the property is not included, that such an officer cannot permit a wrongdoer to escape from the clutches of a Statute, that a nationalize and honest officer, successor in office, of such negligent or inefficient or lethargic officer may exercise the powers by issuing a fresh/second/third notice u/s 6 of the SAFEMA Act. It is submitted that there may be an element of dishonesty on the part of the officer who is supposed to include all the properties in the first notice served to the affected persons. But this logic would not help the respondents. For the sake of argument, this logic if is accepted, than any officer, successor in the office, being not honest or has any vindictive mentality may start issuing such notices to each individual under the SAFEMA Act for forfeiture of the property who is a member of family, brother, married sister, partner or even ex-servant of a COFEPOSA detinu for calling such persons and they can be harassed as many times, even after long interval, as he wishes.

24. The ratio of the decision in the case of Tata Iron and Steel Co., Limited, Bombay Vs. S.R. Sarkar and Others, can help the present petitioner and in this decision the petitioner was under the threat of recovery of sales tax again on the same turn-over on behalf of the Central Government by another State. Of course, at the relevant point of time, the right to property was one of the fundamental rights enshrined in Article 19(1)(g) of the Constitution of India, but the principle propounded by the decision is still a good law in view of the subsequent pronouncement of the Apex Court. In this case, the petitioner-company had approached the Court when it was under threat of recovery of tax. The apprehension expressed by the present petitioner is that a third notice u/s 6 of the SAFEMA Act has been issued at a belated stage though it was possible for the authority to initiate the proceedings much earlier, at least when the second notice was served in the year 1986. It is a settled proposition of law that irrespective of the over-riding effect of the statute and empowerment flowing from the Sections 6, 7 and 19 of the SAFEMA Act, the competent authority is supposed to exercise the powers in a reasonable period of time. In Para 3.5 of reply affidavit, the only stand taken by the authority is that "there is no time-limit under the SAFEMA as to when the proceedings can be initiated or re-initiated, and tor the properties acquired out of the illegally earned money within the meaning of SAFEMA can crop up at any time and after any period of time.

25. The Act does not bar the competent authority for initiating fresh proceedings on substantial properties are detected at a later stage, believed to have been acquired out of such illegal sources, but it is not the contents of the notice issued by the authority that the properties mentioned in Paras 5 and 6 are properties detected recently by the department and authority was not aware during all these years about the properties located in district Kutchh itself. Notices though runs in several pages is totally silent as to the efforts made by the competent authority from revenue authorities or City Survey department under the Revenue Collector of district Kutchh till the year 2000. Para 3.5 mentions only about the existing Statute but the authority has failed in justifying the belated action by placing cogent material or other relevant facts. I am afraid that it would not only

be improper but illegal to hold that in absence of prescription of time-limits in a special statute, the authority can exercise the powers without placing justification on record, at any time or for any number of time. In case of *State of Gujarat v. Patel Raghav Natha and Ors.*, reported in 1969 GLR 992 (SC), it is propounded that when there is no limitation prescribed in initiating action than powers should be exercised in a reasonable period of time. The "reasonable period" has been analysed and dealt with in many subsequent decisions; namely in the decision of *Bhagwanji Bawanji Patel v. State of Gujarat*, reported in 1971 GLR 156, and in case of *Bhaniben Makanbhai Tandel Vs. State of Gujarat and Another*, as well as in the decision in the case *Bhanabhai Morarbhai Solanki Vs. State of Gujarat*, . The decision of the Apex Court in the case of *Mohamad Kavi Mohamad Amin Vs. Fatmabai Ibrahim*, where the Apex Court while confirming the decision of this Court has held that the exercise of powers under the Statute where no time-limits is prescribed, should be exercised within a reasonable time. The similar ratio is found in the decision in the case of *Ram Chand and Others Vs. Union of India (UOI) and Others*, .

26. The reference may not be of much relevance but under the Income Tax Act, considering the contingencies, the reasonable period for re-opening the assessment and an assessee can be served with a notice to appear before the authority in reference to the earlier assessment made, not beyond the period of eight years. In number of decisions, this "reasonable period" has been shown to be period between 1 year to 3 to 5 years. Under the Income Tax Act, it can be said that the period is stretched to the maximum and in none of the decision cited before the Court it has been held either by this Court or by the Apex Court that such powers can be exercised even after 7-8 years. Even under the Income Tax Act, when an assessee found to have suppressed any material only than he supposed to give the details of last 8 years. When adversial proceeding has been initiated by a Government department, than at what point of time, a citizen may think that a chapter initiated against him can be treated as a closed chapter. For the sake of argument, the say of the department is accepted that the competent authority may issue such notice even after several years, than at least a notice should be reasoned one and there should be details as to the reasons or cause for late initiation of proceeding. Disclosure for delayed initiation of proceedings should precede the cause of issuance of notice. The authority is not at liberty to carve out the contents of the notice in a convenient manner, otherwise, it may hamper a right to have or enjoy the property flowing from the Constitution not only that but it would also simultaneously deprive even the Court from appreciating the say or version of the competent authority and affected party if a citizen intends to bring the notice to a touch-stone of the Court of law. Why delay is a question can be raised by a person to whom the notice is issued especially when a burden of proof or onus is on the person to whom the same is served. Absence of convincing reasons for late initiation of the proceedings irrespective of the scheme in the Statute would vitiates the notice itself. A delayed notice must speak for its own bona fide. It is rightly submitted that in such a

contingencies, the malice in law can legitimately infer. The Courts have refused to exercise the powers at show-cause notice stage when a malice in fact is only pleaded. If malice in law is inferable, than wrong cause in issuing such notice hidden behind the intention automatically peeps out. Certain statutory provisions in a special statute puts an officer to a very high pedestal but it impliedly puts the particular authority under a great obligation flowing from the very statute itself, and it is not necessary for the legislation to describe the nature of the obligation on the shoulders of such authority. The grievance of the petitioner is that he is being victimized after 17 years though earlier under the similar proceedings, his certain properties forfeited by the State free from all encumbrances. The competent authority even if satisfied and able to record reasons for service of second or third notice at belated stage, than the forming of opinion or reasons to issue such notice unless are made available, or at least brought to the notice of the affected persons, than it can be said that the notice suffers from a vices of material suppression. The affected person who is being served with notice u/s 6 should feel satisfied on receipt of the notices that the subjective satisfaction recorded by the statutory functionary is not dealing with the wrong approach or with irrelevant or extraneous matter otherwise he may be tempted to approach the High Court invoking the jurisdiction under Article 226 of the Constitution of India in spite of appearing before the authority.

27. Mr. Naik has placed reliance on a decision reported in *Shri Krishnan Vs. The Kurukshetra University, Kurukshetra*, and has submitted that there should be one time action. By referring relevant Para 7 of the decision, the Apex Court observed that the ratio of the decision of the Madhya Pradesh High Court in the case of *Premji Bhai Ganesh Bhai Kshatriya Vs. Vice Chancellor, Ravishankar University and Others*, is the correct approach showing the complete agreement with the reasons given by the Madhya Pradesh High Court. The Apex Court held that :

"once the appellant was allowed to appear at the Examination in May, 1973, the respondent had no jurisdiction to cancel his candidature for that examination. This was not a case where on the undertaking given by a candidate for fulfilment of a specified condition a provisional admission was given by the University to appear at the examination which could be withdrawn at any moment on the non-fulfilment of the aforesaid conditions. If this was the situation, then the candidate himself would have contracted out of the statute which was for his benefit and the statute therefore would not have stood in the way of the University authorities in cancelling the candidature of the appellant."

28. The facts of the cited decision are materially different and the scheme of SAFEMA where the competent authority is empowered to issue more than one notice and where there is no prescribed time-limits, than this case may not help the petitioner, however, the petitioner who is asked to face the proceedings at a very very belated stage, especially after a lapse of several years or a decade can legitimately submit that the properties for which he has been served with the notice were available for inclusion or say presumably known to the authority

when the action initially taken against them because the authority was otherwise empowered to use its machinery and the powers under Sections 16 and 18 of SAFEMA Act. When a petitioner approaches the Court saying that the authority is either victimizing him or is exercising the powers colourably than it also can be apprehended that it would be possible for the authority in all cases to exercise the powers of issuance of notice u/s 6 with a view to forfeit the property u/s 7 read with Section 19 of the SAFEMA Act after completion of the inquiry or investigation required to be made in exercise of powers under Sections 16 and 18 of the SAFEMA Act. Unless otherwise, it is brought to the notice of the Court by way of affidavit or any other convincing documentary evidence so it can be legally inferred that while issuing first notice, the authority has exercised all powers under Sections 16 and 18 of the SAFEMA Act and with all reasonable efforts certain properties were not traced.

29. It is also rightly submitted that when burden of proof or say onus is on the affected person, the unreasonable and unexplained delay in issuing notice u/s 6 of the SAFEMA Act may result into denial of right, indirectly to put up a great defence because one may lose or destroy some of the important or relevant documentary evidence. Important supporting witnesses may also die in a long spell of time, which might substantiate a claim over the property in question. So, the trend of the respondent department if is accepted or approval of that the authority is entitled to issue any type of notice at any time and for any number of time u/s 6 of the SAFEMA Act may give rise to many questions and contingencies, therefore, the same is not found acceptable. A supporting technical plea, that the petition has been filed at premature stage or at initial stage, raised by learned Senior Standing Counsel Mr. D.N. Patel is also not accepted because it would not be legal to say that each petitioner who has been served with the notice to show-cause or to put up his/her case before the statutory authority having jurisdiction over the matter shall have under compulsion to appear before it, and there is no scope for such petitioner to approach before High Court invoking the jurisdiction under Article 226 of the Constitution of India. The observations of the Apex Court in the case of Whirlpool Corporation (supra) in Paras 14 and 15 are in positive support of present petitioners. The notices in question are found invalid and suffering from vices as discussed hereinabove, and therefore, these notices shall have to be quashed and set aside.

30. In the result, both these petitions are allowed. The notice dated 8-8-2000 bearing F. No. CA/U-AHD/2(b)/M-135/2000/01/925 issued to the petitioner of petition being Special Civil Application No. 11079 of 2000 and the notice dated 8-8-2000 bearing F. No. CA/U-AHD/2(b)/M-135/2000/01/925 issued to the petitioner of petition being Special Civil Application No. 11080 of 2000 and the notice issued to Jayshreeben are found bad in law and the same are hereby quashed and set aside. The competent authority is directed not to initiate any action whatsoever in reference to the above said notices for forfeiture of the properties mentioned thereunder. Rule is made absolute accordingly in both the

petitions.