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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 15.01.2013

Judgment delivered on: 15.04.2013

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WP(C) No.4567/2001

STATE BANK OF INDIA

..... Petitioner

Vs

UNION OF INDIA AND ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Rajiv Kapur & Ms Vatsala Rai, Advocates.

For the Respondents: Mr Sumeet Pushkarna, CGSC with Ms Meenakshi Midha & Mr Gaurav Varma, Advs.

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. This writ petition has been preferred by the State Bank of India (in short SBI) to assail the order dated 02.05.2005 passed by the Appellate Tribunal for Forfeited Property (hereinafter referred to as the Appellate Tribunal), which in turn confirmed the order of the competent authority dated 22.11.1999. The net effect of the impugned orders is that the two sets of margin money amounting to Rs.36,90,000/- and Rs.36,80,000/- paid by respondent nos.6 and 7 (the total sum amounting to Rs. 73,70,000/-) stand forfeited on the premise that the said sums of money were the illegally acquired property of respondent nos.4 and 5.

1.1 Respondent no.4, is one, Mr.Mahesh Kanti Lal Javeri. The said respondent is the husband of respondent no.5, one, Ms. Anjana Mahesh Javeri. Respondent nos.4 and 5 were at the relevant point in time partners in two partnership firms referred to above, i.e., respondent nos.6 and 7.

1.2 SBI, had been remitted the aforementioned amounts by respondent nos.6 and 7 to purchase, and thereafter, import gold for their use in terms of the Gold/Silver Jewellery Export Promotion and Replenishment Scheme (in short the Scheme). This Scheme was framed by the Government of India pursuant to its Export Import Policy for the period April, 1992 to March, 1997, which is formulated in exercise of powers conferred upon it under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (in short FTDR Act).

1.3 Under the Scheme, SBI was to act as a facilitator and a canalizing agent for purchase and import of gold/silver. The Scheme enabled replenishment gold/silver, against export of gold/silver jewellery and articles. It is in the context of this Scheme that respondent nos.6 and 7 i.e., the partnership firms remitted the aforementioned amounts to SBI.

1.4 Since, respondent no.4 was convicted by the Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Bombay (now Mumbai), on 17.12.1987, followed by his detention under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short COFEPOSA), pursuant to an order dated 03.06.1991, proceedings under the provisions of Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (In short SAFEMA), were commenced against the said respondent.

1.5 It is in this background that steps were taken by the authorities administering the provisions of SAFEMA to forfeit the illegally acquired properties of the convict / detenue respondent no.4 and his wife.

1.6 Based on the premise, that the aforementioned sums lying with SBI was an illegally acquired property of respondent nos.4 and 5 that notices were issued for the first time on 21.06.1995 by the Enforcement Directorate under the provisions of Foreign Exchange Regulation Act, 1973 (in short FERA). Pertinently, SBI had made purchases and imported the gold as per the mandate of its clients i.e., respondent nos.6 and 7 between 23.05.1995 and 21.06.1995. It is important to note, and in that respect there appears to be no dispute, that the Scheme required that the person, who was interested in purchasing and thereafter, importing the gold was required to pay 20% of the amount in the form of earnest money based on the value communicated by SBI which, as indicated above, was the canalizing agency under the Scheme. The two sets of amounts, to which reference is made hereinabove, i.e., Rs.36,90,000/- and Rs.36,80,000/- (i.e., a total sum of Rs. 73.70,000) were these amounts i.e., earnest money, which was made available to SBI for purchase of gold.

1.7 Under the Scheme, SBI was required to purchase the gold on receipt of mandate from an eligible exporter (in this case respondent nos.6 and 7) within two (2) business working days of receipt of the earnest money. On making a purchase as per the mandate of the exporter, (once again in this case, respondent nos.6 and 7) a certificate was issued, which indicated the quantity and the price of the gold/silver purchased (in this case gold was purchased). The price was indicated in Dollars. The final sale of gold/silver was made to

the holder of the release order at the price indicated in the certificate issued in the first instance by SBI in that behalf.

1.8 The exporter was given a leeway of making requisite exports and having the gold/silver replenished by seeking delivery of the gold/silver, in respect of which, an order was placed, within a maximum period of 120 days from the date of shipment or 180 days from the date of booking, whichever was earlier. In case the exporter failed to export and seek delivery within the period stipulated above, SBI was entitled to forfeit the earnest money deposited by the exporter; claim damages and also interest on the value of purchase of gold/silver made by SBI on behalf of the exporter from the date of booking of gold/silver till the payment of full price in respect of the same.

2. In the instant case, the crucial events took place as follows :-

2.1 As indicated above, after the conviction of respondent no.4 on 17.12.1987, and his subsequent detention under COFEPOSA on 03.06.1991, unknown to SBI, respondent nos.4 to 7 approached SBI in October, 1993 to purchase and thereafter import gold for them, under the Scheme.

2.2 Two agreements in that behalf were executed with SBI from 27.10.1993 and 03.06.1994. In pursuance of the aforementioned agreements, between 22.05.1995 and 21.06.1995, respondent nos.6 and 7 deposited a margin money, by way of earnest money, in two tranches of Rs.36,90,000/- and Rs.36,80,000/-, aggregating in all, to a sum of Rs.73,70,000/-.

2.3 As indicated above, between 23.05.1995 and 22.06.1995, SBI purchased gold as per its mandate in respect of which bills were raised on respondent nos.4 and 5. It is the case of SBI that bills amounting to Rs.1,81,67,495/- and Rs.1,81,28,571/- were raised on respondent nos.4 and 5.

2.4 On 21.06.1995, a communication was served at 5.15 p.m., on the Bombay Overseas Branch (as it then was) of SBI, by the Enforcement Directorate, asking it to freeze the proceeds of pay orders which were referred to in the said communication as they were apparently "funded with deposits which had been received in violation of FERA". It was also indicated in the said communication that the amounts received by SBI through the pay orders referred to in the said communication should not be credited to anybody or be used for booking gold / silver. Pertinently, the aggregate value of the purchase orders referred to in the communication dated 21.06.1995, amounted to a sum of Rs.11,20,000/-. The communication also informed SBI that they would be receiving necessary instructions in that behalf from the Reserve Bank of India (in short RBI) issued under Section 73(3) of FERA.

2.5 Accordingly, on 29.06.1995, RBI issued a communication to the very same effect qua the pay orders referred to in the Enforcement Directorate's communication of 21.06.1995.

2.6 By a communication dated 12.07.1995, the competent authority under SAFEMA brought to the notice of SBI that proceedings under SAFEMA had been initiated against respondent nos.4 and 5, for forfeiture of illegally acquired properties held by them. The said communication went on to state that a notice under section 6(1) of SAFEMA had been issued to respondent nos.4 and 5 for forfeiture of their properties including the amount of Rs.73,70,000/- lying with it. It was brought to the notice of SBI that any transfer of property after issuance of notice under section 6(1) of SAFEMA, would be null and void if, such property was subsequently forfeited to the Central Government. In this behalf, the provisions of Section 11 of SAFEMA were brought to the notice of SBI.

2.7 It is important to note that, the 21.06.1995 communication, was of the Enforcement Directorate, which referred to purchase orders aggregating in the sum of Rs.11,20,000/- whereas the communication dated 12.07.1995, which was issued by the competent authority under SAFEMA, referred to the entire sum remitted by respondent nos.4 to 7 to SBI for making purchase and thereafter import of gold for their purposes; albeit under the Scheme.

2.8 Importantly, the competent authority under SAFEMA passed a final order of forfeiture on 07.01.1996, which was challenged before the Appellate Tribunal. The Appellate Tribunal by an order dated 10.12.1997, allowed the appeal and set aside the order of the competent authority. The principal grounds on which the appeal was allowed evidently were : Firstly, that no evidence was shown that respondent no.4 was convicted in respect of a property valued over Rs.1 Lakh. Secondly, that order of detention dated 03.06.1991, passed against respondent no.4, was revoked by the Central Government based on the opinion of the Advisory Board. The order passed by the Central Government revoking the detention order is dated 05.08.1996.

2.9 Evidently, in the interregnum, a second detention order was passed against respondent no.4, on 05.10.1995, under the provisions of COFEPOSA. Based on the second detention order, an perhaps having regard to the fact that, proceedings taken out under SAFEMA in the first instance had failed, fresh notice dated 31.12.1997 was issued, under Section 6(1) of SAFEMA.

3. A copy of the said notice dated 31.12.1997 was marked to SBI. This was followed by a communication dated 12.03.1998 alongwith summons, issued to SBI, by the competent authority. SBI, apparently, sent in response a communication dated 16.03.1998.

3.1 The aforementioned communication of SBI was followed by communications dated 25.03.1998, whereby it sought to explain its stand to the competent authority. The copies of the applications received from respondent no.6, whereby requests had been made to purchase gold on their behalf, were produced before the competent authority. In the said communication, details as to the date on which booking had been made for purchase of gold, the quantity and name of the importer (i.e. respondent nos.6 and 7) were also indicated. In addition, the office copies of invoices issued to respondent nos.6 and 7, were also produced. Brief details of the date of invoices raised, the quantity purchased and value against each purchase made was also indicated in the said letter. SBI, further indicated that such an exercise is conducted by it on behalf of similarly circumstanced entities and the total gold purchased was held in stock by it and was released to the purchasers only on payment of total price. The sum and substance of SBI's stand taken in the said communication was that, on payment being made by it to foreign suppliers, a debit was raised to the cost of gold account maintained in its books and that, in respect of respondent nos.6 and 7 amounts were outstanding against 20 contracts/indents raised by the two partnership firms.

3.2 It is the case of SBI that, since it did not receive the balance consideration from respondent nos.4 to 7, it sold the gold on 30.04.1998 and 05.05.1998 for a sum of Rs.3,66,06,607/-; albeit at a loss. The stand of SBI at the time of institution of the present petition was that a substantial amount towards interest amounting to Rs.1,33,28,828/- was due and outstanding towards interest on the balance amount, which was payable by respondent nos.6 and 7.

3.3 On 22.11.1999, the competent authority under SAFEMA, passed an order forfeiting the properties of respondent nos.4 and 5, which included the sum of Rs.76,80,000/- remitted to SBI for purchase of gold.

3.4 Appeals qua the said order were preferred both by respondent nos.4 and 5 and SBI. The appeal of respondent nos.4 and 5 was dismissed by the Appellate Tribunal vide an order dated 14.08.2000, against which, a writ petition bearing no.WP(C) 5946/2000 was filed in this court.

3.5 The appeal of SBI which was confined, quite naturally, to the amount remitted to it, i.e., the sum of Rs.73,70,000/- was dismissed by the impugned order dated 02.05.2001.

3.6 The instant writ petition was moved on 31.07.2001 when, an ex parte order was passed staying the impugned order passed by the Appellate Tribunal.

3.7 The writ petition was admitted on 27.01.2003. On the said date, a direction was issued for listing the captioned writ petition alongwith WP (C) 5946/2000.

3.8 It appears that, writ petition being: WP(C) 5946/2000 was dismissed on 20.05.2011 against which an appeal has been preferred i.e., LPA No.494/2011. The appeal was admitted on 26.05.2011 and notice has been issued to the official respondents

SUBMISSIONS OF COUNSELS

3.9 In the background of the aforesaid circumstances, on behalf of SBI, arguments were advanced by Mr. Rajiv Kapoor alongwith Ms. Vatsala Rai. On behalf of the official respondents, submissions were advanced by Mr.

Sumeet Pushkarna, CGSC and Ms. Meenakshi Midha, Advocate assisted by Mr. Gaurav Verma, Advocate.

4. Mr. Kapoor submitted that in terms of the Scheme, once earnest money had been received by SBI to purchase the gold on behalf of respondent nos.6 and 7 in terms of the Scheme, the money became the property of SBI. He contended that SBI had the right to forfeit the earnest money received within 120 days from the date of shipment or 180 days from the date of booking, whichever was earlier. Mr. Kapoor pointed out that 180 days from date of booking expired on 19.12.1995, on which date, in law, there was no notice under Section 6(1) of SAFEMA in existence, as the final order of the competent authority dated 07.01.1996 was set aside in appeal by the Appellate Tribunal on 10.12.1997. This argument of Mr Kapoor was pivoted on the fact that Section 6(1) notice dated 12.07.1995 had culminated into a final order of 07.01.1996, which was eventually set aside. Mr. Kapoor thus, argued that in the eye of law, the forfeiture of the sums in issue, became complete, on 19.12.1995.

4.1 He submitted that as rightly found by the Appellate Tribunal in its order dated 10.12.1997, the order of the competent authority of 07.01.1996 could not have survived in view of the fact that respondent no.4's detention was revoked by the Central Government on 05.08.1996, pursuant to the opinion rendered by the Advisory Board. It was his contention that the provisions of Section 7 for forfeiture of illegally acquired property can only be invoked if a valid detention order is in existence. For this proposition, he relied upon the judgment of the Supreme Court in the cases of *Union of India Vs. Hazi Mastan Mirza*, (1984) 2 SCC 427 and the Judgment of the Bombay High Court in the case of *Padma Nirmal Aggarwal vs UOI* in WP(C) No.

1398/2004 dated 11.03.2005. Mr. Kapoor further submitted that even though a second detention order was issued on 05.10.1995, the notice under Section 6(1) of SAFEMA was issued only on 31.12.1997. It was thus, the contention of Mr. Kapoor that by this time, the right to forfeit the earnest money stood crystalized in favour of SBI.

4.2 It was Mr. Kapoor's contention that since, the first order of forfeiture dated 07.01.1996 had been set aside, the Appellate Tribunal by its order dated 10.12.1997, no fresh order of forfeiture on the same set of facts could have been passed by the competent authority. For this purpose, reliance was placed on the following judgments: *Shanti Devi Vs. Union of India, 1998 7 DLT 477*, *Ashok Kumar Vs. Competent Authority, 2001 (3) AD Delhi 121* and *Ghanshyam Das Vaswani Vs. Union of India, 167 (2010) DLT 434*.

4.2 Mr. Kapoor submitted that the Appellate Tribunal failed to appreciate this aspect of the matter, and thus, erroneously sustained the order of the competent authority forfeiting the said sums of money which were remitted by SBI to purchase the gold under the Scheme.

4.3 Mr. Kapoor further contended that SBI, falls within the ambit of the provisions of the Sections 2(1) read with 2(2)(e) and Section 3(1)(c)(iv)(A) of SAFEMA and would thus be protected from the provisions of SAFEMA, as its actions were bonafide and taken in good faith. In support of this contention, reliance was placed on Section 131 of the Negotiable Instruments Act, 1881 (in short NI Act) and Section 18 of the FTDR Act. The sum and substance of this contention was that, SBI being a bonafide transferee for consideration, which acted in good faith, it was protected from incurring any loss qua the transaction entered into with respondent nos.4 to 7.

4.4 Mr. Kapoor further submitted that, SAFEMA, is directed against forfeiture of illegally acquired properties of persons falling under clause (a) or clause (b) of Section 2(2) of SAFEMA. Since, SBI was neither a relative nor an associate of respondent nos.4 and 5, the property in issue, i.e., the aforementioned sums of money, could not be forfeited. For forfeiture of property, it had to be established that it was an illegally acquired property of a convict or detainee, which was held by a relative or an associate. SBI, being a bank could neither be categorized as a relative or an associate of respondent no.4, and hence, SAFEMA was not applicable to it. For this purpose, reliance was placed by him on the judgment of the Supreme Court in the case of *Attorney General for India Vs. Amratlal Prajivandas, AIR 1994 SC 2179*.

4.5 It was Mr. Kapoor's contention that the earnest money deposited by respondent nos.6 and 7 was not available when, notice under section 6(1) of SAFEMA was issued for the first time on 12.07.1995. Mr. Kapoor sought to draw the court's attention to the fact that the purchase of gold at the behest of respondent nos.6 and 7 had taken place between 22.02.1995 and 21.06.1995. Mr. Kapoor submitted that since, SBI had already utilized the earnest money transmitted to it, to purchase the gold, no order of forfeiture of earnest money could be practically passed as no earnest/margin money was available with SBI.

5. On behalf of official respondents, Mr. Pushkarna argued that even though the first order of the competent authority dated 07.01.1996 was set aside by the Appellate Tribunal by its order of 10.12.1997, respondent no.4 continued to be covered under the provisions of Section 2(2)(b) of SAFEMA in view of the fact that a second detention order dated 05.10.1995 had been issued by the Government of India under the provisions of COFEPOSA.

Since, respondent no.5 was the wife of respondent no.4, she was covered under the provisions of Section 2(2)(c) of SAFEMA.

5.1 It was Mr. Pushkarana's contention that pursuant to the communication dated 21.06.1995 issued by the Enforcement Directorate, followed by the earlier notice of 12.07.1995, issued under Section 6(1) of SAFEMA, SBI had placed the amount in fixed deposit and that money was lying in “specie” with SBI. It was his contention that therefore in respect of the said money, a charge was created under Section 24 of SAFEMA.

5.2 It was also the submission of the learned counsel for the respondents that the facts as they obtained, in the present case would show that before the right of forfeiture in favour of SBI could have been triggered, the Enforcement Directorate and RBI intervened in the matter, which effectively put an embargo on RBI, taking recourse to the forfeiture clause. The bookings for purchase of gold took place between 22.05.1995 and 21.06.1995 and before the period provided for triggering the forfeiture clause could get over, which was a maximum of 120 days from the date of shipment or 180 days from the date of booking, whichever is earlier; a letter had been issued by the Enforcement Directorate on 21.06.1995, followed by a letter of RBI dated 29.06.1995. These two communications were followed by a notice issued by the competent authority dated 12.07.1995, under Section 6(1) of SAFEMA. It was thus contended that, in view of these circumstances, the property in the sums in issue remained with respondent nos.4 to 7 and hence, was correctly forfeited by the competent authority by taking recourse to Sections 7 and 19 of SAFEMA.

5.3 It was further contended that, provisions of Section 24 of SAFEMA, clearly provided that the provisions of the said Act would prevail

notwithstanding anything inconsistent contained in any other law for the time being in force. The contention was that, any rights that SBI may have by virtue of the contract, and consequently, under the Contract Act stood overridden by provisions of Section 24 of SAFEMA.

REASONS

6. Having heard the learned counsels for the parties and perused the record, what essentially falls for consideration is the nature of the property i.e., the sums in issue, which were transmitted by respondent nos.6 and 7 to SBI.

6.1 The factual events are largely not in dispute. What emerges from the record is that respondent nos. 4 to 7 approached SBI in October, 1993 for purchase of gold under the Scheme referred to above. SBI, was apparently, unaware of the fact that respondent no.4 had been convicted on 17.12.1987, and had been detained thereafter, by virtue of order dated 03.06.1991, issued under the provisions of the COFEPOSA.

6.2 Agreements were evidently executed between SBI and the private respondents on 27.10.1993 and 10.06.1994.

6.3 Pursuant to the aforementioned agreements, pay orders were issued by respondent nos.6 and 7 between 22.05.1995 and 21.06.1995, to purchase gold on behalf of the said partnership firms. The monies remitted to SBI in all aggregated to a sum of Rs.73,70,000/-. It is not in dispute that the Scheme permitted SBI to collect 20% of the total consideration in the form of earnest money based on the rate at which gold was available in the relevant market.

6.4 SBI, apparently, had many such orders placed on it as it was a facilitator and a canalizing agency for import of gold under the said Scheme. On orders being received, contracts were struck with the foreign supplier and

remittances were made accordingly. The transaction amount qua each of the request received by SBI for purchasing gold on behalf of exporters, who were covered under the Scheme, was debited to the "*cost of gold account*". This procedure apparently was also followed qua respondent nos.6 and 7, who had apparently, raised 20 such indents for purchase of gold between 22.05.1995 and 21.06.1995.

6.5 As per the Scheme, SBI was required to comply with the mandate given to it to purchase the gold within two (2) business working days. Evidently, the mandate given by respondent nos.6 and 7 was executed and accordingly, invoices were issued in that behalf between 23.05.1995 and 22.06.1995. The total value of the invoices qua respondent nos.6 was a sum of Rs.3,62,96,066/-.

6.6 On 21.06.1995, the Enforcement Directorate issued a communication seeking to restrain SBI from dealing with certain purchase orders (which amounted to a sum of Rs.11,20,000/-). SBI was informed that they should not book any gold or silver against the said pay order. It may be noted that, the said letter was received evidently on 21.06.1995 at 5.15 p.m. in the Overseas Branch at Bombay (now Mumbai) of SBI. This endorsement of date and time is made on the document, which was filed before the authorities below. The aforesaid communication of the Enforcement Directorate was followed by a communication of RBI dated 29.06.1995, which almost stressed the same aspect. This document, which is placed on record, bears an endorsement of receipt dated 30.06.1995.

6.7 A third communication was received on 12.07.1995 at 2.00 p.m. (there is again an endorsement to that effect on the document), which was, a notice issued under Section 6(1) of SAFEMA, informing SBI that, proceedings under

SAFEMA had been initiated against respondent nos.4 and 5. It is in this communication that SBI, was informed that, proceedings have been taken out for forfeiting the properties of respondent nos.4 and 5 including the sums in issue i.e., the sum of Rs.73,70,000/-.

6.8 Admittedly, the aforementioned proceedings culminated in an order of forfeiture passed by the competent authority passed under Sections 7 and 19 of SAFEMA. This order was passed on 07.01.1996.

6.9 In an appeal preferred by the private respondents, the order was reversed by the Appellate Tribunal. The order of the Appellate Tribunal, to which I have made a reference above, was passed on 10.12.1997.

7. The detention order of 03.06.1991, was revoked by the Central Government on 05.08.1996, which was noticed by the Appellate Tribunal in its order of 10.12.1997.

7.1 A second detention order was issued under COFEPOSA by the Government of India on 05.10.1995. It is in this background that the official respondents, issued a fresh notice under Section 6(1) of SAFEMA on 31.12.1997. These proceedings culminated in the two impugned orders dated 22.11.1999 and 02.05.2001 being passed by the competent authority and the Appellate Tribunal, respectively.

7.2 As is evident from the aforesaid, it is quite clear that SBI was unaware of the first detention order dated 03.06.1991 or about the factum of respondent no.4's conviction when, it entered into the two agreements referred to above dated 27.10.1993 and 10.06.1994, for purchase of gold on behalf of respondent nos.6 and 7. It is also clear that, for the first time, a notice under Section 6(1) of SAFEMA, was issued by the official respondents, only on

12.07.1995. Much prior to the said date, amounts remitted to SBI had been utilized to purchase the gold.

7.3 The communication issued by the Enforcement Directorate dated 21.06.1995 or of RBI dated 29.06.1995 made no reference to SAFEMA proceedings. The Enforcement Directorate's communication was issued under Section 33(2) of FERA, while that of RBI was issued under Section 73(3) of FERA. Though in both communications, there was a request made to freeze the proceeds of the pay orders referred to therein, which as already indicated, aggregated to a sum of Rs.11,20,000/-, it was made on the basis of alleged violation by respondent nos.4 and 5 of the provisions of FERA. The bar on transfer of property under Section 11 of SAFEMA gets triggered after a notice is issued either under Section 6 or 10 of SAFEMA. For the sake of convenience, Section 11 of SAFEMA is extracted hereinbelow :-

“11. Certain transfers to be null and void. – Whereafter 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 purpose 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.”

7.4 Therefore, Mr. Kapoor is right to the extent that prior to issuance of first notice under Section 6(1) of SAFEMA, the sums in issue remitted to SBI had already been utilized for purchasing the gold as per mandate given by respondent nos.6 and 7.

7.5 Even if one were to take into account the freezing order issued on 21.06.1995 (which was, as indicated above received at 5.15 p.m. in the evening); SBI by this time had already purchased the gold, as mandated by

respondents nos.6 & 7). In any event, the freezing order of 21.06.1995 could have had no effect on transactions for purchase of gold executed before the date of receipt of the said communication. As noticed above, purchase of gold was made by SBI between 22.05.1995 and 21.06.1995.

7.6 But what is more important is the fact that the monies were received in the form of earnest money; a fact which was not disputed before me by the counsels appearing for respondent nos. 1 to 3, and therefore, in my view, became the property of SBI, on receipt. The argument advanced on behalf of the counsel for respondent nos. 1 to 3 that the freezing order passed by the Enforcement Directorate intervened in the matter and hence, the property in the sums in issue, stood forfeited to the Central Government, is in my opinion, untenable. Earnest money is paid to a vendor by a purchaser to secure and/or guarantee due execution of the contract. In case the purchaser defaults, the earnest money is forfeited and if the contract goes through, the said sum is adjusted towards the total consideration. Earnest money, in that sense, is different from part payment. The vendor in this case is SBI, while the purchasers were the private respondents, i.e., partnership firms and/or their partners (respondent nos. 4 to 7). The rights which inure in the vendor on receipt of earnest money are aptly elucidated in the following English and Indian Judgments:

Howe vs Smith 1881 H. 3315

“.....On the other hand, in *Colloins vs Stimson* (2), Baron Pollock said: “According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit.”

These authorities appear to afford no certain light to answer the inquiry whether, in the absence of express stipulation, money paid as a deposit on the signing of a contract can be recovered by the payer if he has made such default in performance of his part as to have lost all right to performance by the other party to the contract or damages for his own non-performance.

Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract....." (emphasis supplied)

Dies and Anr. vs British and International Mining and Finance 1939 1 K.B. 724

".....It is true that this case proceeded on the construction of the particular contract that was then before the Court, but none the less emphasis was laid on the distinction between a payment designated as a deposit and one designated as a part payment, the former serving two purposes – namely, in the event of the contract being performed to go in diminution of the purchase price, and in the interval between contract and completion to operate as an earnest or guarantee that the contract shall be performed...." (emphasis supplied)

Naresh Chandra Guha vs Ram Chandra Samanta & Ors. AIR (39) 1952 Calcutta 93

"....9. It is necessary at this stage to refer to and explain the meaning and implication of an oft-quoted expression, first used by Fry L. J. in 'Howve v. Smith' (1884) 27 Chn Div 89 at p.101 and reproduced by him in his well-known treatise on Specific Performance. That expression which runs as follows, namely, "it

(the deposit or earnest money) is not merely a part payment, but is then also an earnest to bind the bargain so entered into", apparently indicates that the description of the characteristics of the earnest money, as given in the above statement of the 'golden rule of intention', is inaccurate, that, in any event, it is incomplete and, therefore, unsafe to rely upon. The expression, however, if properly understood, presents no such difficulty. It will appear from the authorities that deposit or earnest money, contemplated above, has two characteristics-it is an earnest or security, it is also a part payment of the price-but these two characteristics belong, strictly speaking, to two different stages. In the words of Lord MacNaughten in the case of 'Soper v. Arnold' (1889) 14 A C 429 at p.435

"the deposit serves two purposes, - if the purchase is carried out it goes against the purchase-money but its primary purpose is that it is a guarantee that the purchaser means business."

To the same effect is the decision of the Judicial Committee in the case of 'Chiranjit Singh v. Har Swarup' AIR (13) 1926 PC 1, where their Lordships observe at page 2 of the Report that

"Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through by reason of the fault or failure of the vendee...."

“...15. Until the contract of sale is performed earnest money, as noticed above, is, in the absence of a contrary intention, just a security or earnest for the performance of that contract by the purchaser. It is liable to be forfeited if the contract fails by reason of default on the part of the purchaser (vide the cases already cited above) and the latter is entitled to its return or refund if the contract goes off for no fault on his part (vide 'Levy v. Stogdon' (1899) 1 Chn 5; 'Ibrahimhai v. Fletcher', 21 Bom 827 and 'Karsondas v. Chhotalal', 48 Bom 259). The mere presence or absence of a clause of forfeiture in the contract of sale makes no difference (vide 'Howe v. Smith', (1884) 27 Ch D .89; 'Hall v. Burnell, (1911) 2 Ch 551 and 'Roshanlal v. The Delhi Cloth & General Mills Co. Ltd.', , 33 All 166, and the other cases already cited). So long, therefore, as the contract of sale is not performed, the rights of the parties with regard to the earnest money rest

upon a contract distinct from the real or pure contract of sale, - a contract which may, from its nature, aptly be called a 'contract of security', (relating, as it does, to the security for the performance of the real contract of sale), evidenced by the covenant or term for forfeiture, or, implied by law. This is, strictly speaking, no part of the real contract of sale and it needs performance or enforcement only when the real contract of sale is broken or goes off otherwise. Where, therefore, the contract of sale is broken by the purchaser and, as a consequence, the earnest money is forfeited by the vendor, the forfeiture takes place under the express or implied 'contract of security' which is strictly speaking, no part of the real contract of sale. It may be called an 'ancillary contract' in the words of White C. J. in 'Natesa v. Appavu' 38 Mad .178, but whatever the name, it is, strictly speaking, no part of the real or pure contract of sale. It is also quite clear that, when the contract of sale is broken by the purchaser, the vendor rescinds that contract, that is the real contract of sale and not the 'contract of security', noticed above, as, otherwise, no claim of forfeiture can arise. The benefit, therefore, that accrues to the vendor by such forfeiture is a benefit, received by him not under the real contract of sale which alone is rescinded but under the 'contract of security' which remains in force and under which the forfeiture is imposed and incurred. Sections 64, and 65 of the Indian Contract Act, although they must now be taken to deal also with the return of benefit and/or advantage received under contracts, validly rescinded, (vide Muralidhar v. International Film Co. Ltd. AIR (30) 1943 PC 34-39), can, therefore, have no application to the cases under consideration.....” (emphasis supplied)

7.7 Earnest money, thus, once paid, is and continues to remain the property of the recipient. It is paid under what is termed as a contract of security which is distinct and separate from “the real or pure contract”. The right to forfeit arise under the contract of security which could be provided expressly or impliedly. Therefore, the argument advanced by counsels for respondent nos.1 to 3 and accepted by the Appellate Tribunal that before the forfeiture clause could get triggered, a freezing order had been passed by the

Enforcement Directorate and therefore, the property in the sums in issue, did not pass to SBI, is a reasoning which, according to me, is flawed.

7.8 There is another aspect of the matter, which is that, SBI had entered into the transaction with respondent nos.6 and 7 in good faith without notice of the fact that respondent no.4 had been convicted and issued a detention order under COFEPOSA. SBI, thus, fell within the exception carved out under Section 2(2)(e) of SAFEMA, that is, was a person which was transferred an illegally acquired property of a person falling under Section 2(2)(a) or (b), in good faith, for a consideration, without knowledge of the taint attached to the property. Property held by a person in such circumstances cannot be forfeited under SAFEMA. This is clearly borne out by the observations of the 9 Judge Bench Judgment of the Supreme Court in the case of the *Attorney General for India vs Amratlal Prajivandas*. The relevant observations are as follows:-

"..so far as the holders, not being relatives and associates mentioned in Section 2(2)(e) are concerned, they are dealt with on a separate footing. If such person proves that he is a transferee in good faith for consideration, his property - even though purchased from a convict / detainee - is not liable to be forfeited...

7.9 It is also a fact that, by the time the second notice under Section 6(1) of SAFEMA was issued i.e., 31.12.1997, 180 days from the date of booking had already expired. The last order for purchase of gold was booked by SBI on 21.06.1995, therefore, ordinarily, 180 days would expire sometime in December, 1995. The fact that a detention order was issued on 05.10.1995, could not have triggered the provisions of Section 11 of SAFEMA. Section 11 declares that any transfer of property which takes place after issuance of a notice under Section 6 or 10 is to be ignored, and if such property is subsequently forfeited by the Central Government under Section 7 of

SAFEMA, then the transfer of such property shall be deemed to be null and void. Therefore, strictly, in December, 1995 SBI would have been well within its right to forfeit the sums in issue, had those sums being physically available in December, 1995 as on that date there were no proceedings pending under SAFEMA. The only effect of the freezing order issued by the Enforcement Directorate was that a certain sum of money equivalent to the sums in issue had been kept by SBI perhaps in a separate account. That by itself, in my opinion, would not advance the case of respondent nos.1 to 3 in view of the conclusion reached by me that the sums in issue received by SBI from date of receipt were always the property of SBI, and in any case, SBI having received the amount in good faith, without notice of proceedings under SAFEMA, were not covered under the provisions of SAFEMA. Therefore, the competent authority could not have passed an order which could cover the sums in issue, which were remitted to SBI by respondent nos.6 and 7, to purchase gold on their behalf.

8. Thus, for the reasons set out above, I find it difficult to accept the rationale supplied by the Appellate Tribunal to sustain the order of the competent authority. Accordingly, the writ petition is allowed. The impugned orders passed by the Appellate Tribunal and the competent authority are set aside. However, there shall be no order as to costs.

RAJIV SHAKDHER, J

APRIL 15, 2013

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