

(2005) 11 DEL CK 0144
In the Delhi High Court
Case No : Criminal A.No. 546 of 2003

Union of India (UOI)

APPELLANT

Vs

Prem Khanna

RESPONDENT

Date of Decision : 21-11-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 100
Foreign Exchange Management Act, 1999 — Section 19(6), 35
Foreign Exchange Regulation Act, 1973 — Section 52(4), 54, 71, 8(1)
Non-resident (External) Accounts Rules, 1970 — Rule 4

Citation : (2005) 125 DLT 249 : (2005) 85 DRJ 379

Hon'ble Judges : Ramesh Chand Jain, J

Bench : Single Bench

Advocate : P.P.Malhotra, ASG, Navin K. Matta and Rajiv K. Singh, for the Appellant; Mukul Rohtagi, Jayant Bhushan, Sidharth Luthra and Ajay Bhargava, for the Respondent

Judgement

R.C. Jain, J.—This appeal u/s 54 of the Foreign Exchange Regulation Act, 1973 (in short "FERA") read with Section 35 of the Foreign Exchange Management Act, 1999 (for short "FEMA") is directed against the order of the Appellate Tribunal for Foreign Exchange dated 19.5.2003 thereby dismissing a revision petition filed by the Enforcement Directorate against the order of Special Director of Enforcement (Adjudicating Authority) dated 27.3.2001 by which the Adjudicating Authority exonerated the respondent/noticee Prem Khanna of the charges u/s 8(1) of FERA and dropped the charges/proceedings against him.

2. Briefly, the relevant facts leading to the present appeal are that a show-cause notice No.T-4/60-B/SDE/PKA/99 dated 17th June, 1999 was issued to the respondent-Prem Khanna with the allegations that during the period 1993-1995 he had unlawfully acquired Sterling Ponds 4,22,515.00 in India in violation of Section 8(1) of FERA read with Rule 4 of Non-resident (External) Accounts Rules, 1970 read with Foreign Exchange Manual, 1993. The allegation against the respondent was that he is a Non-resident Indian having business concerns in

United Kingdom. That during the period 1993-95 he visited India on several occasions and brought certain amount of foreign exchange in Sterling Ponds which he disclosed in the Currency Declaration Forms (CDFs) before the Air Custom Authorities. However, pursuant to the said CDFs, the respondent deposited the foreign exchange in Sterling Ponds in the Oriental Bank of Commerce, Bombay which was in far excess to the tune of Sterling Pond 4,22,515.00 of the amount of foreign exchange declared by him in CDFs. On inquiries undertaken by the Enforcement Department, it was revealed that the respondent had forged 8 CDFs by interpolating certain figures and words in the amount of foreign exchange. According to the Enforcement Directorate, the respondent has committed an offence u/s 8(1) of FERA by acquiring the foreign exchange in India in an unauthorised manner without the previous general or special permission of the RBI. The show cause notice also proposed to confiscate the amount of Sterling Ponds 4,22,515.00. Respondent contested the show cause notice by denying the allegations of having acquired foreign currency in India otherwise than in accordance with law or having forged the CDFs so as to inflate the figures of the foreign exchange which was actually brought by him from U.K. It was pleaded by the respondent that the foreign exchange deposited by him in the Oriental Bank of Commerce was brought by him from U.K. out of his earnings and receipts from M/s Bryan Investment Corporation, U.K. and other sources, he being engaged in the business of different kinds in United Kingdom. After a semblance of protracted hearings (word "semblance" is used deliberately because that is precisely the question required to be considered in this appeal), the Adjudicating Authority discharged the notice and exonerated the respondent of the charge u/s 8(1) of FERA and dropped the proceedings against him primarily relying and acting on the stand of the respondent that the total amount of foreign exchange deposited by him in the Oriental Bank of Commerce was lawfully acquired foreign exchange in U.K. and brought to India and, Therefore, it did not violate any of the provisions of FERA or of the Non-resident (External) Accounts Rules, 1970 or Exchange Control Manual, simultaneously holding that the material brought on record at most created some suspicion about the manner in which the huge amount of foreign exchange was brought in India and deposited in the bank.

3. Aggrieved by the order of the Adjudicating Authority, the Enforcement Directorate preferred a revision u/s 52(4) of FERA and Section 19(6) of FEMA before the Appellate Tribunal for Foreign Exchange for setting aside the order of Adjudicating Authority, but without any success. The Appellate Tribunal for Foreign Exchange dismissed the revision petition and upheld the order of the Adjudicating Authority holding thereby that the order passed by the Adjudicating Authority did not suffer from any error of fact or law. Aggrieved by the said decision, the Enforcement Directorate has come up in the present appeal.

4. I have heard Mr.P.P.Malhotra, learned Additional Solicitor General, representing the Enforcement Directorate and Mr.Mukul Rohtagi, learned senior counsel representing the respondent and have bestowed my thoughtful consideration to

their respective submissions. At the outset, Mr.Rohtagi has urged that the present appeal, as framed and filed, is not maintainable under the provisions of Section 54 of FERA firstly, because an appeal u/s 54 lies only on questions of law and secondly, that the proceedings in revision filed by the Enforcement Directorate before the Appellate Tribunal u/s 52(4) of FERA were misconceived and not maintainable and was filed almost after one year of the order passed by the Adjudicating Authority. In this connection he has pointed out that neither the memorandum of appeal has set out any questions of law, sought to be raised in the present appeal nor any questions of law have been formulated by the Court and, Therefore, it should be presumed that there are no questions of law involved in this appeal or the appeal primarily seeks to assail the concurrent findings of fact reached by the Adjudicating Authority and the Appellate Tribunal for Foreign Exchange. To buttress his submissions, Mr.Rohtagi, learned senior counsel for the respondent has relied upon a few decisions rendered by the Apex Court and by this Court. The first being the case of Narayanan Vs. Kumaran and Others, where the Court considered the scope of the powers of High Court in exercising its jurisdiction u/s 100 CPC and laid down that it is quite safe to adopt that appeal under Order 43 Rule 1 clause (u) should be heard only on the ground enumerated in Section 100 CPC. The appellant under an appeal under Order 43 Rule 1 clause (u) is not entitled to agitate questions of fact. In an appeal against an order of remand under that clause the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of facts arrived at by the lower appellate court. In the case of Sarjas Rai and Others Vs. Bakshi Inderjit Singh, it was held by the Supreme Court that the High Court was justified in dismissing the second appeal when the appellant sought to challenge the finding of fact recorded by the two courts below and no question of law was urged. There cannot be any quarrel with the above proposition of law but one would bear in mind that the present appeal is not a second appeal u/s 100 CPC but is under a special statute which does not enjoin upon the appellant to set out the questions of law or upon the Court to frame such questions of law before hearing the appeal. Even, otherwise, what can be said to be questions of law is not restricted to only strict legal propositions which can be raised and has to be considered having regard to the totality of the facts and circumstances of each case.

5. Mr.Malhotra, learned Additional Solicitor General appearing for the Appellant refuting the above contention of Mr.Rohtagi, has urged that in given cases High Court or a second Appellate Court will entertain the appeal if there is no evidence to support the finding of fact of the Tribunal which circumstance would give rise to a question of law and can be agitated in the second appeal. In this connection, he has referred to a Supreme Court decision in the case of Rameshwar Prasad Bagla v. Commissioner of Income Tax, U.P., (1973) ITR 421. In that case the Supreme Court was dealing with a similar situation and held as under:

"It is also well-established that when a Tribunal acts on material which is irrelevant to the enquiry or considers material which is partly relevant and partly

irrelevant or bases its decision partly on conjectures, surmises and suspicions and partly on evidence, then in such a situation an issue of law arises and the finding of the Tribunal can be interfered with. The finding may also be interfered with if it be found to be so unreasonable that no person acting judicially and properly instructed as to the relevant law could have arrived at it. None of the circumstances justifying interference with the finding of fact of the Tribunal has been shown to exist in this case. In the absence of any such circumstance, the High Court in our view was not justified in interfering with the finding of fact of the Tribunal. The fact that the High Court on appreciation of evidence would have arrived at a conclusion of fact different from that of the Tribunal did not warrant interference with the finding of the Tribunal."

6. In yet another decision in *Omar Salay Mohamed Sait. v. Commissioner of Income Tax, Madras*, (1959) ITR 151, the Supreme Court held as under:

"We are aware that the Income Tax Appellate Tribunal is a fact finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it this court will not interfere. It is necessary, however, that every fact for and against the assessed must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessed, the assessed should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does everything of the sort, its findings, even though on question of fact, will be liable to be set aside by this Court."

7. On a consideration of the legal position emerging from these authorities and otherwise, the general proposition that the High Court has the power to set aside a perverse concurrent finding of fact even if it is reached by two Courts or Tribunals, this Court has no hesitation in holding that having regard to the grounds set up in the appeal and the submissions made by the learned Additional Sessions Judge, the appeal involves questions of law which needs to be considered and answered by this Court.

8. So far as the submission of the respondent that the proceedings before the Appellate Tribunal for Foreign Exchange were not maintainable u/s 52(4) of FERA or were time barred, the same were raised even before the Appellate Tribunal and answered in the negative and in the opinion of this Court rightly so having regard to the scope of Section 52(4) of FERA. This Court does not subscribe to the view that the proceedings u/s 52(4) of FERA are not in the nature of revision proceedings and could not have been entertained by the Appellate Tribunal.

9. Now, coming to the merits of the plea of the appellant, learned Additional Solicitor General has taken pains to refer to the record of the Adjudicating Authority more particularly the show cause notice No. T-4/60-B/SDE/PKA/99 dated 17th June, 1999, the original Currency Declaration Forms, the forged Currency Declaration Forms, the opinion of the Deputy Government Examiner of Questioned Documents from the Office of the Govt. Examiner of Questioned Documents, Hyderabad as also the impugned orders and various other documents in his attempt to show that the order passed by the Adjudicating authority, as affirmed by the Appellate Tribunal, are based on no evidence or a very improper appreciation of the evidence and material brought on record and by discarding certain important evidence and material brought on record while at the same time taking into consideration certain external/ inadmissible/ irrelevant and inadmissible material for recording a wholly incorrect and perverse finding. This Court has gone into the said record. On the basis of the report of the Examiner of Questioned Documents, it will appear to this Court that forgery was committed by the respondent in the eight Currency Declaration Forms so as to add the figure of "1" before the figures of the amount and adding the word "one hundred and" before the actual amount in words. That would show that the foreign currency in Sterling Pond which was deposited by the respondent in the Oriental Bank of Commerce was not commensurate with the foreign currency brought by him at the time of his visits to India but was in far excess to the tune of 4,22,515.00 Sterling Ponds and, Therefore, the onus to prove as to how he received huge amount of foreign exchange in India lay on the respondent by virtue of Section 71 of FERA. No doubt an attempt was made on behalf of the respondent to account for the said excess amount of currency on the plea that he had received the same from his company namely M/s Bryan Investment Corporation, U.K., of which he was the sole shareholder, and for that he produced a copy of message dated 7.11.2000 emanating from a person claiming himself to be the treasurer of the said company. It would appear that the Adjudicating Authority took the facts stated in the said fax message on its face value and a gospel truth without holding any inquiry whatsoever, about either the existence of such a corporation or the respondent having, in fact, received such heavy sums in cash as claimed by him and whether such a remittance was in accordance with the laws of United Kingdom. Though much more can be said on this aspect, but this Court will not go any further to make more comments, lest the respondent gets prejudiced. However, totality of the facts and circumstances brought on record are so glaring and speak for themselves and this Court can only observe is that the finding of Adjudicating Authority in exonerating the respondent of the charge u/s 8(1) of FERA is to say the least is not based on correct and proper appreciation of evidence in accordance with settled principles. It would also appear to the Court that full opportunity was not granted to the Department to put its case and rebut the evidence led by the respondent and the adjudication proceedings were abruptly concluded. The Appellate Tribunal did no better by affirming the said order of the Adjudicating Authority.

10. Having regard to the totality of the facts and circumstances of this case and the material obtaining on record, this Court is of the considered opinion that the order of Appellate Tribunal for Foreign Exchange dated 19.5.2003 and that of Adjudicating Authority dated 27.3.2001 cannot be legally sustained as the same have resulted into miscarriage of justice. Therefore, the only course left is to remit back the matter to the Adjudicating Authority for a fresh consideration and decision in accordance with law after affording the parties due opportunity to put-forth their case.

11. In the result, the appeal succeeds and is hereby allowed. The impugned orders of the Appellate Tribunal for Foreign Exchange dated 19.5.2003 and that of Adjudicating Authority dated 27.3.2001 are hereby set aside and the matter is remanded back to the Adjudicating Authority for deciding the proceedings arising out of show cause notice No.T-4/60-B/SDE/PKA/99 dated 17th June, 1999 issued to the respondent. The Adjudicating Authority shall afford reasonable opportunity to the parties to put-forth their case and will make a fresh decision in the matter expeditiously, preferably within a maximum period of six months.

12. Appeal stands disposed of.