Supreme Court of India
Biswanath Bhattacharya vs Union Of India & Ors on 21 January, 1947
Bench: H.L. Gokhale, J. Chelameswar

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 772-773 OF 2014
[Arising out of SLP (Civil) Nos.16872-16873 of 2007]

Biswanath Bhattacharya …Appellant
Versus
Union of India & Others …Respondents

J U D G M E N T

Chelameswar, J.

1. Leave granted.

2. These two appeals are preferred against the final judgment dated 9th August 2007 passed by the Calcutta High Court in FMA No.206 of 2003 and order dated 30th August 2007 in Review Application bearing RVW No.2372 of 2007 dismissing the said review application filed by the appellant herein.

3. The facts leading to the instant litigation are as follows:

4. The appellant was initially detained by order dated 19.12.1974 under the provisions of the Maintenance of Internal Security Act, 1971 (since repealed) and later under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the "COFEPOSA") on the ground that he in collaboration with his brother, who was living in London at that point of time, was indulging in activities which are prejudicial to the conservation of foreign exchange. The appellant unsuccessfully challenged the detention order. He was eventually released in 1977.

5. While he was in custody, the second respondent issued a notice dated 4th March 1977 under section 6(1) of the Smugglers and Foreign Exchange Manipulators (Forefeiture of Property) Act, 1976 (hereinafter referred to as "the Act") calling upon the appellant to explain the sources of his income out of which he had acquired the assets described in the schedule to the notice. Some correspondence ensued between the second respondent on one hand and the wife of the appellant

and the appellant on the other hand, the details of which may not be necessary for the time being.

6. Eventually on 27th November 1989, the second respondent passed an order under section 7(1) of the Act forfeiting the properties mentioned in the schedule to the said order.

7. Aggrieved by the said order, an appeal was carried to the Appellate Tribunal constituted under section 12 of the Act. The appeal was partly allowed setting aside the forfeiture of two items of the properties.

8. Not satisfied with the Appellate Authority's conclusion, the appellant challenged the same in writ petition No. C.O. No.10543 (W) of 1991 before the High Court of Calcutta. In the said writ petition, the appellant also prayed for two declarations – (1) that the Act is illegal and ultra vires the Constitution and (2) that the detention of the appellant under the COFEPOSA by the order dated 19th December 1974 was illegal and void – a collateral and second round of attack.

9. Learned Single Judge of the Calcutta High Court by an order dated 10th May 2002 partly allowed the writ petition holding that the forfeiture of the property by the second respondent as confirmed by the Appellate Tribunal was illegal on the ground that the notice under section 6(1) of the Act dated 4th March 1977 was not in accordance with the law as the notice did not contain the reasons which constituted the basis for the belief of the competent authority that the appellant illegally acquired the scheduled properties.

10. Aggrieved by the order of the learned Single Judge, the respondents herein carried the matter in appeal to the Division Bench. By the judgment under appeal, the appeal was allowed.

11. It appears from the judgment under appeal that though the appellant sought a declaration that the Act (SAFEMA) is unconstitutional, such a plea was not pressed before the learned Single Judge.[1]

12. Before us, the appellant made three submissions – (1) that the notice issued under Section 6 of the Act is defective and therefore illegal as the notice did not contain the reasons which made the competent authority believe that the notice scheduled properties are illegally acquired properties. In other words, the reasons were not communicated to the appellant; (2) that the forfeiture, such as the one provided under the Act, is violative of Article 20 of the Constitution of India; and (3) in the alternative, it is argued – that the High Court failed to consider the question whether the decision of the competent authority as confirmed by the appellate authority is sustainable and therefore, the matter is required to be remitted to the High Court for an appropriate consideration of the legality of order of forfeiture.

13. Regarding the non communication of the reasons, the judgment under appeal recorded as follows:

> "The matter may be looked into from another angle. In 1976 he was under detention. His wife replied to the said notice without complaining of non-supply of reasoning.

> After his release the respondent No.1 gave a further rejoinder by adopting what had been said by his wife. The authority did not proceed against him until he was served with the reasoning in 1988. The respondent No.1 was also afforded opportunity to deal with the reasonings in his rejoinder. The competent authority after affording him opportunity of hearing passed a detailed reasoned order. He preferred an appeal. The appeal was allowed in part that too by a detailed reasoned order. Hence, we do not find any reason to hold that the fundamental right of the respondent No.1 was infringed." It appears from the record that initially notice dated 4.3.1977 under Section 6(1) was issued at a point of time when the appellant was under preventive detention. Subsequently, by a communication dated 1st June, 1988, the recorded reasons for the belief which led to the issuance of notice under Section 6(1) of the Act was served on the appellant. The appellant not only filed a rejoinder to the said notice but he was also given a hearing before an order of forfeiture under Section 7 was passed.

It is in the background of the abovementioned facts we are required to consider the submission that the High Court erred in coming to the conclusion that notice under Section 6(1) did not vitiate[2] the subsequent proceedings.

14. In support of the submission, learned counsel for the appellant very heavily relied upon a judgment of this Court in Ajantha Industries and others v. Central Board of Direct Taxes and others, (1976) 1 SCC 1001. It was a case where this court had to consider the legality of the order under Section 127 transferring the 'case' of the Ajantha Industries.

15. Section 127 of the Income Tax Act, 1961 empowers the authorities (mentioned therein) to transfer "any case" (explained in the said section) from one Income Tax Officer to another. Further, the section stipulates that before such an order of transfer is made, two conditions are required to be complied with – (1) that the assessee must be given a reasonable opportunity to explain why his case should not be transferred; and (2) the authority transferring the case is required to record the reasons which led him to initiate the proceedings. It appears from the judgment that though first of the abovementioned two requirements was complied with, it was found that no reasons were recorded much less communicated. Dealing with the legality of such an order, this Court held that there is a requirement of not only recording the reasons for the decision to transfer the case but also such reasons are required to be communicated to the assessee.

16. Though section 127 expressly provided for recording of reasons it did not expressly provide communicating the same to the assessee. Still, this Court held that such a communication is mandatory. "10. The reason for recording of reasons in the order and making these reasons known to the assessee is to enable an opportunity to the assessee to approach the High Court under its writ jurisdiction under Article 226 of the Constitution or even this Court under Article 136 of the Constitution in an appropriate case for challenging the order, inter alia, either on the ground that it is mala fide or arbitrary or that it is based on irrelevant and extraneous considerations. Whether such a writ or special leave application ultimately fails is not relevant for a decision of the question.

11. We are clearly of opinion that the requirement of recording reasons under Section 127(1) is a mandatory direction under the law."

17. In our view, such a conclusion must be understood in the light of the observation of the Court that there was no provision of appeal or revision under the Income Tax Act against an order of transfer. For the same reason, this Court distinguished and declined to follow an earlier judgment in S. Narayanappa v. The Commissioner of Income-tax AIR 1967 SC 523 where this Court on an interpretation of Section 34 of the Income Tax Act, 1922, opined to the contra. Section 34 provided for re-opening of the assessment with the prior sanction of the Commissioner, if the income tax officer has 'reasons to believe' that taxable income had been under-assessed. Dealing with the question whether the reasons which led the Commissioner to accord sanction for the initiation of proceedings under section 34 are required to be communicated to the assessee, this Court held – "There is no requirement in any of the provisions of the Act or any section laying down as a condition for the initiation of the proceedings that the reasons which induced the Commissioner to accord sanction to proceed under S.34 must be communicated to the assessee."

18. In Ajantha Industries case, Narayanappa's case was distinguished on the ground – "When an order under Section 34 is made the aggrieved assessee can agitate the matter in appeal against the assessment order, but an assessee against whom an order of transfer is made has no such remedy under the Act to question the order of transfer. Besides, the aggrieved assessee on receipt of the notice under Section 34 may even satisfy the Income-tax Offier that there were no reasons for reopening the assessment. Such an opportunity is not available to an assessee under Section 127(1) of the Act. The above decision is, therefore, clearly distinguishable."

19. We reject the submission of the appellant for the following reasons. Firstly, there is no express statutory requirement to communicate the reasons which led to the issuance of notice under Section 6 of the Act. Secondly, the reasons, though not initially supplied alongwith the notice dated 4.3.1977, were subsequently supplied thereby enabling the appellant to effectively meet the case of the respondents. Thirdly, we are of the opinion that the case on hand is squarely covered by the ratio of Narayanappa case. The appellant could have effectively convinced the respondents by producing the appropriate material that further steps in furtherance to the notice under Section 6 need not be taken. Apart from that, an order of forfeiture is an appealable order where the correctness of the decision under Section 7 to forfeit the properties could be examined. We do not see anything in the ratio of Ajantha Industries case which lays down a universal principle that whenever a statute requires some reasons to be recorded before initiating action, the reasons must necessarily be communicated.

20. Now, we deal with the second submission. The Act enables the Government of India to forfeit "illegally acquired property" of any person to whom the Act is made applicable. The Act is made applicable to the persons specified in section 2(2)[3]. Five categories of persons are covered thereunder. Clause (a) – persons who have been convicted under various enactments referred to therein; clause (b) - persons in respect of whom an order of detention has been made under the COFEPOSA (subject to certain conditions/exceptions the details of which are not necessary for our purpose); clause (c) – persons who are relatives of persons referred to in clause (a) or clause (b).

Expression "relative" is itself explained in explanation 2. Clause (d) – every associate of persons referred to in clause (a) or clause (b). Once again the expression "associate" is explained under explanation 3 to sub-section (2). Clause (e) – subsequent holders of property which at some point of time belonged to persons referred to either in clause (a) or clause (b).

21. Section 4 makes it unlawful (for any person to whom the Act applies) to hold any illegally acquired property and it further declares that such property shall be liable to be forfeited to the Central Government (following the procedure prescribed under the Act). The procedure is contained under sections 6 and 7 of the Act. Section 8 prescribes the special rule of evidence which shifts the burden of proving that any property specified in the notice under section 6 is not illegally acquired property of the noticee. Section 6 inter alia postulates that having regard to the value of the property held by any person (to whom the Act applies) and his known sources of income, if the "competent authority" (notified under section 5) has reason to believe that such properties are "illegally acquired properties", the competent authority is authorized to call upon the holder of the property to 'indicate' the source of his income etc. which enabled the acquisition of such property along with necessary evidence. It also authorizes the competent authority to call upon the noticee to show cause as to why all or any of such properties mentioned in the notice should not be declared illegally acquired properties and be forfeited to the Central Government. Section 7 provides for a reasonable opportunity of being heard after the receipt of response to the notice under section 6 to the noticee and requires the competent authority to record a finding whether all or any of the properties in question are illegally acquired properties. Section 7 also provides for certain incidental matters the details of which are not necessary for the present purpose.

22. Expression "illegally acquired property" is defined in elaborate terms under the Act[4]. Broadly speaking the definition covers two types of properties:

1) acquired by the income or earnings; and
2) assets derived or obtained

from or attributable to any activity which is prohibited by or under a law in force. Such law must be a law with respect to which parliament has the power to make law. A complete analysis of the definition in all its facets may not be necessary for our purpose.

23. From the language and the scheme of the Act it does not appear that the application of the Act is limited to persons who either suffered a conviction under one of the acts specified in section 2(2)(a) the Act or detained under the COFEPOSA subsequent to the commencement of the Act in question. On the other hand, explanation 4 to section 2 expressly declares as follows:

> "Explanation 4.—For the avoidance of doubt, it is hereby provided that the question whether any person is a person to whom the provisions of this Act apply may be determined with reference to any facts, circumstances or events (including any conviction or detention which occurred or took place before the commencement of this Act)." Apart from that we have already taken note of the fact that there are other categories of persons to whom the Act applies.

24. The appellant happens to be a person to whom the Act applies. He was detained under the provisions of the COFEPOSA. However, such a detention was anterior to the commencement of the Act, which came into force on 25th January 1976, while the detention order was passed on 19th December 1974. It appears from the judgment under appeal that the appellant was eventually set at liberty in 1977.

25. Section 7(3) of the Act provides for forfeiture of the illegally acquired property of the persons to whom the Act is made applicable after an appropriate enquiry contemplated under Sections 6 and 7 of the Act. In other words, the Act provides for the deprivation of the (illegally acquired) property of the persons to whom the Act applies. The question which we were called upon to deal with is whether such a deprivation is consistent with Article 20[5] of the Constitution of India in the specific factual setting of the case coupled with the explanation 4 to section 2 which reads as follows:

> "Explanation 4.—For the avoidance of doubt, it is hereby provided that the question whether any person is a person to whom the provisions of this Act apply may be determined with reference to any facts, circumstances or events (including any conviction or detention which occurred or took place before the commencement of this Act)." The answer to the question depends upon whether such deprivation is a penalty within the meaning of the said expression occurring in Article 20.

26. Article 20 contains one of the most basic guarantees to the subjects of the Republic of India. The Article in so far as is relevant for our purpose stipulates two things:-

> ? That no person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence; and ? That no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

27. It is a well settled principle of constitutional law that sovereign legislative bodies can make laws with retrospective operation; and can make laws whose operation is dependent upon facts or events anterior to the making of the law. However, criminal law is excepted from such general Rule, under another equally well settled principle of constitutional law, i.e. no ex post facto legislation is permissible with respect to criminal law. Article 20 contains such exception to the general authority of the sovereign legislature functioning under the Constitution to make retrospective or retroactive laws.

28. The submission of the appellant is that since the Act provides for a forfeiture of the property of the appellant on the ground that the appellant was detained under the COFEPOSA, the proposed forfeiture is nothing but a penalty within the meaning of the expression under Article 20 of the Constitution. Such an inference is inevitable in the light of the definition of "illegally acquired property" which by definition (under the Act) is property acquired either "out of" or by means "of any income, earnings ..." "obtained from or attributable to any activity prohibited by or under any law ...". On the other hand, if the forfeiture contemplated by the Act is not treated as a penalty for the alleged violation of law on the part of the appellant, it would be plain confiscation of the

property of the appellant by the State without any factual justification or the constitutional authority.

29. The learned counsel for the appellant further argued that the forfeiture contemplated under the Act whether based on proven guilt or suspicion of involvement in a certain specified activity prohibited by the Customs Act can only be a 'penalty' attracting the prohibition of Article 20 of the Constitution of India. It is submitted that under Section 53[6] of the Indian Penal Code, forfeiture of property is one of the prescribed punishments for some of the offences covered under the Indian Penal Code.

30. Learned counsel for the appellant placing reliance on R.S. Joshi, Sales Tax Officer, Gujarat and Others v. Ajit Mills Ltd. and Another, (1977) 4 SCC 98 submitted that a Constitution Bench of this Court also opined the expression "forfeiture" to mean "a penalty for breach of a prohibitory direction".[7]

31. On the other hand, the learned Addl. Solicitor General appearing for the respondent submitted that the forfeiture contemplated under the Act is not a 'penalty' within the meaning of that expression occurring in Article 20 but only a deprivation of property of a legislatively identified class of persons – in the event of their inability to explain (to the satisfaction of the State) that they had legitimate sources of funds for the acquisition of such property. The learned Addl. Solicitor General further submitted that while in the case of that class of persons covered under Section 2(2)(a) of the Act, the forfeiture though has a remote connection with the commission of a crime and conviction; with reference to the other four classes of persons to whom the Act is made applicable under Section 2(2) (b) to (e), the forfeiture has nothing to do with any crime or conviction. Therefore, to say that the forfeiture under the Act is hit by the prohibition under Article 20 is without any basis in law. The learned Addl. Solicitor General also relied upon The State of West Bengal v. S.K. Ghosh, [AIR 1963 SC 255] and R.S. Joshi (supra) in support of his submission. Alternatively, the learned Addl. Solicitor General submitted that in view of the fact that the Act is included in the Ninth Schedule, the Act is immune from any attack on the ground that it violates any one of the fundamental rights contained in Part III of the Constitution of India, as was held by a Constitution Bench of this Court in Attorney General for India & Others v. Amratlal Prajivandas and others (1994) 5 SCC 54.

32. Lord Green in Bidie v. General Accident, Fire and Life Assurance Corporation [(1948) 2 All ER 995 at 998] said in the context of ascertaining the meaning of an expression in any statute that "Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context".

33. Chief Justice Sikri in His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another (1973) 4 SCC 225 dwelt on this subject referring to two English decisions and one American decision stating in substance that the meaning of a word occurring in a statute cannot be ascertained without examining the context and also the scheme of the Act in which the expression occurs.[8]

34. The regime of forfeiture of property contemplated under the Act is not new. At least from 1944 such a regime (though not identical but similar to the impugned one) is prevalent in this country.

Two ordinances were made in 1943 and 1944, subsequently amended by another ordinance in 1945, all called Criminal Law Amendment Ordinances, which continued to be in force in this country by virtue of operation of Article 372 and some anterior laws - the details of which may not be necessary for the present purpose. Under the 1943 Ordinance, two special Tribunals were constituted to try cases allotted to them "in the first Schedule in respect of such charges of offence prescribed under the second Schedule etc.". Essentially, such cases were cases either of charge of receipt of illegal gratification by a public servant or embezzlement of public money etc. The 1944 Ordinance provided for the attachment of the money or other property which is believed to have been procured by means of one of the above mentioned scheduled offences by the offender. Such attached property is required to be disposed of as provided under section 13 of the said Ordinance. Under Section 12 of the Ordinance, the Criminal Court trying a scheduled offence is obliged to ascertain the amount or value of the property procured by the accused by means of the offence. Under section 13(3), it is provided that so much of the attached property referred to earlier equivalent to the value ascertained by the Criminal Court under section 12 is required to be forfeited to the State.

35. Dealing with the question – whether such forfeiture (in the factual setting of the case) violated Article 20 of the Constitution of India?, a Constitution Bench of this Court held that the forfeiture contemplated in the Ordinance was not a penalty within the meaning of Article 20 but it is only a speedier mode of recovery of the money embezzled by the accused.[9]

36. In R.S. Joshi case, the question was whether it was permissible for the State Legislature to enact that sums collected by dealers by way of sales tax but are not exigible under the State Law – indeed prohibited by it – shall be forfeited to the exchequer.

37. The question - whether such a forfeiture was a penalty violating Article 20 did not arise in the facts of that case. The discussion revolved around the question - whether such a forfeiture is a penalty for the violation of a prohibition contained under section 46 of the relevant Sales Tax Act? The contravention of section 46 is made punishable with imprisonment and fine under section 63 of the said Act. Apart from that, section 37 of the said Act provided for a departmental proceeding against the dealers who violated the prohibition under section 46. The said departmental proceeding could result in the forfeiture of ".. any sums collected by any person by way of tax in contravention of section 46 ..". The legal issue before this Court was – whether the State Legislature had necessary competence to provide for such forfeiture? The answer to the query depended upon whether such a forfeiture is a penalty for the violation of law made by the State for the levy and collection of sales tax. If it is not a penalty but a plain transfer of money (illegally collected by the dealer) to the State it would be incompetent for the legislature to make such a provision in the light of an earlier Constitution Bench decision of this Court in R. Abdul Quader & Co. v. STO, AIR 1964 SC 922.[10]

38. As explained above, the issue and the ratio decidendi of R.S. Joshi case is entirely different and has nothing to do with the application of Article 20 of the Constitution of India.

39. To understand the exact nature of the forfeiture contemplated under the (SAFEMA) Act it is necessary to examine the nature of the property which is sought to be forfeited and also the persons from whom such forfeiture is sought to be made. As already noticed, the Act is made applicable to

five classes of persons specified under section 2. In other words, the properties of persons belonging to any one of the said five categories only could be forfeited under the Act. Even with reference to the properties held by any one falling under any of the abovementioned five categories, their entire property cannot be forfeited except the property which is determined to be illegally acquired property as defined under section 3(c) of the Act. Of all the five categories of persons to whom the Act is made applicable, only one category specified under section 2(2)(a) happens to be of persons who are found guilty of an offence under one of the enactments mentioned therein and convicted. The other four categories of persons to whom the Act is applicable are persons unconnected with any crime or conviction under any law while the category of persons falling under section 2(2)(b) are persons who are believed by the State to be violators of law. The other three categories are simply persons who are associated with either of the two categories mentioned in section 2(2)(a) and (b). At least with reference to the four categories other than the one covered by section 2(2)(a), the forfeiture/deprivation of the property is not a consequence of any conviction for an offence.

40. Therefore, with reference to these four categories, the question of violation of Article 20 does not arise. Insofar as first category mentioned above, in our opinion, Article 20 would have no application for the reason, conviction is only a factor by which the Parliament chose to identify the persons to whom the Act be made applicable. The Act does not provide for the confiscation of the properties of all the convicts falling under Section 2(2)(a) or detenues falling under Section 2(2)(b). Section 6 of the Act authorises the competent authority to initiate proceedings of forfeiture only if it has reasons to believe (such reasons for belief are required to be recorded in writing) that all or some of the properties of the persons to whom the Act is applicable are illegally acquired properties. The conviction or the preventive detention contemplated under Section 2 is not the basis or cause of the confiscation but the factual basis for a rebuttable presumption to enable the State to initiate proceedings to examine whether the properties held by such persons are illegally acquired properties. It is notorious that people carrying on activities such as smuggling to make money are very clandestine in their activity. Direct proof is difficult if not impossible. The nature of the activity and the harm it does to the community provide a sufficiently rational basis for the legislature to make such an assumption. More particularly, Section 6 specifically stipulates the parameters which should guide the competent authority in forming an opinion, they are; the value of the property and the known sources of the income, earnings etc. of the person who is sought to be proceeded against. Even in the case of such persons, the Act does not mandate such an enquiry against all the assets of such persons. An enquiry is limited to such of the assets which the competent authority believes (to start with) are beyond the financial ability of the holder having regard to his known and legitimate sources of income, earnings etc. Connection with the conviction is too remote and, therefore, in our opinion, would not be hit by the prohibition contained under Article 20 of the Constitution of India.

41. If a subject acquires property by means which are not legally approved, sovereign would be perfectly justified to deprive such persons of the enjoyment of such ill-gotten wealth. There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth. Such a deprivation, in our opinion, would certainly be consistent with the requirement of Article 300A and 14 of the Constitution which prevent the State from arbitrarily depriving a subject of his property.

42. Whether there is a right to hold property which is the product of crime is a question examined in many jurisdictions. To understand the substance of such examination, we can profitably extract from an article published in the Journal of Financial Crime, 2004 by Anthony Kennedy.[11] "..It has been suggested that a logical interpretation of Art. 1 of the First Protocol of the European Convention on Human Rights is:

> 'Everyone is entitled to own whatever property they have (lawfully) acquired .....' hence implying that they do not have a right under Art. 1 to own property which has been unlawfully acquired. This point was argued in the Irish High Court in Gilligan v The Criminal Assets Bureau, namely that where a defendant is in possession or control over assets which directly or indirectly constitute the proceeds of crime, he has no property rights in those assets and no valid title to them, whether protected by the Irish Constitution or by any other law. A similar view seems to have been expressed earlier in a dissenting opinion in Welch v United Kingdom : 'in my opinion, the confiscation of property acquired by crime, even without express prior legislation is not contrary to Article 7 of the Convention, nor to Article 1 of the First Protocol.' This principle has also been explored in US jurisprudence. In United States v. Vanhorn a defendant convicted of fraud and money laundering was not entitled to the return of the seized proceeds since they amounted to contraband which he had no right to possess. In United States v Dusenbery the court held that, because the respondent conceded that he used drug proceeds to purchase a car and other personal property, he had no ownership interest in the property and thus could not seek a remedy against the government's decision to destroy the property without recourse to formal forfeiture proceedings. The UK government has impliedly adopted this perspective, stating that:
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> '.... It is important to bear in mind the purpose of civil recovery, namely to establish as a matter of civil law that there is no right to enjoy property that derives from unlawful conduct."

43. Non-conviction based asset forfeiture model also known as Civil Forfeiture Legislation gained currency in various countries: United States of America, Italy, Ireland, South Africa, UK, Australia and certain provinces of Canada.

44. Anthony Kennedy conceptualised the civil forfeiture regime in the following words:-

> "Civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice. It seeks to take illegally obtained property out of the possession of organised crime figures so as to prevent them, first, from using it as working capital for future crimes and, secondly, from flaunting it in such a way as they become role models for others to follow into a lifestyle of acquisitive crime. Civil recovery is therefore not aimed at punishing behaviour but at removing the 'trophies' of past criminal behaviour and the means to commit future criminal behaviour. While it would clearly be more desirable if successful criminal proceedings could be

instituted, the operative theory is that 'half a loaf is better than no bread'."

45. For all the above-mentioned reasons, we are of the opinion that the Act is not violative of Article 20 of the Constitution. Even otherwise as was rightly pointed out by the learned Addl. Solicitor General, in view of its inclusion in the IXth Schedule, the Act is immune from attack on the ground that it violates any of the rights guaranteed under Part III of the Constitution by virtue of the declaration under Article 31-B.

46. Now we are required to consider the alternative and last submission i.e., in view of the failure of the High Court to examine the tenability of the order of the forfeiture as confirmed by the appellate tribunal the matter is required to be remitted to the High Court for appropriate consideration. This submission is required to be rejected. We have carefully gone through the copy of the writ petition (a copy of which is available on record) from which the instant appeal arises.

47. Except challenging the order of forfeiture on the two legal grounds discussed earlier in this judgement, there is no other ground on which correctness of the order of forfeiture is assailed in the writ petition. For the first time in this appeal, an attempt is made to argue that the conclusions drawn by the competent authority that the properties forfeited are illegally acquired - is not justified on an appropriate appreciation of defence of the appellant. In other words, the appellant seeks reappreciation of the evidence without even an appropriate pleading in the writ petition. It is a different matter that the High Court in exercise of its writ jurisdiction does not normally reappreciate evidence. Looked at any angle, we see no reason to remit the matter to the High Court.

48. In the result, the appeals, being devoid of merit, are dismissed.

.....J.

(H.L. GOKHALE) .....J.

(J. CHELAMESWAR) New Delhi;

January 21, 2014.

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[1] On perusal of the judgment and order of the Learned Single Judge it appears that although the vires of the said Act was under challenge the respondent No.1 only asked for cancellation of the order of detention issued under Section 3 of the COFEPOSA and the orders passed by the competent authority so merged in the appellate authority under section 6(1) of the SAFEMA as well as prayed for release of the properties confiscated by the appellate authority in terms of the order impugned therein. [2] The respondent No.1 for the first time in the writ petition contended that the notice under Section 6(1) was bad due to non-supply of reasons whereas it would appear that the reasons were supplied as and when asked for. Delayed supply of reasons, in our view, did not vitiate the subsequent orders of the competent authority as well as appellate authority. Show cause notice was

served in 1976. It was not proceeded with till 1988 when reasons were supplied. Order was passed by the competent authority upon affording adequate opportunity of hearing. The respondent No.1 availed the remedy of appeal where his appeal was partly allowed. With deepest regard we have for the learned single Judge, His Lordship was perhaps not right in interfering with the show cause notice at the stage when the respondent No.1 availed of the remedies in law and became partly successful before the appellate authority. [3] Section 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 of value involved in which exceeds one lakh of rupees; or

iii) who have 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 12A 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 12A 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 12A, 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 person referred to in clause (a) or clause (b);

e) any 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.

Explanation 1.— For the purposes of sub-clause (i) of clause

(a), the value of any goods in relation to which a person has been convicted of an offence shall be the wholesale price of the goods in the ordinary course of trade in India as on the date of the commission of the offence.

Explanation 2.— For the purpose of clause ©, "relative" in relation to a person, means—

i) spouse of the person;

ii) brother or sister of the person;
iii) brother or sister of the spouse of person;
iv) any lineal ascendant or descendant of the person;
v) any lineal ascendant or descendant of the spouse of the person;
vi) spouse of a person referred to in clause (ii), clause (iii), clause (iv) or clause (v);
vii) any lineal descendant of a person referred to in clause (ii) or clause (iii).

Explanation 3.— For the purposes of clause (d), "associate", in relation to a person, 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 firms, or private company within the meaning of the Companies Act, 1956 (1 of 1956), of which such person had been or is a member, partner or director;

iv) any individual who had been or is a member, partner or director of an association of persons, body of individuals, partnership firm, or private company within the meaning of the Companies when such person had been or is a member, partner or director of such association, body, partnership firm of a private company;

v) any person who had been or is managing the affairs, or keeping the accounts, of any association of persons, body of individuals, partnership firm or private company referred to in clause (iii);

vi) the trustee of any trust, where,—
a) the trust has been created by such person; or
b) the value of the assets 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 the contribution is made, to not less than twenty per cent, of the value of the assets of the trust on that date;

vii) where the competent authority, for reasons to be recorded in writing considers that any properties of such person are held on his behalf by any other person, such other person.

Explanation 4.— For the avoidance of doubt, it is hereby provided that the question whether any person is a person to whom the provisions of this Act apply may be determined with reference to any facts, circumstances or events including any conviction or detention which occurred or took place before the commencement of this Act.

[4] Section 3(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 (ii) or the income or earnings from such property; and includes—t A) any property held by such person which would have been, in relation to any previous holder thereof, illegally acquired

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

[5] 20. Protection in respect of conviction for offences.—(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

[6] Section 53. Punishments.—The punishments to which offenders are liable under the provisions of this Code are— First—Death;

Secondly.—Imprisonment for life;

Thirdly.— Omitted Fourthly.—Imprisonment, which is of two descriptions, namely.— (1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly.—Forfeiture of property;

Sixthly.—Fine.

[7] 18. Coming to "forfeiture', what is the true character of a "forfeiture'? Is it punitive in infliction, or merely another form of exaction of money by one from another? If it is penal, it falls within implied powers. If it is an act of mere transference of money from the dealer to the State, then it falls outside the legislative entry. Such is the essence of the decisions which we will presently consider. There was a contention that the expression "forfeiture" did not denote a penalty. This, perhaps, may have to be decided in the specific setting of a statute. But, speaking generally, and having in mind the object of Section 37 read with Section 46, we are inclined to the view that forfeiture has a punitive impact. Black's Legal Dictionary states that "to forfeit" is "to lose, or lose the right to, by, some error, fault, offence or crime', "to incur a penalty'. "Forfeiture', as judicially annotated, is "a punishment annexed by law to some illegal act or negligence . . .'. "something imposed as a punishment for an offence or delinquency'. The word, in this sense, is frequently associated with the word "penalty'. According to Black's Legal Dictionary, The terms "fine", "forfeiture", and "penalty", are often used loosely, and even confusedly : but when a discrimination is made, the word "penalty" is found to be generic in its character, including both fine and forfeiture. A "fine" is a pecuniary

penalty, and is commonly (perhaps always) to be collected by suit in some form. A "forfeiture" is a penalty by which one loses his rights and interest in his property.

More explicitly, the U.S. Supreme Court has explained the concept of "forfeiture" in the context of statutory construction. Chief Justice Taney, in the State of Maryland v. Baltimore & Ohio RR Co., 11 L.Ed. 714, 722 observed :

"And a provision, as in this case, that the party shall forfeit a particular sum, in case he does not perform an act required by law, has always, in the construction of statutes, been regarded not as a contract with the delinquent party, but as the punishment for an offence. Undoubtedly, in the case of individuals, the word forfeit is construed to be the language of contract, because contract is the only mode in which one person can become liable to pay a penalty to another for breach of duty, or the failure to perform an obligation. In legislative proceedings, however, the construction is otherwise, and a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law ; and such, very clearly, is the meaning of the word in the act in question."

19. The same connotation has been imparted by our Court too. A Bench has held [Bankura Municipality v.Lalji Raja & Sons, 1953 Cri LJ 1101] :

"According to the dictionary meaning of the word 'forfeiture' the loss or the deprivation of goods has got to be in consequence of a crime, offence or breach of engagement or has to be by way of penalty of the transgression or a punishment for an offence. Unless the loss or deprivation of the goods is by way of a penalty or punishment for a crime, offence or breach of engagement it would not come within the definition of forfeiture." This word "forfeiture" must bear the same meaning of a penalty for breach of a prohibitory direction. The fact that there is arithmetical identity, assuming it to be so, between the figures of the illegal collections made by the dealers and the amounts forfeited to the State cannot create a conceptual confusion that what is provided is not punishment but a transference of funds. If this view be correct, and we hold so, the legislature, by inflicting the forfeiture, does not go outside the crease when it hits out against the dealer and deprives him, by the penalty of the law, of the amount illegally gathered from the customers. The Criminal Procedure Code, Customs & Excise Laws and several other penal statutes in India have used diction which accepts forfeiture as a kind of penalty. When discussing the rulings of this Court we will explore whether this true nature of "forfeiture" is contradicted by anything we can find in Sections 37(1), 46 or 63. Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by mens rea. The classical view that "no mens rea, no crime" has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Section 37(1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty.

[8] 56. In construing the expression "amendment of this Constitution" I must look at the whole scheme of the Constitution. It is not right to construe words in vacuum and then insert the meaning

into an article. Lord Green observed in Bidie v. General Accident, Fire and Life Assurance Corporation (1948) 2 All ER 995, 998.

"The first thing one has to do, I venture to think, in construing words in a Section of an Act of Parliament is not to take those words in vacuo, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of prima facie meaning which you may have to displace or modify. It is to read the statute as a whole and ask oneself the question : 'In this state, in this context, relating to this subject-matter, what is the true meaning of that words'."

57. I respectfully adopt the reasoning of Lord Green in construing the expression "the amendment of the Constitution."

58. Lord Green is not alone in this approach. In Bourne v. Norwich Crematorium, (1967) 2 ALL ER 576, 578 it is observed:

"English words derive colour from those which surround them.

Sentences are not mere collections of words to be taken out of the sentence defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language."

59. Holmes, J., in Towne v. Eisner, 245 US 418, 425 had the same thought. He observed :

> "A word is not a crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used." [9] The State of West Bengal v. S.K. Ghosh, AIR 1963 SC 255 Para 15. .. We are therefore of opinion that forfeiture provided in S. 13(3) in case of offences which involve the embezzlement etc. of Government money or property is really a speedier method of realizing government money or property as compared to a suit which it is not disputed the Government could bring for realizing the money or property and is not punishment or penalty within the meaning of Article 20(1). Such a suit could ordinarily be brought without in any way affecting the right to realize the fine that may have been imposed by a criminal Court in connection with the offence.

[10] The first question therefore that falls for consideration is whether it was open to the State legislature under its powers under Entry 54 of List II to make a provision to the effect that money collected by way of tax, even though it was not due as a tax under the Act, shall be made over to Government. Now it is clear that the sums so collected by way of tax are not in fact tax exigible under the Act. So it cannot be said that the State legislature was directly legislating for the imposition of sales or purchase tax under Entry 54 of List II when it made such a provision, for on

the face of the provision, the amount, though collected by way of tax, was not exigible as tax under the law. The provision however is attempted to be justified on the ground that though it may not be open to a State legislature to make provision for the recovery of an amount which is not a tax under Entry 54 of List II in a law made for that purpose, it would still be open to the legislature to provide for paying over all the amounts collected by way of tax by persons, even though they really are not exigible as tax, as part of the incidental and ancillary power to make provision for the levy and collection of such tax. Now there is no dispute that the heads of legislation in the various Lists in the Seventh Schedule should be interpreted widely so as to take in all matters which are of a character incidental to the topics mentioned therein. Even so, there is a limit to such incidental or ancillary power flowing from the legislative entries in the various Lists in the Seventh Schedule. These incidental and ancillary powers have to be exercised in aid of the main topic of legislation, which, in the present case, is a tax on sale or purchase of goods. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the ambit of the legislative entry as ancillary or incidental. But where the legislation under the relevant entry proceeds on the basis that the amount concerned is not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry. We do not think that the ambit of ancillary or incidental power goes to the extent of permitting the legislature to provide that though the amount collected — may be wrongly — by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were tax. The legislature cannot under Entry 54 of List II make a provision to the effect that even though a certain amount collected is not a tax on the sale or purchase of goods as laid down by the law, it will still be collected as if it was such a tax. This is what Section 11(2) has provided. Such a provision cannot in our opinion be treated as coming within incidental or ancillary powers which the legislature has got under the relevant taxing entry to ensure that the tax is levied and collected and that its evasion becomes impossible. We are therefore of opinion that the provision contained in Section 11(2) cannot be made under Entry 54 of List II and cannot be justified even as an incidental or ancillary provision permitted under that entry.

[11] Head of Legal Casework, Northern Ireland for the Assets Recovery Agency in his Article ‘Justifying the civil recovery of criminal proceeds’ published in the Journal of Financial Crime, 2004 Vol.12, Iss.1.
