(2006) 03 GUJ CK 0030

In the Gujarat High Court

Case No : Special Civil Application No. 11138 of 2003

Union of India (UOI) APPELLANT

Vs

Arvind Shivlal Soni and Another RESPONDENT

Date of Decision : 03-03-2006

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 12(4), 6(1), 7(3), 8, 9
Constitution of India, 1950 — Article 226, 227

Citation : (2006) 3 GLR 1993

Hon'ble Judges : D.A. Mehta, J

Bench : Single Bench

Advocate : Jitendra Malkan and P.J. Malkan, for the Appellant; J.B. Pardiwala, for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

D.A. Mehta, J.—This petition though styled under Articles 226 and 227 of the Constitution of India is primarily under Article 227 of the Constitution. The petition challenges order dated 4/1/2002 made by the Competent Authority, The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act,1976 (SAFEMA/the Act), Mumbai, Camp at Ahmedabad, in case of the two respondents. Heard Mr.Jitendra Malkan appearing on behalf of the petitioner.

2. Brief facts necessary for deciding the present controversy :

3. The respondents are brother and wife of the brother of the detenu, one Shri Indulal Shivlal Soni, who had been detained under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act,1974 (COFEPOSA). Notice came to be issued u/s 6(1) of the Act on 9/4/1999 to the two respondents herein. After considering the explanation tendered by the two respondents on 4/1/2002 Order No. 1/SAFEMA/AHD/2002 came to be made by the Competent Authority. For the present purpose only part of the impugned order which is necessary is reproduced hereinafter.

ORDER 24. Having regard to the facts and circumstances of the case I pass the following order :-

(a) xxx xxx xxx

(b) xxx xxx xxx

c.) xxx xxx xxx

d. I declare the property at shop No. 7, Ratan Chambers, Ratanpole, Ahmedabad as legally acquired property and order its release from the proceedings.

(e) I declare the property at Shop No. 81 at Shethni pole, Ratanpole, Ahmedabad as illegally acquired property and therefore, order its forfeiture to the Central Government free from all encumbrances u/s 7(3) of the Act. As out of the total cost of Rs. 40,000 the AP could explain the source of Rs. 32,500 only which is more than 50% of the total cost, under the provisions of Section 9 of the Act, I give an option to pay a fine of Rs. 9,000 (Rupees Nine Thousand Only) i.e. a fine equal to one and one fifth times of the value of unexplained amount in lieu of forfeiture. If the AP chooses to pay fine in lieu of forfeiture, he should make the payment by way of a demand draft payable in favour of ''The Competent Authority SAFEMA'' payable at Mumbai. This Demand Draft should be send to the office of the undersigned at Ahmedabad. This option should be exercised within 30 days from the date of receipt of this order failing which the same shall stand forfeited to the Central Government free from all encumbrances under the provisions of the Act. On failure to redeem the forfeited property within the stipulated period of 30 days the AP shall surrender the same to the Inspecting Officer, SAFEMA/NDPSA, Office of the Competent Authority, Aayakar Bhawan, Ground floor, Ashram Road, Navrangpura, Ahmedabad - 380009 within a period of 30 days from the date of receipt of this order failing which the same shall be taken over by use of necessary force as may be necessary.

4. The case of the petitioner is that the Competent Authority by virtue of order made on 26/7/2002 in the case of wife of the detenu directed forfeiture of 50% share in the two properties by observing as under :

ORDER

a) xxx xxx xxx

b) 50% share in building at 81, Sheth-ni-pole, Ratanpole, Ahmedabad.

c. 50% share in shop at 7, Ratan Chambers, Sheth-ni-pole, Ratanpole,Ahmedabad.

5. The principal contention is that u/s 8 of the Act the burden lies on the relative who is called upon to explain the source of investment i.e. whether the investment in the property is from known legal source or not. That the Competent Authority while passing the impugned order dated 4/1/2002 has committed an error in accepting the explanation tendered by the respondents

herein, because in case of the co-owner of the same property having 50% share, the Competent Authority did not find the explanation tendered by the co-owner to be satisfactory.

6. Apart from the fact that the impugned order is an appealable order in terms of provisions of Section 12(4) of the Act and the petition is required to be rejected on this limited count, considering the fact that the petition has been admitted since 1/8/2003, the matter is heard and finally disposed of on merits also.

7. u/s 9 of the Act, the Competent Authority is entitled to make an order giving an option to the person affected to pay, in lieu of forfeiture, a fine equal to one and one-fifth times the value of such part, viz. part which is less than one-half of the share where the source of investment of the property acquired has not been proved to the satisfaction of the Competent Authority. It is not the case of the petitioner that the Competent Authority does not have power. The only ground is that once the Competent Authority held in case of the co-owner having 50% share in relation to the same property and directed forfeiture, the impugned order could not have been made by the Competent Authority. The entire premise is based on a fallacy. In the first instance, the impugned order dated 4.1.2002 cannot be considered to be bad in law merely because the Competent Authority passes a different order subsequently, i.e. on 26.7.2002 in case of the co-owner. The subsequent order was not in existence when the impugned order was made.

8. Section 9 of the Act specifically provides for the imposition of a fine in lieu of forfeiture when more than 50% of the share stands explained and only a minor portion is left out in relation to which the explanation is not accepted. Therefore, in case of an affected person where the affected person is holding 50% share of the entire property, the provision has to be applied by treating such 50% share as entire holding and then ascertain as to whether the explanation of the source is in relation to more than 50% of such value of the holding.

9. In relation to property bearing Shop No. 7, Ratan Chambers, Ratanpole, Ahmedabad the entire holding has been found to be legally acquired property and order of release has been made. Therefore, in so far as this property is concerned there is no question of treating the same, viz. the impugned order on this count, bad in law merely because the remaining 50% share of the property has been treated as being liable to forfeiture in hands of the co-owner.

10. Coming to property bearing Shop No. 81 at Sheth-ni-pole,Ratanpole, Ahmedabad, the Competent Authority came to the conclusion that though the property should be termed to be illegally acquired property and was liable to forfeiture as out of total cost of Rs. 40,000/- the affected person could explain the source of investment to the extent of Rs. 32,500/- only, which was more than 50% of the total cost i.e. holding; and hence in exercise of powers vested in the Competent Authority by virtue of Section 9 of the Act the Competent Authority gave an option to pay a fine of Rs. 9,000/- in lieu of forfeiture qua this property. In the subsequent order made in case of wife of the detenu the

Competent Authority came to the conclusion that the said affected person viz. wife of the detenu could not explain the source of investment. That by itself cannot make the impugned order bad in law or without jurisdiction. It is not even the case of the petitioner that the order suffers from vice of perversity.

11. The only plea is based on provisions of Section 8 of the Act. Whether a person has discharged the onus or not would be a question of fact based on appreciation of evidence on record and cannot constitute a ground for seeking intervention of High Court under Article 227 of the Constitution. The parameters for exercise of jurisdiction under Article 227 of the Constitution stand well defined and the present petition does not meet with any of the parameters.

12. In the result, the petition cannot be accepted and is accordingly rejected. Rule discharged. Interim relief stands vacated.

