

(1990) 10 KAR CK 0004

In the Karnataka High Court

Case No : Writ Petition No's. 6322 to 6326 of 1983

Mrs. Jacqueline Chandani

APPELLANT

Vs

Deputy Director, Enforcement Directorate, Madras and
another

RESPONDENT

Date of Decision : 05-10-1990

Acts Referred:

Citizenship Act, 1955 — Section 5

Foreign Exchange Regulation Act, 1973 (FERA) — Section 14, 33 (2), 8 (1)

Citation : AIR 1991 Kar 194 : (1991) CriLJ 1408 : (1991) 32 ECC 332

Hon'ble Judges : H.G. Balakrishna, J

Bench : Single Bench

Advocate : G. Chander Kumar, for the Appellant; D.V. Shylendrakumar, Central Govt. Standing Counsel, for the Respondent

Judgement

1. Action is brought by the petitioner for quashing the order under Annexure-G dated 27-12-1982 passed by the Deputy Director, Enforcement Directorate, Madras (respondent-1) as well as the Notification issued by the Union of India (respondent-2) under Annexure-H dated 21-5-1979 published in Gazette of India Part-II dated 2-6-1979 besides a writ of prohibition restraining the respondents from enforcing the provisions of Ss.8(1), 14 and 19(1)(e) of the Foreign Exchange Regulation Act, 1973.

2. The material facts are that the petitioner is a citizen of United States of America (U.S.A.) by birth and origin holding an U.S. Pass Port. She was married in 1967 to one Jagdish Chandani of Indian origin when he was permanently residing in U.S.A. He shifted his residence from U.S.A. to India by the end of 1966. It was during his visit to U.S.A. in 1967 that the marriage took place.

3. Before the marriage of the petitioner, she was residing with her parents in U.S.A. and her parents are citizens of America by birth and origin. Prior to her marriage, she was employed and all her savings from her earnings were deposited from time to time by her in her Bank account maintained with Winters

National Bank and Trust Company, Dayton Ohio, U.S. A. and the operation of the accounts continued even subsequent to her marriage. After her marriage, she did not renounce her citizenship of America and when she came to India, she registered herself as a foreigner under the Foreigners Act, 1946. Her Visa is being extended from time to time by the concerned authorities in India. She claims that she is a citizen of U.S.A. and not India and that she cannot be treated as a citizen of India even under the provisions of the Citizenship Act, 1955 and the Rules made thereunder.

4. The Assistant Director, Enforcement Directorate, Bangalore, searched the premises of M/s. System Manufacturing Limited, No. 1A, 2nd Phase, Peenya Industrial Area, Tumkur Road, Bangalore-22, as well as the residential premises of the husband of the petitioner at No. 385, Rajmahal Vilas Extension, Bangalore-80, on 10-9-1981. At the time of the search, the petitioner was not in India and she was residing at Dayton, Ohio, U.S.A. with her parents. Several documents were seized along with some files including a diary belonging to the petitioner which reflected maintenance of account by her in her name and also in the name of her minor children with witness National Bank and Trust Company, U.S.A. It is stated that the petitioner was maintaining this account as a foreign citizen by virtue of the general exemption granted under Notification No.1/3/E.C/73 dated 15-6-1977 subsequently amended by Notification No. 1/ 71/E.C/75 dated 31-8-1977. Under para (iii) of the said notification, maintenance and operation of any account in foreign currency outside India by a foreign citizen who is resident in India temporarily, is permissible. Therefore, it is stated that the petitioner did not seek any special permission to do so from the Reserve Bank of India.

5. The documents which were seized on 10-9-1981 revealed that the petitioner was holding 12 shares of General Motors Stock, U.S.A. which she had purchased when she was employed in U.S.A. prior to 1966. In pursuance of the search made by the authorities, a statement was recorded from the husband of the petitioner on 21-9-1981 whereas the search took place on 10-9-1981. In the statement, the husband of the petitioner confirmed that his wife had remained to be the citizen of U.S.A. and that her stay in India was governed by the provisions of the Foreigners Act, 1946 and the Rules thereunder. He also stated that the petitioner was presently staying with her parents at Ohio, U.S.A. and it is only she who would be in a position to explain her account which has been maintained by her in U.S.A. On 18-1-1982, a directive was issued by the Assistant Director, Enforcement Directorate, Bangalore, under S. 33(2) of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "the Act") asking the petitioner to furnish all such material particular and details mentioned in the schedule appended to the notice. The directive was addressed to the petitioner to her address at Ohio, U.S.A.

6. On receipt of the above directive, the petitioner returned to India on 25-1-1982 and submitted the information called for personally at the Office of

the Assistant Director, Enforcement Directorate, Bangalore, on 27-1-1982. Her statement was also recorded by the Enforcement Officer on 27-1-1982.

7. Thereafter followed six show cause notices from respondent-1 dated 30-8-1982 to the petitioner imputing violation of certain provisions of the Act. It is stated that, out of the six show cause notices, proceedings were dropped by respondent-1 in regard to one of the show cause notices.

8. The petitioner had submitted her reply to each of the show cause notices on 15-10-1982. Her explanation was that she being a person of foreign origin and a citizen of U.S.A. temporarily staying in India, her stay in India being controlled by the limited period of Visa issued to her and she being registered as a foreigner holding a Pass Port issued by the U.S. authorities, has no intention whatever permanently residing in India particularly since she was the only heir to her parents who reside permanently at Ohio, U.S.A. She took the stance that she cannot be treated as a residence in India and, therefore, neither the provisions of the Act were applicable to her nor the notifications issued thereunder. Even otherwise she claimed exemption under para (iii) of the notification dated 15-6-1977 vide Annexure-A. She maintained that the maintenance of account by her in the country of her home town was under a bona fide belief that she was entitled to do so under the law. She further asserted that even otherwise the provisions of S. 8(1) of the Act were inapplicable to her since there was no allegation against her of lending foreign exchange by her within the meaning of the explanation to S. 8(1) of the Act and she also specifically pointed out that Ss. 14 and 19(1)(e) of the Act were not applicable to the facts of her case since she had acquired the shares long prior to the commencement of the Act.

9. By order dated 27-12-1982 dispatched on 17-2-1983 holding the petitioner guilty of charges, R-1 penalised her in a sum of Rs. 26,500/- in respect of the five show cause notices.

10. The explanation offered by the petitioner was repudiated solely on the ground that the notification issued by the Government of India in No. GSR 745 dated 21-5-1979 under Ss.8(1) and 14 of the Act contemplated under explanation (c) that "a wife of an Indian citizen or of a person of Indian origin shall be deemed to be a person of Indian origin even though she is a foreign citizen of Non-Indian origin". Applying this explanation, the petitioner was held to be person permanently resident in India and, therefore, guilty of the charges made against her. It was a common order passed by respondent-1 in respect of all the five show cause notices and the same is challenged in these writ petitions under Annexure-G. Annexure-H is a copy of the notification No. GSR 745 dated 21-5-1979 which is also assailed in this writ petition.

11. The contention on behalf of the petitioner is that the provisions of the Act are not applicable to the persons who are non-citizens of India either residing in India or outside India and that the non-citizens who are residing in India are governed by the provisions of the Act provided such persons are found to be

"persons resident in India", as defined in S. (p) of the Act to the extent it is relevant.

12. The contention is that neither S. 1(3) nor S. 2(p) of the Act deems such non-citizens to be citizens of India by origin and that no such legal fiction is created under the law of Foreign Exchange. It is also contended that notification No. GSR 745 dated 21-5-1979 issued under Ss. 8(1) and 14 of the Act is beyond legislature competence under Ss. 1(3) and 2(p) of the Act and, therefore, the notification under Annexure-H is ultra vires the provisions of the Act.

13. To therefore the contention, it is urged that neither Arts. 5 to 10 of the Constitution of India nor Ss. 3 to 6 of the Citizenship Act, 1955 provide for status of citizenship by origin to the wife of an Indian citizen and that the notification issued is violative of the provisions of Arts. 5 to 10 of the Constitution and also Ss. 3 to 6 of the Citizenship Act and the Rules thereunder.

14. According to the learned counsel for the petitioner, S. 5 of the Citizenship Act allows option to the women who are or have been married to citizens of India to apply for and register as citizens of India and such persons can only be called as citizens of India by registration and not by origin and further nowhere the law provides that such women by fiction of law can be regarded as citizens of India by origin contrary to what is sought to be made out by notification dated 21-5-1979 (Annexure-H) and, therefore, the notification is bad in law.

15. It is contended that the petitioner being undisputedly a citizen of U.S.A. is entitled to operate and maintain foreign account in U.S.A. being a temporary resident in India as permitted by the Reserve Bank of India under notification Annexure-A dated 31-8-1977 and the order of penalty is illegal and devoid of jurisdiction. As regards penalty, another contention is that the proceedings under the Act being quasi criminal in nature, the burden of proving violation beyond reasonable doubt is on the respondents who have failed to discharge the same by adequate evidence on record to support penalisation. Penalty is also questioned on the ground that it has been imposed in a routine manner without due consideration of the legal principle underlying imposition of penalty.

16. Regarding availability of alternate remedy, it is contended that the remedy provided under the Act is not efficacious since the challenge is to the vires of notification under Annexure-H issued by respondent-2.

17. In the statement of objections filed on behalf of the respondents, the maintainability of the writ petition without impleading the Reserve Bank of India which issued the notification under Annexure-H is questioned.

18. It is also contended that there is no substance in the claim of the petitioner that she being a citizen of U.S. A. cannot be treated as a resident of India and that the Citizenship Act has no relevance to the question involved. It is contended that the restrictions imposed under S. 8 of the Act and the power vested in the Central Government under S. 14 of the Act as well as S. 19(1)(e) of

the Act prohibit the acquisition, holding or disposal of any foreign security, except with the general or special permission of the Reserve Bank and that these provisions have been violated by the petitioner. The main thrust of the argument is that there can be no doubt that the petitioner comes within the definition of "person resident in India" as defined under S. 2(p) of the Act and, therefore, she is bound by the other provisions of the Act. It is also submitted that if there is any valid basis of justification to hold that the petitioner does not come within the definition of S. 2(p) of the Act, the impugned action cannot be sustained. Emphasis is laid on the fact that the petitioner is staying in India for considerable length of time at her choice with her spouse in India and that this factor is sufficient to bring her within the ambit and jurisdiction of the Act, It is denied that the Department has failed to prove beyond reasonable doubt that the petitioner has violated the provisions of the Act. But, on the other hand, the Enforcement Officer has considered the evidence of the case, the statement made by the petitioner and her husband as well as the circumstances and the conduct of the petitioner before reaching his finding. Lastly it is contended that S. 52 of the Act provides the remedy by way of appeal and not having exhausted the same, the petitioner cannot invoke the writ jurisdiction under Art. 226 of the Constitution.

19. The question is whether the petitioner is a "person resident in India" as defined under S. 2(p) of the Act and whether the impugned action should fail as legally impermissible.

20. The Act has its origin in the Foreign Exchange Regulation Act, 1947 (7 of 1947) originally enacted as a temporary measure. By Act 39 of 1957, it was permanently placed on the Statute Book and thereafter it has been subjected to several amendments. Based on long experience, the Directorate of Enforcement and the Reserve Bank of India suggested to the Government of India the need for regulating many other matters, the entry of foreign capital in the form of branches and concerns with substantial non-resident interest in them apart from the employment of foreigners in India. The suggestion impressed the Central Government. A Study Team was appointed by the Government of India on the recommendation of the Public Accounts Committee in its 56th Report of 1968 in order to study the question of "Leakage of Foreign Exchange through Invoice Manipulation", The report of the Study Team was received by the Government of India in June, 1971. In April, 1972, the Law Commission submitted the 47th Report on "Trial and Punishment of Social and Economic Offence" to the Government of India. On a consideration of both the reports, a bill was drafted and placed before the Parliament with the object of introducing the changes felt necessary for the effective implementation of Government of India policy and for removing difficulties which were experienced in the actual working of the Act. Thus emerged the Act dated 19-9-1973.

21. The Act extends to the whole of India and it applies also to all citizens of India outside India and to branches and agencies outside India of companies or

bodies corporate, registered or incorporated in India. The Act came into force on 1-1-1974 vide Notification No. S.O.3043 dated 27-10-1973 by notification in the Official Gazette of India.

22. Section 2 of the Act deals with the definitions and S. 2(p) of the Act defines "person resident in India" which 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;

(11) xxx xxx

(iii) a person, not being a citizen of India, who has come to, of stays in, India, in either cases--

(a) and (b) xxx xxx

(c) for staying with his or her spouse, such spouse being a person resident in India, or

(d) xxx xxx"

23. Applying the above provision to the facts of this case, what requires examination is whether the petitioner being admittedly a non-citizen of India and being undisputedly a permanent citizen of U.S.A., whether she falls within the definition of S. 2(p)(iii) of the Act.

24. The petitioner is a person who is not a citizen of India has come to India for staying with her spouse temporarily and her spouse is not only a person resident in India but also a citizen of India. It is to be seen from the definition of S. 2(p) (i) of the Act that person resident in India means a citizen of India, who has, at any time after the 25th day of March, 1947, been staying in India permanently, but does not include a citizen of India who has gone out of, or stays outside, India in either case -- for the purpose stated in sub-cls, (a), (b) and (c) of S. 2(p) (i) of the Act. The petitioner does not fall within the said definition. Nor does the petitioner fall within the definition of S. 2(p)(ii) of the Act. But the question is whether the petitioner comes within the meaning of S. 2(p)(iii)(c) of the Act since she is a citizen of U.S.A. and obviously not a citizen of India who has been staying temporarily in India under the Visa granted by the Reserve Bank of India for a limited duration during each year of her stay in India, the purpose of her coming to India being for the purpose of staying for a limited duration of time

with her spouse who is a citizen of India. I am of the opinion that the petitioner does not satisfy all the ingredients set out in the definition of S. 2(p)(iii)(c) of the Act, and therefore, she is not a person resident in India within the meaning of the Act.

25. According to S. 1(3) of the Act, the Act applies also to all citizen of India outside India and to branches and agencies outside India of companies or bodies corporate, registered or incorporated in India. From this provision, it is clear that the Act applies only to citizens of India and even to those citizens of India who are outside India. Undeniably the petitioner is not a citizen of India at all. It is no doubt true that the Act extends to the whole of India and also to person resident in India, but it does not mean that the Act brings within its sweep non-citizens of India including persons temporarily resident in India within the meaning of S. 2(p)(iii)(c) of the Act. Therefore, I am of the view that for the purpose of application of the Act, the petitioner being temporary resident in India is excluded from its operation. The stay in India of the petitioner is temporary in nature. Being a non-citizen of India, she has obtained Visa from the Reserve Bank of India for her temporary stay with her spouse. Each time she wants to stay with her spouse in India, it is mandatory that she should obtain the Visa from the Reserve Bank of India and that she has been staying for specified durations only under the Visa granted by the Reserve Bank of India is not in dispute.

26. The impugned order under An-nexure-G dated 27-12-1982 passed by respondent-1 has to be viewed against the statutory back-ground. In para-9 of the said order, the discussion leading to the findings is of material relevance. It would be better to reproduce the discussion for better appreciation which reads as follows:--

"..... Before I deal with the merits of individual Show Cause Notice, I would like to take a decision first on the arguments advanced by the Learned Advocate with regard to the residential status of Mrs. Jacqueline Chandani. The Learned Advocate has vehemently argued that Mrs. Jacqueline Chandani (hereinafter referred to as Mrs. Chandani) who is a citizen of US has a permanent "right of abode". She has also registered herself as a foreigner under foreigners rules. Her Visa in India is being extended from time to time. He stated that the stay of Mrs. Chandani is also periodically verified by the Commissioner of Police. The Learned Advocate has also cited the decision in the case of Firm Ganga Ram Kishore Chand Vs. Firm Jai Ram Bhagat Ram, with regard to the term resident and dwelling. He also cited the decision in T. J. Poonen v. Rathi Varghese AIR 1967 Ker 10 (FB) in support of his stand about the residential status, i.e. there should be intention to stay for an indefinite period. I have considered the above submissions and also the decisions quoted by the learned advocate. It is an admitted fact that Mrs. Chandani is a citizen of US. According to her statement she has been staying in India from 1967 onwards except for a short spell, during which time she was in U.S. He also cited the definition under S. 2(p)(c) and

stated that unless Mrs. Chandani made up her mind to stay in India permanently she cannot be treated as a person permanently resident in India. There is force in the argument of the learned advocate but I am not in a position to accept the argument of the learned advocate in view of the Notification No. 1/25/EC/78 GSR 745 dated 21-5-1979 issued under Ss. 8(1) and 14 of the Foreign Exchange Regulation Act, 1973....."

27. Respondent-1 was not justified in holding that the provisions of the Act are applicable to the petitioner having taken the view that there is force in the argument of the counsel for the petitioner that she cannot be treated as a person permanently resident in India unless the petitioner herself made up her mind to stay in India permanently. The mere fact that the petitioner has been staying in India with her spouse for several years but for specified limits during each year under the Visa granted by the Reserve Bank of India for each year does not render the stay of the petitioner in India permanent and she cannot be treated as a person permanently resident in India.

28. The notification under Annexure-A is issued by the Ministry of Finance, Department of Economic Affairs, Government of India, dated 31-8-1977. It is seen from the said annexure that the order contained in it shall not apply to maintenance of, and operation of, any account in foreign currency maintained outside India, by foreign citizens in, or resident in, India but not permanently resident therein, vide proviso (iii). It is clear from this proviso that the order contained in Annexure-A does not apply to the petitioner since she is a foreign citizen (American citizen) residing with her spouse but not permanently resident in India. I do not see any justification for respondent-1 to hold that the order under Annexure-A is applicable to the petitioner because the said order does not prohibit maintenance of, and operation of, any account in foreign currency maintained by the petitioner outside India.

29. Annexure-H is a notification issued under sub-sec. (1) of S. 8 of the Act as an amendment to its earlier notification No. F.E.R.A.3/74--R.B. dated 1-1-1974. This notification is issued by the Reserve Bank of India whereas Annexure-A is issued by the Ministry of Finance, Department of Economic Affairs, Government of India. Under explanation (c) it is provided that a wife of an Indian citizen or person of Indian origin shall be deemed to be a person of Indian origin, even though she is a foreign either of non-Indian origin. It is this explanation which is sought to be applied to the petitioner notwithstanding the fact that she is only an American citizen (non-citizen of India) staying with her spouse in India as a person resident in India temporarily. Proviso (iii) to Annexure-A is not only inconsistent with the definition of "person resident in India" given under S. 2(p) of the Act but, if accepted, renders the definition nugatory. I am of the opinion that a notification issued in exercise of the powers conferred by S. 14 of the Act, cannot alter the statutory definition under the Act. The Reserve Bank of India is not invested with the power to legislate on the definition of "person of Indian origin" which runs counter to the statutory definition of "person resident in India"

within the meaning of S. 2(p) of the Act. Explanation (c) of Annexure-H is not only irreconcilable, but also would reduce the definition of "person resident in India" under S. 2(p) of the Act ineffective. This is impermissible for want of legislative competence on the part of the Reserve Bank of India, What the definition of S. 2(p) of the Act does not permit is sought to be achieved indirectly by explanation (c) of Annexure-H. It is to be observed that a notification can only explain the section, but it cannot go so far as to enlarge the provisions of the statute. From this point of view also, the notification dated 21-5-79 in question is per se ultra vires the Act, What is contemplated under S. 2(p) of the Act is the element of residence or staying. The concept is one of residence and not domicile. The impugned notification introduces the concept or element of domicile which is foreign to the Act itself. None of the provisions of the Act including the scheme of the Act makes any reference to the element of "domicile". It is the intention of the legislature that only residence has to be taken into account. The element of domicile is extra statutory which cannot be imported into the provisions of the Act particularly in view of the fact that the Act does not provide for a deeming provision. The term "domicile" is not synonymous with the term "residence". In fact "domicile" is governed by the Citizenship Act, 1955 and not under the Act. In tact, even if the provisions of the Citizenship Act are applied to the petitioner, the petitioner does not answer the definition of "citizenship" as contemplated under Ss. 3 to 6 at all. This is because the petitioner is a citizen of U.S.A.

30. Since I have taken the view that the notification under Annexure-H is ultra vires the Act, it is not necessary for me to refer to the legality of penalisation of the extent to which penalisation is permissible by applying the principle of proportionality. Nor is it necessary to go into the question of improper exercise of power of penalisation.

31. Since the petitioner has challenged the vires of the impugned notification and the order flowing therefrom, I am unable to accept the contention of the learned counsel for the respondents that alternate remedy is a bar and that the writ petition is not maintainable for not having exhausted the remedy.

32. In the result, for the foregoing reasons, the writ petitions are allowed and the impugned order under Annexure-G in so far as it relates to the show cause notices marked as Annexure-E and E1 to E4 is quashed. The Notification issued by respondent-2 under Annexure-H is also quashed. Consequently, respondents-1 and 2 are hereby prohibited from enforcing the provisions of Ss. 8(1), 14 and 19(1)(e) of the Foreign Exchange Regulation Act, 1973 in so far as the petitioner is concerned.

33. Petitions allowed.