(1984) 11 AP CK 0017

In the Andhra Pradesh High Court

K. Rambraham and Sons (P) Limited — APPELLANT

Vs

Foreign Exchange Regulation Board — RESPONDENT

Date of Decision : 28-11-1984

Acts Referred:

Foreign Exchange Regulation Act, 1947 — Section 19(2), 23(1), 23D, 5(1)
Foreign Exchange Regulation Act, 1973 — Section 2
Regional Banks Exchange Control Manual — Section 11

Citation : (1984) 11 AP CK 0017

Hon'ble Judges : T. Lakshminarayana Reddy, J

Bench : Single Bench

Advocate : Rama Rao, for the Appellant; R. Sri Ramulu, for the Respondent

Judgement

Lakshminarayana Reddy, J.

1.This is an appeal preferred u/s 54 of the Foreign Exchange Regulation Act, 1973, against the orders passed in Appeal No. 340 of 1975 dated June 18,1977, on the file of the Foreign Exchange Regulation Appellate Board, New Delhi. The appellant in the lower court is the appellant herein. The facts that led to this appeal are as follows:

The appellant is a private limited company doing stevedores business at Visakhapatnam. During the years 1961.1967, this company made certain payments to the captains of various foreign vessels, that is, persons resident outside India, without the necessary permission from the Reserve Bank of India, without the necessary permission from the Reserve Bank of India. The amount involved in these payments is a total of Rs. 1,23,240. The Director of Enforcement gave notice to the appellant company for contravention of the provisions of section 5(1)(a) of the Foreign Exchange REgulation Act,, 1947. In other words, he conduced inquiries under the provision of section 19(2) of the Act. During the inquiry, he found that the appellant company made 209 payments totaling a sum of Rs. 1,23,240 to persons resident outside India in contravention of the provisions of section 5(1)(A) of the Act and issued a invoice dated February 24, 1971, asking the appellant to show cause why adjudication proceedings should not be held against them as provided u/s 23D of the Act.

2. To this show-cause notice, the appellant-firm gave a reply explaining the circumstances under which they paid those amounts. They stated that it was an international trade practice to pay to the captains of the ships what is called " hat money" and the said payments do not attract the provisions of the Act. The Director of Enforcement held this payment as contravening section 5(1)(a) of the Act and imposed a fine of Rs.25,000 u/s 23(1)(a) of the Act. Against these orders, the appellant preferred an appeal to the Foreign Exchange Regulation Appellate Board and Board , by its order dated June 18, 1977, dismissed the appeal. Against thee orders, the present appeal is filed.

3. The point that arises for consideration in the appeal is whether the payment of Rs. 1,23, 240 by the appellant on various occasions during a period of some six years, i.e. from 1961 to 1967, to captains and other officers of foreign vessels amounts to contravention of section 5(1)(a) of the Act.

4. It is not indispute that the appellant company has made payments to the captains of the foreign ships of a sum of Rs. 1,23,240 on various occasions during the period 1961-67. This payment is made to persons resident outside India. It attracts the provisions of section 5(1)(A) of the Act. Section 5(1)(a) of the Act of 1947 reads thus :

It is not in dispute that the appellant company has made payments to the captains of the foreign ships of a sum of Rs. 1,23, 240 on various occasions during the period 1961-67. This payment is made to persons resident outside India. It attracts the provisions of section 5(1)(a) of the Act. Section 5(1)(a) of the Act of 1947 reads thus:

" Save as may be provided in ad in accordance with any general r special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by the Reserve Bank, no person in, or resident in, India shall -

(a) make any payment to or for the credit of any person resident outside India ;"

5. Learned counsel for the appellant submits that these captains of foreign ships, though not citizens o India. since their ships are camping at the pot of India at the time of payment, cannot be termed as residents outside India. In other words, his argument amounts to this that even though the captains are citizens of a foreign country, since they are camping at a port of India at the time of payment, they must be considered as persons residents in India and not persons resident outside India.

6. There is no substance in this argument. Simply because the ships manned by these captions are berthed in an Indian port at the time of payments, the captains cannot be residents of India. The Foreign Exchange Regulation Act, 1947, no doubt did not define a person resident in India or a person outside

India. Section 11 of the REserve Bank of India''s Exchange Control Manual clearly stated that all persons normally resident outside India, including Indian citizens, who have made their permanent homes outside India, are to be regarded as residents outside India''s, even during their visits to India. Thus the Reserve Bank''s Exchange Control a Manual makes it very clear that Indian citizens also. If they make their permanent homes outside india and visit India during intervals they are also, for purposes of this Act, termed as persons resident outside india. If Indian citizens during their visit to India having their permanent homes outside India are treated as residents out side India for purposes of this Act, it is beyond doubt that foreign citizens, if they were to come to India for a short sojourn for whatever purpose it may be must be treated as persons resident outside India. The captains of foreign vessels who are admittedly foreign citizens, simply because they berth their ships for a few days or months in a particular port in India, cannot be treated as persons resident in india.

7. Under the Foreign Exchange Regulation Act, 1973, we have the definition of "person resident in India". Section 2(p)(i) of the Act reads as follows:

"person resident in india'' means -

(i) a citizen of India who has, at any time after the 25th day of March, 1947, been staying in India, but does not include a citizen of India who has gone out of, or stays outside, India, in either case -

(a) for or on taking up employment outside India, or

(b) for carrying on outside india a business or vocation outside india ,or

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

8. Learned counsel for the appellant contended that the captions of the foreign ships will fall under the definition stated in section 2(p)(iii) which reads thus :

" 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,"

9. I do not see any substance in this argument also. It cannot be said that captains of foreign ships employed under foreign companies when they call upon an Indian port with their shops, they cannot be said to be persons that came to India to stay and for carrying on a business or vocation in India. So also, it

cannot also be said that this purpose is such as indicating an intention to stay in India for an uncertain period. In other words, a captain manning a foreign ship that calls at an Indian port carrying goods to India and sojourning in an India port for the purpose of loading or unloading goods do not indicate the intention of the captain if the ship to stay in India. Therefore, this argument of learned counsel for the appellant that during the period of berthing of a foreign ship at an Indian port, the captains and other crew of the ship would become persons resident in India for the purpose of the Foreign Exchange Regulation Act, is without substance.

10. Thus, the payments made by the appellant in the instant case with which we are concerned in this appeal are certainly payments to persons resident outside India.

11. It is next argued by learned counsel for the appellant that what ever the nationality of a person may be, if once he is India at the time of payment, he must be considered as a person resident in India, since he is there on the Indian soil at the time of payment. This argument also cannot be accepted. If this argument is to be accepted, then the very purpose of the Foreign Exchange Regulation Act would be defeated. The purpose of the Foreign Exchange Regulation Act is to conserve foreign exchange. If foreign nationals who visit India, whatever the purpose may be, are allowed to take payments from Indian citizens, they could as well keep the exchange of their own nations with them and can easily borrow moneys from their friends in India and spend the same then India will lose the foreign exchange to the extent of their spending in India. If we permit foreign persons taking Indian money as loan or credits for their spending in India, it is obvious that we are losing that much of foreign exchange. When the purpose of the Foreign Exchange Regulation Act is to conserve foreign exchange, this restriction on foreigners take moneys in Indian currency from their friends in India and restriction on Indian citizens to pay foreigners in Indian currency,is absolutely necessary. Therefore, foreigners, whenever they visit India and simply because they are on the Indian soil if they were to become residents in India, for the purpose of this Act, then the very purpose of the Act would be defeated. Therefore, this argument of learned counsel for the appellant is rejected as not acceptable.

12. It is then argued by learned counsel for the appellant that this payment of "hat money" is normal and is an accepted international trade practice in the shipping business and, therefore, it cannot be held to contravene any provisions of the Foreign Exchange Regulation Act. It may be a practice. But, so long as there is no regulation preventing such payment, the practice is legal. However, once Government wants to make regulations restricting such a payment and Parliament makes law, the regulation cannot become null and void on the ground of accepted trade and international practice.

13. Then, learned counsel for the appellant argued that the two lower tribunals have erred in referring to the Exchange Control Manual of the Reserve Bank of

India for the definition of a "resident outside India," since the Manual cannot have the force of law. It is true that the Manual is a guide and does not have the force of law unless it is made under a statute duly passed by Parliament. But, when the statute is not having the definition of a resident outside India, it is the duty of the Reserve Bank as the controller and conserve of foreign exchange to make regulations so as to explain to the public the meaning of the expression "resident outside India" used in the Act. Even if we ignore the Exchange Control Manual of the Reserve Bank of India, a foreign citizen who comes to India for a short sojourn can never be treated as a resident in India, simply because the foreigner would not lose his citizenship of the foreign country during his stay in India. He did not acquire the citizenship automatically. In order to acquire the Indian citizenship, certain conditions are to be fulfilled and all those persons who did not acquire Indian citizenship cannot be treated as residents in India simply because they happened to stay in India for a few days. Strictly speaking, all non-citizens, during their stay in India, would be treated as residents outside India. The word "resident" goes along with the concept of "citizenship". A non-citizen of India is generally a resident outside India. That is why, under the new Act, that is, the Foreign Exchange Regulation Act, 1973, Parliament particularly incorporated the provision in section 2(p)(iii)(a) and (b) conferring the status of a resident in India, though they are not citizens of India under certain conditions. One such condition is that when the non-citizen comes to or stays in India for or on taking up employment in India or for carrying on a business or vocation in India, or for staying with his or her spouse, such spouse being a person resident in India or for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period. If a non-citizen becomes a resident of India for the simple reason that he happened to be there in India at the time of payment, there would have been no need for Parliament to incorporate section 2(p)(iii) in the statute. Therefore, apart from the Foreign Exchange Control Manual, we have to hold that these captains of foreign ships are persons resident outside India during the period of berthing their ships in an Indian port.

14. It is then argued that these payments are trivial and, therefore, the same is liable to be ignored. Trivial acts relating to offences under the Indian Penal Code can be ignored. When we are dealing with the Foreign Exchange Regulation Act, there is no question of trivial payments. When the purpose of the Act is to conserve foreign exchange, unless we take care of travails, conservation is not possible. Moreover, we do not know the exact amount paid on each occasion. All that we know from the record is that the payments are as many as 209 and the total came to Rs.1,23,240 and the total is not trivial.

15. It is then argued that the fine of Rs.25,000 is too heavy for the offence committed. Section 23 of the Foreign Exchange Regulation Act, 1947, deals with penalty and procedure. It prescrines for contravention of section 5, a penalty not exceeding three times the foreign exchange in respect of which a contravention has taken place, or Rs. 5,000, whichever is more, as may be adjudged by the

Director of Enforcement, in the manner provided. The foreign exchange involved in the case before us is of the value of Rs.1,23,240 and the fine should have been thrice that amount. But, somehow the concerned authorities were satisfied to impose a fine of Rs.25,000. Therefore, it cannot be side that the fine imposed is heavy and disproportionate to the offence committed.

16. One other argument advanced by learned counsel for the appellant is that section 23(a) only contemplated penalty when foreign exchange is involved in the offence committed; otherwise not. In a way, foreign exchange is involved in this contravention with which we are concerned in this case. If Indian money is not paid by the appellant to these captains of the ships, they would be obliged to spend foreign exchange of their country during their stay here in India. They could save the exchange of their own countries because Indian currency was supplied to them. Thus, India lost foreign exchange which it would otherwise have earned if the appellant had not supplied them with Indian currency. In this view of the matter, foreign exchange is involved in this contravention. Therefore, this argument of learned counsel for the appellant that no foreign exchange is involved in the transaction with which we are concerned in this case is not correct at all.

17. It is then argued by learned counsel for the appellant that if payment of "hat money" is not allowed to be paid to the captains of the ships, it would adversely and injuriously affect the Indian trade and economy and militates against the well recognised practices of international trade.

18. There is no absolute bar on this type of payments under the Foreign Exchange Regulation Act. All that is wanted is that those firms who want to pay "hat money" and other payments must get the previous permission of the Reserve Bank of India. If the Reserve Bank of India is convinced that, if such payments are prevented, the trade of Indian companies will be adversely affected, it will certainly allow and permit some moneys to be paid towards this type of payments. Therefore, this argument of learned counsel for the appellant is also not of much substance.

19. In the result, I see no merit in this appeal and the appeal is accordingly dismissed with costs.

20. Appeal dismissed.

