

M.S.M. Syed Mohammad Bukhari Vs. the Director of Enforcement, New Delhi and ors.

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Court : Chennai

Decided On : Dec-12-1975

Reported in : AIR1977Mad23

Judge : N.S. Ramaswami, J.

Acts : Foreign Exchange Regulation Act, 1947 - Sections 4(1), 5(1), 23-E and 23-EE

Appeal No. : Appeal No. 415 of 1970, against order of Foreign Exchange Regulation Appellate Board, New Delhi, D/-

Appellant : M.S.M. Syed Mohammad Bukhari

Respondent : The Director of Enforcement, New Delhi and ors.

Judgement :

1. This is an appeal under Sec. 23-EE of Foreign Exchange Regulation Act, 1947, (hereinafter referred to as the Act) by one M. S. M. Syed Mohammad Bukhari who was charged by the Director, Enforcement Directorate, New Delhi under the provisions of the Act. There were three charges. The Director found the appellants guilty of the charges and imposed a penalty of Rs. 2,500/-. The appellant filed an appeal under Section 23-E of the Act to the Foreign Exchange Regulation Appellate Board, but without success. Therefore this appeal under Section 23-EE of the Act has been filed. Under that section, a second appeal to this Court lies only on a question of law.

2. The contention on behalf of the appellant before me has been that the Director had not followed the proper procedure laid down under the relevant rules framed under the Act, that he had found the appellant guilty without recording of evidence and that no opportunity had been given to the appellant to meet the charges. It was further contended that in law the alleged charged cannot be said to have been made out.

3. The three charges are:

(1) during the years 1954-59 the appellant made various payments amounting to St. \$3062 to persons resident outside Indian without any prior general or special permission of the Reserve Bank of India and had thereby contravened the provisions of Section 5(1)(a) of the Act;

(2) On or about 6-4-1959, the appellant borrowed foreign exchange to wit St. 3500 dollars from persons other than the authorised dealers in foreign exchange in India without the previous general or special permission of the Reserve Bank of India and

had thereby contravened the provisions of Section 4(1) of the Act;

(3) during the years 1954-59, the appellant maintained an account with the Singapore Branch of Bukhary and Co., a firm resident outside India without the prior permission of the Reserve Bank of India and contravened the provisions of Section 4(1) of the Act.

4. Admittedly the appellant is a permanent resident of India. But during the relevant times, he had been temporarily staying at Singapore. The charges relate to what the appellant did while at Singapore. One of the contentions on behalf of the appellant is that the provisions under which the appellant had been charged apply only to persons resident in India and as the appellant has been actually residing at Singapore and not in India, none of the provisions of the Act would be applicable to him and he cannot be held to have contravened any of those provisions. But this contention is not acceptable in view of the decision reported in *Bhagwandas v. Union of India*, : AIR1961Mad47 . In Sections 4(1) and 5(1) of the Act under which the appellant has been charged, the reference is to a person 'in' and a person 'resident in' India. Similarly under Section 9 also the same phraseology occurs. In considering the same under Section 9, a Bench of this Court in the above case pointed out that the distinction between 'in' and 'resident in' clearly implies that what is intended is a description of quality, namely, of ordinarily continuous residence, and a purely temporary stay abroad will not make the offending section less applicable. It was further pointed out that, that part of the section will, therefore, apply to persons who can be justifiably described as permanent residents of India, though they might be abroad at the particular time of a transaction, while the earlier part will apply to those who are in the country, whatever might be the quality of their permanent residence. In view of this decision, it cannot be legitimately contended that the appellant, who is a permanent resident of India, cannot be charged under the relevant provisions of the Act merely on the ground that during the relevant period, he was staying outside India.

5. As I said, the contention of the learned counsel for the appellant is that the Director had not followed the proper procedure in conducting the inquiry regarding the charges, that he had not acted on relevant evidence and that he had not given an opportunity to the appellant to meet the charges. Whatever may be said regarding charges 1 and 3, as far as charge No. 2 is concerned, I fail to appreciate the contentions put forward on behalf of the appellant. That is a charge in respect of certain amount of Singapore Dollars borrowed by the appellant against the provisions of S. 4(1) of the Act. R. 3 of the adjudication proceedings stipulates of the adjudication proceedings stipulates the procedure to be adopted by the Director in inquiring into the charges against a person or persons. Sub-rule (1) of R. 3 contemplates the issue of a notice to the concerned person. Sub-rule (2) of Rule 3 says that such notice shall indicate the nature of the offence alleged to have been committed by the person. It is not the grievance of the appellant that the above said two sub-rules had been contravened. Admittedly he had received the necessary notice indicating the nature of the offence alleged to have been committed by him. The contention on behalf of the appellant is that even though such a notice had been issued, the further relevant procedure in the matter had not been adopted by the Director.

6. But as far as charge No. 2 is concerned, I am of the view that no further proceeding is at all necessary, for further proceedings regarding a charge would arise

only when the concerned person shows cause against the charge. As far as charge No. 2 is concerned, in the statement made by the appellant before the Director, he has unequivocally stated that he did borrow the said amount of dollars for the purpose of paying to two other partners of the firm of which he, himself, had been a partner. The version of the appellant at that stage was that the firm, of which he was a partner, came to be dissolved, that he had to pay certain amounts to the other partners and that for that purpose, he borrowed the said amount under promissory notes. This is a clear admission on the part of the appellant regarding charge No. 2. As already seen that charge is for unauthorised borrowing of foreign exchange without the prior permission of the Reserve Bank of India. From the above statement, it is clear that the appellant far from showing any cause against charge No. 2, has in fact admitted the said charge and therefore no further proceeding of taking evidence or giving opportunity to the appellant to produce evidence arises. Sub-rule (3) is in these words:

'If after considering the cause, if any, shown by such person, the Director is of opinion that adjudication proceedings should be held, he shall fix a date for the appearance of that person either personally or through his lawyer or other authorised representative.'

I am quite sure that as far as charge No. 2 is concerned, the appellant did not show any cause and therefore the alleged irregularity in the further proceedings in the matter, does not in any way affect the finding of the Director and that that charge stood proved.

7. I am unable to accept the finding of the Director as well as that of the Appellate Board regarding the other two charges namely charges 1 and 3. As far as charge No. 3 is concerned, neither the Director nor the Appellate Board gives any finding. The Director simply narrates the three charges, after which he deals with only charges 1 and 2 and does not deal with the 3rd charge at all. There is no indication in the order of the Director that he held that charge No. 3 stood proved. The Appellate Board has also no doubt referred to the three charges. But in dealing with the charges, it had dealt with only charges 1 and 2 and said nothing about the 3rd charge. Therefore I have to take it that neither the Director, nor the Appellate Board actually held the appellant guilty of the 3rd charges.

8. Coming to charge No. 1, I am of the view that on the facts available the charge cannot be held to have been proved. The Director has found the appellant guilty of that charge on the statement made on 11th May, 1963 and also upon a plea of guilty said to have been made by the appellant. If the appellant had shown cause against a particular charge as contemplated under sub-rule (3) of Rule 3 referred to above, then the duty of the Director is to conduct an inquiry into the charges and give a finding on the evidence placed before him. There is no provision in the Act or in the relevant rules (after initiating adjudication proceedings upon the person concerned showing cause against a particular charge) to find the person guilty on his own plea. Therefore the observation of the Director that the appellant pleaded guilty to the charges (after the adjudication proceedings commenced on the appellant showing cause against a particular charge) is of no help.

9. The only other material is the appellant's statement made on 11th May, 1963. In that statement all that the appellant said was he spent 3062.49 dollars while he was at Singapore. On this statement and upon the fact that the appellant did not bring

anything in cash to India while he returned from Singapore, the Director seems to hold that the appellant had made payments to the tune of 3062.49 dollars at Singapore without prior permission from the Reserve Bank of India as contemplated under Section 5(1) of the Act. This view is not correct. Sec. 5(1) does not in any way prohibit a person who earns foreign money while residing in the foreign country in spending money on himself. The contravention of Section 5(1) would come in, only if the foreign currency is paid to another person or credited to the account of another person. By merely spending money on himself, the person cannot be said to have contravened the provisions of Section 5(1) of the Act. The Director and the Appellate Board have overlooked this aspect of the matter.

10. The appeal is therefore partly allowed in that, charges Nos. 1 and 3 are held not proved and they are accordingly quashed. The appeal is dismissed as far as charge No. 2 is concerned except that the penalty amount is reduced from Rs. 2,500/- to Rs. 500/- only. I have so reduced the penalty taking into consideration that the amount of foreign exchange involved is small and the offence is a technical one. The excess penalty amount deposited is to be refunded.

11. Appeal partly allowed.

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