

(2017) 04 MAD CK 0069

MADRAS HIGH COURT

Case No: 15020 of 2002

Aminath Fathima

APPELLANT

Vs

The Competent
Authority, Smugglers
and Foreign Exchange
Manipulators
(Forfeiture of Property
) Act, & Anr.

RESPONDENT

Date of Decision: April 25, 2017

Acts Referred:

- Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976,
Section 6(1), Section 3(c), Section 2(2)(c) - Notice of forfeiture - Definitions - Application

Hon'ble Judges: Anita Sumanth

Bench: SINGLE BENCH

Advocate: Anita Sumanth

Final Decision: Allowed

Judgement

1. This Writ Petition challenges an order passed by the Appellate Tribunal for Forfeited Properties (in short "Tribunal") dated 27.2.2002

confirming the order of the Competent Authority dated 28.2.2001 in terms of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (in short "SAFEMFOPA").

2. The petitioner is the daughter of one S.S.A. Shahul Hameed alias Lucky Savanna, Keelakarai who was detained in terms of the Conservation of foreign exchange (Protection of smuggling) Act (in short "COFEPOSA"). There is no dispute with the position that she comes within the definition

of "person" in terms of section 2(2)(c) of the SAFEMFOPA and was issued a notice in terms of Section 6(1) of the said Act calling upon her to

show cause why properties at Lingi Chetty Street, Keelakarai, jewellery, Bank Account and cash on hand do not constitute "illegally acquired

properties" liable to be forfeited in terms of the SAFEMFOPA. Despite objections of the petitioner, an order of forfeiture was passed, that was

confirmed by the Tribunal vide order dated 27.2.2002 giving way to the present writ petition.

3. Mr. B. Kumar, learned Senior Advocate appearing for Mr. Loganathan on behalf of the petitioner would draw my attention to the provisions of

section 6(1) of the Act, wherein a notice to show cause may be issued by the competent authority upon the recording of reasons in writing leading

to the belief that all or any of the properties sought to be addressed in the notice are illegally acquired.

4. According to him, the reasons recorded in the present case do not reveal the link between the properties in issue and the detenu which is a

precondition to their forfeiture as "illegally acquired properties". In the absence of such nexus being drawn by the competent authority, the very

foundation of the proceedings fail and are, according to him, liable to be quashed. He would rely on judgments of the Supreme Court in the cases

of Attorney General of India Vs. Amratlal Prajivandas and others (1994 AIR SC 2179(1) (Constitutional Bench), Fatima Mohd. Amin Vs. Union

of India and another [(2003) 7 SCC 436] (Full Bench) and Aslam Mohammed Merchant Vs. Competent Authority and others [(2008) 14 SCC

186] (Division Bench) as well as the First Bench of this Court in the case of the Competent Authority Vs. M. Khader Moideen. Learned senior

counsel would also bring to our notice that the mother of the petitioner, against whom similar proceedings had been initiated under SAFEMFOPA,

had been cleared of all the charges by this Court by order dated 08.04.2001 in W.P.No:7609 of 2001 ((2011) 6 MLJ 661).

5. Per contra, Mr. G. Rajagopal, learned Addl. Solicitor General appearing for the respondent would support the order of forfeiture as confirmed

by the Tribunal stating that the reasons had duly taken into account the fact that the properties are nothing, if not illegally acquired. He would

emphasize the position that the petitioner was, in 1965, merely 21 years of age and a Pardanashin lady with neither means nor resources to acquire

such substantial assets on her own. In such circumstances, he would urge that the order of the Tribunal be upheld.

6. I have heard the submissions of learned Senior counsel appearing for both parties, perused the records and the case-law relied upon.

7. The Supreme Court in the case of Attorney General of India Vs. Amratlal Prajivandas and others (supra) has dealt in detail with the provisions

of the SAFEMFOPA and the need for the Legislation. The Bench has specifically dealt with the scope of the Act and its application to third

parties. In the context of its applicability to relatives and associates of the detenu, the Bench states thus:

"...We do not think that Parliament ever intended to say that the properties of all the relatives and associates, may be illegally

acquired, will be forfeited just because they happen to be the relatives or associates of the convict/detenu. There ought to be the

connecting link between those properties and the convict/detenu, the burden of disproving which, as mentioned above, is upon the

relative/associate....."

8. The connecting link or nexus between the property and the detenu has to emanate from the "reasons recorded" prior to issue of show cause

notice under section 6(1) of the Act. The entire superstructure or edifice of the proceedings lies on the strength of the material set out in the reasons

to believe. It is at this stage that the competent authority has to justify the link between the assets that stand in the names of the relatives, and the

detenu himself so as to establish, at least prima facie, that the relative/associate is a mere name lender for property that has been acquired by the

detenu out of the funds, incomes, earnings or assets derived, obtained from or attributable to any activity prohibited by or under/contravening any

law for the time being in force relating to any matter in respect of which Parliament has the power to make laws.

9. Mr.Rajagopal, Learned Senior Counsel, however, would draw attention to the definition of "illegally acquired property" under the

SAFEMFOPA and the Narcotics Drugs and Psychotropic Substances Act 1985, pointing out the differences in language between the two

enactments. Both definitions are extracted below:

The definition of "illegally acquired property" set out in section 3(c) of the SAFEMFOPA reads thus:

(c) illegally acquired property, in relation to any person to whom this Act applies, means-

(i) 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 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) or 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;....

(emphasis supplied)

The definition of "illegally acquired property in terms of the Narcotics Drugs and Psychotropic Substances Act reads thus:

68B. Definitions.-In this Chapter, unless the context otherwise requires,-

(g) illegally acquired property, in relation to any person to whom this Chapter applies, means, -

(i) any property acquired by such person, whether before or after the commencement of this Chapter, wholly or partly out of or by

means of any income, earnings or assets derived or obtained from or attributable to the contravention of any provisions of this Act or

the equivalent value of such property; or....

(emphasis supplied)

10. According to him, the definition of "illegally acquired property" under the SAFEMFOPA is much wider and consequently, the acquisition of

the property, whether illegal or not, would have to be viewed in the context of all other enactments by Parliament as opposed to the Narcotics Act

where the definition refers only to violations under that specific Act. That may be so. However, this court is of the opinion that the wider ambit of

the definition under SAFEMFOPA does not, in any way, obviate the requirement in the reasons recorded, for the establishment of a link between

the property in issue and the detenu. I draw support, in this regard, from the judgments of the Supreme Court in the cases of Aslam Mohammad

Merchant and others (supra), Fatima Mohd Amin (supra) and P.P.Abdulla vs Competent Authority ((2007) 2 SCC 510). The latter two

judgments have been rendered in the context of the SAFEMFOPA and the conclusion reached is that the Act would not be attracted in a case

where the notice and the reasons recorded do not allege a link or nexus between the property sought to be forfeited and the illegally acquired

money/activity of the detenu. Thus, the unambiguous and settled position of law is to the effect that unless the funds for acquisition of the property standing in the name of a relative are traced back to the detenu, and the reasons recorded contain the basis of the link or nexus drawn in this regard, the provisions of SAFEMFOPA would not stand attracted.

11. Let us now apply the above proposition to the reasons recorded in the present case, extracted below:

Reasons recorded for the Issue of Notice

Under section 6(1) of SAFEM (FOP) Act, 1978

Case of Smt. Ameenath Fathima,

425, Mint Street, Madras - 600 001.

Smt. Ameenath Fathima is the daughter of Shri S.S.A. Shahul Hameed, alias Lucky Saravana, Kilakarai, who is a COFEPOSA

detenu. Hence she is a "Person" under sec.2(2)(o) of SAFEM (FOP) ACT, 1976.

2. A perusal of the Income-tax records show that she purchased a house property at Old No. 286, (New No.135), Linghi Chetty

Street, Madras - 1 in December, 1965 for Rs. 45,000/- including the expenditure on stamp paper and registration charges, the total

investment was around Rs.50,000/-. This was claimed to have been met as under :-

(i) Amount disclosed under Sec.24 of Finance (No.2) Act, 1965 brought into account. Rs.22,000

(ii) Credit on 31-3-1965 said to be proceeds on sale of Jewels but could not be proved and offered for

Rs. 4,000

assessment.

(iii) Credit on 30-11-1965 said to be proceeds of sale of Jewels but could not be proved and offered for

Rs. 4,000

assessment.

(iv) Prior mortgage taken over. Rs. 20,000

Total Rs. 50,000

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It is also seen that this property was demolished and new construction was undertaken from the previous year relevant for the assessment year 1968-69 onwards and the construction continued year after year in stages.

3. It is apparent from the above facts that out of the total investment of Rs.50,000/- in the house property aforesaid, the sources for

Rupees : 30,000/- could not be proved and hence were either voluntarily disclosed under the Voluntary Disclosure Scheme

(Rs.22,000/-) or offered for assessment as income from "Undisclosed Sources" (Rs.8,000/-). Therefore, atleast to the extent of

Rs.30,000/- on the admission of Smt. Ameenath Fathima herself, the investment in this house property is from undisclosed sources.

Hence it is apparent that this (is) an "illegally acquired property".

4. In addition to the above property, she has a house property at her native place viz., Kilakarai. It is seen from the Income-tax

records for the assessment year 1975-76 that she claimed that this partly constructed building at the native place valued at

Rs.35,000/- was gifted to her by her mother on 4-12-1974. From the assessment records it is seen that further construction in this

property was carried out and the value of building has been admitted at Rs.60,000/- in the Wealth-tax return for the assessment year

1979-80. There is no evidence on record to show that Smt.Ameenath Fathima's mother was possessed of funds to construct a

building for Rs.35,000/- and gift it to her. In the absence of any evidence to prove the sources for her mother to construct a building

at her native place, it is to be taken that the property is an "illegally acquired property".

5. It is seen from the Wealth-tax records that this lady is possessed of Jewellery worth Rs. 55,000/- as also a bank account with

Indian Bank. The Income tax records show that there are no debits for the purchase of jewellery. In fact, in the Wealth-tax Return for

1971-72, no jewellery had been disclosed. In the Wealth-tax return for 1972-73, jewellery of the value of Rs.21,000/- had been

admitted. The sources for the acquisition of the jewellery had not been disclosed. The value of Rs.21,000/- was continued to be

disclosed up to the assessment year 1973-74. However, for the assessment year 1974-75, the value admitted was Rs.52,500/-. The

sources for the acquisition of the additional jewellery had not been disclosed. No list of jewellery had been filed. Therefore, it has to

be considered, prima-facie, that the jewellery has also the bank account are illegally acquired properties and hence a notice under

section 6(1) will be issued in respect of the following properties:

(1) Land and building at 135, Linghi Chetty Street, Madras-1

(2) Land and building at Kilakarai.

(3) Jewellery of the value of Rs.55,000 as on 31-3-1979 and further acquisition.

(4) Bank Account in Indian Bank which stood at Rs.493 as on 31-3-1979 and further accretions thereto.

(5) Cash on hand as on 31-3-1979, Rs.2,910 with further Accretions thereto.

12. The assets in question are five fold. With respect to the house property at Linghi Chetty Street, the explanation given by the petitioner for the

investment of Rs.50,000/- was accepted to the extent of Rs.20,000/-. The competent authority, however states that the sources for the balance of

Rs.30,000/- cannot be proved and assumes that since a voluntary disclosure under Income tax law was made by the assessee, the property is

illegally acquired. While this may be undisclosed income in the hands of the petitioner for the purposes of income tax duly offered under the

voluntary disclosure scheme, we fail to see how it would satisfy the definition of illegally acquired property under SAFEMFOPA. The wider

definition under SAFEMFOPA cannot be pressed into service to bring within the fold of the Act all and every income unless the competent

authority draws a link between the same and the detenu. We cannot lose sight of the position that other enactments like the Income and Wealth

Tax Acts contain their own mechanisms for addressing undisclosed income/assets and the purpose of the SAFEMFOPA is different as seen from

the Preamble of the Act that reads "An act to provide for the forfeiture of illegally acquired properties of smugglers and foreign exchange

manipulators and for matters connected therewith or incidental thereto." The presence of undisclosed income/wealth has thus to be seen in the

context of illegal acts of omission and commission by the detenu only and none other. In the present case, there is not even an allegation made, let

alone a link/nexus drawn in this regard.

13. With respect to the house property at Kilakkarai, the explanation by the petitioner was to the effect that the building was gifted to her by her

mother and further construction was carried out by her. The competent authority states that there was no evidence to establish that the petitioner's

mother had enough funds in this regard and thus assumes that the property is illegally acquired property in the petitioners' hands. Jewellery and the

bank account with Indian Bank were also held to be illegally acquired on the "prima facie" consideration that the sources for the acquisition of the

jewellery were not proved by the petitioner. Nowhere in the reasons have the properties traced back to the detenu and his acts

prohibited/contravening the law. The conclusion of illegal acquisition has been drawn on the mere ipse dixit of the authority.

14. In this context, it would be relevant to quote the Bench, at para 8 of the judgment in P.P.Abdulla's case (supra):

" 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."

15. In the light of the above discussion, the Reasons recorded by the competent authority do not satisfy the parameters of the Act. As a

consequence, the notice u/s 6(1) based on the reasons as aforesaid, stands quashed and the order of forfeiture is set aside. The writ petition stands

allowed without costs.