

(2009) 07 DEL CK 0079

In the Delhi High Court

Case No : Criminal Appeal No. 37 of 2006

Prabhat Kumar Srivastava

APPELLANT

Vs

Director of Enforcement

RESPONDENT

Date of Decision : 17-07-2009

Acts Referred:

Customs Act, 1962 — Section 112
Foreign Exchange Management Act, 1999 — Section 35
Foreign Exchange Regulation Act, 1947 — Section 4(1)
Foreign Exchange Regulation Act, 1973 — Section 40, 41, 52, 54, 59
Gold (Control) Act, 1968 — Section 85

Citation : (2009) 95 SCL 292

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : M. Venkataraman, for the Appellant; Rajdipa Behura, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar, J.—This order shall dispose of the appellant's appeal u/s 54 of Foreign Exchange Regulation Act, 1973 read with Section 35 of the Foreign Exchange Management Act, 1999 against the order dated 30th September, 2005 in Appeal No. 251 of 1997 dismissing the appeal of the appellant and upholding the Adjudication No. SDE(APK)/III/07/1997 dated 7th May, 1997 passed by Special Director, Enforcement, imposing a penalty of Rs. 5.00 lakh against the appellant for the contravention of provisions of Section 8(1) read with Section 64(2) of the Foreign Exchange Regulation Act, 1973.

2. The brief facts for comprehension of disputes are that on 13th February, 1993, the officers of Central Economic Intelligence Bureau, New Delhi, searched the residence of the appellant and seized foreign currencies, US\$ 64015, Canadian Dollar 4789, Saudi Riyals 600, Italian Lira 5,00,000 and Indian currency of Rs. 43,800/-.

3. On 13th and 14th February, 1993, the statement of the appellant was recorded by the respondent, Director of Enforcement u/s 40 of Foreign Exchange Regulation Act, 1973 in which the appellant stated that the seized foreign currencies were given to him by Dr. Anand who lives in Doha, United Arab Emirates, in December 1991 when he had come to Delhi and on his subsequent visits after declaring the same on his arrival. The appellant contacted Dr. Anand in Doha and informed him of the seizure of foreign currency from him. A letter was written by Dr. Anand to the respondent claiming that the seized foreign currencies from the petitioner were his which were given by him to the petitioner for the purpose of acquiring property for charitable hospital. The petitioner also filed an affidavit dated 12th March, 1993 of Dr. Anand along with a copy of the letter which was sent by Dr. Anand to the respondent.

4. In the deposition in the form of affidavit filed by Dr. Anand, it was deposed by him that he had brought into India a sum of US\$ 82,000 in cash for which he had made a declaration at the Customs counter of Delhi Airport vide the Currency Declaration Form No. 006290. A copy of the said declaration form filled by Dr. Anand in 1991 was also annexed with the affidavit sworn in by him.

5. Dr. Anand also deposed in his affidavit that foreign currency was brought by him for setting up a charitable hospital. Dr. Anand further asserted that as he wanted to keep his this money separately in India, therefore, he left it in the custody of the appellant till the finalization of his plans for the hospital. It was categorically deposed by him that he was also in possession of various types of foreign currencies, Canadian dollars, Italian Lira and Saudi Riyals which were brought by him on later occasions and for which no declaration was made by him, as the value of the foreign currency brought by him was below minimum amount for which the declaration was required to be made under the Foreign Exchange Regulation Act, 1973.

6. On account of recovery of foreign currencies of different countries from the appellant, the respondent had issued a memorandum by way of show cause notice dated 10th August, 1993, contending that the appellant had "otherwise acquired foreign exchange" without the permission of Reserve Bank of India in violation of Section 8(1) of Foreign Exchange Regulation Act, 1973. It was also contended that the seized Indian currency was the sale proceeds of foreign currency and, therefore, he was asked to show cause as to why the foreign currency seized from him be not confiscated and why penalty should not be imposed on him.

7. The appellant replied to the show cause notice. In his reply the appellant contended that he was not the owner of foreign currencies seized from him which was owned by Dr. Anand of Doha. It was also pleaded by him that the seized Indian currency was not the sale proceeds of foreign currencies. The adjudicating authority, however, passed an order dated 7th May, 1997 holding the appellant guilty of contravention of Section 8(1) of Foreign Exchange Regulation Act, 1973 and imposed a penalty of Rs. 5.00 lakh on him and ordered confiscation of seized

foreign currencies. The Indian currency worth Rs. 43,800/- which was also seized from the appellant was, however, directed to be appropriated towards the penalty amount of Rs. 5.00 lakh. Appellant aggrieved by the order of adjudication dated 7th May, 1997 filed an appeal before the Appellate Tribunal u/s 52 of Foreign Exchange Regulation Act, 1973. The appeal of the appellant was, however, dismissed by order dated 30th September, 2005, a copy of which was dispatched to the appellant on 5th October, 2005 and received by the appellant on 7th October, 2005. Thereafter the present appeal was filed by the appellant u/s 54 of Foreign Exchange Regulation Act, 1973 on 5th December, 2005, within time.

8. The appellant has challenged the order on the grounds that the authorities below did not consider the ramification of the statement of the appellant recorded u/s 40 of the Foreign Exchange Regulation Act, 1973 where he had categorically deposed, at the first instance, that the foreign currencies seized from him belonged to Dr. Anand of Doha. It was also contended that the copy of the declaration form given by Dr. Anand along with his affidavit could not be ignored by the authorities below in the facts and circumstances on the various assumptions by the authorities.

9. The appellant has also contended that merely because the address of Dr. Anand could not be orally given by the appellant, adverse inference could not be drawn against him inasmuch, as in Doha there are no addresses for the postal purposes and the communications are sent at the post box numbers and if the appellant did not remember the Post Box number, it could not be inferred that the appellant was not stating the facts correctly. Regarding the other types of foreign currencies recovered from the appellant, reliance has also been placed on the affidavit of Dr. N.S. Anand categorically deposing that the amount of other foreign currencies recovered from the appellant was small and could be brought without any declaration and was given by him to the appellant. This aspect has been completely ignored and not considered by the respondent. According to the appellant, the facts disclosed and deposed by the appellant and on his behalf were sufficient to discharge the onus cast on him u/s 71(3) of the FERA, 1973 and the respondent has failed to rebut the categorical facts disclosed and proved on behalf of the appellant.

10. The appellant also relied on (2000) 10 SCC 169, Union of India v. Abdul Mohamed where it was held that the precondition to attract Section 4(1) of Foreign Exchange Regulation Act, 1947 would be to buy or otherwise acquire or borrow from or sell or otherwise transfer or lend to or exchange with any person not being an authorized dealer of any foreign exchange. The only provision which may possibly get attracted is that the person can be said to have "otherwise acquired" because the other expressions in Sub-section 1 of Section 4 are totally absent. The Supreme Court was of the view that the expression "otherwise acquire" must have a definite connotation and it must indicate something more than mere possession. The appellant also relied on a decision of Foreign

Exchange Regulation Appellate board reported as (2000) 112 Taxman 137 (FERAB), O.P. Gulati v. Director of Enforcement, holding that mere possession, even if a conscious possession, would not amount to acquisition of that currency and, therefore, the charge on "otherwise acquiring" foreign currency in violation of Section 8(1) would not be proved by a mere fact of conscious possession. It was further held that in case there was an adequate justification for holding the currency the same could not be confiscated.

11. Per contra, the respondent has contested the appeal contending that on the basis of a specific intelligence report relating to the delivery of foreign exchange by one Shri Lal Singh to one Shri Aditya Bhandari on 13th February, 1993, watch was kept for the suspect at the Municipal Shopping Centre, Munirka. The Surveillance Team had noticed said Shri Bhandari was in a car bearing registration No. DL3C B 0881 which was trailed. While trailing the car, it was also noticed that Shri Lal Singh was following the said car on a scooter No. DL1S D 7270. Shri Lal Singh was intercepted but Shri Bhandari managed to escape. Shri Lal Singh led the officers to Flat No. BE-7C, DDA Flats, Munirka, from where, according to Lal Singh, Shri Bhandari had come to take delivery of foreign exchange. In the flat besides the appellant, Shri C. Anand was also present.

12. From the scooter of the Lal Singh bearing No. DL1S D 7270 foreign currencies were recovered. On searching the flat of the appellant bearing No. BE-7C DDA flats, Muniraka, foreign currencies as detailed hereinabove were recovered and the statement of Lal Singh was recorded u/s 40 of FERA, 1973 on 13th February, 1995 and 14th February, 1993 who stated that the foreign currency recovered from his scooter had been given to him by one Bittu who operated from Room No. 31, Hotel Prabha, Bagichi Chetan Dass, Near Red Fort, Delhi, for delivering the same to Shri Aditya Bhandari or appellant. Shri Lal Singh is alleged to have disclosed that in the past he had made 10 such deliveries to Aditya Bhandari and the appellant and had in return received packets containing gold from them on three or four occasions.

13. According to respondent, appellant in his statement dated 13th February, 1993 and 14th February, 1993 recorded u/s 40 of FERA, 1973 had stated that the foreign currencies seized from his above flat belonged to his friend, Dr. Anand of Doha, and the foreign currencies were given to him in December, 1991 and on subsequent visits of Dr. Anand. The respondent has, however, relied on the circumstances that when the statement of the appellant was recorded on 13th February, 1993 and 14th February, 1993, the appellant could not give the complete name of Dr. Anand nor he could furnish orally his address or telephone number either in Doha or in Delhi. Reliance has also been placed on the fact that there has been no correspondence between the appellant and Dr. Anand regarding the foreign currencies. The respondent also relied on the statement of Capt. Manjeet Singh, elder brother of Dr. N.S. Anand, recorded on 17th April, 1993 wherein he deposed that his brother, Dr. N.S. Anand, had been living in UAE since 1990 and he used to stay with him whenever he visited India. Capt.

Manjeet Singh has also stated that his brother, Dr. N.S. Anand, never told him about his dealing with the appellant or his plan to setup a hospital in Delhi and whether his brother had left any foreign currency with anybody in India. Reliance was also placed by the respondent on the statement of Rishi Kumar Shrivastava, brother of the appellant and Shri Ramesh Chand, proprietor of Hotel Prabha. In these circumstances, the respondent contended that Shri Lal Singh and appellant had illicitly acquired foreign currencies in contravention of the provisions of Section 8(1) of FERA, 1973. The respondent also contended that in 9 out of 10 cases the possession shows acquisition and ownership of the article in whose possession it is found. The respondent also concluded that nobody has claimed the foreign currencies recovered from the appellant and the mere statement of the appellant that he is a carrier cannot lead to the conclusion that the appellant did not make preparation or attempt to acquire foreign currency. It was also held that the appellant was not working gratuitously as a carrier of the foreign currencies and since he was not ignorant of the foreign currencies with him, therefore, mere possession itself is the proof of attempt/preparation of acquisition.

14. The point for consideration is whether the appellant had un-authorizely acquired the foreign exchange in contravention of the provisions of Section 8(1) of the Act. Section 8(1) of the Act is as under:

8. Restrictions on dealing in foreign exchange-

1). Except with the previous general or special permission of the Reserve Bank, no person other than an authorized dealer shall in India, and no person resident in India other than an authorized dealer shall outside India, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorized dealer, any foreign exchange.

Provided that nothing in this Sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money-changer.

Explanation - For the purposes of this Sub-section, a person, who deposits foreign exchange with another person or opens an account in foreign exchange with another person, shall be deemed to lend foreign exchange to such other person.

2) Except with the previous general or special permission of the Reserve Bank, no person, whether an authorized dealer or money-changer or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorized by the Reserve Bank.

3) where any foreign exchange is acquired by any person, other than an authorized dealer or a money changer, for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that

purpose or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or the conditions cannot be complied with the said person shall, within a period of thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell the foreign exchange to an authorized dealer or to a money-changer.

4) For the avoidance of doubt, it is hereby declared that where a person acquires foreign exchange for sending or bringing into India any goods but sends or brings no such goods or does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time or sends or brings any goods of a kind, quality or quantity different from that specified by him at the time of acquisition of the foreign exchange, such person shall unless the contrary is proved, be presumed not to have been able to use the foreign exchange for the purpose for which he acquired it or, as the case may be, to have used the foreign exchange so acquired otherwise than for the purposes for which it was acquired.

5) Nothing in this Section shall be deemed to prevent a person from buying from any post office in accordance with any law or rules made there under for the time being in force, any foreign exchange in the form of postal orders or money orders.

15. Perusal of the said Section reflects unequivocally that the acquisition is more than a mere possession. Acquisition, possession and control are different concepts in law. While dealing with Section 4(1) of Foreign Exchange Regulation Act, 1947 which is para materia with Section 8 of Foreign Exchange Regulation Act, 1973, the Supreme Court in (2000) 10 SCC 169, *Union of India v. Abdul Mohamed* had held that the expression "acquire" has different connotation and it indicates something more than mere possession. In this case foreign exchange was recovered from the car belonging to the accused and there was no evidence to indicate that the accused knew what the packet contained when it was delivered to him or when the packet was recovered from the car being intercepted. The accused had taken a plea that it was handed over to him at Bombay to be carried to Kasaragod and somebody had to come to take it from him at Kasaragod. It was held that such a plea on the face of it could not be rejected ipso facto. It was further held that in the absence of any positive material to indicate as to how he could have acquired the foreign exchange, the accused could not be held to have otherwise acquired the foreign exchange in violation of the provisions of Section 4(1) of the 1947 Act. In another case (2000) 112 Taxman 137, *O.P. Gulati v. Director of Enforcement* it was held that mere possession, even if a conscious possession of foreign currency would not amount to acquisition of foreign currency in contravention of Section 8(1). In this case during a search an amount of US\$ 2000 was recovered from the personal search of the accused and it was seized. Regarding the foreign currency seized

from him it was stated by the accused that his son during his last visit had left the said amount with him while leaving from India and the purpose for leaving the said amount was for possible use en route the journey to USA by the wife and daughter of the accused as they were also planning to go to USA. It was stated by the accused that since the son had surplus dollars, therefore, he had left them with him. When he was asked whether he was aware that keeping so much foreign currency is an offence under the Act, the accused had shown his ignorance of the provision of FERA. The accused after the seizure of the currency had also addressed a communication detailing that the amount so given to him, to his wife and his daughter, dollar 500 each was given for en route expenses to his wife and daughter. It was stated that the intention was that no further foreign exchange may be required for travel purposes for his wife and daughter. In these circumstances, it was held that mere possession, even if a conscious possession, would not amount to acquisition and the charge of "otherwise acquiring" foreign exchange in violation of Section 8(1) could not be proved by a mere fact of conscious possession. It was further held that since the foreign currency involved was not illicitly acquired there was no justification for confiscation of such foreign currency.

16. This cannot be disputed that in the statement given on the spot by the appellant, he had disclosed that the foreign currency was given to him by his friend Dr. Anand, resident of Doha. He had also disclosed that he had come in December, 1991. This has not been disputed that the appellant deals in properties. He had also stated in the statement recorded on spot that in 1988 Dr. Anand had come and thereafter he met him 2-3 times for purchasing a property.

17. Dr. N.S. Anand of P.O Box 2315, Ajman, UAE, and Passport No.H-904780 by his communication which is annexed as Annexure D at page 38 has also requested for release of US dollar and foreign currencies belonging to him which were recovered from the appellant. His communication addressed to the Director General, Central Economic Intelligence Bureau is as under:

To,

The Director General

Central Economic Intelligence Bureau

North Block

New Delhi.

Sub: Request for release of U.S. Dollars and assorted

Foreign Currency lawfully belonging to me.

Sir,

I am resident of Doha holding passport No. H-904780. I have been informed by the relations of Sh.Prabhat Kumar Srivastava r/o.BE-7/C, DDA Flats, Munirka,

New Delhi that on 13.2.1993 your officers raided his place and seized US dollars and assorted foreign exchange from him and arrested him.

I wish to bring to your kind notice that the entire seized amount belongs to me which I kept in safe custody of Sh. Prabhat Kumar Srivastava during my visit to India in November, 1991.

I enclose herewith an affidavit duly attested by the Indian High Commission at Dubai with supporting documents to show my ownership of the seized amount and the circumstances under which these amounts were kept in custody with Sh. Prabhat Kumar Srivastava. A perusal of my affidavit and the supporting documents would show that Sh. Prabhat Kumar Srivastava is not the owner of these amounts.

I humbly request that the seized amount of US Dollars and assorted foreign exchange may kindly be released to Sh. Prabhat Kumar Srivastava from whose possession your officers seized so that as and when I come to India, I can collect the same from him, as the property deal couldn't materialize in time due to seizure of the currency.

18. He also swore an affidavit dated 16th March, 1993 at Dubai before the Consulate of India that in 1991 during his visit to India he had declared US\$ 82,000 in cash. He deposed about the declaration form No. 006290 under Foreign Exchange Regulation Act, 1973 and he also annexed a copy of the same with his affidavit. The foreign exchange declaration form dated 17th April, 1991 has not been disputed and cannot be disputed by the respondent. The affidavit sworn by Dr. N.S. Anand on 16th March, 1993 at Dubai is as under:

I, Dr. Navjit Singh Anand s/o, Man Mohan Singh, P.O.Box.2315, Ajman, U.A.E, do hereby declare and solemnly affirm as under:

1. That I am non-Resident India holding passport No. H 904780 issued to me by Pool Singh, Vice Consul, Consulate General of India, Dubai authorities, Dubai, U.A.E.
2. That I had been visiting India in the past to meet my friends and relatives in India.
3. That I visited New Delhi, India on 17th November, 1991.
4. That I, on my aforesaid visit, brought into India a sum of US\$ 82,000 (US Dollar Eighty Two Thousand only) in cash for which I made a declaration at the Custom counter of Delhi Airport vide currency Declaration Form No. 006290 under foreign Exchange Regulation Act, 1973. A photocopy of the Currency Declaration form is enclosed as Annexure "A".
5. That while bringing the above stated US\$ amount into India, I had noble intentions of setting up a Charitable hospital in India to serve the population of India with special skills & Training I have achieved abroad.

6. That I wanted to keep some amount of foreign currency separately in India in safe custody of some close friend until the finalization of my plans to set up the charitable hospital.

7. That I was also in possession of various types of foreign currencies the details of which are given in Annexure "B" which I had brought into India on later occasions but for which no declaration were made by me as the value of currencies brought by me were below the minimum amount for which declaration was required to be made under FERA of India.

8. That Shri Prabhat Kumar Srivastava s/o. Shri S.P. Srivastava R/o. BE-7C DDA Flats, Munirka is a close friend of mine.

9. That I prepared a packet of all type of currencies which I had in my possession and gave it to Shri Prabhat Kumar Srivastava and requested him to keep it in his safe custody.

10. That after keeping the money in the safe custody with Shri Prabhat Kumar Srivastava in December, 1991 I have not asked for that money till date as I have still not been able to finalize my plans to set up the Charitable hospital in India due to my professional preoccupation.

11. That on 12th March, 1993 Shri Rajesh Kumar Srivastava elder brother of Shri Prabhat Kumar Srivastava informed me on telephone that some Revenue Officers of Indian Govt. have seized my packet of foreign currency from the custody of Shri Prabhat Kumar Srivastava and have held him under the charge of violation of FERA of India.

12. That I was very perturbed by the news and felt guilty that because of me my friend has landed into trouble.

13. That the entire amount of foreign exchange recovered from Shri Prabhat Kumar Srivastava belongs to me.

14. That I, therefore, appeal to the Indian Govt. that entire amount of foreign currency taken away from Shri Prabhat Kumar Srivastava may kindly be given back to him so that I can collect the same from him.

19. Dr. N.S. Anand in his affidavit dated 16th March, 1993 which was sworn at Dubai also gave details of foreign currencies which had been kept by him in the safe custody of Sh.Prabhat Kumar Srivastava, petitioner, on his various visits to India which is as under:

Annexure "B"

Details of Foreign Currencies which I keep in the safe custody of Shri Prabhat Kumar Srivastava.

1. US Dollar 64,015

2. Canadian Dollar 4,789

3. Italian Lira 5,00,000

4. Saudi Riyal 600

20. Section 59 of FERA makes it incumbent for the Courts to presume the evidence of a culpable mental state on the part of an accused for an offence under the act for which, a culpable mental act is required. But it also postulates that it establishes a defense for accused to prove that he had no such mental state. A fact is stated to be proved only when Courts believe it to exist beyond reasonable doubt and not merely when its existence is established by preponderance of probability. Sub-section 3 of Section 59 further adds that the presumption of Section 59 shall, so far as may be, apply in relation to any proceedings before an adjudicating authority also as they apply in relation to any prosecution for an offence under the Act. This makes it clear that existence of culpable mental state in prosecution or proceedings in relation to any offence under the Act can be presumed, however, such a presumption is rebuttable and an accused can rebut this presumption by proving that he had no such culpable mental state. A heavy burden is cast upon the accused for rebutting the presumption but an accused is not to prove his defense only by defense evidence, he may also prove his defense through the facts and circumstances brought on record by the prosecution, for rebutting of presumption against him.

21. The Special Director has inferred the culpable mental state of the petitioner of "otherwise acquisition" by disbelieving the version of the appellant. The version of the appellant has been disbelieved on the ground that Dr. Anand, if brought larger amount of foreign exchange in cash into India will not leave it with the appellant without telling his brother Manjeet Singh with whom he was staying at that time. The accused version has been found to be not reliable on the premise that accused does not know Dr. Anand very well because he could not recollect his address and phone number on 14th February, 1993 when his statement was recorded. The version of the petitioner has also been found to be incredulous as no material was produced to set up a charitable hospital and in the circumstances it has been presumed that no one would leave cash with someone without informing his plans for the purpose for which the money is intended. The Appellate Tribunal also inferred the culpable mental state of the petitioner as inferred by the Special Director. The Appellate Tribunal though referred the certificate of Dr. Anand, however, has not considered it on the ground that it was quite early i.e. 17th April, 1991. The declaration certificate has also been ignored because currencies of other countries were also recovered and it had not been disclosed either in the affidavit or in the application as to where from he got changed US dollars into currency of other nations and for what purpose. The Appellate Tribunal presumed that Dr. Anand could not have handed over US dollars to his so-called trustee for safe upkeep and on this ground the application and currency declaration form have been rejected and the adjudication order by the Special Director was not faulted.

22. A copy of currency declaration form for US \$ 82000 dated 17th April, 1991

has been produced. Authenticity of certificate has not been disbelieved nor can be rejected nor has been rejected by the respondents. If Dr. Anand had brought US \$ 82000 by appropriate declaration, the fact that the petitioner did not recollect his address and phone number is not sufficient to infer that the foreign currency could not have been given by Dr. Anand to the petitioner. The affidavit of Dr. Anand dated 16th March, 1993 duly sworn before the competent authority categorically deposing that he had brought US \$ 82000 in cash in 1991 and given to the petitioner, could not be rejected on such assumptions as has been drawn by the Special Director and the Appellate Tribunal without evidence to the contrary. There is no presumption that if a person who comes from abroad lives with his brother, then he will disclose all his facts about his finances and future plans to his brother. In the present facts the culpable mental state of the petitioner has been inferred on the basis of presumptions which do not arise in law and in the present facts and circumstances. The assumptions which have been considered by the respondents that if a person is very friendly with another person then he would remember his phone number and address orally; unless there are plans or concrete proposals for construction of charitable hospitals, idea or desire of a person to construct a charitable hospital cannot be inferred; a person will disclose all his affairs and future plans to his brother in preference to a person who has been dealing with the properties and who is alleged to be not so well known to such person than his brother: if Dr. Anand had to leave foreign exchange with petitioner he will not leave small amounts of different denominations of different currencies but will rather put US dollars in the safe custody with the petitioner.

23. Such presumptions do not arise in law nor there are any facts established by the respondent to draw the inference as has been drawn by them. Along with affidavit dated 16th March, 1993, the details of foreign currencies of other nations other than United States of America have also been disclosed by Dr. Anand. The respondents have failed to establish that the affidavit is false or that the foreign currency declaration given by Dr. N.S. Anand dated 17th April, 1991 is forged, fabricated or incorrect. The respondents have tried to establish the existence of the culpable state of the respondent not even on the basis of preponderance of probabilities but on their own assumptions. The respondent had to establish the culpable state of mind of the petitioner beyond reasonable doubt and not on the basis of their assumptions. The presumptions drawn by the respondents have been rebutted successfully by the petitioner in the present facts and circumstances and consequently it has to be inferred that the petitioner did not have culpable mental state to commit the offence as has been alleged by the respondent. In *O.P. Gulati (Supra)*, the Appellate Board had rather held that in certain facts and circumstances even conscious possession of foreign currency will not result into violation of Section 8(1) of Foreign Exchange Regulation Act. In the said case, the accused was having the foreign currency which was sent by his son for the travel of his daughter and wife and it was held that it was not within the expression of "otherwise acquire".

24. The precedent relied upon by the respondent State of Maharashtra (supra) is distinguishable as the search was made in absence of the accused and in presence of his wife and mother and as a result of the search, gold biscuits of foreign marking and of 24 carat purity, which was not available in India at the material time, were found stitched in a cotton jacket which was lying in a steel trunk underneath some clothes. In Khirode Chandra Dhar (Supra) currencies of different foreign countries were recovered from the accused. When the search was in progress there was a telephone call from the accused which was attended to by a search witness and the caller had asked whether the goods were ready for delivery. The Special Director had held that the accused was in the habit of illegal dealing in foreign currencies and therefore he was held guilty of contravention of provision of Section 41 of the Act and the Appellate Board had concurred with the findings of the Special Director. The High Court in appeal had held that concurrent finding of fact were not to be gone into in that case and that burden of proof was on the accused who was in possession of foreign currency to show as to how he had acquired it and in the circumstances, it was also held possession was acquisition as he had failed to disclose as to how he had come in possession. Section 85 of the Gold Control Act, 1968 and Section 112 of the Customs Act, 1962 makes the possession itself a distinct offence in contradistinction to Foreign Exchange Regulation Act which does not prohibit mere possession as distinct from acquisition of foreign exchange. If the intention of the legislature was to make possession of foreign exchange an offence, it would have incorporated mere "possession" also as an offence which has not been done.

25. In the present case, the affidavit and the currency declaration by Dr. N.S. Anand cannot be rejected as has been done by the respondent. If that be so it will be difficult to hold that the petitioner had acquired the foreign exchange in contravention of Section 8(1) of Foreign Exchange Regulation Act. Even giving the widest connotation to the term acquisition, it would not include act of the petitioner in the present facts and circumstances and therefore he is entitled to be acquitted of the charge in so far as it relates to the acquisition of foreign currencies recovered from him.

26. The jurisdiction of High Court in appeal has to be exercised when there exists a question of law or where the findings arrived at by the respondents are perverse or where in arriving thereto legal principles are ignored. The findings of the respondent are based on its own presumptions and assumptions and cannot be termed to be based on legal principles and therefore the Court would be justified in inferring with such perverse findings. The findings have been arrived at without any basis which has been successfully rebutted by the petitioner and in the circumstances it has to be held that adjudication order is not sustainable nor is the order dated 30th September, 2005 of the Appellate Board sustaining the same. The observation of the Board that possession by itself in nine out of ten cases is proved acquisition is also without any basis. In any case, what ought to be established was that in the case of petitioner possession was "otherwise

acquisition" which the respondents have failed to establish. Consequently the appeal of the appellant is allowed and the order of adjudication No. SDE(APK)III/07/1997 "F No. T-4/18-2/93 dated 7th May, 1997 and the order dated 13th September, 2005 in Appeal No. 251/1997, Prabhat Kumar Srivastava v. Director of Enforcement are set aside and the penalty amount awarded against the petitioner is also quashed. Consequently the petitioner shall be entitled for the refund of foreign currencies and Indian currency seized from him and refund of any amount deposited as penalty. Therefore, appeal is allowed in terms hereof. Considering the facts and circumstances, parties are, however, left to bear their own cost.