A SMT. GANGADEVI

v.

UNION OF INDIA AND ANR.

OCTOBER 1, 1996

B [B.P. JEEVAN REDDY AND K.S. PARIPOORNAN, JJ.]

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974/Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976:

C

S.3 read with s.12A/s.6—Relative's right to contest/challenge the order of detention of detenu after his death—Detenu filing writ petition challenging his order of detention dated 22.9.1975—Notice u/s.6 of SAFEMA issued on 11.3.1976 Pending writ petition detenu died on 1.5.1976—Writ petition dis-

D *missed as infructuous on the statement of Public Prosecutor that detenu had been released—Orders under SAFEMA passed forfeiting his properties—Wife of detenu challenged the orders under SAFEMA—High Court dismissed writ petition—Special leave petition by wife—This Court permitted the wife to challenge the order of detention of her husband—Appeal was treated as Writ petition under Article 32 of the Constitution—Held, writ petition filed by*

E *detenu was not decided on merits, and the order dated 12.4.1977 on the writ petition on the basis of an incorrect representation made by the State is a nullity—Wife of detenu is entitled to contest the writ petition filed by her husband and to challenge proceedings under s.6 of SAFEMA—Challenge to the order of detention passed on 22.9.1975 has to be examined with reference*

F *to the law obtaining as on that date—Writ petition challenging the detention order and dismissed by Bombay High Court would be treated as pending and the wife of deceased detenu would be allowed to continue the said writ petition—If she makes application for continuation of the writ petition the orders made against her in SAFEMA shall abide by the result of the said writ petition.*

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Attorney General for India and Others **v.** *Amrat Lal Prajivandas and Others,* **[1994] 5 S.C.C. 54, followed.**

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 574 of

H 1994.

(Under Article 32 of the Constitution of India.) A

S.V. Tambwekar for the Petitioner.

V.K. Verma and C.V. Subba Rao for the Respondents.

The following Order of the Court was delivered: B

Petitioner is the widow of one Shrikrishna Gopilal Solanki who died on May 1, 1976 while in detention. The petitioner is seeking to question the validity of a detention order passed against her husband under Section 3 read with Section 12-A of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, (COFEPOSA), 1974, for the reason that C on the basis of such detention order, proceedings have been initiated against her properties under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, (SAFEMA), 1976.

An order dated September 25, 1974 was passed against Solanki under D Section 3 of Maintenance of Internal Security Act, (MISA), 1971 and he was detained. Solanki questioned the same by way of a writ petition in the Bombay High Court. While that writ petition was pending, Parliament enacted COFEPOSA and it was brought into force on December 19, 1974. On the same day, the order of detention under MISA was revoked and an order of detention was passed under COFEPOSA against Solanki. The writ E petition filed by Solanki against the detention order under MISA was withdrawn and dismissed as infructuous.

On June 25, 1975 the President of India proclaimed emergency under Article 352 of the Constitution and on June 27, 1975, the President made an order under and in terms of Article 359 of the Constitution suspending F certain fundamental rights.

By its order dated September 22, 1975 the High Court of Bombay quashed the order of detention dated December 19, 1974. On the same day, however, a fresh order of detention made under Section 3 read with G Section 12-A of COFEPOSA was served on Solanki. He continued under detention.

On November 5, 1975 SAFEMA Ordinance was promulgated by the President of India which was later made into an Act with effect from the date of Ordinance. H

A On January 19, 1976, Solanki filed a writ petition (Criminal M.P. No. 134 of 1976) in the Bombay High Court challenging the validity of the order of detention dated September 22, 1975. The writ petition was admitted and notice was issued to the State.

On 11th March, 1976, notices were issued under Section 6 of
B SAFEMA to the petitioner proposing forfeiture of the properties standing in her name.

On May 1, 1976, as stated above, Solanki died while under detention.

C Another notice under Section 6 of SAFEMA was issued to the petitioner on October 19, 1976. The petitioner sent her reply thereto.

On April 12, 1977, the writ petition filed by Solanki (Criminal M.P. 134 of 1976) was dismissed as infructuous on a representation made by the Public Prosecutor appearing for the State that the detenue has been
D released. Admittedly it was an incorrect representation. The detenue had expired while in detention, as stated above, on May 1, 1976 itself.

Pursuant to the notice issued under Section 6, the Authority under SAFEMA passed orders forfeiting the petitioner's properties under the said Act. An appeal preferred by the petitioner was dismissed by the
E Tribunal on June 7, 1979. Thereupon the petitioner approached the Delhi High Court by way of a writ petition challenging the said orders under SAFEMA (writ petition No.1487 of 1979). The High Court dismissed the writ petition on 12.10.79 against which the present SLP was filed in June 1980. On 18.4.1983 this Court granted special leave to appeal and on
F 12.11.92, the Court permitted the petitioner to amend her S.L.P. so as to challenge the detention order dated 22 September, 1975 made against her deceased husband. The petitioner did so. Thereafter by an order dated September 8, 1994, this Court treated the said Civil Appeal as a writ petition under Article 32 of the Constitution. It has been numbered as writ
G petition 574 of 1994.

Under Section 2(2)(b)(iv) of SAFEMA, proceedings under the said Act can be taken in case of a person (his relatives and associates) against whom an order of detention has been made under COFEPOSA and "such order of detention has not been set aside by a Court of competent juris-
H diction". The respondents say that inasmuch as an order of detention dated

September 22, 1975 was made against Solanki under COFEPOSA and because it has not been set aside by a Court of competent jurisdiction, the proceedings taken against the petitioner (who is a 'relative' of Solanki as defined in the said Act) are perfectly valid and competent. As against this, the contention of the petitioner is: Solanki had filed a writ petition challenging the validity of the aforesaid order of detention in the Bombay High Court. While it was pending, he died. The order made by the High Court on April 12, 1977 dismissing the writ petition as infructuous, acting upon and incorrect representation made on behalf of the State that the detenue has already been released, is a nullity in law. Not only the detenue was dead long prior to the said order but also because the said order was induced by and based upon a totally incorrect representation of fact viz., that the detenue has already been released. There has been no pronouncement by any court upon the validity of the detention order dated 22.9.1975. The petitioner is entitled to challenge the validity of the aforesaid detention order because it is now being made a foundation for forfeiting her properties under SAFEMA. The validity of the said detention order was indeed questioned by Solanki himself and unless the challenge is repelled, it cannot be made a basis for initiating proceedings under SAFEMA against the petitioner (his wife). It may be well be that the Court will set it aside, in which case the entire proceedings taken under SAFEMA against the petitioner will fall to ground, says the petitioner.

This aspect has been dealt with by a special Bench of nine Judges of this Court in *Attorney General for India and Others* v. *Amratlal Prajivandas and Others,* [1994] 5 S.C.C. 54. The decision deals with several aspects arising under the aforesaid enactments. What is however, relevant herein is the discussion in paragraphs 35 to 42 (pages 83 to 87). In particular, the following holding in para 41 is relevant to the present controversy:

> "*even if such an order is allowed to be challenged when action under SAFEMA is taken, the challenge must be confined to grounds which were open or available during the period of emergency*; otherwise there would be no meaning behind the concluding words in Article 358(1) and Article 359(1-A). Hence, we say that a person who did not choose to challenge such an order of detention during the emergency when he was detained, or challenged it unsuccessfully, cannot be allowed to challenge it when it is sought to be made the basis for applying SAFEMA to him. *In either of the two situations*

A *mentioned above, i.e., whether the challenge is made during the period of detention or later when proceedings under SAFEMA are taken against him*, the grounds of challenge and scope of judicial scrutiny would be the same. Failure to challenge the detention directly when he was detained, precludes him from challenging it after the cessation of detention, where it is made the basis for initiating action under SAFEMA."

Now, the writ petition filed by Solanki was not decided on merits. It was dismissed on the basis of an incorrect representation made by the State. It was an order against a dead person. It is a nullity. Since the said C order of detention is being made a basis for initiating action under Section 6 of SAFEMA, the petitioner is entitled to challenge it. It cannot be gainsaid that but for the said order of detention against Solanki, no proceedings could have been taken against the petitioner (his wife). She cannot, therefore, be denied the right to challenge the said detention order. D Of course, it follows from the holding in *Amrat Lal Prajivandas* that challenge to the order of detention dated September 22, 1975 (made against Solanki) has to be examined with reference to the law obtaining as on the date the said order was made and not with reference to the law obtaining at any later point of time. Now the question is whether that should be allowed to be done in the writ petition filed by the petitioner in E the Delhi High Court (it is really directed against the orders made under SAFEMA against her) or should it be allowed to be done in the writ petition (Crl.M.P. 134 of 1976 on the file of the Bombay High Court) which was disposed of on the basis of wrong representation and after the death of the detenue (writ petition or therein). In our opinion the proper course F is to treat the order dated April 12, 1977 (dismissing the writ petition Crl.M.P. 134 of 1976 as infructuous) as a nullity and to treat the said writ petition as still pending on the file of the Bombay High Court. The petitioner shall be allowed to continue the said writ petition which shall have to be disposed of now according to law in the light of the observations made hereinabove and in accordance with law laid down in *Amratlal* G *Prajivandas*. We must mention by way of clarification that though in the ordinary course, the death of a detenue should bring the writ petition challenging the order of detention to an end, the position here is different because of the fact that the said order of detention is being made a foundation for initiating proceedings for forfeiting the petitioner's proper- H ties on the ground that she is a "relative" of the deceased-detenue. It is in

these peculiar circumstances that we are obliged to adopt the unusual course indicated above. A

Accordingly the writ petition is disposed of with the following direction:

(1) The order dated April 12, 1977 made by the Bombay High Court dismissing the writ petition (Crl.M.P. 134 of 1976 filed by Shrikrishna Gopilal Solanki challenging the order of detention dated September 22, 1975 made under Section 3 read with Section 12-A of COFEPOSA) is treated as a nullity. The said writ petition shall be deemed to be continuing on the file of the Bombay High Court. It is open to the petitioner to continue the said writ petition provided she applies to the Bombay High Court for permission to come on record in the said writ petition and to continue it, within two months from today. If such an application is made, it shall be entertained by the High Court and she shall be allowed to continue the writ petition. The writ petition shall be disposed of in accordance with law as indicated hereinabove. B C D

(2) If the petitioner makes an application for continuing the writ petition as mentioned in direction (1) above, the orders made against her in SAFEMA shall remain stayed pending disposal of the said writ petition. In case the writ petition is allowed, it is obvious, the proceedings taken against the petitioner under SAFEMA shall stand set aside. In case, however, the said writ petition is dismissed the said proceedings taken under SAFEMA shall be given effect to subject of course to any orders of this Court. E

(3) In case the petitioner does not apply to the Bombay High Court for continuing the aforesaid writ petition within the period prescribed in direction (1) above, the orders made against her under SAFEMA shall be given effect to. F

The writ petition is disposed of. There shall be no orders to costs. G

R.P. Petition disposed of.