

(1982) 12 MAD CK 0027

In the Madras High Court

Case No : Writ Petition No's. 891 and 892 of 1978

A.M.M. Firm

APPELLANT

Vs

Reserve Bank of India

RESPONDENT

Date of Decision : 02-12-1982

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 14, 2, 4, 73, 8
Income Tax Act, 1961 — Section 6(2), 6(3)

Citation : (1985) 58 CompCas 308 : (1985) 4 ECC 27

Hon'ble Judges : V. Ratnam, J;G. Ramanujam, J

Bench : Division Bench

Advocate : V.P. Raman, for the Appellant; V.K. Thiruvengkatachari, for the Respondent

Judgement

This Judgment has been overruled by : T. Velayudhan Achari and Another Vs. Union of India (UOI) and Others, (1993) 1 BC 564 :

(1993) 77 CompCas 197 : (1993) 1 JT 580 : (1993) 1 SCALE 586 : (1993) 2 SCC 582 : (1993) 1 SCR 832

Ramanujam, J.—Since the petitioner in both the writ petitions is the same and the points involved are also the same, they are dealt with together.

2. In Writ Petition No. 891 of 1978, the petitioner seeks a writ of certiorari to quash the order dated February 17, 1978, passed by the

respondent in so far as it calls upon the petitioner to repatriate the funds of the petitioner firm held in the Chartered Bank, Singapore. In Writ

Petition No. 892 of 1978, the petitioner seeks a writ of mandamus directing the respondent to permit the petitioner to utilise the funds held in the

Chartered Bank at Singapore for the purposes of the firm abroad and forbearing

the respondent from taking any action pursuant to its letter dated February 17, 1978.

3. The circumstances under which the impugned order dated February 17, 1978, came to be passed by the respondent can briefly be set out. The petitioner firm has been in existence since 1929. The firm originally consisted of Thiru A.M. M. Murugappa Chettiar, Thiru M. V. Arunachalam and A.M. M. Arunachalam. In 1965, the said Murugappa Chettiar died and thereafter his sons, M. M. Muthiah, A.M. M. Arunachalam and M. V. Arunachalam, became the partners of the firm. The firm owned several rubber estates in Malaya and was carrying on business as rubber planters besides money-lending business. Due to Japanese invasion, many of the rubber estates were damaged and there was also large scale community infiltration in those estates. After the withdrawal of the Japanese, the rubber planting business became impossible and the firm incurred heavy losses every year. The estates were, therefore, sold and a substantial portion of the sale proceeds also remitted to India and the balance remained in the bank account of the firm with the Chartered Bank, Kuala Lumpur. Under a notification dated March 25, 1947, issued under s. 9, an obligation was cast on every person resident in India to whom the FERA, 1947, applied to surrender currency of the United States of America and Philippines but there was no obligation cast upon anyone to surrender any other foreign currency. However, by a further notification dated September 25, 1958, it was made obligatory on all persons owning any foreign exchange to surrender it to the authorised dealer. But this was subject to a proviso exempting the sums held in an account expressed in pound sterling provided such account was in existence prior to July 8, 1947. By a notification dated September 12, 1961, the Government directed that every resident in India owning foreign exchange in any account other than in the currency of Burma, Ceylon or Pakistan shall make a return to the RBI, giving particulars of such account and the balance held therein. Pursuant to the said notification, the partners of the firm declared by letter dated November 9, 1961, the amount of Pounds 18,000 held abroad under three accounts expressed in pound sterling prior to 1947 with the Chartered Bank, Kuala Lumpur. Subsequently, on January 29, 1965, the petitioner firm applied for permission to transfer the amount of Pounds

18,000 held in three fixed deposit accounts from Kuala Lumpur to the London branch of the same bank on the ground that the conditions prevailing in Malaysia were uncertain and, therefore, they preferred that the deposits in sterling be held in the United Kingdom in the same bank. That request was granted by the Reserve Bank by their letter dated February 11, 1965. By a letter dated January 21, 1969, the Reserve Bank has called upon the petitioner to close their fixed deposit account in London and repatriate the amounts to India soon after the deposits matured. The petitioner replied on February 7, 1969, stating that there is no question of repatriating the amounts held under fixed deposits in London as they are not under any statutory obligation to do so. The Reserve Bank, however, directed by their letter dated September 11, 1969, to repatriate the amounts held in London on the ground that such accounts would not qualify for the exemption given for accounts opened before July 8, 1947, which is usually called "pre-zero" exemption. Since the petitioner did not repatriate the accounts held in London as required by the Reserve Bank, a further letter dated October 20, 1970, had been issued informing the petitioner that if the firm fails to repatriate the amount within a month of its receipt, it would be rendering itself liable to punishment for contravention of Exchange Control Regulations. As against the said letter dated October 20, 1970, Writ Petition No. 3823 of 1970 was filed by the petitioner. The petitioner also filed Writ Petition No. 3824 of 1970 for the issue of a writ of mandamus to the Reserve Bank to permit the firm to utilise the funds held in fixed deposit account in London for the purpose applied for by the firm. By way of interim orders, the court directed the Reserve Bank to permit the petitioner to transfer funds from the Chartered Bank, London, to the Chartered Bank, Singapore. Pursuant to that order, the funds were transferred to the Chartered Bank, Singapore, and are lying there as on date. Ultimately, the writ petitions were allowed holding that the petitioner's account was a pre-zero account and, therefore, it was entitled to the exemption from repatriation. As against the said judgment, the respondent filed Writ Appeal No. 75 of 1974. In the said writ appeal, permission was sought to file two additional notifications dated October 1, 1973, and October 4, 1973, by which the distinction between pre-zero accounts and post-zero accounts had been

removed. Based on these subsequent notifications, the writ appeal was allowed on November 3, 1977, setting aside the order dated November

10, 1972, passed in the writ petition holding that the petitioner is entitled to the benefit of exemption for pre-zero accounts.

4. Subsequently, the petitioner requested the Reserve Bank to withdraw the restrictions placed on the operation of the funds and use the same for

its business purposes contending that the funds in question belong to a foreign firm and, therefore, the provisions of the Foreign Exchange

Regulation Act would not apply. In reply dated February 17, 1978, the Reserve Bank drew the attention of the petitioner to the Government of

India's notification dated June 15, 1977, issued under s. 14 of the Foreign Exchange Regulation Act, 1973, by which the distinction between pre-

zero and post-zero account stood removed and called upon the petitioner firm to repatriate forthwith the funds held in the Chartered Bank,

Singapore. The petitioner therefore, seeks to challenge the respondent's letter dated February 17, 1978, wherein reliance has been placed on the

Government of India's notification dated June 15, 1977, in these writ petitions, on the ground (1) that the petitioner is entitled to pre-zero

exemption as the amount represents pre-1947 assets of the firm and that the notification dated June 15, 1977, seeking to take away the exemption

cannot, in any event, operate retrospectively so as to affect an account already vested with such immunity, (2) that it is not open to the Government

of India to issue the notification dated June 15, 1977, in the face of the decision in Writ Petition No. 3823 of 1970 which has not been modified or

set aside in the writ appeal, (3) that the executive is not competent to remove or nullify the basis of the judgment of a court treating itself as a

Legislature, and (4) that the petitioner being a foreign firm, the Foreign Exchange Regulation Act will not apply to it, and the expression ""person

resident in India"" defined in s. 2(p) of the said Act will not include a firm registered outside India or having no office in India.

5. In the counter-affidavit filed by the respondent, it has been stated that all the contentions advanced by the petitioner are not tenable, that the

respondent has every right to withdraw the protection given to pre-zero accounts or to modify or alter the same, that the competent authority has

power to cancel a notification issued earlier and that, therefore, the petitioner is not right in his submission that an exemption once given cannot be

cancelled by a subsequent notification. According to the respondent, the notification dated June 15, 1977, does not purport to operate retrospectively but only operates in future. The fact that the notification dated June 15, 1977, withdraws the exemption granted in relation to pre-zero accounts does not mean that the said notification is retrospective in operation. The respondent also contends that the petitioner cannot place reliance on the judgment of Ramaprasada Rao J. in Writ Petition No. 3823 of 1970 as the said judgment has been set aside by a Division Bench in writ appeal and that in any event that judgment in so far as it holds that the petitioner's account is a pre-zero account cannot be of any use to the petitioner as the distinction between pre-zero and post-zero account has been abolished and all the accounts expressed in foreign currency are now covered by the notification dated June 15, 1977. Therefore, it cannot be said that the respondent has purported to nullify the judgment of this court in the earlier writ petition by issuing a notification taking away the distinction between pre-zero and post-zero accounts. The respondent also contends that the FERA applies to the petitioner firm is controlled from India and, therefore, the firm cannot claim to be outside the purview of the said Act.

6. After a due consideration of the matter, we are of the view that the first three contentions advanced by the petitioner are not legally tenable. It is no doubt true that by the earlier notification dated September 25, 1958, issued under s. 14 of the FERA, 1947, all holders of pre-zero foreign accounts expressed in pound sterling are not obliged to surrender the fund to the authorised dealers. After construing the scope of that notification, Ramaprasada Rao J. (as he then was) held in W.P. No. 3823 of 1970, that the petitioner's account is a pre-zero account and, therefore, it is entitled to the exemption granted under the said notification. However, while the writ petition was pending, a fresh notification has been issued under s. 14 of the said Act taking away the distinction between pre-zero and post-zero accounts and taking note of the said notifications, the appellate court in Writ Appeal No. 75 of 1974 has held that in view of the notification dated October 1, 1973, the decision of Ramaprasada Rao J. (as he then was) cannot be sustained and on that ground allowed the writ appeal and the relevant observations are these :

The distinction between the "pre-zero accounts" and what we may term as "post-zero accounts" having been removed, it seems to be

unnecessary for us to deal with the question dealt with by the learned judge in the judgment under appeal. We also consider it unnecessary to retain

any finding entered by the learned judge on that aspect of the matter. It is particularly so in view of the assurance given by the counsel, Mr. Govind

Swaminathan, appearing, for the appellant, that the Reserve Bank of India has no intention whatever to enforce the communication dated October

20, 1970, which is at page 1 of Volume A of the typed set of papers and which was challenged in writ petition.

7. Having regard to the above observations made by the appellate court, it is not possible to say that the decision given on the writ petition is still in

force. The petitioner herein does not question the jurisdiction of the respondent to issue either the notification dated October 1, 1973, or the

notification dated June 15, 1977. We would merely say that since the exemption has been given to pre-zero accounts by an earlier notification, that

cannot be taken away by a subsequent notification. But the contention of the learned counsel overlooks the statutory provision contained in s. 21

of the of the General Clauses Act, 1897, which clearly states that the power to issue a notification includes the power to add, to amend, vary or

rescind the notifications from time to time. Therefore, the petitioner's contention that the exemption given under the earlier notification cannot be

withdrawn by the issue of a subsequent notification cannot at all be accepted; not can we accept the petitioner's contention that the notification is

issued with a view to nullify the orders passed by this court in the writ petition, as the earlier decision in the writ petition only dealt with the scope of

an earlier notification granting exemption to pre-zero accounts and that does not deal with the power of the statutory authority to modify or alter

the same by issuing a subsequent notification. Therefore, the question of nullifying the decision of Ramaprasada Rao J. (as he then was) in the writ

petition by issuing a notification does not arise and the object of issuing the notification dated October 1, 1973, and June 15, 1977, are not

specifically to nullify the orders of this court but with a view to give effect to the changed policy to the Government. The notification dated June 15,

1977, cannot be said to be retrospective merely because it has withdrawn the exemption granted earlier to pre-zero accounts. The notification

operates only in future covering both pre-zero and post-zero accounts.

8. The notification dated September 25, 1958, as amended up to October 7, 1965, issued under s. 9 of the FERA, 1947, which directs that every

person in, or resident in India, who owns or holds such foreign exchange or who may hereafter own or hold whether already in India or abroad

expressed in the currencies specified in the Schedule annexed shall within one month offer the same or cause it to be offered for sale to an

authorised dealer against payment in rupees at the rate fixed by the Reserve Bank under s. 4(2) of the Act for conversion into Indian currency of

the foreign currency in which such foreign exchange is expressed. There is a proviso to the said notification which says that the order shall not

apply to any sum held as on July 9, 1947, in an account expressed in pound sterling and in existence prior to that date. Later, by a further

notification dated October 1, 1973, the notification dated September 25, 1958, has been amended to take away the exemption granted to the

pre/zero accounts, that is, sums held as on July 8, 1947, in an account expressed in pound sterling and in existence prior to that date.

Subsequently, a notification G.S.R. No. 839, dated June 15, 1977, was issued by the Central Govt. under s. 14 of the FERA, 1973, directing that

every person in, or resident in, India who owns or holds or who may hereafter own or hold any foreign exchange, whether in India or abroad,

expressed in any currency other than the currency of Nepal or Bhutan shall, before the expiration of one month from the date of the order, or in the

case of a person who hereafter owns or holds such foreign exchange, within one month of the date of his so owning or holding, offer the same or

cause it to be offered for sale to any authorised dealer against payment in rupees, at the rate for the time being authorised by the Reserve Bank in

pursuance of sub-s. (2) of s. 8 of the said Act for conversion into Indian currency of the foreign currency in which such foreign exchange is

expressed. There is a proviso to the said notification and it says that the above order shall not apply to (1) such foreign exchange held by

authorised dealers; (2) persons authorised by the RBI to hold such foreign exchange for business or other purposes; (3) maintenance of, and

operation or any account in foreign currency maintained outside India, by foreign citizens in, or resident in, India but not permanently resident

therein; (4) any sum held in any account in foreign currency, not being a sum expressed in pound sterling and held on or before July 8, 1947, if

such account is maintained in pursuance of the general or special permission of the Reserve Bank; (5) foreign exchange acquired or received in

pursuance of permission granted by the Reserve Bank under s. 8 or s. 9; and (6) holding in India of foreign currency in the form of travellers;

cheques, currency notes, bank notes and coins by foreign citizens in, or resident in India, but not permanently resident therein. Thus, it will be seen

that the exemption granted under the said 1958 notification has been taken away by the notification dated June 15, 1977, issued under s. 14 of the

FERA, 1973. The withdrawal of the exemption in respect of pre-zero accounts appears to have been made on the basis of the 13th report given

by the Estimates Committee (1967-68). In its report, the Committee has pointed out that it is not necessary to exempt from the requirement of

surrender any holdings of foreign exchange expressed in certain particular currencies and its view is expressed in paras. 10.25 and 10.30 which are

extracted below :

10.25 : The Committee also note that even under the notification dated September 25, 1958, the Government's powers to acquire foreign

exchange holdings do not extend to (a) holdings expressed in certain currencies like those of Pakistan, Burma, and Ceylon, and (b) sums held as on

July 8, 1947, in an account expressed in pound sterling and in existence prior to that date. Further, accounts expressed in pound sterling opened

on or after July 8, 1947, are also to be exempted from the requirement of surrender provided general or special permission has been granted by

the Reserve Bank for the maintenance of such accounts. The Committee are unable to appreciate why holdings of foreign exchange, expressed in

certain currencies, should be wholly exempted from the requirement of surrender especially when this requirement is not applicable to accounts in

foreign currency maintained outside India by "persons in or resident in India but not domiciled therein". They would like the Government to

consider whether the aforementioned exemptions, particularly those in respect of holdings of Pakistani currency and accounts in pound sterling,

should not be withdrawn in view of the need to strengthen the country's foreign exchange resources and prevent dealings in foreign exchange by

persons other than authorised dealers.

10.30 : The Committee are of the opinion that the object, scope and effect of section 9 are clearly distinguishable from other provisions of the

Foreign Exchange Regulation Act. They would like to emphasise that section 9 was enacted with the specific objective of enabling the

Government, to assume, as and when necessary, special and overriding powers to strengthen the foreign exchange resources of the country. Once

a notification u/s 9 is issued by Government, it becomes incumbent upon "every person in, or resident in India, who owns or holds such foreign

exchange as may be specified in the notification" to offer it or cause it to be offered for sale to the Reserve Bank on behalf of the Central

Government or to such person as the Reserve Bank may authorise for the purpose, within the period stipulated in the notification. No other

provision of the Act casts a similar obligation on all those who happen to own or hold foreign exchange. For instance, section 4 provides, inter alia,

that no person in, or resident in, India, shall buy or otherwise acquire or borrow or sell or otherwise transfer or lend, etc., any foreign exchange

except to or from an authorised dealer. Unlike section 9, section 4 does not make it obligatory on any one to divest himself of the foreign exchange

owned or held by him. It is also to be noted that section 9 applies not only to future acquisitions of foreign exchange but also to all such foreign

exchange as is owned or held by any person at the date of the issue of a notification under that section.

9. The above extracts clearly indicate the reason why the exemption has been withdrawn by the notification dated June 15, 1977.

10. Coming to the fourth contention that the petitioner company being a foreign firm is not governed by the provisions of the FERA, it is seen that

this contention was not raised in any of the earlier proceedings. As a matter of fact, the petitioner all through has been treating itself as one

governed by the provisions of the said Act and applying for directions of the RBI in relation to the foreign exchange which it holds. Whatever be

the past conduct of the petitioner in not raising that question, when the point is actually raised so as to escape from the provisions of the Act, that

has to be considered on merits and the petitioner cannot be shut out from raising that point merely on the ground that he did not raise that question

at any earlier stage of the proceedings.

11. According to the learned counsel, the notification issued under s. 14 applies to a person in or resident in India, who owns or holds any foreign

exchange and "person resident in India" is defined in s. 2(p) and having regard to that definition, the petitioner which is a foreign firm cannot be

taken to be covered by the Act. According to the petitioner, the firm has been registered in Kaula Lumpur in the year 1929 and has been carrying

on business only in Malaysia. Though the firm is constituted by two partners, who are resident in India, the firm should be treated as independent of

the partners and, therefore, the firm will not come within the purview of the Act. The learned counsellor also refers to s. 73(c) of the Act which is

as follows :

a firm or the branch of a firm shall be treated in all respects as if such firm or branch were a body corporate resident where it is situated.

12. and contends that since the firm has been constituted and registered in Malaysia in the year 1929, it should be taken to be resident in Malaysia.

Reference also has been made to clause 3 of section II of the Exchange Control Manual, 6th edn. 1971, issued by the RBI in support of his

contention. In that clause, the offices and branches of companies, firms, banks or any other organisations, whether Indian or foreign, situated

outside India have been treated as "resident outside India". The petitioners' submission is that even the Reserve Bank has treated firms situated

outside India as being resident outside India to whom the FERA cannot apply and, therefore, the petitioner firm which is resident in Malaysia

should be taken to fall outside the provisions of the Act.

13. Per contra, Mr. V. K. T. Chari, learned counsel appearing for the respondent, contends that there is no definition of a "person" in the Act and

a firm cannot be equated to a person, that normally the residence of the firm is to be determined with reference to the partners and, therefore, since

the partners constituting the firm are residents of India, the firm also should be taken to be resident in India. The learned counsel also refers to the

fact that the partnership as originally constituted has been dissolved by the death of one of the partners, Murugappa Chettiar, and, therefore, the

original partnership which owned or held the foreign exchange should be taken to have been dissolved in which case the foreign exchange should

be taken to have been held by the two individuals who now constitute the new partnership, and they being residents of India, the Act will squarely apply to them. Reliance is placed on s. 42 of the Partnership Act, 1932, by the learned counsel and he submits that where any member of a firm has died and the surviving partners carry on the business of the firm with its capital and assets without any final settlement of accounts between the firm with its capital and assets without any final settlement of accounts between the firm and the estate of the deceased, then in the absence of any agreement to the contrary, the estate of the deceased is entitled at the option of the representatives of the deceased to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share in the partnership assets, or to interest at the rate of 5% per annum on the amount of his share in the partnership business.

14. It is, however, not possible to agree with the learned counsel for the respondent that the petitioner firm should be taken to have been dissolved

on the death of one partner and the residence of the firm should be decided with reference to that fact. We are inclined to hold that the petitioner

firm should be taken to be a resident firm though it has been registered as a firm in Malaysia. Both the partners of the firm are resident in India and

the firm carries on its business in Malaysia under their control, supervision and instructions. In law, a firm has no separate legal entity and it is a

compendious name to refer to the group of persons who constitute the firm. Even in the present proceedings, the firm is represented by three

partners who are not only residents in India but also citizens of India. They are admittedly in management and control of the firm at Kaula Lumpur.

Though the firm's business is carried on in Kaula Lumpur, since the firm is composed of partners in India and the business is carried on under the

control and management of the partners in India, the firm itself should be taken to be a resident of India. For the purpose of the I.T. Act, a

company is taken to be a resident of India in any previous year if (1) it is an Indian company, or (2) if during that year the control and management

of its affairs are situate wholly in India as per s. 6(3). Section 6(2) of the I.T. Act says that an HUF, firm, or other association of persons is said to

be resident in India in any previous year in every case except where during that year the control and management of its affairs is situated wholly

outside India. In this case, admittedly the control and management of the affairs of the firm is vested in the three partners who constitute the firm

and who are admittedly resident in India. As pointed out by the House of Lords in *Sau Paulo (Brazilian) Rly. Co. Ltd. v. Carter* (Surveyor of

Taxes) [1895] 3 TC 407 and by the Supreme Court in *CIT v. Nandlal Gandlal* [1960] ITR 40, the control and the management of the business is

situate at the place where the head and brain of the trading adventure is situate. Control of a business does not necessarily mean the carrying on of

a business and, therefore, the place where the trading activities or physical operations are carried on is not necessarily the place of control and

management; nor is the business necessarily be controlled and managed at the place where the accounts are kept and the division of profits is

decided on. In this case, it is not the case of the partners that they never exercise any control or supervision over the firm's business in Malaysia

and the entire activities of the firm are controlled and managed by some other person independent of the partners and without reference to their

directions and instructions. It was laid down by the Supreme Court in *The Erin Estate, Galah, Ceylon Vs. The Commissioner of Income Tax,*

Madras, , that control and management means de facto control and management and not merely the right or power to control and manage,

approving the decision of the Bombay High Court in *B. R. NAIK Vs. COMMISSIONER OF Income Tax, BOMBAY.*, . In Naick's case, a

partner, who under the terms of the partnership deed, had full control over the firm's business resided in India while the firm's business was carried

on in South Africa. In the absence of any evidence that he in fact controlled and managed the firm's business from here, his residence was held to

be insufficient to establish the residence of the firm in India.

15. The facts here are different. In this view, we have to hold that the petitioner firm is a resident in India and that the Act is applicable to it.

16. Thus, all the contentions advanced by the petitioner having failed, the writ petitions are dismissed. No cost.