
(1981) 03 BOM CK 0008
In the Bombay High Court
Case No : Criminal Appeal No. 156 of 1979

Devilal Ganeshlal Mehta

APPELLANT

Vs

The Director of Enforcement and another

RESPONDENT

Date of Decision : 16-03-1981

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 52, 54, 56, 8(1), 8(2)

Citation : (1982) CriLJ 588

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Judgement

1. This is an appeal u/s 54 of the Foreign Exchange Regulation Act, 1973 against the order of the Appellate Board constituted under the said FER Act confirming the order imposing penalty of Rs. 25,000/- upon the present appellant for having contravened the provisions of S. 8(1) of the said Act.

2. The facts of the case are as follows :-

On 17-11-1975, upon receiving information from reliable sources, the officers of the Authority under the Act raided Room 3, Ghaswala Building 18 Mangesa Shenoy Street, Bombay 1. It was not disputed before the Authorities below nor it is disputed before me by Mr. Chopda, the learned Advocate appearing on behalf of the respondents, that the premises were shop-cum-residential premises and they were held by one Vijaykumar Trilokji Shah as a tenant. There is no dispute that the present appellant was also staying in these premises and one Babulal P. Talesara, was also staying there. At the time of the raid, however, only Babulal P. Talesara was present. During the raid certain foreign currencies were discovered and seized. Likewise the rent receipt showing that Vijaykumar was tenant of the premises was also found in the papers. It appears that one Note-book was found and on page 1 of the same, certain nothings were found. There is no dispute that the nothings were in the handwriting of the present appellant. But nothing has been brought on record to show in what way the noting related to the foreign currency notes which were seized during the day. From the facts found and order

passed by the Dy. Director of Enforcement it appears that said Babulal stated in his statement that the present appellant was his old friend, right from the days of their schooling at Kankroli, Nathdwara, Rajasthan. He further appears to have stated that he had come to Bombay about a month previously and was working with Devilal, the present appellant on a monthly salary of Rs. 200/-; that he was staying with Devilal in the aforesaid premises and that his job was to attend to the Telephone calls at Shri Devilal's premises.

2A. It is the contention of the present appellant at the time of the raid he had been to his native place in Rajasthan. When he returned to Bombay he learnt about the raid. There is no dispute that he himself presented before the Authorities who effected the raid. He was served with a notice to show cause why proceedings against him should not be taken for offence under the provisions of Sections 8(1) and 8(2) of the FER Act.

3. The present appellant filed his reply with a view to show cause. He contended that he was only a subtenant of Vijaykumar Trilokji; that he was not in exclusive possession of the room in question and that the foreign exchange currency which was found in the premises did not belong to him at all. So far as the noting on page 1 of the document was concerned, he contended that he had written those calculations but they were written under the instructions of Vijaykumar.

4. It is against this set of facts and contentions that the Deputy Director had to decide as to whether the present appellant could be said to be guilty of contravention of Section 8(1) of the Act. For deciding this question it was necessary for the Officer first to be satisfied that the present appellant had "acquired" the foreign currency. Secondly he had to decide as to whether he could be said to be at least in possession of the said currency. Thirdly he had to decide as to whether, in the context of the facts of the case, Vijaykumar could be said to be at least as much liable as perhaps the present appellant. He would have to decide as to whether both Vijayakumar and present appellant would be liable or one of them would be liable. If only one of them was liable evidently the present appellant could not be found guilty unless it was clear beyond reasonable doubt that it was he and not Vijayakumar who was guilty of contravention of the said provision.

5. What the Dy. Director of Enforcement did was that he proceeded to hold that although Vijayakumar was the tenant of the premises, the present appellant was in exclusive possession of the same. For coming to this conclusion he had no evidence whatsoever before him. The fact however remains that he arrived at that conclusion. From that conclusion he inferred further that it was the present appellant who was in possession of the foreign currency also. From the inference of possession he came to the conclusion that the present, appellant had acquired foreign currency within the meaning of Section 8(1) of the Act. With this reasoning the held, that the present appellant was guilty of the contravention of the said provisions of Section 8(1) of the Act. He therefore imposed a penalty of Rs. 25,000/-, against the present appellant.

6. The appellant filed an appeal to the Appellate Board constituted u/s 52; of the Act. The Board, however, took the view that even though the appellant was absent from the room still since he was staying in the room he must be deemed to be in possession of the room and hence of all the foreign currency found therein. In support of this conclusion the Board relied upon the judgment of the Supreme Court in the case of Harbansingh Sardar Lenasingh and Another Vs. The State of Maharashtra and Others, The Board seems to have proceeded upon the assumption that the possession of Foreign Exchange was tantamount to acquisition of the same within the contemplation of Section 8(1) of the Act. On the question of penalty the Board was of the view that this being an economic offence highest penalty liable under law was warranted. All the same however the Board persuaded itself to reduce his penalty from Rs. 25,000/- to Rs. 10,000/-.

7. Mr. Solkar, the learned Advocate appearing for the appellant before me contended that in the first place the provisions of S. 8(1) of the Act were not attracted at all. His contention was that assuming that the currency were deemed to be in possession of the present appellant that fact by itself was not sufficient to conclude that the appellant had "acquired" the said foreign currency. Secondly he contended that in the instant case it is an error to hold that the present appellant was in possession of the foreign currency. He contended that in the instant case from the evidence that was led before the Authorities below, it could be very well said that any one of the three persons namely (a) Vijayakumar; (b) Babulal; (c) Devilal, present appellant was in possession of the room or of the currency notes. He contended that to pick and choose only the appellant and to conclude that he was in possession of the currency notes is wholly unjustified. The latter contention was advanced by Mr. Solkar, particularly in view of the raid the present appellant was not present in the room at all and there is nothing on record to show that his contention that he had been away at Rajasthan at that particular time was not acceptable. The fact that he presented himself before the Authorities when he came back from Rajasthan is not disputed before me at all.

8. To my mind all the three contentions raised by Mr. Solkar have got to be accepted. As regards the first contention that concept of possession is not identical to the concept of acquisition within the meaning of Section 8(1) of the Act, it is worthwhile to set out the provisions of the said Section 8(1) verbatim. It reads as follows :-

"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, purchase 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 :

Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money-change.

Explanation :- For the purposes of this sub-section, a person, who deposits foreign exchange with another person or opens an account in foreign exchange with another person, shall be deemed to lend foreign exchange to such other person."

Sub-section (1) of Section 8 is followed by explanation. But admittedly that explanation has no relevance for the present case. An analysis of the said Section 8(1) would show that what is prohibited is the act of purchase or any other act of the nature of acquisition. It therefore follows that what is prohibited is the transfer of property or the acquisition of the property. It is nobody's case that the present appellant had borrowed the foreign currency from any one. It has not been found that he had obtained it in exchange from any one. The allegation is that he had "acquired" foreign currency.

But what is the justification for this allegation ? For acquisition what must be shown is that either he has purchased the property or has taken it by way of mortgage or by way of some similar kind of transfer contemplated by the law relating to transfer of property. A mere "possession" cannot be said to be equivalent to or tantamount to "acquisition". The distinction between the concept of possession and concept of acquisition is well settled. To get into mere possession of any property cannot be said to be an act resulting in the acquisition of the same. In the instant case all that the department has found is that the person in possession of the room was in possession of the currency notes. From such finding a conclusion will not necessarily follow that even the person in possession of the room had necessarily acquired the foreign currency lying in the room.

9. But if we examine the first contention urged by Mr. Solkar in conjunction with the second contention the position becomes clearer still. In the instant case the department has not at all found that the present appellant was in exclusive possession of the room. The fact that Vijaykumar was tenant of the room is not disputed before the Authorities below and it is not at all disputed before me by Mr. Chopda, the learned Advocate appearing for the department, that at the time of actual raid the present appellant was nowhere in the picture at all. For ought we known the foreign currency might have been seized from the room while he was himself blissfully ignorant of its very existence in the room. The mere fact that he used to stay in the room sometime does not mean that even during his absence he was necessarily in possession of certain goods lying in the room. If the reasoning of the department was to be accepted it could as well be held that Vijaykumar who was a tenant of the room was in possession of the currency. But very surprisingly enough the department has found it wholly unnecessary to move its small finger against Vijayakumar. It is not as if that according to the department Vijayakumar is a fictitious person. The department should have with it the address of the landlord of the premises and from the landlord they could easily get every information regarding the various relevant particulars of Vijayakumar. Nothing in this behalf has been done by the department. On the

other hand the department has decided to pick and choose one of the persons who had previously stayed in the premises and to hold him liable for being in possession of the currency notes. To my mind, this is a perverse view of the criminal law as administered in our country.

The Appellate Board has relied upon the judgment of the Supreme Court in Harbansingh Sardar Lenasingh and Another Vs. The State of Maharashtra and Others, The facts of the case were that the appellant was sitting in the back seat of the car and the gold was recovered from the car's dickey. It was held in these particular circumstances that he must be deemed to be in possession of the gold. The Board found the ratio of the said judgment to be applicable on all fours to the facts of this case. I am afraid the Board was not right in arriving at this conclusion. What the Board has lost sight of, in the first place, is that the mere possession of the foreign currency does not result in an automatic contravention of the Section at all. But even assuming that possession was itself an offence still the present appellant could not be said to be in possession in any sense of law. He was not present at the time of the raid. His possession of the currency is not at all proved in any manner whatsoever.

A reference is made in the order passed by the Dy. Director that some noting was found on page. 1 of a note book regarding certain calculations pertaining to currency notes which was admittedly in the handwriting of the appellant but unfortunately it is not at all established that the noting has any relation to the present currency note at all. The explanation given by the accused that Vijaykumar dictated it to the accused and he made some notings as per his dictation can also not be ruled out.

In Harbansingh Sardar Lenasingh and Another Vs. The State of Maharashtra and Others, the Supreme Court was dealing with a case where the gold was found in the dicky at the time when the accused was himself seated on the back-seat of the car and all the circumstances considered together gave rise to a legitimate inference that he was cognizant of its existence in the dicky. That authority could have no application to the facts of this case.

As regards the judgment of the Supreme Court in South India Coir Mills, Poochakkal Vs. The Additional Collector of Customs and Central Excise and Another, , to my mind, the said Authority cannot be invoked in the present case at all. The question of penalty arises only if the contravention of the offence is established. Whether the penalty should be maximum or minimum is a totally irrelevant question when the liability for the penalty itself is not established.

10. For all these reasons this appeal has got to be allowed. The order passed by the Appellate Board Dt/- 1-12-1978, as also the order passed by the Deputy Director Dt/- 24-4-1976 are hereby quashed and set aside. During the hearing of the appeal Mr. Solkar, the learned advocate for the appellant produced a certified copy of the judgment of the Addl. Chief Metropolitan Magistrate, in Esplanade Case No. 359/CW of 1978. From the said judgment it appears that the present

appellant was prosecuted on the same set of facts for having committed offence u/s 8(1) r.w. S. 56 of the FER Act 1973. The judgment shows that an order of acquittal has been passed in favour of the present appellant by the said Criminal Court. To my mind, however, it is not necessary to consider the effect of the said judgment in view of the fact that independent of the said judgment it is possible to hold that no offence can be said to have been brought home against the present appellant.

11. Appeal allowed.