

Nafeesu Vs. Competent Authority

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Court : Kerala

Decided On : Jan-22-2001

Reported in : 2001(132)ELT271(Ker)

Judge : M.R. Hariharan Nair, J.

Acts : Smugglers and Foreign Exchange (Manipulators Forfeiture of Property) Act, 1976 - Sections 2, 2(2), 3 and 7; Customs Act, 1878; [Customs \(Amendment\) Act, 1962](#); Foreign Exchange Regulation Act, 1947; [Foreign Exchange Regulation \(Amendment\) Act, 1973](#); [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#)

Appeal No. : O.P. Nos. 11973 of 1993 A and 12910 of 1993 J

Appellant : Nafeesu

Respondent : Competent Authority

Advocate for Def. : P.S. Biju, ACGSC and; D. Somasundaram, Addl. CGSC

Advocate for Pet/Ap. : U.K. Ramakrishnan,; V. Krishna Menon and; B.M. Joseph

Disposition : Petition allowed

Judgement :

M.R. Hariharan Nair, J.

1. Saidalavi is a COFEPOSA detenu, who has been evading custody ever since the order of detention was passed on 28-3-1985. He had two wives. The petitioners 2 to 5 in O.P. No. 11973/93 are the children born through the 1st wife and the petitioners in O.P. No. 12910/93 are his children born through the 2nd wife.

2. Invoking powers under the Smugglers and Foreign Exchange (Manipulators Forfeiture of Property) Act, 1976 (for short 'SAFEMA'), Ext. P3 notice was issued directing the petitioners to show cause why certain properties comprised in Sy. No. 179/9 etc. of Cherimundam Village, Tirur Taluk having a total extent of about 2 acres should not be declared to be illegally acquired property liable to be forfeited to the Central Government. The Petitioners then filed Ext. P4 explanation which was considered by the competent authority under the aforesaid Act. Ext. P5 order was then issued holding under Section 7 of the Act, that the right, title and interest of the petitioners being under the 'affected person' (Saidalavi) are illegally acquired as defined under Section 3 of the Act and are liable for forfeiture. The petitioners then filed Ext. P6 appeal before the Appellate Tribunal constituted under the Act. As per Ext. P7 order, the Appellate Authority found that as regards the rights of the petitioners the forfeiture will stand, though it will not affect the rights or interests of Smt. Ami Umma, mother of the detenu. It is the correctness of the aforesaid finding that is impugned in the present Original Petition.

3. The learned Counsel for the petitioners submitted that the aforesaid property was actually obtained by the detenu in Ext. P8 family partition of 1955 included in items 12 to 18. The allottees of the said item included the detenu's brothers and sisters as well. As per Ext. P9 document, dated 3-4-1985 the brother and sister jointly released their right in favour of the detenu. As per another document dated 28-4-1977 yet another sister released her right to the detenu. As per another document of 1978 one more brother of the detenu released his right to the detenu and thus the detenu became the full owner of the entire items 12 to 18 of Ext. P8 except those comprised in Sy. Nos. 179/9 and 174/1 which became the joint property of Saidalavi and his mother.

4. It is also the case of the petitioners that on 10-11-1984 the detenu entered into an agreement for conveyance of his rights over the properties to one Abdul Aziz. This was followed by Ext. P9 conveyance entered on 3-4-1985 as per which the detenu sold his entire rights over the properties in favour of the said Abdul Aziz, who subsequently passed away in the year 1987. It is the case of the petitioners that before his death the petitioners obtained conveyance of the rights of Abdul Aziz as per Exts. P10 and P11 documents of the year 1987 and that they are now in joint possession along with the mother of the detenu.

5. The finding in Ext. P5 order is that for getting the purchase from Abdul Aziz as per documents 2748 and 2749 of 1987 of the Sub Registry, Tirur, the total consideration paid was Rs. 56,000/- and including the Stamp Duty paid, the total amount spent for the document was Rs. 61,040/- which came from the pocket of the detenu. It was contended by the petitioners that a sum of Rs. 46,000/- out of the purchase price actually came from the sale proceeds received by the detenu from Abdul Aziz himself earlier. The competent authority found that the said explanation was unacceptable, insofar as there is a difference of nearly two years in between and since it was unusual that the sale proceeds obtained in 1985 would be preserved as it is for such a long period. As regards the sum of Rs. 6,000/- which was claimed to be the agricultural income derived from the properties of the detenu, the competent authority found that there was no contemporaneous evidence to support the same. With reference to the contention of the petitioners that a sum of Rs. 10,000/- was obtained as loan from one Suharabi, who is the cousin sister of the detenu, though records were produced in support of the claim that the money was raised by Suharabi by pledging of her jewellery with the State Bank of India, it was found that the loan was obtained on 9-10-1987 whereas the purchase took place only on 17-12-1987 and that no evidence was adduced to show that the amount was kept by her for nearly 3 months. The competent authority also held that even if all the aforesaid amounts are taken into account, with regard to the balance of Rs. 5,040/- no explanation was offered by the petitioners.

6. The Appellate Tribunal generally agreed with the aforesaid findings. Regarding the contention that the sale proceeds obtained from Abdul Aziz was retained with

the detenu, the Tribunal found that the transactions of sale and re-purchase are highly suspicious and that as the detenu was absconding from the place, it is highly improbable that he would keep the sale proceeds of the property in tact on his person. Referring to the loan obtained by Suharabi the Appellate Tribunal found that the supporting evidence was only photocopy of a small slip purported to have been issued by the State Bank of India. The Tribunal, however, noted that the impact of the conveyance to Abdul Aziz was that the purchaser became a co-owner of the property along with other sharer, who is the mother of the detenu and that viewed from that perspective, the sale and re-purchase cannot affect the rights of Ami Umma.

7. On hearing both sides, I find that the provisions of 'SAFEMA' have been wrongly applied against the petitioners. The Smugglers and Foreign Exchange (Manipulators Forfeiture of Property) Act, 1976, as evident from the preamble itself is an act to provide for forfeiture of illegal acquired properties of Smugglers and Foreign Exchange Manipulators and for matters connected thereto. The Act was brought into being for the effective prevention of smuggling activities and foreign exchange manipulations which are having a deleterious effect on the national economy for which it was necessary to deprive the persons engaged in such activities and manipulations of their ill-gotten gains. The fact that such persons have in many cases been holding the properties acquired by them through such gains in the names of their relatives, associates and confidants was also a reason for bringing in the aforesaid enactment.

8. In the nature of the contentions raised in the case, it is necessary to refer to Section 2 of the Act which provides as follows :-

'2. Application. - (1) The provisions of this Act shall apply only to the persons specified in Sub-section (2).

(2) The persons referred to in Sub-section (1) are the following, namely:

(a) every person - -

(i) who has been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), of an offence in relation to goods of value exceeding one lakh of rupees; or

(ii) who has been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), of an offence, the amount or value involved in which exceeds one lakh of rupees; or

(iii) who having been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), has been convicted subsequently under either of those Acts; or

(iv) who having been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), has been convicted subsequently under either of those Acts;

(b) every person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974);

XX XX XX XX XX(c) every person who is a relative of a person referred to in Clause (a) or Clause (b);

(d) every associate of a person referred to in Clause (a) or (b);

(e) any holder (hereafter in this Clause referred to as the present holder) of any property which was at any time previously held by a person referred to in Clause (a) or Clause (b) unless the present holder or, as the case may be, any one who held such property after such person and before the present holder, is or was a transferee in good faith for adequate consideration.'

9. It is obvious from a reading of the aforesaid provision that Sections 2 (a) and (b) are intended to be operative against the detenu whereas Clauses (c) and (d) can take in even his relatives and associates. The scope and ambit of the aforesaid provisions and the extent to which the properties of the relatives and associates would be affected by applying the Act were considered by the Apex Court in

Attorney General for India v. Amratlal Prajivandas and Ors., AIR 1994 S.C. 2179. The Apex Court considered the contention that relatives or associates of a detenu may have acquired properties of their own albeit by illegal activities; but, nevertheless, such acquisitions cannot be brought within the scope of Section 2 aforementioned. The Court held that 'SAFEMA' is directed towards forfeiture of illegally acquired properties of a person falling under Clause (a) or Clause (b) of Section 2(2) and that the relatives and associates are brought in only for the purpose of ensuring that the illegally acquired properties of the convict or detenu, acquired or kept in their names, do not escape the net of the Act. The possibility that persons indulging in smuggling etc. screen their properties acquired from illegal activity in the names of relatives and associates and sometimes even transfer such properties to them was taken note of. It was held that it is immaterial how such relative or associate holds the properties i.e. whether as a benami or as a mere name-lender or as a bonafide transferee for value or in any other manner. Whatever be the nature of possession, he cannot claim those properties and must surrender them to the State under the Act. He cannot put forward any defence once it is proved that the property was acquired by the detenu whether in his, own name or in the name of his relatives and associates.

10. As regards the relatives and associates the fact of their holding or possessing the properties of convict or detenu furnishes the link between the convict or detenu and his relatives. It was further held that only the properties of the convict or detenu are sought to be forfeited, wherever they are; the idea being to reach his properties in whosoever's name they are kept or by whosoever they are held and that independent properties of relatives and friends, which are not traceable to the convict/detenu are not sought to be forfeited nor are they within the purview of SAFEMA.

11. The question that falls for consideration therefore is whether the rights obtained by the present petitioners by re-conveyance from Abdul Aziz can be traced to the detenu. If the answer is yes, they are within the purview of the Act and the provisions of the Act would be applicable to them.

12. Here is a case where the Department has no case that the original acquisition of rights over the properties in question was made by the detenu using any portion of his alleged illegal gains. The source of title of the detenu is a family partition of the year 1955 that took place several decades before the detention order came into force. The detenu has obtained the rights of co-sharers also more than a decade before passing of the detention order. He has sold his property to Abdul Aziz under Ext. P9 for Rs. 40,000/-. It is true that there is no definite evidence in the form of any affidavit or the like to show that Saidalavi, the detenu, retained this amount until the need for re-purchase arose. Nevertheless, in the absence of any other evidence to show the manner in which the said amount was spent, the petitioners are certainly justified in contending that a link can be established between the said consideration of Rs. 40,000 and the sum of Rs. 46,000/- which the detenu allegedly gave to the petitioners for re-conveyance. The difference of Rs. 6,000/- which is said to be the agricultural income derived from the various properties of the detenu between the years 1985 and 1987. It is not as though in villages every one maintains true and correct accounts of each and every item of agricultural income and in the circumstances, the petitioners cannot be found fault with for not producing evidence with regard to the details of acquisition of the said amount which, according to me, is only a small fraction of the total consideration. The same is the position with regard to the registration expenses and stamp duty.

13. As regards the sum of Rs. 10,000/- the only reason for rejecting the case of loan from Suharabi is that what was produced was only a photocopy of a small slip from the State Bank of Travancore. The Department has no case that Suharabi did not get a loan from the State Bank of Travancore three months before the transaction in question. If the authority was not satisfied by production of a photocopy of the slip from the State Bank of Travancore, it was open to it to probe the matter further before rejecting the same. The petitioners have produced whatever record was available with them in support of the contention and in the circumstances, the rejection of the said claim also appears to be unjustified.

14. In the absence of anything to show that the original acquisition of the property itself was with the amounts received through illegal activities, I do not think that the Department is justified in appropriating the property held by the petitioners

apparently under a bona fide claim. As held by the Apex Court, in order to expropriate the relatives of their property, it is necessary to provide a link between the detenu and the properties, especially, in the matter of the source of acquisition.

15 In the instant case, the source of acquisition has nothing to do with the alleged gains of the detenu and the property was actually obtained in partition of the year 1955. The reasons given for rejecting the claim of the petitioners are untenable and in the circumstances, I do not think that the Department is justified in passing Ext. P7 order.

16. The learned Counsel for the respondents submitted, based on case law, that this is not a fit case where the Court should intervene. According to him, there is no erroneous exercise of jurisdiction or breach of principles of natural justice or exercise of excessive jurisdiction. Nor is there any defect apparent on the face of Ext. P7. The submission does not appear to be correct. It is true that while exercising the power of judicial review this Court cannot substitute its judgment for that of the statutory authority in matters within its province. This Court also cannot substitute the view of the expert with its own views. When the legislature or executive acts within the sphere of its authority the Court can enter only to satisfy the test of reasonableness. What can be looked into therefore is whether the findings of fact are reasonably based on the evidence and whether such findings are consistent with the laws of the land. When a decision is vitiated by taking into account irrelevant considerations, or neglecting to take into account of relevant factors or is so manifestly unreasonable that no reasonable authority, entrusted with the power in question could reasonably have made such a decision, the judicial review of the decision making process can be exercised. If any authority is required on the point, reference may be made to *State of U.P. v. Maharaja Dharmander Prasad Singh*, AIR 1989 S.C. 997 and *Sitaram Sugar Co. Ltd. v. Union of India and Ors.*, AIR 1990 S.C. 1277.

17. In the instant case, the Appellate Tribunal has not entered their decisions from the correct perspective and applying the findings of the Apex Court in Attorney General's case, AIR 1994 S.C. 2179 with the result that a property that was obtained by the detenu in family partition and which has been held by him for long

by himself and by other family members has been directed to be taken away, merely because no accounts could be produced for some small amounts. This is not the purpose of the Act as evident from the features already mentioned supra.

18. In the circumstances, Exts. P5 and P7 orders are set aside.

Original Petitions are allowed as above.

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