(1995) 11 MAD CK 0025

In the Madras High Court

Case No : Appeal Against Order No. 830 of 1982

Saratha's APPELLANT

Vs

Assistant Director, Enforcement Directorate RESPONDENT

Date of Decision : 02-11-1995

Acts Referred:

Evidence Act, 1872 — Section 101, 103
Foreign Exchange Regulation Act, 1973 — Section 2, 5, 50, 51, 52

Citation : (1997) 57 ECC 212

Hon'ble Judges : Kanakaraj, J;Janarthanam, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Janarthanam, J.—This appeal arises out of confirmation of penalty imposed during adjudication proceedings.

2. (a) One V. Vaithialingam, it is said, had contravened the provisions of Sections 9(1)(b) and 9(1)(a) of the Foreign Exchange Regulation Act,

1973 (Act 46 of 1973--for short ""FERA""), in having received Rs. 6,567.48, otherwise than through an authorised dealer in foreign exchange by

order or on behalf of one V. Subramanian of Ceylon and in having made a payment of Rs. 10,000 to one P. Shanmugham Pillai of Malaysia

respectively. Show-cause notices of even date, namely, 28.2.1981 were issued to him.

(b) Likewise, one S. Sivalingam appeared to have contravened the provisions of Sections 9(1)(d) of FERA and 5(1)(d) of the Foreign Exchange

Regulation Act, 1947 in having made a payment of Rs. 6,567.48 to one V. Vaithialingam in India by order or on behalf of one V. Subramanian of

Ceylon, a person, resident outside India and in having placed a sum of Rs. 7,400 in the books of accounts of Sri Venkateswara Finance to the

credit of the said V. Subramanian respectively. Show-cause notices of even date, that is to say, 28.2.1981 were issued to him for the aforesaid

contraventions.

(c) Similarly, a firm going by the name, ""Saratha''s"" situate at NSB Road, Trichy and its managing partner one Manavalan appeared to have

contravened the provisions of Section 9(1)(e) of FERA in having placed a sum of Rs. 17,645 in the books of accounts of the said firm to the credit

of one V. Subramanian of Ceylon, a person resident outside India and a show-cause notice dated 28.2.1981 was issued to them.

(d) No reply was furnished by any one of them to the show-cause notices so issued.

3. The said V. Vaithialingam and S. Sivalingam, however, appeared on 23.3.1981 and admitted the charges levelled against them and pleaded

ignorance of law, as an excuse for their actions. The case was posted for hearing on 24.4.1981. But none appeared then. The case was

subsequently posted for hearing on 21.5.1981. On that day, one T.V. Natarajan, Advocate appeared and requested for a short adjournment to

produce an attested copy of the ledger accounts and as such, the case was posed for personal hearing on 1.6.1981. Accordingly, the said

advocate appeared and filed a copy dated 22.5.1981 of the account of V. Subramania Pillai with the Saratha''s, NSB Road, Trichy and pleaded

that his client was under the bona fide belief that the said Subramania Pillai was a resident of India and the proceedings may therefore be dropped.

4. The Assistant Director of Enforcement, Madras-6, on consideration of the materials placed, levied penalties u/s 51 of FERA by his Order No.

144-148/81 (PSV), dated 15.6.1981 as below:

(10) In the circumstances, I hold Saratha''s and its Managing Partner, Sri Manavalan, No. 32, NSB Road, Trichy - 2, as liable to penalties for

contravening Section 9(1)(e) of F.E.R. Act, ''73 for Rs. 17, 645 and impose u/s 50 of F.E.R. Act ''73, a penalty of Rs. 1,000 on Saratha''s and

Rs. 750 on Shri Manavalan. I order confiscation of the amount of Rs. 17,645 [being the amount involved in the contravention of Section 9(1)(e) of

F.E.R. Act ''73] for being credited into Govt. Account.

(11) The penalties of Rs. 1,600 (Rs. One thousand six hundred only) imposed on

Sri. V. Vaithialingam, Rs. 1,300 (Rs. One thousand three

hundred only) imposed on Sri S. Sivalingam, and Rs. 1,000 (Rs. One thousand only) imposed on M/s. Saratha''s Rs. 750 (Rs. Seven hundred and

fifty only) imposed on Sri Manavalan, Managing Partner, should be paid to this office by means of a bank draft drawn in favour of the Asst.

Director, Enforcement Directorate, Shastri Bhavan, Madras-6, within 45 days from the date of receipt of this order.

5. The aggrieved M/s. Saratha''s and its Managing Partner T. Manavalan preferred independent appeals--Appeal Nos.391 and 390 of 1981

respectively before the Foreign Exchange Regulation Appellate Board, Southern Zone u/s 52 of FERA. The said Board, however, dismissed both

the appeals, by its common order dated 13th August, 1982.

6. The aggrieved M/s. Saratha''s alone resorted to the present action u/s 54 of FERA.

7. Mr. A.K. Lakshminarayanan, learned Counsel appearing for the appellant would urge for consideration the following two points:

(1) The Enforcement Directorate placed no material whatever to point out that the appellant-firm had any sort of knowledge as to V. Subramania

Pillai, being a citizen of Ceylon and a resident outside India at the relevant point of time of placing a sum of Rs. 17,645 in the books of the firm to

his credit; and

(2) The appellant-firm was under bona fide belief that the said Subramania Pillai was a resident of India.

8. Mr. C.A. Sundaram, learned Additional Central Government Standing Counsel would, however, repel such submissions.

9. The tenability or otherwise of the rival submission of either learned Counsel may now fall for consideration in the arena of discussion.

10. The gravamen of the accusation, as levelled against the appellant was, that it placed a sum of Rs. 17,645 in its accounts to the credit of one V.

Subramania Pillai, a citizen of Ceylon and a resident outside India and thereby, contravened the provisions of Section 9(1)(e) of FERA, which read

as under:

9. Restrictions on payments.-- (1) Save as may be provided in and in accordance with any general or special exemption from the provisions of this

sub-section which may be granted conditionally or unconditionally by the Reserve

Bank, no person in or resident in, India shall--

(a) to (d) ....

(e) Place any sum to the credit of any person resident outside India:

....

11. A cursory perusal of the provision, as extracted above, would reveal that no person in, or resident of India, shall place any sum to the credit of

any person, resident outside India, except in accordance with any general or special exemption, which may be granted conditionally or

unconditionally by the Reserve Bank of India. That apart, no mens rea, that is to say, culpable mental state has been prescribed for such a

contravention. Even where mens rea is a necessary ingredient of any offence under FERA, its existence shall be presumed by the court, according

to the sanguine provisions, adumbrated under Sub-section (1) of Section 59 of FERA, which prescribes,

59. Presumption of culpable mental state.-- (1) In any prosecution for any offence under this Act, which requires a culpable mental state on the

part of accused, the court shall presume the existence of such mental state but 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.

....

Explanation: In this section, ''culpable mental state'' includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

12. On a careful analysis of the statutory provision, as extracted above, it is rather clear that the presumption arising under the said sub-section

may be rebutted by the accused, but the burden that is cast upon the accused to rebut the presumption is quite heavy. The accused has to prove

absence of culpable mental state beyond reasonable doubt in the same way as is cast upon the prosecution in an ordinary criminal trial. It is not as

if the sanguine provisions adumbrated under the said sub-section is not applicable to the adjudication proceedings u/s 51 of FERA and this is made

clear by Sub-section (3) of Section 59 thereof by stating that the provisions of the said section shall, so far as may be, apply in relation to any

prosecution for an offence under the said Act.

13. Section 71 of FERA dealing with the burden of proof in certain cases also requires to be referred to in the process of understanding the

efficacy of the points urged by learned Counsel for the appellant. Sub-section (1) thereof, which is relevant for our present purpose reads as

under:--

71. Burden of proof in certain cases.-- (1) When any person is prosecuted or proceeded against for contravening any of the provisions of this Act

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.

14. Section 59 of, as already referred to, provides that if any prosecution for any offence under the Act, requires a culpable mental state on the

part of the, accused, the court shall presume the existence of such mental state; but it shall be a defence for the accused to prove the absence of

any such mental state. But Section 71 specifies some cases, where the burden of proof shall be on the offender and not upon the prosecution or

the Department. As regards ""Burden of Proof"", Section 101 of the Evidence Act provides that when a person is bound to prove the existence of

any fact, it is said that the burden of proof lies on that person. u/s 103 of the said Act, the burden of proof as to any particular fact lies on that

person who wishes the court to believe in its existence. Section 71 FERA, however, is not consistent with such general provisions and the burden

of proof therein has been shifted to the offender, though ordinarily the burden of proof in such cases should be upon the prosecution. As for

instance, where the prosecution charges a person for contravention of any of the provisions of the Act, which prohibits him from doing an act

without permission the burden of proof should normally be upon the prosecution to prove that he had done the act without such permission, by

examining the concerned authority empowered to grant the necessary permission, since in the absence of such proof the prosecution would fail.

But Section 71 of FERA provides that the burden of proof shall be upon the person charged, to prove that he did the relevant act with the requisite

permission.

15. Worthy it is to note at this juncture that a person, not being a citizen of India, is capable of being construed to be a ""person resident in India

under certain contexts and situations, as contemplated u/s 2(p)(iii) of FERA, which reads as under:--

Section 2. Definitions: In this Act, unless the context otherwise requires,--

(p) ''Person resident in India'' means--

....

(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:

16. From the salient provisions adumbrated in FERA, as referred to above, it goes without saying that it is incumbent upon the appellant-firm to

prove that it placed a sum of Rs. 17,645 in its accounts to the credit of V. Subramania Pillai, a citizen of Ceylon and that he had been a resident in

India at the relevant point of time, in order to extricate himself from the penal consequences flowing from the contravention of the provisions of

Section 9(1)(e) of FERA. No tangible materials had been placed by the appellant-firm before the competent authority in that regard. In this view of

the matter, the imposition of penalty u/s 9(1)(e) of FERA cannot at all be stated to be not sustainable in law. Even the penalty of Rs. 1,000

imposed upon the appellant-firm, on the facts and circumstances of the case, we rather feel, is not excessive calling for interference.

17. For the reasons, as above, CMA deserves to be dismissed and the same is accordingly dismissed. There shall, however, be no order as to

costs, in the circumstances of the case.

