

(2013) 11 DEL CK 0318
In the Delhi High Court
Case No : Criminal A. 392 of 2007

UOI thru Directorate of Enforcement	Vs	APPELLANT
Amway India Enterprises and Others		RESPONDENT

Date of Decision : 07-11-2013

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 29(1)(a), 30, 35, 50, 51

Citation : (2014) 140 DRJ 43

Hon'ble Judges : Hima Kohli, J

Bench : Single Bench

Advocate : Rajdipa Behura, for the Appellant; Anil K. Kher and Mr. Rishi Manchanda, Advocate for Respondents Nos. 1 to 3, Mr. Kartik Bajpai, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Hima Kohli, J.—The present appeal arises out of the common order dated 28.2.2007 passed by the Appellate Tribunal for Foreign Exchange (hereinafter referred to as "the Tribunal") allowing Appeals No. 262, 263, 264 & 301/2005 filed by the respondents No. 1, 2, 3 & 4 respectively, assailing a common adjudication order dated 7.2.2005 passed by the Adjudicatory Authority imposing penalties against them for contravention of Section 29(1)(a) of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "FERA"). Vide order dated 7.2.2005, the Adjudicatory Authority had disposed of the notice to show cause dated 29.5.2002 addressed to the respondents, calling upon each of them to show cause as to why the adjudication proceedings contemplated u/s 51 of FERA should not be initiated against them for contravention of the provisions of Section 30 read with Para 11 D.2(ii) of the Exchange Control Manual (for short "ECM") of FERA. The Adjudicatory Authority had found the respondents No. 1, 2 & 3 guilty of having contravened the provisions of Section 30 read with Para 11 D.2(ii) of the ECM and the respondent No. 4 guilty of having contravened the provisions of Section 64(2) of FERA and resultantly, imposed penalties of Rs.

80.00 lacs on the respondent No. 1, Rs. 50.00 lacs on the respondent No. 2, Rs. 12.00 lacs on the respondent No. 3 and Rs. 30.00 lacs on the respondent No. 4.

2. Assailing the aforesaid decision of the Adjudicatory Authority, all the respondents had filed separate appeals registered as Appeals No. 262, 263, 264 & 301/2005, that were disposed of by the Appellate Tribunal by passing a common order dated 28.2.2007, whereunder the said appeals were allowed and the adjudication order was set aside. Aggrieved by the aforesaid decision of the Appellate Tribunal, the appellant/UOI has filed the present appeal.

3. Ms. Rajdipa Behura, learned counsel for the appellant/UOI submits that the impugned order is liable to be set aside for the reason that the Appellate Tribunal had failed to appreciate the fact that there was a clear contravention of Section 30 of FERA by the respondents, particularly, respondents No. 2 & 3, who had possessed transit/business visas and not an employment visa and the Reserve Bank of India (RBI) had not granted any permission to them as contemplated u/s 30 of FERA. She further states that as per the terms of the business visa issued by the Ministry of Home Affairs, Government of India in favour of the respondents no. 2 & 3, who being foreign nationals, could not have stayed in India for a period beyond three months and having transgressed the said condition, they are liable to be prosecuted u/s 50 of the FERA.

4. Lastly, learned counsel for the appellant/UOI submits that as per the law, a foreign national working for gain in India is required to be registered with the Ministry of Home Affairs, GOI and in the absence of an employment visa, any registration with the Foreign Regional Registration Office (for short "FRRO") alone cannot be considered sufficient to permit such a foreign national to work for gain in India. As far as the questions of law raised by the appellant/UOI in the present appeal as mandated u/s 35 of the Foreign Exchange Management Act, 1999 (for short "FEMA") is concerned, learned counsel draws the attention of the court to page 14 of the appeal paper book and states that the main question of law required to be decided in the present appeal is, "Whether the Tribunal was justified in cancelling the penalties imposed on the respondents and set aside the adjudication order dated 7.2.2005 in circumstances where they had failed to obtain a prior permission from the RBI as contemplated u/s 30 of FERA?"

5. Mr. Anil K. Kher, Senior Advocate appearing for the respondents No. 1 to 3 supports the impugned order of the Appellate Tribunal and states that it does not deserve any interference. He contends that as a matter of fact, the appellant/UOI has not formulated any question of law for the consideration of this Court in the present appeal. He further states that Section 30 of FERA envisages prior permission by the RBI in favour of a foreign national to enable him to practice any profession or undertake any occupation, trade or business in India in circumstances where he desires to acquire any foreign exchange for being remitted abroad from out of the moneys received by him within the country on account of practicing of such profession, trade, business, etc. and this Court is not required to interpret the aforesaid provisions for the reason that the

appellant/UOI has not raised a purely legal question in the appeal. Rather, the arguments advanced on behalf of the appellant/UOI involve a mixed question of facts and law that have already been examined and adjudicated upon at two levels, once before the Adjudicatory Authority and the second time before the appellate authority and therefore, cannot be re-agitated in these proceedings.

6. It is further stated on behalf of the respondents No. 1 to 3 that Section 74 of FERA, empowers the RBI to delegate any of its powers or functions as stipulated in the said provision and in exercise thereof, the RBI has appointed certain banks as authorized dealers on its behalf to allow remittance of fees, remuneration, etc., for foreign nationals engaged by Indian companies, subject to the limitations and conditions imposed in that regard, but after 8.1.1993, when sub-section (1) of Section 30 of FERA came to be amended, no permission is required from the RBI for engaging foreign nationals.

7. Mr. Kher, Senior Advocate argues that while passing the order dated 7.2.2005, the Adjudicatory Authority had exceeded its brief by holding inter alia that respondents No. 2 and 3, who are foreign nationals, came to India on a business visa and not on employment visa and as they were practicing a profession in India while holding business visas, they were required to obtain prior permission of the RBI, which was not obtained whereas the correct position is that after the amendment of sub-section(1) of Section 30 of FERA, no such permission was required to be obtained from RBI.

8. The Court has heard the arguments advanced by the counsels for the parties and carefully examined the trial court record. Before dealing with the submissions made by both sides, it is deemed necessary to recapitulate the relevant facts of the case that are as follows:

9. On 1.5.1995, respondent No. 1 had entered into an agreement with its parent company, M/s. Amway Corporation, USA to acquire the services of the respondent No. 2 in India. On 1.3.1998, the respondent No. 1 had entered into an agreement with M/s. Amway Corporation, Australia to acquire the services of the respondent No. 3 in India. In accordance with the terms of the aforesaid agreements, the salaries payable to the respondents No. 2 & 3 were remitted by respondent No. 1 to M/s. Amway Corporation, USA and M/s. Amway Corporation, Australia. The remittances made to respondent No. 2 covered the period between 1997 to 1999 and the remittances made to the respondent No. 3 covered the period w.e.f. 1998 to 2000.

10. It is an undisputed position that remittances were made by the respondent No. 1 in favour of the respondents No. 2 & 3 through the respondent No. 4 bank. Under para 11 D.2(ii) of the ECM, as existing prior to October, 1997, prior clearance of the Ministry of Home Affairs, Government of India was required to be obtained if the period of engagement of a foreign national exceeded one year at a time. The aforesaid guidelines of the ECM were however modified on 29.10.1997, and in consultation with the Government of India, it was decided to

dispense with the requirement of obtaining prior clearance of the Ministry of Home Affairs in such cases, provided that the concerned foreign national held a valid employment visa. The relevant extract of the amendment to the ECM is reproduced hereinbelow for ready reference:

3. Short term Engagement of Foreign Nationals

3.1 Attention is invited to paragraph 11D.2 of ECM in terms of which authorized dealers have been permitted to allow remittances in connection with the short term engagement of foreign nationals by Indian firms/companies upto 12 man-months in a calendar year subject to certain conditions which, among other things, include that the concerned foreign national should hold a valid visa, i.e., employment, business, tourist, etc., and if the period of engagement exceeds three months, the foreign national should hold a valid employment visa. It has now been decided to remove the ceiling of 12 man-months prescribed for short term engagement of foreign nationals by Indian firms/companies. Authorized dealers may henceforth allow remittance in connection with the engagement of foreign nationals by Indian firms/companies without any limit on the total duration of engagement of foreign nationals in any calendar year.

3.2 In terms of paragraph 11D.2(ii) of ECM, prior clearance of Ministry of Home Affairs (MHA), Government of India, is required to be obtained if the period of engagement of a foreign national exceeds one year at a time. It has been decided, in consultation with the Government of India, to dispense with the prior clearance of MHA in such cases provided the foreign national concerned holds a valid employment visa.

11. It is the case of the respondent No. 1 that despite the aforesaid relaxation of the norms, the respondent No. 1 continued to approach the RBI as before, with a request for grant of approval for making remittances of foreign currency in favour of the respondents No. 2 & 3 outside India, which were duly granted from time to time. Post amendment, the RBI had directed the respondent No. 1 to approach its authorized dealer for processing its case in terms of para 11 D.2(ii) of the ECM.

12. On 29.5.2002, the Directorate of Enforcement issued a notice to show cause to the respondents for alleged contravention of Section 30 read with Para 11 D.2(ii) of the FERA. The respondents had replied to the aforesaid notice to show cause, whereafter the Adjudicatory Authority observed that the respondents No. 2 & 3, both foreign nationals, had arrived in India in the years 1995 and 1998 respectively, as per their respective service agreements and since both of them were on business visas and not on employment visas, they were required to obtain prior permission of the RBI u/s 30 of the FERA because they were practicing a profession in India.

13. The Adjudicatory Authority went on to draw a distinction between foreign nationals holding employment visas whose period of engagement exceeds one year, and other foreign nationals who have business visas, and held that as the

cases of respondents No. 2 & 3 herein fell in the latter category, the provisions of para 11D.2 of ECM would not apply to them. As a consequence thereof, the respondent No. 1 was held guilty of having contravened the provisions of Section 30 read with para 11D.2 of ECM for having remitted the salaries of the respondents No. 2 & 3 abroad and the respondents No. 2 & 3 were held guilty of having contravened the aforesaid provisions in the same manner. Further, the Adjudicatory Authority held respondent No. 4 bank guilty for having contravened the provisions of Section 64(2) of the FERA and penalties were imposed on all the said respondents u/s 50 of the Act.

14. Aggrieved by the aforesaid decision, the respondents herein had preferred independent appeals, which came to be allowed by a common order dated 28.2.2007 passed by the Appellate Tribunal, wherein it was held that the first condition of para 11D.2 of ECM had been fulfilled by the respondents for the reason that service agreements had been executed between the respondents No. 1 and No. 2 and the respondents No. 1 and 3 respectively, whereunder remittances of foreign currencies were made to USA and Australia in accordance with the terms of the agreements. As for the prior permission allegedly required to be obtained from the RBI, it was observed by the Tribunal that the FRRO had registered respondents No. 2 & 3 and issued them residential permits under the Registration of Foreigners Rule, 1939.

15. The contention of the appellant/UOI that registration of the respondents No. 2 & 3 with the FRRO is irrelevant as it is manned by a personnel deputed by the Delhi Police was turned down and Tribunal held that the said office comes under the wings of the Ministry of Home Affairs, GOI and no evidence to the contrary had been placed on record by the Enforcement Directorate. Thus, the Appellate Tribunal concluded that the respondents No. 2 & 3 were employees of the respondent No. 1 and even in the absence of an employment visa, their service agreements executed with the respondent No. 1 bear out the said position. As a result, the observation made by the Adjudicatory Authority that the respondents No. 2 & 3 were practicing a profession in India was turned down and the order dated 7.2.2005 was set aside.

16. Similarly, the appeal of the respondent No. 4/bank was allowed by the Tribunal and it was held that when the other respondents No. 1 to 3 had not contravened the provisions of the FERA, it could not be held that the respondent No. 4/Bank had committed any contravention.

17. The contention of the counsel for the appellant/UOI that the Appellate Tribunal had failed to appreciate the fact that the respondents No. 1 to 3 had not obtained any permission from the RBI and that the respondents No. 2 & 3 possess only business visa and not employment visas, are questions of fact that have been duly adjudicated upon by the Appellate Tribunal. Despite the fact that the scope of the present appeal ought to be confined to the question of law raised therein, as prescribed u/s 35 of FEMA, in view of the arguments addressed by both sides, this Court has perused the trial court record and is satisfied that

the Appellate Tribunal has taken into consideration the documents filed by the respondents No. 1 to 3 before arriving at the conclusion that requisite permissions had been duly obtained by them from the RBI before remitting foreign exchange abroad.

18. As for the argument advanced on behalf of the appellant/UOI that the respondents No. 2 & 3 had never held employment visas and they had continued to hold transit visas and that they had not registered themselves with the Ministry of Home Affairs, GOI, at the cost of repetition, it may be reiterated that the aforesaid argument is also not premised on any question of law raised by the UOI in the present appeal. Rather, it is purely a question of fact that has been duly examined by the Appellate Tribunal and negated on the basis of the documents filed by the respondents. For taking the aforesaid view, this Court is fortified by the decision of the Supreme Court in the case of *Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another*, wherein it was held that u/s 35 of FEMA, the legislature has conferred a right of appeal to a person aggrieved from "any", "order" or "decision" of the Appellate Tribunal only on a question of law.

19. It is also pertinent to note that any argument sought to be urged by the appellant/UOI in respect of the employment visas of the respondents No. 2 & 3 is beyond the scope of the notice to show cause that was originally issued to them by the Adjudicatory Authority and this ground can hardly be urged at the stage of second appeal. As a matter of fact, the learned Adjudicatory Authority had gone beyond the scope of the notice to show cause while making observations in the order dated 7.2.2005 with regard to the employment visa of the respondents No. 2 & 3, which was never an issue raised in the said notice addressed to the respondents. The aforesaid observation is borne out on a bare perusal of the contents of the Memorandum dated 29.5.2002 issued by the Directorate. Having failed to take up the said issue at the relevant point of time, the question of the notices responding to the said issue in their replies, did not arise and now the appellant is barred in law from agitating the said issue at this belated stage, and that too at the stage of appeal.

20. Finally, coming to the last limb of the arguments canvassed by the learned counsel for the appellant/UOI with regard to the non-compliance of Section 30 of the FERA, the aforesaid provision is reproduced hereinbelow for ready reference:

30. Prior permission of Reserve Bank required for taking up employment, etc., in India by nationals of foreign States- (1) No national of a foreign State shall, without the previous permission of the Reserve Bank, practice any profession or carry on any occupation, trade or business in India in a case where such national desires to acquire any foreign exchange (such foreign exchanging being intended for remittance outside India) out of any moneys received by him in India by reason of the practicing of such profession or the carrying on of such occupation, trade or business, as the case may be.

(2) Where any national of a foreign State desires to obtain the permission of the Reserve Bank under sub-section (1), he may make an application to the Reserve Bank in such form, in such manner and containing such particulars as may be prescribed.

(3) On receipt of an application under sub-section (2), the Reserve Bank may, after making such inquiry as it deems fit, allow the application subject to such conditions, if any, as it may think fit to impose or reject the application.

Provided that no application shall be rejected under this sub-section unless the applicant has been given a reasonable opportunity for making a representation in the matter.

21. As is apparent from a perusal of the aforesaid provision, no foreign national can practice any profession or carry out any occupation, trade or business in India without prior permission of the RBI for the purpose of acquiring foreign exchange with the intention of remitting it outside India out of moneys received by him in India as a consequence of practicing such profession, occupation, trade, business, etc. Sub-section (1) of Section 30 was amended by Act 29 of 1993 and it was substituted w.e.f. 8.1.1993. On the date of issuance of the Show Cause Notice dated 29.5.2002, the amended sub-section (1) of Section 30 was applicable to the facts of the present case. Furthermore, as noted earlier, Para 11 D.2(ii) of the ECM had also been amended w.e.f. 29.11.1997.

22. Prior to the amendment of the aforesaid Paragraph 11, authorized dealers of the RBI were permitted to allow remittance in connection with short term engagement of foreign nationals by Indian firms/companies upto 12 man-months in a calendar year on certain conditions, which included a requirement for such a foreign national to hold a valid visa for employment, business, tourism, etc., and if the period of engagement exceeded three months, such a foreign national was required to hold a valid employment visa. However, post amendment, the ceiling of 12 man-months in a calendar year was done away with and authorized dealers of the RBI were allowed to make remittance in connection with engagement of foreign nationals by Indian firms/companies without imposing any limitation on the total duration of their engagement in a calendar year. Additionally, the requirement of obtaining prior clearances from the Ministry of Home Affairs, GOI for foreign nationals holding valid employment visa was also done away with.

23. In view of the aforesaid changed legal position on the date of accrual of the cause of action, i.e., in the year 2002, when the show cause notice was issued to the respondents, it cannot be held that there was any violation of Section 30 of the FERA by any or all the respondents for the reason that the records clearly reveal that the respondent No. 1 had duly approached the RBI for obtaining prior permission for remitting foreign currency on account of salaries paid to the respondents No. 2 & 3, both foreign nationals, in terms of their service agreements executed in the years 1995 and 1998 respectively. Moreover, the records reveal that the FRRO had duly issued residential permission to the

respondents No. 2 & 3 under the Registration of Foreigners Rule, 1939 and thus, they were well entitled to obtain employment with the respondent No. 1 in India during the relevant period.

24. In view of the aforesaid facts and circumstances, this Court is of the opinion that the impugned order dated 28.2.2007 passed by the Appellate Tribunal is a legal and valid order and does not deserve any interference. The Tribunal was quite justified in setting aside the penalties imposed on the respondents and quashing the adjudication order dated 7.2.2005, as there was no contravention of the provision of Section 30 of FERA by any of the respondents. As a result, the present appeal fails and is accordingly dismissed. Trial court record be released forthwith.