(2011) 01 KL CK 0095

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 11277 of 2007 (P)

Ms. Maria Angela Fernhof APPELLANT

Vs

The District Collector and Others RESPONDENT

Date of Decision : 31-01-2011

Acts Referred:

Foreign Exchange Management Act, 1999 — Section 2

Citation : (2011) 01 KL CK 0095

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : Santhosh Mathew, for the Appellant; P. Jacob Varghese, S.C., for the Respondent

Judgement

Antony dominic, J.—Petitioner is a Swiss National. Ext.P2 is the residential permit that was granted to the Petitioner in the year 1997. According to the Petitioner, during her stay in India, by Exts.P3 and P4 of 10/11/2003, she purchased 105 cents of land in Thanneermukkam Village.

2. Although initially her residential permit was for her stay in Kumali in Idukki District, subsequently, she made Ext.P5 representation to the Foreign Registration Officer, Alleppey based on which, order dated 29/6/2004 was passed permitting the Petitioner to stay in Alleppey District upto 6/5/2005. According to the Petitioner, during this period, she decided to dispose of her property, and at that time, a doubt was entertained whether the very purchase itself was regular, and therefore, she sought clarification from the RBI as to whether she answered the description of person resident in India as defined in Section 2(v) of Foreign Exchange Management Act (FEMA). Accordingly, RBI issued Exts.P7 and P8, which clarified that a person residing in India for more than 182 days during the course of the preceding financial year and satisfying the other conditions mentioned in Section 2(v) of the Act could acquire property without any further permission from the RBI.

3. According to the Petitioner, during that period, she approached the 2nd

Respondent for disposal of the property and on a report made by the Superintendent of Police, Alappuzha, the District Collector issued Ext.P14 informing the 2nd Respondent that, in view of the pendency of an enquiry against the Petitioner, documents concerning the property mentioned in Exts.P3 and P4 shall not be registered. It is Ext.P14 that led the Petitioner to file this writ petition seeking to quash the said order, to direct the authorities to register the sale deed and to permit the Petitioner to sell the property covered by Exts.P3 and P4.

4. At the stage of admission, this Court passed interim order dated 02/04/2007 directing that documents will be registered, but however, the Petitioner shall deposit the entire sale proceeds before the 1st Respondent. Against the said order, Petitioner filed WA No. 1032/07, in which the aforesaid interim order was modified and the condition requiring deposit of the sale proceeds was confined to ` 5 lakhs. It is stated that, maintaining the aforesaid order, writ appeal itself was disposed of by judgment dated 5/10/2007. Accordingly, document was registered and ` 5 lakhs has been deposited and at this stage, all that remains to be considered is whether the Petitioner is entitled to return of the aforesaid ` 5 lakhs. Answer to this question will depend upon the finding whether the Petitioner could be considered as a person resident in India, during the relevant period.

5. In the counter affidavit dated 4/2/2008 filed by the 1st Respondent, it is stated that the Petitioner has not resided for more than 182 days in India during the preceding financial year to the year of purchase viz., 2002-03, and therefore, the purchase of 105 cents of land in Thanneermukkam Village of Cherthala Taluk as per Exts.P3 and P4 documents is invalid and against the FEMA Rules. Thereupon Petitioner filed reply affidavit. In para 7 of the reply affidavit, after giving details of her stay in India during the aforesaid period, Petitioner has stated that, during the period from 01/04/2002 to 31/3/2033, she was in India for 288 days. As far as her departure outside country during the aforesaid period is concerned, she has explained in para 6 of the affidavit thus:

It is submitted that the Petitioner''s daughter Tanya Bahn was pregnant and her due date for delivery was the last week of March and therefore the Petitioner left India on 24/3/2002 and her grandson Ocean was born on 30/3/2002. After being with the grand child and her daughter for a month the Petitioner returned to India on 30/4/2002. Thereafter on 15/10/2002 the Petitioner went to visit her daughter and son and to attend certain family functions and returned to India on 18/11/2002. On 16/3/2003 the Petitioner left India to visit her children and returned on 18/4/2003. Subsequently on 27/7/2003 the Petitioner went to visit her children and returned on 7/9/2003.

6. Taking note of the aforesaid averments in the counter affidavit and the reply affidavit, this Court passed order dated 30th of January, 2010 directing that the Petitioner will appear before the 1st Respondent and the 1st Respondent will verify the details as averred in the affidavit along with the entires in the passport

of the Petitioner. It was ordered that, on such verification, the 1st Respondent will file a report in the form of an affidavit before this Court. Accordingly, 1st Respondent has filed affidavit dated 6th of February, 2010, where after stating that her stay in India during the financial year 2002-03 was not continuous, 1st Respondent has stated that, going by the endorsement in the passport, the Petitioner was in India during the aforesaid period for more than 182 days.

7. From the above, therefore, it is obvious that during the financial year 2002-03, Petitioner was in India for more than 182 days and the only question is whether her stay during the said period should be continuous to satisfy the requirements of Section 2(v) of the Foreign Exchange Management Act to acquire the status of a person resident in India.

8. First of all, a reading of Section 2(v) of the FEMA does not indicate that a person should have continuous stay in India to acquire the status of resident in India. Secondly, instructions furnished by the 3rd Respondent to its Senior Counsel also indicates that even according to the Reserve Bank, stay need not be continuous. Therefore, the Petitioner having stayed in India for more than 182 days during the financial year 2002-03, the financial year preceding the year of acquiring the properties covered by Exts.P3 and P4, had entitlement to dispose of that property also without any further orders from the 3rd Respondent or any other authority.

9. In that view of the matter, Ext.P14 order issued by the 1st Respondent preventing the 2nd Respondent from registering the document was clearly erroneous. Therefore, that order deserves to be quashed and I do so. In view of the above, Petitioner is entitled to be disbursed ` 5 lakhs deposited by her with the 1st Respondent. Therefore, it is ordered that, on the production of a copy of this judgment, 1st Respondent will ensure that the amount of ` 5 lakhs deposited by the Petitioner along with the interest accrued thereon, is released to her or her representative. This shall be done as expeditiously as possible, at any rate within 4 weeks of production of a copy of this judgment.

Writ petition is disposed of as above.

