

(1987) 09 MAD CK 0068
In the Madras High Court

G. Ramaiah Kandiar

APPELLANT

Vs

Additional Director, Enforcement

RESPONDENT

Date of Decision : 11-09-1987

Acts Referred:

Foreign Exchange Regulation Act, 1947 — Section 10

Citation : (1989) 66 CompCas 283 : (1988) 17 ECC 178 : (1988) 1 LW 536

Hon'ble Judges : P.K. Sethuraman, J

Bench : Single Bench

Advocate : V. Swaminathan, for the Appellant; S. Veeraraghavan, Additional Central Government Standing Counsel, for the Respondent

Judgement

P.K. Sethuraman, J.—This is an appeal against an order passed by the Foreign Exchanged Regulation Appellate Board, Madras, dismissing the appeal filed by the appellant against the order passed by the Additional Director, Enforcement.

2. The facts leading to the filing of this appeal are briefly as follows: One G. Masilamoney was the brother of the appellant and he had serving in Singapore and he died while in service leaving behind him sum of \$ 20,000 payable by an insurance company and another sum of \$ 4,000 with the Central Board Provident Fund, Singapore. The appellant after coming to know about his brother's death visted Singapore and arranged to bring the said taken exchanged through unauthorised channells. Hence, action was taken in terms of section 19D of the Foreign Exchange Regulation Act, 1947, by the section of the Nagapattinam unit of the Madras Zonal office of the Enforcement Directorate and there was a search of the residential premises of the appellant on December 2, 1967. The search did not result in seizure of any incriminating documents. But the appellant who was questioned by the Officers of the Enforcement Directorate, in statement, admitted in writing that he received an amount of Singapore \$ 15,000 in Singapore March, 1967, towards life insurance, provident fund and gratuity of his deceased brother, G. Masilamoney. Out of the said amount, he spent a sum of Singapore \$ 8,000 towards advocate's fees and payment of his brother's debt

and other expenses, and out of the remaining amount of Singapore \$ 7,000 he had taken a draft for Rs. 2,500 in Singapore and credited the proceeds thereof in his savings bank account No. 1421 with the Indian Bank Limited, Mannargidu, on March 31, 1967, and the balance of Singapore \$ 6,000 was spent by him for his journey expenses. No documentary evidence was produced by him in support of the explanation with regard to the expenditure incurred by him.

3. The respondent took up adjudication proceedings as contemplated in section 23D of the said Act and a show-cause notice was issued to him. In the said Act-cause notice, it was alleged that he had a right to receive foreign exchange of Singapore \$ 15,000 being the amount of insurance, provident fund and gratuity of his deceased brother, G. Masilamoney, but took some steps as result of which the said foreign exchange ceased to be received by him for which no general or special permission of the Reserve Bank of India was obtained and thereby contravened the provision of section 10(1)(b) of the Foreign Exchange Regulation Act. The appellant in reply to the show- cause notice stated that inspite of his efforts, the foreign exchange was not being remitted and he went to Singapore and as he had to prolong his stay there, more than Singapore \$ 5,000 was spent for his boarding and lodging and since his deceased brother had not made any nomination, he had to engage a counsel in Singapore \$ 3,500 in discharge of debts and liability incurred by his deceased brother and the balance of Singapore \$1,500 was converted into a bank draft and the said amount was repatriated through a bank in India.

4. At the personal hearing, the appellant had engaged a counsel on July 23, 1974, and counsel was heard on behalf of the appellant. Learned counsel had taken up the contention that section 10(1)(b) of the Foreign Exchange Regulation Act, 1947, was not applicable to the facts of this case and the appellant as a legal representation had receive the amount and such a right is not contemplates a person's own right as a legal representatives and the appellant did not do anything to impair the receipt of the foreign exchange should be received in India. Further, according to learned counsel, section 10(1) and penalty could be levied only if section 10(2) is not obeyd.

5. The Additional Director, Enforcement Directorate, Madras, who heard and passed the order of adjudication, negatived the contention put forward on behalf of the appellant and held that the appellant contravened the provision of section 10(1)(b) of the Act and accordingly held that the appellant is guilty of the charge and imposed penalty of Rs. 20,000 u/s 23(1)(a) of the Act. Against the said order, the appellant herein filed an appeal before the Appellate Board and the Foreign Exchange Regulation Appellate Board at Madras dismissed the appeal confirming the order passed by the Additional Director with regard to the contravention, but reduced the quantum of penalty to Rs. 10,000. Aggrieved with the said order, the present appeal has been filed.

6. The appellant has become forward with this appeal contending that the proceedings initiated u/s 10 of the Act, are not sustainable that the appellant

was an Indian citizen and his brother a citizen of Singapore died in Singapore intestate leaving a sum of 15,523.31 Singapore dollars payable to the deceased under life insurance, provident fund and employment benefits and the appellant as his only heir left for Singapore on August 3, 1966, and stayed there till March 24, 1967, and collected the amounts after expending moneys to realise the said sums. The appellant, during his stay for a period of about eight months, incurred expenditure and he also discharged the sundry creditors of his deceased brother in Singapore. The Appellate Board erred in interpreting section 10 of the Act was not at all attracted and therefore, no proceedings for any contravention thereof or any any of the provisions of the Act ought to have been initiated against the appellant. Section 10 of the Act is attracted only when a person had an absolute right to receive any foreign exchange and not to the case of the appellant who claimed the sums only as the legal representative of his deceased brother in Singapore and the right of the legal representative to receive amounts is not a right contemplated u/s 10 of the Act. Further, the appellant did not do anything or refrain from doing anything which had the effect of securing the foreign exchange seized in whole or in part. The appellant received, he made certain other disbursements. The appellate Board totally erred in interpreting the provision and such interpretation is not tenable and the appellant cannot be said to have earned the foreign exchange and as the appellant received the sums in Singapore, it was open to him to spend the entire amount in Singapore and not to bring the same to India at all and if the appellant had brought the same through normal banking channels, no contravention of the provision of the Act could have taken place and hence the proceedings taking against him are bereft of any authority of law. The Appellate Board having allowed certain deductions from the amounts received by the appellant, the gravamen of the offence with which the appellant stood charged u/s 10 of the Act, disappeared and hence the appellant should have been exonerated from any further proceedings under the Act. Section 10(2) of the Act provides for the contravention, if any, of section 10(1) of the Act. Therefore, the provision of section 10(2) of the Act ought to have been followed and it is that violation that would attract section 23 of the Act. Section 23 of the Act being penal has to be strictly complied with, and the benefit of doubt ought to have been given to the appellant. The appellate order did not disclose how the sum of Rs. 10,000 is imposed by the Appellate Board as penalty u/s 23(1)(a) of the Act and therefore in the absence of a proper finding with regard to the value of the foreign exchange in respect of such contravention taking place, the appellate order imposing penalty is liable to be set aside. Further, having regard to the nature of the contravention and the circumstances of the cases, the imposition of Rs. 10,000 as penalty is not justifiable.

7. The point that arises for consideration in this appeal is as to whether section 10 of the Foreign Exchange Regulation Act, 1947, will not be attracted to the facts of this case and accordingly the appellant is not liable to be penalised.

8. There is no dispute with regard to the facts of this case. Since the appellant's brother who was citizen of Singapore died there on January 20, 1966, intestate,

the appellant proceeded to Singapore on August 3, 1966, and stayed there till March 24, 1967. During his stay, the appellant had taken steps to receive Singapore \$ 20,000 payable under the insurance policy in the name of his deceased brother and another sum of Singapore \$ 4,000 from the Central Board Provident Fund, Singapore, due to his deceased brother. The appellant is also stated to have spent a sum of Singapore \$ 8000 towards advocate's fees and in discharge of his brother's debt and other expenses and he had also incurred travelling expenditure and afterwards had taken a draft for Rs. 2,500 at Singapore and credited the same in his savings bank account No. 1421 with the Indian Bank at Mannargudi.

9. Before the Additional Director who held adjudication proceedings, it had been submitted by the appellant that he has to spend more than Singapore \$ 5,000 for his boarding and lodging at Singapore and since his brother had not made any nomination, he had to engage a counsel and he paid fees to the counsel and also incurred expenses towards the proceedings. He had also discharged debts due by his deceased brother and on that account he incurred about Singapore \$ 3,500. On behalf of the appellant, the counsel is known to have submitted that having regard to the facts, section 10(1)(b) of the Act, what is contemplated is a person's own right as a legal representative. It has also been contended that section 10(2) has to be followed for failure u/s 10(1) and penalty could be levied only if section 10(2) had not been obeyed. Section 10 of the Foreign Exchange Regulation Act, 1947, is as follows:

"10. Duly of persons entitled to receive foreign exchange, etc. - (1) No. person who has a right to receive any foreign exchange or to receive from a person resident outside India a payment in rupees shall, except with the general or special permission of the Reserve Bank, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing, -

(a) that the receipt by him of the whole or part of that foreign exchange or payment is delayed, or

(b) that the foreign exchange or payment cases in whole or in part to be receivable by him.

(2) Where a person has failed to comply with the requirements of Sub-section (1) in relation to any foreign exchange or payments in rupees, the Reserve Bank may give to him such directions as appear to be expedient for the purpose of securing the receipt of the foreign exchange or payment as the case may be."

10. There is no dispute with regard to the fact that since his brother had not nominated any one to receive the amount due under the insurance policy taken by him as well as the amount due under the provident fund account, the appellant had taken steps to collect the amounts as a legal representative at Singapore. I am unable to accept the contention put forward on behalf of the appellant that the right claimed by the appellant as a legal representative is not a right as such of the appellant and only when the appellant becomes entitled in

his own right, section 10 of the Act will be attracted. Having regard to the death of the appellant's brother, who was a citizen of Singapore and not a citizen of India, the appellant become entitled as heir to the said brother and had the right to receive the foreign exchange. Therefore, there could be no hesitation in coming to the conclusion that the appellant had right to receive the amount as legal heir of his deceased brother. For receiving such amount, the appellant failed to get permission from the Reserve Bank of India. And without such permission, the appellant has repatriated only a portion of the amount and has failed to realise the entire foreign exchange to which he became entitled. u/s 10 of the Act, in any person becomes entitled to receive foreign exchange, he should take every possible step to secure its receipt and if he refrains from taking action which has the effect of securing the said receipt by him of foreign exchange of the whole or part thereof is delayed, he will be guilty of contravention of this section. If a person has the right to receive the foreign exchange, it is obligatory on such person not to delay the receipt and such receipt should be with the permission, general or special, of the Reserve Bank of India.

11. Learned counsel for the appellant also submitted the decisions in Shanti Prasad Jain Vs. The Director of Enforcement, , M.S.M. Syed Mohammad Bukhari Vs. The Director of Enforcement, New Delhi and Others, , Escorts Ltd. Vs. Foreign Exchange Regulation Appellate Board, and M.G. Wagh and Others Vs. Jay Engineering Works Ltd., . In the decision in Shanti Prasad Jain Vs. The Director of Enforcement, , rendered by the Supreme Court, the facts reveal that the appellant therein had certain claims for compensation against certain Germans firms in respect of machineries supplied by them to the appellants's concerns. The appellant went to Germany and arrived at a settlement with the firms under which firms deposited certain sums of money with the Deutsche Bank in the account of the appellant with the stipulation that the money was only to be used by the appellant for the purpose of new machineries from the same firms after obtaining import licensed from the Government of India. The appellant had not obtained such permission, general or special, of the Reserve Bank for opening the account and therefore proceedings were initiated by the Directorate of Enforcement for adjudication Regulation Act, 1947. The Director imposed a penalty of Rs. 55 lakhs and on appeal, the Foreign Exchange Appellate Board held that the deposits amounted to loans by the appellant to the Bank and consequently section 4(1) was contravened, but it reduced the penalty to Rs. 5 lakhs. The Supreme Court ultimately held that the appellant cannot be said to have lent money to the bank and had not contravened the provisions of section 4(1) of the Act and allowed the appeal. In the case in M.S.M. Syed Mohammad Bukhari Vs. The Director of Enforcement, New Delhi and Others, , the facts reveal that a person resident in India was charged for contravention of section 5(1) and there were charges any prior, general or special, permission of the Reserve Bank of India and about his borrowing foreign exchange at Singapore without the previous general or special permission of the Reserve Bank of India and also about maintaining an account with the Singapore Branch of Bukhary

and Co., firms resident outside India without the prior permission of the Reserve Bank of India. N. S. Ramaswami L. after discussing the facts held that having regard to the admitted facts in that case, the charge relating to the appellant therein borrowing foreign exchange from person other than authorised dealers in foreign exchange in India without the previous, general or special, permission, and thereby contravening the provisions of section 4(1) of the Act was clearly established, but with regard to other charges, in view of the facts that proper opportunity had been given, those charges were held to be not established. The decision in Escorts Ltd. Vs. Foreign Exchange Regulation Appellate Board, relates to short realisation of the value of goods exported and having to do with the facts in that case, it had been held that offences under sections 10(1) and 12(2) of the Foreign Exchange Regulation Act, 1947, were not made out. The decision in M.G. Wagh and Others Vs. Jay Engineering Works Ltd., , also relates to repatriation of earnings from export of goods. Therein, it has been laid down by the Supreme Court that section 10 has no application in respect of foreign exchange earnings related to export of goods. Section 10 is designed primarily to impose an obligation on person who have a right to receive any foreign from a exchange from a person resident outside India. This section has nothing to do with the foreign exchange earned by export of goods.

12. I have carefully read all the decisions and I have no hesitation in coming to the conclusion that none of the decisions will be of any help to the case of the appellant.

13. Learned counsel for the appellant put forward a contention that having regard to the fact that the foreign exchange was received by the appellant due to an insurance policy taken by his deceased brother and also the provident fund amount, it cannot be said that the appellant had a right to receive such foreign exchange from a persons resident outside India and therefore, section 10 of the Foreign Exchange Regulation Act has no application. That the appellant is an heir is not in dispute and because of such a right only, the appellant became entitled to the amounts and that such amounts were payable in foreign exchange also cannot be said to be in dispute. Therefore, the said contention is also wholly devoid of any merit.

14. The contention that the Appellate Board did not actually fix the amount with regard to which there was violation and that, therefore, imposing a penalty of Rs. 10,000 is liable to be set aside is also without any substance.

15. Accordingly, I am unable to accept the contentions of the appellant, and the appeal has to be dismissed as devoid of merits. But having regard to the facts and circumstances of the case, I feel the penalty imposed on the appellant which was reduced to Rs. 10,000 by the Appellate Board could further be reduced to Rs. 5,000. With this modification in penalty, the civil miscellaneous appeal is dismissed in other respects. There will be no order as to costs.