(2015) 08 MAD CK 0029

In the Madras High Court

Case No : Civil Miscellaneous Appeal Nos. 2581 and 2582 of 2011

A.N. Dyaneswaran and Others — APPELLANT

Vs

The Special Director of Enforcement, Enforcement Directorate, Government of India and Others — RESPONDENT

Date of Decision : 19-08-2015

Acts Referred:
Foreign Exchange Management Act, 1999 — Section 35, 40, 41
Foreign Exchange Regulation Act, 1973 — Section 40, 56, 63, 8(1)
Gold (Control) Act, 1968 — Section 71(1)

Citation : (2015) 08 MAD CK 0029

Hon'ble Judges : V. Ramasubramanian and T. Mathivanan, JJ.

Bench : Division Bench

Advocate : B. Kumar, SC for B. Satish Sundar, for the Appellant; M. Dhandapani, Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

V. Ramasubramanian, J.—These two appeals are filed under Section 35 of the Foreign Exchange Management act, 1999 (hereinafter referred to as the FEMA) as against the order of the Appellate Tribunal for Foreign Exchange confirming the orders of adjudication passed against the appellants.

2. Heard Mr. B. Kumar, learned Senior Counsel appearing for the appellants and Mr. M. Dhandapani, learned Standing Counsel appearing for the first respondent.

3. The appellant in C.M.A. No. 2581 of 2011 belonged to Indian the Administrative Service and he was for sometime the Chairman and Managing Director of Tamil Nadu Minerals Limited. The appellant in the other appeal was his auditor, a practising Chartered Accountant. When the appellant in the first miscellaneous appeal was holding office as the Chairman and Managing Director of the Tamil Nadu Minerals Limited, which is a 100% export oriented unit, wholly owned by the State of Tamil Nadu, a raid was conducted at the premises bearing door No. M-26, 10th Street, ''M'' Block, Anna Nagar, Chennai. During the raid,

foreign currencies to the extent of US$ 5061, S$ 527 and 210 Malaysian ringgits were recovered.

4. When the raid was going on, the Chartered Accountant of the appellant in the first miscellaneous appeal, who is the appellant in the next appeal, came to the same premises. From a briefcase that he was carrying, foreign currencies to the extent of US$ 5014 were recovered.

5. After recording statements under Section 40 from both the appellants as well as another person by name Ms. Seethalakshmi Nagaraj, show cause notices were issued to the appellants, on 21.8.1996, calling upon them to show cause as to why adjudication proceedings under Section 41 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the FERA) should not be held against them. Simultaneously, the Directorate of Enforcement also filed two independent criminal complaints against these appellants on the file of the Additional Chief Metropolitan Magistrate, Egmore, Chennai.

6. When the adjudication proceedings were pending, the FERA, 1973 was replaced by the FEMA, 1999 with effect from 1.6.2000. Therefore, the question as to whether the proceedings initiated under the 1973 Act could continue or not, became a contentious issue all over the country. Eventually, after the dust settled down, the Special Director, Enforcement Directorate, passed an order of adjudication on 12.5.2008 as against the appellants. By the said order, the appellants were imposed with penalties of Rs. 2 lakhs each for contravention of Section 8(1) of the FERA, 1973. The foreign currencies recovered from both the appellants were also directed to be confiscated to the credit of the Central Government account in terms of Section 63 .

7. As against the orders of adjudication, the appellants filed two independent appeals in Appeal Nos. 175 and 178 of 2008 before the Appellate Tribunal. The Appellate Tribunal confirmed the findings of the Adjudicating Authority with regard to the contravention of the provisions of the Act, but reduced the quantum of penalty to the extent of the pre-deposit made by the appellants at the time of filing of the appeals. Not satisfied with being let off so, the appellants have come up with the above appeals.

8. Since the present appeals are filed under Section 35 of the new Act, the appeals are filed on certain questions of law. The questions of law that the appellants have raised in the memorandum of grounds of appeals are as follows:

"(i) Whether the second respondent Tribunal viz. Appellate Tribunal for Foreign Exchange, New Delhi is right in holding that a charge under Section 8(1) of Foreign Exchange Regulation Act, 1973 on the ground that the appellants had ''otherwise acquired'' foreign currencies is made out in the facts and circumstances of the case?

(ii) Whether the second respondent is right in holding that the version of Smt. Seethalakshmi Nagaraj (as regards holding the currency as owner thereof and handing a part of for safe custody with the appellant''s mother and wife), would in any manner constitute violation of Section 8(1) of FERA is not a plausible one?

(iii) Whether the second respondent is right in holding that the version of Smt. Seethalakshmi Nagaraj (as regards holding the currency as owner thereof and handing a part of it to the appellant for deposit in the FCNR account of the appellant brother-in-law), is not a plausible one?

(iv) Whether the second respondent Tribunal is right in ignoring the statements recorded from the said Seethalakshmi Nagaraj under Section 40 of the Foreign Exchange Regulation Act, 1973 and her claim for the currencies before the Income Tax Authorities which are evidence in themselves to show that she was the only owner of the currencies and she had not lost her proprietary control over the same?

(v) Is the second respondent Tribunal right in ignoring the statements recorded from the appellant under Section 40 of FERA in which he has clearly explained the circumstances under which the currencies came to be found, including the version of it being owned and possessed by Smt. Seethalakshmi Nagaraj at all times?

(vi) Is the second respondent Tribunal right in finding that it was for the appellants to prove the urgency of the matter for handing over foreign exchange to the appellants despite the fact that she (Smt. Seethalakshmi Nagaraj) had sufficient opportunity for deposit of currencies in bank. In this connection, is the second respondent Tribunal right in ignoring the explanation of Smt. SeethalakshmI Nagaraj in her statement recorded under Section 40 of the Foreign Exchange Regulation Act, 1973 by the investigation agency?

(vii) Is the second respondent Tribunal right in holding that the findings of the Income Tax Appellate Tribunal and this Honourable Court in the income tax appeal are not relevant and criteria under the Income Tax Act and the Foreign Exchange Regulation Act, 1973 are different?

(viii) Are the second respondent Tribunal findings vitiated on account of perversity and errors apparent on its face, ignoring vital and relevant material and taking into consideration extraneous and irrelevant material in arriving at a conclusion that the appellant had ''otherwise acquired'' the foreign currencies and thereby sustaining the charge under Section 8(1) of the Foreign Exchange Regulation Act, 1973? and

(ix) Is the second respondent Tribunal right in ignoring settled precedents on the issue as to what would amount to ''otherwise acquired'' of foreign currencies in terms of Section 8(1) of the Foreign Exchange Regulation Act, 1973?"

9. Though the appellants have raised 9 questions of law, we are of the considered view that only two questions of law actually arise for consideration. They are:

(i) Whether the Adjudicating Authority and the Appellate Tribunal could have ignored the orders of assessment passed under the Income Tax Act, both in respect of the appellant in the first miscellaneous appeal and in respect of Mrs. Seethalakshmi Nagaraj, who, right from the beginning, claimed to be the owner of the foreign currencies seized from the premises that was raided? and

(ii) Whether, after this Court discharged the appellant in the first miscellaneous appeal in the prosecution launched by the Enforcement Directorate, on the basis of the decision of the Supreme Court to the effect that the word ''otherwise acquired'' should be given a different connotation, is it possible to sustain the orders of adjudication and the order of the Appellate

Authority?

Question of law (i):

10. As we have pointed out earlier, foreign currencies to the extent indicated above were recovered from the premises bearing door No. M-26, 10th Street, ''M'' Block, Anna Nagar, Chennai-40 and also from the briefcase of the appellant in the second miscellaneous appeal, at the time when the premises was being raided. In the statement recorded from the appellant in the first miscellaneous appeal under Section 40 , he claimed that the premises that was raided belonged to his mother and that those foreign currencies were actually entrusted by a family friend by name Mrs. Seethalakshmi Nagaraj to his mother, who was the owner of the premises, for safe custody. This statement recorded from the appellant in the first miscellaneous appeal was also corroborated by Mrs. Seethalakshmi Nagaraj in a statement independently recorded from her under Section 40 .

11. In so far as the appellant in the second miscellaneous appeal is concerned, he took a position that the foreign currencies recovered from his briefcase also belonged to Mrs. Seethalakshmi Nagaraj and that he was entrusted with those currencies for making a deposit. In other words, the stand taken by the appellants in both these appeals right from the beginning was that those currencies recovered from the premises and recovered from the briefcase belonged to one Mrs. Seethalakshmi Nagaraj.

12. It is not known whether Mrs. Seethalakshmi Nagaraj accounted for this money in her own income tax returns and paid income tax and the matter was allowed to rest there or not. When the Department of Income Tax attempted to include the value of the foreign currencies recovered from the appellant in the first miscellaneous appeal, within his total income for the relevant assessment year, the order of assessment was successfully challenged by the appellant in the first miscellaneous appeal before the Income Tax Appellate Tribunal. The order of the Income Tax Appellate Tribunal deleting the value of the currencies from the income of the appellant in the first miscellaneous appeal, was confirmed by the Division Bench of this Court in T.C. (A). No. 150 of 2004 by a judgment dated 3.9.2007. The effect of the said judgment was that the value of these foreign

currencies could not be taken to be the income of the appellant in the first miscellaneous appeal for the relevant assessment year, as it was claimed to belong to one Mrs. Seethalakshmi Nagaraj.

13. Therefore, (i) on the basis of the statements recorded under Section 40 from the appellants as well as Mrs. Seethalakshmi Nagaraj and (ii) on the basis of the deletion of the value of those currencies from the income of the appellant in the first miscellaneous appeal, in the proceedings under the Income Tax Act, it is contended by Mr. B. Kumar, learned Senior Counsel appearing for the appellants that the orders of adjudication and the order of the Appellate Tribunal holding the appellants guilty of contravention of Section 8(1) were completely contrary to law. Under Section 8(1) of the FERA, 1973, a person can be held to be guilty of an offence, only if he purchases or otherwise acquires or borrows from or sells or otherwise transfers or lends to or exchanges with, any person not being an authorized dealer, any foreign exchange.

14. It is the contention of the learned Senior Counsel for the appellants that once it is found by the Department of Income Tax that this money did not belong to the appellant in the first miscellaneous appeal, the respondents are not entitled to come a different conclusion for the purpose of the FERA, 1973. Right from the beginning, the claim of ownership of these currencies was made only by Mrs. Seethalakshmi Nagaraj and that therefore, the learned Senior Counsel contends that the appellant in the first miscellaneous appeal neither purchased nor acquired otherwise nor borrowed from nor sold nor otherwise transferred this money. The premises from where the currencies were recovered, did not also belong to him, but to his mother.

15. Hence, the learned Senior Counsel for the appellants submits that after the issue has been settled by a Division Bench of this Court in T.C. (A). No. 150 of 2004 by a judgment dated 3.9.2007 with regard to the ownership of the money, the appellants cannot be held guilty of contravention of Section 8(1) .

16. We have carefully considered the above submissions.

17. At the outset, it should be pointed out that any conclusion reached by an authority under the Income Tax Act, 1961, need not necessarily lead to a finding that a person cannot be prosecuted under the FERA, 1973 or the FEMA, 1999. The Income Tax Act, 1961 is a peculiar piece of legislation where there Department of Income Tax is not concerned about the method, by which, one earns money. Even if a person is engaged in a business prohibited by law, the Department of Income Tax would not hesitate to collect tax. No income is a tainted income in so far as the Income Tax Law is concerned. The moment it is proved that a person has earned income whether by rightful methods or wrongful means, the liability to pay income tax arises. Therefore, the fact that a person disowned money and succeeded upto the High Court in a tax case appeal, need not be a pointer to the effect that he cannot be held guilty of violation of Section 8(1) .

18. The above conclusion can be drawn even by a different method, if we have a careful look at Section 8(1) . As we have indicated earlier, Section 8(1) uses several expressions. These expressions are: (i) purchase (ii) otherwise acquire (iii) borrow from (iv) sell (v) otherwise transfer (vi) lend to and (vii) exchange with. The liability to pay income tax need not arise, when any of these seven expressions are satisfied with regard to an income. There are a variety of reasons for enabling a person to make a claim for some money or disclaim an amount. It is only in three or four contingencies that are indicated in Section 8(1) that a person may become obliged to pay tax. Therefore, the decision rendered in T.C. (A). No. 150 of 2004 need not necessarily be a pointer to the effect that there was no violation of Section 8(1) of the FERA.

19. Mr. M. Dhandapani, learned Standing Counsel for the first respondent is right in relying upon the decision of the Supreme Court in this regard in K.T.M.S. Mohd. and another Vs. Union of India, . In the said decision, the Supreme Court pointed out that the purport of the Income Tax Act and the FERA, 1973 are different. In paragraph 24 of the said decision, the Supreme Court made it clear that the FERA and the Income Tax Act are two separate and independent Acts operating in two different fields. Therefore, we do not think that the appellants can take advantage of the decision rendered in the tax case appeal.

20. The decision rendered by the Authorities under the Income Tax Act has to be viewed in the context of the most fundamental principle that no income can be taxed twice. If one person makes a claim for certain amount of money and pays income tax, the Department cannot tax the same money at the hands of another, unless that other person has received it in the form of income through a secondary transaction. Therefore, the non inclusion of the value of these currencies in the income of the appellant in the first miscellaneous appeal, may have been driven by circumstances that provide for avoidance of double taxation. Hence, the first question of law is to be answered against the appellants.

Question of law (ii):

21. Coming to the second question of law, the contention of Mr. B. Kumar, learned Senior Counsel for the appellants is that in the criminal prosecution, the appellant in the first miscellaneous appeal filed a petition for discharge. The petition for discharge was dismissed by the Trial Court. As against the dismissal of the petition for discharge, the appellant in the first miscellaneous appeal filed a revision in Crl. R.C. No. 1094 of 2010. This revision was allowed by this Court by a final order dated 7.2.2012. This order appear to have attained finality.

22. Therefore, the contention of Mr. B. Kumar, learned Senior Counsel for the appellants is that once the prosecution under Section 8(1) of the FERA, 1973 had been quashed, the orders of adjudication for contravention of the very same section cannot stand in the eye of law. In other words, the contention is that it is not permissible for an adjudicating authority to say that the appellants had contravened Section 8(1) of the Act, when the Criminal Court had declared that

there was no contravention.

23. But, in response to the above contention, Mr. M. Dhandapani, learned Standing Counsel for the Department invited our attention to the decision of the Supreme Court in Standard Chartered Bank and Others Vs. Directorate of Enforcement and Others, . In the said decision, the Supreme Court, relying upon Section 56 of the FERA, 1973, came to the conclusion that the adjudication proceedings are different from prosecution. Section 56 of the FERA, 1973 starts with a rider ''without prejudice to any award of penalty by the Adjudicating Officer under this Act''. Therefore, the Act treats the civil liability and the criminal liability differently. Though an order of adjudication may ultimately result in the order of confiscation and the imposition of penalty, it is not strictly criminal in the sense in which we understand criminality. At the most, it could be taken to be quasi criminal.

24. However, relying upon the decision of the Supreme Court in Gopaldas Udhavdas Ahuja and Another Vs. Union of India (UOI) and Others, , it is contended by Mr. B. Kumar, learned Senior Counsel for the appellants that the moment it is found that when the criminal prosecution as well as the adjudication proceedings are based upon the same set of facts and the proceedings rely upon the same evidence, two different authorities cannot come to two different conclusions.

25. The case in Gopaldas Udhavdas Ahuja arose out of the proceedings for adjudication under Section 71(1) of the Gold (Control) Act, 1968. Drawing inspiration from the decision in Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, , the Supreme Court held that on the basis of the same set of facts, on the basis of the same incriminating materials and on the basis of the statements of the same witnesses, two different conclusions could not be drawn.

26. But, we are of the considered view that the decision in Gopaldas Udhavdas Ahuja would have no application to the cases on hand at least for two reasons. The first reason is that in this case, the Directorate of Enforcement did not even have the opportunity to examine any witnesses before the criminal court. The appellant in the first miscellaneous appeal succeeded before this Court in getting his discharge petition allowed. The appellant in the other miscellaneous appeal was convicted by the criminal court after trial. Therefore, after the witnesses were allowed to be examined, the Criminal Court had come to a conclusion in respect of the appellant in the second miscellaneous appeal that the appellant in the second miscellaneous appeal was guilty of the offence. Therefore, the decision in Gopaldas Udhavdas Ahuja is clearly distinguishable.

27. The second reason as to why the decision in Gopaldas Udhavdas Ahuja is distinguishable is that in paragraph 21, the Supreme Court clarified in Gopaldas Udhavdas Ahuja that the observations made in paragraphs 19 and 20 should not be taken to mean that there is no difference between the departmental proceedings and the prosecution. Therefore, the proposition laid down in

Gopaldas Udhavdas Ahuja is not to the effect that the adjudication proceedings would automatically meet with the same fate as that of the criminal proceedings.

28. As a matter of fact, in the decision relied upon by Mr. M. Dhandapani, learned Standing Counsel namely Standard Chartered Bank v. Directorate of Enforcement, heavy reliance was placed upon the decision of the Supreme Court in K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, . What the Supreme Court did in Standard Chartered Bank v. Directorate of Enforcement was not only distinguishing K.C. Builders, but also observing that the decision in K.C. Builders requires re-consideration. Therefore, the decision in Standard Chartered Bank v. Directorate of Enforcement appears to be squarely on the point. Hence, the second question of law is also to be answered against the appellants.

29. The Appellate Tribunal itself has gone into the question relating to the expression ''acquire'' in Section 8(1) and came to the conclusion that the non examination of Mrs. Seethalakshmi Nagaraj on the side of the defence was fatal. It was not relied upon by the prosecution. There was no explanation as to why and how the appellant in the second miscellaneous appeal came to the premises that was being raided, with a briefcase carrying foreign currencies. In such circumstances, we do not think that the orders of the Adjudicating Authority and the Appellate Tribunal call for any interference.

30. Accordingly, the civil miscellaneous appeals are dismissed. No costs.