(1994) 04 MAD CK 0042

In the Madras High Court

Case No : Writ Petition No''s. 1279/94 and 1280/94

K.M.A. Abdul Kabeer APPELLANT

Vs

Enforcement Directorate RESPONDENT

Date of Decision : 21-04-1994

Acts Referred:
Foreign Exchange Management Act, 1999 — Section 40
Foreign Exchange Regulation Act, 1973 — Section 3, 30, 34, 4, 41
General Clauses Act, 1897 — Section 6

Citation : (1994) 72 ELT 826

Hon'ble Judges : Kanakaraj, J

Bench : Single Bench

Advocate : Shri S.K.L. Ratan, for the Appellant; Shri C.A. Sundaram, Additional C.G.S.C., for the Respondent

Judgement

1. The petitioner in both the writ petitions are one and the same and the two reliefs sought for in the two petitions arise out of the same facts. I

therefore, proceed to dispose of the writ petitions by a common order. The facts are as follows :-

The Officers of Enforcement Directorate searched the residential premises of the petitioner, in exercise of the powers conferred u/s 34 of the

Foreign Exchange Regulation Act, 1973 (hereinafter called the FERA Act). They seized Indian Currency of Rs. 1,65,000/- which was kept in a

wooden almirah under a Mahazar on 18-8-1992. A statement is said to have been recorded from the petitioner, by using force and exercising

coercion, and the said statement was subsequently retracted by a latter dated 21-8-1992. It is not necessary for this Court to go into the question

as to the character of possession of the currencies and whether the same was acquired in a lawful manner or not. While W.P. No. 1279 of 1994 relates to the power to retain the currency u/s 41 of the FERA Act beyond a particular period, W.P. No. 1280 of 1994 rates to the validity of the

show cause notice issued on 4-8-1993. For the purpose of understanding the scope of the argument in W.P. No. 1279 of 1994, the following

dates are materials.

(1) The date of seizure of the Currency 18-8-

1992

(2) The date of Amendment to Section 41 of the FERA Act. 8-1-

1993

(3) The date of the show-cause notice 4-8-1993

(4) The date of service of the show cause notice 24-8-1993

2. The argument is that after 8-1-1993 Section 41 of the FERA Act empowers the authorities to retain the currency only for a period of six

months, unless of course proceedings had been initiated as per sub-clauses (i) and (ii) of Section 41 of the FERA Act. Prior to the amendment the

authorities had power to retain the documents for a period of one year. If a period of one year is available, the power to retain the documents can

be unheld because within the period of one year from 18-8-1992, a show-cause notice was issued on 4-8-1993. If the amended provision of law

applies, the respondent will have only six months from 18-8-1992 and the period of six months from 18-8-1992 and the period of six months had

expired on 17-8-1993. Consequently, show-cause notice issued on 4-8-1993 will not enable the authorities to retain the documents being the

currency notes after 17-2-1993. The prayer in W.P. No. 1279 of 1994 is for the issue of a writ of mandamus to direct the respondent to return

the seized documents namely, currency notes to the tune of Rs. 1,65,000/- to the petitioners.

3. In W.P. No. 1280 of 1994, the argument is that the first respondent namely Special Director has no jurisdiction to issue the show cause notice

u/s 51 of the FERA Act and the delegation of powers to the first respondent is illegal and contrary to Sections 3 and 4 of the FERA Act.

Consequently, the prayer in W.P. No. 1280 of 1994 is to quash the show-cause notice date 4-8-1993 by the issue of a writ of certiorari.

4. Two separate counter affidavits have been filed by the respondents. While the

facts are not disputed with reference to the sequence of events, it

is contended that the amended provision of Section 41 of the FERA Act will not have any application to the present case and the show cause

notice having been issued within a period of one year, they are entitled to retain the seized currency. In other words, the argument is that the

amended provisions do not have a retrospective effect, and they can be applied only prospectively. It is also contended that the right of seizure and

retention of documents is a substantive right, and therefore, the same cannot be taken away by reducing the period of retention. It is therefore,

contended that the argument of the petitioner that the period of limitation is only procedural in nature, and therefore, the amended provisions alone

should be applied cannot be accepted. In W.P. No. 1280 of 1994, the argument is that by a specific notification dated 22-9-1989, the

Government has exercised the power under sub-section (1) of Section 4 read with Clause (c) of Section 3 of the FERA Act and appointed one

S.S. Renhgen to be an Officer of Enforcement with the designation of Special Director of Enforcement giving him powers of adjudication u/s 50 of

the Act. The contention is the delegation of powers to the incumbent of the first respondent is perfectly legal and in accordance with Sections 3 and

4 of the FERA Act. Consequently, it is contended that the show-cause notice is valid and not liable to be quashed.

5. I will first deal with the power to retain the document namely, the currency notes in accordance with Section 41 of the FERA Act and whether

the respondent has lost the power and is bound to return the currency notes. A decision on this aspect will depend on the question whether the

amended provisions of Section 41 of the FERA Act which came into force on 8-1-1993 are prospective or retrospective. The argument of the

petitioner that even after the amended provisions came into effect on 8-1-1993, the respondents had about 23 days in January, and 16 days in

February, 1993 to initiate proceedings like the issue of a show-cause notice and continue to retain the documents. On the other hand, the

respondents failed to avail of this period and save themselves from the bar of limitation prescribed by the amended Act. Therefore, it is contended

that by no stretch of imagination can the respondent seek to claim the period of one year granted under the unamended Section 41 of the FERA

Act. It is pointed out that there is a line of authority on the manner of interpreting the statute of limitation when the period is shortened or reduced

by an amendment. It is also not disputed that the question will depend upon the nature of the right which is sought to be reduced namely, where it is

a procedural right or a vested right. The well accepted principle of law is that in the case of a vested right, the same cannot be taken away by an

amendment of the law which is silent with regard to its applicability prospectively or retrospectively. On the other hand if the amended provision

only relates to a procedure, then it can be applied retrospectively subject to one or two well accepted exceptions. These principles of law can very

well be deduced from the following judgment cited at the Bar. In Mt. Begam Sultan Vs. Sarvi Begam the Court was considering a case where a

decree was passed at a time when the old CPC of 1882 was in force. The application for execution was made at a time when new Civil Procedure

Code, 1908 had come into force. It was held that the law of procedure and limitation applicable to an application for execution would be the law

actually in force at the time when the application was made namely, the new C.P.C. 1908. The following passage is relied upon :-

The new Code did not in any way affect his right to execute the decree which he had obtained. It has in no way curtailed his right; it has merely

placed a bar of limitation as to the period of time during which he can apply. There was no vested right in the decree-holder to wait for an indefinite

period of time in order to apply for execution. The learned Judges who decided the case above mentioned were led away by the supposition that

the decree-holder acquires a vested right not only to apply for execution but also in the period within which he can apply.

In Khondkar Md. Saleh v. Chandra Kumar AIR 1930 Cal. 34 a Division Bench of Calcutta High Court has analysed all the aspects of the case

relating to the alteration of the period of limitation and the circumstances under which the amended provisions will or will not apply. In that case the

due date under a mortgage deed, for payment of the mortgage money, was 12-4-1904. The original mortgagee died in December, 1905. The only

legal representative being his minor son brought the suit in 1906 and a preliminary decree was passed on 30-11- 1906. A final decree was passed

on 7-1-1907. After the sale of the mortgaged property there was still a balance to be paid to the mortgagee. The minor legal representative of the mortgagee attained minority on 23-9-1924 and applied under Order 34, Rule 6 C.P.C. for a personal decree against the mortgagor. The

mortgagor pleaded that the application was barred by limitation. The trial court had overruled the plea of limitation and granted a personal decree

against the mortgagor. The appeal against the said order which was decided by the Division Bench of the Calcutta High Court. The issue arose

before the Division in the following manner :-

Under the Limitation Act 15 of 1877, the mortgagee had a right to apply for a personal decree after attainment of majority and thereafter within the

period of limitation. Under the new Limitation Act 9 of 1908 which was passed in August 1908, but came into operation on 1-1-1908, the minor

must make the application within the period of limitation prescribed under Article 181 of the Schedule to the Limitation Act. In other words the

period of limitation was three years from the time when the right to apply accrued. The right to apply accrued in the said case in September, 1908.

Therefore, it was contended that the application filed in September, 1924 was barred by limitation. The argument which was accepted by the trial

Court was that the Limitation Act 15 of 1877 would alone apply and even though the right to apply accrued in September, 1908 the mortagagee

was under a disability of minority till 23-9-1923. It was therefore, argued that he was entitled to make the application within three years from the

date when attained majority. The trial court in that case had held that 1908 Act affected the vested right of the mortgagee and therefore, it was only

1877 Act which apply. The Calcutta High Court, as I have already pointed out, has analysed all the aspects of the case on the issue in question

and held that 1908 Act only cut down the period of limitation and did not take away any vested right. In this view of the matter it was held that the

application for a personal decree was barred by limitation. The following passages are strongly relied upon by the learned counsel for the petitioner

:-

Now, applying this rule to the present case there cannot be any doubt that the plaintiff might have made his application within the period of

limitation, prescribed under Act 9 of 1908. The time when the right accrued was September 1908 and three years would expire in September,

1911. Therefore, the mortgagee had about two years nine months, time after the passing of the Act of 1908 to make his application and hence

there was no hardship which was discussed in the cases of Towler v. Chatterton (1829) 6 Bing 258 : 21 L.J.M.C. 193] and R. v. Leeds And

Bradford Ry Co. (1852) 18 Q.B. 343. It is not necessary in this case to lay any stress upon the fact the Limitation Act of 1908 was passed in

August 1908 and it was to come into operation on 1st January, 1909. That fact might have been important if the position of the plaintiff was such

that he would have no time under the new law to make any application after the Act came into operation. But as a matter of fact, as I have already

pointed out, he had two years nine months under the new law within which he could make his application. Therefore, in my judgment, it cannot be

doubted that the rule of limitation applicable to the present case should be that laid down by Act 9 of 1908.

However, the Calcutta High Court referred to a distinguished case of Promotha Nath v. Sourav Dasi (1920) 31 C.L.J. 463 in the following words

:-

The learned Judges held that S. 66 of the Code had no retrospective operation as it actually took away a right of suit which is a vested right.

Finally, the Calcutta High Court concluded with the approval the following passage in Maxwell''s ''Interpretation of Statutes'' 6th Edition, at page

399.

In both of the above cases, however the construction, though fatal to the enforcement of a vested right, by shortening the time for enforcing it, did

not in terms take away any such right; and in both it seems to fall within the general principle that the presumption against a retrospective

construction has no application to enactments which affect only the procedure and practice of the Courts, even where the alteration which the

statute makes has been disadvantageous to one of the parties. Although to make a law for punishing that which, at the time when it was done, was

no punishable, is contrary to sound principle; a law which merely alters the procedure may, with perfect propriety, be made applicable to past as

well as future transactions; and no secondary meaning is to be sought for an enactment of such a kind. No person has a vested right in any course

of procedure.

6. Two important principles of law can be deduced from the above judgment. The

first is that the law of limitation is procedural and should operate

in respect of past transactions also. The only exception is where the Law of Limitation is amended in such a way as to take away the rights of a

person to bring a suit within the period of limitation prescribed by the Act before the amendment comes into operation. In such a case, the law as

laid down by the Calcutta High Court in to see whether the plaintiff has time to apply before the new law come into operation. It is this aspect of

the case which is strongly relied upon by the learned counsel for the petitioner in suggesting that the respondent had time even after the new

provisions of Section 41 of the FERA Act come into effect on 8-1-1993 to take appropriate action before 17-2-1993. The contention is that in

view of this availability of time, it must be interpreted that the amended provisions of Section 41 of the FERA Act will have a retrospective effect.

Inasmuch as the respondent did not take steps even after amendment of Section 41 of the FERA Act, before 17-2-1993, they should be debarred

from withholding the documents. In my opinion, the interpretation of a statute cannot be left to differ from the facts of each case. In other words, in

this particular case, it so happens that the seizure was on 18-8-1992 and even after the amendment of Section 41 of the FERA Act, there was

short period from 8-1-1993 to 17-2-1993 for initiating action and consequently retaining the documents. But one can easily visualise other cases

where for instance a seizure is made on or before 8-7-1992. In respect of such seizure if the new Section 41 of the FERA Act is applied the

period of six months will expire by 8-1-1993 when the new Act came into force. In other words, in respect of a seizure made prior to 8-7-1993

when the authorities were contemplating action within a period of one year as per the unamended Act they are suddenly faced with a situation that

the period has been reduced to six months and therefore they are bound to return the documents, because no action had been initiated. Therefore,

the proper interpretation of a statute of limitation reducing or shortening the period will be to see whether the amended Act gives an order dated by

which actions should be initiated in respect of applications which get barred by the ammended provisions. One can easily advert to several such

enactments like the Limitation Act, 1963 and the Land Acquisition Act 64 of 1984. These enactments say that as and from the date of the amended act actions should be initiated within a particular period failing which the action, if any, will get time barred under the provisions of the

amended Limitation Act. In this connection reference may be made to two other judgments of the Supreme Court in Ramprasad v. Vijay Kumar

1967 S.C. 278 : 69 BLR. 20. The apex court had to consider the applicability of the Article 138 of the Limitation Act, 1908 which abridged the

period of limitation for enforcement of a mortgage. The Supreme Court held that the abridgement did not take away any vested right. The following

passage is in with the line of approach indicated by me earlier :-

But this abridgment did not impair or take away any vested right. Section 30 of the India Limitation Act, 1908 inserted by the Part B States (Law)

Act, 1951 made suitable provision safeguarding vested rights in cases where the period prescribed was shorter than that prescribed by the

corresponding law previously in force in the part B State.

7. In Syed Yousuf Yarkhan and Others Vs. Syed Mohammed Yarkhan and Others, the Apex Court was concerned with the recovery of a Wakf

property and the fact that the Hyderabad Limitation Act did not contain any period of limitation for the recovery of Wakf property. On the other

hand, Article 142 of the Limitation Act, 1908 which was made applicable to the area in question by the Part B States (Laws) Act, 1951 with

effect from 1-4-1951, provided a limited period for recovery of Wakf property and the question was whether the switchover for unlimited period

to a limited period had the effect of taking away the vested right and as to the principles which would govern the case. Observed the Supreme

Court.

The extension of the Indian Limitation Act, 1908 to Hyderabad and the consequential change in law prescribing a shorter period of limitation did

not confiscate the existing case of action and must be regarded as an alternation in the law of procedure for the enforcement of the cause of action.

We must therefore, apply the normal rule that the law of limitation applicable to the suit is the law in force at the date of the institution of the suit.

The suit is, therefore, governed by the Indian Limitation Act, 1908. The plaintiffs did not institute the suit within two years after April 1, 1951. They

cannot, therefore, avail themselves of the benefit of S. 30.

8. Let me now find out whether Section 41 of the FERA Act which was amended

to reduce the period of retention of documents by the authorities

from one year to six months contains any such salient provisions like Section 30 of the Indian Limitation Act, 1908. If there is no such safeguard in

the amended provisions of Section 41 of the FERA Act, the contention of the respondents that the substantial right of the Department to retain the

documents for a period of one year cannot be reduced to six months and the documents directed to be returned to the persons from whom they

were seized, loam be taken as well founded. A careful perusal of the amended provision of Section 41 of the FERA Act shows that after reducing

the period to six months a proviso was added. It is as follows :-

provided that the aforesaid period of six months may, for reasons to be recorded in writing, be extended by the Director of Enforcement for a

further period not exceeding six months.

9. It is thus clear that where in stated cases the department is faced with the situation that the period of six months expires on the date of coming

into force of the amended provisions namely on 8-1-1993, it is always open to the Director of Enforcement to come to the aid of the authority and

extend the period upto a maximum limit of six months, after recording the reasons therefor. In my opinion, this safety valve in the amended Section

41 of the FERA Act provides the key to solve the disputed question between the parties. Even assuming on the particular facts of the case where

even after the amendment to Section 41 of the FERA Act, the Department had a short period from 8- 1-1993 to 17-2-1993 to initiate action and

continue to have possession of the seized documents, and that it was not sufficient, it was open to the authorities to have sought for extensions of

time by applying to the Director of Enforcement under the proviso above quoted.

10. The argument of the respondents is, that no questions of limitation is involved to Section 41 of the FERA Act and the right to retain the

documents is a substantial right and therefore, the same cannot be taken away by the amended provisions. There is a misconception in the

argument because the amended provision does not take away substantial right to retain the documents. On the other hand, the amended provision

only says that instead of a period of one year the authorities can retain documents only for a period of six months, subject of course, to the

authorities initiating action under sub-clauses (1) and (11) of Section 41 of the

FERA Act. So far as the reduction of the period of limitation is

concerned, on the basis of the voluminous authorities cited above, I have no hesitation in holding that the shortening of the period of limitation is

only procedural and therefore, the amended provisions will alone apply subject to the proviso above quoted. In this case, it is not disputed that

there was no order of the Director of Enforcement extending the period of retention of the documents by the respondent.

11. The last argument of the respondents is based on Section 6(e) of the General Clauses Act, 1897. In my opinion, there is no scope for resorting

to Section 6 of the General Clauses Act because this is not a case of repeal of a provision of law and the repeal not affecting any investigation or

obligation arising out of an Act being proceeded with as if the repealing Act had not been passed. The shortening of the period of limitation and the

retrospective or prospective application of the amendment will depend only upon the considerations already referred to and as decided by various

courts, including the apex court.

12. The prayer in W.P. No. 1279 of 1994 has necessarily to be conceded based on the judgment of the Supreme Court of India in SLP (Civil)

No. 3997 of 1976 reported in Arjunan Chettiar v. Enforcement Officer 1977 2 M.L.J.S.C. 5 Consequently, a writ of mandamus will issue

directing the respondents to return the seized currency to the turn of Rs. 1,65,000/- to the petitioner herein within eight weeks from today. W.P.

No. 1279 of 1994 is allowed in the above manner.

13. The above decision will not automatically result in prayer in W.P. No. 1280 of 1994 being granted. I have already noticed the fact that in this

writ petition the challenge is to the show cause notice dt. 4- 8-1993 on the ground that the Special Director, S.S. Renhgen has no jurisdiction to

issue the notice. The argument of Mr. S.K.L. Ratnam is as follows :-

Section 3 of the FERA Act lists the class of Officers of Enforcement. Sub-clause (3) of Section 3 says that such other class of officers of

Enforcement may be appointed for the purpose of the Act. Section 4(1) of the Act empowers the Central Government to appoint any person as it

thinks fit to be an officer of an Enforcement. Sub-section (2) of Section 4 need not detain us because that relates to the delegation of powers to

certain class of officers to appoint an officer of enforcement below that rank of

Assistant Director of Enforcement. We are not concerned with

such a case in this writ petition. The arguments of the petitioner is that under GSR 61, dated 1-1-1974 the Central Government had already

authorised the Director of Enforcement to appoint officers of the Enforcement below the rank of an Assistant Director of Enforcement. On the

creation of a class designated as Enforcement Officers the power under clause (e) of Section 3 read with Section 4(1) gets exhausted, according

to the petitioner. It is the further case of the petitioner that the Government is not empowered by Section 3(e) to create a new class or a new post.

The class of Enforcement Officers already created u/s 3(e) rank below the Assistant Director. Therefore, it is argued that the post of a Special

Director cannot come within the clause because he ranks above the Addl. Director and below the Director. Learned counsel for the petitioner

relies on certain Text books in support of his argument. In the Text book written by R. Swaminathan, the following is relied on :

Special Directors have not been notified by the Central Government as Officers above the rank of Assistant Directors and hence powers of

adjudication given to them may be open to question, though at present each Special Director of Enforcement is specially entrusted with

adjudication powers by separate notifications.

The above passage does not conclusively prove that the delegation to Special Directors is illegal or contrary to the provisions of Sections 3 and 4

of the Act. In fact, the author later on says.

The word in Section 50 of the FERA Act says the Officer in question should be specially empowered in this behalf by an order of the Central

Government, would appear to require each officer to be specially empowered and not by empowering a whole class of officers.

14. In answer to the above contention Mr. C.A. Sundaram points out that in the instant case there was a specific notification dated 22-9- 1989

published in the Gazette of India which specially authorises the Special Director to be an Officer of Enforcement for the purpose of enforcing the

provisions of the Act and to exercise the power u/s 50 of the Act. These notifications have been purported to be in the exercise of the power

conferred by Section 4(1) read with Section 3(e) of the FERA Act. I am of the opinion that the argument of the petitioner is without any force because Section 4(1) categorically says that the Central Government may appoint any person as it thinks fit to be an officer of Enforcement Mr.

S.S. Renhgen has been specifically appointed as an Officer of Enforcement with the designation of a Special Directory of Enforcement. There can

therefore be no dispute that the impugned show cause notice is valid. That apart, as rightly pointed out by the learned counsel for the respondents,

the doctrine of factum valet or the de facto theory will apply to this case. For this proposition learned counsel relies on the judgment of the

Supreme Court in Gokaraju Rangaraju Vs. State of Andhra Pradesh, and Pushpadevi M. Jatia v. Wadhavan 1987 12 E.C.C. 356. The following

passage in the latter decision is sufficient to uphold the contention of the respondents.

In any event, the learned counsel further contends that R.C. Singh was clothed with the insignia of office and he was purporting to exercise the

functions and duties of a gazetted Officer of Enforcement under Sec. 40(1) of the FERA and therefore the de facto doctrine was attracted. He

relies upon the decision of this Court in Gokaraju Rangaraju Vs. State of Andhra Pradesh, enunciating the de facto doctrine born of necessity and

public policy to prevent needless confusing and endless mischief. In other words, he contends that where an officer acts under the law, in matter

not how the appointment of the incumbent is made so far as the validity of his acts are concerned.

15. In this view of the matter, I therefore, reject the contention of the petitioner that the first respondent has no jurisdiction to issue the subject

show cause notice. Consequently, W.P. No. 1280 of 1994 is dismissed. There will, however, be no order as to costs.

