

DOMNIC ALEX FERNANDES (D) THROUGH LRS. & ORS. A

v.

UNION OF INDIA AND ORS.

(Criminal Appeal No. 34 of 2009)

AUGUST 17, 2017 B

[ADARSH KUMAR GOEL AND UDAY UMESH LALIT, JJ.]

Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) – ss. 3(1)(c), 7 and 19 – Detention order against a person – Confirmation of the detention order and detenu covered by SAFEMA – Notice of forfeiture of the property of detenu – Order of forfeiture, if would operate against the tenants of the said property – Held: The property would be treated as “illegally acquired property” within the meaning of s. 3(1)(c) and can be subjected to forfeiture under the provisions thereof – However, rights of a bona fide tenant would not stand automatically terminated by forfeiture of property and vesting thereof in the Central Government – Such forfeiture would extinguish the rights of the person to whom the Act applies, the owner of the property or his relative or associate having nexus with him in relation to the said property. C D E

Allowing the appeal, the Court

HELD: In the instant case, it is undisputed that only adjudication which has taken place by the competent authority is that the property was owned by the person to whom the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 applied i.e. against whom the order of detention had been confirmed. The rights of the appellants, who claim to be bona fide tenants even prior to purchase of the property by the person to whom the Act applied, have not been adjudicated upon on the assumption that their rights will stand automatically terminated. In view of law laid down by this Court, the rights of a bona fide tenant will not stand automatically terminated by forfeiture of property and vesting thereof in the Central Government. Such forfeiture will extinguish the rights of the person to whom the Act applies in the instant case, the owner of the property in question or his relative or associate having nexus with him in F G H

- A relation to the said property. However, the question whether the appellants are the bona fide tenants and had no nexus with the acquisition of the property by the person to whom the Act applied as claimed by them, would be determined independently by the competent authority as defined in section 3(B) of the Act. The order of the High Court is set aside and the matter is remitted to the competent authority for passing an appropriate order in accordance with law. [Paras 20, 21] [629-D-G; 630-A]

- C *C.B. Gautam v. Union of India and Ors.* (1993) 1 SCC 78 : [1992] 3 Suppl. SCR 12; *Attorney General for India and Ors. v. Amratlal Prajivandas and Ors.* (1994) 5 SCC 54 : [1994] 1 Suppl. SCR 1; *State of West Bengal and Ors. v. Vishnunarayan & Associates (P) Ltd. and Anr.* (2002) 4 SCC 134 : [2002] 2 SCR 557; *Fatima Mohd. Amin (Smt.) (Dead) through LRs. v. Union of India and Anr.* (2003) 7 SCC 436 ; *P.P. Abdulla and Anr. v. Authority and ors.* (2007) 2 SCC 510 : [2006] 10 Suppl. SCR 983; *Aslam Mohammad Merchant v. Competent Authority and Ors.* (2008) 14 SCC 186 : [2008] 10 SCR 332; *Vishal N. Kalsaria v. Bank of India and Ors.* (2016) 3 SCC 762 : [2016] 1 SCR 419; *Narayan Vittappa Kudva versus Union of India and Anr.* 2002 (2) MhLJ 290 – referred to.

Case Law Reference

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|---|--------------------------|-------------|--------|
| | [1992] 3 Suppl. SCR 12 | referred to | Para 9 |
| | [1994] 1 Suppl. SCR 1 | referred to | Para 9 |
| F | [2002] 2 SCR 557 | referred to | Para 9 |
| | (2003) 7 SCC 436 | referred to | Para 9 |
| | [2006] 10 Suppl. SCR 983 | referred to | Para 9 |
| | [2008] 10 SCR 332 | referred to | Para 9 |
| | [2016] 1 SCR 419 | referred to | Para 9 |
| G | 2002 (2) MhLJ 290 | referred to | Para 9 |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.34 of 2009.

From the Judgment and Final Order dated 11.07.2007 passed by

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the High Court of Judicature at Bombay in Criminal Writ Petition No. 1088 of 1995. A

Chander Uday Singh, Sr. Adv., Pratap Venugopal, Ms. Surekha Raman, Ms. Niharika, Anuj Sarma, Ms. Kanika Kalaiyarasan (for K. J. John and Co.) Advs. for the Appellants.

Mahling Pandarge, AAG, Rana Mukherjee, Sr. Adv., Ms. Binu Tamta, Abhay Kumar, B.V. Balaram Das, Nishant Ramakantrao Katneshwarkar, Mukesh Kumar Maroria, Advs. for the Respondents. B

The Judgment of the Court was delivered by

ADARSH KUMAR GOEL, J. 1. This appeal has been preferred against Order dated 11th July, 2007 of the High Court of Judicature at Bombay in Criminal Writ Petition No. 1088 of 1995. C

2. The question for consideration is whether tenancy of a property, ownership of which is acquired by a person to whom the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) applies, will be treated as "illegally acquired property" within the meaning of Section 3(1)(c) of SAFEMA and can be subjected to forfeiture under the provisions thereof. D

3. Facts giving rise to the issue may be briefly stated. Vide order dated 19th January, 1974 one Krishna Budha Gawde was detained under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) by the Government of Maharashtra. As his detention was confirmed by the Advisory Board, he was covered by Section 2(b) of SAFEMA¹ as the person to whom E

¹ 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:— F
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(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):
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(c) every person who is a relative of a person referred to in clause (a) or clause (b); G
(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. H

A the said Act applied. Once it was so, the property illegally acquired by

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Explanation 2.—For the purposes of clause (c), “relative”, in relation to a person, means—

- B (i) spouse of the person;
(ii) brother or sister of the person;
(iii) brother or sister of the spouse of the 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);
- C (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 outhouses) of such person;
(ii) any individual who had been or is managing the affairs or keeping the accounts of such person;
D (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;
E (v) who had been or is managing the affairs, or keeping the accounts, of an association of persons, body of individuals, partnership firm or private company referred to in clause (iii); value of the assets of the trust on that date; referred to in clause (iii);
F (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;
G (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.

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him (as defined in Section 3(1)(c)² of the Act was liable to be forfeited. A
Accordingly, notice of forfeiture was issued under Section 6 of the Act
in respect of several properties including the property which is subject
matter of present proceeding viz. T-40, Juhu Koliwada, H.B. Gawde
Road (also known as Azad Road), I Santacruz (West), Mumbai – 400
049. Vide order dated 29th August, 1977, the competent authority passed B
an order under Section 7 of the Act holding the property in question to be
liable to be forfeited. This order was confirmed by the Appellate Tribunal
for Forfeited Property on 2nd April, 1997 in respect of the said property.

4. The appellants herein filed a Writ Petition under Articles 226/
227 of the Constitution seeking a direction that order of forfeiture passed C
against Krishna Budha Gawde could not operate against them as they
are bona fide tenants. Prior to 1965, the original owner of the property
sold the property to Krishna Budha Gawde. The new landlord – Gawde
reconstructed the structure in the year 1972 and the appellants were put
in possession thereof and were paying rent to the new owner under the
Bombay Rent Act. They were not aware of proceedings under D

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

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(c) “illegally acquired property”, in relation to any person to whom this Act applies,
means— E

- (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, earning or assets in respect of which any such law has been contravened; or F
- (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 G
- (iv) 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 referred to in sub-clauses (i) to

(iii) or the income or earnings from such property; and includes—

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A SAFEMA and COFEPOSA against the landlord. They informed the competent authority about this. Since they apprehended coercive steps against them, they are entitled to be granted protection.

B 5. The writ petition was contested by submitting that since the properties of Krishna Budha Gawde stood forfeited and vested in the Central Government free from all encumbrances, the alleged tenancy rights did not survive and the competent authority was entitled to take possession under Section 19 of SAFEMA.

C 6. The High Court dismissed the writ petition holding that the tenancy did not survive in view of Section 7(3) of SAFEMA.

C 7. We have heard learned counsel for the parties.

D 8. The contention raised on behalf of the appellants is that forfeiture contemplated under Section 7 of the Act is only of illegally acquired property as defined under Section 3(1)(c) of SAFEMA i.e. property acquired by the person to whom the Act applies which is defined under Section 2(2) of SAFEMA. The Act applied to a person against whom the order of detention has been passed or a person who is a relative or associate of such person or holder of the property which was previously held by such person as per the said provision, quoted earlier. 'Relative' is defined in Explanation 2 and 'associate' is defined in E Explanation 3 of Section 2 of SAFEMA.

F 9. It is submitted that the appellants could not, in any manner, be held to be relative or associate of the person against whom the order of detention had been passed, and, therefore they could not be visited with any adverse consequences for the wrongful action of Krishna Budha G. Gawde. Reliance has been placed on judgments of this Court in *C.B.*

G (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;

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*Gautam versus Union of India and Ors.*³; *Attorney General for India and Ors. versus Amrattal Prajivandas and Ors.*⁴; *State of West Bengal and Ors. versus Vishnunarayan & Associates (P) Ltd. and Anr.*⁵; *Fatima Mohd. Amin (Smt.) (Dead) through LRs. versus Union of India and Anr.*⁶; *P.P. Abdulla and Anr. versus Competent Authority and ors.*⁷; *Aslam Mohammad Merchant versus Competent Authority and Ors.*⁸; *Vishal N. Kalsaria versus Bank of India and Ors.*⁹; and judgment of Bombay High Court in *Narayan Vittappa Kudva versus Union of India and Anr.*¹⁰.

10. Learned counsel for the respondents supported the view taken in the impugned judgment.

11. On due consideration of the matter, we find merit in the contention of the appellants. The answer to the question framed in earlier part of the judgment has to be in favour of the appellants and in the negative.

12. In *C.B. Gautam* (supra) validity of Chapter XX-C inserted in the Income Tax, 1961 by the Finance Act of 1986 was considered. The scheme of the said provision was to confer power of compulsory purchase of immovable property by the Department if there was under-valuation for evasion of tax. This Court upheld the provision by reading therein the requirement of giving opportunity of hearing and recording reasons. However, as regards the bona fide rights of encumbrance holders such as a subsisting lease, it was observed that they could not be visited with adverse consequences as they were not involved in tax evasion. This Court observed:

“36.In the result the expression “free from all encumbrances” in sub-section (1) of Section 269-UE is struck

³(1993) 1 SCC 78

⁴(1994) 5 SCC 54

⁵(2002) 4 SCC 134

⁶(2003) 7 SCC 436

⁷(2007) 2 SCC 510

⁸(2008) 14 SCC 186

⁹(2016) 3 SCC 762

¹⁰2002 (2) MhLJ 290

A down and sub-section (1) of Section 269-UE must be read
without the expression "free from all encumbrances" with the
result the property in question would vest in the Central
Government subject to such encumbrances and leasehold
interests as are subsisting thereon except for such of them as
B are agreed to be discharged by the vendor before the sale is
completed. If under the relevant agreement to sell the property
is agreed to be sold free of all encumbrances or certain
encumbrances it would vest in the Central Government free
of such encumbrances. Similarly, sub-section (2) of Section
269-UE will be read down so that if the holder of an
C encumbrance or a lessee is in possession of the property and
under the agreement to sell the property it is not provided
that the sale would be free of such encumbrances or leasehold
interests, the encumbrance holder or the lessee who is in
possession will not be obliged to deliver the possession of the
property to the appropriate authority or any person
D authorised by it and the provisions of sub-section (3) also
would not apply to such persons. If the provisions of Section
269-UE are read down in the manner indicated above then,
in our opinion, the provisions of sub-section (6) of that section
do not present any difficulty because the vesting in the Central
E Government would be subject to such encumbrances and
leasehold rights as stated earlier."

13. In *Amratlal* (supra) this Court considered the validity of the
SAFEMA and the COFEPOSA and in that context one of the questions
F framed for consideration was whether the definition of "illegally acquired
property" in clause (c) of Section 3(1) of SAFEMA was unconstitutional
and whether application of the Act to the relatives and associates of a
person illegally acquiring the property was valid. This Court observed:

G "44.The relatives and associates are brought in only
for the purpose of ensuring that the illegally acquired
properties of the convict or detenu, acquired or kept in their
names, do not escape the net of the Act. It is a well-known
fact that persons indulging in illegal activities screen the

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*properties acquired from such illegal activity in the names of their relatives and associates. Sometimes they transfer such properties to them, may be, with an intent to transfer the ownership and title. In fact, it is immaterial how such relative or associate holds the properties of convict/detenu — whether as a benami or as a mere name-lender or as a bona fide transferee for value or in any other manner. He cannot claim those properties and must surrender them to the State under the Act. Since he is a relative or associate, as defined by the Act, he cannot put forward any defence once it is proved that that property was acquired by the detenu — whether in his own name or in the name of his relatives and associates. It is to counteract the several devices that are or may be adopted by persons mentioned in clauses (a) and (b) of Section 2(2) that their relatives and associates mentioned in clauses (c) and (d) of the said sub-section are also brought within the purview of the Act. The fact of their holding or possessing the properties of convict/detenu furnishes the link between the convict/detenu and his relatives and associates. Only the properties of the convict/detenu are sought to be forfeited, wherever they are. The idea is to reach his properties in whosoever's name they are kept or by whosoever they are held. The independent properties of relatives and friends, which are not traceable to the convict/detenu, are not sought to be forfeited nor are they within the purview of SAFEMA**¹¹. We may proceed to explain what we say. Clause (c) speaks of a relative of a person referred to in clause (a) or clause (b) (which speak of a convict or a detenu). Similarly, clause (d) speaks of associates of such convict or detenu. If we look to Explanation (3) which specifies who the associates referred to in clause (d) are, the matter becomes clearer. 'Associates'*

¹¹ ** That this was the object of the Act is evident from para 4 of the preamble which states: "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." We are not saying that the preamble can be utilized for restricting the scope of the Act, we are only referring to it to ascertain the object of the enactment and to reassure ourselves that the construction placed by us accords with the said object.

A means — (i) any individual who had been or is residing in the residential premises (including outhouses) of such person [‘such person’ refers to the convict or detenu, as the case may be, referred to in clause (a) or clause (b)]; (ii) any individual who had been or is managing the affairs or keeping the accounts of such convict/detenu; (iii) any association of persons, body of individuals, partnership firm or private company of which such convict/detenu 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 of persons, body of individuals, 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) the trustee of any trust where (a) the trust has been created by such convict/detenu; or (b) the value of the assets contributed by such convict/detenu to the trust amounts, on the date of contribution not less than 20% of the value of the assets of the trust on that date; and (vii) where the competent authority, for reasons to be recorded in writing, considers that any properties of such convict/detenu are held on his behalf by any other person, such other person. It would thus be clear that the connecting link or the nexus, as it may be called, is the holding of property or assets of the convict/detenu or traceable to such detenu/convict. Section 4 is equally relevant in this context. It declares that “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”. All such property is liable to be forfeited. The language of this section is indicative of the ambit of the Act. Clauses (c) and (d) in Section 2(2) and the Explanations (2) and (3) occurring therein shall have to be construed and understood in the light

of the overall scheme and purpose of the enactment. The idea is to forfeit the illegally acquired properties of the convict/detenu irrespective of the fact that such properties are held by or kept in the name of or screened in the name of any relative or associate as defined in the said two Explanations. The idea is not to forfeit the independent properties of such relatives or associates which they may have acquired illegally but only to reach the properties of the convict/detenu or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties. By way of illustration, take a case where a convict/detenu purchases a property in the name of his relative or associate — it does not matter whether he intends such a person to be a mere name-lender or whether he really intends that such person shall be the real owner and/or possessor thereof — or gifts away or otherwise transfers his properties in favour of any of his relatives or associates, or purports to sell them to any of his relatives or associates — in all such cases, all the said transactions will be ignored and the properties forfeited unless the convict/detenu or his relative/associate, as the case may be, establishes that such property or properties are not “illegally acquired properties” within the meaning of Section 3(c). In this view of the matter, there is no basis for the apprehension that the independently acquired properties of such relatives and associates will also be forfeited even if they are in no way connected with the convict/detenu. So far as the holders (not being relatives and associates) mentioned in Section 2(2)(e) are concerned, they are dealt with on a separate footing. If such person proves that he is a transferee in good faith for consideration, his property — even though purchased from a convict/detenu — is not liable to be forfeited. It is equally necessary to reiterate that the burden of establishing that the properties mentioned in the show-cause notice issued under Section 6, and which are held on that date by a relative or an associate of the convict/detenu, are not the illegally acquired properties of the convict/detenu, lies upon such relative/associate. He must establish that the

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A *said property has not been acquired with the monies or assets provided by the detenu/convict or that they in fact did not or do not belong to such detenu/convict. We do not think that Parliament ever intended to say that the properties of all the relatives and associates, may be illegally acquired, will be*
B *forfeited just because they happen to be the relatives or associates of the convict/detenu. There ought to be the connecting link between those properties and the convict/detenu, the burden of disproving which, as mentioned above, is upon the relative/associate. In this view of the matter, the apprehension and contention of the petitioners in this behalf*
C *must be held to be based upon a mistaken premise. The bringing in of the relatives and associates or of the persons mentioned in clause (e) of Section 2(2) is thus neither discriminatory nor incompetent apart from the protection of Article 31-B."*

D 14. In *Fatima* (supra), applying the ratio of *Amratlal* (supra), this Court held that in absence of an averment that the property with an individual was benami, such individual could not be proceeded against in absence of any link or nexus of the property with the illegally acquired money.

E 15. In *Vishnunarayan* (supra) it was held that Section 6-A of the W.B. Govt. Premises (Tenancy Regulation) Act, 1976 is not applicable to tenants in lawful occupation.

F 16. In *Abdulla* (supra) following the judgment of this Court in *Fatima* (supra) it was held that Section 6(1) of the Act could apply only when there was a link or nexus of the property sought to be forfeited with the illegally acquired money of the person to whom the Act applied.

G 17. In *Vishal* (supra), the question was whether protected tenant under the Maharashtra Rent Control Act, 1999 could be deprived of his rights under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the SARFAESI Act). Answering the question in the negative, it was held that such a situation was not contemplated as it will result in a central statute nullifying a State statute which was within the exclusive jurisdiction of the legislature and thereby affecting the concept Federalism.

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18. In *Narayan Vittappa* (supra) the Bombay High Court held that a person to whom the Act applied, his relative or associate did not include a bona fide tenant having no connection whatsoever to the person who was convicted or detained in the manner contemplated under Section 2 of the Act and if such a person claims to be having no nexus to the person to whom the Act applied, his rights will not stand vested in the Central Government, though he may be liable to be proceeded against the Public Premises Eviction Act¹². A B

19. In *Aslam* (supra), following the judgments of this Court in *Amratlal* (supra) and *Fatima* (supra) it was held that for forfeiture of property under Chapter V-A of the Narcotic Drugs and Psychotropic Substances Act, 1985, a direct nexus/link was necessary between the properties sought to be forfeited and its illegal acquisition. C

20. In the present case, it is undisputed that only adjudication which has taken place by the competent authority is that the property was owned by the person to whom the Act applied i.e. against whom the order of detention had been confirmed. The rights of the appellants, who claim to be bona fide tenants even prior to purchase of the property by the person to whom the Act applied, have not been adjudicated upon on the assumption that their rights will stand automatically terminated. In view of law laid down by this Court, noticed above, we are of the view that rights of a bona fide tenant will not stand automatically terminated by forfeiture of property and vesting thereof in the Central Government. Such forfeiture will extinguish the rights of the person to whom the Act applies in the present case Krishna Budha Gawde, who was the owner of the property in question or his relative or associate having nexus with him in relation to the said property. However, we do not express any opinion whether the appellants are the bona fide tenants and had no nexus with the acquisition of the property by the person to whom the Act applied as claimed by them. This question needs to be determined independently by the competent authority as defined in Section 3(b) of the Act. D E F

21. Accordingly, we allow this appeal, set aside the order of the High Court and remit the matter to the competent authority for passing G

¹² Para 15 in *Narayan Vittappa Kudva v. Union of India and Anr.* [2002 (2) MhLJ290]

A an appropriate order in accordance with law. The parties are directed to appear before the competent authority for further proceedings on 9th October, 2017.

B Nidhi Jain

Appeal allowed.