S. Raman Director of Enforcement

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Court : Appellate Tribunal for foreign Exchange New Delhi

Decided On : Jul-08-1992

Judge : R.L. Meena, Chairman

Appeal No. : APPEAL NO. 383 OF 1985

Appellant : S. Raman Director of Enforcement

Advocate for Pet/Ap. : Hemanth Kumar for the Appellant. V.S. Thiageswaran for the Respondent.

Judgement :

1. This appeal arises against the adjudication order No. DD/MAS/96 and 97/85 dated 29-3-1985 whereby total penalty of Rs. 7,500 (Rs. 5,000 for contravention of the provisions of section 8(1) and section 8(2), and Rs. 2,500 for contravention of section 8(1) of the Foreign Exchange Regulation Act ('the Act') read with the RBI Notification No. FERA/47/77- RB, dated 24-11-1977 was imposed on the appellant.

2. In the instant case, two show-cause notices (Memo No. T4/337/SZ/ City/84-SCN-I and Memo No. T4/338/SZ/City/84-SCN-II) were issued to the appellant charging him as follows:

(i) SCN-I - The charge levelled against the appellant in this notice is that during June 1984, the appellant Sh. S. Raman, a person resident in India other than an authorised dealer in foreign exchange, otherwise acquired foreign exchange to wit

US $ 3.768 from his brother in Saudi Arabia as gift but failed to surrender the same within 7 days from his return to India and thereby contravened provisions of section 8(1) read with RBI Notification No. FERA 47/77-RB, dated 24-11-1977.

(ii) SCN-II - The charge levelled against the appellant in this notice is that during June 1984, the appellant Sh. S. Raman, a person other than

an authorised dealer in foreign exchange resident in India, purchased foreign exchange, viz., US $ 4,000 from persons other than authorised dealers in foreign exchange without the general or special permission of the RBI and thereby contravened the provisions of section 8(1) and that the appellant entered into a transaction for purchase of foreign exchange, viz., US $ 4,000 at rates of exchanges other than the rates prescribed by the Reserve Bank and thereby contravened section 8(2) of the Act.

3. As the explanation furnished by the appellant in regard to the above show-cause notices were not found satisfactory, adjudication proceedings were initiated against him. The Adjudicating Officer found the appellant guilty of having contravened the provisions mentioned in SCN-I and II and imposed penalties on him as above.

4. I have heard the counsel for the parties and have perused records of the case.

5. The counsel for the appellant submits that the charges levelled against the appellant are not established as the confessional statement was obtained by use of threat, which was retracted by the appellant on the same day and that the charges cannot be sustained on the basis of such a statement without any corroboration. The counsel further submits that the adjudication proceedings are vitiated as the appellant was not given the opportunity to cross-examine the witnesses and also because two independent charges were clubbed and adjudicated upon in one notice only (SCN-II). It was also contended on behalf of the appellant that mere receipt of money from his brother as gift would not amount to contravention of section 8(1). Alternatively, the counsel for the appellant pleaded for a lenient view as the appellant had already been prosecuted for non payment of the penalty as also because the appellant is economically very weak

apart from being mentally and physically handicapped.

6. The counsel for the respondent, on the other hand, submits that the confessional statement was voluntary, that the retraction was after thought and that the appellant did not make any request for cross- examination of the witnesses during the course of the adjudication proceedings.

7. SCN-I - A perusal of records of the case reveals that the appellant, when he was in Singapore, had received US $ 3,768 from his brother in Saudi Arabia as gift. This is not in dispute. The appellant had admitted this fact in his letters dated 23-6-1984 addressed to the D. D., 28-7-1984 addressed to the D.D., 20-8-1984 addressed to the Asstt. Director as also in his reply dated 31-1-1985 to the SCN-I. This position has not been also disputed in the memorandum of this appeal. However, the contention of the appellant is that "the receipt of 3,768 US dollars in Singapore by the appellant from his twin brother, Sh. Lakshmanan from Saudi Arabia, for meeting the expenses of the appellant's stay, needs, travels and for providing his conveniences while abroad, is not a dealing in foreign exchange within the mischief contemplated under section 8 of the Act 46 of 1973" (vide para 5 of the appeal). The appellant had stated in his letter dated 31-1-1985 as also in the reply to the SCN that the said amount was also utilised by him for purchasing goods. The vital question for consideration is whether receipt of the said amount of US $ 3,768 by the appellant from his brother in Saudi Arabia as gift would fall within the mischief of section 8(1) R/W RBI Notification No. FERA 47/77-RB, dated 24-11-1977.

8. Section 8(1) provides as follows :

"Restrictions on dealing in foreign exchange - (1) Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange :

Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money changer."

9. While considering the scope of the expression 'otherwise acquire' occurring in the above provision, the Bombay High Court in Pandharinath Kishthiah Renguntawar v. Dy. Director of Enforcement [1981] 51 Comp. Cas. 163, 173 (Bom.) has held as follows:

"... It does not stand to reason that a gift of foreign exchange inter vivos will be outside the purview of the acquisition contemplated. If it be the gift of foreign exchange inter vivos, then It is nonetheless an acquisition of foreign exchange. When acquisition comes by gift it extinguishes the title of the donor and confers title on the donee. Not only possession but also entitlement are available in a transaction of gift. Gift of foreign exchange resulting in receipt thereof by a person cannot, in the context of the present sub-section, be excepted from the purview of the term 'otherwise acquired'." (p. 173)

10. In view of the above legal position, the receipt of US $ 3,768 by the appellant in Singapore from his brother in Saudi Arabia as gift clearly amounts to 'otherwise acquiring' of foreign exchange within the meaning of section 8(1). As per the first proviso of clauses (b) and (c) of the RBI Notification No. FERA 47 of 1977-RB, dated 24-11-1977 foreign exchange acquired outside India by an Indian citizen resident in India by way of gift under clause (b) thereof is required to be surrendered to an authorised dealer within 3 months from its receipt instead of utilising the same for one's own purposes. In other words, the foreign exchange acquired by an Indian resident by way of gift outside India cannot be spent or utilised by the donee for any purpose as the donee is obligated under section 8(1) read with the above notification to surrender the same within the period stipulated under the said first proviso. It may be stated that SCN-I mentions 7 days instead of 3 months. The period of 7 days is relevant under the third proviso of that notification, which is not attracted when an Indian resident acquires foreign exchange outside India by way of gift, as such, a case would fall under the said first proviso under which the period stipulated is 3 months. As the said amount was not surrendered even after

7 days, this anamoly is not such as may vitiate the proceedings. Nor can it be said to have occasioned failure of justice. This is only a minor discrepancy, particularly when the said notification was mentioned in the SCN along with the substantive provisions contained in section 8(1) as also when the explanations contained in the appellant's aforementioned letters and the reply to the SCN-I had covered the aspects of the matter having bearing on the contravention relatable to the relevant provision contained in the said notification. Further, under section 464 of the Cr. P.C., no finding, sentence or order shall be deemed to be invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any mis-joinder of charges, unless in the opinion of the Court of Appeal, a failure of Justice has, in fact, occasioned thereby. As already stated, the aforementioned error does not appear to be such as may result in the failure of justice. Needless to say that above provision of the Code of Criminal Procedure also applies to the proceedings/trial for offences under the Act, as its applicability has not been excluded by the Act.

11. SCN-II- This notice contains two charges - one involving contravention of section 8(1) and the other relating to contravention of section 8(2). At the outset, it may be stated that the mere fact that a notice contained two charges would not vitiate the adjudication proceedings, if the charges have been clearly mentioned in the notice and there is no ambiguity. In the instant case, both the charges mentioned in SCN-II are clearly and as such the appellant does not appear to have been prejudiced in any way, particularly having regard to the legal position discussed in the preceding para.

12. As regards the contravention of section 8(1) of the Act contained in SCN-II, it may be stated that the appellant has stated in his statement dated 23-6-1984 given before the E.O. that before departure to Singapore, he purchased US $ 4,000 from an unknown person in Burma Market (Madras) and took the same to Singapore. The confessional statement given by the appellant on 19-6-1984 before the Customs Officers also corroborates the appellant's statement dated 23-6-1984. Further, the fact that the appellant had brought 3 gold biscuits and number of other goods from Singapore, as mentioned in the seizure memo also lends support to the above confessional statement of the appellant. Therefore, the

retraction appears to be afterthought. There is no reason as to why the confessional statements of the appellant given before the E.O. and the Customs Officers should not be relied upon. The confessional statements appear to be voluntary as also true. Therefore, the charge that the appellant had purchased US $ 4,000 without the general or special permission of the RBI from a person other than an authorised dealer in contravention of section 8(1) is established.

13. As regards the contravention of section 8(2), it may be stated that the

provisions of this section would be attracted if the following conditions are satisfied :

(i) There must be a transaction providing for the conversion of Indian currency into foreign currency or vice versa at certain rates;

(ii) Such rates of conversion are rates other than the rates authorised by the RBI; and

(iii) Such transaction was entered into without the previous general or special permission of the RBI.

14. In this case, it is established that the appellant had purchased US $ 4,000 from the Burma Market (Madras) from an unknown person at Rs. 12.50 to Rs. 13 per dollar (vide the statement of the appellant dated 23-6-1984 read with his earlier statement dated 19-6-1984 given before the Customs Officers) and that no permission was obtained from the RBI in that regard. Therefore, the condition Nos. (i) and (iii) above stand satisfied. However, there is no material to indicate as to what was the authorised rate of conversion of Indian currency into foreign currency at the relevant time. In the absence of such authorised rate, it is difficult to say that the said purchase was made at rates other than the rates authorised by the RBI. The condition (ii) above is not satisfied. Accordingly, the charge of violation of section 8(2) is not established against the appellant.

15. A perusal of the adjudication order reveals that the appellant was given opportunity of personal hearing and the appellant's advocate appeared before the Adjudicating Officer and argued the case. The adjudication order does not reveal

that cross-examination of the witnesses was demanded by the appellant during the course of hearing before the Adjudicating Officer. Therefore, the plea that the appellant was not afforded opportunity to cross-examine witnesses does not have any substance.

16. As the penalty imposed appears to be proportionate to the contraventions, the same cannot be said to be excessive. It appears to me that the Adjudicating Officer has in fact already taken a lenient view in this regard. No further leniency is warranted. However, as the charge of contravention of section 8(2) is not established, I reduce the penalty to Rs. 4,500 from Rs. 5,000 which was the total penalty imposed by the Adjudicating Officer for contravention of both sub-sections (1) and (2) of section 8 under SCN-II.

17. In the light of the above, I confirm the findings of the Adjudicating Officer as regards contravention of section 8(1) read with the said Notification (SCN-I) and contravention of section 8(1) of the Act (SCN-II). The findings of the Adjudicating Officer as regards contravention of section 8(2) of the Act, are set aside. Penalty of Rs. 2,500 imposed for violation of section 8(1) (SCN-I) is confirmed.

18. Accordingly, I reduce the total penalty to Rs. 7,000 from Rs. 7,500. The adjudication order is modified to that extent. Rest of the appeal is dismissed.