

S. Parameswaran Vs. Director of Enforcement

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Court : Appellate Tribunal for foreign Exchange New Delhi

Decided On : Jun-26-1992

Judge : R.L. Meena, Chairman

Appeal No. : APPEAL NOS. 558 AND 559 OF 1986

Appellant : S. Parameswaran

Respondent : Director of Enforcement

Advocate for Pet/Ap. : A. Packiaraj and G. Walter Solomon for the Appellant.
V.S. Thiageswaran for the Respondent.

Judgement :

1. Since Appeal Nos. 558 and 559 of 1986 are inter-connected, they are being decided by a common order.
2. These appeals arise against a common adjudication order No. DD/MAS/190 and 191 of 1986 dated 23-6-1986 whereby a penalty of Rs. 5,000 on Associated Travel Agency (P.) Ltd. for contravention of the provisions of section 9(1)(b) of the Foreign Exchange Regulation Act. 1973 ('the Act') and a penalty of Rs. 5,000 on Shri S. Parameswaran for violation of section 9(1)(a) were imposed and the sum of Rs. 99,800 involved in the contravention was confiscated under section 63 of the Act.

3. Briefly stated, the facts of the case are that the premises of Associated Travel Agency (P.) Ltd. were searched on 13-8-1984 pursuant to an information that the company has received a payment of Rs. 1 lakh under the instructions of a person resident outside India. Indian currency of Rs. 99,800 and certain other documents were seized. Shri G. Singaravelu, an employee of Associated Travel Agency (P.) Ltd. gave his statement on 14-8-1984, inter alia, stating that Shri Parameswaran was the managing director of the company that Vellaian Transport used to have some connection with Associated Travel Agency (P.) Ltd. that on 13-8-1984 Shri Haja representing Vellaian Transport came to the office and gave Rs. 13,000 to the cashier, Shri Ansari, informing that he would come again; and that Shri Haja came again and delivered the balance of Rs. 87,800 which was received by the cashier and a receipt was given to him. Shri Haja admitted in his statement dated 14-8-1984 that he made a payment of Rs. 1 lakh to Associated Travel Agency (P.) Ltd. by order of Shri Hameed Abdul Kader. Shri Parameswaran disclosed in his statement dated 14-8-1984 that Shri Kader of Singapore mortgaged his property when he was in Madras for a sum of Rs. 1 lakh and he (Shri Parameswaran) paid him a sum of Rs. 1 lakh on 27-7-1983.

4. As the above facts disclosed contravention of section 9(1)(a) and 9(1)(b) following show-cause notices were issued :

(i) SCN-I was issued to Associated Travel Agency (P.) Ltd.; Shri S. Parameswaran (M.D. of Associated Travel Agency (P.) Ltd.) and Shri S.I. Ansari, cashier of that company, the persons responsible for receiving Rs. 1 lakh from a local person other than an authorised dealer in foreign exchange, by order or on behalf of Shri Kader of Singapore, requiring them to show cause as to why adjudication proceedings should not be held against them for contravention of section 9(1)(b) and why the Indian currency of Rs. 99,800 seized from the said company being the amount involved in the contravention should not be confiscated to the Central Government under section 63.

(ii) SCN-II was issued to Shri S. Parameswaran, M.D. of Associated Travel Agency (P.) Ltd., a person resident in India, alleging that he, without the general or special exemption from the RBI made a payment of Rs. 1 lakh to Shri Kader of

Singapore, a person resident outside India and thereby contravened section 9(1)(a).

5. As the replies given to the aforesaid show-cause notices were not found satisfactory, adjudication proceedings were drawn against (1) Associated Travel Agency (P.) Ltd., (2) Shri S. Parameswaran, M.D. of the said company, and (3) Shri S.I. Ansari, cashier thereof. The Adjudicating Officer found Associated Travel Agency (P.) Ltd., guilty of having contravened section 9(1)(b) and imposed a penalty of Rs. 5,000 on it for the said contravention and also confiscated the sum of Rs. 99,800. The Adjudicating Officer found Shri Parameswaran guilty of contravention of section 9(1)(a) and Imposed a penalty of Rs. 5,000 on him for the said contravention. Although Shri Parameswaran and Shri S.I. Ansari were also charged with violation of section 9(1)(b), the Adjudicating Officer did not impose any separate penalty on them for that violation as he felt that the penalty imposed on the said company would meet the ends of justice.

6. Being aggrieved by the aforesaid order, the appellants (Shri Parameswaran in Appeal No. 558 of 1986) and Associated Travel Agency (P.) Ltd. (in Appeal No. 559 of 1986) have filed the present appeals challenging the order almost on similar grounds.

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

8. The counsel appearing for the appellants submitted as follows :

(i) Section 9(1)(a) is not attracted as Shri Kader was not a person resident outside India at the relevant time. The amount of Rs. 1 lakh was borrowed by Shri Kader on 27-7-1983 mortgaging his premises at Madras when he was residing in India. That money was repaid for getting the property redeemed and as such, it was only a legitimate transaction between persons resident in India.

(ii) When the transaction between a foreigner and an Indian resident relates to any property in India, the question of obtaining approval of the RBI would not arise. Reliance was placed on *George Elwin King v. RBI* AIR 1974 All. 452 in this regard.

(iii) It was for the Investigating Agency to prove that Shri Kader was a resident outside India. The Enforcement Directorate has failed to discharge that burden. While 'visiting card' is not a conclusive evidence to prove the above fact, the Adjudicating Officer has wrongly based his findings on such evidence, ignoring the power of attorney executed by Shri Kader, the affidavit of Shri Kader and his marriage invitation card. Reliance was placed on (2) Hanutram Ramprasad v. CIT [1978] 114 ITR 19 (Gauhati), (2) L. Sohan Lal Gupta v. CIT [1958] 33 ITR 786 (All.) as regards the evidentiary value of the affidavit. It was also submitted that the Adjudicating Officer had also ignored to note that Shri Kader was an income-tax assessee and a partner in an Indian company in India at the relevant time.

(iv) If Shri Kader had temporarily gone to Singapore, he cannot be regarded as a person resident outside India - M.S.M. Syed Mohammad Bukhari v. Director of Enforcement MR 1977 Mad. 23.

(v) As the appellants had shown cause against the charges, it was the duty of the Adjudicating Officer to take evidence and conduct inquiry before deciding the issue as was laid down by the Madras High Court in M.S.M. Syed Mohammad Bukhart's case (supra), para 8, mentioned above.

(vi) Even according to the prosecuting agency, the cashier in Associated Travel Agency received the amount of Rs. 1 lakh on instructions given by Shri Parameswaran. As Shri Parameswaran admittedly is not a person resident outside India, section 9(1)(b) will not be attracted as laid down in the following authorities :

(a) Smt. V. Achi v. Director of Enforcement 1981 TNLJ 275.

(b) K. Narainaswamy v. Dy. Director 1981 TNLJ 223.

(vii) Even assuming for the sake of arguments that the payment was made by order of a person resident outside India, it has been done by Shri Haja for which the appellants are in no way responsible.

9. On the other hand, the counsel appearing for the respondent submitted that the findings of the Adjudicating Officer on the charges are based on sufficient evidence. It was also submitted that the material placed on record is enough to

show that Shri Kader was a person resident outside India at the relevant time and after that was established, the burden had shifted to the appellants to rebut that it was not so. Reliance was placed on the decision of the Madras High Court in V. Khader Ibrahim v. Dy Director, Enforcement Directorate [Civil Misc. Application No. 211 of 1981 dated 10-7-1986].

SCN-II

10. The charge levelled against Shri Parameswaran vide SCN-II is that he paid Rs. 1 lakh to Shri Kader of Singapore, a person resident outside India without the general or special permission of the RBI. Shri Parameswaran in his statement made before the Enforcement Officer on 14-8-1984 stated that he had paid Rs. 1 lakh to Shri Kader when he was in Madras and mortgaged his premises in his favour. This fact was also admitted by Shri Parameswaran in his subsequent statement dated 16-8-1984. He has also admitted in the Memo of Appeal (para vii) that he had paid Rs. 1 lakh to Shri Kader. Shri Parameswaran has also stated in his reply dated 20-5-1985 that he paid Rs. 1 lakh as loan to Shri Kader. Thus, it is not in dispute that the appellant, Shri Parameswaran had paid Rs. 1 lakh as a loan to Shri Kader against the said mortgage. However, he maintains that Shri Kader was a person resident in India and, as such, the said payment did not violate the provisions of section 9(1)(a). This plea has also been raised as regards allegation contained in SCN-I.

SCN-I

11. The allegation levelled against the appellant, Associated Travel Agency (P.) Ltd. vide SCN-I is that Associated Travel Agency (P.) Ltd. had received Rs. 1 lakh from a local person other than an authorised dealer in foreign exchange by order or on behalf of Shri Kader of Singapore and thereby violated section 9(1)(b). Shri Parameswaran stated in his statement dated 16-8-1984 that the amount of Rs. 1 lakh was received on 13-8-1984 towards the repayment of loan made by Shri Kader from Singapore. Shri Parameswaran also stated in his statement dated 14-8-1984 that at Singapore, Shri Kader informed him that "he was making arrangements to pay back the mortgaged money in a few days at my travel office. Madras" and when contacted from Singapore, his Asstt. Shri Shiv Shankaran

replied that a person had come and paid the amount 'on behalf of Hameed Abdul Kader'. Shri Parameswaran stated in his written reply dated 20-5-1985 that when he was in Singapore, Shri Kader told him that he would be repaying the mortgaged money and that when he arrived in India,

he was informed that the amount paid by Shri Kader has been seized. Shri Parameswaran also stated in his written reply dated 2-7-1985 filed by him in continuation of his earlier reply dated 20-5-1985 that Hameed was an Indian citizen, no objection was involved in advancing a loan of Rs. 1 lakh and in subsequently receiving back the same from Shri Kader. Shri S.I. Ansari in his statement dated 14-8-1984 stated that Shri Haja from Vellaian Transport, Madras had paid Rs. 13,000 and Rs. 87,000 on 13-8-1984. This statement has been corroborated by Shri G. Singaravelu. Shri Singaravelu in his statement dated 14-8-1984 stated that Shri Shiv Shankaran informed him and Shri Ansari that Shri Parameswaran has spoken to him and informed him that Shri Parameswaran had arranged payment of Rs. 1 lakh which would be paid by Shri Haja, who used to come to their office representing Vellalan Transport and that later on Shri Haja came and enquired whether any phone from Singapore had come and then paid the said amount. Shri Shiv Shankaran has also corroborated the above averment in his statement dated 14-8-1984. A perusal of the above statements clearly indicates that Shri Kader had repaid the said mortgaged money to Associated Travel Agency (P.) Ltd., through Shri Haja of Vellaian Transport. However, the appellant Associated Travel Agency (P.) Ltd., also maintains that Shri Kader was not a person resident outside India at the time when the said amount was received by the appellant.

12. In view of the above, the main question that has been raised for consideration is whether or not Shri Kader was a person resident outside India at the time when the said loan was advanced to him by Shri Parameswaran (M.D. of Associated Travel Agency (P.) Ltd.) and at the time of receipt of the amount of the said loan by Associated Travel Agency (P.) Ltd. The visiting card which has been relied by the Adjudicating Officer for arriving at the conclusion that Shri Kader was a person resident outside India at the relevant time, reads as follows :

"ZAMROOTH GEMS

Gems and Diamonds Importers and Exporters

Mohd. Hameed Abdul Kader

Managing Partner

Block 9, Room 03-23 Phone 3382544

Selegie House, Singapore 0718 3381164. "

13. A perusal of the above contents indicates that Shri Kader was managing director of the Singapore firm mentioned in that card. The fact that he was M.D. of that firm would indicate that Shri Kader was residing at the relevant time in Singapore, particularly when the office of that company of which he as the M.D. was based in Singapore. Further, on the other hand, the records also indicate that Shri Kader was also a partner in Vellaian Transport, Madras but he was not an active partner in that firm as the management was entirely run by another 'partner-driver'. So, the fact that he was a partner in an Indian firm, would not be enough to disprove that Shri Kader was a person resident outside India at the relevant time whereas the fact that he was an M.D. in the said Singapore firm would clearly indicate that he was residing in Singapore only. This is also clear from the statement of Shri Parameswaran dated 14-8-1984 in which he has stated that though Shri Kader was a partner in Vellaian Transport its management was entirely run by another "Driver-partner" and that "whenever necessary Kader will come back to Madras and then again go back to Singapore". Shri Parameswaran has further stated that last year when he was in Madras, he mortgaged his premises in Madras to him. Further, Shri Parameswaran has stated in his written reply dated 2-7-1985 that when he was in Singapore, Shri Kader told him that he would be repaying the mortgaged money. A minute scrutiny of this statement would indicate that Shri Kader was residing in Singapore at that time. Shri Parameswaran also stated in his statement dated 16-8-1984 that the repayment of loan was made by Shri Kader from Singapore. Therefore, the facts mentioned in the visiting card, read with the above statement, would clearly indicate that Shri

Kader was a person resident in Singapore at the time when Shri Parameswaran paid Rs. 1 lakh and at the time when he repaid the same through Shri Haja. The above statements also indicate that though he was residing in Singapore, he used to come to India only for a short time. The fact that he visited India or stayed in India temporarily would not be sufficient to regard Shri Kader as a person resident in India as was held by the Madras High Court in M.S.M. Syed Mohammad Bukhari's case (supra). The appellants rely on the affidavit of Shri Kader to show that he was a person resident in India at the relevant time. It may be noted that Shri Kader was a party to the transactions in issue amounting to the said contravention of the provisions of the Act and, as such, his affidavit does not seem to carry any credibility. Since violation of the provisions of the Act stands on a different footing as compared to cases of income-tax assessment under the Income-tax Act, 1961 the ratio of the authority cited by the appellants in this regard does not appear to apply to the present case. It is also submitted on behalf of the appellants that Shri Kader has stated in the power of attorney executed by him that he was ordinarily residing in India. The version given by Shri Kader in the said power of attorney cannot also be accepted for the same reasons stated above. Further, the mere fact that Shri Kader married a Singapore lady after Shri Parameswaran paid him Rs. 1 lakh is also not such as may establish that he was a person resident in India at the relevant time. If that plea was raised to show that Shri Kader became resident of Singapore only after marriage, then it would amount to admitting that he was a person resident outside India at the time when he repaid the loan. That apart, the mere fact that he was an income-tax assessee in India would not also be sufficient to show that he was a person resident in India at the relevant time, particularly when adequate evidence, as already stated above, exists to prove that he was actually not a person resident in India but was a person resident outside India at the relevant time, i.e., at the time when Shri Parameswaran paid him Rs. 1 lakh and at the time when he repaid the same through Shri Haja.

14. The Madras High Court in its judgment mentioned in para 9 above observed that "No doubt, the burden is upon the respondent but as they had relied upon the corroborating statements on material particulars, to dispel the inference drawn on the contents of these statements, appellant having not produced any material,

there was no error of law or fact committed, in proceeding on the basis that she was a non-resident". As already discussed in the preceding paras, the documents filed by the appellants cannot be relied upon for the reasons given in these paras as also for the reason that documents, such as, affidavit, power of attorney, marriage card, etc., can be easily procured.

15. Shri Parameswaran has stated in his statement dated 14-8-1984 that at Singapore, Shri Kader informed him that he was making arrangements to pay back the mortgaged money. This clearly indicates that the money was paid by Shri Haja to Associated Travel Agency (P.) Ltd. under the instruction of Shri Kader. Therefore, it cannot be said that the said amount was paid under the instructions of Shri Parameswaran and not under the instructions of Shri Kader. It is true that section 9(1)(b) will not be attracted if the money in Indian currency is paid by a person residing in India to an Indian resident under the instructions of a person resident in India as held in Smt. V. Achl's case (supra) and K. Narainaswamy's case (supra). However, in the instant case, as discussed above, Shri Kader under whose instructions the payment has been made to Associated Travel Agency (P.) Ltd. was a person resident outside India at the relevant time. If a person residing in India is instructed by a person resident outside India to make payment to any person in India, the person who receives the amount would be violating section 9(1)(b).

16. The authority in George Elwin King's case (supra) cited by the appellants relates to a case involving gifts made by a foreigner resident in India in favour of a person resident in India regarding the estate in India and after the gift, demand made by the Indian resident was not regarded as a demand made by or on behalf of the foreigner as he had ceased to be an owner thereof. Such is not the case here. Therefore, the above authority is not applicable to the present case, particularly when Shri Haja representing Vellaian Transport made payment under the instructions of Shri Kader, a person resident outside India.

17. It is stated by the Adjudicating Officer in his order dated 23-6-1986 that after considering replies to the show-cause notices, the case was posted for personal hearing at Madras on 16-4-1986 and 7-5-1986. Therefore, the contention that

inquiry contemplated under rule 3(3) of the Adjudicating Proceeding and Appeal Rules, 1974 was not held, is not tenable. The Adjudicating Officer has, in fact, held the inquiry as per the principle laid down by the Madras High Court in M.S.M. Syed Mohammad Bukhari's case (supra), para 8, mentioned above.

18. There appears to be no reason as to why the statement made by the above persons should not be believed. The records of the case do not also indicate that the said statements were obtained by force. I rather find from perusal of the records that the abovesaid statements were voluntarily made by the said persons.

19. In the light of the above, I am of the opinion that the finding of the Adjudicating Officer that Associated Travel Agency (P.) Ltd. and Shri Parameswaran had contravened section 9(1)(b) and 9(1)(a) respectively is correct and the same is confirmed.

20. Coming to the question of confiscation of the sum of Rs. 99,800, it may be stated that the Adjudicating Officer has found that the said sum was involved in the contravention and that by receiving a payment of Rs. 1 lakh in an unauthorised manner, the country has lost the foreign exchange to the extent of Rs. 1 lakh and, therefore, the Adjudicating Officer felt that it was justified that the sum of Rs. 99,800 be confiscated to the Central Government under section 63. This indicates that the Adjudicating Officer has applied his mind in ordering confiscation of the said amount. That apart, a perusal of the adjudicating order indicates that the confiscated amount was involved in the business activities in India and abroad. Therefore, the order confiscating the said amount is legally in order.

21. In the light of the above discussion, there is no substance in the appeals. The adjudication order and the findings contained therein are confirmed.

22. In the result, the appeals are dismissed.

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