

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 08.08.2013

+ LPA No.231/2013

SHRI BASANT KUMAR SHARMA

..... Appellant

versus

GOVERNMENT OF INDIA & ORS.

.... Respondents

Advocates who appeared in this case:

For the Appellant : Mr P. Ramesh Kumar

For the Respondent : Mr Saqib & Ms Shipra Shukla, for R-1 & 2.
Mr H. S. Parihar, Advocate for R-3/RBI.
Mr Rajiv Kapur with Ms Vatsala Rai for
R-4/SBI.

CORAM:-

**HON'BLE MR JUSTICE BADAR DURREZ AHMED, ACTING
CHIEF JUSTICE**

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present appeal is directed against the judgment dated 07.02.2013 passed by a learned Single Judge of this Court in W.P.(C) No.3760/1995. The appellant had preferred the writ petition, *inter alia*, praying for quashing and setting aside the directions issued by the Finance Ministry by the letter dated 23.03.1995. In addition, the appellant had sought various prayers which were in the nature of claiming damages from the respondents. The said writ petition was dismissed by the impugned order.

2. The controversy in the present appeal revolves around the question whether the appellant was liable to be treated as a non-resident for the purposes of maintaining his bank account with the State Bank of India (arrayed as respondent No.4 herein). The relevant facts necessary to consider the present appeal are as under.

3. The appellant was employed with an organization in Saudi Arabia. The appellant worked in Saudi Arabia for a period of six years under a contract and on completion of the same returned to India on 26.01.1988. It is the case of the appellant that he returned to India “due to recession and drastic salary cuts, with the sole intention to explore better job/immigration opportunities abroad”.

4. The appellant was maintaining bank accounts with the Mumbai Branch of the respondent No.4 bank. In addition to the bank accounts, the appellant was also availing the services of portfolio investment and safe custody of securities with repatriation benefits from the respondent no. 4 bank. One of the accounts of the appellant was an ‘NRE’ account while the other was an ‘NRO’ account (NRE A/c No.6384 and NRO A/c No.0684). Admittedly, the facility of maintaining a NRE account is only available to a non-resident. On his return to India, the appellant wrote a letter dated 28.03.1988 to the respondent seeking conversion of the status of his accounts to ‘NRO’. The relevant extract of the said letter dated 28.03.1988 is quoted below:-

“Dear Sir,

Reg : CHANGE OF STATUS- NRE A/c 6384
NRO A/c 0684

Portfolio Investment	A/c P-406
Security Custody	A/c Sh.4/1324 Without Repatriation
Security Custody	A/c Sh.4/1296 With Repatriation

This is in continuation of my discussions of 28 Jan.88 and letter dated 05 Feb.88, I wish to advise you that I have returned to India on 26 Jan.88 to explore the possibilities of re-settlement. There is also a possibility of leaving for another assignment overseas after elapse of 12 months from the date of arrival as above, if suitable employment is re-located overseas.

In view of the above, I intend to acquire 'Ordinarily Non Resident' status and request you to take necessary action to convert my above accounts to NRO status and also to take a note of my new address during my exploratory stay.

Please also send me necessary RBI Form(s) to obtain permission to hold immovable property abroad and Shares of foreign Companies abroad."

5. The respondent No.4 bank took note of the fact that the appellant had returned to India and recorded the change in his status from a 'non-resident' to a 'resident'. The respondent No.4 bank also sent a letter dated 27.04.1988 forwarding the requisite forms required to be submitted to Reserve Bank of India for their permission to hold immovable property and shares of foreign companies overseas. This letter indicated that the respondent No.4 bank was treating the appellant as a resident. Apparently, the appellant desired that his status be that of an "ordinarily non-resident" and he accordingly, desired that the status of his accounts not be altered to that of a resident Indian. Several complaints and representations in this regard are stated to have been made by the appellant. In response to one of his complaints, the respondent No.4 bank clarified, by the letter dated

02.01.1989, that all non-resident Indians on becoming residents in India are not allowed to maintain non-resident external accounts. The relevant extract of the said letter is as under:-

“2. Accordingly, NRIs on becoming Resident are not allowed to keep Non Resident external accounts in terms of para 29 A-15 of Exchange Control Manual 1987. Edition Vol. 1 as under “Non Resident (External) accounts of NRIs should be redesignated as Resident accounts immediately after the return of the account holder to India, if the authorised dealer is satisfied that he has returned to India for taking-up employment or for carrying on a business or vacation or for any other purpose with intention of residing in India.”

6. Since several complaints were being made by the appellant, the respondent No.4 bank sought a clarification from Reserve Bank of India, *inter alia*, on the issue whether the appellant could maintain his NRE accounts. The relevant extract of the said letter dated 03.03.1989 seeking clarification is quoted hereunder:-

“2. The account holder had advised us that he come to India on 26.1.88 and also took the benefit under ‘transfer of residence’ scheme. He also mentioned to us that he left job abroad and came to India to explore the possibilities of another job opportunity working abroad and requested to have correspondence at his address in India. It is thus obvious that he became resident under FERA. Accordingly, we advised him that he cannot maintain NRE account, which is required to be redesignated/closed. Besides, we wrote to the companies in which investment was made, advising them to change of his status.

XXXXX

XXXXX

XXXXX

XXXXX

4. In the circumstances, explained above, we shall be glad if you will please confirm to us on the following :

- (i) Whether he becomes resident under FERA
- (ii) On his becoming Resident
 - (a) He cannot keep NRE accounts and that will have to redesignated/closed.
 - (b) He cannot keep investment with benefit repatriation.
- (iii) Re-conversion facilities if granted will apply only to balances in NRE/FCNR account and not investment in shares/debentures of Indian companies.”

7. In response to the letter dated 03.03.1989 respondent No.3 responded vide its letter dated 04.07.1989 as under:-

“Please refer to your letter no.2353/P/406 dated 03rd march 1989 on the captioned subject.

In this connection we advise you as under :

- i) Since Shri Basant Kumar Sharma has returned to India on 26th January 1988 he had been treated as ‘Resident’ and his NRE/FCNR accounts should be converted into resident account immediately.
- ii) He should declare his foreign currency accounts/assets held abroad to Reserve Bank, if not already done and obtain permission giving justification for the delay in declaration.
- iii) The reconversion facility is available on the balances held as on the date of return to India and on foreign currency balances held abroad with Reserve Bank’s permission and subsequently

repatriated to India provided he had returned to India for exploratory purpose.

- iv) As regards his investment in India he is not eligible for any additional benefits after his return to India and becoming resident.

Sd/-
Exchange Controller”

8. The appellant continued to send letters/complaints to agitate his contention that he was entitled to maintain a non-resident account. In this regard, the appellant also approached the Reserve Bank of India. The Reserve Bank of India vide letter dated 18.02.1995 informed the appellant that he was not entitled to maintain a non-resident account in terms of the Exchange Control Regulations. The relevant extract from the letter dated 18.02.1995 is as under:-

“2. In this connection, we advise that the Exchange Control Regulations prevailing at the time of your return to India are applicable in your case. In terms of Para.29A.15 of Exchange Control Manual (1987 Edition) the NRE/FCNR accounts maintained by Non-Resident Indians are required to be redesignated as resident accounts consequent upon change of residential status from non-resident to resident. Further, in terms of Para.22C.2 ibid the reconversion facility was available only to those non-residents who desire to return to India to explore the possibility of settling down in India. Similarly, as per the regulations contained in Chapter 27 of Exchange Control Manual, 1987 Edition, NRIs would be eligible for all investment facilities as long as they are non-residents. Therefore, immediately on their becoming residents, they are required to intimate their change of status to the concerned companies whose shares/debentures are held by them. Since you returned to India on 26th January 1988 after resigning from your job abroad, you became a person resident in India in terms

of Section 2(P) of FERA, 1973. You are, therefore, governed by the above Exchange Control Regulations relating to NRE/FCNR Accounts and investment in Indian companies firms, non-compliance of which would be violation of the provisions of FERA, 1973 and you are liable for action under the above Act. You may also note that as you returned to India to explore the possibility of getting another job abroad you are not entitled to reconversion facility.

3. The above position had already been explained to you in 1989 itself. The question of granting you any relief/exemption as sought for does not arise at all, as the legal position explained above, is very clear.”

9. Thereafter, the appellant was also informed by a letter dated 23.03.1995 to comply with the instructions of the Reserve Bank of India contained in the letter dated 18.02.1995. This communication dated 23.03.1995 was challenged by the appellant in the writ petition W.P.(C) No. 3760/1995.

10. The appellant has contended that he was entitled to be considered as ordinarily non-resident and thus was entitled to repatriate his assets in India overseas. It has been further contended that various countries like Canada and United States of America prescribed a certain minimum net worth as a pre requisite qualification for immigration into their countries. As the appellant had been denied repatriation benefits, in effect, the appellant's networth in India would not be counted towards qualification for immigration into other countries and this according to the appellant has deprived the appellant from availing employment opportunities overseas. It is contended that denial of non-resident status to the appellant violates his fundamental rights under Article 19(1)(g) of the Constitution of India. It is

further submitted that the denial of repatriation benefits to the appellant is arbitrary and, thus, violates Article 14 of the Constitution of India.

11. We have heard the learned counsel for the parties.

12. The principle question to be considered is whether the appellant could be considered as a non-resident for the purposes of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the “FERA”). The other issue to be considered is whether the provisions of the FERA are arbitrary or violate Article 19(1)(g) of the Constitution of India.

13. Section 2(p) of FERA defines the meaning of a person resident in India. Section 2(p) of FERA is quoted below:-

“(p) “person resident in India” means-

- (i) a citizen of India, who has, at any time after the 25th day of March, 1947, been staying in India, but does not include a citizen of India who has gone out of, or stays outside, India, in either case-
 - (a) for or on taking up employment outside India, or
 - (b) for carrying on outside India a business or vocation outside India, or
 - (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
- (ii) a citizen of India, who having ceased by virtue of paragraph (a) or paragraph (b) or paragraph (c) of sub-clause (i) to be resident in India, returns to, or stays in, India, in either case-
 - (a) for or on taking up employment in India, or

- (b) for carrying on in India a business or vocation in India, or
 - (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;
- (iii) a person, not being a citizen of India, who has come to, or stays in India, in either case-
 - (a) for or on taking up employment in India, or
 - (b) for carrying on in India a business or vocation in India, or
 - (c) for staying with his or her spouse, such spouse being a person resident in India, or
 - (d) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;
- (iv) a citizen of India, who not having stayed in India at any time after the 25th day of March, 1947, comes to India for any of the purposes referred to in paragraphs (a), (b) and (c) of sub-clause (iii) or for the purpose and in the circumstances referred to in paragraph (d) of that sub-clause or having come to India stays in India for any such purpose and in such circumstances.”

14. As per Section 2(p)(ii)(c) of FERA, any person who ceased to be a resident of India on account of his having left India for taking up employment abroad and has returned to India in circumstances which would indicate his intention to stay in India for an uncertain period would fall within the definition of a person resident in India. In the present case, the letter dated 28.03.1988 sent by the appellant itself indicates that the

appellant had returned to India for an uncertain period. The expression uncertain period as occurring in Section 2(p)(ii)(c) of FERA does not relate to the duration of the stay but the character of the stay in India. In our view, the quantum of period for which a non-resident Indian returns to India is not relevant but the certainty or uncertainty of his intention to stay in India would be the determining factor. If the person returns to India with no definite plans or intention to return overseas then he would have to be considered as a person resident in India by virtue of Section 2(p)(ii)(c) of FERA. In the present case, the appellant had proceeded to Saudi Arabia to take up employment under a contract and on expiry of the contract the appellant had returned to India. His letter dated 28.03.1988 clearly indicates that he had no definite plans or intention to relocate overseas. The learned Single Judge has also considered the letter dated 28.03.1988 and held as under:-

“32.3 A careful reading of the aforementioned paragraph would show that, while one hand, the petitioner was wanting to explore the possibilities of resettlement in India, he also wanted to keep open, an opportunity, to leave India for an overseas assignment, within the next twelve (12) months from the date of his arrival. To my mind, if nothing else, uncertainty was writ large in the letter itself. The petitioner did not state that if, he was not able to re-settle in India within the next twelve (12) months, he would leave India. On the contrary he only projected a “possibility” of leaving India within twelve (12) months if, he found a suitable employment overseas.”

15. It is also relevant to note that the appellant had taken the benefit of transfer of residence and this too indicated that the appellant had no certain

plans or intention to go abroad. Considering the circumstances, the learned Single Judge has rightly held that the appellant fell within the definition of a person resident in India.

16. The learned Single Judge has also examined the question whether the bank account of the appellant was required to be re-designated as a resident account on account of change in the status of the appellant from a non-resident to a person resident in India and has held as under:-

“36.1 Clearly, on perusal of the record, the only conclusion that could have been drawn is that the petitioner himself had indicated his intention to stay in India and acquire a status of a ‘Resident’; on return from Saudi Arabia after giving up his assignment in that country. What began with the duration of the petitioner’s stay in India being uncertain, acquired certainty with the issuance of letter dated 20.07.1988 to BASF (India).

37. Therefore, quite naturally, under Regulation A.15, the relevant portion of which reads as follows, the NRE account of the petitioner had to be re-designated as ‘Resident Account’.

“..A.15 Non-resident (External) accounts of NRIs should be redesignated as resident accounts immediately upon the return of the account holder to India if authorized dealer is satisfied that he has returned to India for taking up employment or carrying on a business or vocation for any other purpose with the intention of residing in India. FCNR account should be first converted into rupee accounts by applying the T.T. buying rate for the relative currency ruling on the date the accounts are converted into rupee accounts and thereafter designated as resident accounts. Where account holder is only on a short visit to India, the account may continue to be treated as Non-resident (External) account even during his stay in this country...”

17. We are in complete agreement with conclusion arrived at by the learned Single Judge that the appellant became a person resident in India and accordingly, his bank account was rightly re-designated as a resident account by respondent No.4 bank.

18. The next question that is urged before us is that the provisions of Section 2(p) of FERA are unconstitutional and violate Articles 14 and 19(1)(g) of the Constitution of India. It has been contended on behalf of the appellant that denial of repatriation benefits to the appellant had made it significantly difficult for the appellant to seek immigration abroad and, thus, the regulations disentitling him for repatriation benefits are unconstitutional. The logical sequitur of this argument is that Exchange control regulations which restrict citizens of this country to export their wealth overseas should be construed as unreasonable restrictions on the right to the citizens to carry on their vocation or trade. This contention, in our opinion, has to be rejected as Article 19(1)(g) Constitution of India does not confer an absolute right on the citizens. The right to practise any profession, or carry on any occupation, trade or business as conferred by Article 19(1)(g) is, as per Article 19(6) of the Constitution of India, subject to “reasonable restrictions” that may be imposed in the “interests of general public”. The export of assets outside the country would draw on exchange reserves of the country which are limited and have to be utilized in the best interest of the nation. Indisputably, exchange control has been considered necessary in national interest by the policy makers. The preamble of FERA indicates that FERA is an Act for conservation of the foreign exchange resources of the country and proper utilization thereof in the interest of the

economic development of the Country. The genesis of FERA relates back to a system of exchange control that was set up in India on the outbreak of the World War II in September, 1939. The system was directed for the best utilization of the limited supply of foreign exchange available at the material time. The exchange control was made effective through a series of rules made under the Defence of India Act, 1939. These rules were temporary but were extended from time to time. In order to continue the Exchange Control Regulation, the Foreign Exchange Regulation Act, 1947 was enacted which was also for a temporary duration as at the material time it was hoped that the economic conditions would stabilize after the initial post war period. Since, India continued to face shortage of foreign exchange, the Foreign Exchange Regulation Act, 1947 was made permanent by passing of the Bill in 1957. The Foreign Exchange Regulation Act, 1947 was repealed and replaced by FERA.

19. The statement of objects and reasons stated in the 1957 Bill to make the Foreign Exchange Regulation Act, 1947, permanent indicated as under:-

“.....India still continues to be short of foreign exchange and it is necessary to ensure that our foreign exchange resources are conserved in the national interest. The trend of events in this and other countries further indicates that the shortage is likely to continue for an indefinite period, and it is difficult to visualise at this stage that in any foreseeable future it will be possible to dispense with the exchange control altogether. Another important factor is the development programme under the Second Five Year Plan which compels us to husband and utilise our external resources properly. In the circumstances, the continuance of the Foreign Exchange Regulation Act is

unavoidable and it is proposed to place it on a permanent footing.”

20. The FERA was enacted to consolidate and amend the existing laws relating to Foreign Exchange. Indisputably, FERA has been enacted in the larger interest of this Country and to manage the valuable foreign exchange resources of this country. The Parliament had considered it necessary to enact FERA in the national interest. In view of the fact that the Legislature has considered it necessary to control and regulate foreign exchange in the national interest, we are unable to agree that denial of repatriation benefit to the appellant imposed an unreasonable restriction. The Foreign Exchange laws did not in any manner restrain the appellant from pursuing his employment of carrying on any business or trade. The only restriction that resulted from the appellant becoming a resident in India was that he was not allowed to repatriate funds from India and viewed in the perspective of the necessity of the legislation at the material time we are unable to accept the same as unreasonable in any manner.

21. It is relevant to note that on 10.08.1975 the FERA has been placed in the 9th Schedule to the Constitution of India by the Constitution (39th Amendment) Act, 1975. Thus by virtue of Article 31B of the Constitution of India, the FERA or any of its provisions would be immune to the challenge on ground of violating any of the provisions of Part III of the Constitution of India. In this context, it is relevant to refer to paragraph 38 of the judgment of a constitution bench of the Supreme Court in the case of **Dattaraya Govind Mahajan v. State of Maharashtra and Anr**: AIR 1977 SC 915, which is quoted below :-

"Art. 31B categorically states that none of the Acts specified in the Ninth Schedule nor any of the provisions thereof, shall be deemed to be void on any conceivable ground rooted in Part III. Even if such Act or provision is inconsistent with any provision of Part III it shall not be invalidated. Even if such Act or provision takes away or abridges any of the rights conferred by any provisions of Part III it shall continue in force. In short, no matter what the grounds are, if they are traceable to Part III in whatever form, they fail in the presence of Art. 31B. No master of English legal diction could have used, so tersely, such protean words which in their potent totality bang, bar and bolt the door against every possible invalidatory sally based on Part III. And Art. 31A(1) being Part III, Shri Tarkunde's '2nd proviso' bullet cannot hit the target. Nor are we impressed with the cute argument that the phraseology of Art. 31B must be correlated to Article 13 and read with a truncated connotation. Legal legerdemain is of no avail where larger constitutional interests are at stake."

The Appellant has not challenged the Constitution (39th Amendment) Act, 1975. The writ petition is bereft of pleadings as to how the Constitution (39th Amendment) Act, 1975 is invalid or contrary to the basic structure of the Constitution of India.

22. The contention of the appellant that the provisions of FERA are arbitrary is also bereft of any foundation and the appellant has not been able to indicate as to why provisions of section 2(p) of FERA should be considered as arbitrary or discriminatory. We do not find that the provisions of section 2(p) of FERA violate either Articles 14 or 19(1)(g) of the Constitution of India.

23. We do not find any merit in the present appeal or any error in the impugned judgment dated 07.02.2013 passed by the learned Single Judge and, accordingly, dismiss the present appeal.

24. The parties are left to bear their own costs.

VIBHU BAKHRU, J

BADAR DURREZ AHMED, ACJ

AUGUST 8, 2013
MK

