

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.3178 OF 2009

Navneet Kumar Didwania]
 Age about 39 years, Occ;Business]
 having residential address at]
 172, Kshitij Apartments, 17th Floor,]
 47, Napeansea Road,]
 Mumbai – 400 036]Petitioner

Versus

- | | | |
|---|--|------------------|
| 1 | Union of India]
Dedicated Legal Cell Customs,]
6 th Floor, New Custom House,]
Ballard Estate, Mumbai – 400 038.] | |
| 2 | The Competent Authority,]
Smugglers and Foreign Exchange]
Manipulators(Forfeiture of Property]
Act, 1976 and Narcotic Drugs and]
Psychotropic Substances Act, 1985]
Mittal Court, "C" Wing, 3 rd Floor,]
Nariman Point, Mumbai – 400 021.] | |
| 3 | The State of Maharashtra]
Through the Public Prosecutor,]
High Court, P.W.D. Building,]
1 st Floor, Bombay – 400 032.] |Respondents |

Mr. Vivek Kantawala along with Mr. Amey Patil i/b. Vivek Kantawala and Co., advocates for the petitioner.

Ms. Rebecca Gonsalvez, advocate for the respondent Nos.1 and 2.

Mr. Y. M. Nakhwa, APP for the State.

**CORAM : RANJIT MORE &
SMT.SADHANA JADHAV, JJ.**

DATE : 21st SEPTEMBER, 2017.

Oral Judgment : (Per Ranjit More, J.)

The petition was admitted by this Court by an order dated 6th May, 2010. In due course, the petition is now placed for final hearing before this Bench.

2. Heard Mr. Kantawala, learned counsel for the petitioner, Ms. Gonsalvez, learned counsel for the respondent Nos. 1 and 2 and Mr. Nakhwa, learned counsel for the respondent No.3.

3. The petition is filed for the following reliefs :

(a) That this Hon'ble be pleased to issue the appropriate Writ, Order or direction and quashing and setting aside, in view of the order dated 3rd March, 2004 (Exhibit "D" hereto);-

(i) the forfeiture of the properties as set out in Exhibit "B" hereto in File No.CA/BOM/1/D-2/MUM/2000 in Order No.17/SAFEMA/MUM/2000 dated 26th June, 2000 passed by the 2nd Respondent (Exhibit "B" hereto) be released; and

(ii) as also for setting aside the Show Cause Notice dated 17.9.1996 issued by the 2nd Respondent to the Petitioner (Exhibit "A" hereto)

4. On 17th July, 1995, detention order was issued against the petitioner under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short “the COFEPOSA). On 17th September, 1996, show cause notice was issued under section 6(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, (for short “the SAFEMA”. In pursuance of the said show cause notice, the order was passed by the competent authority under sections 7 and 19 of the SAFEMA on 26th June, 2000 thereby forfeiting the petitioner's properties mentioned in the show cause notice. The petitioner filed an appeal before the Tribunal being appeal No.55/BOM/2000. The petitioner's appeal before the appellate tribunal challenging the forfeiture order was dismissed on 1st October, 2001. The petitioner, thereafter, challenged the said order by filing writ petition No.50 of 2002. However, the same was also dismissed on 9th June, 2003. The Central Government by its order dated 3rd March, 2004, under section 11 of the COFEPOSA revoked the detention order of the petitioner and, thereafter, in the month of October, 2009, the petitioner approached this Court by way of the above said writ petition for the reliefs mentioned hereinabove.

5. Ms. Gonsalvez, learned counsel for the respondent Nos.1 and 2, at the outset, submitted that the petition is filed belatedly and the

petitioner is guilty of laches and, therefore, the same deserves to be dismissed on that ground alone.

6. The undisputed facts stated herein above revealed that the writ petition challenging the appellate tribunal's order was dismissed on 9th June, 2003. Meanwhile, the properties of the petitioner which came to be forfeited by the competent authority under the SAFEMA came to be disposed off during the period between 2001 and 2008, by issuing tender notices.

7. The detention order revoked under section 11 of the COFEPOSA was made in the year 2004. The petitioner preferred to wait for a period of five years and the present petition is filed in the year 2009. The petitioner has not approached this Court as expeditiously as possible and, therefore, on the ground of laches alone, we are inclined to dismiss the petition.

8. Be that as it may, we have heard Mr. Kantawala, learned counsel for the petitioner and Ms. Gonsalvez, learned counsel for the respondent Nos. 1 and 2 on merits of the petition and will be dealing with the arguments advanced by the respective counsel.

9. Mr. Kantawala submitted that the validity of the detention order under section 3(1) of the COFEPOSA is sine qua non for proceedings under the provisions of SAFEMA. He submitted that since the order detaining the petitioner under COFEPOSA is revoked by the Central Government in exercise of powers under section 11 of the COFEPOSA, the proceedings initiated against the petitioner under SAFEMA became void ab initio and, therefore, the same deserves to be quashed and set-aside.

Mr. Kantawala relied upon the provisions of section 2(2)(b) of the SAFEMA and a decision of the Apex Court in **Union of India and others versus Mohanlal Likumal Punjabi and ors.(2004) 3 SCC 628** and Division Bench judgment of this Court in **criminal writ petition No.368 of 2012 in Union of India versus Pawan Kumar Didwania and ors.** Mr. Kantawala in terms of the proviso (i) to section 2(2)(b) of the SAFEMA submitted that the proceedings of the petitioner falls in 3rd category viz. before making a reference to the Advisory Board and, therefore, the proceedings under the SAFEMA deserves to be quashed and set-aside.

10. Ms. Gonsalvez, learned counsel for the respondent Nos.1 and 2, vehemently opposed the petition. She relied upon the provisions of section 2(2)(b) of the SAFEMA and the decision of the Apex Court in

Mohanlal Likumal Punjabi and ors.(supra). So far as the decision of the Division Bench in **criminal writ petition No.368 of 2012 in Union of India versus Pawan Kumar Didwania and ors.** is concerned, she submitted that the same is challenged by the Union of India before the Apex Court by filing SLP (criminal) 6670 of 2014 and the matter is pending.

11. Having considered the rival contentions of the learned counsel appearing for the respective parties and having gone through the petition along with annexures thereto and the decisions cited across the Bar, we find no merit in the petition.

Section 2 of the SAFEMA deals with the application of SAFEMA.

It reads as under :

"2. Application.—(1) The provisions of this Act shall apply only to the persons specified in sub-section (2).

(2) The persons referred to in sub-section (1) are the following, namely:

—

(a) every person—

(i) who has been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), of an offence in relation to goods of a value exceeding one lakh of rupees; or

(ii) who has been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), of an offence, the amount or value involved in which exceeds one lakh of rupees; or

(iii) who having been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), has been convicted subsequently under either of those Acts; or

- (iv) who having been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), has been convicted subsequently under either of those Acts;*
- (b) every person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974):*

Provided that—

- (i) such order of detention, being an order to which the provisions of section 9 or section 12-A of the said Act do not apply, has not been revoked on the report of the Advisory Board under section 8 of the said Act or before the receipt of the report of the Advisory Board or before making a reference to the Advisory Board; or*
- (ii) such order of detention, being an order to which the provisions of section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the review under sub-section (3) of section 9, or on the report of the Advisory Board under section 8, read with sub-section (2) of section 9, of the said Act; or*
- (iii) such order of detention, being an order to which the provisions of section 12-A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under sub-section (3) of that section, or on the basis of the report of the Advisory Board under section 8, read with sub-section (6) of section 12-A, of that Act; or*
- (iv) such order of detention has not been set aside by a court of competent jurisdiction;*
- (c) every person who is a relative of a person referred to in clause (a) or clause (b);*
- (d) every associate of a person referred to in clause (a) or clause (b);*
- (e) any holder (hereafter in this clause referred to as the present holder) of any property which was at any time previously held by a person referred to in clause (a) or clause (b) unless the present holder or, as the case may be, any one who held such property after such person and before the present holder, is or was a transferee in good faith for adequate consideration.”*

In the present case, we are concerned with clause (b) of sub-section 2 of the above section. Under the said clause, the provisions of SAFEMA are applicable to every person in respect of whom an order of detention has been made under the COFEPOSA. Admittedly, the petitioner is a person against whom detention order under section 3(1) of the COFEPOSA was issued and, therefore, he is covered by section 2(2)(b) of the SAFEMA Act. Section 2(2)(b) of the SAFEMA deals with three situations when the exceptions provided under proviso (i) can operate when the order of revocation is made :

- 1) On the report of the Advisory Board under Section 8 of the COFEPOSA.
- 2) Before the receipt of the report of the Advisory Board.
- 3) Before making a reference to the Advisory Board.

12. The question similar to the present case fell for consideration before the Apex Court in **Mohanlal Likumal Punjabi and other's case** (*supra*). In paragraph 14, the Apex Court made following observations:

"14. The first situation envisaged in sub-clause (i) of the proviso to clause (b) of sub-section (2) of Section 2, SAFEMA applies when the revocation is based on the report of the Advisory Board. As the factual position noted above goes to show, the revocation was only in terms of Section 11(1)(b) of the COFEPOSA. Such revocation when is done by the Central Government as in this case is really unrelated to a report of the Advisory Board. On the factual position, none of the three situations indicated in the first sub-clause of the said proviso is applicable."

It is abundantly clear from the reading of the above observations that if the revocation is under section 11(1)(b) of the COFEPOSA, then, exceptions carved out under proviso (i) to section 2(2)(b) of the SAFEMA are not applicable.

13. Mr. Kantawala heavily relied upon the last exception under proviso (i) to section 2(2)(b) of the SAFEMA and submitted that the petitioner's detention order though revoked in the year 2004, indeed the same was before making reference to the Advisory Board.

14. Ms. Gonsalvez, on the contrary, submitted that the first detention order under section 3(1) of the COFEPOSA was issued on 17th July, 1995, and the petitioner was throughout absconding and, therefore, the detention order could not be served upon him. Meanwhile, the proceedings under the SAFEMA were initiated and the petitioner's properties were forfeited and disposed off long before filing of the petition. She submitted that the said three exceptions under the proviso (i) to section 2(2)(b) of the SAFEMA would operate only post-detention order.

15. We find substance in the submission of Ms. Gonsalvez. It is abundantly clear from the proviso (i) to section 2(2)(b) of the SAFEMA that all three exceptions come into picture only after detention of the person against whom the detention order is issued. In the present case,

the petitioner was never detained in pursuance of the detention order under section 3(1) of the COFEPOSA. Therefore, the petitioner is not entitled to take benefit of the last exception under proviso(i) to section 2(2)(b) of the SAFEMA.

16. This takes us to consider the decision of the **Division Bench of this Court in criminal writ petition No.368 of 2012 (Union of India versus Pawan Kumar Didwania and ors.)**. This decision does support the contention of Mr. Kantawala. However, in our considered opinion, the observations made in paragraph 6 of the said decision are contrary to the observation of the Apex Court in paragraph 14 of **Mohanlal Likumal Punjabi and other's case (supra)**. That apart, the decision of the Division Bench of this Court in **criminal writ petition No.368 of 2012 (Union of India versus Pawan Kumar Didwania and ors.)** is challenged and the matter is sub judice before the Apex Court. Hence, the said decision will not come to the rescue of the petitioner.

17. Taking totality of the facts and circumstances mentioned hereinabove, we find that the petition is devoid of any merit and the same is, accordingly, dismissed. Rule is discharged.

[SMT. SADHANA JADHAV, J.]

[RANJIT MORE, J.]