

(2008) 03 MAD CK 0156

In the Madras High Court

Case No : Writ Petition No's. 1149 and 1150 of 2001

V. Mohan, etc.

APPELLANT

Vs

The Income Tax Officer and Others

RESPONDENT

Date of Decision : 24-03-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 —
Section 10, 12, 12(4), 18, 18(1)

Citation : (2008) CriLJ 2821

Hon'ble Judges : P.K. Misra, J;K. Chandru, J

Bench : Division Bench

Advocate : C. Natarajan for N. Inbarajan and N. Sriprakash, for the Appellant; P. Wilson, Asst. Solicitor General, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—One V.P. Selvarajan was convicted under the provisions of Customs Act, 1962 by the judgment dated 23-11-1969 (hereinafter referred to as "the convict"). The petitioner in W.P. No. 1150 of 2001 is the wife of one V.P. Vadivel Achari, who is the brother of such convict and the petitioner in W.P. No. 1149/2001 is the nephew of the convict (the son of the petitioner in W.P. No. 1150 of 2000). After coming into force of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property Act, 1976 (hereinafter referred to as "the Act"), the competent authority issued a notice apparently u/s 18 of the Act to the Income Tax Officer (1st respondent) to make enquiries regarding the agricultural land, house, investments and capital account shown in the balance sheet of the petitioner in W.P. No. 1150/2001. Such petitioner furnished details of the accounts right from 1950-51 till 1966-67 by referring to the regular Income Tax assessment which had been completed by the Income Tax Officers.

2. On 2-2-1980, the competent authority (the 2nd respondent) issued a notice u/s 6 of the Act to the convict which was in respect of certain gold ornaments and

there was not even a whisper relating to the immovable properties standing in the name of the present petitioners. Therefore, the petitioner in W.P. No. 1150 of 2001 furnished further particulars pursuant to the query of the Income Tax Officer and also furnished different particulars relating to query made by the competent authority vide notice dated 29-3-1993. At that stage, a notice, purporting to be u/s 6 of the Act, was served on the petitioner in W.P. No. 1150 of 2001 listing certain immovable properties as well as investments and jewellery. It was indicated by the said petitioner that the books of accounts had been maintained since 1950 and she also furnished particulars relating to different assessments made, thereby contending that the properties in question were acquired from lawful business activities of the petitioner.

2.1 A notice u/s 6(1), dated 19-1-1994, was issued to the petitioner in W.P. No. 1149 of 2001 in respect of the investments in a proprietary concern by name V.P.V. Gold Palace, Kumbakonam, residential house property and certain agricultural lands, the investments in the shape of cash made in 1973 and 1986 and the immovable property purchased in 1970 and 1976. Such petitioner, in the explanation claimed that he had no financial or business connection with his convicted paternal uncle and he had also explained the sources of investment by referring to various Income Tax returns and tax assessment orders. Various documents relating to gifts were also referred to.

3. An order u/s 7 of the Act was passed on 30-4-1998 forfeiting the properties standing in the name of the writ petitioner W.P. No. 1150 of 2001, who filed an appeal u/s 12 of the Act before the Appellate Tribunal for Forfeited Property. During pendency of the appeal also, certain additional materials were produced on behalf of the petitioner in W.P. No. 1150/2001.

4. The competent authority by order dated 28-5-1998 passed u/s 7 of the Act forfeited the properties of the petitioner in W.P. No. 1149 of 2001. Thereafter, the said petitioner filed FPA No. 32/MDS/98. The aforesaid appeal was taken up by the appellate authority along with FPA No. 31/MDS/98, which had been filed by Smt. V. Padmavathy, the mother of the present petitioner, and by a common order dated 15-11-2000, both the appeals were dismissed. W.P. No. 1149 of 2001 has been filed by the son (nephew of convict) against such order relating to FPA No. 32/MDS/98, whereas Writ Petition No. 1150/2001 has been filed by his mother (the wife of brother of convict). Both the writ petitions were taken up together and having been disposed of by this judgment.

5. Mr. C. Natarajan, learned senior Counsel appearing for the petitioners has submitted as follows:

(i) the notice issued u/s 6 of the Act is illegal as it does not disclose the reason for the proposed forfeiture and does not allege the existence of any nexus between the property sought to be forfeited and the convict.

(ii) Even assuming that the notice u/s 6 was not illegal on the above account, the notice was required to be served on the convict and a copy was required to be

served on the relative as specifically envisaged u/s 6 of the Act and therefore in the absence of the notice as contemplated, the entire proceeding was vitiated.

(iii) The Appellate Tribunal acted illegally in ignoring altogether the report of the Income Tax Officer which was sought for and secured by the 2nd respondent himself.

(iv) Keeping in view the voluminous materials produced on behalf of the writ petitioner indicating about their own income which had been accepted and assessed by the Income Tax Authorities for a considerable length of period, extending from 1950 onwards, there was no justification for the Appellate Tribunal to reject such un rebutted materials produced by the petitioner, which would clearly indicate that the petitioner had acquired the property from out of her own income and such property had nothing to do with the convict.

(v) The conclusion of both the authorities are based on surmises and conjectures, completely, ignoring the various materials produced on behalf of the petitioner and thus the orders are vitiated by non-application of mind and liable to be quashed.

(vi) The order u/s 7 passed against, the convict having been set aside by the Appellate Tribunal in respect of the gold ornaments sought to be forfeited, there was no other material to indicate that this property was held by the convict either directly or through a relative.

6. Mr. P. Wilson, learned Asst. Solicitor General of India appearing for the respondents, on the other hand, submitted that the competent authority as well as the Appellate Tribunal had applied their mind to the relevant facts and circumstances and have come to a particular conclusion, which is not expected to be interfered with in exercise of jurisdiction under Article 226 of the Constitution of India. It is further submitted by him that the non-service of any notice u/s 6 of the Act on the convict, in the peculiar facts and circumstances of present case, does not have the effect of vitiating the proceedings, inasmuch as the petitioners, who are the ostensible owners of the properties, had been served with notice and were given opportunity of hearing and therefore it cannot be said that the petitioners have at all been prejudiced by the non-service of notice u/s 6, relating to the forfeited property, on the convict.

7. Before considering the submissions made by the counsel, it is necessary to notice the relevant provisions of the Act. The Act was enacted to provide for the forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators and for matters connect therewith or incidental thereto. As per Section 2 of the Act, the provisions shall apply only to the persons specified in Sub-section (2), as per Section 2(1). u/s 2(2), the persons specified have been enumerated and Clause (a) indicates every person convicted under different statutes indicated in such provisions. As per Section 2(2)(c), a relative of a convict also comes within the purview of the Act. Explanation 2 indicates who are all the relatives and as per Sub-clause (vi), the spouse of a person referred to in

Sub-clause (ii), that is to say brother, and as per Clause (vii) lineal descendant of a person referred in Clause (ii), that is to son of the brother, also come within the definition of the expression "relative". (In the present case, thus, admittedly, both the petitioners come within the purview of the Act.)

8. Section 3 contains the definition clauses. As per Clause (c) "illegally acquired property", in relation to the concerned person means,

(i) any property acquired by such persons whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings 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-clauses (i) to (iii) of the 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;

(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;

9. Sections 6 and 7 being relevant are also quoted hereunder.

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, and 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.

(2) Where a notice under Sub-section (1) to any person specifies any property as being held on behalf of such person by any other person, a copy of the notice shall also be served upon such other person.

7. Forfeiture of property in certain cases.- (1) The competent authority may, after considering the explanation, if any, to the show cause notice issued u/s 6, and the materials available before it and after giving to the person affected (and in a case where the person affected holds any property specified in the notice through any other person, to such other person also) a reasonable opportunity of being heard, by order record a finding whether all or any of the properties in question are illegally acquired properties.

(2) Where the competent authority is satisfied that some of the properties referred to in the show cause notice are illegally acquired properties but is not able to identify specifically such properties, then, it shall be lawful for the competent authority to specify the properties which, to the best of its judgment, are illegally acquired properties and record and finding accordingly under Sub-section (1).

(3) Where the competent authority records a finding under this Section to the effect that any property is illegally acquired property it shall declare that such property shall, subject to the provisions of this Act, stand forfeited to the Central Government free from all encumbrances.

(4) Where any shares in a company stand forfeited to the Central Government under this Act, then, the company shall, notwithstanding anything contained in the Companies Act, 1956, or the articles of association of the company, forthwith register the Central Government as the transferee of such shares.

10. Section 12(4) provides for an appeal against the order of the competent authority made under Sections 7, 9(1) or 10. Section 18(1) is extracted hereunder.

18. Power of competent authority to require certain officers to exercise certain powers.- (1) For the purposes of any proceedings under this Act or the initiation of any such proceedings, the competent authority shall have power to cause to be conducted any inquiry, investigation or survey in respect of any person, place, property, assets, documents, books of account or any other relevant matters.

11. While upholding the validity of the Act, the Supreme Court in the decision reported in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, , had observed in para 44, which is as follows:

44. ...It would thus be clear that the connecting link or the nexus, as it may be called, is the holding of property or assets of the convict/detenu or traceable to such detenu/convict. Section 4 is equally relevant in this context. It declares that "as from the commencement of this Act, it shall not be lawful for any person to whom this Act applies to hold any illegally acquired property either by himself or through any other person on his behalf". All such property is liable to be forfeited. The language of this Section is indicative of the ambit of the Act. Clauses (c) and (d) in Section 2(2) and the Explanations (2) and (3) occurring therein shall have to be construed and understood in the light of the overall scheme and purpose of the enactment. The idea is to forfeit the illegally acquired properties of the convict/detenu irrespective of the fact that such properties are held by or kept in the name of or screened in the name of any relative or associate as defined in the said two Explanations. 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/detenu or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties. By way of illustration, take a case where a convict/detenu purchases a property in the name of his relative or associate - it does not matter whether he intends such a person to be a mere name lender or whether he really intends that such person shall be the real owner and - or possessor thereof - or gifts away or otherwise transfers his properties in favour of any of his relatives or associates, or purports to sell them to any of his relatives or associates - in all such cases, all the said transactions will be ignored and the properties forfeited unless the convict/detenu or his relative/associate, as the case may be, establishes that such property or properties are not "illegally acquired properties" within the meaning of Section 3(c). In this view of the matter, there is no basis for the apprehension that the independently acquired properties of such relatives and associates will also be forfeited even if they are in no way connected with the convict/detenu....

12. In Smt. Kesar Devi Vs. Union of India (UOI) and Others, , it was observed in paras 10 & 12 which is as follows:

10. Section 2(1) of SAFEMA lays down that the provisions of the said Act shall apply only to the persons specified in the Sub-section (2) of that section. Sub-section (2) of Section 2 gives a long list of different categories of persons to whom the Act shall apply and they include those who have been convicted under the Customs Act, 1962, Sea Customs Act, 1878, Foreign Exchange Regulation Act, 1947 or 1973, where the value of goods or the amount involved exceeds Rs. 1 lakh or have been convicted subsequently under the aforesaid Acts. Clause (b) of this Sub-section includes a person against whom an order of detention has been made under COFEPOSA Act and is not covered by the proviso to this clause.

Clause (c) to Sub-section (2) includes every person who is a relative of the person referred to in Clause (a) or Clause (b). Explanation (2) gives a long list of relatives for the purpose of Clause (c) and in view of Clause (i) thereof, Kesar Devi being the spouse of Jagannath Sharma is clearly covered by the provisions of the Act. Section 6 of the Act lays down that if, having regard to the value of the properties held by any person to whom the Act applies, either by himself or through any other person on his behalf, his known source of income, earnings or assets, and 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 calling upon him to indicate the sources of his income, earnings or assets, out of which or by means of which, he has acquired such property 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. The condition precedent for issuing a notice by the competent authority u/s 6(1) is that he should have reason to believe that all or any of such properties are illegally acquired properties and the reasons for such belief have to be recorded in writing. The language of the Section does not show that there is any requirement of mentioning any link or nexus between the convict or detenu and the property ostensibly standing in the name of the person to whom the notice has been issued. Section 8 of the Act which deals with the burden of proof is very important. It lays down that in any proceedings under the Act, the burden of proving that any property specified in the notice served u/s 6 is not illegally acquired property, shall be on the person affected. The combined effect of Section 6(1) and Section 8 is that the competent authority should have reason to believe (which reasons have to be recorded in writing) that properties ostensibly standing in the name of a person to whom the Act applies are illegally acquired properties, he can issue a notice to such a person. Thereafter, the burden of proving that such property is not illegally acquired property will be upon the person to whom notice has been issued. The statutory provisions do not show that the competent authority, in addition to recording reasons for his belief, has to further mention any nexus or link between the convict or detenu (as described in Sub-section (2) of Section 2) and the property which is sought to be forfeited in the sense that money or consideration for the same was provided by such convict or detenu. If a further requirement regarding establishing any link or nexus is imposed upon the competent authority, the provisions of Section 8 regarding burden of proof will become otiose and the very purpose of enacting such a Section would be defeated.

12. The judgment of a Court is not to be interpreted like a statute where every word, as far as possible, has to be given a literal meaning and no word is to be ignored. The observations made have to be understood in the context of the facts and contentions raised. As mentioned earlier, Explanation (2) appended to Clause (c) of Sub-section (2) of Section 2 gives a very long list of relations. The

combined effect of Clauses (iii) and (vii) of the Explanation is that a convict or detenu's wife's sister's lineal descendant whether male or female and howsoever low is also included even though the relationship is quite remote. In those cases where the relationship is a very remote one, the competent authority may have to indicate some link or nexus while recording reasons for belief that the property is an illegally acquired property. But cases where relationship is close and direct like spouse, son or daughter or parents stand on an altogether different footing. Here no link or nexus has to be indicated in the reasons for belief between the convict or detenu and the property, as such an inference can easily be drawn.

13. In the light of the aforesaid provisions of the Act, as elucidated by the two Supreme Court decisions, the contentions raised by the petitioners are required to be considered. It is not disputed that V.R. Selvarajan was "convict" and the petitioner being the brother's wife and son are "relatives" in terms of the definitions given under the Act.

14. It is convenient to consider the second contention raised by the petitioners first as such submission stands on strongest footing. The provisions contained in Section 6 have already been extracted in extenso. It is not in dispute that in the present case notice was served on the relative as contemplated u/s 6(2) of the Act. The contention of the petitioner is to the effect that in the absence of issuance of any notice of forfeiture on the convict as specifically contemplated u/s 6(1) of the Act, the entire proceeding was vitiated.

15. We have carefully considered the submission made by the counsel for both parties on this aspect. A bare reading of the provisions contained in Section 6 leaves no room for doubt that the primary notice is intended to be served on the convict, where-under the convict is required to indicate the sources of his income, earnings or assets out of which or by means of which he had acquired the properties sought to be forfeited. When the competent authority has the reason to believe that the property even if held in the name of a relative is in fact the property of the convict, such competent authority is required to send a notice u/s 6(2) of the Act upon such relative. This is to be done by serving "...copy of the notice u/s 6(1)." In the present case, admittedly, no notice has ever been served on the convict u/s 6(1) in relation to the property standing in the name of the petitioner.

16. Learned Counsel for the Central Government had contended that since the ostensible owners had been served with the notice and had all opportunity to establish that the properties were actually their own property, it cannot be said that any prejudice has been caused to the petitioner on account of non-service of notice u/s 6(1) on the convict.

17. Even though such a submission may appear, prima facie, to be attractive, on a closer scrutiny cannot be accepted. There is no doubt that any action taken under the Act has got far reaching consequence. The ostensible owner of a

property is likely to be deprived of the property. The procedure contemplated in such Act containing provisions relating to forfeiture of properties standing in the name of a relative is required to be complied with strictly in accordance with the provisions. Where the method of issuance of notice and subsequent forfeiture have been laid down in clear terms by the statutes, the authorities are required to follow the procedure. This cannot be equated with a case of mere prejudice. On the other hand, such a defect relating to absence of notice u/s 6(1) on the convict is a jurisdictional defect and the authorities concerned cannot be heard to say that no prejudice is caused. Law is well settled that the authorities vested to do a particular matter in a manner contemplated, such action has to be taken, in accordance with the manner contemplated or not at all. See *State of Gujarat Vs. Shantilal Mangaldas and Others*, .

18. In the present case, since the basic requirement of service of notice u/s 6(1) on the convict had not been complied with, in our considered opinion, the competent authority had no further jurisdiction to proceed in the matter by merely serving a notice on the petitioner purporting to be u/s 6(2). As a matter of fact, Section 6(2) contemplates that upon service of notice u/s 6(1) on the convict, if the property sought to be forfeited stands in the name of the relative, a copy of such notice shall also be served upon such other person. Therefore, there is no escape from the conclusion that in the present case the proceedings got vitiated from that stage onwards.

19. Learned Counsel for the respondents submitted that such a contention was not raised before the original authority or before the Tribunal. On a careful scrutiny of the materials on record, we find that in fact such a contention was specifically raised before the appellate tribunal and therefore it cannot be said that that question had not been raised earlier. Since the question relates to the very jurisdiction of the competent authority, in the absence of compliance with the jurisdictional fact, we are constrained to hold that the subsequent proceedings became vitiated. On this ground alone, the orders passed by the authorities are liable to be quashed.

20. Learned Senior Counsel appearing for the petitioner further submitted that even on merit, the order passed by the appellate tribunal cannot be supported, as according to the petitioner, in spite of furnishing copious materials, the appellate tribunal has merely short circuited the contentions raised on behalf of the present petitioner. The learned Senior Counsel has painstakingly taken us through the various materials in support of his submission that the conclusion of both the authorities are in fact not based on materials on record and several relevant materials on record have been illegally ignored. In view of our conclusion that the competent authority lacked jurisdiction to proceed further in the absence of issuance of any notice u/s 6(1), it is not necessary to delve further into such aspect. Similarly, the other contentions need not be decided in these writ petitions.

21. Learned Counsel for the respondents submitted that if, in any case, this

Court concludes that in the absence of any notice u/s 6(1) the proceedings were vitiated, the authorities should be given the option to proceed further by issuing fresh notice. Learned senior Counsel for the petitioner, on the other hand, submitted that since the convict has admittedly expired in the meantime, issuance of notice at this stage would be redundant.

22. We do not think it is necessary to resolve this question as to whether notice u/s 6(1) can be issued to the legal representatives after the death of the convict. Leaving such question open, we observe that it would be open to the authorities, if they are so advised, to initiate fresh proceedings in accordance with law. However, as already observed, the question as to whether such a notice can be issued u/s 6(1) after the death of the convict is a matter left open to be agitated at the appropriate time if the occasion so arises.

23. Subject to the aforesaid observation, the writ petitions are allowed. No costs. Connected miscellaneous petitions are closed.