

(2016) 03 GUJ CK 0181

In the Gujarat High Court

Case No : Special Civil Application No. 13355 of 2009

Union of India

APPELLANT

Vs

Ismail Mulla Fazle Abbas

RESPONDENT

Date of Decision : 31-03-2016

Acts Referred:

Constitution of India, 1950 — Article 227
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 —
Section 3, Section 6

Citation : (2016) 03 GUJ CK 0181

Hon'ble Judges : S.G. Shah, J.

Bench : Single Bench

Advocate : Devang Vyas and P.Y. Divyeshwar, Advocates, for the Appellant;

Final Decision : Dismissed

Judgement

S.G. Shah, J.—1. Heard learned advocate Mr. P.Y. Divyeshwar for the petitioner being Union of India as competent authority and administrator under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (herein after referred to as "SAFEMA"), whereas respondent though duly served, has remained absent.

2. I have heard learned advocate Mr. P.Y. Divyeshwar at length and perused the relevant record, so also law applicable to such cases.

3. The brief facts arising from the record so as to drag the issue till this Court is to the effect that;

"3.1 Brother of the present respondent was detained under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (herein after referred to as "the COFEPOSA Act") by the petitioner authority on or about 28.04.1975.

3.2 It is the case of the petitioner that during investigation carried out by them to find out the properties acquired by the detinue by illegal means it was found

that respondent has acquired some properties illegally and did not file any income tax returns till 1969 when he purchased the property and filed returns of the income tax for the previous year i.e. from 1965 onwards without producing any books of accounts.

3.3 Therefore, petitioner had issued show-cause notice under Section 6 of the SAFEMA calling upon the respondent to explain the source of income and to show cause that why such properties should not be forfeited under SAFEMA.

3.4 It is alleged that even after ample opportunities, respondent has not produced any evidence to prove his business activities, so as to justify the income and purchasing of properties which are subject - matter of this litigation and for which, order of forfeiture was passed by the petitioner. Details of such properties are not much material at this stage and, therefore, reproduction of such minute details is avoided since such details are available on record in the form of pleadings and in impugned order and judgment.

3.5 It is also pleaded that petitioner has adjudicated the show-cause notice and thereafter order of forfeiture of all the properties found in the name of respondent and covered under show-cause notice, was passed on 25.06.1999 except for the ornaments. Such order was challenged by the respondent in Appeal being FPA No. 27 & 28/Bom/1999/447 before the Appellate Tribunal for the Forfeited Property at New Delhi which has, by its judgment and order dated 17.06.2009 quashed and set aside the show-cause notice and order of forfeiture of properties by allowing the appeal."

4. Such impugned order dated 17.06.2009 by the appellate Tribunal is a consolidated order in two appeals being FPA Nos. 27 and 28 of 1999. Since similar order of forfeiture was passed against two brothers of detainee namely Abbas Mulla Fazle Abbas and Ismail Mulla Fazle Abbas. It is also evident from record that the Chairman of such appellate authority is generally a retired Judge of High Court with one member from administrative or revenue side.

5. On perusal of such impugned judgment, it becomes clear that the respondent was working as angadia and, therefore, competent authority has believed that when no books of accounts have been kept, there is no basis to support the contentions of the respondent that he was carrying out business as angadia and, thereby he was having income and capacity to purchase some properties.

6. Whereas, it is contended by the respondent, before the competent authority that there are several decisions by the Honourable Supreme Court that relatives and associates can brought in such proceedings only for the purpose of ensuring that whether illegally acquired properties of the convict or detainee are acquired or kept in their names, and in that case they do not escape from the net of the provisions of SAFEMA and COFEPOSA Act. But the only idea is to reach the property of the detainee and, therefore, the independent properties of the relatives and friends, which are not connected to the detainee, are not sought to be forfeited nor they are within the purview of SAFEMA.

7. The appellate authority has observed that the order of competent authority does not even prima facie show and disclose that the properties under reference were ever belonging to the detenue or were acquired out of the funds of the detenue. On the contrary, it is observed by the appellate authority, that there is cogent evidence on record to show that the properties have been independently acquired by the appellant himself out of his own money and that either they are purchased by virtue of registered sale deeds even before the Act came into force or they are not even remotely traceable to the detenue. It is also observed by the appellate authority that ample evidence was produced before the competent authority to show that the properties under reference were acquired legally and they have been duly reflected in the books of accounts of the appellant as well as in the income tax returns and wealth tax returns filed by the appellant but the competent authority has totally forgotten to deal with such documents and erred in observing that income tax returns were filed with a view to cover up the sources which have come from illegal earnings of the detenue, though there is no evidence that they were purchased by illegal earnings of the detenue. The most convincing reason assigned by the Appellate Tribunal is to the effect that in the relevant year for which respondent has paid income tax are between 1965 to 1969, when SAFEMA and COFEPOSA were not in existence and income tax returns have been accepted on the basis that they are independent savings of the appellant himself, which has no nexus with his brother - the detenue. Therefore, it cannot be said that income tax return filed later on in the year 1969 while purchasing the properties were with ulterior motive to get rid of provisions of SAFEMA and COFEPOSA, because those two Acts were came in force only in the year 1976 and 1974 respectively, i.e. after more than 5 years from the date of purchase of properties in question.

7.1 The appellate authority has also considered that there was enough documentary evidence to prove the purchase of properties and developments, which are reflected in income tax returns and in account books and, thereby, competent authority has erred in observing that genuineness of the source of initial investment is not proved. The appellate authority has recorded the details of properties and its source in detail which is not required to be reproduced herein, since I do not find any illegality or irregularity or perverseness in such discussion and findings, more particularly when properties are directly purchased by the respondent through registered sale - deeds.

7.2 The appellate authority has also relied upon several previous decisions of the Honourable Supreme Court viz.

"(1) , 1994 (5) SCC 54 Attorney General v. Amrutlal Prajivandas

(2) , 2003 (7) SCC 436 Fatima Mohammed Amin v. Union of India

(3) , 2007 (2) SCC 510 P.P. Abdulla v. Competent authority"

7.3 Relying upon all such previous decisions, the appellate authority has come to the conclusion that the show cause notice issued by the petitioner does not

disclose nexus between the detainee and the respondent, so also his properties and, therefore, held that initiation of proceedings against respondent is bad and illegal.

7.4 The appellate authority has thereafter given detailed reasoning for its conclusion as above and concluded that the show cause notice is silent on providing any connection or link with the illegal earnings of the detainee apart from merely stated by the competent authority that "reason to believe that the properties described in the Schedule enclosed hereto which are held by you are illegally acquired properties within the meaning of Clause (c) of Sub Section (1) of Section 3 of the said Act."

7.5 Therefore, appellate authority has allowed the appeal and thereby show-cause notice was quashed and set aside.

8. While impugning such order, the petitioner - Union of India has taken so many factual and legal grounds so as to make an attempt to prove that show-cause notice was valid and proper. However, I do not find any substance in any such ground for the simple reason that the law is well settled as interpreted and decided by the Honourable Supreme Court. The petitioner has also tried to compare several other judgments and Special Act like TADA and NDPS Act to plead and to induce by this Court to believe that it would be difficult to get direct evidence to control grave offence and, therefore, burden of proof rests upon respondents to prove that what is pleaded by the authority is not correct rather than to ask the authority to prove that what is pleaded by them is correct fact. It is difficult to believe such submission.

8.1 Petitioner has gone to the extent of challenging the impugned order by describing it as a non speaking order when it is pleaded that the Appellate Tribunal has neither considered the issue raised by the petitioner nor discussed the fact of the case. As already recorded herein above and perusal of impugned judgment, makes it very much clear that the factual details are well discussed in such judgment and all issues are properly dealt with and answered by the Appellate Tribunal with reasonings and citations of relevant cases. Therefore, there is no substance in the petition when it is trying to misguide the judicial proceedings.

8.2 Thereupon petitioner has disclosed relevant provisions of different Acts and few judgments and tried to emphasize that once the facts specified under the particular sections are established, then there may be statutory presumption of guilt which follows the punishment unless contrary is proved by the affected person. Thereby an attempt was made to submit that nexus is implicit and is not required to be established in such proceedings under the special act, wherein reverse burden is imposed upon the person against whom the action is initiated by the competent authority. However, the most interesting pleadings are in ground No. (h) with several sub paras from (i) and again in ground (k) wherein petitioner has practically admitted that there is no substance in the present

petition. But the most interesting pleadings is in ground (i) on page 21 of the petition, which reads as under:

"(i) The judgment of the Hon'ble Supreme Court passed in the case of Fatima Mohd. Amin, reported in , (2003) 7 SCC 436 and in the case of Abdulla, as reported in 2006 (SC-4) GJX-1080-SC, laying down the condition of mentioning about existence of nexus or link between the properties sought for forfeiture and illegal activities/illegal income of the detainee/convict in Notice issued have been passed on the wrong interpretation of the judgment of the Constitution Bench delivered in the case of Attorney General v. Amritlal Prajivandas and also without appreciating category of the Act, provisions of the Act and intention of the Legislature, as demonstrated in Grounds (a) to (h)."

8.3 Thereby the petitioner has tried to emphasize that the judgment in case of Fatima (supra) is not a good judgment and that the Honourable Supreme Court has not interpreted the judgment of Constitution Bench properly. If it is so, first of all it would be necessary for the petitioner to approach the Honourable Supreme Court to rectify its interpretation but in absence of any such exercise, this Court has to rely upon the Honourable Supreme Court's judgment in case of Fatima (supra).

9. In any case, even decision in case of Kesar Devi v. Union of India reported in , 2003 (7) SCC 427 is also confirming the same view taken in the case of Fatima (supra) and, therefore, when two judgments of the Honourable Supreme Court are conclusive in its findings, an attempt of the petitioner herein to allege that the interpretation of previous judgment in these two judgments is not proper, cannot be upheld.

10. It cannot be ignored that this petition is filed under Article 227 of the Constitution of India, where the Court has to verify the limited issue that whether proper care has been taken by the authority in passing impugned order or not. Thereby only because petitioner is not comfortable with some of the judgments of the Honourable Supreme Court then they have to prefer petitions against such order, unless and until they get the Supreme Court judgments reversed by the Honourable Supreme Court itself, this Court cannot uphold their pleadings and submissions which are contrary to the decisions of the Honourable Supreme Court.

11. In view of above facts and circumstances, there is no substance in the petition and the same is dismissed. Rule is discharged. Interim relief, if any, granted earlier shall stand vacated.