

(2007) 08 CAL CK 0048
In the Calcutta High Court
Case No : F.M.A. No. 206 of 2003

Union of India (UOI) and Others

APPELLANT

Vs

Biswanath Bhattacharya and Others

RESPONDENT

Date of Decision : 09-08-2007

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 3(1)
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 —
Section 18, 6, 6(1)

Citation : (2007) 4 CHN 975 : (2007) CriLJ 4128

Hon'ble Judges : Tapas Kumar Giri, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Kalyan Bandopadhyay and Mintu Kumar Goswami, for the
Appellant; Sadhan Roy Chowdhury and Rajarshi Basu, for the Respondent

Final Decision : Allowed

Judgement

Ashim Kumar Banerjee, J.—On December 19, 1974 the respondent No. 1 was detained under MISA. His detention was continued u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA"). The reason for detention as appears from the record was that the respondent No. 1 in active connivance with his brother who was staying at London at the material point of time was illegally dealing in foreign exchange. The allegation against the respondent No. 1 was that he used to arrange tours as travel agent of foreign nationals and/or persons coming after by the respondents No. 1 in India. The entire expenses were borne by him. In turn, his brother was receiving the expenses of such tour in foreign currency at London. Such transaction was illegal under the provisions of COFEPOSA. He challenged the order of detention. However, he was unsuccessful. He filed a habeas corpus petition before the Division Bench which was also dismissed. He was, however released in 1977. While he was in custody he was served with a notice dated March 4, 1977 appearing at page 285 of the Paper

Book u/s 6(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter referred to as "SAFEMA"). Since he was in custody his wife by a letter dated March 11, 1977 replied to the said show cause notice appearing at pages 287-289 of the Paper Book wherein details of properties belonging to the elder brother of the respondent No. 1 was given. The wife contended that the elder brother should be proceeded with for the identical offence and in case he was proceeded with the truth would come out. Significant to note, the charges were not denied as such. After his release respondent No. 1 by letter dated April 11, 1977 appearing at pages 190-291 of the Paper Book wrote to the authority reiterating what had been contended by his wife in the earlier reply. He applied for inspection of the documents being the report of the competent authority on the basis of which the authority issued the notice. Such letter was written for the first time by the respondent on April 22, 1988. Immediately thereafter, a copy of the reasoning appearing at pages 294-301 was supplied by the authority vide letter dated June 4, 1988. After receipt of the reasoning the respondent No. 1 gave a further rejoinder dealing with each and every allegations made against him by his letter dated July 22, 1988 appearing at pages 302-306 of the Paper Book. The authority afforded him adequate opportunity to defend himself in the proceeding. The competent authority by an order dated November 27, 1989 passed a reasoned order appearing at pages 307-334 of the Paper Book. An appeal was preferred by the respondent No. 1. The Appellate Authority by a reasoned order appearing at pages 335-353 of the Paper Book partly allowed the appeal by setting aside the forfeiture in respect of item Nos. 1 and 4 and affirmed the forfeiture of the remaining items made by the competent authority in terms of the order of the competent authority so modified and affirmed by the Appellate Authority two properties at Salt Lake and investment in M/s. Bijaya Publishing House were confiscated by the appropriate authority.

2. Challenging the order of the competent authority so merged in the order of the Appellate Authority the respondent No. 1 filed a writ petition on August 23, 1991, inter alia, for the following reliefs:

(a) A declaration that Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 is illegal, ultra vires and void.

(b) A declaration that detention of your petitioner u/s 3 of COFEPOSA Act on 19th December, 1974 was illegal and void.

(c) A writ and/or order and/or directions in the nature of Mandamus commanding the concerned respondents and/or each of them to recall, rescind and/or withdraw the impugned orders being annexure "H" and "J" collectively to the petition and not to proceed further with regard to the properties of your petitioner mentioned in the annexure FE to the petition.

(d) A writ and/or order and/or direction in the nature of certiorari calling upon the respondent No. 1 to certify and transmit the records of detention of your

petitioner and the purported order of detention u/s 3 of COFEPOSA Act, 1976 being annexure "A" to the petitioner be quashed and/ or set aside and/or declared illegal and void.

(e) A writ and/or order and/or direction, in the nature of certiorari or any other appropriate writ or order or direction calling upon for record and proceeding pertaining to your petitioner and the impugned orders passed by the Competent Authority being annexure "E" and the order passed by the appellate Tribunal for forfeited property being annexure "F" be quashed and/or set aside.

(f) A writ and/or order and/or direction in the nature of certiorari commanding respondents to certify records and transmit the records to render conscionable justice to your petitioner and the letter being annexure "H" and prohibitory order being annexure "J" collectively be quashed or set aside.

(g) A Writ or in the nature of certiorari and/or any other appropriate writ order and/or direction calling for records relating to SEFTH (FOP) Act and the said Act being Annexure "G" to the petition be quashed and/or set aside.

(h) A writ and/or order and/or direction in the nature of prohibition prohibiting the concerned respondent and/or each of them from proceeding in any manner whatsoever with the properties of your petitioner mentioned in the annexure "FE" to the petition.

(i) Rule Nisi in terms of prayer (a), (b), (c), (d), (e), (f), (g) and (h) above.

(j) Ad interim order on injunction restraining the competent authority from taking any step and/or further step against your petitioner in terms of the order passed by the Appellate Tribunal for forfeited Property in Delhi and/or from taking physical possession of the properties mentioned in the annexure "FF" to the petition till disposal of the Rule.

(k) Ad interim order of injunction restraining the respondent and each of them from giving any effect to or further effect to the notices being annexure "H" and "J" collectively to the petition.

(l) Ad interim order in terms of prayers (b) and (3) till disposal of the Rule.

(m) Such other further order or orders and direction or directions be made as this Hon'ble Court may seem fit and proper.

3. The writ petition was heard and disposed of by the learned single Judge by judgment and order dated May 10, 2002 appearing at pages 182-222 of the Paper Book. On perusal of the judgment and order of the learned single Judge it appears that although the vires of the said Act was under challenge the respondent No. 1 only asked for cancellation of the order of detention issued u/s 3 of the COFEPOSA and the orders passed by the competent authority so merged in the appellate authority u/s 6(1) of the SAFEMA as well as prayed for release of the properties confiscated by the appellate authority in terms of the order impugned therein.

4. We have perused the well versed judgment and order of the learned single Judge.

5. On perusal of the Judgment it appears that it was sought to be contended on behalf of the respondent No. 1 before His Lordship that although the order of detention was held to be legal by the Division Bench while dismissing his application for habeas corpus the challenge to the said order of detention was still available for judicial review. It was further contended that the learned Counsel did not place all relevant contentions and propositions of law before the Division Bench. Hence, the Division Bench could not consider the issue in its proper perspective.

6. The learned single Judge negated such contention by holding that the Division Bench was right in rejecting the challenge to the order of detention. Significant to note, the learned single Judge independently considered the order of detention and ultimately observed as such as would appear from the judgment.

7. After holding that the order of detention was lawful His Lordship, however, was of the opinion that since the notice u/s 6(1) of SAFEMA was not accompanied by the reasonings the same was bad and all orders consequential to issuance of the said show cause notice were also liable to be quashed. His Lordship quashed the show cause notice and all other consequential orders.

8. Being aggrieved by and dissatisfied with the judgment and order of the learned single Judge Union of India preferred the instant appeal. Significant to note, the respondent No. 1 did not file any appeal or cross-objection against the first part of the judgment rejecting his challenge to the order of detention.

9. Mr. Kalyan Bandyopadhyay, learned senior counsel appearing in support of the appeal contended that although the notice u/s 6(1) was issued as far back in 1976-77 no step was taken by the authority until the reasons were supplied to him and he was given appropriate opportunity to deal with the allegations brought against him.

10. In support of his contention Mr. Bandyopadhyay relied upon the following decisions:

(i) State Bank of Patiala and others Vs. S.K. Sharma,

(ii) Rajendra Singh Vs. State of Madhya Pradesh and others,

(iii) M.C. Mehta Vs. Union of India (UOI) and Others,

(iv) Aligarh Muslim University and Others Vs. Mansoor Ali Khan,

11. Mr. Sadhan Roy Chowdhury, learned Counsel appearing for the respondent No. 1 on the other hand contended that once the personal liberty of the respondent No. 1 was infringed by invoking Section 6(1) of the SAFEMA supply of reasoning was a must. It was immaterial whether non-supply of reasoning did cause any prejudice to the respondent No. 1 or not. He also contended that it

was not incumbent on the part of the accused to prove that prejudice had caused to him for such non-supply as the respondent authority had to satisfy themselves before issuing of such notice that the properties liable to be confiscated had a nexus with the offence under the said Act of 1976. In support of his contention Mr. Roy Chowdhury relied on the two Apex Court decisions in the case of Fatima Mohd. Amin (Smt.) (Dead) Through Fatima Mohd. Amin (Dead) through LR. Vs. Union of India (UOI) and Another, and P.P. Abdulla and Another Vs. The Competent Authority and Others, .

12. Section 6(1) of the SAFEMA is reproduced below:

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.

13. On a plain reading of the section it appears that before issuance of any notice to show cause the authority was not only to satisfy itself that the properties were illegally acquired by the persons to whom the said Act applied but also to record such reason in writing. The respondent No. 1 was detained u/s 3(1) of the COFEPOSA. Hence, the provisions of SAFEMA applies in his case. The authorities recorded reasons establishing nexus with the properties mentioned in the schedule and thereafter issued a notice. Hence, the notice could not be said to be bad in our view. The provisions u/s 6 does not specifically provide for supply for reasons along with the notice. However, applying the principles of natural justice as and when the respondent No. 1 asked for preliminary report on the basis of which the authority formed their opinion the authority supplied him the reasonings. Such belated supply, in our view, would not be itself vitiate the entire proceeding.

14. The matter may be looked into from another angle. In 1976 he was under detention. His wife replied to the said notice without complaining of non-supply of reasoning. After this release the respondent No. 1 gave a further rejoinder by adopting what had been said by his wife. The authority did not proceed against him until he was served with the reasoning in 1988. The respondent No. 1 was also afforded opportunity to deal with the reasonings in his rejoinder. The competent authority after affording him opportunity of hearing passed a detailed

reasoned order. He preferred an appeal. The appeal was allowed in part that too by a detailed reasoned order. Hence, we do not find any reason to hold that the fundamental right of the respondent No. 1 was infringed.

15. In case of Fatima Mohd. Amin (supra) the property of the lady was confiscated u/s 6(1) on the ground that her two sons were detained under COFEPOSA and as such she being related to her sons would also come within the mischief of "person" within the meaning of SAFEMA. The Apex Court came to the conclusion that there was no averment to the effect that the property acquired by the lady was a benamy property of her sons or that the same was illegally acquired by her sons for her. Paragraph 8 of the said decision is quoted below:

8. The contents of the said notices, even if taken at their face value do not disclose any reason warranting action against the appellant. No allegation whatsoever has been made to this effect that there exists any link or nexus between the property sought to be forfeited and the illegally acquired money of the detenu(s).

16. In the case of P.P. Abdullah (supra) the appellant was convicted under the Customs Act. He was thereafter served with a notice u/s 6(1) of SAFEMA on the allegation that the building constructed by him was liable for confiscation under the said Act. The competent authority directed forfeiture which was upheld by the appellate authority. The writ petition filed before the learned single Judge was, however, allowed on the ground that no link or nexus between the property and the money could be established. Union filed an appeal which was, however, allowed by the Division Bench. Hence, the appellant approached the Apex Court. While allowing the appeal the Apex Court reiterated that the provisions of the statute must be construed strictly and the nexus had to be established, otherwise the order of confiscation would become illegal.

17. In the Instant case on perusal of the reasoned order so passed by the competent authority and merged in the order of the appellate authority we find that nexus was established. As per the Income Tax return the respondent No. 1 was having 1/3rd share in M/s. Bhattacharjee & Company. The authorities discussed in detail the relevant tax return submitted by the respondent No. 1. The respondent No. 1 also declared before the Income Tax authority that he was having income only from M/s. Bhattacharjee & Company, Such income on the basis of the tax return could not permit acquisition of properties mentioned in the said notice. The opportunity was given to explain the source. The respondent No. 1 could establish the source in respect of item Nos. 1 and 4 which was allowed by the appellate authority and the order of forfeiture was cancelled in respect of item Nos. 1 and 4. For the remaining items the respondent No. 1 could not give any plausible explanation as to the source.

18. On perusal of the writ petition it appears to us that there was no independent or specific challenge to the show cause notice. In any event, the respondent No. 1 approached at the stage when his appeal was partly allowed. No grievance was

made contemporaneously in any of the correspondence with regard to non-disclosure of reasons. The learned Judge held the order of detention legal. Once such order was held to be lawful the respondent No. 1 squarely comes within the mischief of SAFEMA. The properties acquired by the respondent No. 1 are therefore available for confiscation u/s 6(1). An opportunity is always given to the accused to satisfy the source and on failure presumption of illegal acquisition is a consequence.

19. In the writ petition it was contended that since the ground of detention was not supplied to the petitioner such non-supply would make the order of detention itself void ab initio. Such contention was negated by His Lordship. No appeal was preferred by the respondent No. 1.

20. The respondent No. 1 for the first time in the writ petition contended that the notice u/s 6(1) was bad due to non-supply of reasons whereas it would appear that the reasons were supplied as and when asked for. Delayed supply of reasons, in our view, did not vitiate the subsequent orders of the competent authority as well as appellate authority. Show cause notice was served in 1976. It was not proceeded with till 1988 when reasons were supplied. Order was passed by the competent authority upon affording adequate opportunity of hearing. The respondent No. 1 availed the remedy of appeal where his appeal was partly allowed. With deepest regard we have for the learned single Judge, His Lordship was perhaps not right in interfering with the show cause notice at the stage when the respondent No. 1 availed of the remedies in law and became partly successful before the appellate authority.

21. The appeal thus succeeds and is allowed.

22. Judgment and order of the learned single Judge to the extent where the show cause notice and the orders passed on the basis thereof were quashed, is set aside.

23. There would be no order as to costs,

24. There would be stay of operation of this judgment and order for a period of six weeks from date.

25. Urgent xerox certified copy would be given to the parties, if applied for.

Tapas Kumar Giri, J.

26. I agree.