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(1997) 06 CAL CK 0010

In the Calcutta High Court

Case No : CO. No. 8574 (W) of 1996

Smt. Surjit Kaur — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 12-06-1997

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 2, 3, 6, 7, 9

Citation : (1998) 59 ECC 71

Hon'ble Judges : Satyabrata Sinha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Satyabrata Sinha, J.—The petitioner by reason of this application questions an order dated 25th November, 1996 passed by the respondent No. 2 whereby and whereunder the properties of the petitioner were confiscated purported to be under the provision of Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter referred to as "the Act").

2. Shortly stated the fact of the matter is as follows:--

The respondent No. 4 was detained by the respondent No. 1 u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. In a proceeding initiated against the said respondent as well as the petitioner a truck bearing No. WBI-5562 was seized. The said truck, however, was released. Thereafter a confiscation proceeding was initiated in respect of the following properties:--

A: Moveable Properties:-- 1. Truck No. WBI-5562 purchased in 1981 at a cost of Rs. 30,000/ 2. 50% share in second hand truck bearing No. NLH-1057, Model 1960 purchased in 1984 contributing Rs. 20,000/

B: Immovable Properties:-- 1. House property on 5 kattahs of land at Panagarh Bazar, constructed in the financial year 1975-76 wherein total

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investment is Rs. 40,000/ 2. House property on 1-5 kattahs of land at Panagarh Bazar constructed in 1988, Approximate value is Rs. 60,000/

(C) That a notice u/s 6(1) of the Act was also issued to Sardar Kundan Singh, father of the detenue Shri Amarjit Singh, alias Gulu, on 1.8.90 on the basis of the recorded reasons that the following properties were illegally acquired properties within the meaning of Section 3(1)(c) of the Act,

A. Moveable properties:-- 1. 10'' Lathe Machine (one) about Rs. 15,000/- 2. 6'' Lathe Machine (one) about Rs. 5,000/- 3. Electric Welding Set (one) about Rs. 2,000/- 4. Drill Machine (one) about Rs. 1,500/- 5. Cash in hand as per Capital A/c. for the year 1980-81 Rs. 4,439.80/-

3. The said properties admittedly are in the name of the petitioner of her husband. The petitioner contends that the said properties were not illegally acquired by the respondent No. 4 in his name. In the said proceedings, as it appears from the statements made in the affidavit-in-opposition that notices were served on her but despite opportunities given the petitioner has failed to explain the source of income from which the aforementioned properties were purchased.

4. A confiscation order was thereafter passed in terms of Section 7(1) of the Act holding that as the petitioners have failed to satisfy from the Income Tax records that they had sufficient fund and in view of certain discrepancies, whereby a conclusion was arrived at that the properties were illegal properties within the meaning of Section 3(1)(c) of the Act.

5. Admittedly, the petitioners filed various representations requesting the respondent No. 3 to release the said properties. By an order dated 30th April 1996 the respondent No. 3 rejected the said prayer on the ground that there is no provision to revise an order which has been passed u/s 7(3) or Section 19(1) of the said Act. Despite the same the petitioner filed another representation on 8.5.96 requesting him to at least spare one workshop, which was started with the bank loan amounting to more than Rs. 65,000/-.

6. Mr. Basu Mallick. the learned Counsel appearing on behalf of the petitioner has placed before me a deed dated 10.5.75, from a perusal whereof it appears that the petitioner''s husband obtained the said properties as far back as on 10.5.75 and submitted that as at that point of time the respondent No. 4 was merely 15/16 years old, the question of the said property being illegally acquired does not arise. It was further submitted that the factory premises have also been purchased by taking loan from the banks which was the subject matter of the case. The learned Counsel in this connection has relied upon a decision of the Supreme Court of India in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, .

7. Mr. Prantosh Mukherjee, the learned Counsel appearing on behalf of the respondents, on the other hand, drew my attention to the statements made in

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the affidavit-in-opposition, from a perusal whereof it would appear that opportunities were granted to the petitioner and her husband who died in 1991. According to the learned Counsel in that view of the matter this Court should not interfere with the impugned order. In support of his aforementioned contention reliance has been placed by the learned Counsel in a recent decision of the Supreme Court in Gangadevi (Smt) Vs. Union of India (UOI) and Another, .

8. The Act was enacted to provide for forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators and matters connected therewith or incidental thereto as would be evident from the preamble thereof. Section 2(1) of the Act provides that the provisions thereof shall apply only to the persons specified in Sub-section (2) which includes every person who is a relative of a person referred to in Clause (a) or Clause (fa). Explanation 2 defines relative for the purpose of Clause (c) of Sub-section (2) of Section 2 which includes any lineal ascendant or descendant of the person. Thus, there cannot be any doubt that the petitioner is a relative within the meaning of the provision of the said Act.

9. Section 3 is an interpretation clause. Section 3 defines ''illegally acquired property'' to mean:

(i) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earning or assets derived or obtained from or attributable to any activity prohibited by or under any law for the time being in force relating to any matter in respect of which Parliament has power to make laws; or

(ii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets in respect of which any such law has been contravened; or

(iii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets the source of which cannot be proved and which cannot be shown to be attributable to any act or thing done in respect of any matter in relation to which Parliament has no power to make laws; or

(iv) any property acquired by such person, whether before or after the commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property referred to in Sub-clause (i) to (iii) or in income or earnings from such property;

and includes--

(A) any property held by such person which would have been, in relation to any previous holder thereof, illegally acquired property under this clause if such previous holder had not ceased to hold it unless such person or any other person who held the property at any time after such previous holder or, where there are two or more such previous holders, the last of such previous holders is or was a transferee in good faith for adequate consideration;

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(B) any property acquired by such person, whether before or after the commencement of this Act," for a consideration, or by any means, wholly or partly traceable to any property falling under item (A), or the income or earnings therefrom.

10. A bare perusal of the aforementioned provision, therefore, does not leave any manner of doubt that the property in question must be a property acquired by such person from earnings prohibited by any law for the time being in force.

Section 9 provides for the imposition of a fine in lieu of forfeiture. Admittedly the truck in question was also subject matter of a forfeiture proceedings and the same was released in favour of the petitioner which was standing in her name on imposition of a payment of Rs. 5,000/-as a fine in lieu of forfeiture thereof.

11. In Amratlal Prajivandas and Ors. (Supra) the Supreme court considered the vires of the provision of the said Act. It was clearly held that 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'' detenue or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties.

12. From the said decision it is, therefore, evident that the competent authority is to arrive at a decision that the properties were illegally acquired by the detenue in the name of his relative or the associates. Unless and until such a finding is arrived at, the properties cannot be confiscated. From a perusal of the impugned order it does not appear that such a finding was arrived at. The said respondent failed to consider the relevant facts as to the point of time when such properties were acquired and the value thereof.

13. If the contention of the petitioner is correct that the respondent No. 4 was born on 10th February, 1961 and he was studying in Class-IV in 1972 and unless it is brought on records that from his childhood he had been violating the provisions of the said Act and he was a smuggler, even if it is held that the properties in question have some nexus with the activities of her son. The competent authority, on the basis of the materials available on record must come to a clear finding that the sources of acquisition of the property relates to the detenue and not to a property which was acquired by relatives or associates of the detenue from their own income

14. It is not in dispute that the respondent No. 4 was found guilty of commission of the offence of smuggling only in the year 1988. The petitioner has further, as noticed hereinbefore, stated that certain properties had been purchased by taking loan from the bank.

15. In Gangadevi''s case (Supra) the Supreme Court followed Amratlal Prajivandas and Ors. (Supra) and held that keeping in view the drastic nature of the provision of the said Act, it was permissible for the petitioner or a detenue to question the order of detention despite her death because in the event the

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detention is held to be void, the provision of the said Act would not apply.

16. It is now well known that a penal provision and particularly the provisions in terms whereof the person can be deprived of a lawfully acquired property must be very strictly construed and all substantive and procedural safeguards must be complied with. In view of the fact that the competent authority in its impugned order has failed to take into consideration the relevant facts and arrived at a conclusion on irrelevant grounds not germane for the purpose of passing of an order and particularly in the light of the decision of the Supreme Court in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, I am of the opinion that the impugned order cannot be sustained. The respondent No. 3 is, therefore, directed to consider the matter afresh after giving an opportunity of hearing to the petitioner, consider the contentions raised in the application including the question that at the time of acquisition of the property the respondent No. 4 was minor which is a relevant factor and pass an appropriate order in accordance with law.

17. This application also cannot be thrown out on the ground of delay in view of the decision of the Supreme Court of India in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , wherein it was held:--

18. When substantial justice and technical considerations are pitted against each other cause of substantial justice deserves to be preferred for the either side cannot claim to have vested right in injustice being done because of a non-deliberate delay. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

19. This application is, thereof, allowed but in the facts and circumstances of this case there will be no order as to costs.

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