

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 2nd August, 2011

+ **W.P.(C) 19837-38/2004**

SURINDER KUMAR & ANR.

..... Petitioners

Through: Mr. H.S. Phoolka, Sr. Adv. with
Mr. S.M. Anis & Mr. Kanwar Faisal,
Adv.

Versus

UOI & ORS.

..... Respondents

Through: Mr. R.V. Sinha & Mr. A.S. Singh,
Adv. for UOI.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

- | | | |
|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the order dated 9th December, 2004 of the Appellate Tribunal for Forfeited Property and further seeks to restrain the respondents from taking over possession of the premises of the petitioners falling in property no.1233, Kacha Bagh, Chandni Chowk, Delhi.

2. Notice of the petition was issued and vide order dated 17th December, 2004 the dispossession of the petitioners stayed. Rule was issued in the petition on 23rd January, 2006 and subject to the petitioners depositing the title deeds in their favour with the Registrar of this Court the order restraining dispossession of the petitioners confirmed till the pendency of the petition.

3. The case of the respondents is that a notice dated 16th November, 1977 under Section 6 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) was issued to one Smt. Maha Devi Sharma being the wife of detenu Ratan Lal Sharma; that the said notice was served on the said Smt. Maha Devi Sharma on 27th December, 1977; that the order of forfeiture of property made on 27th March, 1978; that the said Smt. Maha Devi Sharma preferred an appeal to the Appellate Tribunal on 27th April, 1978 and during the pendency of appeal, the dispossession of Smt. Maha Devi Sharma was stayed subject to filing of an undertaking that she will not transfer, alienate or encumber the property; such an undertaking dated 23rd May, 1978 was filed by Smt. Maha Devi Sharma; the Appellate

Tribunal dismissed the appeal on 6th February, 1979; Smt. Maha Devi Sharma thereafter preferred a writ petition to this Court and vide interim order dated 2nd March, 1979 in it, dispossession of Smt. Maha Devi Sharma was again stayed; the said writ petition was dismissed on 23rd September, 1996 on the ground that Smt. Maha Devi Sharma had died and none of the legal representatives had come forward for continuance of the writ petition.

4. Per contra, it is the case of the petitioners that Smt. Maha Devi Sharma had sold the property vide sale deed dated and registered on 30th November, 1977 to Smt. Mohinder Kaur and the petitioners bought the property from Smt. Mohinder Kaur on 20th January, 1997.

5. Though the writ petition of Smt. Maha Devi Sharma was dismissed on 23rd September, 1996 and with which dismissal, the order of interim stay also stood vacated but it appears that the respondents did not take any steps for taking over the forfeited property till 2004 when notice was issued to the petitioners. The petitioners first preferred an appeal to the Appellate Tribunal, which was dismissed as not maintainable vide order dated 9th December, 2004 impugned in this petition and have thereafter filed this writ

petition.

6. The sale deed by Smt. Maha Devi Sharma is thus between the date which the notice issued under Section 6 bears and the date of service thereof. Section 11 of SAFEMA voids transfers effected after the issuance of notice under Section 6 of the Act.

7. It was thus found in the hearing on 27th July, 2011 that the only question falling for adjudication in this petition was as to when the notice under Section 6 of the SAFEMA was issued. The senior counsel for the petitioners had then contended that there was nothing on record to show that the notice dated 16th November, 1977 was in fact issued prior to 30th November, 1977 when the Sale Deed was executed.

8. Being of the opinion that ordinarily a notice ought not to take so long to be served and must have been dispatched a few days prior to 27th December, 1977 and being further of the view that merely preparing the notice and keeping the same in the file would not amount to issuance of notice within the meaning of Section 11 of SAFEMA and finding that notwithstanding the writ petition having remained pending since the year

2004, the records of the Competent Authority and the Appellate Tribunal had not been requisitioned, it was on 27th July, 2011 put to the counsel for the respondents as to why this Court should not presume that the notice dated 16th November, 1977 had been dispatched only a few days prior to 27th December, 1977, i.e. after 30th November, 1977 being the date on which Smt. Maha Devi Sharma sold the property. The counsel for the respondents had on that date contended that since the petitioner had nowhere in the petition challenged that the date of issuance of the notice was anything other than 16th November, 1977, thus the occasion for producing the record did not arise.

9. In the circumstances, direction was given to the respondents to produce the records.

10. The counsel for the respondents has today produced the records of the Competent Authority. The office copy of the notice dated 16th November, 1977 therein, has an endorsement of the same having been “issued on 26th November, 1977”. The record also contains the postal envelope in which the notice was dispatched on 26th November, 1977 and which postal envelope

was returned undelivered to the Competent Authority on 5th December, 1977 with the postal endorsement of the addressee i.e. Maha Devi Sharma having not been found inspite of repeated visits, the first of which was on 28th November, 1977. The record also shows that upon the notice being so returned, the Competent Authority on 8th December, 1977 directed the procedure under Section 22 (b) of SAFEMA to be followed. The counsel for the respondents states that however when the officials of the Competent Authority went for pasting of the notice on 27th December, 1977 they found Smt. Maha Devi Sharma and who signed the acknowledgment card of the notice.

11. The counsel for the respondents has thus contended that since the notice was issued on 26th November, 1977 i.e. prior to the Sale Deed by Smt. Maha Devi Sharma on 30th November, 1977, thus the said Sale Deed is void under Section 11 of SAFEMA.

12. Per contra, the senior counsel for the petitioners has referred to:-

a) *Gulshan Ahuja v. Union of India* 115 (2004) DLT 691 where this Court observed that there is no methodology of intimating the Authority for registering documents with respect to properties, of

pendency of proceedings under Section 6 of SAFEMA and/or whereby the prospective purchasers could enquire about the same and quashed the forfeiture for the reasons of, delay of 18 years in that case between the date of issuance of the notice under Section 6 and passing of the order under Section 7 and of the property having changed hands in between;

b) ***Fatima Mohd. Amin v. Union of India*** (2003) 7 SCC 436 holding that without notice under Section 6 disclosing any reason warranting action, the proceedings for forfeiture could not be sustained;

c) ***P.P. Abdulla v. The Competent Authority*** AIR 2007 SC 1057 also holding that it was necessary for the notice under Section 6 to show the link or nexus between the property sought to be forfeited and alleged illegally acquired money;

d) ***Aslam Mohd. Merchant v. Competent Authority*** JT 2008 (7) SC 446, though under the Prevention of Illicit Traffic in NDPS Act, 1988 but relating to the necessity of the notice to be precise;

e) Judgment dated 23rd March, 2011 of this Court in W.P.(C)18635/2004 titled ***Vinod Kumar v. Union of India*** pertaining to forfeiture of properties of Smt. Maha Devi Sharma only and relating to a property sold by her on 29th October, 1977 and wherein finding the sale to be of prior to the notice dated 16th November, 1977, the order of forfeiture was set aside/quashed.

13. Sections 6, 11 & 22 of SAFEMA are as under:-

" 6. Notice of forfeiture:

- (1) If, having regard to the value of the properties held by any person to whom this Act applies, either by himself or through any other person on his behalf, his known sources of income, earnings or assets, and any other information or material available to it as a result of action taken under Section 18 or otherwise, the competent authority has reason to believe (the reasons for such belief to be recorded in writing) that all or any of such properties are illegally acquired properties, it may serve a notice upon such person (hereinafter referred to as the person affected) calling upon him within such time as may be specified in the notice, which shall not be ordinarily less than thirty days, to indicate the sources of his income, earnings or assets, out of which or by means of which he has acquired such property, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties, as the case may be, should not be declared to be illegally acquired properties and forfeited to the Central Government under this Act.
- (2) Where a notice under sub-section (1) to any person specifies any property as being held on behalf of such person by any other person, a copy of the notice shall also be served upon such other person.

11. Certain transfers to be null and void:

Where after the issue of a notice under Section 6 or under Section 10, any property referred to in the said notice is transferred by any mode whatsoever such transfer shall, for the purposes

of the proceedings under this Act, be ignored and if such property is subsequently forfeited to the Central Government under Section 7, then, the transfer of such property shall be deemed to be null and void.

22. Service of notices and orders:

Any notice or order issued or made under this Act shall be served-

(a) by tendering the notice or order or sending it by registered post to the person for whom it is intended or to his agent;

(b) if the notice or order cannot be served in the manner provided in clause (a), by affixing it on a conspicuous place in the property in relation to which the notice or order is issued or made, or on some conspicuous part of the premises in which the person for whom it is intended is known to have last resided or carried on business or personally worked for gain."

14. The mode of service of a notice under Section 6 is as provided under Section 22. The Competent Authority itself on 8th December, 1977 held that notice could not be served on Smt. Maha Devi Sharma by sending it to her by registered post and decided to serve the same upon her by pasting/affixation under Section 22(b). Such service admittedly took place on 27th December, 1977 i.e. after the Sale Deed of the subject premises by Smt. Maha Devi Sharma.

15. The questions which fall for adjudication are, as to the meaning to be given to the words “Where after the issue of a notice under Section 6” in Section 11 of SAFEMA; whether the word “issue” is to be understood as “served”. It also falls for consideration whether, if the word “issue” is to be interpreted as something different from “served”, then whether issuance has to be by a process ultimately resulting in service or issuance by a process by which service is ultimately not effected would also be relevant.

16. The aforesaid questions arise because if issuance is to be interpreted as “dispatch” , whether results in service or not, then the dispatch through Registered Post-AD, by which mode Smt. Maha Devi Sharma could not be served, was on 26th November, 1977 i.e. before the date of Sale Deed and would make the sale deed dated 30th November, 1977 void. However if issuance means “dispatch” by a mode ultimately resulting in service, then such issuance, at the earliest was on 8th December, 1977 i.e. after the Sale Deed and would not affect the sale deed.

17. Significantly, Section 22 uses all the expressions “issued”, “made” and “served” in relation to notices under the Act. Section 11 having used the

word “issue” and not “made”, the date on which the notice under Section 6 is made/prepared by the Competent Authority would not be relevant.

18. As far as whether “issue” is to be understood as “dispatched” or “served”, the Apex Court in *Banarsi Debi v. Income-tax Officer, Calcutta* (1964) 7 SCR 539 held that Section 27 of the General Clauses Act, 1897 communicated that Parliament uses the words “serve”, “give” and “send” interchangeably and that in the legislative practice of our country the expressions “issued to” or “served upon” are used as equivalent expressions to convey the same idea. It was thus held that the expression “issued” used in Section 4 of the Indian Income Tax (Amendment) Act, 1959 had to be given the meaning which carried out the intention of the legislature and in preference to that which defeats it.

19. To determine the intention of the legislature in the context of SAFEMA, Section 7(1) thereof also becomes relevant. It is as under:-

“ 7. Forfeiture of property in certain cases:

(1) The competent authority may, after considering the explanation, if any, to the show-cause notice issued under Section 6, and the materials available before it and after giving to the person affected (and in a case where the person affected holds any property specified

in the notice through any other person, to such other person also) a reasonable opportunity of being heard, by order, record a finding whether all or any of the properties in question are illegally acquired properties.”

20. Though Section 7(1) also uses the expression “issued” but there could be no occasion of the noticee showing cause without the notice under Section 6 being served. It thus indicates that “issued” is intended to mean “served”.

21. Similarly Section 8 which is as under also presumes the service of the notice:-

“ 8. Burden of proof:

In any proceedings under this 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.”

22. Yet further, Section 13 of the Act which is as under, also uses the word “issued” and “served” interchangeably:-

“13. Notice or order not to be invalid for error in description:

No notice issued or served, no declaration made, and no order passed, under this Act shall be deemed to be invalid by reason of any error in the description of the property or person mentioned therein if such property or person is identifiable from the description so mentioned.”

23. I am even otherwise of the view that the transfer of property cannot be made void without even effecting the service of the notice in the modes specified under Section 22 of SAFEMA. Without even the person, transfers by whom are sought to be made void, being made aware of the notice by service thereof, it would be improper to invalidate the transaction. If that were to be the position, the transferee from such person would not even be able to make a complaint of cheating/misrepresentation and/or a claim against such transferor who himself/herself was not aware of issuance of notice. The Supreme Court in *Aamenabai Tayebaly v. Competent Authority under SAFEMA* (1998) 1 SCC 703 held the sale after the notice under Section 6 and before the order of forfeiture to be hit by Section 11 and further held that the doctrine of bonafide purchaser for value does not apply in such cases inasmuch as on the date of transfer the seller has no interest in the property which could have been conveyed/transferred.

24. There is yet another important reason for holding that the word “issued” means “served”. The entire procedure of forfeiture under Section 6 commences with the service of the notice. Thus without the procedure

having begun, it cannot be said that the transfers would become void. The Division Bench of this Court in *MCD v. Dharma Properties* 120 (2005) DLT 588 held in relation to the notice under Section 126(1) of the Delhi Municipal Corporation Act, 1957 that there can be various situations in which the notice properly issued and dispatched might not be received and which would defeat the purpose of an otherwise legitimate exercise of modification of assessment list. It was thus held that “giving” of a notice is complete not on the date of its dispatch but on the expiry of time on which the notice would be delivered in the ordinary course of post, unless contrary is proved. It would be incongruous to hold that mere dispatch or sending of the notice, without service thereof would put a clog on the property.

25. I am therefore of the view that the date with effect from which Section 11 comes into play is the date of service of the notice and not the date of dispatch of the notice. A word of caution may however be appended. If it is found that the noticee has avoided to receive the notice and has thereafter transferred the property, such noticee would be deemed to have been served on the date when he avoided to receive the notice and transfer

thereafter shall attract Section 11.

26. The service of the notice in the present case was admittedly after the date when the property had been sold by Smt. Maha Devi Sharma and thus the said property could not be forfeited under the provisions of the Act in as much as the same ceased to be the property of Smt. Maha Devi Sharma.

27. The petition therefore succeeds and is allowed. It is declared that the proceedings of forfeiture of the property sold on 30th November, 1977 are *non est* and the said property cannot be forfeited and/or taken possession of in pursuance of the said proceedings.

28. The petition is disposed of with no order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

AUGUST 02, 2011

pp

(corrected and released on 24th August, 2011).