IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 29.09.2022	Delivered on 13.10.2022

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THE HONOURABLE MR.**JUSTICE R.SUBRAMANIAN**

AND

THE HONOURABLE MR.**JUSTICE K.KUMARESH BABU**

Writ Appeal No.1333 of 2018
and CMP No.10689 of 2018

The Competent Authority,
Smugglers and Foreign Exchange Manipulators
(Forfeiture of Property) and NDPS Acts,
T.Nagar, Chennai 17. ..Appellant/2nd Respondent

Vs.

1. Smt. Ayisath Munawara .. Respondent/Petitioner

2. The Appellate Tribunal for Forfetied Property,
Loknayak Bhavan,
4th Floor, Khan Market,
New Delhi -3. .. Respondent/1st Respondent

Prayer: Writ Appeal filed under Clause 15 of Letters Patent, against the order passed by this Court dated 23.07.2013 passed in W.P.No.14625 of 1996.

For Appellant : Mr. R.Sankaranarayanan

Addl. Solicitor General of India
Assisted by Mr.B.Rabumanohar
Central Govt. Standing Counsel

For Respondents : Mr. B.Sathishsundar, for R1

R2 - Tribunal

JUDGMENT

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

The Competent Authority under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, aggrieved by the order made in WP No.14625 of 1996 setting aside the proceedings of the appellant forfeiting the properties of the first respondent on the ground that they were acquired out of the proceeds of illegal activities of her father K.T.M.S.Mohammed, against whom proceedings under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 were launched, has come up with this appeal.

2. The appellant issued a notice under Section 6(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (ACT 13 0f 1976), requiring the first respondent to show cause, as to why, her properties should not be forfeited under the provisions of the Act of *13 of 1976*. The notice alleged that these properties have been purchased out of the monies that were illegally made by her father whose detention under the COFEPOSA Act, was sustained. Since she was unable to provide details of the sources of acquisition of the funds, the Authority *prima facie* felt that the properties have been illegally acquired and therefore, liable for forfeiture.

3. The Competent Authority after affording an opportunity to the first respondent herein by its order dated 10.03.1977, exercising powers under Section 7 of the Act *13 of 1976*, passed an order forfeiting the properties belonging to the first respondent. Aggrieved the first respondent preferred an Appeal to the Appellate Tribunal for forfeited property in F.P.A.No.15/MDS/77-78. The Appellate Tribunal while allowing the Appeal in respect of the movable properties dismissed the Appeal in respect of the immovable properties. The first respondent carried the matter to this Court in WP No.2825 of 1978, which came to be disposed of on 01.02.1995, by the First Bench of this Court. While setting aside the order passed by the Appellate Tribunal, the Hon'ble First Bench remitted the matter to the Appellate Authority with a direction to decide the same in accordance with law in the light of the observations made in the order, after affording an opportunity to the petitioner therein (first respondent herein) to produce evidence to prove the lawful source for the acquisition of properties in question, on receiving the affidavits.

4. Thereafter, the Appellate Tribunal received affidavits of at least three persons of whom one, namely Mr.S.Meeralabbai, had died even in the year 1992. The Appellate Tribunal upon a consideration of the evidence concluded that since the deponents of the affidavits, that were placed before it, could not be cross-examined, their affidavits cannot be taken on their face value. Therefore, the Appeal was dismissed. This order of dismissal of the Appeal dated 12.08.1996 that was subject matter of challenge in WP No.14625 of 1996. Though various grounds were alleged the affidavit filed in support of the Writ Petition, the Hon'ble Single Judge had allowed the Writ Petition quashing the proceedings for forfeiture solely on the ground that the Competent Authority has not made out the link or the nexus between the illegal earnings of the detenue namely K.T.M.S.Mohammed, and the acquisition of the properties by the petitioner.

5. After considering the sweep of Sections 7 sand 8 of Act of *13 of 1976*, the Writ Court felt that the essential ingredient, namely the nexus or the link between the alleged illegal earnings of the detenue and the acquisition of properties by the petitioner has not been made out. As a consequence, the Writ Court held that the order of forfeiture cannot be sustained. In the course of the order, the Writ Court rejected the contention of the learned counsel for the respondent/the Competent Authority to the effect that Section 8 of the Act of *13 of 1976*, creates a presumption regarding the link or the nexus and therefore, it is for the person charged to establish that such link or nexus is absent. The Writ Court held that Section 8 of the Act of *13 of 1976*, speaks of burden of proof and after referring to Section 102 of the Evidence Act, concluded that if either of the parties do not let in evidence, it is the person charging who should fail and not the person charged.

6. Mr.R.Sankaranarayanan, learned Additional Solicitor General appearing for the appellant would contend that the Writ Court was not justified in referring to Section 102 of the Evidence Act, which is a General Law. The learned Additional Solicitor General would contend that Section 8 of the Act of *13 of 1976*, makes a special Rule of evidence and it being a special enactment would override the provisions of the Evidence Act, which is a General Law. Relying upon Section 8 of Act of *13 of 1976*, which reads as follows:

> ***"8. Burden of Proof.****— In any proceedings under this Act, the burden of proving that any property specified in the notice served under Section 6 is not illegally acquired property shall be on the person affected."*

the learned Additional Solicitor General would submit that the burden of proving, absence of nexus is on the person charged and it is enough, if the Authority points outs that there is a possibility of there being a nexus between the illegal earnings and the acquisition of property. Arguing further, the learned Additional Solicitor General would submit that the Writ Court was not justified in concluding that the effect of Section 8 of the Act of *13 of 1976,* is not an absolute burden. Decrying the reference to Section 102 of the Evidence Act in the given situation, the learned Additional Solicitor General would submit that Section 102 of the Evidence Act would apply only when the special enactment is silent about burden of proof. When the special enactment lays down a particular Rule of burden of proof and it is that which would prevail and not the Rule of evidence under the General Law, namely the Indian Evidence Act.

7. Contending contra, Mr.B.Satish Sundar, learned counsel appearing for the first respondent would submit that *dehors* Section 8 of the Act of *13 of 1976*, the Competent Authority should show that there was some nexus or link between the acquisition and the illegal earnings of the delinquent, namely the father of the first respondent. In the absence of any material or even a semblance of reasoning in support of the conclusion that the properties were acquired out of the illegal earnings of the detenue, the burden to disprove created by Section 8 of the Act of *13 of 1976*, cannot be applied and therefore, the Writ Court was justified in striking down the forfeiture of the immovable property. Arguing further, the learned counsel would submit that unless the jurisdictional fact, namely the nexus or the link is alleged in the notice issued under Section 6(1) of the Act of *13 of 1976*, forfeiture under Section 7 cannot be justified.

8. Reliance is also placed by the learned counsel on the judgment of the Constitution Bench of the Hon'ble Supreme Court in ***Attorney General for India and Others v. Amratlal Prajivandas and others,*** reported in

(1994) 5 SCC 54, in support of his submission. The learned counsel would also draw our attention to the judgments of the Hon'ble Supreme Court in ***Aslam Mohammad Merchant v. Competent Authority and others,*** reported in ***(2008) 14 SCC 186*** and ***Income Tax Officer v. V.Mohan and Another,*** reported in ***2021 SCC Online SC 1240*** and the judgment of this Court in ***Aminath Fathima v. Competent Authority, SAFEMA,*** reported in ***2017 (352) E.L.T.280 (Mad.)***.

9. We have considered the rival submissions.

10. Section 3(1)(c) of the Act of *13 of 1976*, defines illegally acquired property as follows:

> ***"3. Definitions.***— *(1) In this Act, unless the context otherwise requires,—*
>
> *(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

(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

(iv) any property acquired by such person, whether before or after 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 there from."

11. Clause (c) of Sub Section (2) of Section 2 of the Act of *13 of 1976*, makes the Act applicable to a relative of the person who has been charged under the Act and Explanation (2) to Sub Section (2) of Section 2, makes a lineal ascendant or descendant of the person as a relative.

12. The thrust of the arguments of the learned Additional Solicitor

General is that the Writ Court invoked the theory of presumption and burden to disprove to conclude that the initial burden is on the Authority and the same would shift only on proof of basic jurisdictional fact. The learned Additional Solicitor General would submit that it is one thing to say that the Authority had not satisfied the requirements of Sections 6 and 7 of the Act of *13 of 1976,* and it is another to say that the burden of proof is on the Authority. Section 6 of the Act of *13 of 1976,* which requires the notice of forfeiture to be issued to a person charged, reads as follows:

> ***6. Notice of forfeiture.**— **(1)**If, having regard to the value of the properties held by any person to whom this Act applies, either by himself or through any other person on his behalf, his known sources of income, earnings or assets, any other information or material available to it as a result of action taken under section 18 or otherwise, **the competent authority has reason to believe (the reasons for such belief to be recorded in writing) that all or any of such properties are illegally acquired properties,** it may serve a notice upon such person (hereinafter referred to as the person affected) calling upon him within such time as may be specified in the*

notice, which shall not be ordinarily less than thirty days, to indicate the sources of his income, earnings or assets, out of which or by means of which he has acquired such property, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties, as the case may be, should not be declared to be illegally acquired properties and forfeited to the Central Government under this Act.

***(2)** Where a notice under sub-section (1) to any person specifies any property as being held on behalf of such person by any other person, a copy of the notice shall also be served upon such other person.*

Section 7 of the Act which provides for forfeiture reads as follows:

"7. Forfeiture of Property in certain cases.—

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

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

(2) Where the competent authority is satisfied that some of the properties referred to in the show-cause notice are illegally acquired properties but is not able to identify specifically such properties, then, it shall be lawful for the competent authority to specify the properties which, to the best of its judgment, are illegally acquired properties and record a finding accordingly under sub-section (1).

(3) Where the competent authority records a finding under this section to the effect that any property is illegally acquired property, it shall declare that such property shall, subject to the provisions of this Act, stand forfeited to the Central Government free from all encumbrances.

(4) Where any shares in a company stand forfeited to the Central Government under this Act, then, the company

shall, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or the articles of association of the company, forthwith register the Central Government as the transferee of such shares.

Section 8, extracted *supra*, casts the burden of proving that such property specified in the notice served under Section 6 is not illegally acquired property on the noticee.

13. The effect of these provisions was considered by the Hon'ble Supreme Court in ***Attorney General for India and Others v. Amratlal Prajivandas and others,*** wherein the Hon'ble Supreme Court held that though Section 8 of the Act of *13 of 1976*, places the burden of establishing that the properties mentioned in the show cause notice issued under Section 6 of the Act of *13 of 1976*, are not illegally acquired properties lies upon the noticee, the Competent Authority will have to at the least establish the connecting link between acquisition of those properties and the illegal earnings of the detenue and it is the burden of disproving such link that is placed on the noticee by operation of Section 8 of the Act of *13 of 1976*.

While doing so, the Hon'ble Supreme Court observed as follows:

> *"44. .... We do not think that Parliament ever intended to say that the properties of all the relatives and associates, may be illegally acquired, will be forfeited just because they happen to be the relatives or associates of the convict/detenu.* ***There ought to be the connecting link between those properties and the convict/detenu, the burden of disproving which, as mentioned above, is upon the relative/associa****te. ... "*

Again in ***Aslam Mohammad Merchant v. Competent Authority and others***, while considering the effect of a *pari materia* provision, namely Section 68 J of the Narcotic Drugs and Psychotropic Substances Act, 1985, the Hon'ble Supreme Court had observed as follows:

> *"27. It is, therefore, evident that the property which is sought to be forfeited must be the*

one which has a direct nexus with the income etc. derived by way of contravention of any of the provisions of the Act or any property acquired therefrom. What is meant by identification of such property having regard to the definition of `identifying' is that the property was derived from or used in the illicit traffic."

14. Recently in ***Income Tax Officer v. V.Mohan and Another***, the Hon'ble Supreme Court after exhaustively referring to the judgment of the Constitution Bench in ***Attorney General for India and Others v. Amratlal Prajivandas and others***, had concluded that notice to the detenue or the actual offender is not necessary in a proceeding under Section 6 of the Act of *13 of 1976,* the Hon'ble Supreme Court up held the view of the Calcutta and Kerala High Court, as opposed to the view of this Court to the effect that notice to the actual offender is mandatory in proceedings for forfeiture under Section 6 of the Act of *13 of 1976.* The Hon'ble Supreme Court, however, reiterated the requirement that the Competent Authority should establish the jurisdictional fact in order to invoke the provisions of Sections 6 and 7 of the

Act of *13 of 1976.* This Court in ***Aminath Fathima v. Competent Authority, Safena***, held the same view after referring to the judgment in ***Aslam Mohammad Merchant v. Competent Authority and others***, referred to *supra*.

15. Therefore, the question that would arise in the case on hand is not one of burden of proof, but as to whether the Competent Authority has made out the jurisdictional fact, namely the link or the nexus between the acquisition of the property and the illegal income of the father of the first respondent/detenue. If we are to look at the notice under Section 6(1) of the Act of *13 of 1976,* and the subsequent proceedings there is nothing in the said notice to connect the purchase of the property with the illegal income of the detenue. The notice proceeds on the footing that once the relationship between the noticee and the detenue is established the property in the hands of the noticee would automatically become illegally acquired property.

16. Section 3(1)(c) of the Act of *13 of 1976,* only makes the property which is shown to have been acquired, 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; (or) property acquired wholly or partly out of or by means of any income, earnings or assets in contravention of any law; (or) property acquired wholly or partly 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 the Parliament has the power to make law; (or) property acquired for a consideration which is wholly or partly traceable to sub-clauses (i) to (iii) of Clause (c) of Subsection (1) of Section 3.

17. Therefore, as pointed out by the Constitution Bench of the Hon'ble Supreme Court in ***Attorney General for India and Others v. Amratlal Prajivandas and others***, the Authority must make out the jurisdictional fact, namely the nexus or the link between the acquisition and the consideration, if such a link is not made out, the question of disproving or proving the contrary will not arise dehors the fact that the burden of proof is cast on the noticee by virtue of Section 8 of the Act of *13 of 1976.* In order to invoke the provisions of Sections 6 and 7, the Competent Authority must establish the jurisdictional fact. It should record reasons for the belief that the property would have been acquired by means of illegal earnings and that reason should disclose the nexus of the link. The mere failure to prove the source or absence of evidence to establish the source on the side of the noticee cannot by itself make the property an illegally acquired property.

18. No doubt the learned Additional Solicitor General would be right in his submission that the Writ Court ought not to have invoked Section 102 of the Evidence Act, to conclude that the burden is on the Competent Authority, but at the same time, he cannot succeed unless he is able to go one step further and establish the nexus or the link. A perusal of the notice issued under Section 6 and the order of the Competent Authority passed under Section 7 of the Act of *13 of 1976*, would demonstrate that such a link or nexus is totally absent and no effort or endeavour has been made to establish such link or nexus. What could be forfeited under Sections 6 and 7 of the Act of *13 of 1976*, is the illegally acquired property. Therefore, the jurisdictional fact or the fundamental requirement in order to invoke Sections 6 and 7, is the conclusion that the property is illegally acquired. In order to reach the said conclusion, the jurisdictional fact, namely the link or the nexus between the income of the detenue and the acquisition of the property should be established. If such link or nexus is absent, then the Competent Authority has no power or jurisdiction to direct forfeiture of the property.

19. As rightly pointed out by the Writ Court we also find that such link or nexus is totally absent rendering the invocation of power of forfeiture illegal. We, therefore, do not see any reason to interfere with the conclusion of the Writ Court in quashing the proceedings. We, however, make it clear that the Writ Court's conclusions regarding burden of proof are not in tune with the intendment of the enactment and therefore, the observations of the Writ Court regarding burden of proof alone will stand set aside.

20. In fine the Writ Appeal is **dismissed** with the above observations. In the circumstances there will be no order as to costs. Consequently the connected miscellaneous petition is closed.

(R.SUBRAMANIAN, J.) (K.KUMARESH BABU, J.)

13.10.2022

jv
Index: No
Internet: Yes
speaking order

To

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