

(1998) 08 BOM CK 0050

In the Bombay High Court

Case No : Criminal Writ Petition No. 1333 of 1990

Abdul Rashid Abdul Gani

APPELLANT

Vs

J.M. Jain, Deputy Director, Enforcement Directorate and
Another

RESPONDENT

Date of Decision : 04-08-1998

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 71, 8(1), 8(3)

Citation : (1998) CriLJ 4313 : (1998) 3 MhLj 879

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

Advocate : Aayesha Damania and Vidya Udas, instructed by Haresh Mehta and Co, for the Appellant; M.K. Patwardhan, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

T.K. Chandrashekhara Das, J.—The petitioner challenges the order passed by the Court of Session, greater Bombay in Cri. Revision Application No. 159 of 1989 whereby the order passed by the Addl. Chief Metropolitan Magistrate, 32nd Court, Bombay in Cri. in Case No. 24/CW of 1984 discharging the petitioner u/s 8(1) of the Foreign Exchange Regulation Act, 1974 was set aside and directed the Magistrate to frame charge against the accused.

2. The facts of the case in short are that the petitioner was found to be in possession of 2872 US. dollars. 23 sterling pounds, 35 Kuwait Dinars, 20 Dutch Marks, 5 Iraqi Dinars, 200 Singapore dollars, 35 Australian Dollars, 43 Saudi Riyals and 400 Oman Baisa collectively equivalent to Rs. 35,000/- at the relevant time. On getting information, that one Smt. Urmilaben Patel was unauthorisedly in possession of the foreign exchange and her premises was searched by the Enforcement Officer under search warrant, it was disclosed that the aforesaid foreign exchange was found in one tin box kept. It was disclosed by Smt. Urmilaben Patel that the tin box belongs to one Abdul Rashid Abdul Gani, the

petitioner. He came there at the time of search, but he told that the tin box belongs to him. On questioning further, he told that the tin box containing foreign currencies was entrusted to him by a seaman for safe custody. However, the aforesaid Abdul Gani did not give any further information regarding the name and address of the Seaman and offence u/s 8(1) of the F.E.R.A. was charged. Before Magistrate, plea of discharge was taken by the petitioner. After hearing petitioner and also examining the materials before the Magistrate, the petitioner was discharged. Against the said order, Dy. Director, Enforcement Directorate filed Revision Application before Court of Session, Greater Bombay and it is in these circumstances, impugned order referred to above came to be passed.

3. The learned counsel for the petitioner Ms. Damania submits that the learned Magistrate was right in discharging the petitioner for the simple reason that mere possession of foreign currencies does not call for any prosecution in view of Section 8(1) of the F.E.R.A. Act. She also brought to my notice a judgment of this Court in *Devilal Ganeshlal Mehta Vs. The Director of Enforcement* and another, wherein the scope of Section 8(1) of F.E.R.A. has been examined by the Court and held that mere possession of foreign currencies will not attract the mischief of Section 8(1) of the Act. As found out from the Section no word "possession" was used. What is objectionable u/s 8(1) is only "acquisition" or "dealing with the foreign exchange by transfer or custody". Mere possession simpliciter of the foreign currencies will not attract provisions of Section 8(1) of the Act. I fully agree with the view expressed by the learned- single Judge in that decision and therefore, I have no hesitation to hold that the learned Sessions Judge has committed error in setting aside the order of discharge passed by the learned Magistrate.

4. The learned counsel for the State has tried to contend that Section 8(1) of the F.E.R.A. Act cannot be read in isolation, it should be read along with Section 71. Section 71 lays down :

Burden of proof in certain cases :- (1) where any person is prosecuted or proceeded against for contravening any of the provisions of this Act or of any Sub-section, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him.

(2) Where any person is prosecuted or proceeded against for contravening the provisions of Sub-section (3) of Section 8, the burden of proving that the Foreign Exchange acquired by such person has been used for the purpose for which permission to acquire it was granted shall be on him.

(3) If any person is found or is proved to have been in possession of any foreign exchange exceeding in value two hundred and fifty rupees. the burden of proving that the foreign exchange came into his possession lawfully shall be on him.

5. With respect, I cannot agree with the contention of the learned A.P.P. The award only comes when it shows to the Court that charge u/s 8(1) is

maintainable. Unless that primary responsibility is discharged by the prosecution, the accused cannot be called upon to discharge burden u/s 71. Therefore, arguments of learned A.P.P. found to be devoid of any substance.

6. In view of the above discussion, I hold that the order passed by the learned Sessions Judge, which is impugned in this writ petition is to be set aside.

7. In the result, writ petition is allowed. Sub-section is made absolute in terms of Prayer Clause (a). In the circumstances, no orders as to costs.

Prayer Clause (a) :

That this Honourable Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction, calling for the records of this case and after considering the legality, validity and rroririety of the impugned order dated 30th October, 1990 of the Sessions Court (Exhibit "U" hereto) in Criminal Revision Application No. 159 of 1989 be pleased to quash and set aside the same.