

(1992) 02 BOM CK 0055

In the Bombay High Court

Case No : Appeal No. 1404 of 1988 in Writ Petition No. 2528 of 1986

Union of India

APPELLANT

Vs

Mohibali Roshanali Naser

RESPONDENT

Date of Decision : 10-02-1992

Acts Referred:

Constitution of India, 1950 — Article 226

Foreign Exchange Regulation Act, 1973 — Section 33, 48, 49, 59, 6

Citation : (1992) 59 ELT 403

Hon'ble Judges : S.H. Kapadia, J;M.L. Pendse, J

Bench : Division Bench

Advocate : Shri S.M. Shah, R.C. Master and S. Sankararamkrishnan, for the Appellant; Shri T.R. Andhyarujina, P.D. Ganguly and C.A. Jani, Advs, for the Respondent

Judgement

Kapadia, J.—This appeal has been filed by Union of India seeking to challenge the judgment and order of the learned Single Judge dated 23rd September 1988 in the petition filed by the original petitioner under Article 226 of the Constitution of India.

2. The facts giving rise to this appeal are as follows :-

(a) The original petitioner firm carries on business as a travel agent in the name and style "Alshaya Nasser Travels" along with Aysha Shaya & Haya Shaya.

(b) The petitioner firm had arranged 2 groups of passengers for Haj through different group leaders. The first group consisted of 200 passengers scheduled to leave Bombay on 20th July 1986, while the second group was consisting of 269 passengers scheduled to leave Bombay on 27th July 1986.

(c) On 8th July 1986, the petitioners paid to the original 3rd respondent Bank an amount in Indian Rupees equivalent to foreign exchange of 200 passengers of the first group with requisite documents viz. passports, A2 forms, FTS forms duly certified by I.A.T.A., agents and tickets to passengers. However, the foreign

exchange was not collected by the petitioner.

(d) On 18th July 1986 (in the morning) for the first group of passengers the Bank issued foreign exchange to 118 out of 200 passengers of the first group at Kutchi Memon Jamat Musafir Khana, Kambekar Street, Bombay. This amount came to be disbursed in the morning of 18th July 1986 by the Bank at Musafir Khana, Bombay. According to the petitioner firm, at the instance of the Bank Shri Sandeep Naik representative of the said Bank came to the office of the petitioner firm on 18th July 1986 in the afternoon to give exchange to the remaining 82 passengers out of the said group of 200 passengers. While Shri Sandeep Naik was in the process of delivering the requisite foreign exchange to the passengers after identifying each passenger through Passport and after obtaining their signatures or thumb impressions on each Travellers Cheque, the officers from the Enforcement Directorate came for search on the business premises of the petitioner firm. The officers of Enforcement Directorate seized from the said Shri Sandeep Naik a representative of the Bank Travellers Cheque/Foreign Currency worth 26,500 U.S. dollars being foreign exchange for the remaining 54 passengers. A panchanama was also written by the Enforcement Officers wherein it was mentioned that foreign exchange was given to the passengers directly by the said Shri Sandeep Naik representative of the Bank.

(e) On the following day i.e. 19th July 1986 Bank gave fresh travellers cheques/foreign currency amounting to 26,500 U.S. dollars on their own to the said 54 passengers whom they could not give on the previous day owing to the search and seizure of the travellers cheques and foreign currency on behalf of the officers of the Enforcement Directorate.

(f) On 20th July 1986 all the said 200 passengers left Bombay for Haj. It is the case of the petitioner firm that the payment for the said 200 passengers came to be made by the petitioner firm to the Bank between 25th June 1986 and 9th July 1986 after the petitioner firm had received the same from each of the passengers between 25th June 1986 and 9th July 1986; whereas the foreign exchange was given to the said 200 passengers during the period 18th July 1986 and 19th July 1986 after they arrived in Bombay from up-country.

(g) The petitioner firm states that the petitioner firm had similarly made payment of Rs. 17,00,057/- also on behalf of the second group of passengers which group as stated above consisting of 269 passengers to the Bank between 12th July 1986 and 17th July 1986 by 4 separate cheques being the equivalent of the F.T.S. exchange after having received the payment from the said 269 passengers and it was thereafter that the Bank gave foreign exchange only to 2 out of 269 passengers, as they were living in Bombay. As regards the remaining 267 passengers the release of foreign exchange could not be made as the officers of the Enforcement Department came to the Bank and seized the foreign exchange and TC amounting to \$ 132000 meant for 267 passengers of the 2nd group.

(h) It may be pointed out that when the petitioner firm along with the leader of

second group of passengers approached the Bank on 26th July 1986 for F.T.S. exchange for the remaining 267 passengers, the Bank refused to give the said exchange. Despite the repeated requests, the Bank did not give foreign exchange nor returned to the petitioner firm the said amount of Rs. 16,87,397/-. This was, according to the Bank in view of the orders passed by the Enforcement Directorate stopping the Bank from making the said payment in respect of 267 passengers out of 269 passengers belonging to the second group. In other words, in respect of the second group of the passengers, the amount which was paid by the petitioner firm to the Bank was not returned to the petitioner firm.

(i) As mentioned above, since the Bank did not release foreign exchange about 267 passengers left without paying to the petitioner firm for tickets and the petitioners, therefore, called upon the Bank to return the amount of Rs. 16,87,397/-.

(j) By letter dated 9th September 1986 addressed by the said Bank to the Advocates of the petitioners, the petitioners were informed that the Bank had received from the Enforcement Directorate an order u/s 33(2) of the FERA Act, dated 8th September 1986 directing the Bank to surrender Rs. 17,00,057/- to the office of the Directorate.

(k) The order dated 8th September 1986 was issued against the Bank u/s 33(2) of the FERA Act of 1973. By the said order the Assistant Director of Enforcement being original respondent No. 2 stated that during the course of investigation it was observed that the petitioners had paid an amount of Rs. 17,00,057/- by separate cheques for purchase of foreign currency under FTS. According to the Assistant Director, the amount was liable for confiscation to the Central Government account in terms of Section 63 of the said Act. By the said order the Bank was directed to surrender the said amount to the office of the Enforcement Directorate.

(l) Against the said order dated 8th September 1986, the present petition came to be filed on 3rd October 1986.

(m) On 17th July 1987, the Enforcement Directorate issued show cause notice in which it was alleged that the said Bank had been granted licence by the Reserve Bank of India for entering into sale/purchase of foreign exchange. It was further alleged that the Bank had committed breach of the provisions of the said Act of 1973 as also the Exchange Control Manual of Reserve Bank of India. It was further alleged that the IATA agent by the name M/s. A. K. Travels and Tours sold tickets to the petitioners after processing and approving the FTS and A2 forms submitted by the petitioners. It was further alleged that during July, 1986 the said Bank had sold foreign exchange amounting to 2,32,500 U.S. dollars to the groups of Haj Pilgrims through the petitioners against the payment in rupees by cheques issued by the petitioners on the strength of FTS and A2 forms which, according to the Department, were forged signatures/thumb impressions of the applicants duly processed and approved by the said IATA agents without

verifying the signatures/thumb impressions of the applicants on the FTS and A2 forms. It was further alleged that the petitioners had admitted that the forms were signed by their employees. Accordingly, the said show cause notice was issued against the Bank and the petitioners alleging contravention of the provisions of Sections 6(4), 6(5) and 49 read with Section 64(2) and Section 48 of the FERA Act. It was alleged that the petitioners had abetted in the contravention of the said provisions of the said FERA Act by the said Bank. It was further stated in the show cause notice that in view of the alleged contravention of the above provisions of the Act, the petitioners as well as the Bank were called upon as to why amounts mentioned in the said show cause notice should not be confiscated.

(n) Pursuant to the said cause notice dated 17th July 1987, the Enforcement Directorate completed the adjudication proceedings on 20th June, 1988. By the order of adjudication dated 20th June 1988 the Assistant Director found that the Bank was guilty of contravention of the provisions of the FERA Act. As regards the petitioners it was found that the petitioners and their employees were guilty of the charge of abetment and accordingly the adjudication order proceeded to confiscate the foreign currency amounting to 1,32,000 U.S. Dollars, 26,500 U.S. dollars seized from the Bank, Rs. 17,00,057 obtained u/s 33(2) of the Act which came to be confiscated, Rs. 60,000/- was penalty imposed on the petitioners and similar penalty of Rs. 10,000/- was also imposed on the employees of the Bank as also on the partners of the petitioner firm. It may be clarified at this stage that the Bank has not filed any proceedings in this Court challenging the order of adjudication. The employees of the petitioner firm or Bank have also not challenged the adjudication proceedings. Only the petitioners have filed the petition challenging the order of confiscation of Rs. 17,00,057/- and the Order dated 20th June 1988.

(o) As the adjudication order was passed on 20th June 1988 the above writ petition came to be amended and accordingly both the orders namely, the order dated 8th September 1986 u/s 33 of the FERA Act as also the adjudication order dated 20th June 1988 came to be challenged in the above writ petition.

(p) By the judgment and order dated 23rd September 1988 passed by the learned Single Judge, the learned Single Judge found firstly that the order passed on 8th September 1986 u/s 33(2) of the FERA Act was not sustainable in view of the fact that Section 33(2) did not empower the Department to confiscate the amount of Rs. 17,00,057/-. According to the learned Single Judge, the said order dated 8th September 1986 was not addressed to the petitioners and therefore, it also violated the rules of natural justice, inasmuch as no show cause notice was issued to the petitioners in respect of the said order dated 8th September 1986. The learned Single Judge also found that Section 33(2) did not empower the Department to confiscate the currency and that Section 33(2) was only meant to obtain information in regard to the books and documents. According to the learned Single Judge, the impugned order dated 8th September 1986 virtually

amounted to confiscation and therefore, the learned Single Judge found that the said order was bad in law and accordingly the learned Single Judge quashed the said order dated 8th September 1986. As regards the impugned adjudication order the learned Single Judge observed that the only fault of the petitioners was that FTS forms as well as A2 forms were not signed by the passengers themselves and instead they were signed by the employees of the petitioners. According to the learned Single Judge, there was no evidence that the foreign exchange obtained had not gone to the bona fide purchasers. According to the learned Single Judge, there was no finding that the amount of foreign exchange had been misappropriated and therefore the learned Single Judge came to the conclusion that the signing of the forms by the passengers was an inconsequential formality as the forms themselves permitted the signatures of the Head of the family or the leader of the group, and therefore, the learned Single Judge came to the conclusion that the petitioners could not be held liable u/s 49 of the Act for aiding or abetting the Bank for contravention of the provisions of the FERA Act. Accordingly, the learned Single Judge quashed the order of adjudication dated 20th June 1988.

(q) Against the said impugned judgment of the learned Single Judge dated 23rd September 1988, the present appeal has been filed by the Government.

3. Mr. Shah, the learned counsel appearing on behalf of the Government, submitted that the learned Single Judge was not right in setting aside the entire order of adjudication. According to Mr. Shah, the Bank has not filed the writ petition challenging the order of adjudication. According to Mr. Shah for the Government, the show cause notice and the order of adjudication indicate that the Bank was found guilty of the contravention of various provisions of the Act and accordingly various penalties have been imposed on the Bank, as well as employees both of the Bank and the petitioner firm. Mr. Shah pointed out that the petitioner firm has been imposed with a penalty of confiscation of Rs. 17,00,057/- and fine of Rs. 60,000/-, inasmuch as the petitioners have been found guilty by the order of adjudication of the offence of aiding and abetting the Bank in the contravention of the above provisions of the Act.

3A. As regards the order dated 8th September 1986, the learned counsel submitted that the said order was passed only as an order of retention and the amount was retained by the Department for purpose of carrying out the investigation and the said order was not an order of confiscation as held by the learned Single Judge.

4. At the outset, it may be stated that the challenge to the order dated 8th September 1986 passed by the Department u/s 33(2) of the FERA Act has lost its relevancy particularly in view of the fact that after the said order was passed a show cause notice was issued by the Department and the order of adjudication came to be passed on 20th June 1988. In view of the said order dated 20th June 1988, the question as to whether the order dated 8th September 1986 was an order of confiscation or not is not required to be decided. According to the

Government, it was an order of retention of the amount of Rs. 17,00,057/-, whereas according to the petitioners, it was an order confiscating the said sum of Rs. 17,00,057/-. However, in view of our observations pertaining to the order of adjudication dated 20th June 1988, the question regarding the validity of the order dated 8th September, 1986 is not required to be gone into.

5. As regards the impugned order of adjudication dated 20th June 1988 we agree with the finding of the learned Single Judge that the petitioners could not be held guilty of aiding or abetting the contravention of the provisions of the Act by the Bank. In fact, we have been informed that the prosecution against the Bank has been dropped by the Government. Moreover, a bare perusal of the order of adjudication shows that the Department found that the FTS forms as well as A2 forms for release of foreign exchange were not signed by the individual applicants but they were signed by the employees of the petitioners. The order of adjudication also shows that the forms also bear thumb impressions of the applicants but according to the order of adjudication the signatures as well as thumb impressions are of the employees of the petitioner firm and therefore, the petitioners were guilty of the offence of contravention of the provisions of the Act by the Bank, which was also found guilty of contravention of the provisions the about Act. At the outset it may be stated that the show cause notice issued by the Department as well as the affidavits filed by the Department in the present proceedings show that the tickets were sold by the IATA agent in respect of the passengers to the petitioners only after processing and approving the FTS and A2 forms submitted by the petitioners to the IATA agent. The evidence on record also shows that the foreign exchange came to be distributed by Mr. Sandeep Naik the employee of the Bank. The evidence further indicates that the passengers had authorised the petitioner firm's employees to sign on their behalf the requisite forms. It is not the case of the Department that the amount has been misappropriated. It is not the case of the Department that the passengers have not received the foreign exchange. There is no finding even in the order of adjudication to the effect that the amount has been misappropriated. It may also be mentioned that 90% of the passengers came to Bombay for Haj from up-country. It is also well-known fact that the said passengers have got limited time at their disposal and many of the said passengers are not in a position to sign the documents. The object appears to be to facilitate the expeditious process of clearance to the Haj pilgrim. We may make it clear that we are not certifying that there is no breach of the Rules or the forms. The question is whether it could be said on the basis of the finding recorded by the order of adjudication as to whether the petitioners abetted or aided in contravention of the provisions of the Act by the Bank and whether the Department was justified in confiscating an amount of Rs. 17,00,057/- and imposing a fine of Rs. 60,000/-. The learned Single Judge has relied upon various judgments of the High Courts and the Supreme Court and has rightly concluded that every breach of the Rules and the notifications do not constitute contravention. It may be mentioned that it is now well settled that when the Department issues an order of confiscation u/s 63 of

the said Act, it must be established that certain under advantage flowed to the offender or some one out of transaction in such contravention. In the present case there is no such finding recorded by the order of adjudication. The amounts were paid or deposited with the Bank and the Bank after verifying the photographs of the applicants personally distributed the amount to each of the applicants. There is no finding of any such undue advantage being taken by the petitioners in the present case. It is also well settled that the power to confiscate is not plenary and that it must be based on sound reasons. It is also well settled by the various judgments of the Supreme Court that even u/s 59 of the FERA Act, which applies to adjudication proceedings u/s 59(3) of the Act, a culpable mental state on the part of the accused is required. It is further laid down that the Court shall presume the existence of the mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged. In the case of Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, , the Supreme Court has held that all the conditions to a licence or permit may not be of the same importance or rigour but when a condition which is vital is breached it would result in an offence. In other words, mere breach of condition would not ipso facto result in contravention. In the present case as mentioned hereinabove the evidence indicates irregularity or a breach but nonetheless it would not constitute contravention by the petitioners and therefore, the learned Single Judge was right in coming to the conclusion that the petitioners were not guilty of aiding or abetting the contravention of the provisions of the Act as found against the Bank. In the circumstances, as mentioned hereinabove, the confiscation of Rs. 17,00,057/- and imposition of penalty of Rs. 60,000/- by the Department on the petitioners was not legal and justified and to that extent we agree with the learned Single Judge. In view of our setting aside the order of confiscation and the penalty of Rs. 60,000/-, it is not necessary for us to go into the question as to whether in the present case the order dated 8th September 1986 was an order of confiscation or not.

6. However, the learned Single Judge was wrong in setting aside the entire order of adjudication. As mentioned hereinabove the order of adjudication covers various penalties imposed on the Bank, their employees as also the employees of the petitioner firm. We are not going into the question as to whether the Bank was guilty of the contravention of the Act or whether the penalties imposed on the Bank or the parties is right or not. We have confined ourselves only to the confiscation of Rs. 17,00,057/- and imposition of penalty on the petitioner of Rs. 60,000/-. Mr. Shah, the learned counsel for the Department was right in submitting that the entire order of adjudication should not have been set aside by the learned Single Judge.

7. Further Mr. Shah appearing for the Department submitted that in any event since there was a breach of the requisite rules and since the employees had signed the forms on behalf of the passengers, which act was in breach of the rules, the learned Single Judge was not justified in imposing interest at the rate

of 12% per annum as mentioned in the impugned judgment. We agree with the submission of the learned counsel for the Department. The learned Single Judge erred in setting aside the entire order of adjudication and the learned Judge erred in imposing 12% per annum interest to be paid by the Department, which was not warranted particularly in view of the fact that a technical breach of the rules has been established by the Department in the order of adjudication.

8. In the circumstances, we uphold the order of adjudication dated 20th June 1988 save and except the confiscation of Rs. 17,00,057/- and imposition of fine of Rs. 60,000/- on the petitioners. Rest of the impugned order dated 20th June 1988 passed by the Assistant Director is hereby confirmed. We also set aside the interest imposed on the Department at 12% per annum by the learned Single Judge by the impugned judgment.

9. In the circumstances mentioned above, the appeal is partly allowed save and except that the confiscation of Rs. 17,00,057/- and the penalty of Rs. 60,000/- imposed by the order of adjudication are hereby set aside. The rest of the order of adjudication stands.

10. In the circumstances, there will be no order as to costs.