The Competent Authority. Vs. A.Sowkath Ali and ors.

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Court : Chennai

Decided On : Apr-17-2012

Judge : K.Chandru, J.

Acts : Customs Act - Section 108; Smugglers and Foreign Exchange Manipulators (Forfeiture of Property)(SAFEMA) Act, 1976 - Section 6(1), 12, 5, 15, 12(5), 26(2),; Foreign Exchange Regulation Act, 1973 - Section 54; Smugglers and Foreign Exchange Manipulators (Appellate Tribunal for Forfeited Property) Rules, 1977 - Rule 7 ; Constitution of India - Articles 226

Appeal No. : W.P.No.2939 of 2011 and M.P.No.1 of 2011

Appellant : The Competent Authority

Respondent : A.Sowkath Ali and ors.

Advocate for Def. : Mr.B.Kumar, Adv.

Advocate for Pet/Ap. : Mr.M.L.Ramesh, Adv.

Judgement :

Writ Petition preferred under Article 226 of the Constitution of India praying for the issue of a writ of certiorari,to call for the records of the third respondent in his proceedings in FPA No.12/MDS/2009 and FPA 13/MDS/2009 dated 06.09.2010, quash the same, thereby confirming the order passed by the petitioner in his proceedings dated 08.06.2009 in No. OCA/MDS/2924/2004 AND 2005/2007.

ORDER

1. Prologue:-

"Among the truly dangerous government powers is the federal asset forfeiture law, which allows the government to seize and basically keep any property supposedly used in the commission of a crime. Under this law your property is charged with the offense, which makes it a civil action rather than a criminal case. Even if your are never charged with a crime, or are charged and acquitted, it can take years and cost you a fortune to get back your own property. But if your are convicted of the crime the government is entitled to sell your property, with the proceeds divided among all the agencies participating in the original seizure. It's an outrageous program. The L.A.Sheriff's Department, for example, depended on the money raised by selling assets seized and forfeited in drug cases to supplement its inadequate yearly budget. (p.231)

Many white people watch quietly as law enforcement officers trample all over the rights of minorities under the guise of crime prevention. And a lot of them are sympathetic, too. They honestly feel sorry for the victims. But they watch from a very safe place, feeling sorry for the victims, but believing as long as they themselves remain law-abiding citizens it cant' happen to them.

Donald Scott believed that, too." (p.236)

- A Lawyer's Life - Johnnie Cochran

- ST.Martin's Press, New York - 2002

The said observations were made by a leading civil rights lawyer of USA in the context of the American law allowing forfeiture of properties of narcotic offenders. The indignation expressed therein will set the tone for this order and hence those statements were quoted.

2. In this case, the question is whether in taking over the property of the contesting respondents, the procedure established by law has been followed by the writ petitioner.

3. This writ petition came to be posted before this Court on being specially ordered by the Hon'ble Chief Justice vide order dated 04.08.2011.

4. The petitioner is the competent authority and the administrator of Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (for short SAFEMA, 1976). In this writ petition, the petitioner challenges an order passed by the Appellate Tribunal For Forfeited Property, New Delhi, dated 06.09.2010.

5. By the impugned order, the Tribunal which heard the appeal filed by the first and second respondent in FPA No.12/MDS/2009 and FPA No.13/MDS/2009 set aside the order of the competent authority dated 08.06.2009.

6. The writ petition was admitted on 08.02.2011. Pending the writ petition, an interim stay was granted for a period of four weeks. Subsequently, it was extended till 29.04.2011.

7. Heard the arguments of Mr.M.L.Ramesh, learned Senior Panel counsel for the petitioner, Mr.B.Kumar, learned Senior Counsel appearing for Mr.M.A.Abdul Huck, learned counsel for respondents 1 and 2.

8. The first and second respondents are husband and wife. The first respondent is the resident of Triplicane, Chennai -5. He was detained under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short COFEPOSA Act) on 23.12.1999. Subsequent to his detention, proceedings were initiated under SAFEMA, 1976. According to the petitioner, the investigation revealed that the first respondent was engaged in the activities of smuggling and illegal export of foreign exchange through carriers. The first respondent had himself admitted this fact in a statement recorded under Section 108 of the Customs Act. These proceedings are deemed to be judicial proceedings. According to the petitioner, the first respondent was apprehended by the customs authorities while attempting to export out of India foreign currencies to the tune of Rs.72,62,570/-, the same was seized by the authorities. The first respondent admitted in his statement that the foreign currencies seized belonged to him. These statements are sufficient reason to believe that he had no legal source of income and he was fully involved in smuggling of currency and it was his source of

earnings. Hence, it was believed that the property in his name is a tainted property acquired through illegal income. Therefore, the competent authority by exercise of power under Section 6(1) of the SAFEMA, 1976 issued a notice to the first respondent on 15.09.2004 in respect of the property held in his name. He was asked to prove that his properties were acquired through legal sources of income.

9. However, detention order passed against the first respondent under COFEPOSA was set aside by the Supreme Court. But the proceedings under SAFEMA, 1976 was continued as he was convicted under the Customs Act, 1962 on 18.06.2003 by the Judicial Magistrate, Alandur. Therefore, he continued to be a person covered by SAFEMA, 1976. Despite sufficient opportunities given, the first respondent could not prove his legal source of income, therefore by an order dated 08.06.2009 his properties were forfeited.

10. It was also further stated by the petitioner that on investigation against the first respondent, it was found that he gave Rs.7 lakhs to his wife, who is the second respondent and she had constructed a house in her name at Tiruchirapalli. Therefore, a notice under Section 6(1) of the SAFEMA, 1976 was served on her on 24.08.2007. she was given necessary opportunity in conformity with the principles of natural justice. As it was found that the property acquired by her was directly attributable to the income of the first respondent which was earned out of illegal means, the property was also forfeited by a common order dated 08.06.2009 which also covered the properties of the first respondent.

11. Both first and second respondents preferred appeals before the Appellate Tribunal constituted under Section 12 of the SAFEMA, 1976. Their appeals were numbered as FPA No.12/MDS/2009 and FPA.No.13/MDS/2009. The Tribunal after notice to the petitioner viz., the Competent Authority passed a common order dated 06.09.2010 and allowed the appeal. Before passing the order, the Tribunal heard the appeal in camp sitting at Kochi (Kerala State) on 31.08.2010. This order became the subject matter of challenge by the competent authority as noted already.

12. The appellate Tribunal found that the investigation was tainted. The competent authority subsequent to the notice given to first and second respondents browsed

the internet and got some materials and without notice to the first and second respondents relied upon the same, thereby violating the principles of natural justice. The Tribunal also observed that if the law made in Singapore was violated by the first respondent, it is for the authorities at Singapore to take action. It also found that there was no allegation that the first respondent, as an NRI (Non Resident Indian) had violated any of the Indian laws applicable to him while earning his income. It found that the income earned by the first respondent cannot be said to be illegally earned. The earnings of the first respondent at Singapore cannot be a subject matter of which the Parliament can enact law. The first respondent had clearly stated that he had a full fledged Travel Agency at Singapore and earned income as a consultancy commission for foreign client. He was not charge sheeted by the Government of Singapore for earning money at Singapore or for bringing silver and gold to India or selling the same in India under the Customs Act. It cannot be said to be contravening the Customs Act or Foreign Exchange Regulation Act (FERA) or Foreign Exchange Maintenance Act (FEMA). He brought to India gold and silver after paying duty. Selling of silver and gold and earnings derived from them were shown in the Income Tax Returns. He has legally explained the source of income. Merely because two persons who were in possession of Foreign Currency mentions the name of the first respondent during the year 1999 and he was convicted on account of the same was not a ground to say that the acquisition of the property in the year 1995 was illegal acquisition of properties.

13. The Tribunal also referred to a Division Bench judgment of the Kerala High Court in W.A.No.1645 of 2007(E) dated 24.02.2009 [Kannanchery Abdu v. The Competent Authority under SAFEMA and others], in support of their conclusions. In that case, the Division Bench presided by Acting Chief Justice J.B.Koshy, incidentally became the Chairman of the Appellate Tribunal. Therefore, he quoted from his own judgment, delivered as an High Court Judge. In that case, it was held that a person who earns money in Dubai cannot be a subject matter of investigation by the Indian authorities. Income earned therein cannot be shown as illegally acquired income in India.

14. Before proceeding to deal with the matter on merits, it is necessary to deal with the preliminary objection raised by Mr.B.Kumar, learned Senior Counsel appearing for respondents 1 and 2 on behalf of Mr.A.Abdul Huck, learned counsel, regarding the maintainability of the writ petition at the instance of the Competent Authority.

15. It was contended by the learned Senior Counsel that the competent authority viz., the writ petitioner is constituted under Section 5 of the SAFEMA, 1976. After forfeiting the properties of a person, who has acquired the properties through illegal source of income is notified to have the jurisdiction of a Civil Court in terms of Section 15 of the SAFEMA, 1976. An order passed by him is liable to be challenged before the Appellate Tribunal for Forfeited Properties (ATFP). An order passed under Section 7 regarding forfeiture can be challenged before the Tribunal constituted under Section 12. Under Section 12, it is only a person aggrieved by the order of the Competent Authority can file an appeal and the Appellate Tribunal will regulate its own proceeding. Under Section 12(5), the power of the Tribunal is set out, which is as follows:-

"12(5) On receipt of an appeal under sub-section (4), the Appellate Tribunal may, after giving an opportunity to the appellant to be heard, if he so desires, and after making such further enquiry as it deems fit, modify or set aside the order appealed against."

16. However, under Section 26, the Central Government can make rules to carry out the provisions of the Act. Under Section 26(2) specific power have been given to the Central Government to frame Rules including the Rule relating to exercise of power by the Tribunal in terms of Section 15(f) of the SAFEMA, 1976.

17. The Central Government has framed Rules known as Smugglers and Foreign Exchange Manipulators (Appellate Tribunal for Forfeited Property) Rules, 1977. Rule 7 reads as follows:-

"7. Procedure after registration of appeal. -(1) After an appeal is registered, one copy of the memorandum of appeal and annexures thereto shall be served as soon as possible on the competent authority either by registered post, acknowledgment due, or by delivering or tendering them to the said authority

through messenger.

(2) The parties shall be informed of the date and place of hearing of the appeal either by registered post, acknowledgment due, or by notice served on them through messenger:

Provided that where the parties are present before the Tribunal, it may inform them the date and place of hearing of the appeal.

(3) Any petition for summoning witnesses or documents, or the like, filed by a party may be heard, if necessary, after giving notice to the other party.

(4) Every requisition, direction, letter, authorisation, or written notice to be issued by the Tribunal shall be signed by the Registrar or any other officer authorised by the Chairman in this behalf and shall be sent by registered post, acknowledgment due.

(Emphasis added)

18. In this context, Mr.M.L.Ramesh, learned Senior Counsel relied on a decision of this Court reported in CDJ 2011 MHC 3966 [Provident Fund Organisation, Coimbatore and others v. Employees Provident Fund Appellate Tribunal (Ministry of Labour and Employment, Government of India), New Delhi and others] and contended that the power of the Competent Authority is similar to that of the Provident Fund authorities and hence, the writ petition is maintainable. He referred to the following passages found in paragraphs 8,9,16 to 18:-

"8. Per contra, various learned counsels appearing for the employers contended that the APFC had no locus standi to file writ petitions challenging the orders passed by the PF Tribunal. The authorities are quasi judicial authorities. Therefore, having determined the liability of the employers and when their orders are challenged before the judicial Tribunal, viz., EPF Tribunal, then any determination by the Tribunal is binding on the parties. Hence, the authority cannot file such writ petitions challenging the orders of the Tribunal

9. In this context, reference was made to an unreported judgment of this Court in Regional Provident Fund Commissoner, Tirunelveli v. M/s.Prabha Beverages Private Ltd., Marthandam (W.P.No.3462 of 1999) dated 22.10.2008. Reliance was placed upon paragraphs 7 to 9, which reads as follows:-

"7. In more or less similar circumstances, under the Cinematograph Act, the Supreme Court vide its decision in Union of India -vs- K.M.Sankarappa reported in (2001) 1 SCC 582 held in para 7, which is as follows:-

"7. .....The executive cannot sit in an appeal or review or revise a judicial order. The Appellate Tribunal consisting of experts decides matters quasi-judicially. A Secretary and/or Minister cannot sit in appeal or revision over those decisions. At the highest, the Government may apply to the Tribunal itself for a review, if circumstances so warrant. But the Government would be bound by the ultimate decision of the Tribunal".

(emphasis added)

8. When the Central Board of Film Certification came up before this Court challenging the order of the Tribunal, a Division Bench of this Court, to which I am (K.Chandru,J.) a party, had an occasion to consider the locus standi of the Central Board of Film Certification in Central Board of Film Certification -vs- Yadavalaya Films ((2007) 2 MLJ 604). In para 22, it was observed as follows:-

"22. In our opinion, it is doubtful whether these appeals are maintainable, in view of the decision of the Supreme Court in Union of India -vs- K.M.Shankarappa, AIR 2000 SC 3678: (2001) 1 SCC 582: (2001) 1 MLJ 146(SC)."

9.In the present case, except that the petitioner was very sensitive about his own order being reversed by the Tribunal, there is no case for them to come to this Court challenging the order of the Tribunal, which had given sound reasoning for reversing the order passed by the first respondent."

16. Taking note of the first objection by the employer regarding the maintainability of the writ petitions, this Court is of the view that the writ petitions cannot be rejected on the ground of locus standi of the APFC. Taking note of the peculiar

position that the PF authorities are to play under the PF Act, the challenge by the authorities of the order of the Tribunal cannot be rejected on the ground of want of jurisdiction. It must be noted that the authorities are playing multifarious role under the provisions of the PF Act including investigation, enforcement, quasi judicial determination of the rights of the parties, prosecution of the erring employers as well as securing the rights of workmen, who also contribute PF subscriptions.

17. The Bombay High Court in the judgment in Nirmitee Holidays's case (cited supra) proceeded on the basis that the quasi judicial authorities are not expected to defend their proceedings before appellate forum and hence they cannot challenge the orders of the Tribunal cannot be accepted. Under Section 7K(2) of the PF Act, the Act provides for the authority to authorize one or more legal practitioners to present its case with reference to any appeal before the Tribunal. Further under Section 7L of the PF Act, the Tribunal is expected to give opportunities to the parties to the appeal and to pass such orders as it may think fit. Under Section 7L(3) of the Act, the Tribunal is mandated to give copies of its orders to both parties to the appeal. Though under Section 7L(4) of the PF Act, it is stated that any order made by the Tribunal finally disposing of an appeal shall not be questioned in any Court of law, the same has no relevance to a writ petition filed under Article 226 of the constitution. In the unreported decision in M/s.Prabha Beverages's Case (cited supra), this Court had merely expressed doubts about the maintainability of the writ petition and it did not give any categorical finding on the said issue. It was only observed that without even a prima facie case in their favour, the APFC ought not have filed that writ petition. Hence, that judgment is not an authority to decide the issue involved.

18. Since the authorities were allowed to be represented before the Tribunal even by engaging a legal practitioner and they were also heard during the proceedings by the Tribunal and that order was directed to be issued to them, certainly they have locus standi to challenge the proceedings of the Tribunal before the High Court. The finality that is attached to the Tribunal's order under Section 7L(4) of the PF Act will not apply to the proceedings initiated under Article 226. It must also be noted that that the PF authorities are holding the amount collecting from the employee and employer in Trust and therefore, as Trustees, they are bound to

maintain the funds of the Trust with greater vigil and for any loss caused to the funds of the Trust as Trustees, they may be held responsible. Therefore, if any order of the Tribunal is manifestly erroneous or passed without jurisdiction, the authority can challenge the same in a writ petition under Article 226 of the Constitution."

19. Per contra, Mr.B.Kumar, learned Senior Counsel referred to the judgment of this Court reported in AIR 1981 Madras 80 [Director of Enforcement, Madras v. Rama Arangannal and another] to contend that the order of adjudication passed by the Director of Enforcement cannot be challenged by him. In such cases, it is only the Central Government which can be an aggrieved party and not the Director of Enforcement.

20. The learned Senior Counsel submitted that the said case came to be referred to and approved by the Supreme Court vide judgment reported in (2007) 8 SCC 254 [Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate] and therefore contended that the Competent Authority has no locus standi to file a writ petition. He placed reliance on the following passages found in paragraphs 16 to 18:-

"16. An adjudicating authority exercises a quasi-judicial power and discharges judicial functions. When its order had been set aside by the Board, ordinarily in absence of any power to prefer an appeal, it could not do so. The reasonings of the High Court that he had general power, in our opinion, is fallacious. For the purpose of exercising the functions of the Central Government, the officer concerned must be specifically authorised. Only when an officer is so specifically authorised, he can act on behalf of the Central Government and not otherwise. Only because an officer has been appointed for the purpose of acting in terms of the provisions of the Act, the same would not by itself entitle an officer to discharge all or any of the functions of the Central Government. Even ordinarily a quasi-judicial authority cannot prefer an appeal being aggrieved by and dissatisfied with the judgment of the appellate authority whereby and whereunder its judgment has been set aside. An adjudicating authority, although an officer of the Central Government, should act as an impartial tribunal. An adjudicating

authority, therefore, in absence of any power conferred upon it in this behalf by the Central Government, could not prefer any appeal against the order passed by the Appellate Board.

17. The Madras High Court in Rama Arangannal1 opined: (AIR p. 81, para 4)

"4. On the question as to the maintainability of the appeal, it is seen that the Explanation to Section 54 of the Foreign Exchange Regulation Act, 1973 treats only the Central Government as an aggrieved party for the purpose of filing an appeal to the High Court in respect of orders passed by the Foreign Exchange Regulation Appellate Board under that section. Therefore, only the Central Government can file and prosecute an appeal against the order of the Appellate Board, and not any other authority. In this case, the appeal has been filed by the Director of Enforcement, who is the initial authority who passed the adjudication order against the respondents and whose order has been set aside by the Appellate Board on an appeal filed by them. Therefore, the Director of Enforcement cannot be said to be aggrieved by the order of the Appellate Board merely because its order of adjudication has been set aside by the Appellate Board."

The Punjab and Haryana High Court in Lal Chand2 followed the said decision.

18. The High Court was, in our considered view, not correct to take a contrary view."

21. The scheme of FERA, as found by this Court and by the Supreme Court, more particularly, explanation to Section 54 of the FERA 1973 shows that locus standi vested with the Central Government and therefore, it was held that the writ at the instance of the Director of enforcement is not maintainable.

22. But in the present case, the Scheme of the Act as decided in the case of the Provident Fund Organisation's case (cited supra) gives locus standi to the competent authority as a matter of right but also in case of any grievance, certainly it is open to him to challenge the same. Hence, the ratio laid down by this Court in the case of Provident Fund Organisation's case (cited supra), cited by

Mr.M.L.Ramesh, learned Senior Counsel, case will apply to the case on hand.

23. The preliminary objection raised by the learned Senior Counsel for the contesting respondents is hereby overruled.

24. On the merits of the case, Mr.M.L.Ramesh learned Senior Counsel for the Competent authority placed reliance on the judgment of the Supreme Court reported in (2003) 7 SCC 427 [Kesar Devi v. Union of India]. He relied on the following passages found in paragraphs 10 and 12:-

"10. ....The condition precedent for issuing a notice by the competent authority under Section 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 under Section 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. .....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."

25. The learned Senior Counsel further referred to the judgment of the Division Bench of the Bombay High Court reported in CDJ 2006 BHC 757 [Shri Shirish Madhukar Dalvi v. Assistant Commissioner of Income Tax and Others) for contending that merely because an order quotes a wrong provision of law, it will not become invalid and the procedural provision cannot be said to be mandatory in nature. Reliance was placed on the following passages found in paragraphs 37 to 39:-

"37. In the case of State of Kerala vs. Muniyalla, AIR 1985 SC 470, it is held that merely because an order is purported to be made under a wrong provision of law, it does not become invalid so long as there is some other provision of law.

38. In the case of Hukumchand Mills Ltd. vs. State Pradesh of Madhya Pradesh, AIR 1964 SC 1329, the Apex Court has ruled that mere mistake in the opening part of the notification in reciting the wrong source of power does not affect the validity of the amendments made.

39.In the case of State Bank of Patiala v. Sharma S.K.Sharma (1996) 3 SCC 364, the Apex Court ruled that in case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the stand-point of substantial compliance. The order passed in violation of such provision can be set aside only where such violation has occasioned prejudice to the subject. It further went on to observe that even mandatory requirement can be waived by the person concerned, if such mandatory provision of law is conceived in his interest and not in the public interest. The conduct of the subject must be borne in mind while examining a compliant of non-observance of procedural rules governing such enquiries. As a rule, all such procedural rules are designed to

afford a full and proper opportunity to the subject to defend himself."

26. The learned Senior counsel also referred to a Division Bench judgment of this Court reported in CDJ 2011 MHC 3203 [The Competent Authority v. Hameed Abdul Kader and another], wherein this Court held that the finding of fact recorded by the Competent Authority cannot be interfered with. Reliance was placed on the following passage found in paragraph 53:-

"53. The question is whether it is open to this Court exercising jurisdiction under Article 226 of the Constitution of India to re-appreciate the materials and arrive at a different conclusion. The power of judicial review is concerned only with the decision making process. Under the guise of judicial review, it is not permissible to consider the facts once again. Limited power of judicial review does not enable the Court to scan the materials considered by the Statutory Authorities and to arrive at an independent conclusion. Therefore, we are of the view that the learned Single Judge was not justified in upsetting the orders passed by the Statutory Authorities."

27. Therefore, the learned Senior Counsel contended that it was wrong on the part of the Tribunal to go into extraneous issues and decide the matter differently and hence, the order is liable to be interfered with.

28. The decision relied on by the Senior counsel in Kesar Devi's case (cited supra), which was subsequently followed by the Division Bench in the judgment reported in CDJ 2011 MHJ 3203 (cited supra) may not be appropriate as the judgment in Kesar Devi's case was dissented by a subsequent judgment of the Supreme Court reported in (2008) 14 SCC 186 [Aslam Mohammad Merchant v. Competent Authority], wherein the Supreme Court held as follows:-

"45. Our attention, however, has been drawn to a decision of a two-Judge Bench of this Court in Kesar Devi v. Union of India3 wherein Fatima Mohd. Amin2 was distinguished by a Bench of this Court, inter alia, opining that no nexus or link between the money of the debt and property sought to be forfeited is required to be established under the scheme of the Act, stating: (Kesar Devi case3, SCC pp. 432 & 434, paras 10 & 13)

"10. ...The condition precedent for issuing a notice by the competent authority under Section 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...

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13. We are, therefore, clearly of the opinion that under the scheme of the Act, there is no requirement on the part of the competent authority to mention or establish any nexus or link between the money of the convict or detenu and the property sought to be forfeited. In fact, if such a condition is imposed, the very purpose of enacting SAFEMA would be frustrated, as in many cases it would be almost impossible to show that the property was purchased or acquired from the money provided by the convict or detenu. In the present case, the appellant is the wife of the detenu and she has failed to establish that she had any income of her own to acquire the three properties. In such circumstances, no other inference was possible except that it was done so with the money provided by her husband."

We, with utmost respect to the learned Judges, express our inability to agree to the said observations. The necessity of establishing link or nexus in our opinion is writ large on the face of the statutory provision as would appear from the definition of "illegally acquired property" as also that of "property". The purport and object for which the Act was enacted point to the same effect."

29. Mr.B.Kumar, learned Senior Counsel referred to the constitutional bench of the Supreme Court reported in (1994) 5 SCC 54 Attorney General for India v. Amratlal Prajivandas, and contended that the Scheme and purpose of enactment is to forfeit the illegally acquired properties of a convict/detenu and not to forfeit the independent properties of his relatives. The Supreme Court held that there must be connected link between the properties and the convict/detenu. He relied on the following passages found in paragraph 44:-

"44. ....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....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. In this view of the matter, the apprehension and contention of the petitioners in this behalf must be held to be based upon a mistaken premise..."

30. The learned Senior Counsel further submitted that even for initiating proceedings, the Competent Authority must record that he has reason to believe there exist a link between the property sought to be forfeited and illegally acquired money and referred to the following judgment reported in (2003) 7 SCC 436 [Fatima Mohd. Amin v. Union of India]. Reliance was placed on the following passages found in paragraphs 7 to 9:-

"7. We have heard the learned counsel for the parties and gone through the reasons recorded by the competent authority along with the show-cause notice. We do not find any averments to the effect that the property acquired by the appellant is a benami property of her son or the same was illegally acquired from her son.

8. The contents of the said notices, even if taken at their face value do not disclose any reason warranting action against the appellant. No allegation whatsoever has been made to this effect that there exists any link or nexus between the property sought to be forfeited and the illegally acquired money of the detenu(s).

9. As the condition precedent for initiation of the proceedings under SAFEMA did not exist, the impugned orders of forfeiture cannot be sustained. In that view of the

matter, the appeals deserve to be allowed. The order under challenge is set aside."

31. He further referred to the following passages in the judgment of the Division Bench of the Kerala High Court in W.A.No.1645 of 2007(E) dated 24.02.2009 [Kannanchery Abdu v. The Competent Authority under SAFEMA and others], which was relied on by the Tribunal in the impugned order, which are as follows:-

"The NRE passbook is sufficient to prove the source of income. The finding of the competent authority as well as the appellate authority was that, there was no evidence to show that how they earned money in Dubai, as books of accounts in Dubai was not produced. How he earned money in Dubai is not a matter that can be looked into by the authorities as no law can be enacted regarding the source of income or accounting procedure in Dubai. No action has been taken against the detenu under the FERA or FEMA for illegal remittances of money to India.

From the NRE account money was withdrawn and they purchased the properties. We are of the view that the detenu has explained the source of money and it cannot be said that the properties were purchased without accounting for the source.

The appellant has explained the source and since there is no allegation in the show cause notice that he has purchased the car with the illegally acquired money violating the provisions of the Act, we are of the view that the said money is not liable to be forfeited and it has to be released to the appellant."

32. The learned Senior Counsel for the contesting respondents further referred to a judgment of a Division Bench of this Court in W.P.Nos.1149 and 1150 of 2001 dated 24.03.2008 presided by P.K.Misra,J.(as he then was). In paragraph 16, it was observed as follows:-

"16. 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 under Section 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 AIR 1969 SC 634; AIR 1969 SC 267 and 2002 (1) SCC 630)"

33. In this case, while issuing notice under Section 6, the Competent Authority recorded that he had reason to believe that the property owned by the first respondent was acquired out of his illegal earnings and therefore, he should be put on notice.

34. Accepting the contesting respondents' appeal, the Tribunal (ATFP) in the impugned order, recorded the following findings:-

"5. ....A reading of the recorded reasons to believe, on the basis of which the show cause notice was issued in this case, it is clear that the entire proceedings are based on issuance of the order of detention against the appellant. But, the above order was set aside by the Hon'ble Supreme Court years before the issuance of the show cause notice. Therefore, on the basis of the above show cause notice, no further proceedings can be made and we agree with the learned counsel for the appellant on this point.

6. ....The contention of the appellant that the has admitted the guilt only to avoid difficulties cannot be accepted and the fact that he is convicted cannot be disputed and he is covered under section 2(2) of the Act. The competent Authority ought to have issued fresh show cause notice after recording the reasons..... .....The reasons recorded in 2004 was not placed before us. It was not given to the appellant and, in any event, on the basis of that reasons said to be recorded in 2004, no show cause notice was issued. Section 6(1) provides that reasons

should be recorded first before issuing the show cause notice. It other words, issuance of show cause notice should be preceded by recording of reasons. In this case, since no show cause notice was issued on the basis of conviction, we are of the view that the property of AP1 cannot be forfeited on the basis of the show cause notice issued in this case.....In this case, after knowing about the conviction and recording of reasons to that effect, the Competent Authority ought to have issued a show cause notice on the basis of the conviction and ought to have withdrawn the first show cause notice. That was not done and the present proceedings started with the only show cause notice issued in the case is illegal as his detention order was set aside.

10. ...In fact, no reasons are stated by the Authority why he considered the property mentioned in the show-cause notice as illegally acquired property and why he came to such a reasonable belief. Here, there is total absence of reasons. As already stated, merely because a person is detained or convicted, one cannot come to the conclusion that all his properties are illegally acquired.

12. ...We have found that the present property was purchased in 1995 out of the sale proceedings of the earlier property.

13. ...There is no allegation that while appellant was an NRI, he violated any of the Indian laws applicable to him in earning the income.

14. ...He was not charge-sheeted for earning money in Singapore or bringing silver and gold to India or selling the same in India under the Customs Act or FERA or FEMA. He has brought gold and silver after paying duty and sold the same and deposited the proceeds in the bank. Selling of silver and gold and earning were shown in the income tax returns and therefore he has legally explained the source of his income. In 1999 merely because two persons who were in possession of foreign currencies mentioned about the appellant's name and appellant was thereafter convicted is not a ground to say that his acquisition of property in 1995 was illegal acquisition.

15. ...The entire proceedings are illegal. We are also of the opinion that even if the show cause notice is valid, by preponderance of probabilities appellant also had

discharged the burden cast on him in proving the legal source of his invested income."

35. As correctly found by the Tribunal, the show cause notice issued by the writ petitioner suffers from manifest irregularity, non-application of mind and in total perversion of SAFEMA. Though this Court has held that in a given case, there is no impediment for the competent authority to file a writ petition, the said discretion must be properly exercised by the authority. It is only in cases where Tribunal's order is perverse, the question of entertaining a writ petition will arise. It is not a fit case where any interference is called for in the impugned order of the third respondent Tribunal.

36. Once again the Supreme Court in the judgment reported in (2007) 2 SCC 510 [P.P.Abdulla and another v. Competent Authority and others] went into the issue relating to confiscation of the properties of smuggler under the SAFEMA. It was held that Section 6(1) of the SAFEMA will have to be strictly followed and the authority's satisfaction must be recorded in writing, failing which, the notice is liable to be quashed. It is necessary to extract paragraphs 6 to 11, which are 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 para 8 that the reasons in the notice under Section 6(1) were recorded in writing. In our opinion this is not sufficient. Whenever the statute requires 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.

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.

9. In our opinion, the facts of the case are covered by the decision of this Court in Fatima Mohd. Amin v. Union of India1. In the present case the contents of the notice, even if taken on face value, do not disclose any sufficient reason warranting the impugned action against the appellant as, in our opinion, the condition precedent for exercising the power under the Act did not exist. Hence, the impugned orders cannot be sustained.

10. In the present case, in the notice dated 15-3-1988 issued to the appellant under Section 6(1) of the Act (copy of which is annexed as Annexure P-1 to this appeal), it has not been alleged therein that there is any such link or nexus between the property sought to be forfeited and the alleged illegally acquired money of the appellant.

11. Hence, in view of the decision of this Court in Fatima Mohd. Amin case1 the said notice dated 15-3-1988 has to be held to be illegal. Consequently the order passed in pursuance of the said notice is declared as null and void. The appeal is, therefore, allowed and the impugned orders of the High Court and the authorities concerned are set aside. No costs."

37. In the light of the above, the writ petition stands dismissed with cost of Rs.10,000/- (Rupees Ten thousand only) payable to respondents 1 and 2. Connected miscellaneous petition is closed.