(2005) 02 KL CK 0086

In the High Court Of Kerala

Case No : O.P. No. 15835 of 1996

Sajitha APPELLANT

Vs

Competent Authority RESPONDENT

Date of Decision : 16-02-2005

Acts Referred:

Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 — Section 12A, 12A(3), 12A(6), 18, 2

Citation : (2005) CriLJ 3255 : (2005) 3 ILR (Ker) 327 : (2005) 3 KLT 637

Hon'ble Judges : M.N. Krishnan, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : A. Antony, Leelamma Antony, Tomy Paul and Mathew Skaria, for the Appellant; Thomas Mathew Nellimoottil and Roy Chacko, Government Pleader, for the Respondent

Judgement

K.S. Radhakrishnan, J.—First petitioner Sajitha is the wife of V.H. Subair, detenu No. 739 who had undergone imprisonment under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, in short COFEPOSA. Petitioners 2 and 3 are the brothers of the detenu. They have approached this court seeking a writ of certiorari to quash Ext. P7 order issued by the Competent Authority u/s 7(1) of Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, in short SAFEMFOPA, and Ext. P8 order passed by the Appellate Tribunal for Forfeiture of Property, New Delhi and also for other consequential reliefs.

2. Petitioner has answered the description of a person within the meaning of Section 2(2)(c) read with Explanation (ii) thereto of SAFEMFOPA. Consequently proceedings under the Act were initiated against all the aforesaid persons after issuing separate notices u/s 6(1) of the Act dated 15.3.1988 for forfeiture of the following properties.

-- Sl. No. Description of property Name of present holder of property

--- 1. Two storeyed building bearing door No. VI/1211 and VI/1212 with land measuring 3 7/8 cents in S. No. 67 of Mattancherry Village, Cochin Smt. Sajitha 2. Building No. C.C.VI/1213 to 1222 and land measuring 3. 585 cents in S. No. 67 Mattancherry Village, Cochin Smt. Sajitha Sri. H. Habeeb Sri. H. Salim Sri. Ibrahim ---

Opportunities were given to all of them to explain the sources. First petitioner gave the following explanation.

(i) She purchased the property as per document No. 3165 and 3281 of Cochin Sub Registry in October 1986 for Rs. 51,000/- again on 22.4.1987, another property for Rs. 1,26,000/- out of which her share was for Rs. 31,500/- and thus the total value of properties owned by her was Rs. 82,500/-.

(ii) Her father Sri A. Abdul Rahimankutty gave Rs .20,000/- by Demand Draft; her brother Sri A. Azad gave Rs. 15,000/- and another brother Sri A. Harris gave Rs. 13,000/- who were working with Essar Contractors, Rs. 5,000/- each was given by her brother-in-laws Sri H. Salim, and Sri H. Ubaid, Sri A. Selvam, tailors and a sum of Rs. 17,000/- received from Sri V.K. Hamza, Textile Merchant, who occupied one of the rented buildings. Confirmation letters from Sri V.H. Saleem, Sri V.H. Ubaid, Sri V.K. Hamza, Sri A. Selvam and Sri P.K. Sebastian were filed.

Second petitioner in his sworn statement dated 6.5.1988 and other replies stated that he was a coolie getting Rs. 50 to 80 per day and afterwards he had worked as casual tally Clerk in the year 1980 and worked as such till November 1984 and after that he became permanent. He was earning Rs. 40/- per shift and was not married at that time and was able to save considerable amount. His savings from 1980 to 1986 was Rs. 18,800/- out of which he had spent Rs. 15,181 towards redemption of jewellery he had purchased and pledged earlier and that he sold the jewellery along with another jewellery item all weighing 15 sovereign to one Y. Jamaluddin. Third petitioner in his sworn statement as well as other replies stated that he had one-fourth share in the property, that he an estate broker in a small way for six years and also ventured hire scrap business and saved Rs. 6,000/- out of the said activities and that he received an advance of Rs. 20,000/- from M/s. ABT Parcel Service for letting out part of the building, that he also availed of a Bank loan of Rs. 10,000/- from Cochin Service Sahakarana Bank Limited. Explanation submitted by him was considered by the competent authority in detail and ultimately passed order u/s 7(1) of the Act forfeiting the building bearing door Nos. VI/1211 and VI/1212 with land measuring 3-7/8 cents situated at survey No. 67 of Mattancherry village, Cochin owned by Smt. Sajitha W/o Shri V.H. Subhair. Building No CC VI/1213 to 1222 and land measuring 3.585 cents in survey number 67 in Mattancherry village, Cochin, jointly owned by Smt. Sajitha, Shri Ibrahim, Shri Salim and Shri Habeeb each having right, title and interest of l/4th share was also forfeited. Competent authority granted opportunity to all of them to file appeal. Consequently all of them jointly preferred appeal before the Appellate Tribunal. Appellate Tribunal confirmed the finding of the competent authority and dismissed the appeal.

3. Counsel appearing for the petitioners Sri Antony submitted that the entire proceeding is vitiated since no notice u/s 6(1) was served on the detenu. Counsel also submitted that there was considerable delay in initiating proceedings under the SAFEMFOPA. Counsel also submitted that the detenu had not involved in smuggling activities but only financing the smugglers.

4. Counsel appearing for the competent authority Sri Thomas Mathew Nellimoottil on the other hand contended no notice was contemplated to the detenu u/s 6(1) of the Act. Counsel also submitted that no time limit has been prescribed under the Act for proceeding against the properties procured by one of the relatives of the detenu. With regard to the contention that no notice was issued to the detenu, Tribunal held as follows:

"However, we do not see any merit in the argument that non issue of a copy of the notice also to the detenu will render the proceedings against other persons to nullity if they are otherwise covered by the provisions of the Act. In the present case, the appellants respectively being wife and brothers of the detenu, are his very close relatives and are fully covered by Section 2(2)(c) read with Explanation 2 in the said section."

In the counter affidavit filed by the fourth respondent it has been stated as follows:

"The plea of the petitioner that no notice u/s 6(2) of the Act was issued to the detenu and that hence the proceedings are bad in law is not correct. As a matter of fact, the very same plea was advanced before the second respondent who had categorically rejected it vide their order in FPA No. 1/MDS/95 dt. 6.9.96 on the ground that the persons are absolutely covered by Section 2(2)(c) of the Act and thus there is no infirmity in the proceedings. In view of the fact that petitioners are close relatives of the detenu and are fully covered u/s 2(2)(c) of the Act, non issue of notice to the detenu u/s 6(2) of the Act would not vitiate the proceedings. Notice u/s 6(2) becomes necessary only in the case of persons coming u/s 2(2)(e) of the Act."

In order to examine the above mentioned contentions, we may extract the relevant portion, Section 6 for easy reference.

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, 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) 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.

Section 6 deals with notice of forfeiture. Section 6 contemplates notice to any person to whom the Act applies having regard to the value of the properties held by any person on his behalf. Section 2 deals with application of the provisions to various persons. The said provision is extracted below.

2. Application

(1) The provisions of this Act shall apply only to the persons specified in Sub-section (2).

(2) The persons referred to in Sub-section (1) are the following, namely:-

(a) every person--

(i) who has been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), of an offence in relation to goods of a value exceeding one lakh of rupees; or

(ii) who has been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), of an offence, the amount or value involved in which exceeds one lakh of rupees; or

(iii) who having been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), has been convicted subsequently under either of those Acts; or

(iv) who having been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), has been convicted subsequently under either of those Acts;

(b) every person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974):

Provided that--

(i) such order of detention, being an order to which the provisions of Section 9 or Section 12A of the said Act do not apply, has not been revoked on the report of the Advisory Board u/s 8 of the said Act or before the receipt of the report of the Advisory Board or before making a reference to the Advisory Board; or

(ii) such order of detention, being an order to which the provisions of Section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of the review under Sub-section (3) of Section 9, or on the report of the Advisory Board u/s 8, read with Sub-section (2) of Section 9, of the said Act; or

(iii) such order of detention, being an order to which the pro visions of Section 12A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under Sub-section (3) of that Section, or on the basis of the report of the Advisory Board u/s 8, read with Sub-section (6) of Section 12A, of that Act; or

(iv) such order of detention has not been set aside by a court of competent jurisdiction;

(c) every person who is a relative of a person referred to in clause (a) or clause (b);

(d) every associate of a person referred to in clause (a) or clause (b);

(e) any holder (hereafter in this clause referred to as the present 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.

Explanation 1.-- For the purposes of sub-clause (i) of clause (a), the value of any goods in relation to which a person has been convicted of an offence shall be the wholesale price of the goods in the ordinary course of trade in India as on the date of the commission of the offence.

Explanation 2. For the purpose of clause (c), "relative", in relation to a person, means-

(i) spouse of the person;

(ii) brother or sister of the person;

(iii) brother or sister of the spouse of the person;

(iv) any lineal ascendant or descendant of the person;

(v) any lineal ascendant or descendant of the spouse of the person;

(vi) spouse of a person referred to in clause (ii), clause (iii), clause (iv) or clause (v);

(vii) any lineal descendant of a person referred to in clause (ii) or clause (iii).

Explanation 3. For the purpose of clause (d), "associate", in relation to a person, means-

(i) any individual who had been or is residing in the residential premises (including out houses) of such person;

(ii) any individual who had been or is managing the affairs or keeping the accounts of such person;

(iii) any association of persons, body of individuals, partnership firm, or private company within the meaning of the Companies Act, 1956 (1 of 1956), of which such person had been or is a member, partner or director;

(iv) any individual who had been or is a member, partner or director of an association of persons, body of individuals, partnership firm, orprivate company within the meaning of the Companies when such person had been or is a member, partner or director of such association, body, partnership firm or private company;

(v) any person who had been or is managing the affairs, or keeping the accounts, of an association of persons, body of individuals, partnership firm or private company referred to in clause (iii);

(vi) the trustee of any trust, where,-

(a) the trust has been created by such person; or

(b) the value of the assets contributed by such person (including the value of the assets if any, contributed by him earlier) to the trust amounts, on the date on which the contribution is made, to not less than twenty per cent, of the value of the assets of the trust on that date;

(vii) where the competent authority, for reasons to be recorded in writing, considers that any properties of such person are held on his behalf by any other person, such other person.

Explanation 4. For the avoidance of doubt, it is hereby provided that the question whether any person is a person to whom the provisions of this Act apply may be determined with reference to any facts, circumstances or events (including any conviction or detention) which occurred or took place before the commencement of this Act.

Section 2(c) refers to every person who is a relative of a person referred to in clause (a) or clause (b). Section 2(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). When we read Section 6(1) and 6(2) along with Section 2(2)(e) it is evident that notice contemplated u/s 6(2) is to any other person if the property does not stands in the name of the detenu. So far as this case is concerned, property stands in the name of wife and brothers. Admittedly notices have been issued to them as contemplated u/s 6(1). We are of the view, non issue of notice to the detenu will not vitiate the proceedings as against their relatives.

5. Petitioners also have raised a contention that more than six years have

elapsed and the proceedings have not been initiated within a reasonable period. No time limit has been prescribed under the Act. The apex court in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, has dealt with the scope and ambit of the Act which requires no reiteration. However we may refer to the recent decision of the Apex Court in Smt. Kesar Devi Vs. Union of India (UOI) and Others, . The apex court while dealing with Section 2(2)(c) of the Act has categorically held that the burden of proving that such property is not illegally acquired property will be upon the person to whom notice has been issued. On facts petitioners could not establish that the properties were legally acquired. Competent authority and the Tribunal concurrently found so and this court in writ jurisdiction will not be justified in taking a different view in the absence of any contra evidence. We therefore find no infirmity in the orders passed by the competent authority. The writ petition lacks merits and the same would stand dismissed.