

MANU/SC/2959/2008

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IN THE SUPREME COURT OF INDIA

Criminal Appeal Nos. 1053, 1054, 1055, 1056 and 1057 of 2003

Decided On: 08.07.2008

Appellants: **Aslam Mohd. Merchant**

Vs.

Respondent: **Competent Authority and Ors.**

Hon'ble Judges/Coram:

S.B. Sinha and V.S. Sirpurkar, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Arvind V. Savant, Raju Ramachandran and V.A. Mohta, Sr. Advs., S.V. Pikale, G.S. Pikale, Mahesh Agarwal, Rishi Agrawala, E.C. Agrawala, Amit Kumar Sharma, Saurabh S. Sinha and Nilkanta Nayak, Advs

For Respondents/Defendant: Vikas Singh and B. Dutta, ASGs., Sunil Roy, Vikas Sharma, B.B. Singh, Arvind Sukla, Arvind Kumar Shukla, G.D. Mishra, Alok Shukla, Purcham Mubarak, Sushma Suri, Sushil Karanjkar and Ravindra Keshavrao Adsure, Advs.

Case Note:

Narcotics - Illicit traffic - Forfeiture of property - Valid Proceeding - Statutory requirements - Sections 68B, 68C, 68E, 68F, 68H, 68I, 68J, 68W of the Narcotic Drugs and Psychotropic Substances Act, 1985 - Interpretation and application of - Prevention of Illicit Traffic in Narcotics Drugs and Psychotropic Substances Act, 1988 (PITNDPS) - Order of preventive detention was passed against X for his alleged involvement in illicit trafficking under the Act of 1988 - Order could not be served on him as he had left India - Appellants being relatives of X issued notice directing to show cause as to why the properties should not be forfeited being 'illegally acquired properties' - Properties belonging to the Appellants were directed to be forfeited - On appeal the Appellate Tribunal affirmed the findings - High Court dismissed the Writ Petition filed by the Appellants - Hence, present appeal - Appellant contended that the conditions precedent for initiating a valid proceeding namely, formation of 'reason to believe' on the part of the authority had not been fulfilled - Respondent contended that a notice containing general allegations would meet the requirements of law - What are the statutory requirements for initiating a valid proceeding - Held, property which sought to be forfeited must be the one derived from or used in the illicit traffic - Issuance of a notice to show cause is essential so as to fulfill the requirements of natural justice and the Competent Authority also required to apply its mind on the materials brought before him - A finding that all or any of the properties in question were illegally acquired properties should be recorded - A roving enquiry was not contemplated under the Act as properties sought to be forfeited must have a direct nexus

with the properties illegally acquired - Further, when stringent laws become applicable as a result whereof some persons were to be deprived of his/ her right in a property, scrupulous compliance of the statutory requirements is imperative - No material had been brought on record to show that any nexus or a link between the properties sought to be forfeited - Statutory requirements have not been fulfilled - If the proceedings were not initiated validly, the Competent Authority did not derive any jurisdiction to enter into the merit of the matter - Impugned Judgments set aside - Appeals allowed

Ratio Decidendi:

"Show Cause Notice is essential to fulfill the requirements of natural justice and a proper application of mind on the part of the Competent Authority is imperative before issuance of Show Cause Notice."

"If the proceedings were not initiated validly, the Competent Authority did not derive any jurisdiction to enter into the merit of the matter."

Case Category:

CRIMINAL MATTERS - CRIMINAL MATTERS RELATING TO DRUGS AND COSMET NDPS ACT

JUDGMENT

S.B. Sinha, J.

INTRODUCTION

1 . Interpretation and application of Chapter VA of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "the Act") providing for forfeiture of property derived from or used in illicit traffic, is in question in this batch of appeals which arise out of a judgment and order dated 27.11.2002 passed by the High Court of Bombay in Criminal Writ Petition No. 1095 of 2002.

OVERVIEW

2 . One Iqbal Mohammed Memon alias Iqbal Mirchi ("Mirchi", for short) is related to the appellants. aPPELLANT No. 2 is his first wife, Appellant No. 3 is second wife, Appellant No. 4, Abdul Kadar Mohd. Merchant, is one of his brothers, Appellant No. 5, Shir Firoz Mohd. Memen, is his second brother whereas Petitioner No. 6, Aslam Mohd. Merchant, is his third brother. Appellant No. 7, Nazma Aslam Merchant, is his brother's wife, Appellant No. 8, Zaibunnisa Memon, is his sister and Appellant No. 9, Arij Mohd. Merchant, is the brother-in-law of the said Iqbal Mohammed Memon.

An order of preventive detention was passed against him for his alleged involvement in illicit trafficking under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (for short the "PITNDPS") on or about 29.9.1994. The same, however, could not be served on him as he had left India.

A pre execution writ petition filed on his behalf was dismissed. The said order of detention is still operative.

3 . The said Iqbal Mirchi is, thus, a 'person' within the meaning of Section 68A(C) of the Act. Appellants being his relatives in terms of Section 68H of the Act were issued

with notices directing them to show cause as to why the properties mentioned therein should not be forfeited being 'illegally acquired properties'. Causes were shown pursuant thereto. Opportunities of hearing were also afforded. Whereas some of the properties belonging to the appellants were directed to be forfeited, some were released.

The Appellate Tribunal on appeals having been preferred there against by the appellants by a common order dated 26.7.2002 affirmed the said findings. Some more properties, however, were directed to be released opining that they did not come within the purview of the definition of 'illegally acquired properties'.

4. Writ Petitions preferred there against by the appellants have been dismissed by the High Court by reason of the impugned judgment, holding that the proceedings were validly initiated against them.

CONTENTIONS

5. Whereas, on one hand, the submissions of the learned Counsel appearing on behalf of the appellants is that the conditions precedent for initiating a valid proceeding, namely, formation of 'reason to believe' on the part of the authority wherefore reasons are required to be recorded in writing had not been fulfilled, the submission of Mr. B.B. Singh, the learned Counsel appearing on behalf of the respondent on the other hand, is that a notice containing general allegations would meet the requirements of law. According to the learned Counsel, once the noticees were informed that they were relatives of the 'person' referred to in Section 68A and valuable properties stand in their name, which were acquired beyond their known source of income, it will be for them to satisfy the authority that acquisition of the property by them has nothing to do with the purported income derived by 'Mirchi' out of illicit trafficking of narcotic, drug and psychotropic substances.

On behalf of the appellants, it was furthermore urged:

(i) Even a perusal of from the order passed by the competent authority, it would appear that one of the properties had been purchased by one of the appellants herein much prior to her marriage to 'Mirchi' and as such the question of such a property having been acquired out of the "illegally acquired property" does not and cannot arise.

(ii) Appellants having filed their income tax returns and wealth tax returns wherein the properties were shown to have been purchased from their own income, the impugned order is wholly unsustainable. Although orders of assessment passed by an authority under the said Act having regard to the provisions contained in Section 68W thereof may not be conclusive, but, the same carry a presumption of correctness and thus were required to be treated as evidence.

(iii) The competent authority, on the basis of the purported investigation report or otherwise, was required to show that the properties in question were in fact purchased from the tainted money and it was not for the appellants to prove contra.

(iv) As the only relevant consideration for passing an order in terms of Section 68H of the Act is that the property had been acquired from the tainted income, it is sufficient for the noticee to show that the said

allegations were not correct.

(v) The competent authority was required to keep distinction between his function and the one under the Income Tax Act and the Wealth Tax Act in mind; his jurisdiction being limited, that is, whether the properties were illegally acquired properties or not, wherefore he could not have gone further and hold that only because the noticees had not been able to trace the source of their income, the properties were to be treated to be illegally acquired property, which may be only a relevant factor but would not necessarily lead to the said conclusion.

THE ACT

6. The Act was enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operation relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drug and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith.

7. Chapter VA was inserted in the Act by Act No. 2 of 1989. It appears that the said amendment was carried out having regard to the International Convention as referred to in Section 2(ix) of the Act, which read as under:

2. Definitions. - In this Act, unless the context otherwise requires, -

(i) *****

(ix) "International Convention" means -

(a) the Single Convention on Narcotic Drugs, 1961 adopted by the United Nations Conference at New York in March, 1961;

(b) the protocol, amending the Convention mentioned in Sub-clause (a), adopted by the United Nations Conference at Geneva in March, 1972;

(c) the Convention on Psychotropic Substances, 1971 adopted by the United Nations Conference at Vienna in February, 1971 ; and

(d) any other international convention, or protocol or other instrument amending an international convention, relating to narcotic drugs or psychotropic substances which may be ratified or acceded to by India after the commencement of this Act.

8. Section 68A of the Act applies to persons specified in Sub-section (2) thereof which would, inter alia, include every person in respect of whom an order of detention has been made under the PITNDPS.

9. It also applies to persons who are relatives of a person inter alia against whom an

order of detention has been issued or his associate(s).

Section 68B is the interpretation section.

We may notice some of the provisions contained therein.

Section 68B. Definitions - In this Chapter, unless the context otherwise requires -

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(b) "Associate" in relation to a person whose property is liable to be forfeited under this Chapter, means, -

(i) Any individual who had been or is residing in the residential premises (including out houses) of such person;

**** **

(ii) Any individual who had been or is managing the affairs or keeping the accounts of such person;

(iii) Any association of persons, body of individuals, partnership firm, or private company within the meaning of the Companies Act, 1956, of which such person had been or is a member, partner or director;

**** **

(vi) The trustee of any trust, where, -

(1) The trust has been created by such person; or

(2) The, value of the asset contributed by such person (including the value of the assets, if any, contributed by him earlier) to the trust amounts on the date on which contribution is made, to not less than twenty per cent of the value of the assets of the trust on that date,

(g) "Illegally acquired property" in relation to any person to whom this Chapter applies, means, -

(i) Any property acquired by such person, whether before or after the commencement of this Chapter, wholly or partly out or by means of any income, earnings or assets derived or obtained from or attributable to the contravention of any provisions of this Act; or

(ii) Any property acquired by such person, whether before or after the commencement of this Chapter, for a consideration, or by any means wholly or partly traceable to any property referred to in Sub-clause (i) or the income or earning 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 Chapter, for a consideration or by any means, wholly or partly traceable to any property falling under item (A), or the income or earnings therefore;

(h) "Property" means property and assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and deeds and instruments, evidencing title to, or interest in, such property or assets derived from, or used in, the illicit traffic,

(i) "Relative" means, -

- (1) Spouse of the person;
- (2) Brother or sister of the person;
- (3) Brother or sister of the spouse of the person;
- (4) Any lineal ascendant or descendant of the person;
- (5) Any lineal ascendant or descendant of the spouse of the person;
- (6) Spouse of a person referred to in Sub-clause (2) or Sub-clause (3), Sub-clause (4) or Sub-clause (5);
- (7) Any lineal descendant of a person referred to in Sub-clause (2) or Sub-clause (3);

(j) "Tracing" means determining the nature, source, disposition, movement, title or ownership of property;

Section 68C provides for prohibition in respect of holding illegally acquired property in the following terms:

68C. Prohibition of holding illegally acquired property - (1) As from the commencement of this Chapter, it shall not be lawful for any person to whom this Chapter applies to hold any illegally acquired property either by himself or through any other person on his behalf.

(2) Where any person holds any illegally acquired property in contravention of the provisions of Sub-section (1) such, property shall be liable to be forfeited to the Central Government in accordance with the provisions of this Chapter:

Provided that no property shall be forfeited under this Chapter if such property was acquired, by a person to whom this Act applies, before a period of six years from the date he was arrested or against whom a warrant or authorisation of arrest has been issued for the commission of an offence punishable under this Act or from the date

the order or detention was issued, as the case may be.

Section 68E provides as to how illegally acquired property shall be identified, stating:

68E. Identifying illegally acquired property - (1) Every officer empowered under Section 53 and every officer-in-charge of a police station shall, on receipt of information is satisfied that any person to whom this Chapter applies holds any illegally acquired property, he may, after recording reasons for doing so, proceed to take all steps necessary for tracing and identifying such property.

(2) The steps referred to in Sub-section (1) may include any inquiry' investigation or survey in respect of any person, place, property, assets, documents, books of account in any Bank or public financial institution or any other relevant matters.

(3) Any inquiry, investigation or survey referred to in Sub-section (2) shall be carried out by an officer mentioned in Sub-section (1) in accordance with such directions or guidelines as the competent authority may make or issue in this behalf.

Section 68F provides for seizure or freezing of illegally acquired property in the following terms:

68F. Seizure or freezing of illegally acquired property - (1) Where any officer conducting an inquiry or investigation under Section 68E has reason to believe that any property in relation to which such inquiry or investigation is being conducted is an illegally acquired property and such property is likely to be concealed, transferred or dealt with in any manner which will result in frustrating any proceeding relating to forfeiture of such property under this Chapter, he may make an order for seizing such property and where it is not practicable to seize such property, he may make an order that such property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, or of the competent authority and a copy of such order shall be served on the person concerned.

The procedure in relation to forfeiture of property is contained in Sections 68H and 68I thereof in the following terms:

68H. Notice of forfeiture of property - (1) If, having regard to the value of the properties held by any person to whom this Chapter applies, either by himself or through any other person on his behalf, his known sources of income, earnings or assets, and any other information or material available to it as a result of a report from any officer making an investigation under Section 68-E 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 a period of thirty days specified in the notice to indicate the sources of his income, earning 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

Chapter.

(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 be served upon such other person:

Provided that no notice for forfeiture shall be served upon any person referred to in Clause (cc) of Sub-section 68A or relative of a person referred to in that clause or associate of a person referred to in that clause or holder of any property which was at any time previously held by a person referred to in that clause.

68I. Forfeiture of property in certain cases - (1) The competent authority may, after considering the explanation, to the show cause notice issued, under Section 68H 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:

Provided that if the person affected (and in a case where the person affected holds any property specified in the notice through any other person such other person also) does not appear before the competent authority or represent his case before it within a period of thirty days specified in the show-cause notice, the competent authority may proceed to record finding under this sub-section ex parte on the basis of evidence available before it.

(2) Where the competent authority is satisfied that some of the properties referred to in 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 (2).

(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 Chapter, stand forfeited to the Central Government free from all encumbrances.

Provided that no illegally acquired property of any person who is referred to in Clause (cc) of Sub-section (2) of Section 68A or relative of a person referred to in that clause or associate of a person referred to in that clause or holder of any property which was at any time previously held by a person referred to in that clause shall stand forfeited.

(4) Where any shares in a company stand forfeited to the Central Government under this Chapter, then, the company shall, notwithstanding anything contained in the Companies Act, 1956 or the articles of association of the company, forthwith register the Central Government as the transferee of such shares.

Section 68J provides for burden of proof as;

68J. Burden of proof - In any proceedings under this Chapter, the burden of proving that any property specified in the notice served under Section 68H is not illegally acquired property shall be on the person affected.

Section 68W provides:

68W. Findings under other laws not conclusive for proceedings under this Chapter - No finding of any officer or authority under any other law shall be conclusive for the purposes of any proceedings under this Chapter.

THE PROCEEDINGS

10. The Show Cause Notice was issued on 17.12.1999. It detailed as many as forty items of properties. In their reply to show cause notice, noticees-appellants contended that they were concerned only with 11 properties which was accepted. Proceedings in respect of the unrelated properties were dropped and, thus, continued in respect of the said 11 properties stating:

27. After the replies to the Show Cause Notice were received from the affected person it was found that many of the properties were disclaimed by them. This necessitated further verification and enquiries were conducted and it was found that most of the properties are under ownership/possession of different persons who are not noticees. The affected person have disclaimed the properties mentioned at Sl. Nos. 6, 7, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 38. It was further informed that the properties at Sl. No. 36 i.e., (i) Rabia Mansion (ii) Mariam Lodge and (iii) Sea View are owned by "Sir Mohammed Yusuf Trust". It was further stated that the properties at sr. Nos. 3 and 33 are not owned by them but are tenanted properties. After preliminary inquiries conducted by office it was felt that in these cases provisions of Section 68-H(2)/68L of the NDPS Act need to be complied with and therefore, in the interest of justice it has been decided to take up those cases separately. This order, therefore, is confined only to the properties which have been claimed by the affected persons, i.e., properties at Sl. Nos. 1, 2, 4, 5, 8, 9, 10, 11, 12, 28, 29, 30, 31, 32, 34, 35, 37 and 39.

The material part of the said show cause notice is contained in paragraphs 15 and 16 thereof which read as under:

15. Whereas AP1 had been absconding since the issue of the detention order and is reportedly living in England with AP3. Exhaustive investigations into the properties of the AP1 by various enforcement agencies including the Anti-Narcotic Cell, C.B. C.I.D. /C.B.I. Mumbai had resulted in issue of freezing orders in respect of 11 properties in the name of AP1 & AP3 and 5 others. These freezing orders were confirmed by the then Competent Authority, SAFEMA/NDPS, Mumbai. The Aps filed detailed and voluminous submissions before the Competent Authority which included Income-tax and Wealth-tax returns and other relevant documents. On the basis of these submissions, the then Competent Authority released 7 properties and forfeited the remaining 4 to the Central Government free from all encumbrances. It is pertinent to note that the 4 properties which were finally forfeited were in the name of AP3 with one property jointly held with AP1. The Aps could not prove the legality of the sources by which these properties were acquired by them. The property in question now are jointly held by AP1 to AP11 in similar manner.

These properties have never found any mention in the submissions made by the APs nor they were declared by the Aps in the proceedings under Chapter V A of the NDPS Act considered by the then Competent Authority nor it was disclosed to any enforcement agencies in any manner.

16. Whereas considering the above and the background of AP1 and his involvement in drug smuggling & in drug trafficking on a massive scale and also the fact that AP2 to AP11 have no source of legal income of their own by means of which they could have acquired such huge and valuable properties mentioned hereinbefore, I have reason to believe that the said properties and assets as mentioned in para 14 have been acquired from the illegal income or source generate or earned by AP1 through or out of drug trafficking and have to be considered as illegally acquired property as defined under Sub-section (g) of Section 68B of the NDPS Act.

11. From a perusal of the said notice to show cause, it is evident that admittedly another proceeding had been initiated against them.

12. Four properties were directed to be forfeited; seven were released.

13. The second proceedings with which we are concerned herein continued in respect of the 11 properties. Indisputably again in the earlier proceedings, income tax returns had been brought on records.

14. The relevant provisions of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (for short "SAFEMA") and Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) are in pari materia.

15. Contentions were raised that the show cause notice shows complete non-application of mind on the part of the competent authority, as ;

(i) 28 unconnected properties including the property of Late Fatima Amin which formed part of the separate proceeding had been included.

(ii) The properties mentioned therein had never been mentioned by the appellants in the previous proceedings, although they did not form part thereof.

ISSUE

16. The core question which, therefore, arises for consideration is what are the statutory requirements for initiating a valid proceeding.

INTERPRETATION

17. Chapter VA contains stringent provisions. It provides for forfeiture of property. Such property, however, as the heading of the Chapter shows, must be derived from or used in illicit traffic. Illegally acquired property in relation to any person to whom the chapter applies would mean only such property which was acquired wholly or partly out of or by means of any income attributable to the contravention of any provision of the Act or for a consideration wholly or partly traceable to any property referred to in Sub-clause (i) or the income or earning from property.

18. 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.

19. The property having regard to the said definition would include any of the properties described therein and deeds of instruments evidencing interest therein derived from or used in the illicit traffic.

In the aforementioned context, the word "person" also assumes importance which leads to determining the nature, source, disposition, movement, title or ownership of the property. Direction to forfeiture of a property is in two parts. Firstly, it has to be identified in terms of Section 68F of the Act. For the said purpose, a satisfaction must be arrived at by the authority specified therein to the effect that the person concerned had been holding any illegally acquired property. Secondly, on the basis of such information, he is entitled to take steps for tracing and identifying the property.

The Authority is also entitled to seize or freeze such a property.

20. Before, however, 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 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 68E of the Act or otherwise.

21. When the aforementioned conditions are satisfied, the competent authority would be entitled to issue a show cause notice, if he has reason to believe, wherefore reasons are to be recorded in writing that the properties are illegally acquired properties.

22. Once the notice to show cause is found to be satisfying the statutory requirements which are condition precedent therefor, a valid proceeding can be said to have been initiated for forfeiture of the property. Only in a case where a valid proceeding has been initiated, the burden of proof that any property specified in the notice is not illegally acquired property, would be on the 'person' affected.

23. Before, however, an order of forfeiture can be passed, the Competent Authority must not only comply with the principles of natural justice, he is also 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

24. The competent authority has a vast power as is provided under Section 68R of the Act. He 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 the said chapter.

Analysis of the aforementioned provisions clearly establish that a link must be found

between the property sought to be forfeited and the income or assets or properties which were illegally acquired by the person concerned.

25. We may, however, at this juncture also notice that during the course of the proceedings, the learned advocate of the appellants by a letter dated 19.2.2000 requested the competent authority to supply the reasons for issuing the notice. In response thereto, the prescribed authority by a letter dated 23.2.2000, stated that the reasons had been incorporated in the respective show cause notices. Evidently, therefore, no other reason was available for being supplied.

26. We may also notice some observations made in the proceeding sheet of the Competent Authority dated 29.12.2000 which is in the following terms:

On going through the certificate in respect of SP/Satara it may be seen that they have simply informed details of the ownership in re present and past only. Nowhere they have mentioned in clear words whether nexus between the present holder and sh. Iqbal mirchi is there nor are properties claimed by sh. Iqbal mirchi and his family members mentioned in Show Cause Notice dated 17/11. as per (illegible) association/ nexus of present holder of properties between iqbal mirchi can't be established as still they are silent on the issue. However, the matter shall be decided on merits by C.A. during the course of proceedings. Put up for instructions.

It shows that till the said date, no material had been brought on record to show that any nexus or a link between the properties sought to be forfeited and thus in case of 'Mirchi' it was merely a perception of the competent authority alone.

27. We are unable to accept the contention of Mr. Raju Ramchandran, the learned senior counsel appearing for the appellants that only because a large number of properties had been mentioned in the show cause notice, the same by itself is demonstration of complete non-application of mind on the part of the competent authority. Identification of such a property although might have been made in an inquiry made by the officer in-charge of a Police Station; however, when the proceeding was initiated, the question as to whether such properties were illegally acquired properties or not, was required to be ultimately determined by the competent authority alone.

28. It is, however, beyond any doubt or dispute that a proper application of mind on the part of the competent authority is imperative before a show cause notice is issued.

Section 68H of the 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 68E 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 said Act as properties sought to be forfeited must have a direct nexus with the properties illegally acquired.

29. It is now a trite law that whenever a statute provides for 'reason to believe', either the reasons should appear on the face of the notice or they must be available on the materials which had been placed before him.

We have noticed hereinbefore that when the authority was called upon to disclose the reasons, it was stated that all the reasons were contained in the show cause notices themselves. They, however, in our opinion, do not contain any reason so as to satisfy the requirements of Sub-section (1) of Section 68H of the Act.

A Constitution Bench of this Court in Attorney General for India and Ors. v. Amratlal Prajivandas and Ors. MANU/SC/0774/1994 : 1995CriLJ426 while considering the validity of the provisions of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, opined:

44...The relatives and associates are brought in only for the purpose of ensuring that the illegally acquired properties of the convict or detenu, acquired or kept in their names, do not escape the net of the Act. It is a well-known fact that persons indulging in illegal activities screen the properties acquired from such illegal activity in the names of their relatives and associates. Sometimes they transfer such properties to them, may be, with an intent to transfer the ownership and title. In fact, it is immaterial how such relative or associate holds the properties of convict/detenu-whether as a benami or as a mere name-lender or as a bona fide transferee for value or in any other manner. He cannot claim those properties and must surrender them to the State under the Act. Since he is a relative or associate, as defined by the Act, he cannot put forward any defence once it is proved that that property was acquired by the detenu-whether in his own name or in the name of his relatives and associates....

Holding that such provisions had been enacted to counteract several devices that may be adopted by the persons concerned, it was stated:

By way of illustration, take a case where a convict/detenu purchases a property in the name of his relative or associate-it does not matter whether he intends such a person to be a mere name lender or whether he really intends that such person shall be the real owner and/or possessor thereof-or gifts away or otherwise transfers his properties in favour of any of his relatives or associates, or purports to sell them to any of his relatives or associates-in all such cases, all the said transactions will be ignored and the properties forfeited unless the convict/detenu or his relative/associate, as the case may be, establishes that such property or properties are not "illegally acquired properties" within the meaning of Section 3(c). In this view of the matter, there is no basis for the apprehension that the independently acquired properties of such relatives and associates will also be forfeited even if they are in no way connected with the convict/detenu. So far as the holders (not being relatives and associates) mentioned in Section 2(2)(e) are concerned, they are dealt with on a separate footing. If such person proves that he is a transferee in good faith for consideration, his property-even though purchased from a convict/detenu-is not liable to be forfeited. It is equally necessary to reiterate that the burden of establishing that the properties mentioned in the show-cause notice issued under Section 6, and which are held on that date by a relative or an associate of the convict/detenu, are not the illegally acquired properties of the

convict/detenu, lies upon such relative/associate. He must establish that the said property has not been acquired with the monies or assets provided by the detenu/convict or that they in fact did not or do not belong to such detenu/convict.

The relevant portion of the summary of the said judgment reads as under:

(4) The definition of "illegally acquired properties" in Clause (c) of Section 3 of SAFEMA is not invalid or ineffective.

(5) The application of SAFEMA to the relatives and associates [in Clauses (c) and (d) of Section 2(2)] is equally valid and effective inasmuch as the purpose and object of bringing such persons within the net of SAFEMA is to reach the properties of the detenu or convict, as the case may be, wherever they are, howsoever they are held and by whomsoever they are held. They are not conceived with a view to forfeit the independent properties of such relatives and associates as explained in this judgment. The position of 'holders' dealt with by Clause (e) of Section 2(2) is different as explained in the body of the judgment.

30. A similar question again came up before a Three Judges' Bench of this Court in Fatima Mohd. Amin (Smt.) (Dead) Through LRs. v. Union of India and Anr. MANU/SC/0291/2003 : 2003(85)ECC723 , wherein relying upon Amratlal Prajivandas (supra), it was held;

7. ...We do not find any averments to the effect that the property acquired by the appellant is a benami property of her son or the same was illegally acquired from her son.

8. The contents of the said notices, even if taken at their face value do not disclose any reason warranting action against the appellant. No allegation whatsoever has been made to this effect that there exists any link or nexus between the property sought to be forfeited and the illegally acquired money of the detenu(s).

9. As the condition precedent for initiation of the proceedings under SAFEMA did not exist, the impugned orders of forfeiture cannot be sustained. In that view of the matter, the appeals deserve to be allowed. The order under challenge is set aside.

31. Our attention, however, has been drawn to a decision of a two Judge Bench of this Court in Kesar Devi (Smt.) v. Union of India and Ors. MANU/SC/0528/2003 : 2003CriLJ3750 wherein Fatima Mohd. Amin (supra) was distinguished by a Bench of this Court, inter alia, 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, stating;

10....The condition precedent for issuing a notice by the competent authority under Section 6(1) is that he should have reason to believe that all or any of such properties are illegally acquired properties and the reasons for such belief have to be recorded in writing. The language of the section does not show that there is any requirement of mentioning any link or nexus between the convict or detenu and the property ostensibly standing in the name of the person to whom the notice has been issued....

13. We are, therefore, clearly of the opinion that under the scheme of the Act, there is no requirement on the part of the competent authority to mention or establish any nexus or link between the money of the convict or detenu and the property sought to be forfeited. In fact, if such a condition is imposed, the very purpose of enacting SAFEMA would be frustrated, as in many cases it would be almost impossible to show that the property was purchased or acquired from the money provided by the convict or detenu. In the present case, the appellant is the wife of the detenu and she has failed to establish that she had any income of her own to acquire the three properties. In such circumstances, no other inference was possible except that it was done so with the money provided by her husband.

32. We, with utmost respect to the learned Judges express our inability to agree to the said observations. The necessity of establishing link or nexus in our opinion is writ large on the face of the statutory provision as would appear from the definition of 'illegally acquired property' as also that of 'property'. The purport and object for which the Act was enacted point out to the same effect.

33. Fatima Mohd. Amin (supra) was followed by a Bench of this Court in P.P. Abdulla v. Competent Authority MANU/SC/8782/2006 : 2007CriLJ1449 , wherein it was observed:

7. Learned Counsel submitted that it has been expressly stated in Section 6(1) that the reason to believe of the competent authority *must be recorded in writing*. In the counter-affidavit it has also been stated in para 8 that the reasons in the notice under Section 6(1) were recorded in writing. In our opinion this is not sufficient. Whenever the statute requires reasons to be recorded in writing, then in our opinion it is incumbent on the respondents to produce the said reasons before the court so that the same can be scrutinised in order to verify whether they are relevant and germane or not. This can be done either by annexing the copy of the reasons along with the counter-affidavit or by quoting the reasons somewhere in the counter-affidavit. Alternatively, if the notice itself contains the reason of belief, that notice can be annexed to the counter-affidavit or quoted in it. However, all that has not been done in this case.

8. It must be stated that an order of confiscation is a very stringent order and hence a provision for confiscation has to be construed strictly, and the statute must be strictly complied with, otherwise the order becomes illegal.

It was also observed:

10. In the present case, in the notice dated 15-3-1988 issued to the appellant under Section 6(1) of the Act (copy of which is annexed as Annexure P-1 to this appeal), it has not been alleged therein that there is any such link or nexus between the property sought to be forfeited and the alleged illegally acquired money of the appellant.

34. In the final order, the rule of evidence as envisaged under Section 68-I read with Section 68J of the Act must be applied. 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 detenu. Such a formation of belief is essential.

35. Mr. B.B. Singh, however, has drawn our attention to a decision of this Court in State of Gujarat and Anr. Etc. v. Mehboob Khan Usman Khan Etc. MANU/SC/0067/1968 : 1969CriLJ26 .

This Court therein, was considering the provisions of the Bombay Police Act of 1951. The said statute postulated externment of the noticee on the basis of 'general allegations' made against him Keeping in view the statutory requirements, this Court opined that 'general allegations' made in the notice would subserve the statutory requirements stating:

...Without attempting to be exhaustive we may state that when a person is stated to be a "thief", that allegation is vague. Again, when it is said that "A stole a watch from X on a particular day and at a particular place", the allegation can be said to be particular. Again, when it is stated that "X is seen at crowded bus stands and he picks pockets" it is of a general nature of a material allegation. Under the last illustration, given above, will come the allegations, which, according to the Gujarat High Court, suffer from being too general, or vague. Considering it from the point of view of the party against whom an order of externment is proposed to be passed, it must be emphasized that when he has to tender an explanation to a notice, under Section 59, he can only give an explanation, which can be of a general nature. It may be open to him to take a defence, of the action being taken, due to mala fides, malice or mistaken identity, or he may be able to tender proof of his general good conduct, or alibi, during the period covered by the notice and the like. The allegations made in the notices, issued under Section 59, as against the respective respondents, in our opinion, contain the general nature of the material allegations made against each of them, in respect of which the respondents had been given a reasonable opportunity of tendering an explanation, regarding them....

(emphasis supplied)

This Court, therefore, in the fact situation obtaining in the said case was satisfied as regards compliance of the statutory requirements. General or vague allegations in a case of this nature would not subserve the statutory purposes and objects.

36. Reliance has also been placed on Pandharinath Shridhar Rangnekar v. Dy. Commr. of Police, State of Maharashtra MANU/SC/0200/1972 : 1973CriLJ612 . Therein again the provisions of the Bombay Police Act were involved.

The said decision ex-facie has no application to the fact of the present case.

REASON TO BELIEVE

37. This brings us to the next question as to what does the term "reason to believe" mean. We may in this behalf notice some precedents operating in the field.

38. In the context of the provisions of Section 147 of the Income Tax Act, this Court in Phool Chand Bajrang Lal v. ITO MANU/SC/0361/1993 : [1993]203ITR456(SC) held:

From a combined review of the judgments of this Court, it follows that an Income-tax Officer acquires jurisdiction to reopen an assessment under Section 147(a) read with Section 148 of the Income-tax Act, 1961, only if on

the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming this belief is not for the court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief.

See also Income Tax Officer v. Lakshmani Mewal Das MANU/SC/0241/1976 : [1976]103ITR437(SC) .

In Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd. MANU/SC/2389/2007 : [2007]291ITR500(SC) , interpreting the term 'reason to believe' as used under Section 247(a) of the Income Tax Act, 1961, it was opined:

To confer jurisdiction under Section 247(a) two conditions were required to be satisfied firstly the AO must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the AO could have jurisdiction to issue notice under Section 148 read with Section 147(a). But under the substituted Section 147 existence of only the first condition suffices. In other words, if the assessing officer for whatever reason has reason to believe that income has escaped assessment, it confers jurisdiction to reopen the assessment.

NON APPLICATION OF MIND

Applying these tests, it is evident that the statutory requirements have not been fulfilled in the present case.

39. Non-application of mind on the part of the competent officer would also be evident from the fact that a property named 'Rose Villa' which was the subject matter of the decision of this Court in Fatima Amin (supra), was also included herein.

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

40. In Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Anr. MANU/SC/3182/2007 : [2007]291ITR519(SC) , this Court held:

86. It is of some significance that in the standard pro forma used by the assessing officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the assessing officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. (*See Malabar Industrial Co. Ltd. v. CIT*)

RECORDING OF REASONS

41. Submission of Mr. Singh that the appellants have not been able to discharge the burden of proof which was on them from the impugned orders, it would appear that they have utterly failed to prove their own independent income; they being close relative of the detune as in terms of the statutory requirements , it was for them to show that they had sufficient income from those properties.

42. Had the show cause notice been valid, Mr. B.B. Singh, might have been right, but if the proceedings themselves were not initiated validly, the competent authority did not derive any jurisdiction to enter into the merit of the matter.

Legality and/or validity of the notice had been questioned at several stages of the proceedings. Despite their asking, no reason was disclosed by the authority to the appellants. They had asked for additional reasons, if any, which were not reflected in the show cause notices. None was disclosed.

43. It is also relevant to notice that the High Court opined that there had been a proper application of mind on the part of the Competent Authority and Appellate Tribunal as they had released some items of properties. Application of mind on the part of the Competent Authority and the Appellate Tribunal at the subsequent stage was not in question; what was in question was non application of mind on the part of the authority prior to issuance of the notice.

CONCLUSION

44. We are not unmindful of the purport and object of the Act. Dealing in narcotics is a social evil that must be curtailed or prohibited at any cost. Chapter VA seeks to achieve a salutary purpose. But, it must also be borne in mind that right to hold property although no longer a fundamental right is still a constitutional right. It is a human right.

The provisions of the Act must be interpreted in a manner so that its constitutionality is upheld. The validity of the provisions might have received constitutional protection, but when stringent laws become applicable as a result whereof some persons are to be deprived of his/her right in a property, scrupulous compliance of the statutory requirements is imperative.

45. For the reasons aforementioned, the impugned judgments cannot be sustained.

They are set aside accordingly. The appeals are allowed. However, it would be open to the respondents to initiate fresh proceeding (s) in accordance with law, if they are so advised. In the facts and circumstances of the case, we make no order as to costs.

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