

(7) In the instance case, there is no dispute that the scheme was not executed within five years of the issuance of the notification under section 42 of the Act and that it was only,—*vide* notification No. 14/102/78-3CI, dated 5th October, 1978, that the period of five years was extended by another period of two years in exercise of the powers under section 44-A of the Act.

In view of our findings above, we allow this petition with costs, quash the scheme published on 27th of February, 1972 and the subsequent proceedings taken in the matter.

S.C.K.

Before R. N. Mittal and J. V. Gupta, JJ.

BANSO DEVI,—Appellant.

versus

ASSISTANT DIRECTOR, ENFORCEMENT DIRECTORATE,—
Respondent.

Second Appeal From Order No. 17 of 1978.

April 17, 1979.

Foreign Exchange Regulation Act (46 of 1973)—Sections 2(h) and 9(1) (b) & (d)—Payments made in India on behalf of a person resident outside India—Whether fall within the scope of Section 9—Involvement of 'foreign exchange' in a transaction—Whether necessary to attract the provisions of the Act.

Held, that the first part of the preamble of the Foreign Exchange Regulation Act, 1973 clearly shows that the object of the enactment was to regulate certain payments also and it cannot be said that Section 9 is beyond the scope of the preamble. Section 9 of the Act puts restrictions on certain payments. It *inter alia* provides that no person in India shall make any payment to any person resident outside India nor any person shall receive payment from any person resident outside India, otherwise than through authorised dealer unless something to the contrary is provided by any general or special exemption granted conditionally or unconditionally by the Reserve Bank. The Explanation appearing under clause (b) of section 9(1) of the Act makes it clear

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that any payment received by order or on behalf of a person resident outside India through any other person without a corresponding inward remittance from any place outside India shall not be deemed to be a payment by an authorised dealer. Thus, it is quite clear that section 9 of the Act does put certain restrictions on payments made or received by order or on behalf of a person resident outside India wherein the question of foreign exchange as such may or may not be involved. It is not necessary that the matter of foreign exchange must be involved directly in the transaction in order to attract the various provisions of the Act, but otherwise also certain restrictions on payments made in India on behalf of any person resident outside India are very much within the scope of the Act as it regulates such payments as well. (Paras 9 and 10).

Case referred by Hon'ble Mr. Justice S. P. Goyal, to a Division Bench for deciding an important question of law involved in the case on 3rd November, 1978. The Division Bench consisting of Hon'ble Mr Justice Rajendra Nath Mittal and Hon'ble Mr. Justice J. V. Gupta finally decided the case on 17th April, 1979.

Second Appeal from the order of the Foreign Exchange Regulation Appellate Board dated 14th October, 1977 modifying that of the Deputy Director of Enforcement Department of Personal Cabinet Secretariat Government of India Foreign Exchange Regulation Act, Jullundur dated 28th October, 1976 reducing the penalty from Rs. 10,000 to Rs. 7,000 (Rupees seven thousand).

(As reduced by Foreign Exchange Regulation Appellate Board)

R. C. Dogra, Advocate, for the appellant.

Kuldip Singh Bar-at-Law, for the respondent.

JUDGMENT

J. V. Gupta, J.

(1) This judgment will dispose of S.A.O. No. 17 of 1978 and S.A.O. No. 69 of 1978, as both arise out of one chain transaction.

(2) In the first instance, both these cases came up before S. P. Goyal, J. for hearing but his Lordship looking to the importance of the matter, has referred them for decision by a larger Bench. It is how this matter has come before us.

(3) Brief facts of the case necessary for its decision are contained in the statement of one Mehnga Ram, the relevant extract of which reads as under :—

“In this connection I want to state that her father Sohan Dass who is residing abroad for the last 25 years owns 8 Acres of agricultural land. This land is being tilled by her uncle Shri Phidu Ram, son of Shri Swan Ram of village Lallian Khurd. On instructions of Shri Sohan Dass, Phidu Ram gave to Smt. Banso sale proceeds of agricultural income of eight Acres of land. The said Rs. 10,000 credited to the account of Smt. Banso on 7th September, 1974 is the amount given by Phidu Ram to Smt. Banso being the agricultural income The balance of Rs. 8,541.50 was the amount given to her by Phidu Ram her uncle on instructions of Sohan Dass living abroad during the period October, 1974 to April, 1975 Rs. 1,000 given to her by the said Phidu Ram in the month of May/June, 1975 on the instructions of Sohan Dass being the agricultural income of his land.”

Shrimati Banso Devi also signed the said statement with the following confirmation :—

“I, Smt. Banso, wife of Ram Parkash d/o Sohan Dass, am present today in response to your summons dated 29th May, 1976, received by me through my father-in-law Mehnga Singh. I am an illiterate lady. Whatever statement my father-in-law Mehnga Ram gave on my behalf today which has been written by my husband's cousin, has been explained to me fully and I agree.”

As regards Shri Phidu Ram, he in his affidavit filed on 8th December, 1976, stated, *inter alia* :—

“That my said younger brother Shri Sohan Dass while leaving for U.K. about twenty years ago desired that said land be cultivated by me and the income from the produce thereof be equally divided between him and his only daughter Smt. Banso Devi, that is, my niece.

That during the years 1974 and 1975, I have paid to my niece Shrimati Banso Devi about Rs. 21,000 being her share of

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income from the land left over by her father, Shri Sohan Dass.”.

(4) The Assistant Director, Enforcement, in the case of Shrimati Banso Devi came to the conclusion that she has received a total sum of Rs. 20,641.50 from Phidu Ram and Karam Chand, otherwise than through authorised dealers, by order and on behalf of her father Sohan Dass, a resident in England, in contravention of the provisions of section 9(1) (b) of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the Act) whereas in the case of Shri Phidu Ram it has been found that he has made these payments by order or on behalf of Shri Sohan Dass, in contravention of the provisions of section 9(1) (d) of the Act. Consequently, under section 50 of the Act, he imposed a penalty of Rs. 10,000 on Shrimati Banso Devi and a penalty of Rs. 4,000 on Phido Ram,—*vide* separate orders, dated 28th October, 1976 and 31st August, 1977, respectively.

(5) Two separate appeals were filed by both of them before the Foreign Exchange Regulation Appellate Board, under section 32 of the Act. When the appeal of Phidu Ram came up for hearing, a photostat copy of a Power of Attorney, dated 12th January, 1972, executed by Shri Sohan Dass in favour of both the appellants, i.e. Phido Ram and Smt. Banso Devi, was furnished to the Board. The learned Chairman, who heard the appeal, took into consideration the said Power of Attorney in the case of Shri Phido Ram but as no copy of the same was produced in the appeal of Smt. Banso Devi, the question of its consideration could not arise. However, a copy of that Power of Attorney was placed on the file of this Court and the same was allowed to be placed on the record in the case of Smt. Banso Devi as well by a separate order of this Court. On the consideration of the matter in appeal, the learned Chairman confirmed the findings of fact given by the Assistant Director, but considering the circumstances of the case he reduced the penalty from Rs. 10,000 to Rs. 7,000 in the case of Smt. Banso Devi and from Rs. 4,000 to Rs. 2,000 in the case of Phidu Ram.

(6) The second appeal filed in this Court under section 54 of the Act is competent only on a question of law. The findings given by both the authorities in the case of Smt. Banso Devi that the amount was received by her otherwise than through an authorised

dealer by order or on behalf of her father Sohan Dass, who is a resident outside India and in the case of Phidu Ram that the said amount was paid by him to Smt. Banso Devi by order or on behalf of Sohan Dass, a resident outside India, therefore, cannot be challenged, being findings of fact.

(7) The terms 'foreign exchange' as well as 'person resident outside India' have been defined in the Act as under :—

“ 'foreign exchange' means foreign currency and includes—

- (i) all deposits, credits and balances payable in any foreign currency, and any drafts, travellers cheques, letters of credit and bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency ;
 - (ii) any instrument payable, at the option of the drawee or holder thereof or any other party thereto, either in Indian currency or in foreign currency or partly in one and partly in the other.
- 'person resident outside India' means a person who is not resident in India”.

Section 8 of the Act, specifically deals with the restrictions on dealings in foreign exchange, whereas section 9 deals with restrictions on payments. Section 9 reads as under :—

“*Restrictions on payments* :—(1) Save as may be provided in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by the Reserve Bank, no person in, or resident in, India shall—

- (a) make any payment to or for the credit of any person resident outside India ;
- (b) receive, otherwise than through an authorised dealer, any payment by order or on behalf of any person resident outside India.

Explanation :—For the purposes of this clause, where any person in, or resident in, India receives any payment

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by order or on behalf of any person resident outside India through any other person (including an authorised dealer) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised dealer ;

- (c) draw, issue or negotiate any bill of exchange or promissory note or acknowledge any debt, to that a right (whether actual or contingent) to receive a payment is created or transferred in favour of any person resident outside India ;
- (d) make any payment to, or for the credit of, any person by order or on behalf of any person resident outside India ;
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(8) The main argument of the learned counsel for the appellant in this case is, that the case is not covered by section 9(1) (b) or section 9(1) (d) of the Act, as no foreign exchange as such is involved in this case. According to him, the money was in India and has been paid in India, and, therefore, there was no question of any foreign exchange, so as to attract the provisions of section 9 of the Act. In support of his contention, he relied upon a judgment, reported as *Rabindra N. Maitra v. Life Insurance Corporation of India*, (1). That was a case under the old Act, i.e., the Foreign Exchange Regulation Act, 1947. Section 5 of the said Act is equivalent to section 9 of the present Act. The observation made therein that section 5 is attracted only when payment is made or intended to be made to a person or to his credit, resident outside India and not to a case where the party is called upon by a permanent resident of India to pay him in India, are not applicable to the facts of the present case. In that case, the payment of the policy was not contrary to law of India nor contrary on the ground of public policy or on any other ground, as no payment was to be made by order or on behalf of the person resident outside India. Support was also sought from

(1) A.I.R. 1964 Calcutta 141.

another authority, reported as *George Elwin King v. The Reserve Bank of India, Foreign Exchange Central, Bombay and another*, (2). In para 9 thereof, it has been observed :—

“When question of making payment ‘by order or on behalf of’ any foreigner arises, such payment cannot be made without the approval of the Reserve Bank. The question of obtaining the approval of the Reserve Bank would arise only when payment has to be made ‘by order’ of a foreigner, or ‘on behalf of’ any foreigner. Here Sri King wants payment on the strength of a deed of gift. When Mrs. Clarke executed the deed of gift its immediate effect was the divesting of her title and interest in the estate and the vesting of that title and interest in Sri King as the donee. When Sri King made a demand for payment to the State Bank of India, he was already the owner of the estate. He was not making any demand for payment ‘by order or on behalf of Mrs. Clarke.’ He was not asking for payment on behalf of Mrs. Clarke but on his own behalf as the owner of the property. Thus so far as the demand of Sri King based upon the gift deed is concerned, section 5(1) (c) is not at all attracted”.

The learned counsel for the appellant further relied upon an authority reported as *The Director, Enforcement Directorate Cabinet Secretariat Department Personnel and A. R. Government of India and others v. Saroj Kumar Bhotika and another*, (3). In para 34 thereof, the statement of Objects and Reasons for the Act as placed before the Lok Sabha on 29th August, 1972, have been reproduced. From that, the contention of the learned counsel was that the provisions of section 9 will only be attracted if in any way foreign exchange is involved and not otherwise. However, I do not agree with the contention of the learned counsel. There is no such suggestion in the case cited by him.

(9) The preamble of the Act reads as under :—

“An Act to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the

(2) A.I.R. 1974 All. 452.

(3) A.I.R. 1978 Cal. 65.

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import and export of currency and bullion, for the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country.”.

The first part of the preamble clearly shows that the object of the enactment was to regulate certain payments also. It cannot be said that section 9 is beyond the scope of the preamble. Section 9 of the Act puts restrictions on certain payments. It *inter alia* provides that no person in India shall receive payment from any person resident outside India, otherwise than through an authorised dealer unless something to the contrary is provided by any general or special exemption granted conditionally or unconditionally by the Reserve Bank. The Explanation appearing under clause (b) of section 9(1) of the Act, makes it clear that any payment received by order or on behalf of a person resident outside India through any other person *without a corresponding inward remittance from any place outside India* shall not be deemed to be a payment by an authorised dealer. This being so, the provision in question seem to have rightly been attracted to the facts of the present case.

(10) In *S. P. Ghosh v. Deputy Controller, Reserve Bank of India*, (4), it has been observed :—

“This is a very sweeping restriction and it is interesting to recall the words of Lord Goddard C. J. in *Pickett. v. Fegg* (1949)2 All E. R. 705 dealing with the corresponding provisions of the English Act, being Exchange Control Act, 1947 :—

‘It may not generally be known how rigid and far-reaching are the provisions of the Exchange Control Act, 1947. It has been pointed out by high authority that if a person plays a game of cards in this country with a person who does not live in one of the scheduled territories—as for

instance, an American and at the end of the game he hands in five shillings which he has lost to him, he is really committing an offence. I do not suppose that in these circumstances anybody would say that a serious offence has been committed or that there would be likely to be a prosecution but the Act is wide enough to cover such a case”.

Their Lordships of the Supreme Court while considering the provisions of section 23 of the Foreign Exchange Regulation Act, 1947, in a case reported as *The Superintendent and Remembrancer of Legal Affairs West Bengal v. Girish Kumar Navalkha and others*, (5), have observed :—

“The preamble provides the key to the general purpose of the Act. That purpose is the regulation of certain payments, dealings in foreign exchange and securities and the import and export of currency and bullion in the economic and financial interest of India. The general purpose or object of the Act given in the preamble may not show the specific purpose of the classification made in section 23(1) (a) and Section 23(1A). The Court has therefore to ascribe a purpose to the statutory classification and co-ordinate the purpose with the more general purpose of the Act and with other relevant Acts and public policies. For achieving this the Court may not only consider the language of section 33 but also other public knowledge about the evil sought to be remedied, the prior law, the statement of the purpose of the chance in the prior law and the internal legislative history. When the purpose of a challenged classification is in doubt, the courts attribute to the classification the purpose thought to be most probable. Instead of asking what purpose or purposes the statute and other materials reflect, the court may ask what constitutionally permissible objective this statute and other relevant materials could plausibly be construed to reflect. The latter approach is the proper one in economic regulation cases. The decisions dealing with economic regulation indicate

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that courts have used the concept of 'purpose' and 'similar situations' in a manner which give considerable leeway to the legislature. This approach of judicial restraint and presumption of constitutionality requires that the legislature is given the benefit of doubt about its purpose. How far a court will go in attributing a purpose which though perhaps not the most probable is at least conceivable and which would allow the classification to stand depends to a certain extent upon its imaginative power and its devotion to the theory of judicial restraint".

Thus, it is quite clear that section 9 of the Act does put certain restrictions on payments made or received by order or on behalf of a person resident outside India, wherein the question of foreign exchange as such may or may not be involved. Admittedly Sohan Dass is a person resident outside India and certain amounts have been paid and received on his instructions by Phidu Ram and Banso Devi appellants who are in India. The language of section 9 already quoted by me in the earlier part of this judgment is quite clear and there is no ambiguity which may call for any different interpretation. It is not necessary that the matter of foreign exchange must be involved directly in the transaction in order to attract the various provisions of the Act, but otherwise also certain restrictions on payments made in India on behalf of any person resident outside India are very much within the scope of the Act as it regulates such payments as well. In this view of the matter, both the appellants were rightly found guilty for the contravention of the provisions of section 9(1) (b) and section (1) (d) of the Act, respectively.

(11) No other point arises in the case.

(12) For the reasons recorded above, both the appeals fail and are dismissed, but the parties are left to bear their own costs.

Rajinder Nath Mittal, J.—I agree.

S.C.K.