

Director of Enforcement

Vs

Fr.J.M.Stevens

(G. T. Nanavati, V. N. Khare JJ)

12.02.1998

JUDGMENT

NANAVATI J

1. In this appeal by certificate, Enforcement Directorate of Government of India is calling in question the judgment of the High Court of Karnataka in Misc. First Appeal No. 1171 of 1981. The High Court dismissed the appeal filed by the Enforcement Directorate and confirmed the order passed by the Foreign Exchange Regulation Appellate Board, New Delhi in Appeal No. 684 of 1977. The Appellate Board had partly allowed that appeal which was filed against the order dated 28.3.1977 passed by the Special Director of Enforcement.

2. The respondent, a Belgium national, came to India in 1948. After completing his religious studies in India he became a priest of the Jesuit Society, Ranchi in 1958. He later qualified himself as an architect in 1959 from Sir.J.J College of Architecture, Bombay. He shifted from Ranchi to Bangalore in 1965 and rendered professional services as an architect in the country and also to persons residing outside India. On information that the respondent was maintaining foreign currency accounts abroad and was crediting the said accounts with foreign exchange earned by him as an architect, his office-cum-residential premises at Bangalore were searched by the Officer of the Enforcement Directorate, under section 37 of the Foreign Exchange Regulation Act, 1973 on 9.10.1975. The documents found therefrom disclosed that the respondent had collected fees as architect for the services rendered by him in India and Bangladesh and got them credited to his accounts maintained in Belgium, Switzerland and Germany. Foreign currency was also seized from the said premises. The Enforcement Directorate, therefore, framed five charges against him and initiated proceedings for contravention of section 10(1)(b) of the Foreign Exchange Regulation Act, 1947 and sections 16(1)(a) and 30(ii) of the 1973 Act. On inquiry by the Special Director of the Enforcement, Madras charges Nos. 3 and 5 were held not proved. As charges Nos. 1, 2 and 4 were held proved different amounts of penalty were levied by an order dated 28.3.1977. Respondent had preferred an appeal against that order to the Appellate Board. It exonerated the respondent of the first two charges and reduced the penalty imposed in respect of charges No. 4. As the Enforcement Directorate was not satisfied with the order passed by the Appellate Board it filed an appeal to the High Court under section 54 of the 1973 Act. The appeal was confined to charges Nos. 1 and 2 which read as follows:

"(i) that during the period 1967 to 31-12-1973 he had a right to receive foreign exchange, to wit Belgium Fr. 2,00,000, Sw. Fr. 38,540.20, D.M. 12,000 and D.M. 5,000, and that he refrained from taking action to secure receipt of the aforesaid sum and, thereby contravened the provisions of Sec. 10(1)(b) of the Foreign

Exchange Regulation Act, 1947.

(ii) that during 1.1.1974 to 31.5.1975, he had a right to receive foreign exchange to wit DM 48,300.Sw.Frs.18,000, Sw.Frs.8,357 and 3988.44 and that he refrained from taking action which caused delay in the repatriation of the said foreign exchange and, thereby, contravened the provisions of Sec.16(1)(a) of the Foreign Exchange Regulation Act, 1973."

3.What was contended before the High Court was that the respondent was not entitled to the exemption under clause (iii) of the first proviso to the notification issued by the Central Government on 25.9.1958 in exercise of its power under section 9 of the 1947 Act which corresponds to section 14 of the 1973 Act, if he was considered as a person 'domiciled in India' or a 'person resident in India'. The High Court after re-appreciating the material on record agreed with the finding of the Appellate Board that the respondent was not a person 'domiciled in India' or a person 'resident in India' and, therefore, upheld the decision of the Appellate Board that the respondent was entitled to the benefit of the exemption granted under clause (iii) of the first proviso to the said notification. It, therefore, dismissed the appeal.

4.Before the High Court an attempt was made on behalf of the appellant to bring the case of the respondent within the purview of section 2(p) (iii) (d) by contending that the respondent had an intention to stay in India for an uncertain period but the High Court rejected that contention also and held that no foundation was laid or facts brought on record for drawing such a conclusion, either before the original authority or before the Appellate Board, nor was it urged in that manner before any of those authorities.

5.In this appeal also the learned counsel for the appellant has raised the same point which was raised before the High Court. He has now raised an additional point of law with the leave of this Court. It was contended by him that sections 9 and 10 are mutually exclusive and, therefore, notification issued under section 9 of the 1947 [Section 14 of the 1973 Act] Act and the exemption granted thereunder was not available to a person charged with the contravention of section 10 of the 1947 Act [Section 16 of the 1973 Act]. Section 9 of the 1947 Act provided for acquisition by the Central Government of foreign exchange. It empowered the Central Government to issue an order for that purpose. The section contemplate creation of a legal obligation on issuance of an order and to the extent specified therein, for every person in, or resident in, India who owned or held specified foreign exchange to offer it to the Reserve Bank and for the person entitled to assign any right to receive such foreign exchange to transfer that right to the Reserve Bank. Section 10 of the 1947 Act (section 16 of the 1973 Act) imposed a duty on every person who was entitled to receive foreign exchange or to receive from a person resident outside India a payment in rupees, not to do or refrain from doing anything or to take or refrain from taking any action which had the effect of delaying or preventing repatriation of foreign exchange or payment in rupees. What was contended by the learned counsel was both these sections operated in different fields as different types of duties were created by them. The point raised by the learned counsel appears to be fairly arguable and prima facie it also appears that the notification issued under section 9 would not be applicable to a case falling under section 10.But during the inquiry held by the Directorate of Enforcement it was neither alleged nor held that the notification dated 25.9.1958 as substituted by the notification dated 15.6.1977 was not applicable if the respondent was held not domiciled in India. It was not the case of the Directorate at any stage that the said notifications had no application to a case where breach of section 10 was alleged. We can safely assume that the Directorate was aware of the correct position. Therefore, we will have to proceed on the basis that the exemptions contemplated by the

said notifications were available to persons facing a charge of breach of section 10 of the Act also. We also feel that it would be unfair if at this stage the respondent is called upon to prove that the benefit of the exemption under Clause (iii) of the first proviso to the said notification was not available to him even if he is held not to be a person 'domiciled in India' or 'resident in India'. We, therefore, do not propose to decide this question of law and leave it open.

6. The Appellate Tribunal and then the High Court after referring to the relevant facts have held that though the respondent has been in India since a long time it has not been his intention to make India his permanent home. He has also been held not a 'person resident in India' as contemplated by section 2(p) of the 1973 Act. We see no reason to differ from this concurrent finding. As the aforesaid notifications were otherwise applicable to the respondent and as he is found to be a person not 'domiciled in India' nor a person resident in India he was entitled to the benefit of the exemption available under clause (iii) of the first proviso to the aforesaid notifications.

7. For the reasons stated above, the appeal is dismissed. No order as to costs.