
(2009) 03 P&H CK 0199
In the Punjab And Haryana At Chandigarh

Iqbal Singh Sabharwal

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 04-03-2009

Acts Referred:

Constitution of India, 1950 — Article 20, 226
Foreign Exchange Management Act, 1999 — Section 13, 16, 17, 31, 47
Foreign Exchange Regulation Act, 1973 — Section 31

Citation : (2009) 2 ILR (P&H) 282 : (2009) 156 PLR 475 : (2009) 3 RCR(Civil) 578 : (2009) 91 SCL 379

Hon'ble Judges : M.M. Kumar, J;H.S. Bhalla, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.M. Kumar, J.—The instant petition filed under Article 226 of the Constitution prays for quashing order dated 17-11 -2008 (P.8) passed by the Deputy Director of Enforcement and the corrigendum dated 2-12-2008 (P.9) issued by her. The petitioner has been found guilty of charge u/s 6(3)(i) of the Foreign Exchange Management Act, 1999 (for brevity "the FEMA") read with Regulation 4 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulation 2000 (for brevity "the FEMA Regulations"). After declaring him guilty in pursuance of the powers conferred on the Deputy Director a penalty of rupees five lacs has been imposed on the petitioner.

2. Brief facts necessary for the disposal of the controversy raised are that the petitioner has been an Indian citizen, holding an Indian Passport. On 5-11-1999 he purchased a plot situated in Ludhiana at an open auction conducted by the Debt Recovery Tribunal, Jaipur. On 18-2-2003, the Enforcement Directorate, Jalandhar initiated investigation against the petitioner alleging that the plot purchased by him in the open auction is an agricultural plot which the petitioner had purchased by violating the provisions of FEMA. He was summoned and his statement was recorded. On 13-3-2003 during the course of investigation the respondent informed the petitioner that the plot purchased by him fell under

industrial zone and hence there was no violation (P.1) of any penal law. In that regard reference has been made to the letter dated 5-2-2003 issued by the District Town Planner, Ludhiana.

3. The letter dated 13-3-2003 (P.1) addressed by the respondent to the petitioner informing him that the investigation against the petitioner was dropped and the action was challenged by M/s. Bicycles Manufacture Corporation, Ludhiana in CWP No. 2977 of 2004 before this Court. In the reply filed before this Court (P.2), the respondents reiterated the stand taken in the letter dated 13-3-2003 (P.1) pleading that the plot purchased by the petitioner fell in industrial zone and there was no violation of FEMA Act by the petitioner. However, on 28-7-2006 when the aforesaid petition was pending (P.3), the Assistant Director of Enforcement filed a complaint u/s 16(3) of the FEMA before the Deputy Director of Directorate of Enforcement, Jalandhar, which is adjudicating authority, alleging that the petitioner had contravened the provisions of Section 6(3)(c) of the FEMA read with Regulation 4 of the FEMA Regulations. On 18-8-2006 the matter (CWP No. 2977 of 2004) came up for consideration before this Court. The writ petition was disposed of by holding that there was no necessity to pass any order in respect of letter dated 13-3-2003 (P.1) as the concerned respondent had already been issued a notice to show cause on 28-7-2006(P.4). The petitioner filed his reply to the show-cause notice by asserting that in the year 1999 he was citizen of India and therefore there was no violation of Section 31 of the Foreign Exchange Regulation Act, 1973 (for brevity "the FERA"), which was repealed in the year 2000. He has also pleaded that FEMA came into effect from 1-5-2000 and since the petitioner had purchased the plot in question on 5-11-1999 therefore there was no violation of FERA and no action could be initiated for violation of any provision of FERA on account of Section 49 of FEMA. The matter was fixed for hearing on 16-7-2008. The petitioner has asserted that without discussing the question of applicability of FEMA and the question of limitation the Deputy Director has pronounced the petitioner guilty of contravening Section 6(3)(i) of FEMA read with Regulation 4 of the FEMA Regulations. The petitioner was declared guilty of the charges and penalty of rupees five lakhs has been imposed.

4. In the written statement filed by the respondents, the respondents have raised a preliminary objection that an alternative remedy of appeal u/s 17 of the FEMA is available to the petitioner. The other broad facts have however been admitted. It has been clarified that a reference was received from the Reserve Bank of India on 26-6-2003. The case was thereafter re-opened and re-investigated which resulted in filing of complaint on 28-7-2006 (P.3) before the adjudicating authority and issuance of show-cause notice to the petitioner which is based on the report dated 23-3-2005 of the Tehsildar, Ludhiana (E) informing the Directorate that the plot in question was an agricultural land and that there was no industry at the spot (R.1). The report sent by the Town Planning Department on 22-9-2005 showed that the land in question fell in industrial zone but the Tehsildar, Ludhiana vide his letter dated 11-10-2005 informed the

Directorate that according to the revenue entries cultivation of the land in question at the time of auction i.e., 5-11-1989 was vacant but thereafter it has been used for agricultural purposes. No certificate of change of land use under the various provisions of the statute was obtained. Therefore, it continues to be agricultural land.

5. We have heard learned Counsel for the parties and have perused the paper book with their able assistance.

6. Mr. Jagmohan Bansal, learned Counsel for the petitioner has raised two submissions before us. Firstly, he has submitted that u/s 31 of the FERA restriction on acquisition, holding of immovable property in India was imposed on such persons who were not citizens of India. According to the learned Counsel the section contemplates that foreign nationals were required to have general or special permission of the Reserve Bank of India to acquire, hold or transfer or dispose of by sale, mortgage, lease etc. any immovable property situated in India. Therefore the provision would not apply to the petitioner because he was a citizen of India on that date. He has further submitted that in pursuance to Section 6(3) and Section 47(2) of the FEMA, the Reserve Bank of India has framed the regulations. The aforesaid regulations have come into force from 1-6-2000. Accordingly to Regulation 4 a person of Indian origin resident outside India who is citizen of India has been permitted to acquire any immovable property in India other than agricultural/plantation/farm house which was not the provision made under the FERA. He has emphasized that the provisions of Section 6(3)(i) of the FEMA would not apply to the transactions concerning purchase of plot on 5-11-1999 and the petitioner could not be prosecuted under the FEMA or FEMA Regulations which have been enforced from 1-6-2000.

7. His second submission is that after completing investigation on 13-3-2003 a letter was issued to the petitioner confirming that there was no violation of the FEMA. The aforesaid order has attained finality as no appeal was filed. Learned Counsel has argued that the adjudication proceedings could not be initiated in the year 2006 after the expiry of three years from the date of conclusion of earlier proceedings. Even on merits, learned Counsel has submitted that according to the letter dated 22-9-2005 sent by the District Town Planner, Ludhiana to Addl. District Magistrate (G), Ludhiana the plot in question fell in industrial zone as per the revised site plan.

8. Ms. Anjali Kukar, learned Counsel for the respondent has argued that Section 31 of the FERA merely imposed similar restrictions on a non citizen and the petitioner had become foreign national as per his own showing from June, 2000. Learned Counsel has maintained that the petitioner can avail the remedy of appeal.

9. Having heard learned Counsel for the parties, we are of the considered view that the issue raised in the instant petition is whether an act which could not be subjected to a penalty on account of contravention of any provisions of the Act,

Rules, Regulations or notification etc. could attract penalty on the basis of subsequent enactment by bringing such an act within the sweep of penalty. Under Article 20(1) of the Constitution protection has been provided of ex facto laws. There are two safeguards namely that no one could be punished for an act which was not an offence under the law in force when it was committed and that (it) no one could be subjected to greater penalty for an offence than what was provided under the law in force when the offence was committed. In order to appreciate the aforesaid issue it would be profitable to read Section 31(2) of the FERA which reads thus:

31. Restriction on acquisition, holding, etc., of immovable property in India.- (1) No person who is not a citizen of India and no company (other than a banking company) which is not incorporated under any law in force in India shall, except with the previous general or special permission of the Reserve Bank, acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India:

Provided that nothing in this sub-section shall apply to the acquisition or transfer of any such immovable property by way of lease for a period not exceeding five years.

10. A perusal of the aforesaid section makes it patent that a person who is not a citizen could not acquire, hold, mortgage, lease etc. any immovable property situated in India except with the previous general or special permission of the Reserve Bank. It is thus evident that the prohibition works against the non citizen and would not apply to the petitioner who was an Indian citizen on the date when he purchased the plot in question even presuming it to be agricultural land. It has come on record that the petitioner became citizen of USA from June, 2000. The aforesaid provision needs to be juxtaposed with Regulations 3 and 4 of FEMA Regulations which read as under:

3. Acquisition and transfer of Property in India by an Indian citizen resident outside India.-A person resident outside India who is a citizen of India may:

(a) acquire any immovable property in India other than agricultural, plantation, or a farm house:

Provided that in case of acquisition of immovable property, payment of purchase price, if any, shall be made out of (i) funds received in India through normal banking channels by way of inward remittance from any place outside India, or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank ;

Provided further that no payment of purchase price for acquisition of immovable property shall be made either by traveller's cheque or by foreign currency notes or by other mode other than those specifically permitted by this clause.

(b) transfer any immovable property in India to a person resident in India, and

(c) transfer any immovable property other than agricultural or plantation property or farm house to a person resident outside India who is a citizen of India or to a person of Indian origin resident outside India.

4. Acquisition and transfer of property in India by a person of Indian origin - A person of Indian origin resident outside India may:

(a) acquire immovable property in India other than an agricultural property, plantation, or a farm house:

Provided that in case of acquisition of immovable property, payment of purchase price, if any, shall be made out of (i) funds received in India through normal banking channels by way of inward remittance from any place outside India, or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank:

Provided further that no payment of purchase price for acquisition of immovable property shall be made either by traveller's cheque or by foreign currency notes of any foreign country or by other mode other than those specifically permitted by this clause;

(b) acquire any immovable property in India other than agricultural land/farm house/plantation property by way of gift from a person resident in India or from a person resident outside India who is a citizen of India or from a person of Indian origin resident outside India;

(c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or from a person resident in India;

(d) transfer any immovable property in India other than agricultural land/farm house/plantation property, by way of sale to a person resident in India;

(e) transfer agricultural land/farm house/plantation property in India, by way of gift or sale to a person resident in India who is a citizen of India;

(f) transfer residential or commercial property in India by way of gift to a person resident in India or to a person resident outside India who is a citizen of India or to a person of Indian origin resident outside India.

11. According to Regulation 3, a non-resident Indian who is a citizen of India may acquire any immovable property in India other than agricultural property, plantation or a farm house and also transfer any immovable property to a person resident in India. Likewise under Regulation 4 a person of Indian origin residing abroad (a foreign national) may acquire any immovable property other than agricultural land, farm house and plantation property in India. The prohibition has been imposed on the Indian citizen resident outside India to acquire any immovable property whereas u/s 31 of the FERA the prohibition was in respect of those who were not Indian citizens. In other words, u/s 31 of the FERA persons

other than citizen of India were prohibited from acquiring, holding or transferring or dispose of by sale etc. any immovable property other than agricultural land. Thus the provision did not apply to the citizens of India like the petitioner. The provisions of the FEMA Regulations were made applicable from 1-6-2000 and thus would not apply to the transaction dated 5-11-1999. u/s 31 of the FERA there is no limitation on the purchase of even agricultural land by the Indian Citizen which was the provision applicable at that time. Therefore, the action of the respondents concerning imposition of penalty u/s 13(1) of the FEMA, adjudication and framing of charge thereunder are patently against Article 20(1) of the Constitution.

12. We are further of the view that once order dated 13-3-2003 (P.1) has attained finality and the proceedings initiated against the petitioner on 18-2-2003 have culminated in a finding that the petitioner did not contravene any provisions of the FEMA then in the absence of any order of the Appellate Authority u/s 17 of the FEMA for setting aside the order dated 13-3-2003, the initiation of fresh proceedings on 28-7-2006 were wholly unwarranted.

13. The preliminary objection raised by the counsel for the respondent that an appeal u/s 17 of the FEMA is maintainable does not need to refrain us from exercising writ jurisdiction because ordinarily the objection would have been sustained but in the present case the fundamental rights of the petitioner guaranteed by the Constitution have been violated therefore, we are not inclined to accept preliminary objection in view of the judgment of Hon''ble the Supreme Court in the case of The Chairman, Railway Board and Others Vs. Mrs. Chandrima Das and Others, . Moreover, the respondents have filed written statement and have taken a categorical stand with regard to application of the FEMA and the Regulations framed thereunder, therefore, it would not be expedient and proper to relegate the petitioner at this stage to avail the remedy of appeal.

14. For the reasons aforementioned, this petition succeeds and the same is allowed. Order dated 17-11-2008 and corrigendum dated 2-12-2008 (Annexures P.8 and P.9) are hereby quashed. As the fundamental right of the petitioner has been violated, we saddle the respondents with costs of Rs. 10,000.