

# **THE SMUGGLERS AND FOREIGN EXCHANGE MANIPULATORS (FORFEITURE OF PROPERTY) ACT, 1976**

## **INTRODUCTION**

The national economy had been very badly affected by the smuggling activities and foreign exchange manipulations. Persons engaged in such malpractices had been augmenting their ill-gotten gains by violations of laws relating to income-tax, wealth-tax or other laws. In many cases, such persons had been holding properties acquired through ill-gotten gains in the names of their relatives, associates and confidants. This accumulation of ill-gotten wealth had given increasing power, influence and resources to those who carry on such clandestine activities. These activities had posed serious threat to the economy and security of the nation. The Government took various steps to deal with the situation and for cleaning the social fabric and resuscitating the national economy, it became necessary to assume powers to deprive such persons of their illegally acquired properties, so as to effectively prevent the smuggling and other clandestine operations. With this objective on 5th November, 1975 the President promulgated the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Ordinance, 1975. To replace the said Ordinance by an Act of Parliament the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Bill was introduced in the Parliament.

## **STATEMENT OF OBJECTS AND REASONS**

1. Smuggling activities and foreign exchange manipulations are having a deteious effect on the national economy. Persons engaged in such malpractices have been augmenting their ill-gotten gains by violation of laws relating to income-tax, wealth-tax or other laws. In many cases, such persons have been holding properties acquired through ill-gotten gains in the names of their relatives, associates and confidants. This accumulation of ill-gotten wealth gives increasing power, influence and resources to those who carry on such clandestine activities and even tend to confer social status and prestige which is quite contrary to the healthy socio-cultural norms. These activities pose a serious threat to the economy and the security of the nation. In conjunction with various steps taken by the Government in recent months for cleaning the social fabric and resuscitating the national economy, it became necessary to assume powers to deprive such persons of their illegally acquired properties so as to effectively prevent smuggling and other clandestine operations. The President promulgated on the 5th November, 1975, the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Ordinance, 1975.

2. The present Bill seeks to replace the aforesaid Ordinance.

3. The notes on clauses appended to the Bill explain in detail the various provisions thereof.

## **ACT 13 OF 1976**

The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Bill having been passed by both the Houses of Parliament received the assent of the President on 25th January, 1976. It came on the Statute Book as THE SMUGGLERS AND FOREIGN EXCHANGE MANIPULATORS (FORFEITURE OF PROPERTY) ACT, 1976 (13 of 1976).

## **LIST OF AMENDING ACTS**

1. The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Amendment Act, 1980 (55 of 1980).

2. The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988 (2 of 1989).

# THE SMUGGLERS AND FOREIGN EXCHANGE MANIPULATORS (FORFEITURE OF PROPERTY) ACT, 1976

(13 of 1976)

[25th January, 1976]

*An Act to provide for the forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators and for matters connected therewith or incidental thereto.*

*WHEREAS for the 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;*

*AND WHEREAS 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 clandestine manner;*

*AND WHEREAS such persons have in many cases been holding the properties acquired by them through such gains in the names of their relatives, associates and confidants;*

BE it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

**1. Short title, extent and commencement.**—(1) This Act may be called the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall be deemed to have come into force on the 5th day of November, 1975.

**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 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 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 (hereinafter 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, 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 purposes of clause (c), “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 Act 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.

#### COMMENTS

The person against whom action is taken by invoking the *Explanation 2* to sub-section (2) of section 2 is at liberty to raise all grounds available to him though such grounds were raised and found against in a proceeding initiated by the relative; *Union of India v. Manoharlal Narang*, AIR 1987 SC 1472.

**[2A. Act not to apply to certain persons.**—On and from the commencement of the provisions of Chapter VA of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the provisions of this Act shall not apply to persons in relation to whom any order, the proceeding, may be made or taken under that Chapter.]

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

- (a) “Appellate Tribunal” means the Appellate Tribunal for Forfeited Property constituted under section 12;
- (b) “competent authority” means an officer of the Central Government authorised by it under sub-section (1) of section 5 to perform the functions of a competent authority under this Act;
- (c) “illegally acquired property”, in relation to any person to whom this Act applies, means,—
  - (i) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law for the time being in force relating to any matter in respect of which Parliament has power to make laws; or
  - (ii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets in respect of which any such law has been contravened; or
  - (iii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets the source of which cannot be proved and which cannot be shown to be attributable to any act or thing done in respect of any matter in relation to which Parliament has no power to make laws; or
  - (iv) any property acquired by such person, whether before or after commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property referred to in sub-clauses (i) to (iii) or the income or earnings from such property;

and includes—

- (A) any property held by such person which would have been, in relation to any previous holder thereof, illegally acquired property under this clause if such previous holder had not ceased to hold it, unless such person or any other person who held the property at any time after such previous holder or, where there are two or more such previous holders, the last of such previous holders is or was a transferee in good faith for adequate consideration;
  - (B) any property acquired by such person, whether before or after the commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property falling under item (A), or the income or earnings therefrom;
- (d) “prescribed” means prescribed by rules made under this Act;
  - (e) “property” includes any interest in property, movable or immovable;
  - (f) “trust” includes any other legal obligation.

(2) Any reference in this Act to any law which is not in force in any areas shall, in relation to that area, be construed as a reference to the corresponding law, if any, in force in that area.

(3) Any reference in this Act to any officer or authority shall, in relation to any area in which there is no officer or authority with the same designation, be construed as a reference to such officer or authority as may be specified by the Central Government by notification in the Official Gazette.

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

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

**5. Competent authority.**—(1) The Central Government may, by order published in the Official Gazette, authorise as many officers of the Central Government (not below the rank of a Joint Secretary to the Government), as it thinks fit, to perform the functions of the competent authority under this Act.

(2) The competent authorities shall perform their functions in respect of such persons or classes of persons as the Central Government may, by order, direct.

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

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

#### COMMENTS

Tainted money earned by smuggler who is convicted under COFEPOSA may result in purchasing number of properties. It cannot, therefore, be said that the properties when confiscated after following due procedure of SAFEMA would amount to multiple forfeiture; *Aamenabai Tayebaly v. Competent Authority under SAFEMA*, AIR 1998 SC 484.

**7. Forfeiture of Property in certain cases.**—(1) The competent authority may, after considering the explanation, if any, to the show-cause notice issued under section 6, and the materials available before it and after giving to the person affected (and in a case where the person affected holds any property specified in the notice through any other person, to such other person also) a reasonable opportunity of being heard,

by order, record a finding whether all or any of the properties in question are illegally acquired properties.

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

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

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

#### COMMENTS

Where the proceedings for forfeiture of the property of the detenu were started on the basis of an order of his detention under COFEPOSA the fact that the copies of the documents relied were not supplied to the detenu would vitiate his detention and consequently subsequent forfeiture of his property; *Union of India v. Haji Mastan Mirza*, AIR 1984 SC 681.

**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 one-half 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 one-fifth times the value of such part.

*Explanation.*—For the purpose of this sub-section, 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 sub-section (1), the person affected shall be given a reasonable opportunity of being heard.

(3) Where the persons affected pays the fine due under sub-section (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.

**10. Procedure in relation to certain trust properties.**—In the case of any person referred to in clause (vi) of *Explanation 3* of sub-section (2), of section 2, if the

competent authority, on the basis of the information and materials available to it, has reason to believe (the reasons for such belief to be recorded in writing) that any property held in trust is illegally acquired property, it may serve a notice upon the author of the trust or, as the case may be, the contributor of the assets out of or by means of which such property was acquired by the trust and the trustees, calling upon them within such time as may be specified in the notice which shall not ordinarily be less than thirty days, to explain the source of the money or other assets out of or by means of which such property was acquired or, as the case may be, the source of the money or other assets which were contributed to the trust for acquiring such property and thereupon such notice shall be deemed to be a notice served under section 6 and all the other provisions of this Act shall apply accordingly.

*Explanation.*—For the purposes of this section “illegally acquired property”, in relation to any property held in trust, includes—

- (i) any property which if it had continued to be held by the author of the trust or the contributor of such property to the trust would have been illegally acquired property in relation to such author or contributor;
- (ii) any property acquired by the trust out of any contributions made by any person which would have been illegally acquired property in relation to such person had such person acquired such property out of such contributions.

**11. Certain transfers to be null and void.**—Whereafter the issue of a notice under section 6 or under section 10, any property referred to in the said notice is transferred by any mode whatsoever such transfer shall, for the purpose of the proceedings under this Act, be ignored and if such property is subsequently forfeited to the Central Government under section 7, then, the transfer of such property shall be deemed to be null and void.

#### COMMENTS

Property in the name of wife of COFEPOSA detenu was forfeited by the competent authority under section 7 of SAFEMA. She had undertaken not to alienate the said property and still in flagrant breach thereof she sold the property, the transaction of purchase is hit by section 11 of SAFEMA. In substance it amounted to selling of Central Government's property by a total stranger in favour of the purchaser; *Aamenabai Taybaly v. Competent Authority under SAFEMA*, AIR 1998 SC 484.

**12. Constitution of appellate tribunal.**—(1) The Central Government may, by notification in the Official Gazette, constitute an Appellate Tribunal to be called the Appellate Tribunal for Forfeited Property consisting of a Chairman and such number of other members (being officers of the Central Government not below the rank of a Joint Secretary to the Government), as the Central Government thinks fit, to be appointed by the Government for hearing appeals against the orders made under section 7, sub-section (1) of section 9 or section 10.

- (2) The Chairman of the Appellate Tribunal shall be a person who is or has been or is qualified to be a Judge of the Supreme Court or of a High Court.
- (3) The terms and conditions of service of the Chairman and other members shall be such as may be prescribed.

(4) Any person aggrieved by an order of the competent authority made under section 7. sub-section (1) of section 9 or section 10, may, within forty-five days from the date on which the order is served on him, prefer an appeal to the Appellate Tribunal:

Provided that the Appellate Tribunal may entertain any appeal after the said period of forty-five days, but not after sixty days, from the date aforesaid if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(5) On receipt of an appeal under sub-section (4), the Appellate Tribunal may, after giving an opportunity to the appellant to be heard, if he so desires, and after making such further enquiry as it deems fit, confirm, modify or set aside the order appealed against.

(6) The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches consisting of three members and constituted by the Chairman of the Appellate Tribunal.

<sup>1</sup>[(6A) Notwithstanding anything contained in sub-section (6), where the Chairman considers it necessary so to do for expeditious disposal of appeals under this section, he may constitute a Bench of two members and a Bench so constituted may exercise and discharge the powers and functions of the Appellate Tribunal:

Provided that if the members of a Bench so constituted differ on any point or points, they shall state the point or points on which they differ and refer the same to a third member (to be specified by the Chairman) for hearing on such point or points and such point or points shall be decided according to the opinion of that member.]

(7) The Appellate Tribunal may regulate its own procedure.

<sup>1</sup>[(8) On application to the Appellate Tribunal and on payment of the prescribed fee, the Tribunal may allow a party to any appeal or any person authorised in this behalf by such party to inspect at any time during office hours, any relevant records and registers of the Tribunal and obtain a certified copy of any part thereof.]

**13. Notice or order not to be invalid for error in description.**—No notice issued or served, no declaration made, and no order passed, under this Act shall be deemed to be invalid by reason of any error in the description of the property or person mentioned therein if such property or person is identifiable from the description so mentioned.

**14. Bar of jurisdiction.**—No order passed or declaration made under this Act shall be appealable except as provided therein and no civil court shall have jurisdiction in respect of any matter which the Appellate Tribunal or any competent authority is empowered by or under this Act to determine, and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

**15. Competent authority and appellate tribunal to have powers of civil court.**—The competent authority and the Appellate Tribunal shall have all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:—

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1. Ins. by Act 55 of 1980, sec. 2 (w.e.f. 1-7-1981).