

# **M/s. Platinum Theatre and Ors. Vs. Competent Authority Smugglers & Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 and Anr.**

Civil Appeal No(s). 4369 of 2009

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## **Full judgment text**

M/s. Platinum Theatre and Ors. Vs. Competent Authority Smugglers & Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 and Anr.

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Rastogi, J.

1. The instant appeal is directed against the judgment and order dated 19th April, 2007 passed by learned Single Judge of the High Court of Karnataka at Bangalore upholding the order passed by the competent authority under Section 7 read with 19(1) of the Smugglers and Foreign Exchange Manipulators(Forfeiture of Property) Act, 1976(hereinafter being referred to as the "Act, 1976") dated 31st December, 1997.

2. Appellant no.1 is said to be a registered partnership firm comprising of appellant nos. 2 to 5 and one N.A. Yusuf(not a party herein) as its partners with the profit sharing ratio of the partners as follows:

3. The background facts culled out from the record which led to passing of the order forfeiting the subject property are that one of the partners of the first appellant, namely, N.A. Yusuf, was ordered to be detained by Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974(hereinafter being referred to as "COFEPOSA") by order dated 21st January, 1985 by Government of Maharashtra and later by the Central Government by order dated 27th August, 1991.

The two detention orders against N.A. Yusuf came to be challenged in the writ petition before Delhi High Court. Both the petitions were allowed by judgments dated 15th October, 1991 and 11th May, 1992 respectively. In consequence thereof, the forfeiture order passed by the competent authority on 23rd November, 1977 came to an end.

4. On 16th October, 1994, a show cause notice was issued to the first appellant firm and its partners calling upon them to provide an explanation as to why the subject theatre (M/s. Platinum Theatre) should not be forfeited. After affording opportunity of hearing, the competent authority, in the first instance, passed an order of forfeiture against the first appellant firm forfeiting M/s. Platinum Theatre and its equipment by order dated 31st July, 1995. However, on appeal being preferred at the instance of the appellants, the matter was remanded back to the competent authority for fresh consideration by order dated 17th July, 1997.

5. The competent authority after revisiting the matter afresh and affording an opportunity of hearing to the parties, passed an order dated 31st December, 1997 of forfeiture of M/s. Platinum Theatre under Section 7 of the Act, 1976. Subsequently, the Appellate Tribunal for Forfeited Property, New Delhi(hereinafter being referred to as the "Tribunal") dismissed the appeal and upheld the order of forfeiture passed by the competent authority on 7th September, 1999 and, thereafter, the writ petition filed at the instance of the appellants also came to be dismissed by judgment and order dated 19th April, 2007 which became a subject matter of challenge in appeal before us.

6. Learned counsel for the appellant has challenged the order of forfeiture particularly on the following submissions:

(i) The land on which the subject theatre was constructed is not the property of the first appellant firm. It is owned by appellant no. 2(P.M. Saheeda w/o Ibrahim Soofi) through a registered sale deed dated 16th April, 1969. Since the land was privately owned by appellant no. 2, the order regarding forfeiture of land, in the facts and circumstance of the case, is not legally sustainable.

(ii) The competent authority ought to have applied Section 9 of the Act, 1976 in the present case and should have provided an option to the appellants to pay fine in lieu of forfeiture, taking into consideration the fact that the appellants had disclosed source of more than 50% cost incurred in construction of the theatre. The loan of Rs.12 lakhs obtained from Vijaya Bank by the appellants constituted more than 50% of cost of the theatre's construction. As such, the authority was under an obligation to give an option to the appellants to pay a fine in lieu of forfeiture in terms of Section 9 of the Act, 1976.

(iii) The forfeiture proceeding initiated in 1995 was grossly delayed. The partnership firm is of the year 1974, the construction of the theatre was carried out during the period 1971-1974 and the forfeiture order was passed in 1997, after more than two decades. The competent authority ought to have considered the inordinate delay in passing of an adverse order of forfeiture on the premise that it could not have been possible because of long delay to trace the relevant documents which, indeed, has caused prejudice to the appellants.

7. Per contra, learned counsel for the respondents, while supporting the finding returned by the competent authority, in the first instance, forfeiting the subject property in question and later confirmed by the Tribunal in the impugned judgment, in counter, has made the following submissions:

(i) Section 8 of the Act, 1976 provides that the burden to prove, in any proceedings under this Act, shall lie on the person affected. The appellants have failed to discharge the said burden, in consequence of which the finding recorded by the competent authority duly supported with the material on record justifies and supports the order of forfeiture passed by the competent authority dated 31st December, 1997.

(ii) Both N.A. Yusuf and appellant no. 2 (P.M. Saheeda) failed to disclose any source of their capital contribution in the first appellant firm and have failed to disclose any books of accounts for the expenditure in construction of the subject theatre and also failed to disclose any bank account from which money was disbursed for building the said theatre. In addition, appellant no. 2 (P.M. Saheeda) failed to substantiate with proof the claim that the land was bought from her wedding gifts in 1969. In the facts and circumstances, the finding of forfeiture recorded by the competent authority has been rightly confirmed at all later stages in the course of proceedings.

(iii) The contribution of N.A. Yusuf was more than half of the total contribution of Rs.10.20 lakhs of capital infused in the partnership firm. Since more than 50% of the value remained unexplained, the appellants were not entitled to seek an option to pay a fine in lieu of forfeiture as contemplated under Section 9 of the Act.

(iv) There was no delay which could be attributed to the authority for the reason that proceedings were initiated in the first instance against the appellant firm by issuance of show cause notice dated 13th January, 1977 and since then the proceedings were continued one after the other.

In reference to the instant proceedings, the show cause notice was served to the appellant firm and its partners (appellant nos. 2 to 5) on 16th October, 1994 which finally culminated into forfeiture of the property under Section 7 by order dated 31st December, 1997. In the given circumstances, there was no delay on the part of the respondent authorities in initiating the proceedings in reference to the forfeiture of the property under the Act, 1976 which, in no manner, can be said to be fatal in the given facts and circumstances to interfere in the instant proceedings.

8. We have heard learned counsel for the parties and with their assistance perused the material available on record.

9. The Act, 1976 has been enacted by the Parliament with an object to provide for the forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators and for matters connected therewith or incidental thereto. At the same time, to provide an effective prevention of smuggling activities and foreign exchange manipulations which are having a deleterious effect on the national economy, it is necessary to deprive persons engaged in such activities and manipulations of their ill-gotten gains.

It also provides that such persons have been augmenting such gains by violations of wealth tax, income tax or other laws or by other means and have thereby been increasing their resources for operating in a clandestine manner and to nail such persons who are holding the properties acquired by them through such gains in the name of their relatives, associates and confidants.

10. Section 2(1) of the Act, 1976 applies to the persons specified in subsection (2). Section 2(2) gives a long list of different categories of persons to whom the Act applies and includes as defined in Section 2(2)(b) that every person in respect of whom an order of detention has been made under the COFEPOSA and also includes every associate of a person referred to in clause (a) or clause (b) as defined in subclause(d) read with Explanation 3, which refers to an associate and covers all individuals who had been or is a member, partner or director of an association of persons including association, body, partnership firm or private company, etc.

11. Sections 2, 6, 7, 8 and 9 of the Act, 1976 which are relevant for the purpose, are extracted hereinbelow:

"2. Application.

(1) The provisions of this Act shall apply only to the persons specified in subsection (2). (2) The persons referred to in subsection (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, 1104 1973 (46 of 1973), of an offence, the amount or value involved in which exceeds one lakh of rupees; or

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

(iv) who having been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), has been convicted subsequently under either of those Acts;

(b) every person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974);

Provided that

(i) such order of detention, being an order to which the provisions of section 9 or section 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 subsection (3) of section 9, or on the report of the Advisory Board under section 8, read with subsection (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 subsection (3) of that section, or on the basis of the report of the Advisory Board under section 8, read with subsection (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 a person referred to in clause (a) or clause (b);

(e) any holder (hereafter in this clause referred to as the present holder) of any property which was at any time previously held by a person referred to in clause (a) or clause (b) unless the present holder or, as the case may be, anyone 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.-

Explanation 2.-

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 outhouses) 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 ( 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 referred to in clause (iii) at any time when such person had been or is a member, partner or director of such association, body, partnership firm or 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) ...."

#### 6. Notice of forfeiture.

(1) If, having regard to the value of the properties held by any person to whom this Act applies, either by himself or through any other person on his behalf, his known sources of income, earnings or assets, and any other information or material available to it as a result of action taken under section 18 or otherwise, the competent authority has reason to believe (the reasons for such belief to be recorded in writing) that all or any of such properties are illegally acquired properties. it may serve a notice upon such person (hereinafter referred to as the person affected) calling upon him within such time as may be specified in the notice, which shall not be ordinarily less than thirty days, to indicate the sources of his income, earnings or assets, out of which or by means of which he has acquired such property, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties, as the case may be, should not be declared to be illegally acquired properties and forfeited to the Central Government under this Act.

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

#### 7. Forfeiture of property in certain cases.

(1) The competent authority may, after considering the explanation, if any, to the showcause notice issued under section 6, and the materials available before it and after giving to the person affected (and in a case where the person affected holds any property specified in the notice through any other person, to such other person also) a reasonable opportunity of being heard, by order, record a finding whether all or any of the properties in question are illegally acquired properties.

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

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

(4) where any shares in a company stand forfeited to the Central Government under this Act, then, the company shall, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or the articles of association of the company, forthwith register the Central Government as the transferee of such shares.

#### 8. Burden of proof.

In any proceedings under this Act, the burden of proving that any property specified in the notice served under section 6 is not illegally acquired property shall be on the person affected.

#### 9. Fine in lieu of forfeiture.

(1) Where the competent authority makes a declaration that any property stands forfeited to the Central Government under section 7 and it is a case where the source of only a part, being less than onehalf of the income, earnings or assets with which such property was acquired has not been proved to the satisfaction of the competent authority, it shall make an order giving an option to the person affected to pay, in lieu of forfeiture, a fine equal to one and onefifth times the value of such part.

Explanation.- For the purposes of this subsection, the value of any part of income, earnings or assets, with which any property has been acquired, shall be, (a) in the case of any part of income or earnings, the amount of such part of income or earnings; (b) in the case of any part of assets, the proportionate part of the full value of the consideration for the acquisition of such assets.

(2) Before making an order imposing a fine under subsection (1), the person affected shall be given a reasonable opportunity of being heard,

(3) Where the person affected pays the fine due under subsection (1), within such time as may be allowed in that behalf, the competent authority may, by order, revoke the declaration of forfeiture under section 7 and thereupon such property shall stand released."

12. Taking into consideration the scope and ambit of Act, 1976 of which a detailed reference has been made, forfeiture proceedings could be initiated under Section 6 in reference to such illegally acquired properties by such persons who are covered under Section 2 read with the explanation, appended thereto, by a show cause notice and after due compliance of principles of natural justice, the power vests in the competent authority to pass an order of forfeiture of the property in exercise of power under Section 7 of the Act 1976.

13. Section 8 clearly postulates that burden of proof, in any proceedings under this Act, in reference to the notice served under Section 6 in regard to the illegally acquired properties shall lie on the person affected and while exercising power under Section 7, forfeiting the illegally acquired properties in a case where the source of only a part, being less than onehalf of the income of which such property is acquired, the acquisition has been subject to proof to the satisfaction of the competent authority, can be offered an option to the person affected to pay in lieu of forfeiture, a fine of the value of such part, as indicated under Section 9 of the Act 1976.

14. The respondents have initiated the proceedings serving show cause notice under Section 6 of forfeiture of the property which was taken from illegotten gains to the first appellant firm and its partners (Appellant nos. 2 to 5) dated 16th October, 1994.

The competent authority, in the first instance, after taking into consideration the material on record returned a finding that the total contribution of the partners in M/s. Platinum Theatre by way of capital was Rs.10,20,000/as could be seen from the Partnership Deed as well as returns of M/s. Platinum Theatre that clearly indicates that N.A. Yusuf contributed Rs.5 lakhs. Appellant no.2 (P.M. Saheeda) and her minor son contributed Rs.5.20 lakhs. The partners are the joint owners of the property of a firm by virtue of their capital contribution in terms of Partnership Deed.

15. N.A. Yusuf has not disclosed any source from which he got capital contribution of Rs.5 lakhs. In respect of contribution made by Appellant no. 2 (P.M. Saheeda) and her minor son to the tune of Rs. 5.20 lakhs in the partnership firm, no explanation was tendered about the source of funds infused in the partnership firm. The authorities of the incometax department on assessment were able to substantiate that neither the source of contribution made by N.A. Yusuf nor anyone else and the entire sum of Rs.4.57 lakhs was assessed as income of Appellant no. 2 (P.M. Saheeda).

From the other documentary evidence which has come on record, it reveals that the construction and decoration of the theatre was undertaken by N.A. Yusuf as a proprietor. A finding was recorded that the entire capital in M/s. Platinum Theatre in the names of N.A. Yusuf, P.M. Saheeda (Appellant no. 2) and her minor children was created through the illegally earned money by N.A. Yusuf through his smuggling activities.

It was supported by incometax returns for the assessment year 197576. Appellant no. 2 (P.M. Saheeda) which claimed that the land was purchased by her for Rs.33,000/in the year 1969 from her own funds generated through wedding gifts in support of which no proofs was produced, and with land, the value of the theatre would work out to be Rs.25.12 lakhs. The appellants failed to justify that the loan of Rs. 12 lakhs from Vijaya Bank was ever invested in the subject theatre. There was no document placed on record which

could justify that Rs.12 lakhs was invested in the construction of theatre.

According to the finding recorded by the competent authority, more than 50% of the value assessed(i.e. Rs. 13.12 lakhs) of the theatre has remained unexplained and accordingly the theatre was liable for forfeiture under Section 7 of the Act, 1976, free from all encumbrances, under Order dated 31st December, 1997. On appeal being preferred, the finding stood affirmed by order dated 7th September, 1999.

16. Against the said order, a writ petition was filed before the High Court under Article 226 of the Constitution. The learned Single Judge of the High Court revisited the factual matrix on record and returned a finding that no documentary evidence was placed by either of the appellants, during the proceedings initiated by the competent authority, who are under an obligation to prove in terms of Section 8 of the Act 1976.

From the evidence which came on record, it could be gathered that out of the investment made by the partners(Appellant nos. 2 to 5) to the tune of Rs.10.20 lakhs, N.A. Yusuf contributed Rs.5 lakhs and Appellant no.2(P.M. Saheeda) and her children have contributed to the tune of Rs.5.2 lakhs each but neither N.A. Yusuf has justified any source from where his capital contribution was made nor the explanation was tendered by Appellant nos. 2 to 5 regarding their source of income and it was disbelieved at all stages and a finding was returned that major part of the investment has been treated as income from undisclosed sources.

That apart, no evidence was placed by Appellant no. 2(P.M. Saheeda) on record to justify that the land in question was purchased from the resources available at her command in the year 1969, through the sale deed dated 16th April, 1969. In the given circumstances, the appellants are not entitled to seek protection of Section 9 of the Act 1976.

17. That apart, as regards the submissions made by the counsel for the appellants to impose fine in lieu of forfeiture, as contemplated under Section 9 of the Act 1976, after noticing the argument advanced by the appellants before the High Court, a categorical finding has been recorded as to why the appellants are not entitled to seek protection of Section 9 of the Act 1976, which is as follows:

"The argument of petitioners' counsel is, major contribution is from the petitioners and that the land in question was acquired in the year 1969 prior to the entering into a partnership agreement out of the borrowings of 2nd petitioner Saheeda and that land in question ought not have been taken into consideration to forfeit the same, and as such, the Competent Authority and the Appellate Tribunal ought to have taken note of the same into consideration only to impose fine and not to forfeit the property and also the land in question should be available to the petitioners and it should not be the subject matter of forfeiture.

In this regard, it appears the Competent Authority as well as the Appellate Tribunal having noted the transaction and also having noted that there is no explanation offered by the 2nd petitioner properly regarding acquisition of the land in question for Rs.33,000/in the year 1969, and also having doubted the unsigned agreement between the 2nd petitioner and N.A. Yusuf, and in the absence of any such proper explanation as to source of acquisition, held that major investment remain unexplained and also disbelieved the version of the 2nd petitioner on the ground that the proof of gift from her marriage has not been produced.

Thus, according to the Competent Authority as well as the Appellate Tribunal, even if the value of the land is taken only at Rs.33,000/, the total value of the land and building will work out at Rs.25,20,000/and as such, it was of the view that major part of the investment remained unexplained. Even the accounts are not maintained in respect of the cost of construction of the building and all other various installations made."

18. Taking into consideration the submissions made, we find no error being committed in the finding returned by the High Court which may call for our interference. 19. Even before this Court, there is no material that has been placed by Appellant no.2 (P.M. Saheeda) in rebuttal which may even prima facie justify the sources of fund available at her command for acquisition of the land in question to the tune of Rs.33,000/in the year 1969.

In the absence of proper explanation as to the source of acquisition and as majority of investment remains unexplained, the authority disbelieved the version of Appellant no. 2(P.M. Saheeda) as no proof was placed on record of gifts from her marriage. That apart, if the value of the land is taken only of Rs.33,000/, the total value of the land and building work out at Rs.25,20,000/, and as such, the major part of the investment still

remains unexplained.

Even the accounts were not maintained in respect of the cost of construction of the building, in absence whereof, the authority has not committed any manifest error in forfeiting the property in exercise of power under Section 7 of Act 1976.

20. Suffice it to say that the proceedings were initiated in reference to the appellants, in the first instance, pursuant to show cause notice dated 13th January, 1977 and the competent authority passed an Order of forfeiture on 23rd November, 1977.

Later that came to be set aside in the year 1991 and fresh forfeiture proceedings were initiated pursuant to show cause notice under Section 6 of the Act dated 16th October, 1994 which finally culminated into passing of order of the competent authority on 31st December, 1997 and on dismissal of appeal, the writ petition was preferred at the instance of the appellants and the matter reached to this stage.

Thus, in the given facts and circumstances, the very plea of so called alleged gross delay in initiating the proceedings for forfeiture of the property is misconceived and deserves an outright rejection.

21. Consequently, the appeal is without substance and accordingly dismissed. No costs.

22. Pending application(s), if any, shall stand disposed of.

Source disclosure: Complete sanitized public judgment text retained for research. Official-primary replacement and later-history closure remain pending.

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