(1987) 07 KL CK 0081

In the High Court Of Kerala

Case No : M.F.A. No. 362 of 1982

Central Government APPELLANT

Vs

Abdul Mohammed and Others RESPONDENT

Date of Decision : 08-07-1987

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 54

Citation : (1988) 17 ECC 96 : (1988) 1 ILR (Ker) 378

Hon'ble Judges : K.G. Balakrishnan, J;K. John Mathew, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

K. John Mathew, J.—This is an appeal u/s 54 of the Foreign Exchange Regulations Act, 1973. The Union of India represented by the Director of Enforcement Directorate, Foreign Exchange Regulation Act, is the appellant. The Director of Enforcement, FERA, took proceedings against the respondent herein, namely, Abdul Mohamed, hereinafter referred to as the respondent u/s 4(1) of the FERA, 1947. On 18-8-1971 a car driven by the respondent was intercepted by officers of the Customs Preventive Unit, Kasaragod at Adakathvayal near Kasaragod and seized foreign exchange, namely drafts, traveller''s cheques and currencies in U.S. $ and pound sterling of the value of U.S. $1,040.0 and ? 4,000.3 along with some letters and foreign goods. These documents and currencies were taken into custody and a list was prepared. The respondent was taken into custody by the Customs Officers and was produced before the Judicial First Class Magistrate, Kanhangad. Subsequently he was handed over to the officers of the Enforcement Directorate for investigation. On 18-8-1971 the respondent had given a statement before the Superintendent of Central Excise & Customs Preventive. He stated that he was a car driver and the seized car was owned by him. He used to take passengers from Kasaragod to Bombay and back by the car. His last visit to Bombay was on 12-8-1971 and on his return trip on 16-8-1971, at 8 a.m. an unknown person handed over to him a bundle containing the documents and foreign goods and foreign exchange which were seized by the Customs Officers to be given to a person at Modern Pharmacy, Kasaragod. He also stated that the seized goods and foreign exchange did not belong to him and that he does not know the owner or the contents of package. The Customs Preventive Officers had made enquiries and found out . that there was no person at Modern Pharmacy, Kasaragod to receive these documents and goods and foreign exchange. It was thereupon that the respondent was handed over to the Enforcement Directorate. A notice was issued to him on 1-8-1972 to show cause why adjudication proceedings u/s 23D of the FERA should not be held against him. In his reply dated 18-8-1972 the respondent denied the allegations against him and stated that on his way from Bombay he carried 5 persons on hire in his car and they got down near Kasaragod Railway Station. When he reached his house he found a small package left behind. So he proceeded to the Railway Station to hand over the package to the passengers. It was at that time that his car was stopped and checked by the Customs Authorities. He also stated that he has no objection in confiscating the seized goods, since they did not belong to him. Subsequently adjudication proceedings were taken against the respondent and in those proceedings it was held that the respondent acquired the foreign currency of $ and ? shown in the list dated 18-8-1971 without the permission of the Reserve Bank and so he contravened the provisions of Section 4(1) of the FERA, 1947. Therefore u/s 23(1)(a) of FERA, 1947 a penalty of Rs. 50,000 was imposed on him. The seized goods were also confiscated u/s 23(B) of the said Act. In the appeal filed by the respondent before the Foreign Exchange Regulation Appellate Board this order was set aside. The order of the Appellate Board is being challenged in this appeal.

2. Learned Senior Central Government Standing Counsel, Sri P.V. Madhavan Nambiar, submitted that u/s 10(j) it was for the respondent to explain the circumstances under which he came into possession of the foreign exchange. Therefore it was contended that the respondent having failed to explain the circumstances, the order imposing penalty on the respondent ought to have been confirmed. It was further contended that since there is no evidence as to the alleged person who handed over the documents and foreign exchange to the respondent and as to the alleged person to whom these articles were to be delivered by the respondent, the Appellate Board ought to have held that the respondent "bought or otherwise acquired" the foreign exchange without the permission of the Reserve Bank and thus violated Section 4(1) of the Act. Alternatively it was contended that even assuming that the respondent was only a carrier the transaction constituted a case of bailment and the respondent was in possession of the foreign exchange as a bailee that amounts to acquisition or possession or an interest in the foreign exchange attracting Section 4(1) of the Act. According to learned Central Government Pleader the Appellate Board erred in holding that the acquisition or possession of foreign exchange by the respondent does not fall within the expression "otherwise acquired" occurring in Section 4(1) of the Act. According to learned counsel the Board misconstrued

Section 4(1) of the Act and also misapplied the decision reported in M. Kuppuswami Chettiar Vs. State, .

3. However, learned counsel for the respondent, Sri. S.A. Nagendran, submitted that the words "acquire and otherwise acquire" have been considered correctly in M. Kuppuswami Chettiar Vs. State, and P.K. Renguntawar v. Dy. Director Enforcement (51 Company Cases 163). As per the latter decision the words "otherwise acquire imply positive possession and capacity for appropriation with regard to the item of property". According to learned counsel, the only evidence in these proceedings is the statement of the respondent dated 18-8-1971. Therein he only stated that the goods were handed over to him by strangers, to be handed over to some person at Modern Pharmacy at Kasaragod. He further stated that he did not examine the packages and did not know what they contained. His only obligation was to carry the goods and he was definite that the goods did not belong to him.

4. Section 4(1) of the FERA, 1947 is as follows:--

(1) Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, buy or otherwise acquire or borrow from, or sell or otherwise transfer or lend to, or exchange with, any person not being an authorised dealer, any foreign exchange. This Sub-section prohibits buying or otherwise acquiring (among other prohibition) of any foreign exchange by a person other than an authorised dealer except with the permission of the Reserve Bank of India. The Madras High Court in Kuppuswami Chettiar v. State AIR 1969 Mad 233 while considering certain provision in the Defence of India Rules 1962 and the Gold Control Order, considered the meaning of the words "otherwise acquired" and held as follows:--

9. ''Acquire'' means, to have gain or to get interest in the property. A carrier of goods for hire cannot be said to acquire interest in the property which he carries. It is true, a carrier is in possession of the property while he carries but without any interest in the property.

4. The words "otherwise acquire" occurring in FERA, 1947 is preceded by the word "buy" and followed by another word "borrow". Therefore the words "otherwise acquired" have to be given a meaning in the context in which it is used, which can only be identical with the meaning given to the words "buy" or "borrow". Therefore, we respectfully agree with the meaning given to these words by the Madras High Court as well as by the Bombay High Court, that interest in the property must have been transferred to the person in possession in order to attract Section 4(1) of the Act.

5. In this case there is no evidence that the respondent acquired any interest in the properties seized.

6. Under the circumstances, we do not think that there is any error in the

decision of the Appellate Board. Accordingly, the appeal is dismissed. However, there will be no order as to costs.

