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(1978) 04 CAL CK 0019

In the Calcutta High Court

Case No : Foreign Exchange Appeal No. 1 of 1975

Union of India (UOI) APPELLANT

Vs

Linotype Machinery Ltd. RESPONDENT

Date of Decision : 12-04-1978

Acts Referred:

Foreign Exchange Regulation Act, 1947 — Section 2, 20(3), 23(1), 23D, 23EE
Foreign Exchange Regulation Act, 1973 — Section 54
Foreign Exchange Regulation Rules, 1974 — Rule 139
Imports and Exports (Control) Act, 1947 — Section 3
Sea Customs Act, 1878 — Section 19

Citation : (1978) 1 ILR (Cal) 650

Hon'ble Judges : Sankar Prasad Mitra, C.J;S.K. Datta, J

Bench : Division Bench

Advocate : A.K. Banerjee, Tarun Kumar Basu and Mukul Lahiry, for the Appellant; Tapas Banerjee and S.P. Majumdar, for the Respondent

Final Decision : Dismissed

Judgement

Sankar Prasad Mitra, C.J.—This is an appeal u/s 54 of the Foreign Exchange Regulation Act, 1973, from a decision of the Foreign Exchange Regulation Appellate Board dated January 31, 1971. The appeal lies only on questions of law. There was a corresponding provision in Section 23EE of the Foreign Exchange Regulation Act, 1947. The Appellant before the Appellate Board was M/ s Linotype and Machinery Ltd. In the memorandum of appeal before this Court filed by the Union of India, Linotype Machinery Ltd. is described as a company incorporated under the appropriate laws of England having its registered office at Altrinehan, Cheshire, England. It is common case that the said company has a branch office, inter alia, at 14 Madan Street in Calcutta within the original jurisdiction of this Court.

2. The said company''s appeal before the Appellate Board was against an order of the Directorate of Enforcement holding the Appellant company guilty of contravening the provisions of Section 4(1) 9 of the Foreign Exchange Regulation

Act, 1947, read with the Central Government Notification No. FI/(67)-EC/57 dated September 25, 1958 and imposing on them a penalty of Rs. 50,000. The Directorate of Enforcement also ordered the company to repatriate the foreign exchange, which formed the subject-matter of the proceedings through authorised channel.

3. The company, as we have stated, is a company incorporated in the United Kingdom. It is a subsidiary of a U.S. company.

4. The substance of the charge against the company is that it earned commissions and discounts from the U.K. company during the period 1962 to May 1967 in foreign currency. They lent the foreign exchange to the foreign principals and did not offer it for sale to the Reserve Bank or to an authorised dealer.

5. It would, therefore, be convenient at this stage to set out the relevant provisions of Sections 2(d), 4(1) and 9 of the 1947 Act and of the Notification hereinbefore referred to.

6. Section 2(d) defines ''foreign exchange''. It means foreign currency and includes all deposits, credits and balances payable in any foreign currency and any drafts, traveller''s cheques, letters of credit and bills of exchange, expressed or drawn in Indian Currency but payable in any foreign currency.

7. According to this definition ''foreign exchange'', therefore, includes deposits, credits and balances payable in any foreign currency. We now come to Section 4(1).It says:

Restrictions on dealing in foreign exchange.

(1) Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India and no person resident in India other than an authorised dealer shall outside India, buy or otherwise acquire or borrow from, or sell or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange.

8. For our purposes it is to be noted that Section 4(1) prohibits lending of foreign exchange by a person resident in India to any person other than an authorised dealer except with the previous general or special permission of the Reserve Bank. We next come to Section 9which is in these terms:

Acquisition by Central Government of foreign exchange. The Central Government may, by notification in the Official Gazette, order every person in, or resident, in India--

(a) who owns or holds such foreign exchange as may be specified in the notification, to offer it, or cause it to be offered for sale to the Reserve Bank on behalf of the Central Government or to such person, as Reserve Bank may authorise for the purpose, at such price as the Central Government may fix, being the price which is in the opinion of the Central Government not less than the market rate of the foreign exchange when it is offered for sale.

9. The application of Section 9requires a notification in the Official Gazette. By the notification an order is to be passed on a person in or resident in India who owns or holds foreign exchange to dispose it of in the manner prescribed by the notification either to the Reserve Bank or to such person as the Reserve Bank may authorise.

10. The notification in the instant case is the Notification No. FI(67)-EC/57 dated September 25, 1958. It runs thus:

G.S.R. 872--In the exercise of the powers conferred by Section 9of the Foreign Exchange Regulation Act, 1947...and in supersession of...the Central Government hereby directs 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 die currency specified in the Schedule annexed to this order shall before 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 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 4of the said Act for conversion into India currency of the foreign currency in which such foreign exchange is expressed;

Provided that this order shall not apply to:

....

(iii) maintenance of and operation on any account in foreign currency maintained outside India by persons in or resident in India but not domiciled therein.

11. By the notification a person in India or resident in India who owned or held or who may after the notification was issued own or hold any foreign exchange was required to offer it for sale at specified rates to a person authorised by the Reserve Bank of India. But this notification would not apply to a person in or resident in India but not domiciled in India.

12. In the context of these provisions of law we have to appreciate the facts of this case.

13. On November 15, 1961, the Customs Authorities issued a show cause notice to the Respondent Linotype Machinery Ltd. to the effect that the Respondent was clearing goods without properly declaring them in the bills of entry, that it obtained two sets of invoices for the purpose of evading customs duty and the goods of a total value of Rs. 65,791-49 have been imported without import trade control licence in contravention of Section 3 of the Import and Export (Control) Act and Section 19 of the Sea Customs Act.

14. On February 18, 1962, the Additional Collector of Customs made an

adjudication order. He held that the Respondent did not correctly declare the real value of the goods. According to him the Respondent has declared as real values prices which represented only 90 per cent of the correct real values. This was achieved, said the Additional Collector, by changing the mode of invoicing and obtaining two sets of invoices. A personal penalty of Rs. 75,000 was imposed on the Respondent.

15. Between 1962 and the May 22, 1967, invoices were prepared for 100 per cent value as desired by the Customs Department.

16. On January 5, 1967, the Respondent gave its answers to certain queries made by the Customs House. The Respondent stated to the Additional Collector of Customs (Valuation Section) that three companies in England and America were its suppliers. These companies were (1) Linotype Machinery Ltd., England; (2) Mergenthaler Linotype Company, New York, U.S.A. and (3) Fair-child Davidson Division, New York, U.S.A. It appears that the Mergenthaler Linotype Company was the holding company of Linotype Machinery Ltd., England. The Respondent stated further that it was a distributor in India of products of the aforesaid companies by virtue of an agreement between the Respondent and Linotype Machinery Ltd., England. The Respondent also stated that no discount had been granted in the past three years to it by any of the above companies as it opted to pay customs duty on the gross prices as shown in the published price lists. Discounts on previous imports (before 1961) were shown as varying between 10 per cent and 35 per cent.

17. From the facts on record it appears that up to December 31, 1961, the Respondent''s principals allowed discounts to the Respondent and invoices were prepared for the amounts less discounts. Between 1962 and May 22, 1967, as we have observed, invoices were prepared for 100 per cent value. From May 23, 1967, a new system was followed. Under this system invoices were prepared in the same way as prior to 1962. In this appeal we are neither concerned with the period up to December 31, 1961, nor are we concerned with the period which started from May 23, 1967. Our attention has to be directed to the period between 1962 and May 22, 1967, when invoices were prepared on 100 per cent value in accordance with the directions of the Customs Department. The entire value was remitted to England; the company in England gave discounts to the Respondent in England; and these discounts were kept in a separate account for adjustment against the dues of the Indian Branch to the parent company and other foreign companies. There Were various other correspondence between the Respondent and the Customs Department as well as between the Respondent and the Exchange Control Department. But we need not go into that correspondence for the determination of the issues involved in this appeal.

18. On August 29, 1969, the Director, Enforcement, Foreign Exchange Regulation Act, Ministry of Finance, Department of Revenue and Insurance, Government of India, gave to the Respondent a show-cause notice. In this show-cause notice principally two charges were levelled against the Respondent. These charges

were:

(1) The Respondent without special or general permission of the Reserve Bank of India lent foreign exchange of ?20,824-3-5 and $84,484.96 to its principal Messrs. Linotype Machinery Ltd., London, resident outside India not being an authorised dealer in foreign exchange, out of their commission/discounts earned during the period 1962 to May, 1967, although the Respondent was not an authorised dealer in foreign exchange.

(2) The Respondent failed to offer and cause to be offered for sale the aforesaid foreign exchange to any authorised dealer in foreign exchange in India within one month from the date of becoming owner/holder thereof.

19. The first charge was a charge of contravention of Section 4(1) of the Foreign Exchange Regulation Act, 1947. The second charge was a charge for contravention of Section 9 of that Act read with notification dated September 25, 1958, relevant portions of which we have set out above.

20. The show cause notice stated that the Respondent had rendered itself liable to be proceeded against u/s 23(1)(a)of the Act. The Respondent was asked to show cause why adjudication proceedings u/s 23D should not be held.

21. At this stage it would be better to review the factual position again, Between the period 1962 and May 1967 the Respondent was remitting to England the full value of goods which the Respondent had imported. The English company was allowing discounts to the Respondent which were kept in a separate account with a view to adjustments against the dues of the Indian branch to the parent company and other foreign companies. The question is whether these discounts could be treated as loans by the Indian branch to the parent company and if they could not be treated as loans, whether it could be said drat so long as the discounts remained unadjusted the Indian branch was owing or holding foreign currency which had to be placed within one month at the disposal of an authorised dealer in terms of Section 9 of the 1947 Act read with the notification dated September 25, 1958?

22. On October 21, 1969 the Respondent gave its reply to the show cause notice. In the reply the following points were stressed:

(1) The Respondent is a branch office of the parent organization in U.K.;

(2) The Respondent is indebted to its parent organization in the sum of ? 117,621-10-2 and U.S. $81,879.71 because of its inability to make payment for the goods supplied to the Respondent for a period of time. Therefore, the actual position is reverse of that stated because the parent organization may be said to have lent that sum to the Respondent. Sums were paid to enable the Respondent to meet the expenses involved in the upkeep of the branch office until such time as necessary funds were obtained for effecting repayment by remittances to the principal;

(3) No commission is granted to Respondent which is only a branch office;

(4) The discounts were not normal trade discounts as were earned by an organization financially independent of its suppliers. They were in the nature of a subsidy and for this reason the Customs Authorities had disallowed them;

(5) Being in the nature of subsidy, the omission of the discounts from the invoices did not imply that the Respondent had lent the moneys to the principal. There was no obligation on the principal to grant the aforesaid discounts. No offence was committed and there was no contravention of the sections mentioned.

23. The Director of Enforcement passed his adjudication order on January 31, 1971. He held:

(1) That in respect of the discounts even though they were to compensate the Respondent for importation expenses, the Reserve Bank of India''s permission was necessary for such adjustments/arrangaments but no such permission was taken and

(2) Whether it is a branch office of a foreign company or an independent company, it was incumbent on it to repatriate the discounts earned by it which the Respondent had failed to do.

The Director imposed a penalty of Rs. 50,000 with a direction to repatriate the sum allowed as discount.

24. The Respondent preferred an appeal to the Chairman of the Foreign Exchange Regulations Appellate Board on March 17, 1971.

25. On November 25, 1974, the Appellate Board passed its order allowing the appeal. The order of the Director of Enforcement was set aside with a direction for refund of the penalty amount if paid. We may conveniently quote the reasonings of the Appellate Board on the alleged contravention of Section 4(1)and Section 9 of the 1947 Act read with the notification dated September 25, 1958. In paras. 8, 9 and 10 of its order at pages 32 to 33 of the paper book the Appellate Board has observed:

8. The further question, however, arises as to whether in fact there has been any lending of money or a failure to offer foreign exchange for sale. These charges necessarily postulate that the branch is the owner of the foreign exchange or holds it. In this connection, it is necessary to consider the meaning of the term ''lending''. As observed by the Supreme Court in Ram Rattan Gupta Vs. Director of Enforcement, Foreign Exchange Regulationand Another, . ''It means in the ordinary parlance to deliver to another a thing for use on condition that the thing lent shall be returned with or without compensation for the use made of it by the person to whom it was lent. The subject-matter of lending may also be money'' (at p. 496).

9. This necessarily postulates that the lender must have been entitled to the

money or to dispose of it before he can lend it. While a branch can be regarded for the purposes of exchange control as an entity distinct from its head office it can still lend the money only if it has control of it or is in a position to acquire the control by its own volition.

10. In the present case, the system of allowing discounts was given up for reasons which the U.K. company considered to be good, namely, the practice of the customs authorities. Once they ceased to allow the discounts, the branch could not be said to become entitled to the money represented by the discount so as to allow the head office the use of the discounts so as to make it a loan. Neither could they in such a circumstance be said to own or hold the foreign exchange represented by the discounts so as to be in a position to offer it for sale.

The Appellate Board, therefore, has held that a branch office for the purposes of exchange control may be regarded as an entity distinct from its head office. This decision of the Appellate Board has not been challenged before us.

26. The Appellate Board has held further that the Respondent had neither lent money to its parent organization in England nor did it own or hold foreign currency in England. The Appellate Board''s opinion is that there has been no contravention either of Section 4(1) or of Section 9of the 1947 Act read with the notification dated September 25, 1958.

27. Learned Counsel for the Respondent has argued before us that our jurisdiction u/s 54 of the 1973 Act is restricted only to ''questions of law. In the instant case there has been a factual finding of the Appellate Board that no money was lent by the Indian branch to the parent organization in England. There has also been a factual finding that no money in foreign currency was held or owned by the Respondent at any time. In these circumstances, the appeal does not lie.

28. We are unable to accept this contention. It seems to us that whether or not there has been lending, owning or holding is dependent on construction of correspondence between the parties and other documents on record. This is not a pure question of fact. this Court under powers conferred on it by Section 54 of the 1973 Act is not debarred from interpreting or construing documents for the purposes of drawing its conclusions on facts. And if in interpreting or construing documents this Court reaches a conclusion contrary to the conclusion of the Appellate Board, this Court can set aside the Appellate Board''s decision.

29. We have considered all the letters and other documents placed before us. On the facts of this case we are inclined to agree with the Appellate Board that no money was lent by the Indian branch to the English company. In the compact edition of the Oxford English Dictionary (vol. I, p. 195, pub. 1971) the meaning of the word ''lend'', relevant for our purposes, is "to grant the temporary possession of (a thing) on condition or in expectation of the return of the same or its equivalent". This meaning cannot be applied to the facts of this case. Here

the Indian branch had remitted to its foreign principal the entire value of imported goods. The foreign principal had granted certain discounts which were kept in a separate account. There was no positive act of lending by the Indian branch to the foreign principal. The Supreme Court in Shree Ram Mills Ltd., Bombay Vs. Commr. of Excess Profits Tax, Central Bombay, has categorically observed that a loan imports a positive act of lending coupled with an acceptance by the other side of the money as a loan. The relationship of a borrower and a lender cannot ordinarily come about by mere inaction. In the instant case there is no evidence of any positive act of lending by the Indian branch to the foreign principal. There is also no evidence of acceptance of any money by the foreign principal as a loan. In this premises, we cannot hold that the Indian branch had lent any money within the meaning of Section 4(1) of the Foreign Exchange Regulation Act, 1947. But we do not agree with the Appellate Board that the Indian branch was not owning or holding foreign exchange within the meaning of Section 9 read with the notification dated September 25, 1958. We express this view because we find on the evidence on record that the Indian branch had accepted the position that discounts which the foreign principal had allowed might be kept in a separate account to the credit of the Indian branch so long as no adjustments were made. On this finding it may be possible to hold that the charge of contravention of Section 9 read with the notification dated September 25, 1958 has been substantiated.

30. We are, therefore, to scrutinize closely the relevant provisions of Section 9 and the relevant provisions of the said notification.

31. Section 9 requires a notification. Until the notification is made, Section 9 cannot be invoked. The terms of the notification, therefore, are of vital importance. In the instant case the third clause in the first proviso to the notification clearly states that it does not apply to "maintenance of and operation on, any account in foreign currency maintained outside India by persons in or resident in India but not domiciled therein".

32. From this clause it is clear that in order to attract the notification a person who is maintaining an account in foreign currency must not only be in India or resident in India but also must be domiciled in India. In the case before us the person maintaining account in foreign currency was not domiciled in India. We have already said that the cause-title to the Memorandum of Appeal, as amended under this Court''s order of July 7, 1975, itself describes the Respondent as--

a company incorporated under the appropriate laws of England having its registered office at Altrinehan, Cheshire, England and Branch office...amongst other places...at 14 Madan Street, Calcutta.

33. In Cheshire''s Private International Law (9th ed., p. 197) it is stated:

Questions concerning the status of a body of persons associated together for some enterprise, including the fundamental question whether it possesses the attribute of legal personality, must on principle be governed by the same law that governs the status of the individual, i.e. by the law of the domicil. What this law is admits of no doubt if we reason upon the analogy of the individual. Every person, natural and artificial, acquires at birth a domicil of origin by operation of law. In the case of the natural person it is the domicil of his father, in the case of the juristic person it is the country in which it is born, i.e. in which it is incorporated. If it is a corporation, it can be so only by virtue of the law by which it was incorporated. It is to this law alone that all questions concerning the creation and dissolution of the corporate status are referred....

34. We find the same observation in Dicey''s ''The Conflict of Laws'' (9th ed., p. 702) in Rule 139 which says:

The domicile of a corporation is in the country under whose law it is incorporated.

35. In Graveson''s ''Conflict of Laws'' (7th ed., p. 181) it is stated : The corporation is a creature of law and accordingly, takes its domicile by operation of law from the law governing its incorporation.

36. The domicile of an incorporated company, therefore, would be determined by the country of its incorporation. In the instant case from pp. 3940 of the paper book which contains the cause-tide to the Memorandum of Appeal we are in ho doubt drat the Respondent was incorporated in England. It had a branch office in Calcutta. This branch office for the purposes of foreign exchange, as held by the Appellate Board, may have a distinct entity and may be resident in India, but the domicile of the Respondent is British and as such the Indian'' branch ''is excluded from the operation of the notification dated September 25, 1958, under die third clause of the first proviso thereto.

37. Learned Counsel appearing for the Appellant has relied on various other provisions of the 1947 Act and regulations framed thereunder in order to contend that the Respondent might have got the advantage of Clause (3) of the first proviso to die notification of September 25, 1958, if the foreign exchange had been maintained in an account with a Bank or with an authorised dealer. Undoubtedly, the provisions on which Learned Counsel has relied speak of accounts with a Bank or with an authorised dealer. It seems to us that Section 9 arid the notification, are self-contained. They do not depend on any other provisions of die Act or on any directions or regulations under those provisions.

38. The Appellant''s counsel placed before us particularly Sub-section (3) of Section 20 of the 1947 Act which is as under:

The Reserve Bank may give directions in regard to the making of payments and the doing of other acts by bankers, authorised dealers, travel agents or stock brokers and other persons who are authorised by die Reserve Bank to do anything in pursuance of this Act in the course of their business, as appear to it to be necessary or expedient for die purpose of securing compliance with the provisions of this Act and any rules, orders or directions made thereunder.

39. Learned Counsel showed to us some rules, orders or directions apparently made or given under Sub-section (3) of Section 20. But we have not been able to appreciate the relevance of these provisions while construing Section 9 read with the notification of September 25, 1958. We are inclined to agree with the observations in Vakil''s. ''The Law Relating to Foreign Exchange'' (4th ed., p. 235). The author has said:

The notification restricts the holding of certain foreign currencies by persons in, or resident in, India; but the proviso to the notification specifically excludes from such restrictions the "maintenance of and operation of any account in foreign currency maintained outside India by persons in, or resident in, India, but not domiciled therein". This proviso, as a matter of plain language, excludes, from the restrictions imposed by the notification any accounts in foreign currency maintained outside India by any person who although regarded as resident in India for exchange control purposes, is not domiciled there.

40. The language, of Clause (3) of the first proviso to the notification gives no indication of an account either with a Bank or with an authorised dealer. To our mind any account in foreign currency maintained outside India would come within the scope of that clause. In the instant case the Indian Branch was a resident in India for exchange control purposes but was not domiciled in India. The notification of September 25, 1958, does not, therefore, apply to the Respondent at all.

41. In the premises, aforesaid, this appeal is dismissed.

42. We make no order as to costs.

43. All interim orders, if any, are vacated.

44. Stay asked for, is refused.

S.K. Datta, J.

45. I agree.

