IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.09.2015

CORAM:

THE HON'BLE Ms.JUSTICE K.B.K.VASUKI

W.P.No.572 of 1998

1.K.M.Basheer Ahmed (died)
2.K.M.Khadeeja
3.Zubaida
4.Mohammed Haniff
5.Sahira
6.Firoz Ali
7.Niyazuddeen
(the legal heirs of the deceased first petitioner are impleaded as the petitioners 2 to 7 by order dated 7.3.2014 in WP.MP.28/2014) .. Petitioners

Vs.

1. The Appellate Tribunal for Forfeited Property
IV Floor, Loknayak Bhavan
Khan Market,
New Delhi- 110 003.

2. The Competent Authority,
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976,
T.Nagar, Chennai-17. .. Respondents

Writ Petition is filed under Article 226 of the Constitution of India praying for a issuance of Certiorari, calling for the records in FPA No.10/Mds/95 dated 4.9.1997 on the file of the first respondent confirming the order in OCA/Mds/89/1976 dated 31.10.1994 of the second respondent and to quash the same.

For Petitioners : Mr.B.Kumar, SC for M/s.S.Ramachandran

For Respondents : Mr.S.Haja Mohideen Gisti

O R D E R

The writ petition is filed by challenging the order of the second respondent competent authority, as confirmed by the first respondent Appellate Tribunal, for forfeiture of the property standing in the name of the deceased first petitioner, his wife and his erstwhile minor children.

2.During the pendency of the writ petition, the first petitioner/husband died and his wife and children are impleaded as the petitioners 2 to 7.

3.The deceased first petitioner was during 1974 detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter shortly referred to as 'COFEPOSA Act') and he was thereafter released from the detention. On the basis of his detention under COFEPOSA Act, the petitioner was considered to be the 'person' as defined under section 2(2)(b) in order to apply the provisions of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter shortly called as 'SAFEMA Act') and was hence issued section 6(1) notice dated 27.11.1976, the copy of which was also marked to his wife K.H.Katheeja. Section 6(1) notice reads that "the competent authority under section 5 of the SAFEMA Act has on the basis of relevant information and/or relevant material available to him, reason to believe that the properties described in the schedule annexed which is/are held by the noticee or on his behalf is/are illegally acquired properties within the meaning of clause (c) of sub section (1) of section 3 of the Act. Therefore, in pursuance of sub section (1) of section 6 of the Act, the noticee was called upon to indicate to him within 35 days of the service of the notice, the sources of his income, earnings or assets, out of which or by means of which he has acquired the aforesaid properties, the evidence on which he relies and other relevant information and particulars and to show cause why the aforesaid properties should not be declared to be illegally acquired properties and forfeited to the Central Government under the Act".

4.The properties mentioned in the schedule annexed to Section 6 (1) notice firstly issued by the then Competent Authority by name V.S.Desikachari to the deceased first petitioner (hereinafter called as person affected) are as follows:

(i)1.42 acres in R.S.No.130/6 in Kudulu village purchased on 8.2.1967

(ii)1.47 acres in S.No.327/2 and 0.92 acres in S.No.328/2 in Puttur village purchased on 27.6.1966.

(iii)1.80 acres in RS No.329/1 purchased on 27.6.1966 in Puttur Village.

(iv)1.25 acres in R.S.No.325/0 in Puttur village purchased on 20.5.1968

(v)Twin house in RS No.246/1A in Ward No.5, Kasargod Municipality – House no.5/54, Vidya Nagar, Kasargod.

(vi)Residence No.9/472 Kasargod gifted to wife K.H.Katheeja on 2.8.1974, which was shown as struck off in the notice.

(vii)share, title and interest in the firm of M/s.K.M.Bhasheer & Company including capital and current account balances as on 31.3.1975

(viii)Advance to wife K.H.Katheeja -Rs.3,20,000/-.

Similar notice was again issued by the same competent authority V.S.Desikachari, to the person affected, the copy of which was also marked to K.H.Katheeja, having address at No.9/472, Kasargode, Cannanore, Kerala, on the same day in respect of the residential property at No.9/472, Kasargode gifted to his wife K.H.Katheeja on 2.8.1974, which was shown as item no.(vi) and struck off in other notice i.e., residence No.9/472 at Kasargod.

5.On receipt of such notices, due reply was submitted by the person affected along with relevant details and records as called for by the department. While doing so, the person affected also asked for the copy of the reasons recorded for the issue of notice under section 6(1) of the SAFEMA Act. The specific request made by the person affected was turned out by saying that the second respondent competent authority is under law not required to communicate the copy of the reasons recorded. However, in view of the repeated request made by the person affected, the copy of the reasons recorded by the second respondent competent authority was furnished to him only along with the copy of the additional counter filed by the Additional Commissioner on behalf of the second respondent, competent authority on 30.11.2010 in this writ petition. The document styled as reasons recorded is purportedly made ready on 27/11/1976, the date on which section 6(1) notices were issued. The fact remains undisputed is that neither the person affected nor his wife were furnished with the copy of the reasons recorded either by the second respondent competent authority or during the pendency of the appeal before the first respondent Appellate Tribunal and both the respondents 1 and 2 disposed of the proceedings initiated under the SAFEMA Act, without complying with the request made either by the person affected or his wife.

6.As per the particulars furnished herein, the proceedings initiated under SAFEMA Act by issuance of section 6(1) notices on 27.11.1976 by the second respondent competent authority was completed on 31.10.1994 by passing an order of forfeiture by the second respondent competent authority. While according to the petitioners, the proceedings was unnecessarily delayed, according to the respondent department, the proceedings was protracted due to non-cooperative attitude on the part of the person affected.

7.Be that as it may, while the proceedings was pending before the second respondent competent authority, another notice under section 6 (1) was issued by the competent authority by name T.A.Balakrishnan to the person affected on 5.2.1980 in respect of the fourth item in the first section 6(1) notice and in respect of a plot, on which item 5 in the first section 6(1) notice twin house situated with the copy of which marked to the minor daughter and son of the person affected, namely, Jubaida Bee and Mohammed Hanifa, in whose name, the property stands. The properties mentioned in section 6(1) notice dated 5.2.1980 are as follows:

(i)1.25 acres in R.S.No.325/0 in Puthur Village
purchased on 20.5.1965 in the name of minor Jubaida Bee
represented by her father and guardian K.M.Basheer Ahamed

(iv)A plot on which twin house in RS No.246/1A in Ward No.5
Kasargod Municipality - House No.5/54 Vidya Nagar,
Kasargod stands in the name of minor daughter Jubaida Bee and
minor son-Mohamed Hanefa represented by their father and
guardian K.M.Basheer Ahamed.

8.The person affected duly contested the proceedings and produced all the title deeds, Income Tax Assessment Orders and the orders passed in appeals, before and during the enquiry before the second respondent competent authority. The person affected appeared through his chartered accountant before the competent authority and explained his source of income through brokerage and commission business and lorry and timber business. The second respondent competent authority, having arrived at the conclusion that the person affected failed to produce any tangible evidence to explain the acquisition of large extent of property and the findings under the Income Tax Act will not be conclusive for the purpose of proceedings under SAFEMA Act, ordered forfeiture of all the properties on 31.10.1994. The copy of the order was also directed to be communicated to the wife, who is the present owner of the property at Sl.Nos.6 and 8 and erstwhile minor daughter and son, in whose names the property at Sl.nos.4 and 5 had been, according to the competent authority, purchased by the person affected. Aggrieved against the same, the person affected and his wife preferred two appeals in FPA/10/Mds/95 and FPA/9/MDs/95 respectively. While the appeal filed by the person affected is in respect of the properties covered under both section 6(1) notices issued to him, the appeal filed by wife is different in respect of the order of forfeiture of different property namely, International Tourist Home.

9.The first respondent Appellate Tribunal has, by common order dated 4.9.1997 which is impugned herein, dealt with both the appeals separately. The first respondent Appellate Tribunal agreed with the findings of the competent authority and confirmed the order of forfeiture of the properties at sl.nos.1 to 8 except sl.no.2. The first respondent Appellate Tribunal was, insofar the property shown as Sl.no.2 is concerned, i.e., land measuring 1.47 acres in S.No.327/2 and 0.92 acres in S.No.328/2 in Puttur village, inclined to accept the explanation given by the person affected regarding the source of income for purchase of the property and held that the entire investment was through proper source, which has been fully explained and accordingly, released the property from the order of forfeiture. Insofar as the appeal filed by the wife is concerned, the order of forfeiture was confirmed and the appeal was rejected. Aggrieved against the common order passed by the first respondent Appellate Tribunal, the husband and wife preferred two separate writ petitions WP.Nos.571 and 572/1998 respectively.

10.WP.No.571/1998 filed by the wife was disposed of, by order of this Court dated 3.7.2013, in and under which, the learned brother judge is pleased to allow the writ petition, by setting aside the impugned orders of the second respondent competent authority as confirmed by the first respondent Appellate Tribunal on the ground of delay in disposing of the matter and on merits.

11.The petitioners, in this writ petition, challenged the impugned orders on the following grounds:(i)section 6(1) notices issued to the person affected are vitiated, as the same do not satisfy the statutory requirements by not disclosing any reason and by not making any allegations regarding the existence of any link or nexus between the properties sought to be forfeited and the illegally acquired money of the detenu. (ii)section 6(1) notices are defective in nature for total non-application of mind of the competent authority and the same renders the initiation of the proceedings under SAFEMA Act to be one without jurisdiction, which inturn would render the forfeiture orders to be legally unsustainable. (iii)the failure to issue separate 6(1) notice to the wife and minor children, in respect of the property standing in their names is contrary to the procedure laid down under the Act and the failure to issue one such notice deprived the wife and minor children of the person affected of their right of opportunity to have effective participation in the proceedings initiated against the forfeiture of the properties standing in their names and the impugned orders of forfeiture of the properties belonging to the wife and children, who were erstwhile minors, without giving them any opportunity to defend their case, are without jurisdiction and void ab initio. (iv)the failure to record any reason in respect of the properties standing in the name of the erstwhile minors and failure to furnish the copy of the reasons recorded at the appropriate stage either to the person affected or to his wife is against the procedure and against the well laid down legal principles. (v)the property standing in the name of the wife, having been dealt with by way of separate proceedings and the proceedings having been set aside by the order of this court made in WP.No.571/98 filed by the wife, the order of forfeiture in respect of the property belonging to wife cannot be sustained. (vi)the impugned order of forfeiture by simply disbelieving the source of investments made for the businesses carried on by the person affected is contrary to evidence and is arbitrary, that too without placing any reliance on the Income Tax Assessment Orders. There is absolutely no reason assigned for disbelieving the explanation offered by the person affected regarding the source of funds. (vii)The unexplained and inordinate delay in completing the entire proceedings vitiate the impugned orders of forfeiture of the properties belonging to the person affected and his wife and erstwhile minor children.

12.The learned senior counsel for the petitioners, in support of his contention relied on the following decisions:

(i)(2003) 7 SCC 436 (Larger Bench of Apex Court consisting of 3 judges) (Fatima Mohd. Amin (dead) through LRs v. Union of India and another

(ii)(2003) 7 SCC 427 (Kesar Devi v. Union of India and others)

(iii)(2007) 2 SCC 510 (P.P.Abdulla v. Competent Authority)

(iv)(2008) 14 SCC 186 (Aslam Mohammad Merchant v. Competent Authority and others.

(v)(2011) 4 MLJ 692 (SC) (State of Orissa v. Mamata Mohanty)

(vi)(2011) 6 MLJ 661 (R.Ramakrishnan v. Appellate Tribunal for Forfeited Property, New Delhi).

13.Per contra, the learned standing counsel for the respondents would defend the impugned orders of forfeiture by contending that (i) in the cases, where the relationship is close and direct like spouse, son or daughter or parents, which stand on altogether different footing, no link or nexus has to be indicated in the reasons for belief between the convict or detenu and the property; (ii)the omission to strike off the irrelevant or inappropriate portions/column in the notice is only in the nature of clerical omission and the same cannot be fatal to very validity of the proceedings. (iii)the copy of the notices marked to the wife and minors is in sufficient compliance of the statutory requirements. (iv)the reasons recorded are sufficient enough to believe to initiate proceedings under SAFEMA Act and the onus is only on the person affected to prove that the properties put to notices are not illegally acquired properties under section 8 of SAFEMA Act. (v)as the property covered under notice dated 5.2.1980 was also the subject matter of earlier notice, no separate reason is required to be recorded before issuing section 6(1) notice dated 5.2.1980. (vi) the person affected has not satisfactorily discharged the burden cast on him before the Authorities concerned. (vii)the documents produced on the side of the person affected are rejected for the well considered reasons recorded in the impugned orders.

14.The learned standing counsel for the respondents in support of his contention, cited the following authorities before this court:

(i)1995 (101) Crl.J. 0426 SC (Constitutional Bench consisting of 9 judges of Hon'ble Supreme Court) (Attorney General for India v. Amratlal Prajivandas and others)

(ii)2003 (5) Supreme 425 (Kesar Devi v. Union of India and others),

(iii)Civil Appeal Nos.772 and 773 of 2014 dated 21.1.2014 (Biswanath Bhattacharya v. Union of India and others)

(iv)1985 (152) ITR 238 (Andhra Pradesh) (Commissioner of Income Tax v. Chandulal)

(v)1995 (216) ITR 660 (Bombay) (Commissioner of Income Tax v. Kaushalya and others)

(vi)(2014) 1 MLJ (Crl) 142 (Rukhiya and others v. Registrar, Appellate Tribunal for Forfeited Property, New Delhi and another).

15.Heard the rival submissions made on both sides and perused the documents produced before this court.

16.The subject matter of Section 6(1) notices numbering three, two dated 27.11.1976 and third one dated 05.02.1980 issued to the person affected by name K.M.Basheer Ahamed are totally for eight properties. Out of eight properties, four stand in the name of the person affected, the landed property shown as item No.4 and the plot on which twin house shown as item No.5 stand in the names of the erstwhile minor children by names Jubaida Bee and Mohammed Hanifa of the person affected. As far as the sixth item is concerned, the same stands in the name of K.H.Katheeja, who is the wife of the person affected. The eighth item is the cash of Rs.3,20,000/-, which was according to the competent authority, advanced by the person affected/husband to his wife K.H.Katheeja for construction of the building known as International Tourist Home, Calicut.

17.As far as the wife and erstwhile minor children are concerned, they were not issued with separate Section 6(1) notice in respect of the properties standing in their names. All the three notices dated 27.11.1976 and 05.02.1980 were issued to the person affected. While the copy of the two notices dated 27.11.1976 were marked to the wife K.H.Katheeja, the copy of the notice dated 05.02.1980 which was issued during the pendency of the proceedings already initiated for forfeiture of the properties, was marked to the erstwhile minors. The failure to issue separate notices to the wife and erstwhile minor children was raised by the person affected both before the Competent Authority as well as before the Appellate Tribunal. The first respondent Appellate Tribunal answered the same by saying that the copy of the first notice was endorsed to the wife and the notice in respect of the erstwhile minors was rightly issued to the father, who is their natural and lawful guardian and the same was substantial compliance of the statutory requirements. As rightly pointed out by the learned senior counsel for the petitioners, when Section 6(1) notice so issued proceeds as if the properties described in the schedule annexed are held by the noticee or on his behalf and the notice does not say that the person to whom the copy was marked is required to appear before the competent authority with necessary documents and particulars and when the notice was issued only to the person affected calling upon him to appear before the competent authority and to explain the source of income, the stand so taken by the Authorities below is contrary to law and is legally untenable. As already stated, notice in respect of minor children was dated 5.2.1980, whereas the proceedings was completed in 1994. Though the proceedings was pending for such a long time, the competent authority did not think fit to issue notice to erstwhile minor children, who attained majority during the pendency of the proceedings, so as to enable them to participate in the same and to contest their case. Even the order copy was marked only to the major daughter and not to major son. Thus, in the absence of proper Section 6(1) notice to all concerned, no proceedings can be said to be validly initiated against the property of the wife and children. Even otherwise, the wife and the erstwhile minors are deprived of their valuable right to participate in the proceedings and the entire proceedings initiated without giving the persons in whose names the properties stand an opportunity of being heard is against law, without jurisdiction and is in violation of the principles of natural justice.

18.Further, the property which is shown as item No.6 standing in the name of the wife and the site shown as item No.5 standing in the name of the minors are the properties gifted in their favour. The wife Katheeja was gifted with the property by her mother, whereas the minor children were gifted with the property by their grand father. Both the respondents 1 and 2 have without recording any reasons and without issuing any Section 6(1) notice to the settlors and without giving them an opportunity to explain their source of income to purchase their property, arrived at the conclusion that the same were purchased from the unexplained source of income and purchased from tainted money and are to be hence treated as illegally acquired properties. In the absence of any reasons recorded and in the absence of section 6(1) notices to the persons concerned, the finding so rendered by the authorities below in respect of the properties originally belonging to mother-in-law and father of the detenu as above referred to is arbitrary, ex facie bad in law and in non-compliance of the statutory requirements and is again in serious violation of the principles of natural justice. The failure to issue proper and valid section 6(1) notice to the persons in whose name the property in question stands would no doubt vitiate the entire proceedings, resulting in the impugned order of forfeiture.

19.Next aspect to be considered herein is the propriety and validity of Section 6(1) notice. Though the person affected was detained under COFEPOSA Act in December 1974, the assets covered under Section 6(1) notices were acquired much before the same. The assessment in respect of all the properties covered under Section 6 (1) notices, was also completed before his detention under COFEPOSA Act, however Section 6(1) notices were issued on 27.11.1976 and 05.02.1980. In this regard, it is but relevant to look into the provision of Section 6(1) of SAFEMA Act and the observations of the Hon'ble Supreme Court and our High court, which read as follows:

> S.6(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, 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.

20.In the following judgments, the Hon'ble Supreme Court has dealt with the particulars to be mentioned in section 6(1) notice and in the reasons recorded, warranting action against the person concerned:

(i)(2003) 7 SCC 436 (Larger Bench of Apex Court consisting of 3 judges) (Fatima Mohd. Amin (dead) through LRs v. Union of India and another

(ii)(2003) 7 SCC 427 (Kesar Devi v. Union of India and others)

(iii)(2007) 2 SCC 510 (P.P.Abdulla v. Competent Authority)

(iv)(2008) 14 SCC 186 (Aslam Mohammad Merchant v. Competent Authority and others

21.In Fatima Mohammed Amin's case, 3 judges larger bench of Apex Court, has dealt with the appeals, arising out of similar order of forfeiture passed under the SAFEMA Act by the Authorities. In the case above cited, the order of forfeiture passed by the competent authority was confirmed by the Appellate Tribunal and by the High Court and the son of the appellant before the Supreme Court was the detenu. The Apex Court, having considered the reasons recorded by the competent authority along with show cause notice and having found the absence of any averments to the effect that the property acquired by the appellant was a benami property of her son or the same was illegally acquired from her son and further having found the absence of any allegations whatsoever to the effect that there exists any link or nexus between the property sought to be forfeited and the illegally acquired money of the detenu, was of the view that the contents of the notices even if taken at their face value do not disclose any reason warranting action against the appellant and the condition precedent for initiation of the proceedings under SAFEMA did not exist and consequently held the impugned orders of forfeiture not sustainable and accordingly allowed the appeals.

22.It may be true that in Kesar Devi's case, the Hon'ble Supreme Court distinguished the decision of Fatima Mohammed Amin case and was of the view that no link or nexus has to be indicated in the reasons for belief between the convict or detenu and the property, in the cases where the relationship is close and direct like spouse, son or daughter or parents which stand on an altogether different footing as such an inference can easily be drawn and on the failure of the appellant to establish that she had any income of her own to acquire the properties, no other inference was possible except that it was done so with the money provided by the husband/detenu. The Apex Court in para 14 of the same decision, reproduced the copy of the notice issued under section 6 and in para 15 held that the notice clearly records the reasons for belief and therefore it fully complies with the requirement of law and there was no infirmity in the same. It is further held in para 16 that the notice issued by the competent authority in Fatima Mohd. Amin's case, did not dislcose any reasons and thus the same did not meet the requirement of sub section (1) of section 6 of the Act, but in Kesar Devi's case, the reasons for belief have been clearly recorded by the competent authority in section 6(1)notice.

23.In Aslam Mohammad Merchant's case, the core question which arose for consideration was that what are the statutory requirements for initiating a valid proceeding for forfeiture of the property. It is held therein that “before the actual order of forfeiture of such illegally acquired property is passed, issuance of a notice to show cause is essential so as to fulfill the requirements of natural justice. Such a notice is to be issued by the competent authority having regard to: (i)the value of the property held by the person concerned (ii)his known source of income, earning or assets, (iii)any other information or material made available as a result of a report from any officer making an investigation under Section 68-E of the Act or otherwise. When the said conditions are satisfied, the competent authority would be entitled to issue a show cause notice, if he has reason to believe, where for reasons are to be recorded in writing that the properties are illegally acquired properties”. It is further held therein that “a proper application of mind on the part of the competent authority is imperative before a show cause notice is issued. The competent authority is required to apply his mind on the materials brought before him. It is also necessary that a finding that all or any of the properties in question were illegally acquired properties is recorded. Section 68-H of the NDPS Act provides for two statutory requirements on the part of the authority viz., (i)he has to form an opinion in regard to his "reason to believe" and (ii)he must record reasons therefor. Both the statutory elements, namely "reason to believe" and "recording of reasons" must be premised on the materials produced before him. Such materials must have been gathered during the investigation carried out in terms of Section 68-E or otherwise. Indisputably, therefore, he must have some materials before him. If no such material had been placed before him, he cannot initiate a proceeding. He cannot issue a show cause notice on his own ipse dixit. A roving enquiry is not contemplated under the Act concerned as properties sought to be forfeited must have a direct nexus with the properties illegally acquired. A valid proceeding can be said to have been initiated for forfeiture of the property when the notice to show cause is found to be satisfying the statutory requirements which are condition precedent therefor".

24.The Apex Court in the same Aslam Mohammed Merchant's case, having found that the statutory requirements have not been fulfilled, as no material has been brought on record to show that any nexus or a link with the properties sought to be forfeited exists and the show cause notices do not contain any reason so as to satisfy the requirements of Section 68 H(1) of NDPS Act, held the show cause notice to be illegal and the same would vitiate all the subsequent proceedings. The Apex Court, while arriving at such conclusion, observed that "the application of mind on the part of the competent authority and the Appellate Tribunal at the subsequent stage was not in question and what was the question was non-application of mind on the part of the authority prior to issuance of the notice. The person affected would be called upon to discharge his burden provided a link or nexus is traced between the holder of the property proceeded against and an illegal activity of the detenu and such a formation of belief is essential". The Apex Court in para 45 of Aslam Mohammed Merchant's case, expressed its inability to agree with the observation of the Supreme court in Kesar Devi case, 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. Though the same is arising out of Narcotic Drugs and Psychotropic Substances Act, the provisions of SAFEMA and NDPS Act are pari materia and the principles laid down by the Supreme Court in that case can be applied to the proceedings initiated under SAFEMA Act.

25.In P.P.Abdulla case, the question arose as to whether it would be sufficient to state that the authority has recorded the reasons in writing. The Hon'ble Supreme Court held that it is incumbent for the competent authority to produce the reasons before the court so that the same can be scrutinised in order to verify whether they are relevant and germane or not and this can be done by annexing the copy of the reasons along with the counter affidavit or by quoting the reasons in the counter affidavit or if the notice itself contains the reason of belief that notice can be annexed to the counter affidavit or quoted in it. The Supreme Court further having found that as the notice does not allege any link or nexus between the property and illegally acquired money of the appellant therein, held that the notice issued by the competent authority under section 6(1) was illegal and the consequential order as null and void.

26.The learned brother judge of this court has in the common order passed by him in two writ petitions [(2011) 6 MLJ 661 - R.Ramakrishnan v. Appellate Tribunal for Forfeited Property, New Delhi], made interpretation and application of the provisions of SAFEMA Act and the effect of the orders passed under the Act, which were challenged before the learned single judge, at the instance of the relatives of detenu/convict. The learned single judge after detailed discussion of the objects and reasons of SAFEMA Act and after reproducing the relevant provisions of the Act and after analysing the principles laid down by the Hon'ble Apex Court in various judgments in detail, summarised the legal principles. The learned brother judge, while doing so, referred to the following decisions: (i)Attorney General of India v. Amratlal Prajivandas- AIR 1994 SC 2179 (9 Judges Bench) (ii)Fatima Mohd. Amin v. Union of India (2003) 7 SCC 436 (iii)Kesar Devi v. Union of India- AIR 2003 SC 4195 (iv)Sajitha v. Competent Authority (2005) Crl.LW 3255 (DB) (v)(2007) 2 SCC 510 P.P.Abdulla v. Competent Authority (vi)(2008) 14 SCC 186 (Aslam Mohammed Merchant v. Competent Authority (vii) V.Mohan v. Income Tax Officer (2008) Crl.LJ 2582 (viii)(2011) 4 MLJ 692 (SC) State of Orissa v. Mamata Mohanty and the legal principles which were culled out from the decisions cited supra are summarised by the learned brother judge as follows:

> "21. Thus, on a careful analysis of the decisions cited supra, the legal principle which could be culled out could be broadly summarised as follows:-
>
> (a) Notice issued under Section 6(1) of the Act shall be issued by the competent authority having regard to (i) the value of the property held by the person concerned, (ii) his known source of income, earning or assets, (iii) any other information or material made available as a result of a report from any officer making an investigation under Section 18 of SAFEMA the Act or otherwise.
>
> (b) When the aforementioned conditions are satisfied, the competent authority would be entitled to issue show cause notice, if has reason to believe, which are to be recorded in writing that the properties are illegally acquired.
>
> (c) A valid proceedings can be said to have been

initiated for forfeiture, upon satisfying the statutory requirement, which are condition precedent.

(d) Only in case where a valid proceeding has been initiated, the burden of proof would be on a person affected.

(e) Before passing an order of forfeiture the competent authority must comply with the principles of natural justice and apply his mind on the materials placed before him.

(f) It is necessary to record a finding that all or any of the properties in question were illegally acquired properties.

(h) Competent authority is not bound by any finding of any officer or authority under any other law as the same would not be conclusive for the purpose of any proceeding under SAFEMA.

(i) That a link must be found between the property sought to be forfeited and income or assets which where illegally acquired by the person concerned.
(j) The idea is to forfeit the illegally acquired properties of the convict/detenue irrespective of the fact that such properties are held by are kept in the name of or screened in the name of any relative or associate as defined in the explanation in Section 2(2).

(k) Only the properties of the convict/detenue are sought to be forfeited wherever they are.

(l) The idea is to reach the properties of the detenue/convict, whosoever's name they are kept or by whosoever they are held.

(m) 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/detenue or properties traceable to him, wherever they are ignoring all transaction with respect to those properties.

(n) Proper application of mind on the part of the competent authority is imperative before a show cause notice is issued.

(o) The competent authority has to form an opinion in regard to his “reason to believe” and he must record reasons there for.

(p) “Reason to believe” and “Recording of reasons” must be premised on the materials produced before the competent authority. Such materials must have been gathered during investigation carried out in terms of the Act or otherwise.

(q) If no materials have been placed before the competent authority he cannot issue proceedings.

(r) A rowing enquiry is not contemplated under the Act as the properties sought to be forfeited must have a direct nexus with properties illegally acquired.

(s) The reasons should appear on the face of the notice or they must be available on the materials placed before the competent authority.

(t) The competent authority has to produce the reasons before the court so that the same can be scrutinised in order to verify whether they are relevant or germane or not?

(u) The burden of establishing that the properties mentioned in the show cause notice are not illegally acquired properties of the convict/detenue lies upon such relative/associate.

(v) Relative/associate must establish that the said property has not been acquired with the monies are assets provided by the detenue/convict.

(w) The connecting link between the properties and the convict/detenue, the burden of disproving is upon the relative/associate.

(x) The necessity of establishing the link or nexus is writ large on the face of the statutory provision as would appear from the definition “illegally acquired property” as also that of “Property”.

(y) A person affected would be called upon to discharge his burden provided a link or nexus is traced between the holder of the property proceeded against and an illegal activity of the detenue and such a formation of belief is essential.

(z) The Court can examine whether there was any material available on record from which the requisite believe could be formed by the authority.

(aa) Once show notice is found to be illegal, the same would vitiate all subsequent proceedings.

(ab) Failure to delete the inappropriate words in a standard performa notice indicates non-application of mind.

(ac) It cannot be disputed that the object of SAFEMA is to achieve a salutary purpose, but it is to be borne in mind that the right to hold property, although no longer a fundamental right, is still a constitutional right. It is a human right.

(ad) When stringent laws like SAFEMA become applicable as a result of which some persons are deprived of their right in a property, scrupulous compliance with the statutory requirements is imperative.

(ae) If notice issued under Section 6(1) is found to be defective and consequently, the order of forfeiture is set aside, it would be open to the competent authority to initiate a fresh proceedings in accordance with law."

27.Out of the two writ petitions decided by the learned brother judge, one of the writ petitioners was the brother's son of convict and is a "person" as defined under section 2(2)(c) of the Act. In other writ petition dealt with by the learned brother judge, the writ petitioner was the wife of the detenu. The The learned brother judge while dealing with the validity of identical section 6(1) notice, observed that the printed format was adopted by the competent authority in issuing section 6(1) notice and the relevant particulars have not been marked and the same does not contain the details as regards the value of the property held by the petitioner regarding his known source of income or earning and the availability of any material or information, as such, the three pre-conditions as required under section 6(1) notice are missing and the same is primary indication of non-application of mind. It is further observed therein that the reasons recorded by the competent authority does not satisfy the primary requirement for issuance of a notice under section 6(1) inasmuch as it does not establish a link between the property sought to be forfeited and the income or assets which were illegally acquired by the person concerned and in the absence of the connecting link, the burden does not shift upon the petitioner, who is the relative of the convict for disproving the allegation and without tracing the link, the petitioner cannot be directed to show cause as to why the properties should not be forfeited, as such, the notice issued under section 6(1) does not satisfy the test laid down by the Hon'ble Supreme Court in the decisions cited supra and is found to be illegal and consequently, the subsequent proceedings initiated for forfeiture is also vitiated. The learned brother judge, by observing so allowed the writ petitions thereby quashing the impugned orders of forfeiture.

28.In the present case, Section 6(1) notices issued to the person affected simply read that the competent authority under section 5 of SAFEMA Act has on the basis of relevant information and/or relevant material available to him, reason to believe that the properties described in the Schedule annexed hereto which are held by him or on his behalf, are illegally acquired properties within the meaning of clause (c) of sub section (1) of Section 3 of the said Act. If the notices issued under section 6(1) to the deceased first petitioner are viewed in the light of legal premises as laid down by the Apex Court and as summarised by the learned single judge of our High Court in the authorities cited supra, it would undoubtedly go to show that the same are bald and vague and are an indication of non application of mind on the part of the second respondent competent authority and the same do not satisfy the statutory requirements as laid down by the Hon'ble Supreme Court and as followed by the learned brother judge of this court. As rightly pointed out by the learned senior counsel for the petitioners, section 6(1) notices do not even read whether the properties are illegally acquired properties either under section 3(1)(c)(i) to 3(1)(c)(iv) or under section 3(1)(A) or 3(1)(B). Though three notices issued were in respect of the properties standing in the names of the husband, wife and erstwhile minor children, there is no reference regarding the existence of any link or nexus between the properties standing in their names covered under section 6(1) notices, which are sought to be forfeited and the illegally acquired money of the detenu. Further, the irrelevant portions were also not struck off so as to ascertain whether the reason to believe is based on any information or relevant material and there is no indication in section 6(1) notice that it was issued having regard to other particulars as referred to in section 6(1). On this score alone, section 6(1) notices based on which is the impugned forfeiture proceedings and the impugned forfeiture order, are bad in law and vitiated and are liable to be set aside.

29.As far as the reasons recorded by the second respondent competent authority is concerned, though three notices were issued, two of the same are dated 27.11.1976 and one of them was issued four years thereafter ie., 1980, but single reasoning is recorded and the reasons recorded are only in respect of the properties covered under first two notices. Further, the same is inspite of repeated demands made by the person affected/deceased first petitioner served on him only along with additional counter filed in this writ petition on 30.11.2010, nearly after 34 years from issuance of section 6(1) notices. When the person affected had repeatedly sought for the copy of the same immediately after section 6(1) notices, the reply given by the second respondent competent authority that he was not entitled to the copy of the same, is in non-compliance of the guidelines issued by the legal authorities cited above and against the principles of natural justice. As rightly argued by the learned senior counsel for the petitioners, non-production of the necessary particulars at the right time to the petitioners would defeat their right to effectively contest their case and providing appropriate opportunity at appropriate time will help the parties to canvass their contention in an appropriate way and failure to provide one such opportunity will circumvent the proceedings, which inturn result in adverse findings against the parties. When the reasons recorded are the basis for initiating the proceedings under SAFEMA Act, the failure to produce the copy of the same by the Authorities below to the person affected, at the earliest possible time, raises a very serious doubt as to whether one such document was available on the date mentioned in the same. In that event, the failure to record reasons for initiating action prior to issuance of notice under section 6(1), in respect of all the properties sought to be forfeited would render section 6(1) notices to be defective in nature and section 6(1) notices issued, without reasons recorded by the second respondent competent authority are bad in law and vitiated.

30.One of the relevant factors to be considered at this juncture is the inordinate delay caused for completing the proceedings. While section 6(1) notices were issued in 1976, the proceedings was completed by the second respondent Competent Authority only in 1994. The reason for the inordinate delay of 18 years remains unexplained. The delay aspect is also discussed by the first respondent Appellate Tribunal in para 2(a) of its order. The first respondent Appellate Tribunal has categorically observed that "there has been inordinate delay in concluding the proceedings and unfortunately no worthwhile information was forthcoming from the case papers to explain away this delay for nearly 15 years from December 1979, when the correspondence ended with the appellant's letter to the Competent Authority, till August 1994, there was no progress in the matter except one supplementary notice issued on 5.2.1980, may be these proceedings were kept in abeyance since the very vires of the SAFEMA was under challenge before various High courts and also in the Supreme Court. Though there was inordinate delay in concluding the proceedings but on this score alone, the Appellate Tribunal cannot set aside the proceedings as contended by the appellant. The Appellate Tribunal shall however, advice the Competent Authority if fault lie at his door, to streamline the procedures to ensure that the least possible time is taken to finalise the proceedings once initiated". The first respondent Appellate Tribunal has erroneously observed that the principles of natural justice was not violated and full opportunities were given to the appellant, when no section 6(1) notices were issued to the wife and erstwhile minor children and no opportunity was given to them even after the minor children attained majority and no copy of the order was marked to the major son, as such, the delay coupled with the act of omission as above referred to on the part of the second respondent Competent Authority has seriously affected the right of the parties and deserve to be viewed very seriously.

31.Here is the case wherein section 6(1) notices issued to the person affected is in respect of the properties not only belonging to him but also belonging to his wife and erstwhile minor children. Except the plot on which twin house in RS.No.246/1A in ward no.5 situated standing in the name of erstwhile minor children, the other properties are covered in section 6(1) notices dated 27.11.1976. In respect of the plot on which situated item 5- twin house property covered under section 6(1) notice dated 27.11.1976, separate section 6(1) notice was also issued on 5.2.1980 but no separate reasons is recorded in respect of that property. Though totally 8 properties are covered under all three section 6(1) notices, the single reasoning recorded in writing refer only to the property numbering 3 purchased in the name of the deceased first petitioner and the twin house constructed in S.No.246/1A. As far as the property belonging to the wife is concerned, the property referred to in the reasons recorded filed along with the additional counter is only construction of the property known as International Tourist Home at Calicut. The reasons recorded in writing do not refer to the other property standing in the name of the wife and erstwhile minor children. Though the second item covered in the third notice dated 05.02.1980 is different property, i.e plot comprising of twin house covered under the earlier notices, no separate reasoning is recorded for initiating action against the particular property. In the absence of any reasons recorded in writing to believe that the properties standing in the name of the husband and in the absence of any reference about the existence of any link or nexus between the properties originally standing in the names of the father and mother-in-law, which were later on settled in favour of the wife and erstwhile minor children and the alleged illegal income of the detenu to say that they are illegally acquired properties, the issuance of section 6(1) notices under SAFEMA Act is defective in nature.

32.Even otherwise, the careful reading of the reasons recorded by the second respondent competent authority would not disclose any prima facie finding arrived at by the competent authority regarding the properties purchased during 1966-67, as illegally acquired properties. As already stated, one such reasoning is not recorded either in respect of the property belonging to the wife or one of the properties of erstwhile minor children. As the reasons recorded is the basis for initiating action under SAFEMA Act and as the same is required to be preceded by due enquiry and as the reasons recorded is required to disclose the outcome of preliminary enquiry, the failure to mention any relevant information/material based on which the properties are held to be illegally acquired properties by the noticee in the reasons recorded cannot satisfy the legal and statutory requirements and cannot be the basis for section 6(1) notices. The reasons recorded during 1976 to the effect that the income returned from the brokerage, lorry and timber business carried on by the noticee during the years 1963-64 to 1966-67 was income from the undisclosed income, is only for the reason that source of investment remained unexplained. The competent authority before referring so, failed to duly consider the Income Tax Assessment Orders, which bears considerable evidentiary value.

33.The facts above stated would reveal that there is no sufficient reasons recorded to hold the properties mentioned in section 6(1) notices were purchased by the noticee from illegally acquired income in his name as well as in the names of his father, mother-in-law, wife and erstwhile minor children etc. and the same are illegally acquired properties. Further, there is absolutely no discussion about nature of the purchase of the properties in the name of the father and mother-in-law of the noticee, which was later on transferred in the name of his wife and minor children, as such, in the absence of any reference made in the reasons recorded about the same, the properties gifted or settled in the name of the wife and erstwhile minor children, cannot be the subject matter of any action for forfeiture. Thus, for the discussion held above, this court is inclined to hold that having regard to the manner in which the reasons recorded and as the reasons recorded are not sufficient enough to sustain any proceedings either under COFEPOSA or SAFEMA Act, the same nullify the entire proceedings and the proceedings initiated, particularly in respect of the properties belonging to the wife and erstwhile minor children is liable to be set aside.

34.Excluding the same, the remaining properties are items 1 to 3 properties purchased in the name of the husband, out of which, item 2 is the land measuring 1.47 acres in S.No.327/2 and 0.92 acres in S.No.328/2 in Puttur Village and is by the first respondent Appellate Tribunal released from the order of forfeiture. The first respondent Appellate Tribunal having found that the property was purchased on 27.6.1966 for Rs.14,100/-, out of Rs.10,000/- declared under VDS scheme and Rs.4,100/- from his marriage presents as explained by the person affected and the same was accepted as genuine by the Income Tax Authorities, held that item 2 property purchased in the name of the person affected was not liable for forfeiture. However, the Income Tax Assessment Orders were not considered by the Authorities below in respect of other items. It is pertinent to mention at this juncture that the Income Tax Assessment orders are either re-opened or scrutinising assessment dealt with under section 143(3) of the Income Tax Act and the order was also challenged by way of appeal and additions made were withdrawn by the Appellate Authority. Though such Income Tax Assessment Orders are not binding on the respondents herein, the same could have been attached some evidenciary value to decide the issue as to whether the person affected have carried on brokerage, lorry and timber businesses and the quantum of income earned and the properties which are sought to be forfeited were purchased from and out of the income derived from those businesses etc. As rightly contended by the learned senior counsel for the petitioners, the first respondent Appellate Tribunal, having accepted and relied on the order of the Income Tax Authorities in respect of one item or in respect of returns submitted for particular Assessment Year, ought to have, in the absence of any other valid reason, accepted the similar assessment order for the preceding year and other years pertaining to the purchase of the property in the name of the person affected.

35.The remaining investments, which required to be explained by the person affected are Rs.2,500/- towards purchase of land on 8.2.1967; Rs.6,000/- towards purchase of land on 27.6.1966 and Rs.17,200/- towards construction cost of twin house at Kasargod in the land belonging to the erstwhile minor children. The construction of twin house was completed in 1970-71 and the source for the cost of construction was shown to be through lorry income and through other income. Considering the quantum of income stated in the assessment years from 1963-64 to 1967-68, the source of investments for the construction as above referred to need not be doubted. As a matter of fact, the Authorities below did not raise any doubt about the lorry and timber business being carried on by the noticee and What was doubted by the Authorities below is the source of investments, without giving any legally valid reason for rejecting the Income Tax Assessment Orders.

36.Insofar as the advance of Rs.3,20,000/- given to the wife by the person affected/husband, the same is by the second respondent competent authority, held to be from illegally acquired income of the husband. Whereas, the first respondent Appellate Tribunal held that the amount advanced to the wife is Rs.85,000/- upto the Financial Year 1973-74 and Rs.2,35,000/- between the Financial Years from 1974-75 and 1978-79 and out of Rs.2,35,000/-, Rs.38,700/- was explained as known source of income and the balance remains unexplained and the unexplained amount was thus from the illegally acquired property and was liable for forfeiture. The amount spent for construction by the wife, which includes the advance given by the husband is one of the issues involved in FPA/9/Mds/95. The first respondent Appellate Tribunal has in para 7(d) dealt with the same issue, while dealing with the appeal filed by the wife and arrived at the same conclusion that the above sum advanced to the wife was from unexplained source. Aggrieved against the same, the wife preferred WP.No.571/1998 and the same was by order dated 3.7.2013, allowed by the learned brother judge, thereby setting aside the order of forfeiture of the property belonging to the wife. The learned brother judge while doing so, arrived at the conclusion that the property independently purchased by her mother and gifted by way of registered gift deed in favour of her daughter, who is the wife of the person affected, could not be construed as illegally acquired property through the funds earned by her husband from illegal means and the same could not be forfeited and set aside the impugned order of forfeiture, in respect of item No.6 of the property. Similar reasoning can be applied insofar as the property gifted by the grandfather in favour of his grand children and the impugned orders of forfeiture without considering this material factor is legally and factually unsustainable. It is note worthy to mention at this juncture that no particulars are produced before this court to show that any appeal was filed against the order passed by the learned single judge in WP.571/1998. In that event, this court need not go once again into the same.

37.Thus, considering the period during which the income was drawn and considering the quantum of income derived and the quantum of amount spent for purchase of the property and the period during which the person affected was detained under the Act and the period during which the proceedings was initiated under the Act, there is no reason to hold that the properties purchased by the person affected are from the illegally acquired money and the finding of the Authorities below to that effect is, in my considered view, lacking on merits.

38.Hence, for the discussions held above, the impugned orders of forfeiture of the properties mentioned in section 6(1) notices passed by the respondents 1 and 2 are both legally and factually unsustainable and are liable to be set aside.

39.In the result, the writ petition is allowed and the impugned orders of the respondents 1 and 2 are quashed. No costs.

rk

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

To

1. The Appellate Tribunal for
   Forfeited Property,
   IV Floor, Loknayak Bhavan
   Khan Market, New Delhi- 110 003.

2. The Competent Authority,
   Smugglers and Foreign Exchange
   Manipulators (Forfeiture of Property)
   Act, 1976, ütsav”64/1, G.N.Chetty Road,
   T.Nagar, Chennai-17.

+ 1 cc to Mr.S.Ramachandran, Advocate SR 48175

svi(co)
prk8/10

W.P.No.572 of 1998