
(2017) 10 DEL CK 0156

In the Delhi High Court

Case No : Letter Patent Appeal No. 531, 532, 534, 540 Of 2012

Union Of India & Ors

APPELLANT

Vs

Kamal Kumar

RESPONDENT

Date of Decision : 27-10-2017

Acts Referred:

Constitution Of India, 1950 — Article 226
Smugglers And Foreign Exchange Manipulators (Forfeiture Of Property) Act, 1976 —
Section 2(2)(c), 3(1)(c), 3(1)(c)(iii), 6, 6(1), 7, 7(3), 8, 18, 20
Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 —
Section 12A(2)
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 68J, 68H, 68H(1)
Prevention Of Illicit Traffic In Narcotic Drugs And Psychotropic Substances Act, 1988 —
Section 3(1)

Citation : (2017) 10 DEL CK 0156

Hon'ble Judges : S. Ravindra Bhat, J;Sunil Gaur, J

Bench : Division Bench

Advocate : Baldev Malik, Arjun Malik, Maneesha Dhir, Sarmishta Gosh, Nishant Piyush, Mahipal Singh

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J

1. The Union of India, by these appeals, challenges the judgment of a learned single judge, dated 25.11.2011, allowing four writ petitions, preferred under Article 226 of the Constitution of India. The petitions had challenged an order dated 28.11.1994 passed under Section 7 and 7 (3) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA), by the competent authority as well as the decision of the appellate tribunal dated 08.03.1996 in FPA No.4/DLI/95, and the rectification order dated 08.05.1996 under Section 20 of SAFEMA.

Facts of the case

2. One Piare Lal (the father of two petitioners and husband of the third and their common predecessor in interest) was served with a detention order dated 08.11.1976 issued in the name of the Governor of Punjab. The order claimed that to prevent him from dealing in smuggled goods, he had to be detained. A declaration was also issued by the Governor of Punjab under section 12A(2) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ("COFEPOSA") declaring that the detention was necessary, and that it is not in public interest to disclose the facts or to give an opportunity of making a representation to the detenu. Piare Lal unsuccessfully challenged his detention. A notice, dated 10.05.1978 was issued by the competent authority under Section 6 of SAFEMA stating that he had reason to believe that the properties mentioned in the schedule have been acquired by him illegally within the meaning of clause (c) of sub section (1) of section 3 of SAFEMA. The petitioner was required to indicate the sources of his income, earnings and assets out of which, or by means of which, the petitioner had acquired the scheduled properties, and also to show cause as to why they should not be declared as illegally procured properties and forfeited under the Act. The notice was with respect to the following properties:

Sl. No.

Description of the property

Name of the present

holder of property

1.

Plot Nos.35 to 38, Chandrauli, Delhi

Shri Piara Lal

2.

Plot No.13/1, 14/15, bearing Khasra No.21-24 in village Karawal Nagar, Ilaqa Shadara, Delhi

DO

3.

Plot No.2, B-Block, Laxmi Industrial Enclave, V, Gharota, Pargna Loni, Tehsil Ghaziabad, Meerut

DO

4.

1/2 share in plots bearing Khasra Nos.13 to 17 in Karawal Nagar, Ilaqa Shahdra, Delhi

DO

5.

110 Tolas gold ornaments

DO

3. In terms of Section 6, SAFEMA, the competent authority has to record reasons to believe that the properties for which notices are issued are illegally acquired properties. The reasons in the present case were that the Commissioner of Income Tax, by letter dated 24.02.1977 had furnished certain information. The position of Piare Lal's income tax returns and assessment were as follows:

Asst. Years

Income returned (In Rupees)

Income assessed (In Rupees)

1967-68

11,300 P

1968-69

11,300 P

1969-70

11,300 P

1970-71

11,300 P

1971-72

11,300

11,500

1972-73

11,300

22,050

1973-74

11,300

12,500

1974-75

11,300

36,062

1975-76

11,300

25,000

The competent authority observed as follows:

"all the returns have been filed on one date viz. 21.1.76 and all the assessments have also been completed on a single date viz. 19.1.77. The source of this income is stated to be Dalali business, but no accounts are stated to have been maintained. Assessments have been completed for the assessment years 1971-72 to 1975-76. It will be noted that in each year additions have been made to the income returned, the heaviest being in assessment years 1972-73, 1974-75, 1975-76. The additions in these years are on account of various investments made and expenditure incurred by Piara Lal in these years. As a perusal of para 3 would indicate, Piara Lal's investments in real estate were made in the periods relevant to assessment years 1972-73 and 1974-75. In the period relevant to assessment year 1972-73, Piara Lal has made an investment of Rs.10,800 in the Chandrauli Plot in Delhi. In the course of assessment proceedings, being unable to explain the source of his investment, Piara Lal has surrendered the amount of investment for assessment. Similarly in the period relevant to assessment year 1974-75, Piara Lal has made investments in real estate listed at S. No.2,3 and 4 in para 2. The aggregate of these investments comes to about Rs.16,000. Here again, unable to explain the source of this investment, Piara Lal has surrendered the same for assessment. In this year an addition has also been made on account of inadequate marriage expenses and inadequate household expenses. It will thus be abundantly clear that although Piara Lal's various investments have been considered in the course of assessment proceedings, the source of these investments has at no stage, been proved. Since the source of investment in properties listed at S. No.1 to 4 of para 3, has not been explained and proved, those properties fall squarely within the purview of sec. 3(1)(c)(iii) of the SAFEMA."

4. It was also stated that the said properties were acquired - either wholly, or partly out of, or through earnings and assets, the source of which was unproved and which was not "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 and is thus hit by the provisions of section 3(1)(c)(iii) of SAFEMA". On the basis of these observations, the competent authority opined that properties held by Piara Lal were illegally acquired properties within the meaning of Section 3 (1) (c) of SAFEMA and that notice under Section 6(1) had to be issued to him, to show cause why they ought not to be declared as illegally acquired and consequently forfeited by the Central Government. Following initiation of these proceedings, orders of forfeiture were passed by the competent, and later, appellate authority. During pendency of those proceedings, Piara Lal died; his legal representatives, i.e. sons and widow were brought on record. Later, his widow too expired and

was succeeded by the surviving sons. Piare Lal had filed writ petitions challenging the orders of forfeiture; since he died, the legal representatives pursued the proceedings.

5. The writ petitioners challenged the initiation of SAFEMA proceedings and the "reasons to believe" recorded, by saying that they did not disclose any nexus between alleged smuggling activities of Piare Lal and the acquisition of properties. He was not a convicted felon, nor was it established that he indulged in smuggling contraband. The lack of any source material to connect any smuggling activity with Piare Lal, therefore vitiated the proceedings, and consequently, the forfeiture order. The writ petitioners relied on *Fatima Mohammed Amin (Smt) (Dead) through LRS v Union of India* (2003) 7 SCC 436; *P.P. Abdulla v Competent Authority & Ors* (2007) 2 SCC 510; *Attorney General for India & Ors v Amritlal Prajivandas & Ors* (1994) 5 SCC 54 and *Gian Chand Garg v Union of India (W.P.(C.) No. No.4581/1996 decided on 04.09.2007)* by a single judge. The Union of India however, argued that the reasons to believe were justified and legal; it was argued that nexus between the property and the detainee had to be established only when the property is held benami. It also underlined the importance of Section 8 of SAFEMA, which provides that in any proceeding under the Act, the burden of proving that any property specified in Section 6 of the Act is not illegally acquired, shall be on the person affected. Piare Lal was unable to explain the source of his income, which enabled him to acquire the properties. Even if the belatedly filed returns were to be accepted, the amount apparently spent on purchase of properties in a few years was far in excess of the income.

6. The learned single judge, by the impugned judgment, in allowing the writ petitions, relied on *Shanti Devi v Union of India & Ors* 73 (1998) DLT 477 (DB) and held that:

"... The Division Bench in this case held that the question of applying the rule of evidence enacted by section 8 of SAFEMA, casting the burden of proof on the person affected, shall come into play only on some connecting link or nexus being established or traced between the holding of the property or assets by the person proceeded against, and illegal activity of the detainee/convict.

15. The "reasons to believe" as recorded in the present case by the competent authority undoubtedly raise a doubt about the source of funds wherefrom the aforesaid properties were acquired at the relevant time. However, they do not go on to state that there was a nexus between the income derived from the alleged activity of smuggling and the scheduled properties acquired by the detainee, and the said "reasons to believe" do not show as to how a nexus is sought to be established between the income allegedly derived from the illegal activity of smuggling, and the acquisition of the said properties.

16. In the light of the aforesaid discussion, since the "reasons to believe", as recorded by the competent authority appear to be wholly insufficient, the notice

issued under section 6(1) of SAFEMA cannot be said to have been issued validly. The competent authority did not derive the jurisdiction to issue the same in the absence of the recording of the valid "reasons to believe". Consequently, the orders passed on the said notice by the competent authority on 28.11.1994, and by the appellate tribunal on 08.03.1996 and the rectification order dated 08.05.1996 cannot be sustained and are, accordingly, quashed."

7. It is argued on behalf of the appellant Union of India, that the impugned judgment is erroneous as it holds that reasons to believe are not recorded in the show cause notice served under Section 6 of SAFEMA. It was argued that though it may not be stated in so many words that the properties in question were acquired from the illegal income of the detainee, such a link may be inferred and be discernible from the entire reading of the reasons to believe. Investigation in the said matter also revealed that the source of funds of the property could not be verified. On that basis the link was inferred and the properties were taken as illegally acquired properties. It was urged that these facts were the basis to conclude that the statutory conditions laid down under SAFEMA were satisfied and the burden was shifted upon the respondents to show the source of the said property and prove that they were not illegally acquired, which they failed to do. Counsel relied on *S. Narayanapa Vs. Commissioner of Income Tax* 63 ITR 219 and *S.T.O. Vs. Uttareshwai Rice Mills* 89 ITR 6 to argue that there is no requirement of disclosure of reasons under Section 6 of the Act to the person issued with show cause notice.

8. Learned counsel argued that the basis of forfeiture under SAFEMA cannot be questioned in terms of observations in *Mahesh Kantilal Zavefi v. Union of India* 2010 VII AD (Delhi) 804 which relied on *Amritlal Prajivandas*, which had ruled that unless the detention order under COFEPOSA is successfully challenged, the basis of subsequent order under SAFEMA cannot be questioned. It was also argued that one of the respondents (*Kamla Vati*), widow of *Piare Lal*, was an affected person. She had no independent source of income and she was financially dependent on the detainee. She did not possess any means to make any investment as regards the property in her name for the same reason. In this regard, it was argued that in the absence of any explanation for the details of income, it could be concluded that the persons shall be covered under section 2 (2)(c) of SAFEMA and the competent authority's order for forfeiture of the property was therefore valid. Counsel lastly relied on *Sh. Zahid Pervaz v Union of India* ILR 2012 (1) Del 566, where it was held as follows:

"The impugned orders have to be tested on the basis of the materials produced before the authorities who have passed these orders. The said plea is clearly an afterthought and is an attempt to improve his case by petitioner. From the known source of income of the petitioner or his father, the aforesaid properties have not been established to have been acquired. It has not even been argued that the competent authority did not have, or did not record the reasons for issuance of the show cause notice.

15. On the other hand, the principle of law contained in the aforesaid observations made by this Court in *Shahid Parvez* (supra), with due respect, appears to be per incuriam. I may refer to the provision contained in Section 68J of the NDPS Act which provides that "in any proceedings under this Chapter, the burden of proving that any property under Section 68H is not illegally acquired property shall be on the person affected." Therefore, the observation of the learned Judge that the onus would be on the respondent authorities is in the teeth of the said statutory provision. I may note that Section 68J has not been noticed by the learned Judge in *Shahid Parvez* (supra).

16. So far as the competent authorities "reason" to believe that the aforesaid properties are illegally acquired is concerned, the acquisition of immovable properties by a minor of 12 years itself furnishes reason to entertain the said belief. The consequence of the said belief is only that an enquiry is set into motion by issuance of a show cause notice to grant the person concerned an opportunity to disclose his income, earnings or assets, out of which or by means of which he has acquired the property in question."

Significantly, the appellants did not produce the original files containing any materials, other than what was mentioned in the notice, linking Piare Lal with any smuggling activities; they relied on the notice and the order of detention.

9. The successful writ petitioners-arrayed as respondents, resist the appeals, contending that the findings drawn on the basis of materials on the record are unexceptionable. It was pointed out that though Section 8 of SAFEMA casts a burden on the person receiving the notice, the basic premise is a valid notice. Thus, the notice should show some nexus or connection with smuggling activities, leading to acquisition of ill gotten wealth. If such nexus is missing, and the notice is upheld, SAFEMA would act in a draconian manner, casting a burden on proving that the wealth or assets acquired were through legitimate means, which may be impossible if, like in this case, the authorities proceeded to reject the income tax authorities' orders.

10. The decisions in *Fatima Mohammed Amin* (supra) and *P.P. Abdulla* (supra) are categorical as to the need for existence of a link between some smuggling activities and the acquisition of assets/properties that are to be the subject matter of SAFEMA proceedings. In *P.P. Abdulla* (supra), this aspect was highlighted by the Supreme Court, in the following manner:

"8. It must be stated that an order of confiscation is a very stringent order and hence a provision for confiscation has to be construed strictly, and the statute must be strictly complied with, otherwise the order becomes illegal.

9. In our opinion, the facts of the case are covered by the decision of this Court in *Fatima Mohd. Amin v Union of India* (2003) 7 SCC 436. In the present case the contents of the notice, even if taken on face value, do not disclose any sufficient reason warranting the impugned action against the appellant as, in our opinion, the condition precedent for exercising the power under the Act did not

exist. Hence, the impugned orders cannot be sustained."

11. Section 6 (1) of SAFEMA provides:

"Section 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 under section 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."

This section therefore, is premised on proper application of mind and subjective satisfaction of the Competent Authority as to the existence of "reasons to believe". Those should be recorded in writing; they should also be to the effect that the property sought to be proceeded against is illegally acquired. In *Gian Chand Garg*, it was held that:

"Such "reasons to believe", should be considered by the authority not only about the disproportionate nature of the assets of the person concerned, (in relation to known sources of income), but also other information or material available as a result of action taken under Section 18 or otherwise. Section 18 empowers the Competent Authority to cause an inquiry or investigation, regarding any person, place, property, etc. For this an officer of the Income-tax Department can be asked to carry out such exercise or survey. This should naturally precede the opinion formation, i.e. "the reasons to believe" as well as precede the issuance of notice under Section 6(1). The facts disclose that no such inquiry preceded the notice. This investigation under Section 18 is a salutary principle, because it is now well settled that the more stringent the procedure and consequences, the threshold of safeguards have to be higher."

12. In *Zahid Pervez* (supra) a show cause notice under Section 68H(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) on 20.04.1994, based on detention under Section 3(1) of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (PITNDPS Act) was in question. The court had to consider if a 12 year old minor's property could be said to have been validly acquired, given that his brother's detention was unsuccessfully challenged. The court, in that case, did not consider either *Fatima Mohd. Amin* or *P.P. Abdulla* (supra). Therefore, this court is of the opinion that

Zahid Pervez cannot be considered a binding authority, which can be preferred over the decisions of the Supreme Court.

13. In this case, the entire basis of the notice appears to be a detention, the challenge to which was declined. Here, it is important to remember that the detainee's access to Article 226 of the Constitution of India was doubted; nine High Courts held that access existed. The Supreme Court, however overturned their rulings in *ADM Jabalpur v Shivakant Shukla* AIR 1976 SC 1207, in its majority judgment. This meant that even petitions challenging validity of detention orders, on the ground that no valid rationale for detention existed under the COFEPOSA could not be entertained. The internal emergency that existed at the time, was lifted; liberties that were taken away or suspended, were restored. And yet, late Piare Lal's troubles were far from over. The wheels of bureaucracy grind- inexorably. For Piare Lal (*supra*) there appeared to be no respite or exit, from the black hole which he entered into, on account of the notices issued under SAFEMA. The rationale for that notice was a valid COFEPOSA detention (in his case, its legality was undisputable, because he was denied the liberty of challenging it). The other rationale was suspicion, based on rejection of the income tax authorities' orders.

14. The importance of establishing a link- howsoever rudimentary, but real nevertheless, between an individual and some smuggling activities, can be the only basis of a valid "reason to believe" under Section 6(1) of the Act. Otherwise, there is a danger of SAFEMA or any other authority concluding that since the subject is unable to establish the legitimacy of his source of income, it must be on account of smuggling. In other words, suspicion is elevated into certainty or a finding. Clearly, that occurred in the facts of this case. The court is therefore of the opinion that the notices initiating the proceedings, in these cases were vitiated and unsustainable. The Union's argument regarding Kamla Vati's acquisition of property is unpersuasive. The Benami Properties (Prohibition) Act, 1988 was not in existence, when the notice was issued; in any case, even if it were assumed that the properties were acquired with Piare Lal's funds, nevertheless, the same infirmity, i.e absence of any link with smuggling activities, applies to those properties too. The argument therefore, fails.

15. It is held that in view of the above conclusions, the appeals are to fail. They are, therefore, dismissed, but without any order on costs.