IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 2698 OF 2013

Iqbal Yusuf Suleman ..Petitioner.

Versus

1. Competent Authority
2. State of Maharashtra ..Respondents.

Mr.B.R.Tripathi, Advocate for the Petitioner.
Ms.Rebecca Gonsalvez, Advocate for Respondent No.1.
Ms.M.H.Mhatre, APP for Respondent No.2- State.

Coram : RANJIT MORE &
R.G.KETKAR, JJ.

Date : 15th SEPTEMBER 2015.

P. C. :

. Heard Mr.B.R.Tripathi, learned Counsel for the petitioner, Ms.Rebecca Gonsalvez, learned Counsel for respondent No.1 and Ms.M.H.Mhatre, learned APP for respondent No.2 at length.

2. By this Petition under Article 226 of the Constitution of India, the petitioner has challenged the judgment and order dated 02/09/2011 passed by the Competent Authority, SAFEMA/NDPSA, Mumbai as also the judgment and order dated 20/03/2013 passed

by the Appellate Tribunal For Forfeited Property, New Delhi (for short 'Tribunal'). The petitioner has further prayed for returning the confiscated amount after deducting redemption fine of Rs.4,00,000/- and personal penalty of Rs.1,80,000/-. The relevant and material facts giving rise to filing of this Petition, briefly stated, are as follows.

3. The officers of the Directorate General of Revenue Intelligence, Mumbai Zonal Unit intercepted the petitioner on 05/02/2004 at Mumbai International Airport while boarding Oman Air Flight with foreign currency equivalent to Indian Rs.17,98,900/-. He was arrested on 06/02/2004. In the statements recorded under Section 108 of the Customs Act, 1962 (for short 'Customs Act'), the petitioner inter alia stated that he is not regularly employed since 1980. He was propositioned to carry foreign currency from Mumbai to Dubai on behalf of one Jagdish in Dubai for a monetary consideration. He agreed to this proposition and had made more than 200 visits to Dubai since 1997. He had been carrying foreign currency out of country with the help of several other persons. He also disclosed names of the other persons involved in the smuggling of foreign currency.

4. On 20/04/2004, the detention order under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short 'COFEPOSA') was issued against the petitioner and he was detained. On the basis of the detention order, the Competent Authority initiated forfeiture

proceedings on 27/08/2009 in respect of the foreign currency recovered from him which had since been confiscated by the Customs Authorities. Before the Competent Authority, the petitioner contended that seized amount was actually income earned by him while working as a salesman at Obaid Alkatbi Readymade Garments Establishment in Dubai since 1997. He was getting a monthly salary of 3,300 Dirhams and his entire salary for 7 years was lying with his employer. The employer gave foreign currency to him while he was returning to India. He further contended that he had brought the money to India for the purpose of buying a house for his family. However, the deal could not be finalized and therefore, he was carrying the money back to Dubai when he was intercepted. The petitioner produced several documents in support of his contentions. By order dated 28/04/2010, the Competent Authority ordered forfeiture of Rs.17,80,900/- found in possession of the petitioner to Central Government free from all encumbrance.

5. Aggrieved by that decision, petitioner instituted Appeal before the Tribunal. By the judgment and order dated 21/03/2011, the Tribunal allowed the Appeal and set aside the order of the Competent Authority and remanded the matter to the Competent Authority for passing de novo orders in accordance with law. After the remand, by order dated 02/09/2011 the Competent Authority ordered forfeiture of Rs.17,80,900/- free from all encumbrance. Aggrieved by this decision, petitioner preferred Appeal before the Tribunal. By the judgment and order dated 20/03/2013, the

Tribunal dismissed the Appeal. The petitioner has instituted present Petition challenging orders dated 02/09/2011 and 20/03/2013 passed by the Competent Authority and the Tribunal respectively.

6. In support of this Petition, Mr.Tripathi reiterated the submissions that were advanced before the authorities below. He submitted that by order dated 27/03/2007, the Additional Commissioner of Customs ordered absolute confiscation of foreign currency equivalent to Rs.17,98,900/- under Sections 113(d), 113(h) and 113(i) of the Customs Act. The Additional Commissioner further ordered absolute confiscation of packing material used for smuggling seized foreign currency under Section 118(b) of the Customs Act and imposed penalty of Rs.6,00,000/- on the petitioner under Section 114 thereof. The Additional Commissioner also imposed penalties of Rs.2,00,000/- each on i) Pankaj Kumar Tripathi ii) Jeetinder Singh iii) Shaikh Intekab Alam iv) Murtaza Mohsin Sakarwala under Section 114 of the Customs Act. Aggrieved by that decision, the petitioner preferred Appeal before the Commissioner of Customs (Appeals). Appeal was decided on 20/09/2007. The petitioner preferred Revision Application (RI) before Government of India, Ministry of Finance (Department of Revenue). By order dated 28/11/2008, the Joint Secretary to the Government of India ordered release of the confiscated currencies on payment of redemption fine of Rs. 4,00,000/- and personal penalty of Rs.1,80,000/-.

7. Mr.Tripathi submitted that after the orders were passed by the Authorities under the Customs Act as aforesaid, it was not open to the Authorities under SAFEMA to once again initiate proceedings for forfeiture of foreign currency. This amounts to double jeopardy. He further submitted that the authorities below failed to appreciate that the petitioner was merely in possession of the foreign currency which belonged to the persons named in the order dated 27/03/2007. In other words, petitioner was mere a carrier in possession of the foreign currency and was not the owner. The petitioner has to refund that amount to the owners and consequently, the authorities were not justified in forfeiting the foreign currency. He further submitted that as the petitioner was merely a carrier of the foreign currency , it cannot be said that he had illegally acquired the said property under the provisions of SAFEMA. He submitted that as the Authorities under the Customs Act ordered release of foreign currency subject to payment of redemption fine and penalty, the authorities below could not have confiscated/forfeited foreign currency under the provisions of SAFEMA.

8. On the other hand, Ms.Gonsalvez supported the impugned orders. She submitted that in the statements recorded under Section 108 of the Customs Act, the petitioner specifically came with the case that the foreign currency amount was the income actually earned by him while working in Dubai since 1997. In other words, the petitioner did not come with the case that the foreign currency was belonging to some other

persons and that he was a mere carrier. The contention that he is a mere carrier of foreign currency is raised for the first time in this Petition.

9. She further submitted that the foreign currency is illegally acquired property as defined in Section 3 (1)(c) of SAFEMA and the provisions of SAFEMA are applicable to the petitioner herein. She also relied upon the decision of this Court in the case of ***Smt.Yamini S.Bhagwanji Vs. Union of India,*** **2011 ALL MR (Cri) 2721** and submitted that the proceedings under the Customs Act and SAFEMA Act are independent and it does not amount to a case of double jeopardy. In particular, she submitted that Section 21 of the SAFEMA lays down that no finding of any officer or authority under any other law shall be conclusive for the purposes of any proceedings under SAFEMA. She submitted that the fact that the foreign currency was allowed to be redeemed in the Revision Application for the reasons stated in that order cannot be a reason for not initiating the forfeiture proceedings under SAFEMA. She submitted that the detention order passed under COFEPOSA was not challenged by the petitioner. Lastly, she submitted that the authorities below concurrently directed forfeiture of foreign currency and therefore, no case is made out calling for interference in exercise of powers under Article 226 of the Constitution of India.

10. We have considered the rival submissions advanced by the learned Counsel appearing for the parties. We

have also perused the material on record. It is not in dispute that on 05/02/2004, the petitioner was intercepted while boarding Oman Air Flight. He was found in possession of foreign currency equivalent to Rs.17,98,900/-. He was arrested on 06/02/2004. On 20/04/2004, the detention order under Section 3(1) of the COFEPOSA was issued against the petitioner and he was detained. The petitioner did not challenge the detention order. In the statements recorded under Section 108 of the Customs Act, the petitioner stated that he is not regularly employed since 1980. He was propositioned to carry foreign currency from Mumbai to Dubai on behalf of one Jagdish in Dubai for a monetary consideration. He had made more than 200 visits to Dubai since 1997. He had been carrying foreign currency out of country with the help of several other persons. He also disclosed names of the other persons involved in the smuggling of the foreign currency.

11. Before the Competent Authority, petitioner contended that the sized amount was actually income earned by him while working as a salesman in Dubai since 1997. He was getting a monthly salary of 3,300 Dirhams and his entire salary for 7 years was lying with his employer. The employer gave foreign currency to him while he was returning to India. He further contended that he had brought the money to India for the purpose of buying a house for his family. However, the deal could not be finalized and therefore, he was carrying the money back to Dubai when he was intercepted. In other words, before the Competent Authority, the petitioner came out with the case that the amount

belonged to him and not to the other persons.

12. It is also a matter of record that in proceedings under the Customs Act, by order dated 27/03/2007, the Additional Commissioner of Customs ordered absolute confiscation of foreign currency under Sections 113(d), (h) and (i) of the Customs Act. Aggrieved by that decision, petitioner preferred Appeal which was decided on 20/09/2007 by the Commissioner of Customs (Appeals). The petitioner preferred Revision Application under Section 129 (DD) of the Customs Act before the Government of India. By order dated 28/11/2008, the confiscated currencies were allowed to be released on payment of redemption fine of Rs.4,00,000/- and personal penalty of Rs.1,80,000/-. It is also a matter of record that on the basis of the detention order, the Competent Authority, Mumbai initiated forfeiture proceedings on 27/08/2009. On 28/04/2010, the Competent Authority passed order under Section 7 of SAFEMA ordering forfeiture of amount of Rs.17,80,900/- found in possession of the petitioner to the Central Government free from all encumbrance. Aggrieved by that decision, petitioner preferred Appeal before the Tribunal. The Appeal was allowed on 21/03/2011. The order dated 28/04/2010 was set aside and matter was remitted to the Competent Authority. After remand, by order dated 02/09/2011, the Competent Authority directed forfeiture of amount found in possession of the petitioner. The said order was confirmed by the Tribunal on 20/03/2013.

13. Mr.Tripathi relied upon Section 125 of the Customs Act and submitted that the currency was merely in possession of the petitioner and he was a carrier. In other words, the petitioner is not the owner of the foreign currency which was found in his possession and the same belonged to persons named in the order dated 27/03/2007 passed by the Competent Authority. The petitioner is liable to return that amount to these persons. Section 125 (1) of the Customs Act reads thus :

> 125. Option to pay fine in lieu of confiscation :- (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods (or, where such owner is not known, the person from whose possession or custody such goods have been seized) an option to pay in lieu of confiscation such fine as the said officer thinks fit."

14. Perusal of Section 125 of the Customs Act shows that whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, **give to the owner of the goods (or, where such owner is not known, the person from whose possession or custody such goods have been seized,) an option to pay in lieu of confiscation such fine as the said officer thinks fit**. In the present case, petitioner did not come with the case that he is not the owner of foreign currency and is merely in possession thereof as a carrier. The said contention is raised for the first time in this proceedings. As against this, all along

petitioner contended that this is his property. It is, therefore, not possible to accept the contention of Mr.Tripathi that the petitioner is mere a carrier and foreign currency does not belong to him.

15. Mr.Tripathi submitted that after initiating proceedings under the Customs Act, it is not permissible to initiate the proceedings under SAFEMA. It also amounts to double jeopardy. It is not possible to accept this submission. Section 4 of SAFEMA prohibits holding of "illegally acquired properties". The expression "illegally acquired properties" is defined under Section 3(1)(c) of SAFEMA which reads thus :

> 3. Definitions – (1) in this Act, unless the context otherwise requires –
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> (c) "illegally acquired property", in relation to any person to whom this Act applies, means-
>
> (i) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law for the time being in force relating to any matter in respect of which Parliament has power to make laws; or
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> (ii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets in respect of which any such law has been contravened; or
>
> (iii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets the source of which cannot be proved and which cannot be shown to be attributable to any act or thing done in respect of any matter in relation to which Parliament has no power to make laws; or
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> (iv) any property acquired by such person, whether before or after the commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property referred to in sub-clauses (i) to (iii) or the income or earnings

from such property; and includes-

> A) any property held by such person which would have been, in relation to any previous holder thereof, illegally acquired property under this clause if such previous holder had not ceased to hold it, unless such person or any other person who held the property at any time after such previous holder or, where there are two or more such previous holders, the last of such previous holders is or was a transferee in good faith for adequate consideration;
>
> (B) any property acquired by such person, whether before or after the commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property falling under item (A), or the income or earnings therefrom;

16. The authorities below concurrently held that the property is illegally acquired property. In particular, petitioner's statements recorded under Section 108 of the Customs Act were considered. In these statements, the petitioner admitted that being a part of a syndicate which was engaged in illegal activity of smuggling of foreign exchange out of India. The authorities below also disbelieved the case made out by the petitioner that the foreign currency recovered from him was his salary income of 7 years. The authorities below also noted that between 1997 and 2003, the petitioner made more than 200 visits which casts serious doubt about the correctness of his case that the foreign currency is his 7 year's salary. The authorities below also noted that the money recovered from him was in the form of US dollars, Qatari Riyals and UAE Dirhams. If at all, the money represented petitioner's salary dues paid by his employer in Dubai, it should normally have been in the form of UAE Dirhams. The fact that money recovered from the petitioner was in the form of different

foreign currencies indicates that he was engaged in smuggling of foreign currencies.

17. We do not find any good reason to take a different view in the matter. The authorities below after considering the material on record have concurrently held that the foreign currency found in possession of the petitioner is illegally acquired property. In view thereof, the provisions of SAFEMA Act are applicable to the petitioner. Section 6 of SAFEMA lays down that where the Competent Authority has reason to believe that properties are illegally acquired properties, it shall serve a notice upon such person calling upon him to indicate the sources of his income etc. Section 7 lays down forfeiture of property in certain cases. Section 8 lays down that in any proceedings under SAFEMA, the burden of proving that any property specified in the notice served under Section 6 is not illegally acquired property is on the person affected. Section 21 lays down that no finding of any officer or authority under any other law shall be conclusive for the purposes of any proceedings under this Act.

18. The question whether after taking action under the Customs Act, the authorities can initiate proceedings under SAFEMA was considered by Division Bench of this Court in the case of **Smt.Yamini S.Bhagwanji** *(supra)*. In paragraph 12, it was observed thus :

> "12. Section 21 of SAFEMA states that no finding of any officer or authority under any other law shall be conclusive for the purposes of any proceedings under this Act. It is pertinent

> to note that the issue before the revisional authority was whether the seized foreign currency was required to be confiscated under the Customs Act or it should be allowed to be redeemed on payment of redemption fine and penalty. Revisionary Authority was not called upon to decide the issue as to whether AP holds any illegally acquired property as defined under SAFEMA and whether the said property was required to be forfeited. The fact that the foreign currency was allowed to be redeemed by the revisionary authority for the reasons stated in his order, could not be a reason for initiating the forfeiture proceedings by issuing the notice under Section 6 of SAFEMA. Similarly, the fact that the detention order passed under the COFEPOSA was revoked by the Government cannot be the reason for not initiating the forfeiture proceedings against the AP and more so when she was convicted under the Customs Act in relation to goods of a value exceeding Rs.1 lakh. The proceedings initiated by the Competent Authority by issuing the show-cause notice under Section 6 (1) of SAFEMA were different from the proceedings before the Commissioner of Customs (Appeals). Hence, the Appellate Tribunal rightly rejected the petitioner's reliance on the order passed by the revisionary authority."

19. In view thereof, we do not find any merit in the submissions of Mr.Tripathi that after taking action under the Customs Act, authorities below was not justified in initiating proceedings under SAFEMA and that it amounts to double jeopardy. For all these reasons, we do not find any merit in this Petition. The authorities below, after considering the material on record, have passed the impugned orders. In our opinion, these orders do not suffer from any infirmity. Hence, no case is made out for invocation of powers under Article 226 of the Constitution of India. Petition fails and the same is dismissed.

[R.G.KETKAR, J.] **[RANJIT MORE, J.]**

CERTIFICATE

Certified to be true and correct copy of the original signed Judgement/Order.