(2009) 12 DEL CK 0313

In the Delhi High Court

Case No : Writ Petition (C) No''s. 7144 of 2002, 196, 1967, 2345, 2356, 8272, 9172-9195 of 2004, 2633, 8717 and 8718 of 2005, 5419 of 2006

Standard Chartered Bank APPELLANT

Vs

Directorate of Enforcement RESPONDENT

Date of Decision : 18-12-2009

Acts Referred:
Foreign Exchange (Amendment) Act, 1999 — Section 19
Foreign Exchange Regulation Act, 1973 — Section 6(4), 6(5)

Citation : (2010) 100 SCL 201

Hon'ble Judges : Veena Birbal, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : A.N. Haksar, Ateev Mathur, Sumit Bansal, Ajay Monga and Manish, for the Appellant; A.S. Chandhiok, B.V. Niren, Pratap, Rajdipa Behura, C.S. Chauhan and H.S. Parihar, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—In these writ petitions a common question arises and, therefore, the same are being disposed of by a common order. The issue raised in these petitions is with regard to the deposits in foreign currency made by power of attorney holders of Non-Resident Indians in whose names the Non-Resident External (NRE) Accounts stood. The question that arises for consideration is - whether, even for the period prior to 31-7-1995, such deposits in foreign currency needed to be made, necessarily, by the Non-Resident Indian account holder, in person?

2. This issue arises in the backdrop of show-cause notices against the petitioner banks issued by the Enforcement Directorate alleging violation of the provisions of Section 6(4) and Section 6(5) of the Foreign Exchange Regulation Act, 1973 (''FERA'').

3. These writ petitions were filed challenging the show-cause notices. For the sake of convenience we shall be referring to Standard Chartered Bank v.

Directorate of Enforcement WP (C) No. 7144 of 2002, dated 11-11-2002. On 11-11-2002, when the said matter came up for hearing, this Court directed that the proceedings pursuant to the show-cause notice may continue and the final order may also be passed, but the same should not be implemented. On 18-1-2005, it was again reiterated by this Court that the said proceedings may continue and that the final adjudication order may be passed but, the same be placed in a sealed cover. The earlier interim direction was also reiterated that the order that may be passed would not be implemented till further orders of this Court. Thereafter, adjudication orders have been passed in these matters, but the same have not been implemented because of the said interim orders passed by this Court.

4. During the pendency of these writ petitions, a petition raising an identical issue came up for hearing before one of us (Badar Durrez Ahmed, J.) and the same was disposed of on 19-4-2007 on the basis of the statement made by the counsel appearing for the respondent Union of India. The order reads as under:

The learned Counsel for the respondent has taken instructions and she states that prior to 31 -7-1995 foreign currency deposits could be made by individuals other than the NRI account holders in the NRE Accounts of such NRIs. In this view all proceedings pursuant to the show-cause notice dated 25-2-2002 as also the show-cause notice stand set aside.

This writ petition stands disposed of.

5. Thereafter, a review petition was filed by the Union of India on the ground that there was a ''communication gap'' and that proper instructions had not been conveyed to the counsel and that the position was otherwise. The said review petition was dismissed by a detailed order on 16-1-2009. Aggrieved with the said order, the Union of India preferred an appeal, being entitled Union of India v. Citi Bank LPA No. 117 of 2009 before a Division Bench of this Court. The said appeal was decided by virtue of the judgment dated 26-3-2009 upholding the decision and order of the Single Judge. Consequently, on the basis of the said Division Bench decision in the case of Citi Bank (supra), the learned Counsel for the petitioners submitted that all these matters stood covered by the said decision. On the other hand, Mr. A.S. Chandhiok, learned ASG, appearing on behalf of the Enforcement Directorate, submitted that certain aspects were not considered by the Division Bench, which are now sought to be raised by him in the present matters. We shall advert to those shortly.

6. Before we do that, it would be instructive to examine as to what exactly was considered and held by the Division Bench in Citi Bank N.A. (supra). The Division Bench considering the appeal against the order dated 16-1-2009, observed that the Single Judge had concluded that prior to 31-7-1995 there was no clear-cut stipulation that deposits/credits could not be made in the NRE accounts of NRI account holders in the absence of the account holders themselves. In this context, the Division Bench examined paragraph 13B.22 of the Exchange Control

Manual, 1993, prior to its amendment as also after the amendment introduced by virtue of the notification dated 31-1-1996. We may also note that the unamended paragraph 13B.22 of the Exchange Control Manual, 1993 was in pari materia to paragraph 29B.8 of the Exchange Control Manual, 1987. Reference should also be made to the circular dated 31-7-1995 which has been reproduced in the Division Bench judgment in the case of Citi Bank (supra). The relevant portion of the circular dated 31-7-1995 is as under:

2. During the scrutiny of the NRE accounts conducted by the Reserve Bank, serious irregularities have been noticed in the operations on these accounts, particularly in regard to affording credits of proceeds of foreign currency/ bank notes. Authorised dealers are advised to follow scrupulously the following instructions while permitting credits representing proceeds of foreign currency/ bank notes and travellers cheques (TCs) to NRE accounts and operations on these accounts by resident power of attorney holders;

(i) The account should be opened by the non-resident account holder himself and not by the holder of power of attorney in India on behalf of a non-resident.

(ii) The credits representing proceeds of foreign currency travellers cheques/ foreign currency/bank notes may be allowed provided these are tendered to the authorized dealer maintaining the NRE account in person by the account holder himself. In addition, in the case of travellers cheques, these should be discharged by the account holder in presence of the officials of the bank with whom the account is maintained.

(Emphasis supplied)

7. We may also point out that the Division Bench examined the meaning, scope and purport of paragraph 13B.22 of the Exchange Control Manual, 1993, both, prior to its amendment and also after its amendment. The amendment was introduced in paragraph 13B.22(c). Prior to its amendment, paragraph 13B.22(c) was as under:

(c) Proceeds of foreign currency/bank notes tendered by account holder during his temporary visits to India, provided authorized dealer is satisfied that account holder is still normally resident outside India (report on form A4 should be submitted).

After its amendment, paragraph 13B.22(c) read as under:

(c) Proceeds of foreign currency/bank notes tendered by account holder during his temporary visits to India, provided these are tendered to the authorized dealer in person by the account holder himself and the authorized dealer is satisfied that account holder is still normally resident outside India (report on form A4 should be submitted).

8. Comparing the amended provision with the unamended one, it is clear that the words ''these are tendered to the authorized dealer in person by the account

holder himself and the'' - have been inserted by way of amendment. Considering the said circular dated 31-7-1995 and the said amendment introduced in the Exchange Control Manual subsequently, the Division Bench came to the following conclusion:

It is apparent from the bare reading of the circular dated 31st July, 1995 that authorized dealers have been advised to scrupulously follow the instructions given therein while permitting credits representing proceeds of foreign currency, bank notes and travellers cheques to NRE accounts and operations on these accounts and operations on these accounts by resident power of attorney holders. The amended instructions provide that the account should be opened by the non-resident account holder himself and not by the holder of power of attorney in India on behalf of a non-resident. It is also provided that credits representing proceeds of foreign currency travellers cheques/ foreign-currency/ bank notes may be allowed provided these are tendered to the authorized dealer maintaining the NRE account in person by the account holder himself. In addition, it was stipulated that in the case of travellers cheques, the same should be discharged by the account holder in the presence of the officials of the bank with who the account is maintained. It is obvious that on and from the date of this circular, i.e., from 31st July, 1995, no NRE account of an NRI could be credited with the proceeds of foreign currency travellers cheques/foreign currency/bank notes unless and until the same was tendered in person by the account holder himself. There is no dispute that on and after 31st July, 1995, this was the position in law. However, prior to this, there has been no circular or requirement clearly pointing out that deposits in the NRE accounts could not be made by persons other than the NRE account holders themselves.

(Emphasis supplied)

9. We may observe that the Division Bench, in no uncertain terms, held that prior to 31-7-1995 there was no circular or requirement clearly pointing out that deposit in NRE accounts could not be made by persons other than NRE account holders themselves. At this juncture, it would be pertinent to point out that the order dated 26-3-2009, as it originally stood, had a typographical error inasmuch as the word "not" had been left out from the expression "NRE account could not be made by persons...". However, that lacuna was corrected by the Division Bench by an order dated 31-7-2009 and, consequently, the expression is to be read as including the word "not".

10. So, the position insofar as the said order of the Division Bench is concerned, is very clear and, that is, that prior to 31-7-1995 there was no requirement that the deposits in NRE accounts could not be made by persons other than the NRE accounts holders themselves. For the subsequent period, that is after 31-7-1995, it is not in dispute that such deposits could only be made by the account holder himself, in person.

11. In this backdrop, Mr. Chandhiok, sought to argue that certain aspects were

not considered by the Division Bench. The first aspect, according to him, drawing our attention to paragraph 13B.22, was that the unamended provision itself required that the foreign currency notes were to be tendered by the account holder. Secondly, it was also a condition that such tender must be made during the temporary visit in India of the account holder. According to Mr. Chandhiok, the Division Bench judgment does not deal with those issues. He submits that even as per the unamended provisions, it was implicit that the account holder himself should have made the deposits.

12. We are unable to agree with these submissions made by Mr. Chandhiok. particularly, in view of the fact that the Division Bench specifically set out the unamended as well as the amended provision of paragraph 13B.22 and also specifically referred to notification dated 31-7-1995. There is no material to indicate that the Division Bench did not consider paragraph 13B.22 in its entirety.

13. Mr. Chandhiok also submitted that the circular dated 31-7-1995 was only a clarificatory circular and it only clarified something which was already there in paragraph 13B.22. Thus, according to him, the circular dated 31-7-1995 and the amendment introduced in paragraph 13B.22 did not make any difference and nothing new was added.

14. Mr. Chandhiok also argued and submitted that now that the show cause notices had culminated into adjudication orders, the petitioners, have the alternative remedy of filing appeals u/s 19 of the Foreign Exchange Amendment Act, 1999.

15. Insofar as the aforesaid two submissions made by Mr. Chandhiok are concerned, we are of the view that the Division Bench in Citi Bank(supra), had considered all aspects of the matter before it rendered its decision. Even at the sake of repetition, we may point out that the Division Bench specifically set out the provisions of the circular as well as the amended and unamended provisions of paragraph 13B.22 and then came to conclusion, that it did. It is obvious that the said Division Bench did not regard the circular or the amendment as being merely clarificatory. We, therefore, feel that the issue stands entirely covered by the said Division Bench decision. With regard to the submission of alternative remedy, we feel that these writ petitions have been pending before this Court since 2002 and that by virtue of interim orders passed in these writ petitions, the show cause notices were permitted to be proceeded with and adjudication orders were allowed to be passed, however, this Court made it clear that the same would not be implemented. The logic behind this was obvious and, that is, the same were subject to any orders that would be passed in the present writ petitions. In view of the fact that we consider that the issue raised in these writ petitions stands covered by the decision of the Division Bench in Citi Bank''s case (supra), we feel that no useful purpose would be served by relegating the petitioners to seek their alternative remedy of appeal u/s 90 of the FEMA, particularly, because, according to us, that would not, now, be an equally efficacious remedy. In view of the foregoing discussion, these writ petitions are

allowed. The show-cause notices and the consequent adjudication orders are set aside. There shall be no order as to costs.

