

(1998) 04 DEL CK 0032

In the Delhi High Court

Case No : LPA. 238/97 and CM. 2352/97

R.P. Verma (Retd) Major

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 17-04-1998

Acts Referred:

Citation : AIR 1999 Delhi 53 : (1999) 97 CompCas 66 : (1998) 2 ILR Delhi 582 : (1998) ILR Delhi 582

Hon'ble Judges : Y.K. Sabharwal, J;C.K. Mahajan, J

Bench : Division Bench

Advocate : Mr. Rakesh Tikku and Mr. H.S. Parihar, for the Appellant;

Judgement

Y.K. Sabharwal, J.

1. The Writ petition filed by the appellant seeking a direction that he should be treated as a Non-Resident Indian (NRI) for a limited purpose of holding assets in U.K. of his late mother having been dismissed by learned Single Judge, the present appeal has been filed.

2. The appellant is a citizen of India. His mother was a permanent resident of U.K. She had acquired some assets including shares in British Companies. She died in U.K. on 13th May,1995. The appellant had gone to London to look-after his mother when she was ailing. The brother of the appellant has also died and the appellant is the sole inheritor of the assets left behind by his mother. The appellant had stayed in U.K. for about seven and half months before returning to India. For some period the appellant was granted extension of time to hold assets abroad. The appellant has, however, not been granted permission by RBI to permanently continue to maintain and hold the assets left behind by his mother in England and is required to sell the said assets and repatriate the sale proceeds to India through banking channel. According to respondents, to acquire the status of NRI one year continuous stay abroad is necessary. The appellant besides seeking declaration to be treated as NRI for the limited purpose of

holding the assets acquired by him by way of inheritance in UK, has in the alternative, sought the waiver of the condition of one year stay abroad. The appellant has also challenged Notification dated 17th July, 1992 issued by respondents u/s 14 of the Foreign Exchange Regulation Act, 1973 (FERA) to the extent it imposes the condition of continuous stay abroad for a period of one year, to acquire the status of NRI.

3. The contention of the appellant is that he had gone to stay outside India for uncertain period and, Therefore, he is not a "person resident in India" within the meaning of Section 2(p) of FERA and is thus entitled to the declaration sought for. The Judgment of learned Single Judge holding that the case of the appellant is covered by Section 2(p), 8 and 14 of FERA and he cannot be treated as NRI is under challenge in this appeal.

"Person resident in India" in terms of Section 2(p) of FERA, to the extent relevant for our purposes, 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)

(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;"

"Person resident outside India" in terms of Section 2(q) means a person who is not resident in India. Section 8 of FERA places restrictions on dealings in foreign exchange. This section, inter alia, provides that except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised 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 authorised dealer, any foreign exchange. Section 14 of FERA provides for

acquisition by Central Government of Foreign Exchange. Under this section the Central Government may by Notification in the official gazette order every person in, or resident in India to sell and/or transfer foreign exchange to Reserve Bank of India.

4. The Central Government in exercise of powers conferred by Section 14 has issued a Notification dated 17th July, 1992 whereby every person in, or resident in India, has been ordered to sell the foreign exchange in the manner provided for in the Notification. However, the Notification, inter alia, provides that the order shall not apply to foreign exchange held outside India, if such foreign exchange was acquired by a person who has been resident outside India for a continuous period of not less than one year. It is not in dispute that the appellant has not complied with the condition of continuous stay abroad for one year.

5. The contention of the appellant is that since he had gone outside India with intention to stay for an uncertain period, he is not a person who can be said to be a "person resident in India" within the meaning of Section 2(p) and he is a "person resident outside India" within the meaning of Section 2(q) of FERA. The further contention is that the Notification dated 17th July, 1992 to the extent it prescribes condition of continuous period of stay of not less than one year outside India is illegal as it amounts to amending the Act and legislating, which is not permissible in law.

6. The question whether a person has gone abroad to stay for an uncertain period would necessarily depend upon the facts and circumstances of each case. We are, however, unable to accept the broad proposition urged by the appellant that if a person goes abroad but at that time he does not know for how long he is going to stay abroad, that would indicate his intention to stay outside India for an uncertain period. We do not think this fact by itself shows intention to go outside India for an uncertain period. To illustrate, one may go abroad either on the business trip or as a tourist but for one or another reason he is uncertain about the period of stay abroad and consequently uncertain about the date of his return, but that by itself would not mean that such a person is a "person resident outside India". Likewise, a citizen of India may go abroad to look after his ailing friend or relation with the intention to return to India only after recovery of such ailing person and in fact returns to India after three months when that person recovers, these persons are not entitled to the status of NRI. The period for which the visa may be issued by the country to be visited is also not relevant. A person may be granted visa for a period of 5 years and when he leaves he may be uncertain about the period of stay abroad but from that itself it is not possible to reach the conclusion that such a person is a "person resident outside India". The appellant had not gone abroad on immigration visa. The appellant had gone to U.K. to look after his mother and came back after her death after about seven and half months. According to him, even if he had come back after a week he would be a "person resident outside India" since he had gone for an uncertain period and the said uncertain period is not defined in the Act. In the Notification

dated 17th July, 1992 issued u/s 14 of FERA, the period of continuous stay of one year has been provided for to hold foreign exchange outside India. It has to be borne in mind that under the provisions of FERA, in particular, Sections 8 and 14, no person is entitled to keep or hold foreign exchange unless permissible to do so. It is also not a case where the term "uncertain period" has been defined and the impugned Notification provides a different period. Further, Section 14, inter alia, empowers the Central Government to acquire foreign exchange and order every person in, or resident in India, by issue of Notification in official gazette, to sell foreign exchange to Reserve Bank of India. It is in exercise of that power that the Notification has been issued but prescribing the continuous period of not less than one year stay abroad as a condition to be entitled to keep or hold the foreign exchange. The appellant cannot claim a right to keep or hold foreign exchange abroad since admittedly he does not fulfill the condition of one year continuous stay abroad.

7. The reliance by the appellant on a Single Bench decision of Karnataka High Court in the case of Mrs. Jacqueline Chandani Vs. Deputy Director, Enforcement Directorate, Madras and another, is entirely misplaced. The Karnataka High Court was concerned with altogether different question. However, there cannot be any dispute in respect of the proposition that a Notification issued in exercise of powers conferred by Section 14 of FERA cannot alter the statutory definition under the Act or that Reserve Bank of India is not invested with the power to legislate on the definition of "person of Indian origin" which may run counter to the statutory definition of "person resident in India" within the meaning of Section 2(p). There can also be no dispute with the proposition that a Notification can only explain the Section, but it cannot go so far as to enlarge the provisions of the Statute. In the cited decision the Notification dated 21st May, 1979 was held to be ultra virus on coming to the conclusion that the said Notification had introduced the concept or element of domicile which is foreign to the Act itself. The learned Judge held that the Act does not deal with the question of domicile but deals with the concept of only residence. The concept of domicile was held to be relevant with reference to Citizens Act, 1955 and not with reference to FERA. The Notification in that case proceeded on the question of domicile and, Therefore, it was held to be ultra vires. The writ petitioner before Karnataka High Court was a foreigner, being a U.S.A. citizen. She had married a citizen of India. During raid of the house of her husband, some documents were recovered which showed her Bank accounts in U.S.A. The Enforcement Directorate alleged violation of provisions of FERA and repudiated her claim that she being a foreign citizen and temporary resident of India was entitled to maintain account in foreign exchange in U.S.A. The case of Department was based on Explanation (c) in the Notification dated 21st May, 1979, issued u/s 8(1) and 14 of FERA, which, inter alia, provided 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 he is a foreign citizen of non Indian origin". Applying this Explanation, Department held the petitioner to be a person permanently resident in India and, therefore, guilty of

charges made against her. It was this decision and also the Notification which were in challenge before Karnataka High Court. The contention of the petitioner was that these provisions of FERA 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 FERA provided such persons are found to be "persons resident In India" as defined in Section 2(p) and that the Notification was beyond legislative competence u/s 1(3) and 2(p) of FERA and, therefore, it was ultra virus the Act. The reliance of the Department was on Section 2(p)(iii)(c). The question for consideration before Karnataka High Court was 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 Section 2(p)(iii)(c) of FERA. It may be noticed that the interpretation of Section 2(p)(i)(c) was not in issue in that case. On the facts of the case the petitioner was held to be temporary resident in India and excluded from operation of FERA. It may be useful to reproduce Paras 25 and 27 of the cited decision, as under:

"25. According to 5.1(3) of the Act, the Act 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. 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 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.

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."

8. As already noticed, the appellant had not gone to U.K. on immigration visa. He stayed in U.K. for less than one year. It cannot be held that he had gone to stay

outside India for an uncertain period. In this case, there is no question of impugned Notification altering any provision of Section 2(p)(i)(c). The cited decision does not advance the case of the appellant. There is neither any infirmity in the impugned Notification nor is appellant entitled to be declared as NRI.

9. For the aforesaid reasons, we find no merit in the appeal and it is dismissed accordingly. The parties are left to bear their own costs.