(2009) 03 DEL CK 0268

In the Delhi High Court

Case No : Writ Petition (C) 4014 of 1997

Rakesh Kr. Kapoor and Others APPELLANT

Vs

Competent Authority and Others RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 4, 6, 6(1), 7(3), 8

Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 — Section 2(1), 2(2), 3, 3(1)

Citation : (2009) 03 DEL CK 0268

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Jatin Zaveri, for the Appellant; Baldev Malik, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—The petitioners in these writ proceedings question an order dated 27.08.1997 made by the appellate Tribunal under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereafter called "SAFEMA"). The petitioners also question an order dated 11.09.1997 whereby the first respondent required them to surrender and deliver the properties that were subject to SAFEMA proceedings within 30 days.

2. Briefly the facts are that the son of Late Smt. Dayawanti Devi, Mr. Ashok Kapoor was detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereafter called "COFEPOSA") on 28.08.1978. It is alleged by the respondents that this was after a disclosure by one Mr. R.K. Katyal, upon his arrest in Bombay by the Customs authorities on the allegation of his possessing smuggled goods worth Rs. 4.86 lakhs. Mr. R.K. Katyal allegedly stated that he was only a carrier of Mr. Ashok Kapoor. Mr. Ashok Kapoor was released from detention under the COFEPOSA on 29.08.1979. On 27.09.1980, the competent authority under the SAFEMA issued a notice to Mr. Ashok Kapoor

and the petitioner, his mother, requiring them to explain why action should not be taken towards forfeiting the listed properties. The notice containing facts, furnished to the petitioner alleged that Mr. Ashok Kapoor was a detenu and subject to provisions of SAFEMA, and that information was received from the Assistant Collector of Customs pursuant to enquiries made by the competent authority as well as its inspectors. The competent authority alleged that the business in the name of M/s Tanni Trading International, started in Sham Singh Building, Delhi Cantonment was a proprietary concern of Smt. Kapoor. She had given a General Power of Attorney (GPA) in favour of the detenu Mr. Ashok Kapoor. It was alleged that there was no source of initial investment in the business. The competent authority, therefore, stated that it had reasons to believe that the said property, i.e. Sham Singh Building, Gopinath Bazar, Delhi Cantonment was liable to forfeiture as it was hit by Section 3(1)(c)(iv) of SAFEMA.

3. The petitioner, after seeking details, replied stating that she was a general insurance agent of the Oriental Fire and General Insurance Company, for the previous 20 years. She also contended being partner of M/s. Kapoor Trading International, situated at 3/78, Sham Singh Building, with effect from 01.04.1975 through a partnership deed. According to her, the firm comprised of three persons which included herself, her son Mr. Ashok Kumar Kapoor and a minor, also her son. It was claimed that she had invested Rs. 10,000/- in cash towards capital in the firm, out of the savings kept with her. In the proceedings before the SAFEMA, she contended having purchased the property, i.e. Sham Singh Building in 1972 by a sale deed dated 29.03.1972 for Rs. 15,000/-. It was submitted that the property was purchased out of the income earned by her as an insurance agent. She sought to place reliance on the Income Tax Returns for the years 1977-78, 1978-79 and 1979-80; copies of which were placed on the record of the competent authority.

4. The late Smt. Kapoor, in addition to the Income Tax returns and assessment orders also placed reliance on letters written by the Oriental Fire and General Insurance Company dated 24.09.1983 stating that she had been in the said office and was acting as its agent, since December 1959 and had been placing business with it. She also relied on another letter dated 05.05.1983 by the United India Insurance Company, which stated that the certificate demanded with regard to her working for British India General Insurance Company Limited could not be issued since that concern had merged with United India Insurance Company Limited, upon nationalization.

5. During pendency of proceedings before the competent authority, Smt. Dayawanti Kapoor died on 25.09.1984; she was accordingly substituted by her husband, Shri Vishwanath Kapoor, who filed a reply as her legal representative. Shri V.N. Kapoor died on 14.12.1993 and the present petitioners stepped into the proceedings as legal representatives of Smt. Kapoor. Mr. Ashok Kapoor too died on 11.04.1985.

6. The competent authority directed forfeiture of the property as well as the assets of the partnership firm, M/s. Taani Trading International. He reasoned that the noticee, Mrs. Dayawanti Kapoor was unable to establish lack of any nexus with the detenu, to escape the clutches of SAFEMA. According to the competent authority, there was insufficient evidence to establish that the noticee, a housewife had adequate independent means or independent income to purchase property or invest in business. The relevant portion in the order is as follows:

13. From the contents of both the letters quoted above it is evident that extent of A.P.s income from insurance business and earnings therefrom have not been proved. As a matter of fact these are not even the pieces of secondary evidence which could be relied upon while considering the explanation of sources of investment in the property at 3/78, Sham Singh Building, Gopinath Bazar, Delhi Cantt., Delhi.

14. Regarding availability of cash with her for investment in the house property and in the concern M/s. Tani Trading International no evidence has been furnished on the basis of which the claim of investment from legal sources could be accepted on principle of preponderance of probability. Savings and availability of cash of Rs. 10,000/- and Rs. 15,000/- as contended in the submissions dated 13.5.1983 is difficult to accept without any satisfactory proof and evidence regarding the same. Rs. 10,000/- and Rs. 15,000/- may appear to be not very considerable amounts presently. But at a time when their availability is claimed with the A.P. without any satisfactory evidence acceptance of the claim would not be justifiable. Hence, it is held that right, title and interest in the assets and business undertaking in the name and style of M/s. Tani Trading International, 3/78, Sham Singh Building, Gopinath Bazar, Delhi Cantt., Delhi is property illegally acquired in the late A.P.''s name by her late detenue son. Regarding nexus between the illegal earnings from the smuggling activities of the late detenue (A.P.''s son) and the business in the name of M/s. Tani Trading International, it may be kept in view that the same is reasonably believed to have been started by the late detenue giving his wife Smt. Tani Kapoor''s name. The late A.P. appears to have been made its proprietor only to provide an external fa?ade. The business in the name of M/s. Tani Trading International commenced in the vicinity of the period when the late detenue had started indulging in smuggling activities for which subsequently he was detained. In view of failure to discharge the burden u/s 8 of the Act all the assets of the A.P.''s proprietary concern referred to in the schedule of notice u/s 6(1) deserve forfeiture under the Act. The ascertain the assets of M/s. Tani Trading International reference has been made to a latest balance-sheet of the concern available on record as on 31.3.1979 in which following assets are clearly reflected:

Assets Amount House property at 3/78 Sham Singh Building, 15,450.00 Gopinath Bazar, Delhi Cantt, Delhi. Loan to Ashok Kapoor 2,07,107.00 Fixed Deposit 22,457.50 Oriental Fire & General Insurance Co. 445.37 Incentive

Receivable 3,495.85 Kapoor Trading International 15,146.00 All India Travel Service 400.00 Syndicate Bank C/A Bombay 96.00 Syndicate Bank S/B A/C 2,814.20 Syndicate Bank C/A 173.86 Cash-in-Hand 54,385.78

15. In view of my above findings, observations and discussions I hold that right, title and interest of the late A.P. in the assets of the business in the name and style of M/s Tani Trading International, 3/78, Sham Singh Building, Gopinath Bazar, Delhi Cantt. Delhi are illegally acquired properties from smuggling activities in A.P.''s name. Hence, in view of the provisions of Section 3(1)(c)(i) to (iv) the same are hereby forfeited u/s 7(3) of the Act without any encumbrances to the Central Government.

7. Feeling aggrieved, the petitioners preferred an appeal to the designated appellate authority. By the order dated 27.08.1997, the appellate authority affirmed the competent authority''s order. The appellate authority affirmed the reasoning of the competent authority, stating that it was not satisfied why Mrs. Dayawanti Kapoor could not use a regular bank account for depositing her savings. According to the appellate authority, the onus of proving that there was no illegality vested with the affected person, i.e. the noticee. It reasoned that in the present case, she did not discharge that function, which lay heavy due to Section 8 of the Act. It, therefore, rejected the appeal.

8. The petitioners in these proceedings submit that the approach of the appellate authority as well as the competent authority are contrary to law. They principally rely upon the special Nine-Bench ruling of the Supreme Court in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, . It is contended that even though "related persons" and "associates" are defined under the SAFEMA; the intent of the enactment was not to strike at the independently acquired property of relatives, - even if by illegal means. It was emphasized during the hearing, that the law declared by Supreme Court is clear enough; it is only such property in respect of which a nexus can be established with the activities of the detenu, that can be subject to forfeiture.

9. It was contended that the competent authority as well as the appellate authority misdirected themselves and approached the issue as if the onus of disproving lay on the petitioners. It was contended that even though Section 8 enacts the presumption - (provided, of course, that the essential facts are clearly brought out), the kind of onus which is expected of the noticee to discharge is not of the same character as in the case of a prosecution in criminal case. It was, therefore, contended that in order to for discharge of the presumption, the noticee, i.e. the relative or the associate has to merely give a plausible explanation, though not an entirely foolproof one.

10. It was also contended that the notice and particulars furnished by the respondents in this case fell short of the requisite standards set out u/s 6. Learned Counsel relied upon the decision reported as Fatima Mohd. Amin (Dead) through LR. Vs. Union of India (UOI) and Another, . It was further contended that

the appellate authority fell into error in completely ignoring the Income Tax assessment orders as well as the documents and certificates furnished in order to prove that the late Mrs. Dayawanti Kapoor was indeed possessed of legitimate and independent source of livelihood.

11. The respondents contend that the impugned order is fair and justified. It is stated that though Mrs. Dayawanti Kapoor claimed to have purchased the property in 1972, yet, she did not take reasonable steps to file Income Tax returns or disclose it any time prior to 1978. It was further contended that the statutory presumption enacted u/s 8 has to be convincingly dispelled. Learned Counsel submitted that Mrs. Dayawanti Kapoor''s explanation that she was an insurance agent was not acceptable since the competent authority noticed that the income revealed in the assessment orders was very meager. It was also contended that the source of Mrs. Dayawanti Kapoor''s income for starting business, M/s Tani Trading International was completely vague and unknown. In these circumstances, learned Counsel submitted that the mere mention about ownership of house property in the returns filed in subsequent years did not lead to the inference that the property was legitimately produced. Under the circumstances, the authorities acted within their jurisdiction in concluding as they did that the property was held benami or for the benefit or on behalf of the detenu by his mother, Mrs. Dayawanti Kapoor.

12. The preceding discussion would reveal that the occasion for issuing of notice u/s 6 was the detention of Mr. Ashok Kapoor, Mrs. Dayawanti''s son. The fact that the property was purchased in 1972; that the proprietary concern, M/s. Tani International was located in the said property are not disputed at all. What is to be seen is that whether the authorities acted within the bounds of law in concluding that the said property belonged to the detenu and not Mrs. Dayawanti Kapoor. In this regard, it would be useful to notice that Section 6, (which deals with the procedure before forfeiture under SAFEMA can be ordered.) visualizes a situation whereby not only a detenu property can be subject to proceedings but also in respect of properties held on behalf of the detenu by his relatives or associates. Section 3(c) defines "illegally acquired property" to mean any property acquired by such person, whether before or after the commencement of the Act, wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to any prohibited activity. Section 2(1) enacts that SAFEMA will apply only to persons subject to Sub-section (2). The law enumerates extensively the category of individuals over whom the SAFEMA extends. Section 2(2)(c) states that every person who is a relative of a person referred to u/s 2(2)(1) is also covered by the Act. Explanation 2 amplifies the intent and spells out that spouses, lineal ascendants or descendants of persons, which include parents, are covered. Section 6, which mandates notice of forfeiture reads as follows:

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, 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 persons 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) Whereas 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.

13. In Amrut Lal (supra), the Supreme Court was concerned with the validity of SAFEMA. Dealing with the arguments that the enactment is wide in terms and would authorize forfeiture of properties which belong to relatives, the Court alleged such apprehensions and clarified that independently acquired assets - even if otherwise illegal, cannot be subjected to forfeiture. It was stated that the essential pre-condition for forfeiture in all these cases was that there had to be an active link between the properties and the affected person or detenu, the burden of disproving it lying on the relative and associate. It would be essential to extract the observations of Supreme Court in this regard, which are as follows:

XXX XXX XXX XXX The idea is to reach his properties in whosoever''s name they are kept or by whosoever they are held. The independent properties of relatives and friends, which are not traceable to the convict/detenu are not sought to be forfeited nor are they within the purview of SAFEMA.

XXX XXX XXX XXX It would thus be clear that the connecting link or the nexus, as it may be called, is the holding of property or assets of the convict/detenu or traceable to such detenu/convict. Section 4 is equally relevant in this context. It declares that "as from the commencement of this Act, it shall not be lawful for any person to whom this Act applies to hold any illegally acquired property either by himself or through any other person on his behalf." All such property is liable to be forfeited. The language of this section is indicative of the ambit of the Act.

XXX XXX XXX XXX The idea is to forfeit the illegally acquired properties of the convict/detenu irrespective of the fact that such properties are held by or kept in the name of or screened in the name of any relative or associate as defined in the said two Explanations. The idea is not to forfeit the independent properties of such relatives or associates which they may have acquired illegally but only to reach the properties of the convict/detenu or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties.

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 of 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.

XXX XXX XXX XXX We do not think that Parliament ever intended to say that the properties of all the relatives and associates, may be illegally acquired, will be forfeited just because they happen to be the relatives of associates of the convict/ detenu. There ought to be the connecting link between those properties and the convict/detenu, the burden of disproving which, as mentioned above, is upon the relative/associate. In this view of the matter, the apprehension and contention of the petitioners in this behalf must be held to be based upon a mistaken premise

XXX XXX XXX XXX

14. In the present case, the authorities were unpersuaded by the petitioner''s submission that the property, acquired in 1972 was through her independent income. The competent authority as well as the appellate forum concluded that her inability to produce any bank records or other proof, naturally led to the consequence of the presumption - enacted u/s 8 remaining unshaken. It is a matter of record that the petitioner was able to produce a certificate by the Oriental Fire and General Insurance Company stating that she had been working since 1959 as an agent. Though the competent authority and appellate authority took note of this, they deemed it insufficient and unconvincing. That part, the petitioner had also relied on successive returns for the period 1975, 1976, 1977-78 and 1978-79, each of which disclosed that she had declared her income, which was assessed to the satisfaction of the Income Tax authorities. Of course, Section 21 of the Act states that findings in other laws are not conclusive for proceeding under the Act. Nevertheless, the authorities under SAFEMA, cannot completely brush aside such findings and assessments which have an intrinsic bearing on the issues which they are expected to adjudicate fairly. In the present case, the income tax authorities were furnished with the same material but found no difficulty in accepting them and finalizing the assessments.

15. The burden of cast upon the individual by Section 8 is that a property mentioned in the notice served u/s 6 is not illegally acquired. It would be worthwhile here to notice that in such cases, the presumption, arises as it were, by virtue of notice u/s 6. Aside from the requirement of Section 6, the burden -

no doubt, a statutory one, is only in the nature of shifting of the onus but it does not amount to presumption in law. Were such the position, Parliament would have spelt it out in clearer terms. The Court is of the opinion that in such cases, the reasonable construction of Section 8 would be to require the individual to whom the notice is issued u/s 6 to show some plausible explanation vis-?-vis the acquisition of property. This is apart from the judgment in Amrut Lal (supra) where the Court stated that even otherwise illegally acquired property would not be subject matter of SAFEMA. Such a structure, according to this Court, is consistent with the proposition of Section 8 and does not allow or impose a heavy burden upon the notice ;it only requires the person concerned to show a plausible though not an entirely acceptable explanation. After all, the properties may have been acquired much before the coming into force of the Act.

16. Keeping the above in mind, and the law declared in Amritlal''s case, one has to see whether the late Smt. Dayawanti Devi had furnished a plausible explanation. The tribunal endorsed the forfeiture, expressing skepticism with the lady''s explanation, saying that no reason was shown why she did not keep her savings in a bank account. Here, the Court is of opinion that such inference could not have been the basis of discounting the evidence placed by the late Smt. Dayawanti, by way of the insurance company''s certificate. The competent authority and appellate authority do not doubt the veracity of that document, yet, inexplicably, give it no weight. Likewise, the income tax assessment orders - though not conclusively binding - are completely taken out of reckoning. This approach is exactly what was cautioned against in Amritlals case, i.e that relatives'' properties, independently acquired, cannot be forfeited. Overall, the approach and findings of the lower authorities discloses disbelief and then great reluctance to take into account anything amounting to plausible explanations for the acquisition of the properties. This Court is of the view that such approach and findings are unsustainable and the reasons given for acquiring the property, as from independent means, perfectly reasonable.

17. In view of the above, the Court is of the opinion that the findings of the competent authority as well as the appellate authority, rejecting the petitioner''s explanations which are perfectly plausible, cannot be sustained. Additionally, this Court is of the view that the notice issued to the petitioner falls short of the standard required u/s 6, as held in Fatima Mohd. Amin''s case (supra). For the above reasons, the impugned order so far as it pertains to the property forfeited stands quashed.

18. The writ petition has to therefore succeed; the order of forfeiture, in respect of Sham Singh Building, Gopinath Bazar, Delhi, as affirmed by the appellate authority is quashed.

19. Rule made absolute. No costs.

