

(1981) 09 MAD CK 0085
In the Madras High Court
Case No : A.A.O. No. 599 of 1978

Valliammai Achi

APPELLANT

Vs

Director of Enforcement, Madras

RESPONDENT

Date of Decision : 07-09-1981

Acts Referred:

Foreign Exchange Regulation Act, 1947 — Section 5(1)

Citation : AIR 1983 Mad 92

Hon'ble Judges : Singaravelu, J;Ramanujam, J

Bench : Division Bench

Advocate : K.P. Jagadeesan, for the Appellant; K. Swamidurai, Addl. Central Government Standing Counsel, for the Respondent

Judgement

Ramanujam, J.—This appeal arises against the order dated 23-6-1978 of the Foreign Exchange Regulation Appellant Board, affirming the order of the Enforcement Directorate, imposing a personal penalty of Rs. 5,000 and confiscating Rs. 18,100/- recovered from the appellant, for contravention of S. 5 (a) (aa) of the Foreign Exchange Regulation Act 1947.

2. The residential premises of one Ramaswami Chettiar was searched on 22nd May 1970, and a statement was recorded from him by the Enforcement Officers and on the basis of the said statement given by Ramaswami Chettiar, the residence of the appellant was searched by the Enforcement Officers on 23rd May, 1970. During the search, three aerogrammes and Indian currency notes amounting to Rs. 8100/- were seized. The seized aerogrammes had been addressed to the appellant by her sons Messrs. Sumbandam and Kasi Viswanathan. A statement was also taken from the appellant at the time of the seizure by the Enforcement Officers on 23rd May, 1970. In the statement the appellant had stated that Messrs Sumbandam and Kasi Viswanathan, her sons, were carrying on money-lending business at Malacca, that they had sent the seized aerogrammes, that by those aerogrammes they had instructed the appellant to receive some money from Ramaswami Chettiar in the presence of

one Ayothi Naidu, that in fact Ramaswami Chettiar came to the appellant's house some time ago and gave her Rs. 20,000, that out of the said sum of Rs.20,000/-, she had spent a sum of Rs. 1900/- that out of the balance of Rs.18,100/- she had deposited Rs. 10,000/- with her mother-in-law, Smt. Alagammai Achi and that the remaining Rs. 8,100/- was seized from her premises had no connection with her shop. Pursuant to the summons issued by the Enforcement Directorate to the appellant requiring her to produced the same after withdrawing it from her mother-in-law. Based on the statement seizure of the sum of Rs. 8100/-, as also the aerogrammes written by her sons, adjudication proceedings were initiated as against the appellant and by his order of adjudication dated 31st December 1973, the Deputy Director of Enforcement, Madras, held the appellant guilty of contravention of Section 5 (1) (aa) of the Act and imposed a personal penalty of Rs. 5000 and ordered confiscation of the said two amounts of Rs. 8100 and Rs. 10,000/- u/s 23 (1-B) of the Act.

3. There was an appeal to the Foreign Exchange Regulation Appellate Board, by the appellant and in that appeal, the Board held, by its order dated 26th September 1975, that the order of the Deputy Director of Enforcement was bad for violation of the principles of natural justice in that no opportunity was given to the appellant to cross-examine the witnesses. In that view, the Board allowed the appeal and remitted the matter to the Deputy Director of Enforcement for a fresh disposal.

4. After remand, the Assistant Director of Enforcement passed a fresh adjudication order practically confirming the earlier order imposing a penalty of Rs. 5000/- confiscating the sum of Rupees 18100.

5. There was again an appeal to the Appellate Board by the appellant. In that appeal, it was mainly contended (1) that the appellant's son Kasi Viswanathan on whose instructions the sum of Rs. 20,000/-, was said to have been received by the appellant through Ramaswami, were not resident outside India and therefore Section 5 (1) (aa) will not stand attracted, and (2) that the statement of the appellant dated 23rd May, 1970 taken at the time of the seizure of the amounts and the aerogrammes was not a voluntary one and therefore it should not be relied upon. Dealing with the first contention, the Appellate Board has specifically held that the appellant's son Kasi Viswanathan has not been shown to be a person resident outside India at the relevant time and that the endorsements made on his passport to the effect that he was not permitted to engage himself in any employment, business or profession there, would go to prove that he is not, in fact, a resident outside India. On the contrary, it relied on the statement of Ramaswami Chettiar given on 22nd May, 1970, which was to the effect that on the instructions of his son Muthukaruppan Chettiar in Malacca, the amount was received by the appellant through him, and held that even if the disputed amount is not received by the appellant on the instructions of her son Kasi Viswanathan, it could be taken that the amount has been received through Ramaswami Chettiar on the instruction of Muthukaruppan Chettiar, a resident

outside India. In this view, the Appellate Board confirmed the order of the Assistant Director of Enforcement imposing a personal penalty of Rs. 5000/- and confiscating the sum of Rs. 18100/-.

6. In this appeal, the learned counsel for the appellant contends that the Appellate Board is in error in upholding the order of the Assistant Director of Enforcement after giving the finding that the appellant's son is not a person resident outside India. According to the learned counsel the charge being one of receipt of money on the instruction of Kasi Viswanathan, a person resident outside India, the department has to prove that charge strictly. Having failed to prove that Kasi Viswanathan, from whom the appellant is alleged to have received instructions, is shown to be a person not residential outside India, the charge must automatically fail and that it is not open to the department to alter the same or substitute a new charge in the place of the original charge and to uphold the order of penalty on the basis that the altered or the substituted charge has been proved by the material on record.

7. In this case, the original charge against the appellant at the stage of the adjudication, proceedings was that she had received a sum of Rs. 20,000/- through Ramaswami as per the instructions of her son Kasi Viswanathan residing at Malacca. Though this charge was taken to have been proved by the Deputy Director of Enforcement, the Appellate Board has taken the view that Kasi Viswanathan is not a person residing outside India and therefore any amount received by the appellant as per his instructions cannot be the subject matter of contravention of Sec. 5 (1) (aa) of the Act. As per the said finding of the Appellate Board, the charge cannot be said to have been proved. To this extent, therefore, the learned counsel appears to be right in his submission. The charge as originally framed has not been established on the finding of the Appellate Board. When the Appellate Board specifically finds that Kasi Viswanathan, on whose instructions the appellant is said to have received the sum of Rs.20,000/- has not been shown to be a person resident outside India, Section 5(1) (aa) cannot be said to have been contravened. The provisions of Section 5 (1) (aa) are to the following effect: "5 (1).....no person in or resident in, the States shall - (aa) receive, otherwise than through an authorised dealer, any payment by order or on behalf of any person resident outside India."

8. If Kasi Viswanathan is not shown to be a person resident outside India, then Section 5 (1) (aa) will not come into play. Therefore, it is clear that on the finding of the Appellate Board that Kasi Viswanathan has not been shown to be a person resident outside India at the relevant time, the charge of contravention of S. 5 (1) (aa) has to fail.

9. However, the Appellate Board relying on the statement of Ramaswami given on 22nd May, 1970 that on the instructions of his son Muthukaruppan Chettiar who had a money lending shop at Malacca he paid the sum of Rupees 20,000/- to the appellant, has held that the appellant has received the sum of Rs. 20,000/- through Ramaswami on the instructions of Muthukaruppan Chettiar at

Melacca and this will attract S. 5 (1) (aa). It is no doubt true that the statement of Ramaswami Chettiar shows that Muthukaruppan Chettiar is resident at Malacca and on his instructions he received a sum of Rs. 30,000/- through one Thirupathi and paid the sum of Rupees 20,000/- out of it to the appellant. The Appellate Board relying on this, held that the facts establish that the appellant has received the sum of Rs. 20,000/- from Ramaswami Chettiar on the instructions of Muthukaruppan Chettiar who is a resident outside India and this will amount to contravention of S. 5 (1) (aa) of the Act.

10. The Appellate Board was of the view that it has jurisdiction to alter the charge if the evidence is such as to establish the altered charge. In support of that view, the Appellate Board has relied on the following decisions :-

1. AIR 1925 130 (Privy Council) .
2. Bijjoy Chand Potra Vs. The State, .
3. Willie (William) Slaney Vs. The State of Madhya Pradesh, and
4. Nani Gopal Biswas Vs. The Municipality of Howrah, .

11. In this appeal, which is directed against the said order of the Appellate Board, the learned counsel for the appellant contends that the Board, having held that the charge leveled against the appellant originally had not been established, erred in holding that the appellant is guilty of a fresh charge that she received the sum of Rs. 20,000/- from Ramaswami on the instructions of Muthukaruppan Chettiar, a resident outside India, without framing a fresh charge and without giving an opportunity to the appellant to rebut that charge. The learned counsel for the appellant also contends that even at the time of the argument, the Appellate Board did not indicate that it is going to alter the charge and that it was a matter of surprise to him when he received the order of the Appellate Board altering the charge and holding that the altered charge is proved on the material on record. Thus, the main question is whether the Appellate Board having held that the original charge had not been established against the appellant, could alter the charge at the stage of appeal without giving any opportunity to the appellant to answer the altered charge, merely on the basis of a statement of Ramaswami Chettiar dated 22nd May, 1970, especially when the veracity of the facts found in the statement of Ramaswami Chettiar cannot be tested by cross-examination and he is no more.

12. It is seen from the order of the Assistant Director of Enforcement that he proceeded on the basis of the statement of Valliammai Achi in which she had stated that she received the sum of Rs. 20,000/- from Ramaswami on the instructions of her son Kasi Viswanathan and therefore held that the charge against her has been proved, and that finding was challenged by the appellant before the Appellate Board. The Appellate Board agreed with the appellant that Kasi Viswanathan has not been shown to be a person resident outside India. Therefore, even if the appellant has received the sum of Rs. 20,000/- through

Ramaswami, on the instructions of Kasi Viswanathan, that will not be a contravention of Section 5 (1) (aa). Perhaps taking note of the situation, the Appellate Board, relying on the statement of Ramaswami that the amount was received from his son Muthukaruppan Chettiar residing at Malacca, and paid over to the appellant has found a contravention of Section 5 (1) (aa). It is in this context the Appellate Board has held that it has got the power to alter the charge at the appellate stage if the facts establish the altered charge. We do not see how the Appellate Board can alter the charge in the manner it has done at the appellate stage. The only case that the appellant was asked to meet at the adjudication proceedings is that she received a sum of Rs. 20,000/- through Ramaswami Chettiar on the instructions of her son Kasi Viswanathan, a person resident outside India. Now the charge as altered, in respect of which the appellant has been found guilty, is that she received the amount from Ramaswami on the instructions of one Mutukaruppan, a resident outside India. The charge is totally different, and the appellant, admittedly, has not been given any opportunity to rebut this charge at any time. Even before the Appellate Board, no opportunity was given to the appellant to meet the fresh charge. As already stated, the Appellate Board has referred to certain decisions as empowering the Board to alter the change if the evidence is such as to establish the altered charge. The decision referred to by the Appellate Board cannot be taken to lay down such a proposition as has been laid by the Appellate Board.

13. In *Bijjoy Chand Potra Vs. The State*, , an accused was charged u/s 307 Penal Code. But after the trial, he was convicted u/s 326 without alteration of the charge as the facts established an offence u/s 326. There, the facts actually established in the case came within the mischief of Section 326 and therefore the court was justified in convicting the accused without altering the charge, for, the accused could have been charged alternatively even initially u/s 307 and 326.

14. The decision in AIR 1925 130 (Privy Council) , dealt with a case where certain persons were charged u/s 302 Penal Code, but were convicted u/s 201 for causing the disappearance of evidence. The Privy Council upheld the conviction and observed :- "A man may be convicted of an offence although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made.....Their Lordships entertain no doubt that the procedure was a proper procedure and one warranted by the Code of Criminal Procedure". There also it was a case where alternative charge could have been initially framed on the facts. In *Willie (William) Slaney Vs. The State of Madhya Pradesh*, a charge against two accused u/s 302 read with Sec. 34 of the Penal Code had been framed. One accused was acquitted but the other was convicted of the offence u/s 302 Penal Code. The question was whether in the absence of a separate alternative charge u/s 302, the conviction of the other accused u/s 302, could be upheld. The Supreme Court took the view that having regard to the nature of the charge framed, the omission to frame a separate charge u/s 302, Penal Code, against the other was only a curable irregularity which, in the absence of prejudice could not affect the legality of conviction

under S. 302. 15. Nani Gopal Biswas Vs. The Municipality of Howrah, , appears to be a still nearer case to the case on hand. In that case, a man was convicted u/s 299 of the Calcutta Municipal Act. Later, at the stage of the appeal, it was argued that the offence would be punishable u/s 300 read with Section 488 of the Act and not u/s 299. The High Court took the view that the accused was fully aware of the nature of the accusation against him and it would not cause any prejudice to him if the conviction and the sentence were altered into those u/s 300 read with Section 488 of the Act. This was upheld by the Supreme Court. The view taken by the Supreme Court was that a man might be convicted of an offence, although there had been no charge in respect of it, if the evidence was such as to establish a charge that might have been made. 16. The basic factor to be taken into account, as pointed out by the Supreme Court itself, is to see whether the person who was accused was fully aware of the nature of the accusation and no prejudice will be caused by the alteration of the charge. The principle laid down in the above decisions cannot apply to the facts of this case for more than one reason. Firstly, the appellant was not aware of the present accusation that she has received the amount through Ramaswami Chettiar on the instructions of Muthukaruppan Chettiar. She was asked to meet a case that she received the amount on the instructions of her son Kasi Viswanathan. The charge is entirely different. Both the charges could not be made at the same time. The receipt of an amount from one non-resident is different from the receipt of the same amount from another non-resident. Having asked the appellant to answer a charge that she received the amount on the instructions of B. The appellant cannot be said to have had an opportunity to meet the new charge. Therefore, real prejudice is caused to the appellant in the alteration of the charge. Though the Appellate Board takes the view that no prejudice is caused to the appellant by alteration of the charge, we are of the view that considerable prejudice is caused by the alteration of the charge, especially when she was not asked to meet that case at any stage of the proceedings, either at the adjudication stage or at the appellate stage. 17. In this case, the statement of Ramaswami Chettiar said to have been given on 22nd May, 1970 has been relied on and this statement was not put to the appellant at any stage and no charge was framed on the basis of that statement. Therefore, when the Appellate Board felt that the original charge of receipt of the money on the instructions of Kasi Viswanathan has failed, it is not open to the Appellate Board to frame a new charge based on the statement of Ramaswami Chettiar. The said statement states that Ramaswami received the amount from Muthukaruppan Chettiar in Malacca and then paid it over to the appellant. That means the amount was received by him in India on the instructions of his son Muthukaruppan and the appellant cannot be taken to have received the amount on the instructions of Muthukaruppan. 18. In this view of the matter, we feel that the view taken by the Appellate Board that the appellant has contravened Section 5(1)(aa) of the Act in receiving the amounts from Ramaswami Chettiar on the instructions of Muthukaruppan Chettiar, a resident outside India, cannot be accepted as correct. The appeal is therefore, allowed and the order levying penalty of Rs. 5,000/- on the appellant

and the order of confiscation of the sum of Rs. 18100 will stand set aside. However, if the Enforcement Directorate feel that the appellant has received the amount of Rs. 20,000/- on the instructions of Muthukaruppan Chettiar, a person resident outside India, it is open to them to take such other action as they consider necessary and possible. There will be no order as to costs. Appeal allowed.