(1984) 08 KAR CK 0030

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 1171 of 1981

Enforcement Directorate, Government of India APPELLANT

Vs

Fr. J.M. Stevens RESPONDENT

Date of Decision : 13-08-1984

Acts Referred:

Foreign Exchange Regulation Act, 1973 (FERA) — Section 16 (1) (a), 16 (1) (a), 2 (p) (iii), 2 (p) (iii), 30 (1) (ii)

Citation : (1986) 60 CompCas 670 : (1985) 4 ECC 233 : (1985) ILR (Kar) 1590

Hon'ble Judges : S.R. Rajashekhara Murthy, J;G.N. Sabhahit, J

Bench : Division Bench

Advocate : K. Shivashankar Bhat, for the Appellant; J.A. Sequeera, for the Respondent

Judgement

Rajasekhara Murthy, J.—This appeal by the Assistant Director, Enforcement Directorate, Foreign Exchange Regulation Act, of India, Bangalore, arises under the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "the Act"), and is directed against the order dated March 31, 1981, passed by the Foreign Exchange Regulation Appellate Board, New Delhi, allowing the appeal of the respondent in part, which was filed against the order dated March 28, 1977, passed by the Special Director of Enforcement, Madras, in Proceedings No. SDE (47)-V/ii-15/77.

2. The facts relevant for the disposal of this appeal are : The respondent, Fr. J. M. Stevens, came to India in the year 1948. He holds a Belgian passport and after completing his religious studies in India, he became a priest of the Jesuit Society, Ranchi, in the year 1958. He later qualified himself as an architect in the year 1959 from Sir J. J. College of Architecture, Bombay. After becoming an architect, the respondent undertook a number of assignments in connection with construction of buildings for the Ranchi Jesuit Society. The respondent shifted from Ranchi to Bangalore in the year 1965 and continued to render professional services as an architect throughout the country and outside also.

3. On an information that the respondent was maintaining foreign currency accounts abroad and was crediting the said accounts with the foreign exchange earned by him as an architect in India, his office-cum-residential premises at "Olgovil", No. 57, D''Costa Layout, Bangalore-5, was searched by the officer of the Enforcement Directorate, Bangalore, under the provisions of section 37 of the Act of October 9, 1975. The search resulted in the seizure of certain documents evidencing collection by the respondents, architect''s fee for his services rendered in India and Bangladesh and for crediting it to his accounts maintained in Belgium, Switzerland and Germany. Considerable amount of foreign currency was also seized.

4. Action was taken against the respondent by the Enforcement Directorate for the contravention of section 10(1) (b) of the Foreign Exchange Regulation Act, 1947, and section 16(1)(a) and section 30(1)(ii) of the 1973 Act and the following charges were framed against him :

(i) that during the period 1967 to December 31, 1973, he had a right to received foreign exchange, to wit, Belgium Frs. 2,00,000, Sw. Frs. 38,540.20, DM 12,000 and DM 5,000 and that he refrained from taking action to secure receipt of the aforesaid sum and thereby contravened the provisions of section 10(1) (b) of the Foreign Exchange Regulation Act, 1947.

(ii) that during January 1, 1974, to May 31, 1975, he had a right to receive foreign exchange, to wit, DM 48,300, Sw. Frs. 18,000, Sw. Frs. 8,357 and Pounds 3,988.44 and that he refrained from taking action which caused delay in the repatriation of the said foreign exchange and thereby contravened the provisions of section 16(1)(a) of the Foreign Exchange Regulation Act, 1973.

(iii) that Fr. Stevens, who is a foreign national, had been carrying on, without the previous general or special permission of the Reserve Bank of India, an occupation in India as an Architectural Engineer in the name and style of S. J. Olgovil at 57, D''Costa Layout, Bangalore, and has thereby contravened the provisions of section 30(ii) of the Foreign Exchange Regulation Act, 1973.

(iv) that in or about August/September, 1974, he became the owner of foreign exchange, to wit, DM 960, Sw. Frs. 500, Belgium Frs. 1,200 and U.S. $. 180, being the amounts brought with him to India on September 1, 1974, and that be failed to offer for sale, to an authorised dealer in foreign exchange in India the aforesaid amounts of foreign exchange, within one months of his coming to India and has, thus, contravened the provisions of section 14 of the Foreign Exchange Regulation Act, 1947, read with the Central Government Notification No. F. 1(67)-EC/57, dated September 25, 1958 (as amended up to March 6, 1961).

(v) that in or about July/August, 1975, he became the owner of foreign exchange, to wit, Italian Lira 25,000, DM (German) 2,200, Pounds Sterling 198, U.S. $. 180, Bel. Frs. 26,060 and Sw. Frs. 530, being the amount of foreign exchange brought by him to India on September 9, 1975, and that he failed to offer the said foreign exchange for sale to an authorised dealer in foreign exchange in India, within one month of his coming to India and has, thereby, contravened the provisions of section 14 of the Foreign Exchange Regulation Act, 1973, read with the Central Government Notification No. F. 1(67)-EC/57, dated September 25, 1958.

5. On enquiry, the Special Director of Enforcement, Madras, the original authority, under the Act, passed an order on March 28, 1977, finding the respondent guilty of contravening the provisions referred to above and levied the following penalties :

(i) Rs. 2,60,000 on charge No. 1; (ii) Rs. 1 lakh on charge No. 2; (iii) Charge No. 3 was dropped.

6. On charge No. (iv), the respondent was found guilty and a penalty of Rs. 10,000 was levied and, on charge No. (v), the respondent was acquitted.

7. The respondent preferred an appeal to the Foreign Exchange Regulation Appellate Board, New Delhi, against the findings of the Original Authority and levy of penalty on charges Nos. 1, 2 and 4.

8. In the appeal, the Appellate Board exonerated the respondent of the first two charges and reduced the penalty imposed on charge No. (iv) from Rs. 10,000 to Rs. 8,500.

9. In this appeal, the appellant has challenged the findings of the Appellate Board on charges Nos. (i) and (ii) only.

10. It is contended by Shri Shivashankar Bhat, learned Central Government Standing Counsel on behalf of appellant that the order of the Appellate Board is liable to be set aside and the order of the Original Authority restored.

11. The main ground on which Sri Shivashankar Bhat argued in support of the order passed by the Original Authority, is, that the respondent would not be entitled to the exemption contained in clause (iii) of the first proviso to the notification issued by the Central Government on September 25, 1958, in exercise of its powers u/s 9 of the 1947 Act (corresponding to section 14 of the 1973 Act), if he should be considered as a "person resident in India" on the facts of the case and on a proper appreciation of the evidence on record.

"Person resident in India" is defined by section 2(p) of the Act as follows :

"(iii) a person, not being a citizen of India, who has come to, or stays in India, in either case -

(a) for or on taking up employment in India; or

(b) for carrying on in India a business or vocation in India, or

(c) for staying with his or her spouse, such spouse being a person resident in India, or

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

12. The notification dated September 25, 1958, issued by the Central Government in exercise of its powers u/s 9 of the 1947 Act on which the Appellate Board has placed reliance to exonerate the respondent is reproduced below :

"Surrender of foreign currency balances :

13. G.S.R. 872. - In exercise of the powers conferred by section 9 of the Foreign Exchange Regulation Act, 1947 (7 of 1947), and in supersession of the notification of the Government of India in the Ministry of Finance No. 12(13)-F.I. 47, dated March 25, 1947, the Central Government hereby directs that every person in, or resident in, India, who owns or holds or who may hereafter own or hold any foreign exchange whether held in India or abroad expressed in the currency specified in the Schedule annexed to this order shall before the expiration of one month from the date of this order, or, in the case of a person who hereafter owns or holds any foreign exchange, within one month of the date of his so owning or holding, offer the same or cause it to be offered for sale to an authorised dealer, being a person authorised by the Reserve Bank for the purpose against payment in rupees, at the rate for the time being authorised by the Reserve Bank in pursuance of sub-section (a) of section 4 of the said Act for conversion into Indian currency of the foreign currency in which such foreign exchange is expressed :

14. Provided that this order shall not apply to :

(i) such foreign exchange held by authorised dealers within the scope of their authority,

(ii) Persons authorised by the Reserve Bank of India to hold such foreign exchange for business or other purposes within the scope of authorisation in their favour;

(iii) maintenance of, and operation on, any account in foreign currency maintained outside India by persons in, or resident in, India, but not domiciled therein :

(iv) any sum held as on July 8, 1947, in an account expressed in existence prior to that date; and

(v) any sum held in any account opened on or after July 8, 1947, and expressed in pound sterling provided the general or special permission has been granted by the Reserve Bank for maintenance of such account."

15. Section 14 of the 1973 Act, which corresponds to section 9 of the 1947 Act, reads :

"14. The Central Government may, by notification in the Official Gazette, order every person in, or resident in, India -

(a)who owns or holds such foreign exchange as may be specified in the notification to offer it, or cause it to be offered, for sale to the Reserve Bank on behalf of the Central Government or to such person as the Reserve Bank may authorise for the purpose, at such price as the Central Government may fix, being a price which is not less than the price calculated at the rate of exchange for the time being authorised by the Reserve Bank;

(b) who is entitled to assign any right to receive such foreign exchange as may be specified in the notification, to transfer that right to the Reserve Bank on behalf of the Central Government on payment of such consideration therefore as the Central Government may fix having regard to the rate for the time being authorised by the Reserve Bank in pursuance of sub-section (2) of section 8 for conversion into Indian currency of the foreign currency in which such foreign exchange is expressed :

Provided that the Central Government may, by the said notification or by a separate order, exempt any person or class of persons from the operation of the order made in the said notification :

Provided further that nothing in this section shall apply to any foreign exchange acquired by a person from an authorised dealer or from a money-changer and retained by him with the permission of the Reserve Bank for any purpose."

16. It may be noted that the notification of September 25, 1958, was superseded by a later notification issued by the Central Government on June 15, 1977, in which the expression "not domiciled therein" in clause (iii) was substituted by "not permanently resident therein" with effect from January 1, 1974.

17. Section 14 of the Act empowers the Central Government to exempt, by notification issued in the Official Gazette, any person or class of persons from the operation of the order referred to in the said notification. Section 14 provides for acquisition by the Central Government of foreign exchange in the circumstances referred to therein. Section 15 deals with the power of the Central Government to direct payment in foreign currency in certain cases. Section 16 (corresponding to section 10 of the Foreign Exchange Regulation Act, 1947) prohibits a person from receiving any foreign exchange, except as provided in the said section.

18. The provisions of section 14 are applicable to every person in, or resident in, India and makes it obligatory on every such person, to offer for sale, to the Reserve Bank or to such other person as the Reserve Bank may authorise, the foreign exchange owned or held by such person, subject to the exemptions as may be granted by the Central Government.

19. The Appellate Board, on a consideration of the consideration of the evidence on record and the facts of the case, has held that the respondent is a domicile of Belgium and is, therefore, entitled to exemption under clause (iii) of the first proviso to the notification dated September 25, 1958. In view of its findings, the

Appellate Board exonerated the respondent on both charges Nos. (i) and (ii) and set aside the penalties imposed.

20. The only point that arises for our consideration in this appeal, therefore, is :

"Whether Fr. J. M. Stevens, the respondent, is entitled to exemption under clause (iii) of the first proviso to the notification dated September 25, 1958 ?"

21. Shri Shivashankar Bhat submits that the respondent is a "person resident in India" since he satisfies the conditions laid down in clause (iii) of the proviso which are referable to a person who is not a citizen of India. In support of this submission, he has narrated chronologically the facts and circumstances of the case, which according to him, are indicative of the intention of the respondent to stay in India for an uncertain period. We have to examine, therefore, whether the appellant has succeeded establishing the said intention on the part of the respondent to stay in India for an uncertain period and has thus becomes ineligible to the exemption.

22. It is in evidence, in the proceedings before the original authority, that the respondent''s place of domicile is Duffel in Belgium and he holds a Belgian passport and his stay in India is authorised by the certificates issued under the Registration of Foreigners Rules, 1939, and extended from year to year. The Appellate Board has, therefore, come to the conclusion that the respondent is not a person - "domiciled in India" and that, therefore, the exemption in the notification applies to him in all its force. We agree with the said finding of the Appellate Board.

23. Shri Shivashankar Bhat, no doubt, attempted to bring the case within the purview of section 2(p)(iii) and also relied upon several circumstances which indicate the intention of the respondent to stay in India for an uncertain period and that, therefore, he is not entitled to the exemption.

24. The expression "not domiciled therein" was substituted by "not permanently therein" and the notification was amended with effect from January 1, 1974. The object of the said amendment appears to be to enable the Central Government to hold in a given case that a foreign national be treated as a "person resident in India" if there is sufficient material and circumstances from which such a conclusion could be drawn so as to satisfy the requirements of sub-clause (d) of clause (iii) of section 2(p) of the Act read with the notification for purposes of deciding the claim for exemption.

25. We have to observe that no foundation was laid or facts brought on record for any such conclusion either before the original authority or before the Appellate Board not was it urged in this manner before any of the authorities under the Act.

26. On the other hand, we agree with the findings arrived at by the Appellate Board and the reasons given for the said conclusions.

27. In the result, the appeal fails and is dismissed. No costs of this appeal.

28. After the judgment was pronounced, Shri Shivashankar Bhat, Central Government Standing Counsel, made an oral application for issue of a certificate to appeal to the Supreme Court against our judgment.

29. In our opinion, the case involves interpretation of section 2(p)(iii) of the Foreign Exchange Regulation Act, 1973, as applicable to foreign nationals and this is a question of general importance which needs to be decided by the Supreme Court. Hence, we direct issue of necessary certificate.