

(2008) 11 MAD CK 0130
In the Madras High Court
Case No : Writ Petition No. 31869 of 2003

Parvathi Bai

APPELLANT

Vs

The Competent Authority, SAFEM (FOP) and NDPS Acts

RESPONDENT

Date of Decision : 11-11-2008

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 31(1)
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 —
Section 10, 11, 19(2), 2(1), 2(2)

Citation : (2008) 11 MAD CK 0130

Hon'ble Judges : R. Banumathi, J

Bench : Single Bench

Advocate : S. Pichai, for the Appellant; S. Haja Mohideen Gisthi, Addl. Central Govt. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

R. Banumathi, J.—Petitioner seeks Writ of Certiorari to quash the Proceedings of the Respondent in F. No. OCA/MDS/1747/78 dated 13.10.2003 confiscating the property bearing Door No. 7/1, Richi street, Mount Road, Chennai-2 u/s 7(1) of Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 [for short SAFEMA].

2. In nutshell, case of the Petitioner is as follows:

(i) Petitioner purchased the property bearing Door No. 7/1, Richi street, Mount Road, Chennai-2 by sale deed dated 13.11.1978 from Sulaika Beevi wie of Sheik Dawood for a consideration of Rs. 18,000/- and Petitioner was put in possession of the property. Prior to purchase, Petitioner has obtained permission from Reserve Bank of India on 15.4.1978 approving the sale since Petitioner's vendor Sulaika Beevi was native of Malaysia.

(ii) It is the further case of the Petitioner that she is a bonafide purchaser for value and she has taken care to verify the title of the property before getting the

sale deed. Section 2(2)(e) protects the bonafide purchaser of any property from auction being taken under the provisions of SAFEMA . The impugned order of confiscation of the property was passed behind the back of Petitioner and that she is not aware of COFEPOSA detention order passed against Sheik Dawood. According to the Petitioner, she is in possession of the property and has paid house tax, property tax and is the rightful owner.

(iii) The impugned order is challenged on the ground that the property was purchased by the Petitioner on 13.11.1978 even before passing order u/s 7(1) by the Respondent in the year 1995. Respondent ought to have considered the fact that since Petitioner is bonafide purchaser in good faith and her right is protected under the provisions of Section 2(2)(e) of SAFEMA and the provisions of the Act itself is not applicable and excludes the transaction by bonafide purchaser and therefore, the impugned order is not sustainable.

3. Respondent has filed counter stating that notice u/s 6(1) of SAFEMA was issued to the person affected viz., Sulaika Beevi as early as on 21.10.1978. As per the provisions of Section 11 of the said Act, after issuance of notice u/s 6, any property referred in the said notice, if transferred such transfer shall be ignored and the property be subsequently forfeited to the Central Government. According to the Respondent/Department, transaction with the Petitioner having been taken place after issuance of notice u/s 6(1) of the Act to the vendor viz., Sulaika Beevi the transaction of purchase carried out by the Petitioner with the vendor is null and void.

4. Challenging the impugned order Mr. S. Pichai, learned Counsel for the Petitioner contended that Section 2(2)(e) protects the bonafide purchaser and the order of forfeiture passed u/s 7(1) of the Act behind the back of Petitioner is unsustainable. Learned Counsel for the Petitioner further urged that Petitioner is exclusively excluded from the operation of protection of the Act. Learned Counsel for the Petitioner submitted that Sulaika Beevi wife of detenu has purchased the property on 05.1.1973 long prior to COFEPOSA Act coming into force and therefore, in the absence of any live link and nexus between the property and the illegal money, Section 6(1) notice is vitiated. Learned Counsel for the Petitioner further submitted that in any event applying Section 9, explanation was not called for from the Petitioner and therefore, the impugned order cannot be sustained.

5. Drawing attention of Court to the dates and events, Mr. S. Haja Mohideen Gisthi, Addl. Central Government Standing Counsel for the Respondent contended that Petitioner has purchased the property after issuance of Section 6(1) notice and therefore by operation of Section 11, the transaction is to be ignored. Placing reliance upon Aamenabai Tayebaly and Others Vs. Competent Authority under Safema and Others, and unreported Judgment in W.P. No. 15017/1999, learned Addl. Central Government Standing contended that any transfer after issuance of notice u/s 6(1) of the Act cannot be put forth a defence of bonafide purchase, since the transaction itself is hit by Section 11 of the Act.

6. SAFEMA has been enacted to provide for the forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators and for matters connected therewith or incidental thereto. It is also true that Section 2 Sub-section (1) of the SAFEMA lays down that "the provisions of this Act shall apply only to the persons specified in Sub-section (2)". When we turn to Sub-section (2) of Section 2 we find list of persons mentioned therein at Clauses (a) to (e). In Section 2 Sub-section 2(a) and (b) are mentioned persons who are themselves detenués under the Act. Clause (c) refers to every person who is a relative of a person referred to in Clause (a) or Clause (b); Clause (d) refers to every associate of a person referred to in Clause (a) or Clause (b); while Clause (e) refers to any holder of any property which was at any time previously held by a person referred to in Clause (a) or Clause (b) unless the present holder or, as the case may be, any one who held such property after such person and before the present holder, is or was a transferee in good faith for adequate consideration.

7. Petitioner's vendor Sulaika Beevi is the wife of Shiek Dawood and is a close relative within the meaning of Section 2, Sub-section (2)(c). Property at Door No. 7/1, Richi street, Mount Road, Chennai-2 stood in the name of Sulaika Beevi. As she was the wife of detenu, u/s 6(1) of SAFEMA, notice was issued to her (dated 21.10.1978). After hearing the parties, Competent Authority passed order u/s 7(1) of SAFEMA on 24.02.1995 forfeiting the property.

8. Challenging the order of the department, Shiek Dawood and Sulaika Beevi have filed W.P. Nos. 333/1979 and 1003/1981. High Court stayed further proceedings pursuant to the notice issued to the persons affected and stay orders were subsequently vacated by the order dated 26.11.1993 and 18.7.1994 respectively. Thereafter, Section 7(1) order was passed on 24.2.1995.

9. A Constitution Bench of Supreme Court in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, , while considering the validity of the provisions of SAFEMA , it was held as follows:

44. ... The relatives and associates are brought in only for the purpose of ensuring that the illegally acquired properties of the convict or detenu, acquired or kept in their names, do not escape the net of the Act. It is a well-known fact that persons indulging in illegal activities screen the properties acquired from such illegal activity in the names of their relatives and associates. Sometimes they transfer such properties to them, may be, with an intent to transfer the ownership and title. In fact, it is immaterial how such relative or associate holds the properties of convict/detenu ? whether as a benami or as a mere name-lender or as a bona fide transferee for value or in any other manner. He cannot claim those properties and must surrender them to the State under the Act. Since he is a relative or associate, as defined by the Act, he cannot put forward any defence once it is proved that that property was acquired by the detenu ? whether in his own name or in the name of his relatives and associates....

Holding that such provisions had been enacted to counteract several devices that may be adopted by the persons concerned, it was stated:

By way of illustration, take a case where a convict/detenu purchases a property in the name of his relative or associate ? it does not matter whether he intends such a person to be a mere name lender or whether he really intends that such person shall be the real owner and/or possessor thereof ? or gifts away or otherwise transfers his properties in favour of any of his relatives or associates, or purports to sell them to any of his relatives or associates ? in all such cases, all the said transactions will be ignored and the properties forfeited unless the convict/detenu or his relative/associate, as the case may be, establishes that such property or properties are not "illegally acquired properties" within the meaning of Section 3(c). In this view of the matter, there is no basis for the apprehension that the independently acquired properties of such relatives and associates will also be forfeited even if they are in no way connected with the convict/detenu. So far as the holders (not being relatives and associates) mentioned in Section 2(2)(e) are concerned, they are dealt with on a separate footing. If such person proves that he is a transferee in good faith for consideration, his property ? even though purchased from a convict/detenu ? is not liable to be forfeited. It is equally necessary to reiterate that the burden of establishing that the properties mentioned in the show-cause notice issued u/s 6, and which are held on that date by a relative or an associate of the convict/detenu, are not the illegally acquired properties of the convict/detenu, lies upon such relative/associate. He must establish that the said property has not been acquired with the monies or assets provided by the detenu/convict or that they in fact did not or do not belong to such detenu/convict.

10. A notice is required to be issued under S.6 where the Competent Authority has reason to believe that any of such properties is illegally acquired property and S.7 provides for the forfeiture of the property.

11. Section 8 of SAFEMA stipulates burden of proving that any property specified in the notice served u/s 6 is not illegally acquired would be on the person affected. Section 8 of SAFEMA reads as under:

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

12. A combined effect of Section 6(1) and Section 8 is that Competent Authority should have reason to believe that the properties ostensibly standing in the name of the person to whom the act applies or illegally acquired properties, he can issue notice to such a person. Thereafter, the burden of proof that such property is not illegally acquired property will be upon the person to whom notice has been issued.

13. In terms of Section 11 of SAFEMA, transfer of any property pending proceedings u/s 6 or 10 of the Act and prior to the order of forfeiture shall be

treated as null and void. Section 11 reads as under:

11. Certain transfers to be null and void ? Where after the issue of a notice u/s 6 or u/s 10, any property referred to in the said notice is transferred by any mode whatsoever such transfer shall, for the purposes of the proceedings under this Act, be ignored and if such property is subsequently forfeited to the Central Government u/s 7, then, the transfer of such property shall be deemed to be null and void.

14. In the present case, show cause notice u/s 6(1) of the Act was issued on 21.10.1978 to the effect that the properties No. 7/1, Richi street, Mount Road, Chennai-2 sought to be forfeited and illegally acquired money of the detenu.

15. In the present case, the following dates are relevant to be noted:

COFE POSA Act came into force :13.12.1974

SAFEMA came into force:25.01.1976

Date of purchase by Sulaika Beevi:05.01.1973

Section 6(1) Notice issued :21.10.1978

Sale Deed infavour of Writ Petitioner:13.11.1978

16. Sheik Dawood was the COFEPOSA detenu. COFEPOSA Act itself came into force on 13.12.1974. Property in Door No. 7/1, Richi street, Mount Road, Chennai-2 was purchased by Sulaika Beevi on 05.01.1973. much prior to COFEPOSA enactment.

17. In AIR 2007 SC 1057 P.P. Abdulla and Anr. v. The Competent Authority and Ors. Supreme Court has held that when there was nothing to show any link or nexus between the properties sought to be forfeited and the alleged illegally acquired money, notice of forfeiture is not valid.

18. Show cause notice u/s 6(1) was issued on 21.10.1978. According to the Respondent as per the provisions of Section 11 of the Act where after issuance of notice u/s 6(1), any property referred to in the said notice is transferred by any mode whatsoever, such transfer shall be ignored for the purposes of proceedings under the Act and the transfer of such property shall be deemed to be null and void.

19. Sulaika Beevi purchased the property on 05.1.1973. Section 6(1) notice was issued to her on 21.10.1978. Writ Petitioner purchased the property on 13.11.1978. Pointing out the dates, learned Counsel for the Respondents contended that the sale in favour of the Petitioner dated 13.11.1978 is after issuance of show cause notice under Section 6(1) and therefore, the transfer of property in Richi street, Mount Road, Chennai-2 is hit by Section 11 of the Act. It was therefore contended that it is not open to the Petitioner to contend that she is a bonafide purchaser in good faith.

20. Learned Counsel for the Respondents further contended that Writ Petitioner and her husband Sheik Dawood have already filed two Writ Petitions ? W.P. Nos. 333/1979 and 1003/1981 which were dismissed by the High Court. Learned Counsel for the Respondent also submitted that Petitioner's vendor Sulaika Beevi and Sheik Dawood have unsuccessfully challenged Section 6(1) notice and also contested the proceedings initiated under SAFEMA. Learned Counsel for the Respondents would further submit that Sheik Dawood and Sulaika Beevi hotly contested the SAFEMA proceedings and rejecting their claim, Section 7(1) order was passed forfeiting the property and while so, it is not open to the Petitioner to challenge Section 7(1) order and proceedings thereon. Having purchased the property after issuance of Section 6(1) notice, it is not open to the Petitioner to contend that Writ Petitioner is a bonafide purchaser for good faith.

21. Placing reliance upon Aamenabai Tayebaly and Others Vs. Competent Authority under Safema and Others, learned Counsel for the Respondent contended that all transactions post issuance notice u/s 7 are null and void and while so, Petitioner cannot claim any locus standi to resist the proceedings before Competent Authority, as they are not at all recognised as affected person under law.

22. In Aamenabai Tayebaly's case, the Appellant was relative of COFEPOSA detenu, her husband, the Competent Authority issued a notice to her u/s 6(1) of SAFEMA in connection with the disputed property herein. After hearing her, the Competent Authority passed an order u/s 7 of SAFEMA forfeiting the said property on 12th October 1977. It is this order which was challenged by her in the Bombay High Court. She had undertaken not to alienate the said property and still in flagrant breach thereof she sold the property in 1981 to purchaser. Apart from the fact that the said transaction had exposed purchaser's vendor to contempt proceedings and she was punished. In such circumstances, the Supreme Court has held that it would be too much for the Appellant to contend that he was a bonafide purchaser for value without notice. In the said case, there was nothing to show that the purchaser had not made an enquiry at the relevant time when she entered into transaction. In such circumstances, Supreme Court has held that the transaction or purchase was hit by Section 11 of SAFEMA. The facts of the present case stand entirely on different footing.

23. Of course, sale deed dated 13.11.1978 is after issuance of notice u/s 6(1) [dated 21.10.1978]. But it appears, u/s 31(1) of Foreign Exchange Regulation Act, parties have made preparatory steps for execution of sale deed much prior to issuance of notice u/s 6(1) of SAFEMA [dated 21.10.1978]. Reserve Bank of India has granted permission to Sulaika Beevi for selling her house bearing Door No. 7/1, Richi street, Mount Road, Chennai-2 to the Petitioner for Rs.18,000/- by the proceedings dated 15.4.1978.

24. By perusal of the sale deed, it is seen that Petitioner has paid the sale consideration on various dates commencing from January 1978, 2nd advance on 06.2.1978, 3rd advance on 10.7.1978, 4th advance on 06.4.1978 and 5th

advance on 08.11.1978. Though, sale deed was executed on 13.11.1978, parties concerned seem to have negotiated for sale long prior to issuance of show cause notice u/s 6(1) of the Act. As pointed out earlier, Reserve Bank of India has granted permission for sale deed by its proceedings dated 15.4.1978 much earlier to Section 6(1) notice. Property was purchased by Sulaika Beevi much prior to passing of COFEPOSA Act. Though, sale deed was after issuance of Section 6(1) notice, as pointed out earlier, preparatory steps were done earlier. The contention of the Petitioner is that she is a purchaser for consideration in good faith is well supported by facts and circumstances of the case.

25. Of course, the Competent Authority has passed the order u/s 7(1) of SAFEMA (dated 24.2.1995) observing that Sulaika Beevi has not satisfactorily explained the source of her consideration for the purchase of house bearing Door No. 7/1, Richi street, Mount Road, Chennai-2. That order was challenged by Sheik Dawood before the Appellate Authority in F.P.A. No. 46/MDS/95. Later the appeal was dismissed for non-prosecution [02.02.1999]. Of course, Petitioner's vendor and her husband have unsuccessfully challenged the order of forfeiture passed u/s 7(1) of SAFEMA. By the time final order u/s 7(1) of SAFEMA came to be passed on 24.2.1995 and when the appeal came up for hearing, Petitioner's vendor and her husband might have lost the interest in pursuing the matter. The fact that Petitioner's vendor have unsuccessfully fought out the matter before the Authorities would not invalidate the sale deed in favour of the Petitioner.

26. Based on the forfeiture order dated 24.2.1995 u/s 7(1) of SAFEMA, the impugned order (13.10.2003) was passed vesting ownership of property with the Central Government and to the effect that the property was taken over by the Competent Authority u/s 19(2) of SAFEMA. Though, Section 7(1) order forfeiting the property was passed, certain vital aspects of the case would exclude the transaction from being hit u/s 11 of the SAFEMA. Property in Door No. 7/1, Richi street, Mount Road, Chennai-2 was purchased by Sulaika Beevi on 05.1.1973 much prior to the COFEPOSA Act which came into force on 13.12.1974. As such the purchase of property on 05.1.1973 was not in contravention of any law then in force. Though, Court is not sitting as Court of appeal against the order u/s 7(1) of SAFEMA, it may be noticed that the property cannot be said to be "illegally acquired property" within the meaning of Section 3(c) of the Act.

27. Placing reliance upon M. Abdul Rahiman Vs. Union of India (UOI) and Others, learned Counsel for the Respondent contended that person claiming as a transferee of a property is not entitled to plead bonafide transferee for valuable consideration. Referring to non obstante clause in Section 24 of the Act and that person claiming as transferee of property is not entitled to plead that he is a bonafide transferee for valuable consideration. In the said decision, Kerala High Court has held as follows:

9. Therefore, no person claiming as a transferee of a property hit by the embargo of Section 11 of the Act, is entitled to plead that he is a bona fide transferee, for valuable consideration, and that therefore the said property may

be saved from the effect of Sections 7 and 11 of the Act. Hence, Ext. P2 transaction is null and void in terms of Section 11 of the Act.

12. While Section 9(1) provides for an order of fine in lieu of forfeiture, recourse to that provision can be made only in relation to any property, the part of the source for which, being less than one half of the income, earnings or assets, with which such property was acquired, has not been proved to the satisfaction of the competent-authority. An order u/s 9(1) giving an option to pay a fine in lieu of forfeiture is therefore one that would depend upon the identity of the earnings and assets with which that property was acquired. This is not a matter which could be raised or decided at the instance of any person other than the one against whom proceedings for forfeiture of property are taken. The subject-matter of Section 9(1) is intricately connected with the subject-matter of the decision making process referable to Sub-sections(1) and (2) of Section 7 in Aamenabai Tayebaly and Others Vs. Competent Authority under Safema and Others, the Apex Court had held that a transfer subsequent to a notice u/s 6(1) shall be ignored in terms of the Act and such transfer will become null and void and that after the property is subsequently forfeited to the Central Government, it cannot be resurrected by recourse of Section 9, imposing fine in lieu of forfeiture.

28. Learned Counsel for the Respondent placed reliance upon Aamenabai Tayebaly and Others Vs. Competent Authority under Safema and Others, and contended that Petitioner cannot claim to have any locus standi to resist the proceedings before Competent Authority as she is not at all recognized as affected person under law. Learned Counsel for the Respondent also placed reliance upon unreported decision in W.P. No. 11218/1994 decided on 17.7.2001.

29. Learned Counsel for the Respondent further submitted that earlier Petitioner and her husband filed W.P. Nos. 1003/1981 and 333/1979 before the High Court. High Court stayed the further proceedings and subsequently vacated the stay orders on 26.11.1993 and 18.7.1994 respectively. Thereafter, the Competent Authority has decided the matter in 1995 by passing the impugned order u/s 7(1) of the Act. At the time when passing of order u/s 7(1) of the Act, the authorities had not chosen to send notice to the Petitioner.

30. Placing reliance upon the above decisions, learned Counsel for the Respondent contended that it is not open to the Petitioner to claim that he is a bonafide purchaser in good faith. This contention does not merit acceptance. As discussed earlier, sale consideration was paid much prior to the registration of the sale deed. For obtaining permission u/s 31(1) of Foreign Exchange Regulation Act, parties have sent letter even on 29.3.1978 and Reserve Bank of India granted permission by its proceedings dated 15.4.1978. Property itself was purchased prior to COFEPOSA Act. In such circumstances, applying the ratio of the above decisions, it cannot be held that the sale deed in favour of the Petitioner is hit u/s 11 of the Act.

31. In the result, the Writ Petition is allowed and the impugned order dated 13.10.2003 passed by the Respondent is set aside.