

(2025) 06 BOM CK 0128

In the Bombay High Court

Case No : Fera Appeal Nos. 57, 58, 59, 60, 61, 62 Of 2006

Neha Shroff

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 26-06-2025

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 2(p), 2(q), 9, 9(i)(a), 9(i)(e), 19, 29, 40, 59, 68(i), 71
Evidence Act, 1872 — Section 114

Citation : (2025) 06 BOM CK 0128

Hon'ble Judges : M.S. Sonak, J;Jitendra Jain, J

Bench : Division Bench

Advocate : B. Seshagopalan, Lorna Carvalho, Vinit Jain, Neeta Masurkar, Neeta Masurkar, Y. R. Mishra, Neeta Masurkar

Final Decision : Dismissed

Judgement

M.S. Sonak, J

1. Heard learned Counsel for the parties.

2. All these Appeals challenge the common order dated 30 October 2000 made by the Special Director, Enforcement Directorate (ED) and the common order dated 18 November 2005, made by the Appellate Tribunal for foreign exchange (Tribunal) dismissing the Appeals instituted by the Appellants herein against the Special Director's common order dated 30 October 2000. The two orders shall hereafter be referred to as the impugned orders.

3. These Appeals were admitted by a common order dated 20 September 2006 on the following questions of law: -

“(1) Whether the provisions of Section 9(i)(a) are attracted only when the person resident in India has made any payment to or for the credit of any person outside India provided the same is made in accordance with the general and special exemption from the provisions of that Section which may be granted

conditionally or unconditionally by the Reserve Bank of India ?

(2) Whether the penalty imposed was without any basis, more particularly as it was in absence by the Respondents to show loss of foreign exchange or any contumacious conduct of the Appellant ?

(3) Whether illustration (g) under section 114 of the Evidence Act would be applicable to the case of the Appellants more particularly in view of the fact that the complete record of the travel of the Appellants daughters during the period of the show cause Notice, including the Visas issued to them by the authorities of the United States of America were placed before the Appellate Tribunal ?

(4) Whether provisions of section 9(i)(a), 9(i)(e) read with Section 68(i) of the Foreign Exchange Regulations Act would be applicable to the person resident in India going abroad on student visa ?

(5) Whether the terms 'person resident in India' ought to be interpreted as provided for in Clause 1.28(ii) A of Chapter I of Exchange Control Manual, 1993 ?

(6) Whether Section 114 of the Indian Evidence Act requires to be invoked whilst going into the question of principles of construction of Section 2(p) & (q) of the Foreign Exchange Regulations Act ?"

4. FERA Appeal Nos. 57 of 2006, 61 of 2006, and 62 of 2006 have been instituted by Neha Shroff, Kiran Shroff, and Kanan Shroff (the Shroff daughters), daughters of the late

Kishor D. Shroff and his wife, Smt. Ranjan K Shroff. The impugned orders impose a penalty of Rs. 41 Lakhs on each of the Shroff daughters.

5. FERA Appeal Nos. 58 of 2006 and 59 of 2006 are instituted by Smt. Ranjan K Shroff, in her capacity as the legal representative of late Kishor D Shroff, to challenge the impugned orders to the extent they impose a penalty of Rs. 25,80,000/- on late Kishor D Shroff.

6. FERA Appeal No. 60 of 2006 is instituted by Sujay Trading Corporation Pvt Ltd, challenging the impugned orders to the extent they impose a penalty of Rs. 8,50,000/- upon the Appellant Company.

7. The common impugned orders, dated 30 October 2000 and 18 November 2005, were also concerned with Ditco Securities Pvt Ltd, Dharmesh P. Shet, and Bhavesh P. Shah, who had instituted FERA Appeal Nos. 778 of 2000, 779 of 2000 and 780 of 2000 before the Tribunal. However, there is no clarity whether these three parties preferred any Appeals and, if so, the status of such Appeals. For the present, therefore, we are concerned with the Appeals preferred by the Shroff daughters, their mother, Smt. Ranjan K Shroff (as legal representative of Kishor D Shroff) and M/s. Sujay Trading Corporation Pvt Ltd, of which the parents of the Shroff daughters, namely the late Kishor and Smt. Ranjan were directors.

8. The core issue involved in all these Appeals is whether the Shroff daughters

could be regarded as "person resident in India" as defined under Section 2(p) of the Foreign Exchange Regulation Act, 1973 (FERA) as contended by them or whether they were "person resident outside India" as defined under Section 2(q) of FERA for the relevant period referred to in the show cause notices and the impugned orders. The issue of whether there was a violation of the FERA provisions will depend on the determination of this core issue.

9. The Special Director, ED and the Tribunal have concurrently held that the Shroff daughters were not "persons resident in India" as defined under Section 2(p) of the FERA. Instead, the Special Director and the Tribunal have concurrently held that the Shroff daughters were "persons resident outside India" as defined under Section 2(q) of the FERA. Accordingly, the Special Director, ED and the Tribunal have concluded that the financial transactions in which the Appellants were involved concerning the sale and purchase of shares of M/s. Ditco Securities Pvt Ltd, an Indian company, without the prior approval of the Reserve Bank of India (RBI), constituted a violation of the provisions of the FERA. Based on such findings and conclusions, the impugned orders have imposed penalties upon the Appellants in FERA Appeal Nos. 57 of 2006, 60 of 2006, 61 of 2006, and 62 of 2006, and Kishor Shroff, upon whose demise, his wife, Ranjan Shroff, has instituted FERA Appeal Nos. 58 of 2006 and 59 of 2006.

10. As such, learned Counsel for the parties agreed that substantially common issues of law and fact arise in all these Appeals and therefore, they could be disposed of by a common judgment and order. Even otherwise, these Appeals are directed against the impugned common orders dated 30 October 2000 and 18 November 2005 made by the Special Director, ED and the Tribunal. Since the core issue in all these Appeals is the same, the learned Counsel for the parties agreed that FERA Appeal No. 57 of 2006 instituted by one of the Shroff daughters, i.e., Neha Shroff, may be treated as the lead Appeal. Incidentally, considering the substantially common issues of law and fact, the Coordinate Bench of this Court admitted all these Appeals by a common order dated 20 September 2006. Thus, even the questions of law formulated in all these Appeals are the same.

11. In FERA Appeal No. 57 of 2006, the allegation in the show cause notice dated 18 November 1999 was that in the year 1995, the Appellant who was alleged to be a person resident outside India purchased 5,62,600 shares of M/s Ditco Securities Pvt Ltd, a company based in Mumbai at the rate of Rs. 30/- per share for a total amount of Rs. 1,68,78,000/-without obtaining any permission from the Reserve Bank of India (RBI) thereby contravening the provisions of the FERA. Similar allegations were made in the show-cause notices issued to the other two Shroff daughters, namely Kiran Shroff and Kanan Shroff.

12. The Shroff daughters denied the allegations in the show cause notices. They contended that they were not persons resident outside India but were students pursuing their higher studies in the United States of America (USA). The Appellants pointed out that they were in the USA on a visitor or student visa.

Therefore, there was no necessity to obtain permission from the RBI for the purchase of shares in an Indian company. Primarily based on this defence, the Appellants submitted that there was no violation of any of the provisions of FERA.

13. The Appellants also referred to the founding of the "Kanan Trust" in or around 1975. They pointed out that the beneficiaries of this trust were the Shroff sisters, i.e. Neha, Kanan and Kiran. They pointed out that the investments in this trust were funded through the sale of shares and/or other assets and/or the withdrawal of sums from the three sisters' accounts. In the event of any shortfall or an emergent situation, funds were transferred through temporary loans by one of the parents, Kishor Shroff (now deceased) or Ranjan Shroff. During the relevant period referred to in the show cause notice, the Appellants submitted that there was a shortage of funds; therefore, their parents advanced temporary loans through a private limited company, M/S Sujay Trading Co., in which the parents were directors. Investigations were conducted, which involved searching the residential and business premises of the Appellants' parents and their chartered accountant, as well as the business premises of certain other individuals, including employees of M/S Sujay Trading Corporation Pvt Ltd. Their statements were recorded under the provisions of the FERA. The adjudication proceedings followed.

14. The Special Director, ED and the Tribunal, by the impugned common orders, concurrently rejected the Appellants' contentions. Hence, these Appeals, on the questions of law referred to above.

15. Mr. B Seshagopalan, the learned counsel for the Appellants, submitted that the Special Director and the Tribunal had misconstrued the provisions of Section 2(p) and 2(q) of the FERA. Also, he submitted that the provisions of which contravention was alleged have also been misconstrued. Accordingly, he submitted that the impugned orders warrant interference.

16. Mr. Seshagopalan submitted that the record shows that the Shroff daughters were citizens of India and were in the USA either on a student visa or a visitor's visa. The evidence regarding their educational pursuits was presented to the authorities. Income Tax and Wealth Tax were filed in India. B-1/B-2 Visas held by the Shroff daughters did not permit them to settle permanently in the USA. This crucial aspect was ignored. In short, Mr. B Seshagopalan submitted that the material on record established that the Shroff daughters were persons resident in India, and therefore, there was no question of even alleging any contravention of FERA. Mr. Seshagopalan relied on *RBI vs. Jacqueline Chandani* (1996) 86 Com.Cas. 231 (Kar) to support his arguments.

17. Mr. Seshagopalan submitted that the presumptions under Section 114 of the Evidence Act were not drawn or appreciated by the Special Director and the Tribunal. He submitted that unnecessarily, there was a reversal of the burden of proof. Based on these contentions, he submitted that there was clear perversity in the record findings that the Shroff daughters were not persons resident in

India, as defined under Section 2(p) of the FERA.

18. Without prejudice, Mr. Seshagopalan submitted that the provisions of Sections 9, 19, 29 or 68 of the FERA were not at all attracted in the context of the transactions alleged. He submitted that none of the ingredients of these provisions were fulfilled, and therefore, the imposition of penalties for the alleged contravention of these provisions was uncalled for. He submitted that the impugned orders warrant interference on these grounds as well.

19. Mr. Seshagopalan, without further prejudice, submitted that this was not a case where there was any loss of any foreign exchange or that the conduct of any of the Appellants was recalcitrant or contumacious. He submitted that in the absence of any such findings, no penalties should have been imposed. In any event, the fines imposed are grossly disproportionate.

20. For all the above reasons, Mr. Seshagopalan submitted that the impugned orders may be quashed and set aside.

21. Mr. Vinit Jain, Ms. Neeta Masurkar and Mr. Y.R.Mishra, the learned counsel for the Respondents, defended the impugned orders based on the reasoning contained therein. They submitted that these were the matters where the Special Director and the Tribunal, upon detailed evaluation of the material/evidence on record, had reached concurrent findings of fact. They submitted that there was no perversity in reaching such conclusions. Therefore, such findings of fact may not be interfered with in these Appeals, which are restricted only to questions of law as provided under Section 54 of the FERA.

22. The learned counsel for the Respondents pointed out that even the provisions of Section 2(p) and 2(q) of the FERA were quite clear and admitted of no ambiguities. They submitted that these provisions were applied to the facts on record, and the finding was reached that the Shroff daughters were not persons resident in India. Such a situation gives rise to no question of law, and therefore, these Appeals deserve to be dismissed.

23. The learned counsel for the Respondents referred to voluminous material on record, which the Special Director and the Tribunal considered. They submitted that given this material, the conclusion about the Shroff daughters being persons not resident in India was correctly reached, and such a conclusion warrants no interference.

24. The learned counsel for the Respondents submitted that there is no question of disproportionality involved, and such a question was not even formulated at the time of admission of these Appeals. They submitted that the Appellants were involved in economic offences and the penalties imposed are not excessive but proportionate. They pointed out that the Appellants had raised patently false defenses and had contravened the provisions of FERA with impunity. Therefore, considering all these aspects, there was no disproportionality involved in the penalties imposed on the Appellants.

25. The learned counsel for the Respondents also relied upon certain decisions which shall be considered during this judgment and order. Based upon the above submissions, the learned counsel for the Respondents urged the dismissal of all these Appeals.

26. The rival contentions now fall for our determination.

27. As noted earlier, even though several questions of law were formulated at the time of admission of these Appeals, the core question in these Appeals is whether the Shroff daughters, at the relevant time, could be regarded as persons resident in India as defined under Section 2(p) of the FERA or, whether they were persons resident outside India as defined under Section 2(q) of the FERA.

28. Section 2(p) of the FERA reads as follows:-

(p) "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;

(ii) a citizen of India, who having ceased by virtue of paragraph (a) or paragraph (b) or paragraph (c) of sub-clause (i) to be resident in India, returns to, or stays in, India, in either case?

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

(b) for carrying on in India a business or vocation in India, or

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

(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 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;

(iv) a citizen of India, who, not having stayed in India at any time after the 25th day of March, 1947, comes to India for any of the purpose referred to in paragraphs (a), (b) and (c) of sub-clause (iii) or for the purpose and in the circumstances referred to in paragraph (d) of that sub-clause or having come to India stays in India for any such purpose and in such circumstances.

Explanation.—A person, who has, by reason only of paragraph (a) or paragraph (b) or paragraph (d) of sub-clause (iii), been resident in India, shall, during any period in which he is outside India, be deemed to be not resident in India;

29. Section 2(q) of the FERA reads as follows:-

(q) "person resident outside India" means a person who is not resident in India;"

30. Thus, it is necessary to determine whether at the relevant time, the Shroff daughters were persons resident in India as defined under Section 2(p) of the FERA. If the evidence on record is sufficient to hold that the Shroff's daughters were persons resident in India at the relevant time, then, automatically, they would be excluded from the definition of "person resident outside India" under Section 2(q) of the FERA.

31. Ordinarily, one of the crucial tests for determining the question of residence is whether the Appellants had an animus manendi, or an intention to stay for an indefinite period at one place. If the person had such an intention, he could be said to reside there. (K. N. Mehta V. The Director of Enforcement 1982 Cri. L.J. 1916). This position is reflected in Section 2 (p) of FERA, which defines "person resident in India" to mean 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 for or on taking up of employment outside, or India, or for carrying on outside India a business or vocation outside India, or for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period.

32. The Shroff daughters contend that they were, at the relevant time, citizens of India and their residence in the USA was not for any employment or business purposes. They further contend that they were in the USA only for educational purposes on a student/tourist visa, and therefore, no circumstances existed as would indicate their intention to stay outside India for an uncertain period. Accordingly, the Shroff daughters contended that they were persons resident in India as defined under Section 2(p) of FERA. They contend that if this were so, there was no question of any violation of the provisions of the FERA.

33. At the relevant time, there is no dispute that the Shroff daughters were residing in the USA. There is no clear evidence suggesting that they were living in the USA for employment, business, or vocational purposes. Therefore, the question that arises for determination is whether the Shroff daughters were residing in the USA for any other purpose, in circumstances that would indicate their intention to stay outside India for an uncertain period.

34. The Special Director in the impugned order dated 30 October 2000, has inter alia referred to certain statements recorded under Section 40 of the FERA. Kishore Shroff, the father of the Shroff daughters (now deceased), in his statement recorded on 17 December 1997, admitted that all three of his daughters, namely Kanan, Neha and Kiran, are staying in the USA; that Kanan and Neha are married, and the younger daughter Kiran is studying in the USA. He admitted that Neha was married to Sanjay Bagai, a practising Chartered Accountant having his own consultancy firm in USA known as ZEIGRST Corporation Inc., San Francisco, USA.

35. In the replies filed to the show cause notice, it was admitted that Neha left for the USA in or about 1986 and was residing in the USA in 1996-1997 when the show cause notice alleged violation of the provisions of FERA. There was no assertion on behalf of Neha that she, at any time, returned to India or was staying in India. The occasional visits to India evidenced by the entries in passports show no intention to return and stay in India. The material on record thus establishes that Neha was married to Sanjay, who was an established Chartered Accountant in the USA, and that she was staying with her husband, Sanjay, from 1986 onwards. No material was produced by or on behalf of Neha that would indicate that she never intended to stay outside India for any uncertain period.

36. The position concerning Kanan is also not substantially different. The statements and the replies on record that have been considered by the Special Director also indicate that Kanan and her husband Vijay Jaychandran did enter USA as students in Architecture in or about 1994, but continued to stay without any intention of returning for an uncertain period. No material was produced by Kanan or on her behalf about her return to India along with her husband. Similarly, the statements and the replies which are considered by Special Director indicate that Kiran left for USA to pursue studies in or about 1992. No record is available concerning her return to India or her marital status. Instead, even the circumstances indicate that Kiran continued to stay in the USA for an uncertain period.

37. Mr. Shesagopalan tried to contend that the evidence or material on record was far from conclusive, and since penalties were imposed on the Appellants, the aspect of the Shroff daughters not being persons resident in India had to be proved by the Respondents beyond a reasonable doubt. He submitted that the burden was on the Respondents, and such burden has to be discharged by establishing beyond a reasonable doubt that the Shroff daughters were persons not resident in India at the relevant time. He submitted that it was for the Respondents to establish beyond a reasonable doubt that the Shroff daughters' residence in the USA was in circumstances as would indicate their intention to stay outside India for an uncertain period.

38. The above contentions cannot be accepted inter alia because we are not dealing with the criminal prosecution of the Appellants. In any event, Section 59

of the FERA provided that in any prosecution for any offence under FERA which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state. Still, it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. The Explanation to Section 59(1) provides that "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

39. Thus, even in the context of prosecution, there is a presumption of a culpable mental state. This is a rebuttable presumption; however, the onus would be on the accused to rebut it.

40. Therefore, where the circumstances indicated the Shroff daughter's intention to stay outside India for an uncertain period, it was for the Appellants to have produced some proper material based upon which such circumstances could have been explained, and it could have been established that the Shroff daughters had no intention whatsoever to stay outside India for an uncertain period. The circumstances surrounding their stay in the USA, the length of the stay, their marriage to persons settled in the USA, and the lack of details about their return or any proposed return to India indicate an intention to stay outside India for an uncertain period. Section 71 of the FERA also provides that where any person is prosecuted or proceeded against for contravening any of the provisions of FERA or of any rule, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him.

41. The Special Director has evaluated the material on record in great detail and concluded that the Shroff daughters were not persons resident in India at the relevant time. The Tribunal has also independently evaluated the material/evidence on record and confirmed the findings of fact recorded by the Special Director. Upon our independent evaluation of the material on record, we see no reason to interfere with these findings of fact. As noted earlier, the evidence on record sufficiently establishes circumstances as would indicate the intention of the Shroff daughters to stay in the USA for an uncertain period.

42. The decision in Jacqueline Chandani (*supra*) relied upon by Mr. Seshagopalan does not assist the case of the Appellants. The facts in the said case are not even remotely comparable to the facts in the present case. In fact, several observations in the said decision are contrary to the Appellants' case. This decision holds that FERA applies even to those citizens of India who are staying outside India for any purpose in such circumstances as would indicate their intention to stay outside India for an uncertain period. This was in the specific context of interpreting the provisions in Section 2(p) of the FERA. The decision holds that what is contemplated under Section 2(p) of the FERA is the element of residence or staying, but not the concept of domicile.

43. In Jacqueline Chandani (*supra*), one of the arguments raised on behalf of the

Respondents was that the Petitioner was staying in India for a considerable length of time with her Indian spouse, and this was a factor sufficient to bring her within the ambit of FERA. However, the Karnataka High Court held that since the Petitioner was not a citizen of India, the provisions of the FERA would not apply to her. As noted earlier, the decision also holds that the FERA would apply to a citizen of India who has gone out of or stays outside India, in such circumstances as would indicate an intention to stay outside India for an uncertain period.

44. One of the questions of law formulated at the time of admission of this Appeal was whether the provisions of Section 9 read with Section 68 of the FERA would apply to a person resident in India going abroad on a student visa. Now that we have held that the Shroff daughters were not persons resident in India, this question of law will have to be answered against the Appellants. No arguments were advanced based upon clause 1.28 of the Exchange Control Manual, 1993. In any event, even if some aid could be taken from these provisions, the question will have to be determined in the light of the statutory definitions contained in the FERA. This is precisely what the Special Director and the Tribunal have done.

45. The Appeals have raised questions of law referring to Section 114 of the Evidence Act. The Tribunal has also referred to Section 114 of the Evidence Act. The Tribunal has presumed the existence of certain facts which it thought are likely to have happened, having regard to the common course of natural events, human conduct, public and private business, in their relation to the facts of the particular case. The Tribunal has also drawn an adverse inference by reference to illustrations (g) below Section 114 of the Evidence Act.

46. Even without any reference to Section 114 of the Evidence Act, we find no error in the findings of fact reached by the Special Director and the Tribunal. However, the Tribunal cannot be faulted for referring to Section 114 of the Evidence Act in the context of evaluating the evidence on record. The travel records of the Shroff daughters does not rebut the circumstances as would indicate their intention to stay outside India for an uncertain period.

47. There is documentary evidence that establishes beyond doubt the contravention of Sections 9, 19 and 29 read with Section 68 of the FERA. The defences were raised not about there being no contravention but that some of the Appellants before the Tribunal had no knowledge about the Shroff daughters being persons resident outside India. The Appellants carried out the transactions of sale and purchase of shares without obtaining the prior permission of the RBI. Considering the magnitude of the transactions and the circumstances in which the same were carried out, there is no substance in the argument based on any alleged disproportionality in the penalty amounts. Accordingly, even the first and second questions of law are required to be answered against the Appellants.

48. The impugned orders made by the Special Director and the Tribunal

considered in detail the materials on record, which include the statements recorded during the proceedings and the documentary evidence concerning the transactions. Both authorities have correctly applied relevant legal provisions. As this is an Appeal, we have also reevaluated the material on record, even though an Appeal under Section 54 of the FERA lies only with questions of law.

49. For all the above reasons, we find no merit in these Appeals and consequently dismiss the same without any order as to costs.

50. The interim orders, if any, are hereby vacated.