
(1982) 05 DEL CK 0019

In the Delhi High Court

Case No : Criminal Appeals No's. 120 and 121 of 1975

K.N. Mehta

APPELLANT

Vs

Director of Enforcement and others

RESPONDENT

Date of Decision : 20-05-1982

Acts Referred:

Citation : (1985) 57 CompCas 820 : (1982) CriLJ 1916 : (1985) 5 ECC 286 : (1982) ILR Delhi 712 : (1982) RLR 644

Hon'ble Judges : Charanjit Talwar, J

Bench : Single Bench

Judgement

Charanjit Talwar, J.—These are two connected appeals filed under s. 54 of the Foreign Exchange Regulation Act, 1973 (herein called "the Act"), challenging the legality of order passed on January 27, 1975, by the Foreign Exchange Regulation Appellate Board (herein called "the Board") upholding the finding of the Director of Enforcement that Mr. K. N. Mehta (appellant in Criminal Appeal No. 120 of 1975) and his wife, Mrs. Saraswati Mehta (appellant in Criminal Appeal No. 121 of 1975), were guilty of contravening the provisions of the Act. The imposition of penalty amounts on different counts is thus sought to be set aside.

2. The Director of Enforcement had originally issued 11 show-cause notices to Mr. Mehta and six show-cause notice to Mrs. Saraswati Mehta for having dealt in foreign exchange in contravention of various provisions of the Act. After adjudication, Mrs. Mehta was found guilty of one charge only; Mrs. Mehta, however, was found guilty in respect of the charges covered under four show-cause notices. The Board, while maintaining the order of the director on three charges, set aside his conviction and penalty for the offence covered under show-cause notice No. 1. For the remaining charges he was directed to pay penalty of Rs. 5,000 on each count. Mrs. Mehta appeal, however, was rejected and the penalty of Rs. 5,000 imposed upon her was maintained.

3. The director proceeded on the basis that the appellants were foreign nationals

who not being domiciled in India were entitled to maintain and operate bank accounts abroad by virtue of the Reserve bank Notification No. FERA/23/47/RB, dated July 8, 1947. It was further held by him that out of those accounts or credit funds, they were permitted to make any payment to or credit of any person resident outside India. The prohibition imposed by s. 5(1)(a) of the Act was not applicable as by virtue of another notification of the Reserve Bank of India (No. RBI(FERA) 119/53-RB dated July 30, 1953), persons in the category of the appellants were exempted from the provisions of the said sub-section. Hence, the seven charges relating to such payments were dropped. His finding, however, was that as persons resident in India, it was not permissible for them to borrow or lend foreign exchange from or to a person resident abroad. Further, on sale and mortgage of the property situate abroad, the foreign exchange obtained by them was liable to be repatriated. The Board has agreed with the above findings.

4. The director found the appellants guilty on the charge covered under the following four show-cause notices :

In re Mr. Mehta :

(1) Show-cause notice No. II related to two charges (a) for having failed to offer for sale of 940 dollars' travellers cheque, (b) for failure to repatriate a sum of Rs. 42,000 Swiss Francs which he had obtained as sale price of his land in Geneva.

(2) Show-cause notice No. VIII related to borrowing of money by Mr. Mehta by mortgaging his villa in Switzerland.

(3) Show-cause notice No. XVII related to lending of Pounds 50,000 by Mr. Mehta to one Mr. Kumar Kochar of London.

(4) Show-cause notice No. V related to the borrowing of the amount of Pounds 60,000 by Mr. Mehta by mortgaging his house at Nairobi.

5. The Board found that the property in question in Nairobi was not owned by Mr. Mehta and, as such, he could not have mortgaged the same. On this charge Mr. Mehta was acquitted, and the penalty for this contravention was set aside. The penalty of Rs. 5,000, however, imposed by the director on each of the other counts as detailed above was maintained.

In re Mrs. Mehta :

The charge in the show-cause notice whereunder Mrs. Mehta was held to have contravened s. 9 of the receipt of rent and dividends amounting to shillings 95,811.98 by her from her property in Nairobi. It was held that she had failed to offer for sale to an authorised dealer the said sum of foreign exchange, thus contravening the provisions of the Act and, as such, a penalty of Rs. 5,000 was imposed by the director. This finding and the imposition of penalty was upheld by the Board.

6. Before analysing the reasons on which the appellants were found guilty, it is necessary to notice certain facts so as to appreciate the legal submission that the appellants were not "persons resident in India", and Therefore, not liable.

7. The appellants are not Indian citizens. Mr. Mehta was born in Gujarat in the year 1921 but had lived in Uganda as a child. He acquired British citizenship and passport in the year 1947. Thereafter, he migrated to Switzerland; he became a permanent resident of that country and was so declared by the Swiss Government. It appears that he acquired immovable property of considerable value and was also maintaining bank accounts in that country and also in England. In October, 1968, Mr. Mehta came to India to take up an appointment as managing Director of Saurashtra Cement and Chemical industries Limited. It was stated at the bar that the said company is a Government company.

8. From the judgment under appeal, it appears that his initial appointment was for a fixed period of five years. It is not contested that Mr. Mehta was registered as a foreigner under the Registration of Foreigners" Rules, 1939.

9. On receipt of reliable information that Mr. Mehta had dispatched on June 29, 1966, a cheque for 700 drawn on the First national City bank of New York to London, the appellant's office and residence at Bombay were searched, and it was found from the documents recovered that the appellant and his wife were not only maintaining several accounts in foreign countries which they had been operating while in India but were also holding considerable assets abroad. The Director of Enforcement was of the view that Mr. Mehta and his wife who were considered by him to be persons resident in India had contravened the provisions of the Act by dealing in foreign currency and consequently show-cause notices were issued to Mr. Mehta and to his wife. The allegations pertained to contravention of s. 4(1)(a) and 9 of the Act read with notification No. F. 1(67)/EC/57, dated September 25, 1958. Apart from one charge falling under show-cause notice No. II, all the other charges related to either dealing in foreign exchange or obtaining certain moneys by mortgaging or selling this property in East Africa and Switzerland. The main finding of the Director of Enforcement which has been upheld by the Board was that the appellants being residents in India had contravened the provisions of the Act by not repatriating the foreign exchange which was raised by them by mortgaging or selling their properties abroad. As noticed above, it is common ground that the appellants are neither citizens of India nor were they domiciled in this country. I may note here that the Reserve bank of India, vide letter dated February 15, 1969, had declared Mr. Mehta as a persons of non-Indian (Swiss) domicile for exchange control purposes. How ever, one of the charges against Mr. Mehta, vide show-cause Notice No. II(a) was that he did not offer for sale to an authorised dealer foreign exchange issued by the American Express Company. This foreign currency was recovered from his possession when his house was searched. According to the notification No. F. 1(67)/EC/57 dated September 25, 1958 which was issued under s. 9 of the Act, a person in India (whether resident or not) is obliged

within one month of the date of his owning or holding of dollars to offer the same or cause the same to be offered for sale to an authorised dealer at the rate which is for the time being authorised by the Reserve Bank of India.

10. Mr. M. C. Bhandare, learned counsel for the appellants, frankly conceded that the relevant time in 1966, Mr. Mehta, while in India, was obliged as per the said notification to offer to the Reserve Bank of India the travelers cheques amounting to 940 dollars for converting them into Indian currency. The violation of the said notification is, Therefore, not open to challenge irrespective of the fact whether Mr. Mehta was an Indian resident or not. He was a person physically in India. Therefore, the imposition of penalty of Rs. 5,000 on this allegation has to be maintained. I may note here that the Board had set aside the order of confiscation of the said travelers cheques.

11. Thus, the only legal question which arise for consideration is whether the finding that the appellants were residents in India is correct. If they were, the imposition of penalty as imposed by the Director of Enforcement and upheld by the Board is justified.

12. However, at this stage I may note that the learned counsel for the respondents has raised a preliminary objection to the maintainability of these two appeals in this court as under Expln. (1) to s. 54 of the Act, "High Court" means "The high Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain". The contention is that the appellants were ordinarily residing at Bombay where Mr. Mehta was personally working for gain, as managing director of Sorashtra Cement and Chemicals Ltd., and, Therefore, the appeals ought to have been filed only in the Bombay High Court. The appeals were admitted on May 20, 1975, for hearing. The respondents were duly served in the same year. A preliminary objection was, however, taken under argument final hearing. Since, for a decision on this objection, facts regarding the appellants being residents in India or not had to be gone into, I considered it appropriate to ask the parties' counsel to address me on all the questions raised in the appeals. The parties were heard at length. In my view, for the reasons stated hereafter, the appeals are maintainable in this court. I, however, propose to deal first with the question whether the appellants were at the relevant time residents in India.

13. The term "person resident in India" was not defined in the 1947 Act. It has, however, been defined in the present Act. under the Act, whether present or old, it is not necessary for a person who is resident in India to have an Indian domicile. Learned counsel for the parties have not disputed this proposition. it is admitted by Mr. Wadhwa that the appellants were not domiciled in India. The definition as given in the new Act is not applicable, as the contravention in the present case took place prior to the coming into force of the Act, it is urged.

14. The director while coming to the finding that the appellants were persons residents in India although not domiciled had held so primarily because of the

admission of Mr. Mehta which he had made before the Enforcement Officer on November 9, 1966. "I came to India on October 19, 1960, and had been ordinarily staying in India ever since except for some visits for short durations abroad".

15. The director (at page 5 of his order) has concluded "It is thus clear that Shri K. N. Mehta is a person resident in Indian although not domiciled".

16. It was, however, found by him that by virtue of Reserve Bank Notification No. FERA 23/47-RB dated July 8, 1947, K. N. Mehta, as he was not domiciled in India was entitled to maintain and operate an account expressed in foreign exchange. Nevertheless, he held that provisions of s. 4(1) of the Act were applicable in Mr. Mehta's case inasmuch as "he cannot borrow or lend foreign exchange from a person other than Bank nor can he purchase or sell foreign exchange from any person without the permission of the Reserve Bank.

17. The other sections of the Act, viz., ss. 5, 8, 9 and 10, etc., will also be applicable to him subject to the exemption given in the various notifications pursuant to the above notification."

18. As noticed earlier, the Board has upheld the finding regarding the appellants being residents in India. The Board, however, did not rely on the statement of Mr. Mehta for coming to this conclusion. It was observed : "we do not consider that we would be justified in drawing any conclusion as to the appellant's domicile or residence solely on the basis of any admissions on this issues." The reason for upholding the finding by the Board was that the appellant's stay in India was not purely temporary as he had been living in India since 1960 and, Therefore, "he can well be regarded as a person ordinarily resident here". On this proposition of law, the Board's conclusion appears in paragraph 46 of its order. It reads thus :

"The period of Shri Mehta's stay as well as the quality of it, viz., it being a stay for the purposes of taking up an office in a country wherein he had roots would, in our opinion, establish that Shri Mehta was in fact resident in India although he may not be domiciled in this country. In fact, it is not necessary for us to express any opinion on the question of Shri Mehta's domicile, for the order of the learned director proceeds upon the basis that the appellant is domiciled abroad. On the question of residence, taking all the circumstances into account, we hold that the appellant Shri K. N. Mehta was a person resident in India since October, 1960".

19. It is this finding which is challenged before me. Ordinarily, the sole test for deciding the question of residence is whether a party had animus manendi or an intention to stay for an indefinite period at one place. If he had such an intention he could be said to "reside" there. It has been held in a catena of authorities that the word "reside" implies something more than a brief visit but not such continuity as to amount to a domicile. As noticed by the Supreme Court in *Jagir Kaur and Another Vs. Jaswant Singh*, , no decision goes so far as to hold that "resides" means only domicile in the technical sense of that word. In the said

case, sub-s. (8) of s. 488 of the Cr. PC, 1898, fell for consideration. It was held that a temporary stay of the husband at a place of temporary residence also. Their Lordships, however, cautioned : "In short, the meaning of the word would, in the ultimate analysis depend upon the context and purpose of a particular statute. In this case, the context and purpose of the present statute certainly do not compel the importation of the concept of domicile in its technical sense. The purpose of the statute would be better served if the word "resides" was understood to include temporary residence".

20. In the instant case, it has been held by the authorities below that the appellant was not a permanent resident in India; he was domiciled in Switzerland. In *Shanti Prasad Jain v. Director of Enforcement*, (FERA [1963] 33 Comp Case 231, in which case the prohibition under s. 4(1) of the 1947 Act was being considered, it was held by their Lordships that the expression "resident in India" is clearly used in the sense "resident of India". The argument was that as the appellant in the said case was outside India and had contravened the provisions of the Act while in Germany, he was not liable. Negating the contention, in paragraph 47 of the judgment, the Supreme Court has held as follows (at p. 254 of 33 Comp Cas) :

"It remains to deal with the contention urged on behalf of the appellant that even if it be held that the appellant had made the deposits in question in the Deutsche Bank as a customer, there had been no contravention of s. 4(1) of the Act as the prohibition enacted therein is only against lending of foreign exchange by person who is resident in India and that at the time of the deposits in question the appellant was not in India but in Germany. There is no substance in this contention. The intention of the legislature was plainly to prohibit all transactions in foreign exchange by persons who are residents of India whether such transactions take place during their actual residence in India or during their sojourn in foreign parts. To hold that the prohibition under the Act does not extend to acts done outside India by residents of India must inevitably lead to large-scale evasion of the Act resulting in its object being defeated. A construction which leads to such a result must be avoided. The expression "resident in India" is clearly used in the sense "resident of India"."

21. It is thus clear that a person to be termed a resident in India under the Act of 1947 must be a person who has an intention to reside in India for uncertain period if not indefinitely, so as to be resident of India in the context and purpose of that Act.

22. The Act of 1947 was a temporary Act due to expire on December 31, 1957. Prior to the enforcement of the Act on the outbreak of the Second World War, for the purpose of conserving the limited supplies of foreign exchange available to India, a series of rules under the defense of India Act, 1939, were framed. After the war, as it was considered that shortage of foreign exchange was likely to continue, a temporary Act containing measures to regulate transactions in foreign exchange was enacted. The trend of events showed that it was not

possible to visualise that in the foreseeable future it would be possible to dispense with the exchange control, and Therefore, the Act was placed on a permanent footing. The Act of 1947 was enacted "to regulate certain payments dealings in foreign exchange and securities and the import and export of currency and bullion." Section 4 laid down the restrictions on dealings in foreign exchange. No person resident in India other than an authorised dealer without the exemption granted by the Reserve Bank of India, could deal in foreign exchange. Section 5 imposed restrictions on payments. The object of the Act was to conserve foreign exchange. To achieve that object, the Central Government was empowered to control transaction in foreign exchange. In that context, restrictions on dealings in foreign exchange were imposed on persons resident in India. Those restrictions, however, could be relaxed by the Reserve bank of India. By notification which I have noticed earlier, the Reserve Bank had permitted persons who were at the relevant time not domiciled in India but resident in India to maintain and operated bank accounts abroad. The earnings in foreign exchange of persons resident in India whether domiciled or not had to be repatriated but this obligation could not be imposed on persons who were not resident of India. A "person resident in India" was not defined in the 1947 Act. However, the definition added in the Act of 1973 shows the mind of the legislature. It is relevant to note here the definition in sub-clause (iii) of sub-s. (p) of s. 2 of the 1973 Act :

"(p)" "person resident in India" means -

(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/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."

23. The emphasis seems to be that those persons who are not citizens of India having come to India to reside for an uncertain period are to be considered as persons resident in India. However, if the stay of a persons, not being a citizen of India, is purely temporary or for a certain fixed period, that person would not be covered under the expression "person resident in India". Such a person would not, Therefore, be resident of India. The prohibitions and obligations imposed under the Act would not be applicable to that person. It is true that the present definition is not applicable to the appellants; it has been noticed only to highlight the position as at present. However, in the case of the appellants, the underlying principle as envisaged by the definition in the 1973 Act could be made use of. Under the 1947 Act, a foreigner not domiciled in India, who had come to this

country for taking up employment for a specific period, his foreign exchange earnings on his assets abroad were not liable to be controlled and, as such, there was no obligation on him to repatriate the same. The appellants were not residents of India. During their visits to foreign countries from India, the restrictions imposed by ss. 4 and 5 of the Act were not applicable to them. While outside the country they were entitled to dispose of their property in Switzerland or Kenya in any way they liked. Therefore, they cannot be termed "persons resident in India". As noticed above, they have since left the country.

24. The authorities cited by Mr. Wadhwa, wherein it has been held that a man's residence is where he habitually sleeps or dwells for a considerable time, are of no help to him as those cases fall outside the scope of the question raised before me. One of the authorities cited by him Sri Sri Sri Kishore Chandra Singh Deo Vs. Babu Ganesh Prasad Bhagat and Others, , wherein it was held that the word "resides" in s. 33(1)(a) of the Indian Registration Act 1908, contemplates not only permanent residence but also temporary residence, is not applicable in the context of the present statute. Similarly, the cases under s. 488 of the Cr. PC, 1898, wherein it has been held that even temporary residence of a husband gives jurisdiction to the Magistrate to entertain a petition under s. 488 of that Code, are not applicable. As noticed above, the expression "person resident in India" is to be read in the context and purpose of the Act of 1947.

25. Now, let me advert to the preliminary objection raised by the respondents regarding the maintainability of the appeals.

26. It is evident that the relevant time, the Act of 1947 was in force. The adjudication proceedings were held by the Director under that Act at New Delhi and were concluded by his order of May 30, 1970. The first appeal, though preferred under the provisions of the old Act, yet since the new Act of 1973 had come into force in the meantime (by virtue of s. 81 of that Act), It was heard and disposed of by the Board at Delhi under the provisions of the 1973 Act. It is no doubt true that now because of the amendment of the Act, the High Court where the appeal lies is the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business. In the present case, however, it is admitted that the appellants are no longer residing in India; they have since left this country. In the facts and circumstances of this case, it is urged on behalf of the respondents that for purposes of filing and prosecuting these appeals, the appellants are ordinarily residents of Bombay.

27. It is admitted that the second appeal provided under the Act of 1947 on a question of law against the Board's decision could be filed in this court. Now, however, it is up to the aggrieved party to file an appeal in the High Court within the jurisdiction of which he resides or carries on business or personally works for gain. Under Explan. II to the said s. 54 where the Central Government is the aggrieved party, it has to file an appeal in the High Court within the Jurisdiction of which the respondent or in a case where there are more than one respondents, any of the respondents ordinarily resides or carries on business or

personally works for gain.

28. The underlying idea manifest is that under Expln. I, an aggrieved party is left to choose the High Court where to prefer an appeal either at the place of his (a) residence, or (b) business; and under Expln. II, it is obligatory on the Central Government to file an appeal only in that high Court within whose jurisdiction the respondent ordinarily resides or carries on business. But the present is a case where the aggrieved party is no longer in India and was never resident of India. Because of Expln. I, is he to file an appeal only in the Bombay High Court or is it open to him to file an appeal in this court after the decision of the Board which rejects his appeal at New Delhi ? This Expln. Appears to have been inserted for the benefit of the aggrieved party and cannot be read so rigidly as is being sought to be interpreted by Mr. Wadhwa. If he is right, then the appeal of a foreign national who had come to India as a tourist and was held guilty for contravening the provisions of the Act would not be maintainable in any High Court because he nowhere "ordinarily resides" or "carries on business" or "works for gain".

29. It is not Mr. Wadhwa's case that wherever an offender under this Act is apprehended, that would become his place of ordinary residence. Generally speaking, this difficulty would not arise in case of residents of India. It may arise in a case where the offender is a non-resident of India. He may choose to file the appeal in this court after the decision of the Board which is situate in Delhi. In such a case, challenge to the decision of the Board taken to Delhi is maintainable in this court.

30. There is another aspect. These appeals were filed in the year 1975 and admitted to regular hearing. It was open to the respondents, if they were so advised, to have raised the objection immediately after service of the notice of the appeals. They chose not to do so. In my view, it is not in the interests of justice at such a late stage that the memorandum of appeals be returned so that they may be filed in the Bombay High Court as suggested by Mr. Wadhwa, particularly as I have heard arguments on merits. Accordingly, in the peculiar facts and circumstances of this case, I hold that this court has jurisdiction to hear these appeals.

31. In view of my discussion above, the orders of the Board with regard to the contraventions, except for the one relating to traveller cheques (show cause notice No. II(a)) are set aside. The appeal of Mr. Mehta is thus partly accepted.

32. Mrs. Mehta's appeal (Criminal Appeal No. 121 of 1975) is also allowed.

33. Fines except with regard to Rs. 5,000 imposed on the charge of possessing traveller cheques by Mr. Mehta, if already paid, will be refunded.