(2004) 07 BOM CK 0002

In the Bombay High Court

Case No : Writ Petition No. 1115 of 1991

Sunder N. Mirpuri APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 13-07-2004

Acts Referred:

Foreign Exchange Regulation Act, 1947 — Section 4(2), 51, 8(2), 9

Citation : (2004) 6 BomCR 665 : (2005) 59 SCL 556

Hon'ble Judges : S.R. Sathe, J;F.I. Rebello, J

Bench : Division Bench

Advocate : Bomi Patel and Sonali Kanekar, for the Appellant; Suresh Kumar and Y.R. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

F.I. Rebello, J.—The petitioner by the present petition has impugned the notification dated 15-6-1977 insofar as it purports to come into force with retrospective effect from 1st April, 1974 is illegal, unconstitutional and invalid and for a further declaration that notification dated 25th September, 1958 will apply to the transfers allegedly made by the Petitioner through his foreign currency accounts in the year 1974-75. The petitioner also seeks a writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order or direction calling for the records of the case and after considering the legality, validity and propriety of the impugned notification dated 15th June, 1977 and of the impugned order dated 13th February, 1991 be pleased to quash the same.

2. A few facts now may be set out:

Government of India had issued notification dated 25-9-1958 in exercise of powers conferred by Section 9 of the Foreign Exchange Regulation Act, 1947 (hereinafter referred to as ''Act'') and in supersession of the notification of the Government of India in the Ministry of Finance No. 12(13)-F. I/47 dated 25th

March, 1947, directing that every person in, or resident in, India who owns or holds or who may hereafter own or hold any foreign exchange, whether held in India or abroad expressed in the currency specified in the Schedule annexed to this order shall before the expiration of one month from the date of the order, or in the case of a person who hereafter owns or holds such foreign exchange, within one month of the date of his so owning or holding, offer the same or cause it to be offered for sale to an authorised dealer, being a person authorised by the Reserve Bank for the purpose, against payment in rupees, at the rate for the time being authorised by the Reserve Bank in pursuance of Sub-section (2) of Section 4 of the said Act for conversion into Indian currency of the foreign currency in which such foreign exchange is expressed.

3. It is not necessary to refer to other part of the said notification. The case of the Petitioner is that thereafter another notification came to be issued on 15-6-1977 in which it is directed that every person in, or resident India, who owns or holds or who may hereafter own or hold any foreign exchange whether in India or abroad, expressed in any currency other than the expiration of one month from the date of this order or in the case of a person who hereafter owns or holds such foreign exchange within three months of the date of his so owning or holding, offer the same or cause it to be offered for sale to any authorised dealer against payment in rupees, at the rate for the time being authorised by the Reserve Bank in pursuance of Sub-section (2) of Section 8 of the Act for conversion into Indian currency of the foreign currency in which such foreign exchange is expressed. The order shall not apply amongst others to maintenance of, and operation of any account in foreign currency maintained outside India by foreign citizen in, or resident in, India but not permanently resident therein. By memorandum dated 4-3-1980 issued by the Additional Director, Enforcement Directorate and addressed to the Petitioner, it was brought to the attention of the Petitioner that during the year 1974-75, the Petitioner was now permanently residing in India and held foreign exchange as set out in the show-cause notice and had transferred to the persons set out therein who were not authorised dealers and further that the petitioner did not obtain permission from the Reserve Bank of India and for other reasons as set out therein the Petitioner was called upon to show-cause why proceedings u/s 51 of the Act should not be initiated.

4. Pursuant to the show-cause notice, petitioner''s statement was recorded. One such statement was recorded on 16-2-1974 where he stated that he was resident of Tanzania, holding a British Passport. He had come to India to take a permanent settlement under the Government of India new scheme whereby foreigners of Indian origin could start business with foreign resources, that he was having account with Trade Development Bank, Geneva and National Bank of Tanzania. In the further Statement recorded on 10-2-1990 it was set out that he is permanently residing in India. Petitioner set out that he is British Passport holder residing in India since 1973. Petitioner also replied to the show-cause notice on 15-9-1980.

5. By order dated 31-5-1984, the Special Director of Enforcement, Enforcement Directorate, Foreign Exchange Regulation Act, held that the Petitioner was guilty of contravention of the provisions of the Act and imposed penalty of Rs. 5 lakhs. The petitioner aggrieved preferred appeal before the Appellate Authority and also filed his submissions. By the impugned order dated 13-2-1991, the appeal preferred by the Petitioner was dismissed. One of the contention raised on behalf of the petitioner before the Appellate authority was that the appellant was neither person residing in India nor foreign citizen permanently residing in India. The learned Appellate Tribunal held that whether the appellant was permanently residing in India or not at the relevant time is to be gathered from the surroundings facts and circumstances and thereafter recorded the finding that though the appellant was foreign citizen he was continuously residing in India since 1973 and permanently residing in India and on that count rejected the contention and confirmed the order which was subject-matter of the appeal.

6. It is this order which is subject-matter of the present petition. At the hearing of this appeal, the learned counsel contends that the notification of 1958 was not applicable to the Petitioner herein and in these circumstances, the order passed is without jurisdiction. It is further submitted that the notification of 25-9-1958 was repealed by notification of 15-6-1977 and that cannot be made applicable with retrospective effect and could only be applied prospectively.

On the other hand on behalf of the respondent, their learned counsel submits that notification of 1958 was amended by GSR 77 by which in the first proviso in the notification for Clause (iii) was substituted and which reads as under:

"maintenance of and operation on any account in foreign currency maintained outside India by foreign citizens in or resident in India but not permanently resident therein."

7. It is therefore, clear that the said GSR which was gazetted in the Gazette of India 1974 has amended the notification of 1958. The show-cause notice issued to the Petitioner was during the year 1974-75 that he had transferred foreign currency to persons other than foreign dealers. Therefore, that show-cause notice was in respect of notification of 1958 as amended by Notification of 1974. Once that be the case, clearly the contention of the Petitioner that notification of 1958 was not applicable is devoid of merits and will have to be rejected.

8. The other contention insofar as Notification of 15-6-1977 and that the same was made retrospective effect is again devoid of any merit as show-cause notice was issued to the petitioner under Notification of 25-9-1958 as amended in 1974. Therefore, there is no question of notification of 1974 being made effective with retrospective effect. That contention must also be rejected.

9. Lastly it was contended that even assuming that Notification of 1958 was attracted yet, the petitioner would not fall within the notification as he was permanently residing in India. The issue whether the person is permanent resident would be a finding of fact. Both the fact-finding authorities below have

recorded a finding of fact that petitioner was a permanent resident of India. This being purely a finding of fact cannot be interfered in the exercise of our extraordinary jurisdiction. The order otherwise does not disclose any error of law apparent on the face of record. We are, therefore, not inclined to exercise extraordinary jurisdiction as there is no merit in the petition.

Rule discharged. No order as to costs.

