(2010) 12 DEL CK 0257

In the Delhi High Court

Case No : Criminal Appeal No''s. 337 and 338 of 2009

Standard Chartered Bank — APPELLANT

Vs

Directorate of Enforcement — RESPONDENT

Date of Decision : 15-12-2010

Acts Referred:
- Banking Regulation Act, 1949 — Section 44A
- Foreign Exchange Management Act, 1999 — Section 49(3), 49(4)
- Foreign Exchange Regulation Act, 1973 — Section 49, 50, 6(4), 6(5), 64(2)

Citation : (2010) 12 DEL CK 0257

Hon'ble Judges : A.K. Pathak, J

Bench : Single Bench

Advocate : Sumit Bansal, Ajay Monga and Ateev Mathur, for the Appellant; K. Singhal and Siddharth Mittal, for the Respondent

Final Decision : Allowed

Judgement

A.K. Pathak, J.—Both the above noted appeals are disposed of together being in similar facts, in as much as, the law point involved therein is also same.

2. These appeals are directed against the order passed by the Appellate Tribunal for Foreign Exchange (hereinafter referred to as "the Tribunal") whereby orders passed by the Adjudicating Authority imposing penalties on the Appellant for contravention of provisions of Sections 6(4), 6(5), 73(3), 49 and 9(1)(e) of Foreign Exchange Regulations Act, 1973 (FERA) read with Section 29B.8(c) of Exchange Control Manual, 1987 has been upheld.

Crl. Appeal 337/2009

3. Brief facts involved in this appeal are that one Mr. Anand Prakash Tripathi had been maintaining a NRE account No. 320169601 with the American Express Bank Ltd. (for short AEBL). In the said NRE account, certain deposits were made between 22nd February, 1993 and 11th October, 1993. Deposits in the said account were made by Umesh Mandiratta and Narender Kumar, mandatees of the

account holder Anand Prakash Tripathi. It may be noted here that AEBL has since been amalgamated with the Appellant bank, pursuant to the order dated 4th March, 2008 passed by the Reserve Bank of India u/s 44(A) of Banking Regulation Act.

4. Since the deposits were made by the persons other than the account holder, a show cause notice dated 18th March, 2002 was issued by the Directorate of Enforcement to the Appellant. It was alleged in the notice as under:

And Whereas it appears that American Express Bank, New Delhi, have accepted the above mentioned cash deposited to the credit of NRE a/c of Sh. Anand Prakash Tripathi, maintained with them without conforming to the guidelines laid down by the Reserve Bank of India.

And Whereas it appears that American Express Bank, New Delhi by their failure to conform to guidelines laid down by RBI by accepting the cash foreign currency deposit as stated in para 3 have contravened the provisions of Section (1) read with section 64(2) and also read with Section 6(4), 6(5) and 739(3) of Foreign Exchange Regulations act, 1973.

5. Adjudicating authority vide order dated 28th February, 2005, imposed penalty of Rs. 2 lakhs on the Appellant. In para 24 of the order it has been held as under:

As regards the charges against American Express Bank, New Delhi (noticee No. 2) I find that the NRE account No. 320169601 was maintained in the name of the noticee No. 1.

It is also an established fact that foreign currencies in the form of cash currencies were deposited in the account on various dates and thereafter cheques were also issued frequently to different persons to the debit of the said account. The noticee bank while furnishing the documents pertaining to the NRE account, furnished certain documents which indicated that after opening the account on 8.2.93 initially the account was operated by Shri Umesh Mendiratta. Thereafter, the mandate given to Shri Mendiratta was withdrawn and another Shri Narendra Kumar was given the mandate for operating the account. The above facts clearly evidenced that the frequent operations in the NRE account of depositing foreign currency and issuance of cheques were not done by account holder but by other persons. A banker who claimed to be too meticulous and scrupulous in its transactions should have been carefully and became cautious when mandate holders i.e. persons other than the account holder frequently carry out such transactions of deposit of foreign exchange. Any rational person would have doubted or became suspicious when foreign exchange in hard currency form were deposited in the account that also frequently. It would have been a case in favour of the noticee bank had they enquired with the persons including the mandate holders so as to the source of such foreign exchange deposited by them. It is not correct that just on the strength of a mandate, any person can deposit foreign currency procured from any source and deposit in the bank account of another person in absentia to circumvent the foreign exchange laws and the noticee bank without raising an eye brow go on accepting the foreign exchange. The argument of the bank would have some merits in such a situation where the account holder himself came and deposited the foreign currency. In such case, the notice bank would have been justified in not insisting on currency declaration form at the time of accepting the deposits and not enquiring the source of the foreign currencies. A mandate holder, to my mind, does not enjoy such a privilege.

(emphasis supplied)

Crl. A. 338/2009

6. Facts involved in this appeal are that one Deepak Bahiri was maintaining two NRE accounts. One NRE A/c No. 320169951 was maintained with the AEBL, Connaught Place Branch and other A/c No. 015-03-41935 with the Appellant''s Sansad Marg Branch. In both these accounts certain deposits were made between 3rd March, 1993 and 11th October, 1993 by Shekhar Goel, who was the mandatee of the said NRE accounts holder. Certain other persons had also made deposits in the said accounts during that period. Since the deposits were made by a person other than the account holder, a show cause notice dated 20th April, 2002 was issued to the Appellant along with other noticees for accepting foreign exchange deposits through a person other than the account holder. It was alleged in the notice as under:

AND WHEREAS by accepting in cash foreign exchange equivalent to Rs. 66,98,318.90 and Rs. 17,22,336.20 tendered by persons other than the account holder for depositing in two NRE accounts of the said Shri Deepak Bahiri of Spain, in the aforesaid manner, in American Express Bank, Hamilton House, A Block, New Delhi and Standard Chartered Bank, Sansad Marg, New Delhi respectively and their respective Manager in charge at the relevant time appear to have contravened the provisions of Section 6(4) and 6(5) read with Section 73(3) and 49 of FERA, 1973 and para 29 B.8 (c) of Exchange Control Manual, 1987 and have thereby rendered themselves liable to be proceeded against u/s 50 of the said Act read with Sub-Section 3 and 4 of Section 49 of Foreign Exchange Management Act, 1999.

AND WHEREAS by crediting the aforesaid foreign change equivalent to Indian Rs. 66,98,318.90 and Rs. 17,22,336.20 in the NRE account of Shri Deepak Bahiri of Spain, a person resident outside India, the said American Express Bank, A Block, Connaught Circus, New Delhi and Standard Chartered Bank, Sansad Marg, New Delhi respectively and their respective Manager-in-Charge at the relevant time appear to have contravened the provisions of Section 9(1)(e) of the FERA, 1973 and have thereby rendered themselves liable to be proceeded against u/s 50 of the said read with Sub-section (3) and (4) of Section 49 of Foreign Exchange Management Act (FEMA), 1999.

(emphasis supplied)

7. After conducting adjudication proceedings, Adjudicating Officer imposed penalty on the Appellant and its managers of different amounts details whereof are given as under:

v) I impose personal penalty of Rs. 5,00,000/- (Rupees Five Lakhs only) on the Manager-in-Charge of America Express Bank, notice No. 3 u/s 50 of the FERA, 1973 for contravention of provisions of Section 6(4) and 6(5) read with Section 73(3) and 49 of FERA, 1973 and para 29 B.8(c) of ECM, 1987 respectively in terms of Section 68 of the FERA, 1973.

vi) I impose personal penalty of Rs. 5,00,000/- (Rupees Five Lakhs only) on the Manager-in-Charge of American Express Bank, noticee No. 3 u/s 50 of the FERA, 1973 for contravention of provisions of Section 9(1) of FERA, 1973 and in terms of Section 68 of the FERA, 1973.

vii) I impose personal penalty of Rs. 5,00,000/- (Rupees Five Lakhs only) on American Express Bank, noticee No. 4 u/s 50 of the FERA, 1973 for contravention of provisions of Section 6(4) and 6(5) read with Section 73(3) and 49 of FERA, 1973 and para 29B.8(C) of ECM, 1987.

viii) I impose personal penalty of Rs. 5,00,000/- (Rupees Five Lakhs only) on American Express Bank, noticee No. 4 u/s 50 of the FERA, 1973 for contravention of provisions of Section 9(1)(e) of FERA, 1973 respectively.

ix) I impose personal penalty of Rs. 2,00,000/- (Rupees Two Lakhs only) on the Manager-in-Charge of Standard Chartered Bank noticee No. 5 u/s 50 of the FERA, 1973 for contravention of provisions of Sections 6(4) & 6(5) read with Section 73(3) and 49 of FERA, 1973 and para 29B.8(c) of ECM, 1987 respectively in terms of Section 68 of the FERA, 1973.

x) I impose personal penalty of Rs. 2,00,000/- (Rupees Two Lakhs only) on the Manager-in-Charge of Standard Chartered Bank noticee No. 5 u/s 50 of the FERA, 1973 for contravention of provisions of Section 9(1)(e) of the FERA, 1973 in terms of Section 68 of the FERA, 1973.

xi) I impose penalty of Rs. 2,00,000/-(Rupees Two Lakhs only) on Standard Chartered Bank, noticee No. 6 u/s 50 of the FERA, 1973 for contravention of provisions of Section 6(4) & 6(5) read with Section 73(3) and 49 of FERA, 1973 and para 29B.8(C) of ECM, 1987 respectively.

xii) I impose penalty of Rs. 2,00,000/-(Rupees Two Lakhs only) on Standard Chartered Bank noticee No. 6 u/s 50 of the FERA, 1973 for contravention of provisions of Section 9(1)(e) of the FERA, 1973.

8. As already mentioned above, appeals filed against the aforesaid adjudication order have been dismissed by the Tribunal vide the order impugned in the abovenoted appeals.

9. In the abovenoted facts, it is clear that the show cause notices had been issued to the Appellant and its predecessor in interest in the month of March/

April, 2002 for the irregularities allegedly committed in the year 1993 i.e. after about nine years. What can be deduced from the facts narrated hereinabove is that Appellant has been found to have contravened various provisions of FERA and the rules and regulations framed thereunder, since it had accepted the deposits in the NRE account from the person other than the account holder. Thus, the question that needs attention of this Court is whether deposits in foreign currency made by the mandatee or any person other than the account holder, in the NRE account, prior to 31st July, 1995 would amount to infringement of provisions of Section 6(4), 6(5), 73(3), 49 and 9(1)(e) of Foreign Exchange Regulations Act, 1973 read with Section 29B.8(c) of Exchange Control Manual, 1987.

10. It appears that similar show cause notices had been issued to several banks by the Department resulting in filing of number of writ petitions in this Court, thereby challenging the validity and legality of such show cause notices. In Citi Bank v. Union of India and Anr. W.P.(C) 1211/2005, a Single Judge of this Court vide judgment dated 19th April, 2007 held that prior to 31st July, 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. Review petition filed by the Union of India in the aforesaid matter was also dismissed on 16th January, 2009. Union of India then preferred an LPA bearing No. 117/2009 titled Union of India and Ors. v. Citi Bank before the Division Bench of this Court, thereby, challenging the order passed by the Single Judge. This LPA was, however, dismissed on 26th March, 2009. Division Bench considered the show cause notice and circular/instructions issued by the Union of India on 31st July, 1995 in respect of deposits of foreign exchange in NRE accounts, as also the provisions of Exchange Control Manual and held that prior to 31st July, 1995, there had been no requirement clearly pointing out that deposits in NRI accounts could not be made by a person other than the NRI account holder themselves.

11. Similar issue was posed for answer in Standard Chartered Bank Vs. Directorate of Enforcement and Others, . The question canvassed in the said case was whether prior to 31st July, 1995, deposits in foreign currency needed to be made, necessarily, by the Non-Resident Indian account holder in person? By following the earlier judgment in Union of India (supra), Division Bench of this Court held that prior to 31st July, 1995, there was no requirement that deposits in NRE accounts could not be made by a person other than the NRE account holders themselves. In the said case, an argument was advanced by the Department that unamended provision itself required that the foreign currency was 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. This argument was advanced by placing reliance on unamended paragraph 13B.22(c) of the Exchange Control Manual, 1993 which was in pari materia to paragraph 29B.8(c) of the Exchange Control Manual, 1987. However, this argument was negated. It was held as under:

Insofar as the aforesaid two submissions made by Mr. Chandhiok are concerned, we are of the view that the Division Bench in Union of India and Ors. v. Citi Bank, N.A. (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.

12. In Standard Chartered Bank v. Directorate of Enforcement 2010 VIII AD (Delhi) 164, similar issue was involved. This was an appeal against the order of the Tribunal upholding the penalty imposed on the bank, in the similar facts. Deposits were made in NRE account sometime in the year 1992-93 by the person other than the account holder. Adjudicating authority had imposed penalty on the Appellant in the said case. A Single Judge of this Court allowed the appeal filed by the Bank and set aside the orders passed by the Tribunal and adjudicating authority. It was held that the show cause notice and the consequent adjudication proceedings were not tenable and the liability of the bank to insist upon that only NRI should appear in person to make the deposits was not clear, inasmuch as, this liability was clarified to the bank only in 1995 i.e. after the impugned transaction.

13. There is yet another reason for which the impugned orders cannot be sustained. Admittedly show cause notice was issued after more than 8 years. Bank was not obliged to maintain record beyond 8 years in view of The Banking Companies (Period of Preservation of Records) Rules, 1985, notified on 29th March, 1985, wherein maximum period of maintenance of records of all kinds of registers etc. has been stipulated as 8 years. In view of issuance of show cause notice after about nine years, Appellant had been prejudiced.

14. For the foregoing reasons, abovenoted appeals are allowed and the impugned orders are set aside.

