

(2010) 08 MAD CK 0315

In the Madras High Court

Case No : Writ Petition No. 16313 of 2001

V.P. Ranganathan

APPELLANT

Vs

Appellate Tribunal for Forfeited Properties and The Competent Authority, Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 and Narcotic Drugs and Psychotropic Substance Act

RESPONDENT

Date of Decision : 05-08-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 300A
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 —
Section 2, 2(2), 3(1), 6, 6(1)

Citation : (2010) WritLR 822

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : Raghul Balaji, for Satish Parasaran, for the Appellant; M.L. Ramesh, for R2, for the Respondent

Final Decision : Allowed

Judgement

S. Nagamuthu, J.—The petitioner is the brother of one Mr. V.P. Selvaraj. The said Mr. V.P. Selvaraj was convicted under the provisions of the Customs Act, 1962 for an offence relating to seizure of 100 bars of gold in November 1969. The said conviction has become final. Some of the properties belonging to the convict were ordered to be forfeited on 23.03.1996 by the competent authority u/s 7(i) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 [hereinafter referred to as "the Act"]. Subsequently, the competent authority issued a notice to the petitioner, the brother of the convict, calling upon him to explain as to why some of the properties belonging to the petitioner should not be forfeited as they are all illegally acquired properties as defined in the said Act. The petitioner submitted an explanation stating that the properties are not illegally acquired properties in terms of the provisions of the Act and, therefore, they are not liable to be forfeited. Thereafter, the competent authority,

by order dated 30.08.1999 rejected all the contentions of the petitioner and held that the properties are illegally acquired properties and, therefore, ordered for forfeiture of the same in favour of the Government. Challenging the same, the petitioner appealed before the appellate tribunal under the Act in FLA No. 41/MDS/99. The appellate tribunal by order dated 04.07.2001, rejected the appeal thereby holding that the forfeited properties were acquired by the petitioner with the illegal earnings of the convict Mr. V.P. Selvaraj. Accordingly, the tribunal dismissed the appeal. Aggrieved over the same, the petitioner is, now, before this Court with this writ petition.

2. In this writ petition, the petitioner would raise mainly the following grounds:

(i) The competent authority, in the notice issued under 6(1) of the Act, had not indicated the reasons which made him to believe that the properties are illegally acquired properties in terms of the Act.

(ii) The competent authority had failed to record such belief in writing before issuing the notice u/s 6(1) of the Act. Therefore, the entire proceeding is without jurisdiction.

(iii) In the absence of notice to the convict as required u/s 6(2) of the Act, issuance of notice to the petitioner u/s 6(1) of the Act is wholly without jurisdiction.

(iv) There is total non application of mind on the part of the competent authority into the facts of the case and thus, the entire proceeding is vitiated.

(v) Though the petitioner happens to be the brother of the convict, there is not even any prima facie material to show that there has been nexus between the properties and the alleged illegal earnings of the convict.

(vi) The properties in question were purchased during 1960's which were duly accounted for. The petitioner was doing gold business and various other businesses. It is further stated that the income derived from such sources have been properly assessed to Income Tax. Further, under Voluntary Disclosure Scheme, some more income was declared and the same was also assessed by the Income Tax Department. Therefore, it cannot be said that the improvements made on the said properties by the petitioner from out of the declared income under the Voluntary Disclosure Scheme would amount to illegal acquisition. The presumption that the properties are illegally acquired properties in terms of the Act also stands rebutted.

On these grounds, the impugned order is liable to be quashed, it is contended.

3. The learned Counsel appearing for the 2nd respondent would oppose the writ petition on the following grounds:

(i) There is no legal necessity under the Act to indicate in the notice itself the reasons for the belief of the competent authority that the properties are illegally acquired properties in terms of the Act and it would be suffice, if reasons are

supplied to the party on demand.

(ii) The legal requirement is only to record the reasons for such belief and, as a matter of fact, in the instant case, such reasons have clearly been recorded by the competent authority before issuing the notice. Such belief is based on sufficient materials available on record and, therefore, it cannot be said that there was total non application of mind on the part of the competent authority.

(iii) There has been clear nexus established between the properties in question and the convict.

(iv) u/s 8 of the Act, there is a presumption that the properties of the relatives of the convict are illegally acquired properties and to rebut the said presumption, such relative should prove to the satisfaction of the competent authority that the properties were not acquired from out of the illegal earnings of the convict. Such presumption raised u/s 8 of the Act would also form the basis for issuing notice by the competent authority.

(v) The competent authority as well as the appellate authority have found that the petitioner has failed to discharge his burden u/s 8 of the Act to prove that the properties in question are not illegally acquired properties in terms of the Act. From out of the materials available on record, the competent authority as well as the appellate authority were fully satisfied that the properties are illegally acquired properties and, therefore, they have rightly ordered for forfeiture which does not require any interference at the hands of this Court, it is contended.

4. I have considered the rival submissions and also perused the records carefully.

5. At the outset, I have to state that it is settled law that recording of reasons for belief that the properties are illegally acquired properties in terms of the Act alone gives rise to jurisdiction to the competent authority to issue notice u/s 6 of the Act and to proceed further u/s 7 of the Act. In the absence any such reason having been recorded by the competent authority, surely, the very issuance of the notice should be held to be without jurisdiction. For this legal proposition, I may refer to the judgment of the Hon''ble Supreme Court in Smt. Kesar Devi Vs. Union of India (UOI) and Others, wherein the Hon''ble Supreme Court in para 10 has held as follows:

10. ...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 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

years 1969-70 to 1972-73 as follows:

Assessment	Year	Nature	of	addition	Sl. No. Amount
1969-70	Value of understatement attributable to Rs. 11,000/-	the cost of construction of building at 101 to 103, Big Street, Kumbakonam up to 31.03.1969			1
1970-71	Value of understatement attributable to Rs. 22,000/-	the cost of construction of building at 101 to 103 , Big Street, Kumbakonam up to 31.03.1970			2
1971-72	Value of understatement attributable to Rs. 33,000/-	the cost of construction of building at 101 to 103 , Big Street, Kumbakonam up to 31.03.1971			3
1972-73	Value of understatement attributable to Rs. 44,000/-	the cost of construction of building at 101 to 103, Big Street, Kumbakonam up to 31.03.1972			4

9. The order further states that the petitioner made declaration u/s 3(1) of the Voluntary Disclosure Scheme, 1975 to the tune of Rs. 25,000/-. In the said disclosure, the petitioner had stated that the sources of the said amount was cash earned over a period of years not easily assessable. From these materials, the competent authority has stated that the unexplained investments in the construction of house properties and the disclosure of income under the Voluntary Disclosure Scheme of 1975 indicate that he was in possession of substantial income, sources of which were not identified. On the basis of the information gathered from the available records relating to income tax and wealth tax assessment of V.P. Ranganathan, the petitioner herein, the recording states "I have reason to believe that the illegally earned income of V.P. Ranganathan, had been invested in the acquisition of the above mentioned movable and immovable assets".

10. A perusal of the above recording, in my considered opinion, would go to show that it satisfies the requirements of Section 6 of the Act. It cannot be said that there was non application of mind on the part of the authority. A detailed documentation of all the materials which were gathered by the competent authority and the discussion made thereunder would go to clearly establish that the competent authority had proper application of mind to find as to whether there were reasons to believe that the properties in question were illegally acquired properties in terms of the Act. Therefore, the contention of the learned Counsel for the petitioner that the notice and the consequential proceedings are vitiated for non application of mind on the part of the competent authority is only

liable to be rejected.

11. Next, a perusal of the above order would also go to show that the competent authority had recorded reasons for the belief that the properties are the illegally acquired properties warranting issuance of notice u/s 6 of the Act. Thus, the requirements of Section 6(1) of the Act have been satisfied and so the notice cannot be stated to be without jurisdiction.

12. The learned Counsel for the petitioner would submit that it is not as though, every alleged illegally earned property of the petitioner is liable for being proceeded against under the Act, but only those properties which have got some nexus with the income of the convict alone could be proceeded with. It is true that the properties which are acquired by the relative of the convict independently out of his own resources cannot be proceeded against simply because the individual happens to be the relative of the convict. The very object of the Act is to deprive the persons engaged in smuggling activities and foreign exchanges manipulations of their illegally acquired properties so as to effectively prevent smuggling and other clandestine operations. Therefore, it is needless to say that there has to be nexus established between the illegal earnings of the convict and the properties held by a close relative.

13. u/s 8 of the Act, however, there is a burden cast upon such a relative to prove the fact that the properties are his own legally acquired properties and they have got nothing to do with the illegal activities of the convict. This burden is to be discharged at the time of enquiry by the competent authority. While recording the reasons for such belief for issuing notice u/s 6(1) of the Act, the competent authority can take into account the presumption u/s 8 of the Act also. Apart from that, the phrase "reasons to believe" does not mean clear proof of nexus between the properties in question and the convict. Such proof is required only for passing final order of forfeiture. For the purpose of Section 6(1) of the Act, to issue notice, belief based on the reasons from out of the materials available on record would be sufficient. In the instant case, it cannot be said that there were no materials available on record to form the reasons for the competent authority to believe that the properties were illegally acquired properties from out of the illegal earnings of the convict. Therefore, the contention of the petitioner that the reasons recorded in this case, would not satisfy the requirement of Section 6(1) of the Act cannot be countenanced.

14. The next contention of the learned Counsel for the petitioner is that it is incumbent, u/s 6(1) of the Act, on the competent authority to indicate in the notice itself his reasons for such belief. For this proposition, the learned Counsel has relied on the judgment in *Fatima Mohd. Amin (Dead) through LR. Vs. Union of India (UOI) and Another*, .

15. But, the learned Counsel appearing for the 2nd respondent would rely on a Judgment in *P.P. Abdulla and Another Vs. The Competent Authority and Others*, the Hon''ble Supreme Court in para 7 has held as follows:

7. Learned Counsel submitted that it has been expressly stated in Section 6(1) that the reason to believe of the competent authority must be recorded in writing. In the counter-affidavit it has also been stated in paragraph 8 that the reasons in the notice u/s 6(1) were recorded in writing. In our opinion this is not sufficient. Whenever the statute required reasons to be recorded in writing, then in our opinion it is incumbent on the respondents to produce the said reasons before the Court so that the same can be scrutinised in order to verify whether they are relevant and germane or not. This can be done either by annexing the copy of the reasons along with the counter- affidavit or by quoting the reasons somewhere in the counter-affidavit. Alternatively, if the notice itself contains the reason of belief, that notice can be annexed to the counter-affidavit or quoted in it. However, all that has not been done in this case.

16. I am also of the view, after perusing the above judgment and after carefully going through the provisions of the Act, that it would be sufficient if such reasons are stated in the counter and the same has been duly done by the respondents in this case. As a matter of fact, Fatima Mohd. Amin's case cited supra, has been distinguished on facts in P.P. Abdulla's case cited supra. In this case, as held in P.P. Abdulla's case the authority has furnished the recordings for perusal along with the counter. Thus, the competent authority has satisfied the said legal requirement.

17. The next contention of the learned Counsel for the petitioner is that in the absence of any notice u/s 6(2) of the Act to the convict, issuance of notice and continuance of proceeding against a relative of the convict, is not sustainable. The learned Counsel, for this proposition, relies on a judgment of a Division Bench of this Court in V. Mohan, etc. Vs. The Income Tax Officer and Others, wherein the Division Bench in para 17 has held as follows:

17. 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.

18. The learned Counsel appearing for the 2nd respondent would rely on an unreported judgment of a Division Bench of the Kerala High Court on the same issue in O.P. No. 15835 of 1996 (I) [Sajitha and Ors. v. The Competent Authority, SAFEMFOP and NDPS Act and Ors.] dated 16.02.2005 wherein it has been held thus:

Section 2(c) refers to every person who is a relative of a person referred to in Clause (a) or Clause (b). Section 2(e) refers to any holder of any property which

was at any time previously held by a person referred to in Clause (a) or Clause (b). When we read Section 6(1) and 6(2) along with Section 2(2)(e) it is evident that notice contemplated u/s 6(2) is to any other person if the property does not stand in the name of the detenu. So far as this case is concerned, property stands in the name of wife and brothers. Admittedly, notices have been issued to them as contemplated u/s 6(1). We are of the view, non issue of notice to the detenu will not vitiate the proceedings as against their relative.

19. Aggrieved over the said judgment of the Kerala High Court, the petitioner therein took up the matter before the Hon"ble Supreme Court in Special Leave to Appeal (Civil) No. 36959 of 2009 wherein the Hon"ble Supreme Court passed the following order:

...In our view, the impugned order does not suffer from any legal infirmity. It is not in dispute that O.P. No. 15835 of 1996 filed by the petitioner for quashing orders dated 17.11.1994 and 06.09.1996 passed by the competent authority and the tribunal respectively was dismissed by the High Court on 16.02.2005 and SLP (c) No. 10348 of 2005 was dismissed on 10.05.2005. This being the position, the Division Bench of the High Court did not commit any error by refusing to review order dated 16.02.2005 and we do not find any valid ground to interfere with the impugned order.

20. Thus, the Hon"ble supreme Court has confirmed the view taken by the Hon"ble Kerala High Court to the effect that for issuance of notice on the relative of a detenu/convict, it is not at all necessary that simultaneously a notice should also be served on the detenu/convict. In view of the above position, in the case on hand, I hold that though there was no notice served on the convict in respect of the properties in question, the notice served on the petitioner, who is a relative of the convict is sustainable and the same cannot be stated to be without jurisdiction. Thus, this ground of attack also fails.

21. At this juncture, the learned Counsel for the 2nd respondent has brought to the notice of this Court an earlier order passed by this Court in W.P. No. 2110 of 1989 along with connected writ petitions by means of a common order dated 16.10.1990. In the said writ petitions, the petitioner herein had challenged the very same notice issued u/s 6(1) of the Act which culminated in the present impugned order. One of the grounds raised before this court earlier was that the notice did not contain the reasons for the belief on the part of the competent authority. This Court in the said writ petition has held as follows:

I have also taken notice of the contents of the impugned notice. It cannot be called all that vague. It gives sufficient indication of the nature of the satisfaction of the competent authority. It has made a specific mention of the application of Clause (c) of Sub-section (1) of Section 3 of the Act. A reference to Clause (c) of Sub-section (1) of Section 3 will evidently enable any person receiving notice that he is either one such person who himself had been convicted as aforesaid or he falls in one or the other category which shall attract the law. If the person

receiving notice is not one to whom the Act would apply, he may appear and show cause and state that he did not come under the Act. If the satisfaction of the competent authority has to be questioned, that can be question only by questioning the reasons recorded in writing by him. The order of the competent authority has not been challenged.

22. Thus, this Court has already negated the challenge to the validity of the notice issued u/s 6(1) of the Act. The said order has become final. Therefore, it is not open for the petitioner to once again raise the very same question regarding the validity of the notice stating that either the notice does not contain the reason for the belief or there is total non application of mind on the part of the competent authority. In that case, this Court has clarified that the reasons recorded could alone be challenged in future. The petitioner has not challenged the same by filing any writ petition. However, on that score, the petitioner cannot be prevented from challenging the same either before the competent authority or before the appellate authority because such recording alone gives jurisdiction to the competent authority to proceed further. That is the reason why this Court heard in detail the arguments advanced by the learned Counsel appearing for the petitioner assailing the correctness of the reasons recorded by the competent authority. After having considered the entire arguments, as I have already concluded , I find that there is no substance in the same to hold that the notice u/s 6(1) of the Act issued to the petitioner is not valid.

23. Now, coming to the next contention of the petitioner that there is no nexus between the properties in question and the alleged illegal earnings of the convict, the learned Counsel appearing for the 2nd respondent would rely on Section 8 of the Act, according to which, it is the burden of the petitioner to prove to the satisfaction of the competent authority that these properties are not illegally acquired properties. In this regard, I may state that there are two kinds of nexuses which are required to be established viz., (1) the nexus between the convict and the individual; and (2) the nexus between the property and the illegal earnings of the convict. In the instant case, there is no dispute that the petitioner is the brother of the convict. Thus, the first nexus between the convict and the petitioner has been established. The second nexus is between the illegal earnings of the convict and the properties in question. In this regard, I may say that in view of Section 8 of the Act, if the first kind of nexus is established, a presumption may be drawn that the properties held by the petitioner are the illegally acquired properties from out of the illegal earnings of the convict. For this, the very fact that the sources of income were not disclosed by the petitioner to the Income Tax Department is yet another circumstance. From these circumstances, the competent authority had drawn the presumption that there is nexus between the illegal earnings of the convict and the properties in question held by the petitioner. But, the said presumption is undoubtedly rebuttable as the said presumption shall not take the place of conclusive proof. The burden u/s 8 of the Act is heavily upon the petitioner. Such burden can be discharged either from out of the materials already available on record or by letting in any evidence or

by proving some documents on his behalf. In this case, the learned Counsel appearing for the respondents would submit that the petitioner has failed to discharge his burden as required u/s 8 of the Act by letting in either oral or documentary evidence.

24. The learned Counsel appearing for the petitioner, per contra, would submit that the Chartered Accountant who appeared on behalf of the petitioner had produced all the records showing the income of the petitioner from out of which the burden of the petitioner u/s 8 of the Act had been discharged. In this regard, he would submit that the properties which were originally purchased during 1960s" have been duly accounted for to the income tax department. The sources of acquisition of these properties are not in dispute. The said sources are legal sources of the petitioner. Therefore, the learned Counsel would submit that in respect of these immovable properties it cannot be said that they were illegally acquired from out of the illegal earnings of the convict. To this extent, the petitioner may be justified in his submissions. But, the case of the 2nd respondent does not stop with that. It proceeds further. According to the 2nd respondent, during 1970s", the petitioner demolished the existing building and made fresh constructions of a lodge investing a huge amount. The source for the said investment was not disclosed by him. A sum of Rs. 25,000/- was disclosed for the first time under the Voluntary Disclosure Scheme during the year 1976. Though it may be true that the petitioner was not required to disclose his sources for the same to the income tax authority, for the purposes of this Act, he is expected to explain the sources for the said amount of Rs. 25,000/- which was invested in the construction of the lodge. vide Tekchand and Others Vs. Competent Authority, . Since the same has not been done, according to the learned Counsel for the 2nd respondent, the burden has not been discharged.

25. In order to appreciate the above rival submissions, I perused the records and I am at loss to find any evidence on record from the petitioner to substantiate his contentions. A perusal of the records would go to show that one chartered accountant had appeared as an agent of the petitioner and a written statement had been produced on behalf of the petitioner explaining the acquisitions. Apart from that, some income tax returns and wealth tax returns and other accounts had also been produced by the Chartered Accountant. From the records, I am also able to find that the chartered accountant made his submissions by way of arguments as though he was appearing as a counsel for the petitioner. Based on such written statement submitted by the petitioner and the other records produced, the competent authority has come to the conclusion that the petitioner has failed to discharge his burden u/s 8 of the Act. In my considered opinion, the procedure adopted by the competent authority cannot be appreciated at all. The competent authority ought to have permitted the petitioner to let in oral as well as documentary evidences or to file at least affidavits. The competent authority, for a moment, should keep in mind that he is acting as a quasi judicial authority discharging a solemn function to decide as to whether the properties held by the petitioner are the illegally acquired properties from out of the illegal earnings of

the convict. vide State of Himachal Pradesh Vs. Raja Mahendra Pal and Others, . The competent authority should also keep in mind the object behind the introduction of the act by the law makers. While discharging his functions u/s 6 of the Act, the competent authority is not discharging a pure executive function so that he can decide the issues on the basis of the files produced before him. As a quasi judicial authority, he is expected to adhere to the principles of natural justice and to the basic principles of evidence. Of course it is not necessary for the competent authority to write a detailed judgment like that of a civil court. Nevertheless, it is incumbent on the competent authority to follow the basic principles of the Evidence Act and then to decide the issues involved based on the evidences so produced before him. The right to hold a property, though no more a fundamental right, still, is a constitutional right under Article 300-A of the Constitution of India. Depriving a citizen of his legally acquired property otherwise than in accordance with law, will be unconstitutional. Therefore, every endeavour should be made to find as to whether the properties are really illegally acquired properties from out of the earnings of the convict. The nexuses, as discussed above, should be established. It is needless to point out that while holding such an enquiry, for the purpose of deciding the above issues, the competent authority is expected to strictly adhere to the principles of natural justice also. The principles of natural justice have been held by the Hon''ble Supreme Court as one of the facets of the fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India. It is one of the weapons available in the hands of a citizen of this country to prevent any arbitrary exercise of power by the public authority to his detriment.

26. In this case, in my considered opinion, the competent authority has given a go by to all the above basic principles resulting in injustice to the petitioner. First of all, a Chartered Accountant is not a competent person to practise as a counsel to represent the petitioner before the competent authority. He does not fall within the ambit of the Advocates Act, 1961. May be true, that he is competent to appear on behalf of an assessee before the Income Tax authorities since there are enabling provisions for the same in the Income Tax Act. Insofar as the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 is concerned, though the competent authority is an officer generally drawn from Income Tax Department, still, he does act as an Income Tax Officer, while exercising the jurisdiction under this Act. Under this Act, he is undoubtedly a quasi judicial authority. Therefore, allowing a Chartered Accountant to appear on behalf of a person under the Act is also not in accordance with law. Of course, a person concerned may appoint a chartered accountant as his power agent so as to appear before the competent authority. In such an event, the chartered accountant, as his agent, would not be competent to speak about the facts by way of deposition which are within the exclusive knowledge of the person concerned. It would be competent for the person concerned to depose on oath. But, in the case on hand, curiously, a written statement of the petitioner has been filed before the competent authority which has been treated as evidence.

This, in my considered opinion, is illegal since, oral evidence as defined in the Evidence Act should be recorded on oath. Mere statement recorded, not on oath, cannot be equated to evidence. Similarly, mere production of documents would not amount to proof of their contents. The contents of some of the documents may require further proof. Therefore, the competent authority should have allowed the petitioner to adduce oral evidence as well as documentary evidence or at least to file an affidavit so as to discharge his burden u/s 8 of the Act. Further, the competent authority has simply considered all the documents filed before him, though they were not proved properly, and has considered the oral statement made by the chartered accountant to come to the conclusion that the petitioner has failed to discharge his burden. Such a conclusion arrived at by the competent authority cannot be sustained. As I have already stated, the competent authority has failed to follow the procedure established under law and also the principles of natural justice. Therefore, the finding of the competent authority that the properties in question are the illegally acquired properties and that the petitioner has failed to discharge his burden cannot be accepted. In my considered opinion, the matter needs to be enquired into and decided afresh by the competent authority.

27. In view of the above, the writ petition is allowed; the impugned orders are set aside; and the matter is remitted back to the 2nd respondent who shall hold a fresh enquiry as indicated above , afford sufficient opportunity to the petitioner to let in evidence, both oral and documentary, if any, and pass final order in accordance with law. In any event, the said exercise shall be completed within a period of three months from the date of receipt of a copy of this order. The petitioner is directed to extend full co-operation for the disposal of the matter within the time frame.