
(2013) 02 DEL CK 0064

In the Delhi High Court

Case No : Writ Petition (C) 3760 of 1995

Basant Kumar Sharma

APPELLANT

Vs

Govt. of India and Others

RESPONDENT

Date of Decision : 07-02-2013

Acts Referred:

Citation : (2013) 3 AD 6 : (2013) 120 SCL 122

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : P. Ramesh Kumar and Mr. Bharat Sood, for the Appellant; Saqib, Advocate for R-1 and 2, Mr. Kuldeep S. Parihar and Mr. H.S. Parihar, Advocates for R-3/RBI, Mr. Tanu Priya Gupta and Mr. Mukesh Verma, Advocates for R-4/SBI, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.

CM No. 1437/2013 (condonation of delay in filing a rejoinder) and CM No. 9214/2012 (for restoration)

1. This writ petition was admitted by a Division Bench of this court on 05.12.1995. Due to persistent non-appearance of the petitioner, the writ petition was dismissed in default on 12.10.2006. By order dated 28.05.2007, the writ petition was restored to its original number on an application being moved by the petitioner in that behalf. It appears that the petitioner was once again not present when the matter came up for hearing on 22.04.2009. In the interest of justice, adverse orders were deferred. Since the petitioner was not present, when the matter was called out, on 23.04.2009 the writ petition was once again dismissed in default. To be noted, the matter was on Regular Board.

2. The petitioner filed, once again, an application for restoration which was dismissed on 17.08.2009. The said matter was carried in appeal, to the Division Bench. The appeal was numbered as 648/2009. The Division Bench, however, set

aside the order dated 17.08.2009 and directed that, the writ petition be heard on merits.

3. In the more recent past, the matter came up for hearing on 02.07.2012. There was no representation on behalf of the petitioner and therefore, adverse orders were deferred. In the order of 02.07.2012, it was noticed that at times the petitioner appeared in person, while on other occasions, he was represented through counsel and therefore, it was not clear whether the petitioner had dispensed with the services of his counsel, altogether. A direction was issued, however, that the matter would remain on the Regular Board. The matter reached hearing, on 12.07.2012 when, once again, there was no representation on behalf of the petitioner. The writ petition was dismissed.

4. On 22.07.2012, notice was issued in the captioned application when, the petitioner was represented by an advocate by the name of Mr. V.M. Vishnu. Respondents/non applicants were given time to file a reply to the said application. The matter was posted for further proceedings, on 30.11.2012. On the said date, time was taken by the Advocate for the petitioner; though this time a different advocate appeared, one, Sh. P. Ramesh Kumar. Resultantly, the captioned application for restoration, was posted for hearing today.

5. In the forenoon, when the matter came up for hearing, the petitioner's counsel Mr. P. Ramesh Kumar was told, to address arguments both on the restoration application as well as on merits, given the fact that it was a petition of 1995.

6. Accordingly, the counsel for the petitioner was heard at length both in support of the application and on the merits, both in the pre-lunch session as well as in the post-lunch session.

7. The counsels appearing for the respondents gave their no objection to the writ petition being restored and the matter being heard on merits. Accordingly, order dated 03.07.2012, is recalled. The writ petition is set down for hearing.

CM No. 1437/2013

8. The captioned application is for condonation of delay in filing the rejoinder. The delay is of 76 days. For the reasons given therein, the application is allowed and rejoinder is taken on record.

WP(C) 3760/1995

9. Shorn of verbiage, the short issue which arises for consideration is whether the petitioner, who returned to India on 26.01.1988, after six (6) years from Saudi Arabia, ought to have been granted the same facilities qua his bank accounts maintained with respondent no. 4, i.e., State bank of India (SBI), which are available to a Non-Resident Indian (NRI).

10. The petitioner, evidently had proceeded to Saudi Arabia, on a work assignment. It is claimed by him that, due to recession and drastic scaling down

of salaries, he decided to visit India with the sole intention of exploring the possibility of taking up a job or a vocation in India.

11. While the petitioner was in Saudi Arabia, he had invested, apparently in shares/debentures floated by Indian companies, through the Bombay (now Mumbai) main branch of SBI under its Non-Respondent Portfolio Investment Scheme. It is the case of the petitioner that, the said investment was made on the basis that he would be able to repatriate the dividend and/or interest receivable on the said investments.

12. It is also the case of the petitioner that, in making the aforementioned investments, requisite permissions were taken from the Reserve Bank of India (RBI) both under the provisions of NRI Portfolio Scheme as well as the then subsisting Foreign Exchange Rules. It is also claimed that due compliance with the relevant provisions of the then subsisting Foreign Exchange Regulations Act, 1973 (in short FERA), was also made.

13. The petitioner, after nearly three (3) months of his return from Saudi Arabia, by a communication dated 28.03.1988, informed respondent no. 4 i.e., SBI of his intention to explore the possibilities of resettlement. It was further indicated, in the very same communication, by the petitioner that, there is also a possibility of leaving for another assignment Overseas after a elapse of 12 months from the date of arrival as above, if suitable employment is relocated Overseas". I have quoted the relevant extracts of the petitioner's letter of 28.03.1988, as much of the submissions in the matter, have veered around the contents of this letter.

13.1 The petitioner, while concluding the said letter indicated to SBI, that he intended to acquire an Ordinarily Non-Resident Status" and therefore, necessary action ought to be taken to convert his existing accounts to reflect the "NRO status". A request was also made that, necessary forms of RBI be sent to him so that, he could seek permission to hold immovable property in foreign country as also shares of foreign companies, which were situated outside India.

14. It appears the petitioner followed the above letter with yet another letter dated 22.05.1988; the said letter, however, has not been placed on record. SBI, in response to the letter dated 22.05.1988, in sum and substance, vide its letter dated 16.06.1988, informed the petitioner that, since he had become a "resident", there was no requirement for him to obtain any permission from RBI for carrying out the sale. Since the letter of 22.05.1988 is not on record one can only hazard a guess that, the petitioner had sought permission to sell shares held in his name.

15. It appears that the petitioner was not happy with the response that he had got from SBI, and therefore, apparently issued several letters in that behalf to SBI between 07.11.1988 and 15.11.1988. These letters are also not on record, though there is a reference to the same in the list of dates. It also appears that, the petitioner held a meeting on 28.11.1988, with the concerned officer of SBI, when the issue of his status i.e., whether he should be regarded as a NRI or a

resident, came up; at which point in time he was apparently informed that, since he had taken transfer of residence, the petitioner could not continue to retain a status of a NRI.

15.1 The reference to the meeting of 28.11.1988 is found, in SBI's letter of 02.01.1999. By this letter, the petitioner was informed that, after he had become a resident, he was not allowed to keep a "Non-Resident External Account" (in short NRE Account) as per the then prevailing provisions of para 29A-15 of the Exchange Control Manual (1987 Edition, Volume 1) [in short EC Manual].

15.2 Thus, in terms, the petitioner was told that his "NRE account" would have to be re-designated as a "Resident Account". The petitioner was further informed that the facilities which were made available to him as a NRI would not be made available any longer and that if he was desirous of continuing his Resident Account with it, he would have to open a fresh account with its personal banking division.

16. As a matter of fact, it may also be noted that, the aforementioned letter was written by SBI in response to the letter dated 10.11.1988 which the petitioner had, apparently, written to the Govt. of India i.e., respondent no. 1.

17. This communication of SBI i.e., letter dated 02.01.1989, triggered a spate of letters, which the petitioner wrote to various authorities, which included RBI and the various officers in the Ministry of Finance, Government of India (GOI), as also, the Directorate of Public Grievances, Cabinet Secretariat, New Delhi. Letters were also addressed to the then Finance Minister, seeking his intercession in the matter. The period, between which, these letters were written was 05.06.1989 to 10.12.1991. It appears that, on 29.12.1992, the Enforcement Directorate, Agra issued a notice u/s 33(2) of the FERA to the petitioner, as well.

18. Apparently, the petitioner thereafter, wrote to the Finance Minister, and the Directorate of Public Grievances, Cabinet Secretariat, New Delhi, calling upon them to amend the provisions of the FERA and the Exchange Rules, so that, the long pending grievance of the petitioner could be addressed. Letters in this behalf were issued on 08.01.1993 and 14.01.1993.

19. In the meanwhile, the petitioner wrote to the Enforcement Directorate that since the matter was receiving the attention of the Ministry of Finance, GOI since 1989, no action ought to be taken against him, under the FERA.

20. According to the petitioner on 11.02.1993, the Directorate of Public Grievances, forwarded his complaint to the Department of Economic Affairs, Ministry of Finance.

20.1 This was followed by a series of letters issued by the petitioner between 10.05.1994 and 11.10.1994 to RBI and the Ministry of Finance, GOI accusing them of callousness and neglect, which according to the petitioner was criminal in nature and had caused immense financial loss, due to lost career opportunities.

21. Evidently, on 02.11.1994, summons u/s 40 of the FERA were issued to the petitioner. The petitioner seems to have taken the stand in response to the summons that, since the matter was under consideration of RBI, no action could be taken against him. Furthermore, the petitioner appears to have contended that, the directive of RBI to convert his status into that of a resident was violative of his fundamental rights.

22. The petitioner, apparently, thereafter issued notices u/s 80 of the Code of Civil Procedure, 1908 (in short CPC) to the respondents herein. These notices are dated 10.11.1984 and 28.11.1984.

23. Respondent no. 1, through Ministry of Finance, GOI, according to the petitioner, sent its reply on 22.03.1995 whereby, the petitioner was directed to comply with the instructions of RBI, as communicated to him, in letters 04.07.1989, 21.09.1994 and 18.02.1995.

24. The petitioner was evidently not satisfied and therefore, has approached this court by way of the captioned writ petition.

24.1 I may only note that in the list of dates, there is a reference to the fact that prior to the captioned writ petition, a writ petition, was filed on 20.04.1995, which was taken back by the counsel engaged by the petitioner at that point in time, on 24.9.1995, apparently without the petitioner's knowledge. On the petitioner being queried, he stated that the writ petition was dismissed. There is, however, no order available on record as to whether the writ petition filed earlier was listed in court and thereafter dismissed.

25. Since there is no record, I propose to give the benefit of doubt to the petitioner that retrieval of the writ petition from the Registry of this court was understood by him, as dismissal of the writ petition.

26. At the outset, it is noted that, though the petitioner has filed elaborate written arguments, the counsel for the petitioner has in the background of the aforesaid broad facts made only the following submissions, in support of the petition:-

(i). The petitioner could not have been treated as a Resident, as he had indicated, that his return to India was exploratory; that is, only to evaluate the possibility of obtaining a suitable employment/engagement. In this behalf, the petitioner sought to draw my attention to the letter dated 28.03.1995, written by the petitioner to SBI; to which I have made a reference above, wherein the petitioner had inter alia indicated that, there was a possibility of him, leaving the country for an Overseas assignment, within the next 12 months, from the date of his arrival.

(ii). The wrongful conversion of the petitioner's status from a NRI holding a NRE account to that of a Resident, had resulted in loss of career opportunities and investment. In this behalf, it was the stand of the learned counsel for the petitioner that because the petitioner was not able to retain his status as a NRI,

he was unable to demonstrate to the consultants, who were engaged to arrange immigration of the petitioner to other countries, that he had funds in India, which could be repatriated. In other words, that the petitioner was a man of means, who would be an asset and not a liability to the country, to which, he would eventually immigrate to.

(iii). The provisions of Section 2(p)(ii)(c) of FERA, which was relied upon by the respondents to contend that the petitioner's NRE account had to be converted to a resident account, required demonstration of the petitioner's intention to stay in India for an "uncertain period. Since, the petitioner in his very first communication of 28.03.1988, had indicated to SBI that, he was on a visit to India only to explore job opportunities and/or a vocation and that too for a limited period of 12 months, the respondents could not have come to the conclusion that, the petitioner, had come to stay in India for an uncertain period. The learned counsel for the petitioner in support of his submission, relied upon the judgment of the Supreme Court in the case of K. Ramullan Vs. Commissioner of Income Tax, Cochin, .

27. On the other hand, on behalf of respondent no. 4, Ms. Gupta submitted that, the petitioner was holding two accounts with SBI. These were: NRE Account 6384 and NRO Account 684. Besides this, the petitioner had also mandated SBI with authority to purchase shares and debentures of Indian Companies through Stock Exchange under its Non-Resident Portfolio Investment Scheme. For this purpose, SBI had obtained requisite approval from RBI.

27.1 It was further contended that, SBI on receipt of information from the petitioner vide its communication dated 28.03.1988 that he had returned to India, advised him vide letter dated 22.06.1988 to deposit his cheque book and passbook to enable re-designation of his NRE account into NRO account.

27.2 Thereafter, according to the learned counsel for respondent no. 4, the petitioner availed of the benefits under the Transfer of Residence Scheme; which was clearly indicative of, the petitioner's intention, to stay in India for a long, though uncertain period.

27.3 The learned counsel submitted that if there was any doubt as regards the petitioner's intention, the same was completely put at rest, when the petitioner, vide his letter dated 20.07.1988, wrote to a company by the name of BASF (India) that, henceforth it should send the dividends and/or interest earned by him directly to his NRO account no. 0684, maintained with SBI, as he had returned to India and therefore, accordingly, his status be changed to that of a "resident".

27.4 Learned counsel for respondent no. 4, submitted that the purport of this letter was, since the petitioner had returned to India, he was not interested in SBI acting on his behalf for collection of dividends and/or interest and other matters relating to his investment in shares and debentures. The petitioner, thus required BASF (India), to correspond directly with him at the address provided

by him, in the said letter.

27.5 It was submitted that, it was in pursuance of the aforesaid circumstances, that the petitioner's NRE and NRO accounts were closed, and funds were transferred, to his saving bank account. A communication to that effect was sent to the petitioner vide letter dated 17.07.1989.

28. The sum and substance of the submissions made by the learned counsel for respondent no. 4 is that, since the petitioner had himself indicated that he had become a resident, he could not contend that his status was wrongly converted from that of a NRI to that of a resident, resulting in closure of his NRE and NRO accounts.

29. Mr. Saqib, who appeared for respondent nos. 1 & 2, supported the submission of learned counsel for respondent no. 4. The learned counsel in fact informed me that the proceedings commenced against the petitioner under FERA, had been closed.

29.1. It was Mr. Saqib's submission that no challenge could be made to the provisions of FERA, in particular, Section 2(p) on the ground that it was violative of the provisions of Article 14 of the Constitution of India, in view of the fact that FERA was included in Schedule IX of the Constitution of India. Mr. Saqib, in support of this proposition, relied upon the judgment of the Supreme Court in the case of Standard Chartered Bank and Others Vs. Directorate of Enforcement and Others, . The learned counsel further submitted that the correspondence on record and the conduct of the petitioner show that his stay in India was for an uncertain period and hence, within the meaning of Section 2(p)(ii)(c) he had attained the status of a Resident in India.

30. Mr. Parihar, who appeared for respondent no. 3 relied upon the provisions of the E.C. Manual to support his contention that, when a person who is a Resident outside India returns to India for an indefinite stay, he would be required to close his foreign currency account, if any, maintained by him during his residence abroad and transfer the balances in those accounts to India, within three (3) months of the date of arrival. The said period, could only be extended and that too, in exceptional cases, on permission being granted by RBI.

30.1. Mr. Parihar, further contended that, those Indian Nationals or persons of Indian origin holding foreign passport, who are residing abroad and were desirous of returning to India to secure suitable employment or, explore possibilities of setting up a small scale industrial unit or, for any other exploratory purpose, could be granted, on merits, an exemption from Exchange Control Regulations, which required such a person to surrender his foreign currency balances within three (3) months of his arrival in India. The exemption, if any, would be granted only to those persons, who applied to RBI, in the prescribed form, within three (3) months of their return to India.

30.2 Mr. Parihar, submitted that, the petitioner did not make any such application

to the RBI to seek exemption for surrendering his foreign currency balances in respect of accounts, if any, maintained by him, outside India.

30.3 Furthermore, Mr. Parihar submitted that, under Regulation A. 15 of the E.C. Manual, a NRE account of a NRI is required to be redesignated as a Resident account immediately upon the return of the account holder to India if, the authorised dealer, is satisfied that the account holder has returned to India for either taking up employment or, carrying on business or vocation, for any other purpose with the intention of residing in India.

30.4 Mr. Parihar, further contended that, if an exemption is granted by RBI then, such a person also, has the option of availing the facility of re-transferring, the foreign currency surrendered on returning to India, as and when, such a person decides to return to a foreign country, within a period of five (5) years or, within such extended time, as RBI may grant.

30.5 Mr. Parihar, submitted that, since the petitioner had unequivocally expressed his intention to stay in India, SBI had rightly closed the petitioner's NRE and NRO accounts, and transferred the funds to the saving bank account of the petitioner.

REASONS

31. I have heard the learned counsels for the parties and perused the record. What emerges and what is relevant for the purposes of the core issue raised in the present writ petition is as follows:-

31.1 The petitioner, while he was away in Saudi Arabia, had opened a NRE and NRO account with SBI. SBI, was also authorized by the petitioner, to deal in shares and debentures of Indian companies as per the mandate given by the petitioner from time to time.

31.2 The petitioner, returned to India on 26.01.1988, after a gap of nearly six (6) years. This information was provided by the petitioner to SBI, only on 28.03.1988. By this letter, the petitioner informed SBI that, he wanted to acquire an "Ordinarily Non-Resident status". A request was thus made, to convert his subsisting accounts, which included a NRE account to a "NRO status". This request was prefaced with the following assertions in the first paragraph of the said letter.

..This is in continuation of my discussions of 28 Jan. 88 and letter dated 05 Feb. 88, I wish to advise you that I have returned to India on 26 Jan. 88 to explore the possibilities of re-settlement. There is also a possibility of leaving for another assignment overseas after elapse of 12 months from the date of arrival as above, if suitable employment is re-located overseas...

31.3 A careful reading of the aforementioned paragraph would show that, while on one hand, the petitioner was wanting to explore the possibilities of resettlement in India, he also wanted to keep open, an opportunity, to leave

India for an overseas assignment, within the next twelve (12) months from the date of his arrival. To my mind, if nothing else, uncertainty was writ large in the letter itself. The petitioner did not state that if, he was not able to re-settle in India within the next twelve (12) months, he would leave India. On the contrary he only projected a "possibility" of leaving India within twelve (12) months if, he found a suitable employment overseas.

31.4 Continuing further, since the petitioner had engaged the services of SBI to sell and purchase share and debentures and/or collect dividend and interest thereon, he appears to have approached SBI to obtain necessary approval from RBI for sale of his investments. This aspect comes through in SBI's letter of 16.06.1988.

31.5 By this letter, quite clearly, SBI informs the petitioner that since he had become a "Resident", there was no requirement to obtain the permission of RBI for sale of his investments. By this very letter, SBI also informed the petitioner that, the Non-Resident Investment Section, in SBI, which was rendering service to the petitioner under its Non-Resident Portfolio Scheme would not be able to do so in view of the fact that the petitioner had acquired the status of a Resident. Accordingly, it was indicated in the very same letter that the said section had requested its securities division to re-designate his safe custody accounts as Resident accounts.

31.6 Since the petitioner protested qua the re-designation of his status as a "Resident", SBI, clarified its position with regard to the same vide its letter of 02.01.1989. In the said letter, not only did the SBI, make a reference to the relevant provisions of the E.C. Manual, but also adverted to the meeting of 28.11.1988, held with the petitioner wherein, he was informed that since, he had already sought transfer of residence, it was quite evident that, he had no intention to go abroad. It was thus communicated to the petitioner that, according to SBI, he had acquired the status of a Resident, and therefore, his account had to be redesignated as a "Resident Account".

32. Perhaps, on a reading of the aforementioned letters of SBI, it could have been argued on behalf of the petitioner, (very weakly though) that it was an erroneous perception, formed on the basis of unclear phraseology used in the letter dated 28.03.1988, which at best can be said to have given rise to doubt qua petitioner's intention vis-?-vis the duration of his stay. This doubt if at all, is completely removed, on perusal of the petitioner's letter dated 20.07.1988. In the said letter, the petitioner quite clearly indicated to BASF (India) [a company in which the petitioner held shares and debentures] that, since he had returned to India, his status be changed to that of a "Resident". The petitioner, further requested BASF (India) that, in the future, they should correspond directly with him, at his address, given in the said letter. In sum and substance, the petitioner had recalled his mandate given to SBI to deal with BASF (India).

33. It is in the background of such like correspondence, perhaps, that SBI issued

the letter dated 02.01.1989, followed by a letter dated 17.07.1989, wherein it reiterated that with the change of status, it had no option but to close the petitioner's NRE and NRO account, and transfer the funds to the savings bank account of the petitioner. As a matter of fact, this very aspect was briefly reiterated in SBI's letter of 11.06.1993.

34. The petitioner, on the other hand, continued to write to various authorities and, did not deem it fit to approach the court till 1995, by which time almost seven (7) years had expired since, the petitioner was informed about the change, in his, status.

35. In the background of these facts, in my view, the respondents are right in contending that under the provisions of Section 2(p)(ii)(c) of FERA, the petitioner's status had to be changed to that of a Resident. For the sake of convenience, the relevant provisions are extracted hereinafter:

..2. Definitions-In this Act, unless the context otherwise requires-

(a). x x x

x x x

x x x

(p). "person resident in India" means

x x x

x x x

(ii). A Citizen of India, who having ceased by virtue of paragraph (a) or paragraph (b) or paragraph (c) of sub-clause (i) to be resident in India, returns to, or stays in, India, in either case-

(a). x x x

(b). x x x

(c). for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.

35.1 Clearly, on perusal of the record, the only conclusion that could have been drawn is that the petitioner himself had indicated his intention to stay in India and acquire a status of a "Resident"; on return from Saudi Arabia after giving up his assignment in that country. What began with the duration of the petitioner's stay in India being uncertain, acquired certainty with the issuance of letter dated 20.07.1988 to BASF (India).

36. Therefore, quite naturally, under Regulation A.15, the relevant portion of which reads as follows, the NRE account of the petitioner had to be re-designated as "Resident Account".

..A.15 Non-resident (External) accounts of NRIs should be redesignated as resident accounts immediately upon the return of the account holder to India if authorized dealer is satisfied that he has returned to India for taking up employment or carrying on a business or vocation for any other purpose with the intention of residing in India. FCNR account should be first converted into rupee accounts by applying the T.T. buying rate for the relative currency ruling on the date the accounts are converted into rupee accounts and thereafter designated as resident accounts. Where account holder is only on a short visit to India, the account may continue to be treated as Non-resident (External) account even during his stay in this country...

37. Thus, in my view, the judgment of the Supreme Court in the case of K. Ramullan (supra) would be distinguishable on facts. The judgment emphasizes that in construing the word "stay", in a pari materia provision, one has to bear in mind that it does not denote a "short" or "casual" stay. It would have to be a "stay" for taking up employment or, carrying on business or, vocation or with the intention of remaining in India for an uncertain period. In the said case, the appellant, who was a person of Indian origin, had settled in Malaysia, since 1941. The appellant in that case had acquired Malaysian citizenship. His wife and children were residing in India, who owned agricultural land in India. The appellant had visited India in two assessment years for the purpose of medical treatment, for which period, he had stayed with his wife. It is in the context of these facts that the Supreme Court held that the appellant could not be treated as one who was resident in India, during the relevant period.

38. In order to ascertain intention, what is required to be seen is the conduct of the person and the surrounding circumstances. Viewed from any angle, it cannot but be said that the respondents had not, correctly, concluded that the petitioner intended to stay in India for an uncertain period and thus, consequently, fell within the rigour of Section 2(p)(ii)(c) of FERA. The logical sequitur of this would be that the relevant regulation i.e., Regulation A.15 of the Foreign Exchange Manual would be applicable to the petitioner. For the aforesaid reasons, I find no merit in the writ petition. The same is accordingly dismissed. However, there shall be no orders as to costs.