

(1989) 08 BOM CK 0003
In the Bombay High Court
Case No : First Appeal No. 146 of 1987

State of Maharashtra

APPELLANT

Vs

Narbheram M. Parekh

RESPONDENT

Date of Decision : 08-08-1989

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 14, 50, 8

Citation : (1990) 3 BomCR 76 : (1990) ECR 378 : (1989) MhLj 926

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : R.M. Kadam, Asstt. Government Pleader, for the Appellant; V.J. Jhaveria, for the Respondent

Final Decision : Dismissed

Judgement

Sharad Manohar, J.—This petition is filed by the State of Maharashtra at the instance of the Direction of Enforcement against the order passed by the Chairman of the Foreign Exchange Regulation Appellate Court allowing the respondent's Appeal against the order of the Adjudication Officer under the Foreign Exchange Regulation Act, 1973 imposing a penalty of Rs. 10,000/- upon the respondent on the ground that he has failed offer for sale the foreign exchange of the worth of 3000 pounds in contravention of the provisions of section 14 of the said Act.

2. There is practically no dispute about the facts which are stated quite precisely by the Court in its judgment which is appealed from:---

The respondent is a person carrying on business in Ethiopia. He started doing so way back in 1938 and there is no dispute that since that year he has been carrying on business in Ethiopia. His wife, however, became ill. Hence, he came back to India in 1975. Before that between 1964 and 1974 he did have occasion, to visit India on quite a few occasion, but that was for a short period. The last time that he came to India was in 1975. He came here on account of the serious

illness of his wife. In fact his wife expired in January 1983. The political situation in Ethiopia became too hot for his collar during that time. The result is that he has continued his stay in India from 1975 till this date. He wants to go abroad, but the date of his going abroad is uncertain.

However, during this period, commencing from 1975, the respondent did have occasion to go to Europe for a short while, mainly for the purpose of treatment of his wife. In July 1979 he was in Europe, he had an Account in the Bank of Napoly, in Italy. From that Bank, he withdrew 3000 pounds and out of this amount of 3000 pounds, he spent the amount of 2100 pounds for his wife's treatment abroad and the balance of 900 pounds was brought by him in India and he even declared that amount while returning. When he was asked to explain the possession of that much amount, he gave the explanation that this was the balance of the amount of 3000 pounds that he had withdraw from the Bank Account, at Napoly, in Italy. The Enforcement Directorate, therefore, raised their eye-brows and issued to him a Show-Cause Notice as to why proceedings against him should not be instituted for offence u/s 8(1) of the Foreign Exchange Regulation Act and as to why penalty should not be imposed upon him.

The petitioner was ready with the reply for this allegation of offence u/s 8(1) of the Act. But on the date of the inquiry, the officer was satisfied that section 8(1) had no application to the facts of the case.

The proceeding started before the Adjudicating officer. It was common grounds before the Adjudicating Officer that the Notice did not lie for offence u/s 8(1) of the Act and even the Adjudicating Officer held that the Notice u/s 8(1) was not maintainable. However, he held that there was enough evidence on record to hold that perpetration of offence u/s 14 of the Act by the petitioner was fully established. He, therefore, dropped the charge for contravention of section 8(1) of the Act, but proceeded to hold him guilty for commission of offence of infringement of section 14 of the Act, in that the amount of 3000 pounds, which the petitioner admittedly withdrew from Bank Napoly, had to be handed over by him to the Reserve Bank of India and failure to do so spelt contravention of section 14 of the Act. He passed an Order against him convicting him for offence u/s 14 of the Act, even though the only Show-Cause Notice given to him was confined only to whatever was allegedly done by the petitioner u/s 8(1) of the Act.

3. In Appeal, the Board has accepted the position that---

(a) no offence was made out for contravention of any of the provisions of section 8(1) of the Act;

(b) the Notice to the respondent related to the so-called offence u/s V of the Act;

However, as regards the direct conviction u/s 14, the Chairman of the Board has negatived the Department's plea that it was open for the Adjudicating Officer to change the charge mentioned in the Show-Cause Notice from section 8(1) of the

Act to section 14 of the Act. According to the Board, if the Show-Cause Notice related to charge u/s 8(1) of the Act, the conviction could not be based upon the alleged contravention of the provisions u/s 14 of the Act without prior appropriate Show-Cause in that behalf.

4. As regards the plea that fresh opportunity should be given to the officer concerned to issue Show-Cause Notice regarding offence u/s 14 of the Act, the learned Chairman held that the entire conduct of the Appellant was a bona fide conduct and that this was not a fit case for the appellant being required to wade through the gruelling indictment de novo. The Board has, therefore, allowed the Appeal and has set aside the conviction of the Appellant for offence u/s 14 of the Act.

The present Appeal is filed by the Government against the said order of the Board.

5. I may state here that the fact that the provision of section 8 of the Act could not be invoked at all by the Government is not disputed before me. But Mr. Kadam, appearing for the Government, submitted that this was certainly a case where contravention of section 14 of the Act could be readily inferred. Submission was that, in any event, there was no reason why the matter should not have been sent back to the authority under the Foreign Exchange Regulation Act for issuance of fresh notice u/s 14 to the respondent so as to start the proceeding from scratch, all over again.

6. I am not inclined to accede to this reasoning and contention. The entire question has been fully examined and considered by the Appellate Board. The fact that the show-cause notice was not valid is not disputed. But the further fact is that apart from being invalid, the notice is not worth the paper it is typed on if it makes the appellant answerable for the charge u/s 8(1) of the Act, which has not a ghost of application to the facts of the case.

7. As regards that offence u/s 14 of the Act, it may be that, very technically speaking, there is some contravention of section 14 of the Act on the part of the Appellant. But, on the face of it, his conduct is full of bona fides and sincerity. He withdrew 3000 pounds from the Bank in foreign currency. He spent 2000 pounds in Europe for his wife's treatment. The remaining 900 pounds were not retained by him. The moment he came here, he declared that amount. He has not got any personal gain by spending the amount of 2100 pounds in the country abroad., He has spent it for his wife's illness, which fact is not disputed at all.

Anybody can see that the respondent could as well have deposited back the balance of \$ 900 in the Napoli, kept prudent mum about and there would hardly be any opportunity for the Department to do anything about. This means that it is his honesty which is his undoing. Putting premium upon dishonesty are the words that spring to the lips. The defendant wants to penalise for his honesty, he legitimately complains.

On the one hand, Government has been declaring from hoardings and from house-tops Amnesty for Income Tax dodgers, that is to say, are holding out inducement of honesty to the erstwhile dishonest tax evaders who have caused loss to the Government of crores. Here, we find that the person who has been honest right from beginning is being condemned to heavy penalty and that too when not a farthing's loss is caused to the exchequer. If penalty is imperative, a token penalty of Re. 1/- would answer the imperative. The Chairman was right is not remanding the matter back for such formality.

In fact it is not disputed that there is discretion vested in the Adjudicating Officer if the mistake committed by the respondent is a bona fide mistake at least re-penalty. I may state here that section 50 of the Act, which is the penal section, does not prescribe any minimum penalty. It prescribes only the maximum penalty. In the instant case, near maximum penalty is imposed by the Adjudicating Officer. I see scant justification for exercise of such discretion. Reliance placed by the learned advocate on the judgment on the Judgment of the Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa, is quite apt and appropriate. There the Supreme Court has held that if the offences such as the present one, are committed by the police or other such person, penalty of the maximum extent should not be imposed upon them. The fact that the conduct has been full of bona fides certainly injuncts the officer concerned to spare any harsh penalty upon the assessee or upon the person by the Adjudicating Officer just in the presence of the respondent and that no intimation of the same was ever received by the respondent was not disputed at all. The only question, therefore, was whether it would be open for the Adjudicating Officer to convict the respondent straightaway on the basis of contravention of section 1 of the Act without giving any effective hearing to the respondent on that point it was not open for him doing so because if the original related to offence u/s 14, the respondent would have come prepared with different defence. This is a matter of substance, not of form, not of mere changing of label as argued by Mr. Kadam. Failure to bear in mind this aspect has no doubt vitiated the entire proceedings. As observed by the learned Chairmen, this is certainly not a case where the Adjudicating Officer should be given a 2nd inning for bringing the respondent to book.

8. The Appeal, therefore, fails and the same is hereby dismissed with costs.