
(2006) 02 KL CK 0038
In the High Court Of Kerala
Case No : W.A. No. 161 of 2003

Azeez

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 01-02-2006

Acts Referred:

Foreign Exchange Management Act, 1999 — Section 13, 14, 15, 49, 49(3)
Foreign Exchange Regulation Act, 1973 — Section 50, 51, 52, 52(1), 52(2)
General Clauses Act, 1897 — Section 6

Citation : (2006) 1 ILR (Ker) 729 : (2006) 2 KLT 145 : (2006) 68 SCL 561

Hon'ble Judges : K.T. Sankaran, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : Kodoth Sreedharan, for the Appellant; John Varghese, Asst. Solicitor General and Lakshminarayan, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.T. Sankaran, J.—The question involved in this Writ Appeal is whether a penalty imposed on the appellant u/s 9(1)(b) and 9(1)(d) of the Foreign Exchange Regulation Act, 1973 in the year 1996 can be recovered as an arrear of land revenue u/s 70(1)(iii) of the Foreign Exchange Regulation Act, 1973, in view of the repeal of the Foreign Exchange Regulation Act by Section 49 of the Foreign Exchange Management Act, 1999?

2. Proceedings were initiated against the appellant writ petitioner by the Assistant Director of Enforcement, Foreign Exchange Regulation Act, Government of India, Calicut u/s 50 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "FERA") for contravention of Section 9(1)(b) and 9(1)(d) of the Act. Ext.P-1 order was passed by him on 29-1-1996 holding the appellant guilty of the charges levelled against him and a penalty of Rs. 35,000 was imposed on the appellant. In addition to the penalty imposed on the appellant, Rs. 75,000 seized from him was confiscated to the Central Government u/s 63 of FERA. Ext. P-1 order has become final. Since the penalty

was not paid by the appellant and since it could not be recovered by resorting to Section 70(1) Clauses (i) and (iii) of the Act, proceedings were initiated for recovery of the amount as arrear of land revenue u/s 70(1)(iii) of FERA. Ext.P-2 sale notice was issued in the proceedings for recovery. Ext. P-2 was challenged by the appellant in the Writ Petition. Learned Single Judge disposed of the Writ Petition granting instalment facility to the writ petitioner-appellant enabling him to pay the amount demanded in three instalments. Dissatisfied with the judgment of the learned Single Judge, the writ petitioner has come up in appeal.

3. Sri Kodoth Sreedharan, learned Counsel for the appellant, contended that no proceedings for recovery could be initiated invoking Section 70 of FERA after the repeal of the said Act by the Foreign Exchange Management Act, 1999 (hereinafter referred to as "FEMA"). He contended that Section 14 of FEMA provides for enforcement of the orders of the adjudicating authority and if the penalty imposed is not paid within ninety days from the date of notice for payment of the penalty, the person liable to pay the penalty would be exposed only to civil imprisonment u/s 14 of FEMA. It is also pointed out that facility for compounding any contravention u/s 13 of FEMA is possible u/s 15 of FEMA and in the event of compounding no further proceedings shall be initiated or continued against the person who contravenes Section 13 of FEMA. It is further submitted that the provisions for recovery of the penalty u/s 70 of FERA are inconsistent with the provisions of FEMA and, therefore, Ext. P-2 proceedings are illegal. He also relied on Section 49 of FEMA.

4. Sri John Varghese, learned Assistant Solicitor General of India, on the other hand submitted that the provisions of FERA for recovery of the amount of penalty are not inconsistent with the provisions of FEMA and that in view of Section 49(3) of FEMA, the proceedings for recovery under FERA are saved. It was also submitted that the appellant could not resort to Sections 14 and 15 of FEMA and that the proceedings initiated against him u/s 70(1)(iii) of FERA are legal and valid.

5. Section 49 of FEMA reads as follows:

49. Repeal and saving.--

(1) The Foreign Exchange Regulation Act, 1973 (46 of 1973) is hereby repealed and the Appellate Board constituted under Sub-section (1) of Section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.

(2) On the dissolution of the said Appellate Board, the person appointed as Chairman of the Appellate Board and every other person appointed as Member and holding office as such immediately before such date shall vacate their respective offices and no such Chairman or other person shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service.

(3) Notwithstanding anything contained in any other law for the time being in

force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention u/s 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of Sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

(5) Notwithstanding such repeal.-- (a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

(b) any appeal preferred to the Appellate Board under Sub-section (2) of Section 52 of the repealed Act but not disposed of before the commencement of this Act shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under this Act;

(c) every appeal from any decision or order of the Appellate Board under Sub-section (3) or Sub-section (4) of Section 52 of the repealed Act shall, if not filed before the commencement of this Act, be filed before the High Court within a period of sixty days of such commencement:

Provided that the High Court may entertain such appeal after the expiry of the said period of sixty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period.

(6) Save as otherwise provided in Sub-section (3), the mention of particular matters in Sub-sections (2), (4) and (5) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal.

FEMA came into force on 1-6-2000. The bar under Sub-section (3) of Section 49 of FEMA does not apply in the case on hand since the adjudicating authority had passed Ext. P-1 order before the commencement of FEMA. Sub-section (3) of Section 49 indicates that proceedings u/s 51 of FERA could be initiated within a period of two years from the date of commencement of FEMA in respect of an offending act committed while FERA was in force. Section 51 of FERA provides for adjudication of the matters mentioned in Section 50 of the said Act. Section 50 of FERA provides that if any person contravenes any of the provisions of FERA other than the provisions mentioned therein, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or Rs. 5,000, whichever is more. Section 51 of FERA provides for an enquiry in

the prescribed manner after giving the person affected a reasonable opportunity for making a representation. If in such enquiry, the adjudicating authority is satisfied that the person concerned has committed the contravention, a penalty could be imposed. Section 52 of FERA provides for appeal to the Appellate Board within forty-five days from the date of the order passed by the adjudicating authority. Section 54 of FERA provides for a further appeal to the High Court, only on questions of law, against an order passed by the Appellate Board u/s 52. The period of limitation provided for a further appeal to the High Court is sixty days from the date of communication of the decision of the Appellate Board. Section 56 of FERA provides for prosecution in addition to the imposition of penalty by way of adjudication. The appellant has not challenged Ext.P-1 order in appeal u/s 52 of FERA and the period of limitation for filing appeal u/s 52 lapsed long before the commencement of FEMA. Therefore, sub-s.(3) of Section 49 of FEMA does not advance the contentions put forward by the appellant.

6. Sub-s.(4) of Section 49 of FEMA provides that all offences committed under the repealed Act (FERA) shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed, subject to the provisions of sub-s.(3). The exception to this General Rule under sub-s.(4) is what is provided in Sub-section (3) of Section 49 of FEMA. We have already held that sub-s.(3) of Section 49 of FEMA does not apply to the case of the appellant. The learned Counsel for the appellant laid much stress on sub-s.(5) of Section 49 of FEMA. He contended that any action taken under FERA shall be deemed to have been done or taken under the corresponding provisions of FEMA, only in so far as it is not inconsistent with the provisions of FEMA. He contended that the proceedings for recovery u/s 70(1)(iii) of FERA is inconsistent with Section 13 and 14 of FEMA and, therefore, Ext. P-2 is illegal. We are unable to accept this contention. Clause (a) of Sub-section (5) of Section 49 of FEMA provides for continuance of the proceedings under FEMA in respect of anything done or any action taken under FERA. The wording of Clause (a) to sub-s.(5) of Section 49 of FEMA would indicate that such continuance is not in respect of any matter which is concluded under FERA. An adjudication or prosecution initiated under FERA shall be continued under that Act itself even after the commencement of FEMA, in view of sub-s.(3) of Section 49 of FEMA. Sub-s.(3) of Section 49 is clear and imperative. Therefore, we are of the view that Clause (a) of sub-s.(5) of Section 49 of FEMA does not control sub-s.(3) of Section 49 of FEMA.

7. There is another fallacy in the argument of the learned Counsel for the appellant. If it is to be taken that the proceedings should continue under FEMA and that Section 13 and 14 of FEMA would apply, necessarily it should mean that the appellant could be proceeded with u/s 14 of FEMA. Section 13 of FEMA provides for a penalty up to thrice the sura involved in the contravention of the provisions of the Act where such amount is quantifiable or up to Rs. 2 lakhs where the amount is not quantifiable. Section 13 further provides for a penalty which may extend to Rs. 5,000 for every day in the case of a continuing contravention. A penalty u/s 13 of FEMA cannot be imposed on the appellant

since the adjudication under FERA is already over. Therefore, Section 13 of FEMA has no application at all. Section 14 of FEMA provides that if any person fails to make full payment of the penalty imposed on him u/s 13 within a period of ninety days from the date on which notice for payment of such penalty is served on him, he shall be liable to civil imprisonment as provided u/s 14. Section 14 of FEMA would have application only in a case where a penalty was imposed u/s 13 of FEMA, We have already held that Section 13 has no application in the case. The necessary consequence is that Section 14 also would not apply. There is another reason also for arriving at this conclusion. Sub-s.(3) of Section 49 of FEMA bars an adjudication u/s 51 of FERA after the expiry of a period of two years from the date of commencement of FEMA. Clause (a) of sub-s.(5) of Section 49 could be invoked for a proceeding for adjudication u/s 13 of FEMA in respect of a contravention under FERA, provided the bar under sub-s.(3) of Section 49 applies to the case and that no final order is passed in adjudication proceedings under FERA. In the case on hand, an order has been passed by the adjudicating authority under FERA and that order has become final. The contention raised by the learned Counsel for the appellant that the appellant could get the beneficial provisions of FEMA u/s 13 and 14 runs contra to the contentions of the appellant that the adjudication order and the notice issued for recovery are inconsistent with the provisions of FEMA.

8. Sub-s.(6) of Section 49 of FEMA provides for the general application of Section 6 of the General Clauses Act, 1897. Clause (d) of Section 6 of the General Clauses Act provides that the repeal shall not affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment which was repealed. Sub-section (4) of Section 49 of FEMA in no uncertain terms saves the continued application of the provisions of FERA in respect of offences committed under FERA. The only exception to such application is the bar under Sub-section (3) of Section 49. In any view of the matter, the contention raised by the appellant that the proceedings for recovery of penalty imposed under the provisions of FERA cannot be continued after the commencement of FEMA cannot be entertained. Learned counsel for the appellant relied on the decision of the Supreme Court in *T. Barai Vs. Henry Ah Hoe and Another*, , which, in our view, has no application to the points involved in this case.

The Writ Appeal, therefore, fails and it is accordingly dismissed. However, taking into account the facts and circumstances of the case, the appellant is granted three months" time to pay the amount sought to be recovered and the proceedings for recovery shall be kept in abeyance for the aforesaid period of three months.