(1986) 10 DEL CK 0028

In the Delhi High Court

Case No : I.A. No. 3200 of 1986 in S. No. 1301 of 1985

Shaukat Ali Khan APPELLANT

Vs

Babu Khan RESPONDENT

Date of Decision : 09-10-1986

Acts Referred:
Foreign Exchange Regulation Act, 1973 — Section 47, 9, 9(1)(a), 9(1)(b)

Citation : AIR 1987 Delhi 158

Hon'ble Judges : Charanjit Talwar, J

Bench : Single Bench

Advocate : G.S. Mathur, for the Appellant; S.K. Puri, for the Respondent

Final Decision : Allowed

Judgement

Charanjit Talwar, J.—By this application, the defendant Babu Khan seeks unconditional leave to defend the suit filed by the plaintiff, Shaukat Ali Khan under Order 37 of the Code of Civil Procedure. Although very many pleas have been stated therein, yet Mr. S. K. Puri, Learned Counsel for the defendant confined his argument to show prima facie that a triable issue has been raised inasmuch as the defendant''s agreements to pay the amount in question, which agreements are the basis of the suit are expressly hit by Ss. 9(1)(a) and 47 of the Foreign Exchange Regulation Act, 1973 (hereinafter called as the Act). To appreciate the rival contentions I may notice a few admitted facts.

2. The plaintiff in the suit has alleged that he was employed in Saudi Arabia when he entered into a partnership with the defendant for carrying on business in Delhi of manufacturing and sale of paints etc. In reply to this application it is further not denied that when defendant agreed in writing to pay to the plaintiff an amount of Rs. 1,26,000/- by the end of December, 1983, he (the plaintiff) was "a person resident outside India". In this connection it is useful to quote paragraph 5 of the application and the reply thereto :

5) That the plaintiff is a non-resident, is permanent resident of Saudi Arabia and,

therefore, transaction in question, that of entering into partnership business or of subsequently entering into alleged agreements to receive money were so executed without permission from Reserve Bank of India and thus is hit by provisions of Foreign Exchange Regulation Act. The alleged two documents stated to be the basis on which the suit has been instituted are, therefore, not legal document and are not enforceable. The factum, legality, validity, admissibility and due execution of the said two documents dated 9th December, 1983 and 24th December, 1983 (sic) is, however, denied.

Reply

5) In reply to para 5 of the Grounds it is submitted that the plaintiff is no doubt employed in Saudi Arabia but it is denied that he could not enter into partnership or could not enter into the Agreement in question to settle the disputes of the partnership and to receive money thereunder without the permission from the Reserve Bank of India or that it is hit by the provisions of Foreign Exchange Regulation Act. It is denied that the two documents referred to in the application under reply are not the legal documents and are not enforceable.

It is submitted that the said two documents dated 9-12-1983 and 24-12-1984 (sic) were duly executed by the defendant and the same are perfectly legal, valid and permissible.

3. However, the agreements dated the 9th December, 1983 and 24th December, 1984 are being admitted. S. 9 of the Act imposes restriction on payments. S. 47 of the Act lays down that no person shall enter into any contract or agreement which evades or avoids in any way the operation of any provisions of the Act or any rule etc. Relevant provisions of S. 9 on which emphasis has been laid down, read as under :

9(1) Save as may be provided in and in accordance with any general or special exemption from the provisions of this subsection which may be granted conditionally or unconditionally by the Reserve Bank, no person in, or resident in, India shall-

(a) make any payment to or for the credit of any person resident outside India;

(b) receive, otherwise than through an authorised dealer, any payment by order or on behalf of any person resident outside India.

4. Mr. G. S. Mathur, Learned Counsel for the plaintiff has referred to four notifications issued by the Reserve Bank of India in support of his argument that payment could be made by a person resident outside India without the permission of the Reserve Bank of India. I have carefully gone through those notifications. None of them is applicable to the payments as described in S. 9(1)(a) (quoted above). For example, the Notification No. F.E.R.A. 257/72 R.B. dated 7th October, 1972, which notification continues to be effective after the amendment of the Act in 1973, reads as follows :

G.S.R. 1426- In pursuance of Cl. (aa) of sub-s. (1) of S. 5 of the Foreign Exchange Regulation Act, 1947 (7 of 1947) and in supersession of the Notification No. F.E.R.A. 229/65-R.B. dated the Ist April, 1965, the Reserve Bank is pleased to permit any person to receive any payment by order or on behalf of a person resident outside India-

(a) made in rupee during such person''s stay in India, out of the rupee funds provided by sale by such person, of foreign exchange to an authorised dealer in India;

(b) by means of postal order issued by a post office outside India or by a postal money order issued by such post office;

(c) by means of cheques drawn on banks situated outside India or bank drafts or traveller''s cheques issued outside India;

(d) in foreign currency notes received by him directly from out of India subject to the condition that any foreign exchange received shall, within seven days of receipt of the same, be offered for sale or caused to be offered for sale in accordance with the provisions of the Notification of the Govt. of India in the Ministry of Finance No. Fl(67)-EC/57, dated the 25th September, 1958.

5. Mr. Mathur further cites a judgment of the Punjab and Haryana High Court in re: Banso Devi v. Assistant Director, Enforcement Directorate, ILR (1980) 1 P&H 42. In the said case also provisions of Cls. (b) and (d) of sub-s. (1) of S. 9 of the Act fell for consideration. However, the principle enunciated that the object of an enactment was to regulate certain payments and that it was not necessary that the foreign exchange must be involved directly in the transaction in order to attract the provisions of S. 9, is applicable. In the said case the land of one Sohan Dass, who was a resident abroad was being tilled by his brother who was in turn paying to his niece the share of income from the land of Sohan Dass. This payment was held to be contravention of provisions of S. 9(1)(b).

6. In the present case it is urged by Mr. Mathur that the moneys which were advanced, had been sent by the plaintiff to his wife through regular channel and those were in turn paid to the defendant who was to look after the partnership business. The agreements executed by the defendant to return the said amount with interest according to the counsel cannot be said to be covered under Cl. (a) of sub-s. (1) of S. 9 and, therefore, the said agreements cannot be said to be void as per S. 47 of the Act. It is further stated that presently the plaintiff after leaving his job in Saudi Arabia has settled in India and thus it cannot be said that his claim based on the two agreements is not maintainable.

7. At this stage, the question to be decided is not whether the said agreements entered into by the parties on 9th December, 1983 and 24th December, 1984 are void. The question is whether the defendant has raised a bona fide triable issue. According to Mr. Mathur, the defence raised is absolutely illusory or sham and, therefore the defendant is not entitled to be granted leave and at any rate he

submits that if leave is to be granted, it should be on directing him either to pay the amount in question in Court or furnish a bank guarantee for the same.

8. I may notice that I granted an adjournment to enable the Learned Counsel for the parties to cite case law applicable to the legal propositions raised in the present case, particularly interpreting S. 9(1)(a) of the Act. Learned Counsel frankly conceded that they have not been able to find out any judgment. However, often quoted observation of Lord Goddard, C.J. in Pickett v. Fesq, (1949) 2 All ER 705 does help in deciding the application. While interpreting the corresponding provisions of the English Act viz., Exchange Control Act, 1947, he said :

It may not generally be known how rigid and far-reaching are the provisions of the Exchange Control Act, 1947. It has been pointed out by high authority that if a person plays a game of cards in this country with a person who does not live in one of the scheduled territories - as for instance, an American and at the end of the game he hands in five shillings which he has lost to him, he is really committing an offence. I do not suppose that in these circumstances anybody would say that a serious offence has been committed or that there would be likely to be a prosecution but the Act is wide enough to cover such a case.

9. Thus prima facie, it appears to me that provisions of S. 9(1)(a) of the Act are applicable. Therefore, keeping in view the principles enunciated by the Supreme Court in Mechalec Engineers & Manufacturers v. Basic Equipment Corporation (C A. No: 508 of 1976 decided on 1st November, 1976) (reported in Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation,), I hold that the defence is reasonable; it raises a triable issue and the defendant is entitled to unconditional leave to defend. The application is allowed but with no order as to costs.

