(1996) 02 MAD CK 0064

In the Madras High Court

Case No : Appeal against Order No. 384 of 1987

Union of India APPELLANT

Vs

A.J. Kingsley Fernandez RESPONDENT

Date of Decision : 14-02-1996

Acts Referred:
Foreign Exchange Regulation Act, 1973 — Section 2, 40, 9

Citation : (1996) 87 CompCas 122 : (1996) CriLJ 4353

Hon'ble Judges : P. Sathasivam, J;Abdul Hadi, J

Bench : Division Bench

Advocate : S. Veeraraghavan, for the Appellant; P. Ananthakrishnanair, for the Respondent

Judgement

Abdul Hadi J.

1. This civil miscellaneous appeal is filed by the Union of India, represented by the Deputy Director of Enforcement, u/s 54 of the Foreign

Exchange Regulation Act, 1973 (hereinafter referred to as ""the Act""). It is against the order of the Appellate Board, dated October 31, 1985,

allowing the appeal preferred by the respondent herein before it and thereby setting aside the penalty of Rs. 7,500 levied by the first authority, in

his order, dated July 31, 1984. The said order, dated July 31, 1984, was passed on the ground that the respondent had contravened section 9(1)

(a) of the Act in having made payment of Rs. 35,000 on January 18, 1978, to one Justus Thomas. The abovesaid order, setting aside the order of

the Appellate Board is on the footing that the said Justus Thomas has not been proved to be a person resident outside India, as mentioned in

section 9(1)(a) of the Act.

2. The first authority has held that he was a person resident outside India.

3. Learned counsel for the appellant submits that the Appellate Board has grossly erred in coming to the abovesaid conclusion and particularly has

not taken into account the definition of the term ""person resident outside India"" u/s 2(q) of the Act. The said provision says that the person resident

outside India means ""a person, who is not as resident in India."" The term ""person resident in India"" is defined u/s 2(p) of the Act. Admittedly, the

said Justus Thomas is a citizen of India and according to the learned counsel for the appellant, section 2(p)(i)(b) of the Act is the relevant provision

applicable in the present case. That provision says that a person resident in India means a citizen of India, who has, at any time after the 25th day

of March, 1947, been staying in India, but does not include a citizen of India who has gone out of India or stays outside India in either case, (a)...

(b) for carrying on outside India a business or vocation outside India. So, accordingly, a citizen of India, who stays outside India for carrying on

outside India a business or vocation outside India shall only be a person resident outside India. Learned counsel for the appellant submits that the

abovesaid Justus Thomas, in the present case, has been proved to be doing business or vocation outside India, viz., Muttrah, Muscat.

4. On the other hand, learned counsel for the respondent, submits that it is not exactly proved when actually Justus Thomas was doing business

outside India, as stated above. Learned counsel for the respondent also submits that it has been proved that on the day, when the payment was

made, viz., January 18, 1978, the said Justus Thomas was actually in India. Therefore, according to learned counsel for the respondent, the said

Justus Thomas cannot be considered as a person outside India, on the date when the payment was made, viz., on January 18, 1978.

5. We have carefully considered the rival submissions of learned counsel appearing on either side. It is clear to us, after going through the relevant

materials in this case that the argument of learned counsel for the appellant has got to be accepted for the following reasons :

(1) In this case after the search and seizure were made on April 28, 1982, the enforcement directorate has subsequently obtained a statement,

dated April 18, 1983, from the respondent himself, pursuant to section 40 of the Act. In the said statement the respondent has admitted thus : ""Mr.

Justus Thomas, is the managing director of Alshanfan Trading and Contracting Establishment, Post Box No. 1184, Muttrah, Muscat - I came to know the said Justus Thomas, during my visits to the Sultanate of Oman.

6. The further statement made therein is as follows :

Even though a copy was addressed to his Muscat address also, I did not receive any reply to this lawyer''s notice from Mr. Justus Thomas. At the

time of giving the loan, I was hardly having one year acquaintance with him. Since I thought him to be a lawful citizen, I paid the money and I am

yet to get it back. After sending the lawyer''s notice, I have not taken any steps to recover the amount of Rs. 35,000. I lend to Mr. Justus Thomas,

since I have to pay to court, the court fee and advocate fee which may run to more that Rs. 5,000.

7. From the above passage, admittedly, it is clear that a sum of Rs. 35,000 was given to Justus Thomas as a loan and that is why in the abovesaid

statement, it is mentioned that the respondent sought to recover back the said sum from the said Justus Thomas by sending a lawyer''s notice. The

significant observation made in the said passage is that admittedly at the time of giving the load, viz., on January 18, 1978, ""the respondent was

hardly having one year acquaintance with Justus Thomas"".

8. In the former quoted passage, the respondent has stated that he came to know the abovesaid Justus Thomas during his visits to the Sultanate of

Oman. Taking that passage along with the letter quoted passage stating that at the time of giving the loan, he was hardly having one year

acquaintance with Justus Thomas, we can come to the conclusion that prior to January 18, 1978, Justus Thomas was resident outside India. Only

when he was thus resident outside India, i.e., in Muscat, the respondent, during his business visits to that place, was meeting the said Justus

Thomas.

9. No doubt as against the show-cause notice dated April 22, 1983, stating that the said Justus Thomas was a person in Muscat and a person

resident outside India, in the reply, dated April 26, 1983, to the show-cause notice, the respondent has stated that the said Justus Thomas is

resident in India. But, in the light of what we have extracted from his original statement on April 18, 1983, it is clear to us that the said Justus

Thomas is a person resident outside India, in view of what is contained in section 2(p)(i)(b) of the Act, coupled with section 2(q) of the Act. The

fact that the said Justus Thomas is such a person prior to January 18, 1978, viz., the date when the payment was made is also very clear from what

we have already pointed out from the abovesaid statement made by the respondent on April 18, 1983 itself.

10. Even if it can be said, for argument sake, that the said Justus Thomas was only a managing director of the abovesaid concern and he was not

actually owning the business in question, it could be easily said, in view of the word ""vocation"" used in section 2(p)(i)(b) of the Act, that the said

Thomas is carrying on ""vocation"" outside India, if not ""business"" outside India. It is settled law that ""vocation"" is a much wider term than ""business"".

11. Without taking into consideration, the above referred to relevant provisions of section 2(p) and 2(q) of the Act, the Appellate Board has only

considered the nature of the bank account held in the name of the abovesaid Justus Thomas, at Union Bank of India, Quilon branch, to which

alone, the draft for Rs. 20,000 (out of the abovesaid sum of Rs. 35,000) was sent. No doubt, it was not a non-resident account, but it was only an

ordinary account, as if the said Justus Thomas was a resident in India.

12. But the reasoning of the Appellate Board is not correct. From the mere fact that the said Justus Thomas was having a resident bank account

and not a non-resident bank account, it cannot be concluded either way, with reference to his residential status, in the light of the abovesaid

relevant provisions of the Act. There is also no need or necessity to go into the question of burden of proof as has been done by the Appellate

Board in paragraph 5 of its order. It is so, because it is quite clear, as we have mentioned already, that the said Justus Thomas was only a resident

outside India at the relevant point of time, taking into consideration the very statement of the respondent himself given on April 18, 1983.

13. Learned counsel for the respondent pleaded for reduction of the penalty already levied. But we do not find any merit in this contention of

learned counsel for the respondent also. In the first appeal filed by him, even alternatively he did not plead for any such reduction of the penalty.

We see no reason at all to interfere with the quantum of penalty already levied.

14. In the result, the order of the Appellate Board, dated October 31, 1985, is erroneous in law and hence set aside, and the order of the first

authority, dated July 31, 1984 is restored. The civil miscellaneous appeal is, accordingly, allowed with costs.

