

A. Michael Vs. Deputy Director, Enforcement Directorate

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Court : Appellate Tribunal for foreign Exchange New Delhi

Decided On : Jul-18-2001

Judge : D.P. Sharma, Chairperson

Appeal No. : APPEAL NOS. 263 & 574 of 2000

Appellant : A. Michael

Respondent : Deputy Director, Enforcement Directorate

Advocate for Pet/Ap. : M. Jeevaratnam for the Appellant. T.K. Gadoo for the Respondent

Judgement :

Sharma, Chairperson Both these appeals have arisen from the same order and as such are being disposed of by this common order.

2. Shri M. Jeevaratnam, the authorised representative of the appellants submitted that the appellants have deposited the amount of penalty and as such they are not seeking dispensation of pre-deposit of penalty and prayed that these appeals can be heard and disposed of on merits.

3. It is noted that Appeal No. 574/2000 has been filed on 29-8-2000. The Foreign Exchange Management Act, 1999 comes into force with effect from 1-6-2000 and appeals filed thereunder are required to be accompanied by fee of Rs. 10,000. Shri Jeevaratnam was, therefore, asked to make good the deficiency in the

amount of appeal fee by paying the balance amount before these appeals can be taken up for consideration on merits. Shri Jeevaratnam submitted that he would deposit the requisite amount of fee forthwith. He further submitted that the copy of the adjudication order was received belatedly and hence he should not be penalised for this. He further submitted that in other appeal the copy of the adjudication order was received in time and, therefore, he filed that appeal in time paying the then prevailing rates of fee. Since the department has sent the copy of the adjudication order late in this case, he should not be penalised for this. He requested that a finding on this aspect may be given. Although the contention of Shri Jeevaratnam appears to be *ex facie* convincing, nonetheless the appeal is governed by the procedure as in force at the time of its filing. This Tribunal is not vested with any power to dispense with the same in any circumstances. Hence the deposit of fee in accordance with the rule is in order.

4. It would be expedient to recaptulate briefly the facts in the context in which these appeals have arisen for consideration. On 10-6-1997, Shri A. Balasubramanian, Manager of International Money Exchange Corporation (IMEC), Chennai and Shri M. Soosai, Cashier of IMEC while riding on a motorcycle were intercepted by the officers of the respondent. The personal searches of these two persons resulted in seizure of foreign currencies of US \$ 10,000 and certain other assorted foreign currencies valued at Rs. 8,45,000, Indian currencies of Rs. 4,300 and discharged travellers cheques for US \$ 20,000 and a bunch of 4 sheets consisting of accounts written and visiting card of IMEC as per Mahazar dated 10-6-1997 from Shri M. Soosai, 12 sheets containing accounts and sales memos were seized from the person of Shri A. Balasubramanian. Thereupon the respondent conducted further investigation on the conclusion of which Shri A. Michael and IMEC were charged for contravening the provisions of section 7 read with sections 6(4), 6(5) and 49 and section 8(1) of Foreign Exchange Regulation Act, 1973 (the Act) in not having complied with the conditions under which the full-fledged money-changers licence was granted to them by the RBI and for having otherwise transferred the foreign exchange and TCs seized as aforesaid to Shri A. Balasubramanian and Shri M. Soosai, Manager and cashier of IMEC respectively. The Manager and the Cashier of IMEC were also charged for contravening the provisions of section 8(1) and section 8(1) read

with section 64(2) of the Act for having otherwise acquired the aforesaid foreign exchange and attempted to sell the same to persons other than the persons authorised dealers in foreign exchange. After hearing the notices and considering the material available on record, the learned Adjudicating Officer quashed the charges against Shri A. Balasubramanian but held Shri A. Michael, Proprietor of IMEC and Cashier guilty of the contravention of provision of which they were charged and, taking a lenient view having regard to the facts and circumstances of the case, imposed a penalty of Rs. 55,000 on Shri A. Michael and Rs. 45,000 on Shri M. Soosai, respectively, besides the confiscation of seized US \$ 20,000 (in TCs) being involved in the contravention in as much the same were otherwise transferred by Shri Michael to Shri M. Soosai for sale unauthorisedly. Feeling aggrieved of this, both Shri A. Michael and Shri M. Soosai have come in appeals against the said order.

5. Shri Jeevaratnam made his submissions orally as well as in writing. The main thrust of his submissions is that the seized currencies and TCs have been legally acquired by IMEC which is a licensed full-fledged money- changer and the same have been duly entered in their records. Shri Jeevaratnam referred to American Expresss Receipt and Ex. 14 relating to sale of travellers cheques. These could not have been sold to anyone unauthorisedly. Both Shri A. Balasubramanian and M. Soosai were the employees and whose names have been duly forwarded to the RBI for sale and purchase of currencies in that capacity on behalf of IMEC. As such, there could not be any transfer in terms of section 8 with whose contravention the appellants were charged with. Shri Jeevaratnam narrated the circumstances in which the TCs were inadvertently signed. Nonetheless, he submitted that as per the prevailing practice, the presenter of these TCs would be required to sign again in the presence of the authorised dealer. Had it been their intention to illegally transfer these TCs, it would have been easier for them not to have these TCs countersigned by anyone for in any case, the buyer would be signing the same at the time of presenting these TCs for encashment to any authorised dealer.

6. Shri Jeevaratnam further submitted that the charges levelled against

the appellant are vague. The show-cause notice did not contain any particular allegation as to which specific condition/regulation is alleged to have been contravened by the appellant. Shri Jeevaratnam very vehemently claimed that appellants have not flouted or contravened any condition of moneychangers business as alleged by the respondents. He further claimed that the facts shown in the show-cause notice do not constitute the charge on the face of it. The show-cause notice ought to have contained specific reference to the condition alleged to have been flouted by the appellants. Shri Jeevaratnam further contended that the learned Adjudicating authority has erred in going beyond the show-cause notice when in para 28 of the impugned order the learned Adjudicating Authority has held that the appellant has not exercised proper caution. Shri Jeevaratnam submitted that no allegation in the show-cause notice was ever made against the appellant to this effect that the appellants have failed to exercise proper caution. Thus this finding is not in accordance with the show-cause notice and, consequently, the impugned order is vitiated. Shri Jeevaratnam also submitted that the impugned order is based on surmises and conjecture and not on any evidence.

7. Shri Gadoo on behalf of the respondents maintained that the impugned order is legally in order. He pointed out that the destruction certificates were not among the seized documents. On enquiry Shri Gadoo, however, failed to show the conditions of licence which are alleged to have been contravened by the appellants. He merely stated that the appellants have not been able to adduce the supporting documents.

8. I have given my careful consideration to the submissions made by both the parties and the material available on records. At the very outset it is noted from Exs. 6 and 22 that the names of Shri M. Soosai, Shri A. Balasubramanian and Shri K. Xaiveer have been duly forwarded to the RBI in terms of para 3 of FLM alongwith their respective specimen signature as authorised signatories. It is seen from Ex. 5 which contain relevant extracts of FLM Memorandum of instructions to full-fledged moneychangers. Para 3 of the said memorandum deals with authorised officials. Accordingly all money-changers should arrange to forward a list giving full names and designations of their representatives who are authorised to buy and sell foreign currency notes, coins and travellers cheques on their behalf

together with their specimen signatures, at the end of each year to the office of Reserve Bank under whose jurisdiction they are functioning. Any changes in the list should also be brought to the notice of Reserve Bank. No person other than the authorised representative should be allowed to transact money-changing business on behalf of the money-changer. In view of this, it cannot be said that the appellants have not complied with the conditions contained in para 3 of memorandum referred to above. It is further clear that the appellant-firm handed over foreign exchange to its employees whose names have been duly forwarded to the RBI as its authorised representatives/officials. It cannot be said that the appellant-firm transferred such foreign exchange in contravention of section 8 when it entrusted foreign exchange to its employees who are duly authorised in this behalf, in connection with its business. Nor, for that reason the employees can be said to have acquired such foreign exchange entrusted to them by their employer in connection with the business of their employer moneychanger. Furthermore, apart from the statements of the appellants, there is no cogent evidence to show that Shri M. Soosai made any attempt to sell the foreign exchange in his possession unauthorisedly to any other person. The material on records falls short of legal requirements. The mere fact that the appellant was intercepted in Barma Bazar which is known for illegal sale and purchase of foreign currency is not decisive on the allegation that the appellant made an attempt to illegally sell foreign exchange to unauthorised persons. Admittedly, the foreign exchange have been legally acquired the appellant. He might be passing through Burma Bazar in their ordinary course of business. If the respondents were keeping the surveillance, they could have waited a little more and got the appellant red-handed while selling foreign exchange illegally. In any case, the chain of circumstances is not complete so as to held Shri Soosai guilty of attempt in terms of provisions of the Act and benefit of this obviously goes to him.

9. The appellants have been charged with non compliance with the conditions subject to which the FMC Licence was issued by the RBI. The learned Adjudicating Authority has nowhere dealt in the impugned order of these conditions and in what manner, they were not complied by with the appellants as alleged. In para 28 of the impugned order, after having dealt with section 49 vis-a-vis section 7 of the Act, the learned Adjudicating Authority gave further finding that

there has been non compliance with the conditions subject to which the FMC licence was granted to IMEC by the RBI and Shri A. Michael, proprietor of IMEC has not exercised proper caution and has not adhered to the instructions given by the RBI in dealing with the foreign exchange thereby he has contravened the provisions of section 6(4) and 6(5) read with sections 7 and 49 as alleged in the memorandum issued to Shri Michael. There is no basis whatsoever that can be gathered from the impugned order for this finding. There is no mention of the conditions alleged to have been contravened. Nor there is anything to indicate in the impugned order as to when, how, and in what manner these conditions have not been complied with by the appellant. The finding apparently proceeded on surmises and conjecture which cannot be sustained in law.

10. Furthermore the Destruction Certificates are not reflected among the seized documents as per the Mazhar. The correctness of this has been challenged by the appellant. Without going into the correctness of this the learned Adjudicating Officer ought to have been taken into consideration the explanation furnished by the appellant as to the circumstances in which the TCs in question were countersigned. Admittedly these TCs have been acquired legally and it has not been controverted by the respondents in any manner. There is a force in the submissions made by Shri Jeevaratnam in this regard that these TCs, having been acquired legally and properly, could not have been sold unauthorisedly to anyone. Had it been the intention, the appellants could have kept these cheques blank instead of signing it twice. Furthermore signing of the cheques twice was not enough as could be seen from the Acceptors Reference Guide of American Express, the relevant extracts of which are filed by the appellants as Ex. 18. Page 13 of the said Ex. contained guidelines regarding accepting American Express Travellers Cheques, relevant extract which reads as : Remember, if anything happens to disrupt the normal Watch and compare procedure, i.e., if a customer presents a Travellers Cheque that has already been countersigned . . . ask your customer to sign the Travellers Cheques again - on the reverse while you watch. Now, compare this signature with the original by folding the cheque over. In view of this it cannot be said simply because the TCs were countersigned they were intended for illegal sale. If the appellant intend to sell the same illegally, it was easier for him not to sign these cheques at all for in any case the buyer would be

required to countersign the same at the time of their presentation. The explanation furnished by Shri Michael appears to be plausible.

11. With due respect I am not inclined to agree with the Adjudicating Authority that merely because TCs were discharged, they seized to be in legal possession. Too much emphasises have been laid on the bulk sales memos not being among the seized documents and have been submitted by the appellants subsequently. The inferences drawn by the learned Adjudicating Authority appears to be more in the realm of surmises rather than being based on evidence which can be validly made basis for the appellants conviction. It cannot be said, in the facts and circumstances of the case, that the TCs in question were undoubtedly meant for sale unauthorisedly as has been held by the learned Adjudicating Authority. Similarly the learned Adjudicating Authority has laid undue emphasises on non availability of BTQ applications with IMEC. The learned Adjudicating Authority, however, failed to take into consideration the explanation furnished by the appellant that passengers having submitted outstation cheques which were not acceptable to the appellants, the passenger collected back the BTQ applications and connected records and left the premises saying that they would come back soon with cash or bank drafts to purchase TCs but the passengers did not come back till the evening of 10-6-1997 whereupon the appellants destroyed TCs in question. It is seen that the seized foreign currency has been directed to be confiscated under section 63 of the Act and as much as the same was transferred by Shri Michael to Shri Soosai for sale unauthorisedly. Since handing over foreign currency by full-fledged moneychanger to one of its employees, who is an authorised signatory, cannot be viewed as transfer in terms of section 8(1), the confiscation is also bad for this reason.

12. In the facts and circumstances of the case, and for the reasons stated above, I set aside the impugned order and allow both the appeals and direct that the seized foreign currency as well as penalties amount that has already been deposited by the appellants be returned to the appellants.

13. These two appeals are accordingly allowed.