Supreme Court of India
Director Of Enforcement vs M.C.T.M. Corporation Pvt. Ltd. ... on 19 January, 1996
Bench: Dr. A.S. Anand, Faizan Uddin

CASE NO.:
Appeal (crl.) 27 of 1996

PETITIONER:
DIRECTOR OF ENFORCEMENT

RESPONDENT:
M.C.T.M. CORPORATION PVT. LTD. AND ORS

DATE OF JUDGMENT: 19/01/1996

BENCH:
DR. A.S. ANAND & FAIZAN UDDIN

JUDGMENT:

JUDGMENT 1996 (1) SCR 215 The Judgment of the Court was delivered by DR. A.S. ANAND, J. Leave granted.

The respondents, a private limited company and its Directors were proceeded against departmentally for having contravened the provisions of Section 10(1)(a) of the Foreign Exchange Regulation Act, 1947 (hereinafter referred to as 'the PER A, 1947'). The gravamen of the departmental case against the respondents was that they had failed to repatriate the foreign exchange lying in Malaysia, which they had a right to receive in India and had thereby failed to take or refrained from taking action which had the effect of not securing the receipt of the foreign exchange in this country. In the charge sheet, the respondents were alleged to have committed two contraventions of the provisions of FERA, 1947 by the Directorate of Enforcement. The first charge related to their failure to repatriate foreign exchange of Malaysian b 62186.42 being the sale proceeds of Nataraja Rubber Estate and Malaysian b 1,25,000, being the Social Welfare Prize money won by the Company in I960 while the second charge related to their failure to repatriate Malaysian b 3,56,222.44 being the profit earned by the Company from the business carried on by the branch of the respondent .company at Kuala Lumpur as per the statement of profit and loss of the Company ending on 31.12,1972. All the amount admittedly belonged to the Company and had been disclosed by the Company in its balance-sheet as well as in the return of income-tax for the relevant years. Admittedly, the respondents had not obtained any special or general permission from the Reserve Bank of India authorising them lo hold the aforesaid foreign exchange lying with their branch at Kuala Lumpur in Malaysia without repatriating the same to India. The Directorate of Enforcement in the departmental proceedings, taken against the respondents, by its order dated 19.9,1977 held the respondents guilty of committing both the contraventions mentioned in the article of charges and in respect of the first charge imposed a penalty of Rs. 4,000 each on its Directors and of Rs. 40,000 on the respondent company while in respect of the second charge imposed a penalty of Rs. 20,000 on each of the Directors and a penalty of Rs. 2,00,000 on the respondent company, under Section 23(l)(a) of FERA, 1947. Against the order dated 19.9.1977 the respondents filed five separate appeals before the Appellate Board, The Board took the view that since it was not a case where

foreign exchange had been surreptitiously held abroad with any malafide motive though it was retained in Kaula Lumpur deliberately and intentionally. The contravention of the provisions was of a technical nature and therefore reduced the penalty to Rs. 2,000 on each of the Directors and to Rs. 20.000 on the company in respect of the first charge and to Rs. 5000 each in the case of the Directors in respect of the second charge, while retaining the penalty on the Company, The Board rejected the plea of the Company and its directors that since no time limit had been specified for repatriation of the foreign exchange under Section 10 of the Act, the respondents could not be held guilty of either of the charges and opined that since no period had been specifically prescribed for repatriation of the foreign exchange, it was implied that foreign exchange had to be repatriated within a reasonable time from the date when the right to receive the same accrued and having regard to the long time taken by the Company, it followed that the Company had failed to repatriate the foreign exchange within a reasonable period. Foreign Exchange had not been repatriated even after the expiry of more than 15 years from the date the right to receive it in India accrued). Dissatisfied, the respondents (the Company and its Directors) filed five separate appeals before the High Court at Madras under Section 54 of 'FERA, 1973. Vide judgment and order dated 9th March. 1988. a Division Bench of the High Court, allowed all the appeals and set aside the penalty as imposed by the Directorate of Enforcement and modified by the Appellate Board. The High Court inter alia held that Section 10(1) of FERA, 1947 is not an independent section and unless some direction given under Section 10(2) by the Reserve Bank of India was contravened, no penalty could be imposed for breach of Section 10(1) (a) under Section 23(1)(a) of FERA, 1947, The High Court also held that a finding regarding existence of "mans rea or criminal intent" for failure to repatriate foreign exchange was necessary before the respondents could be penalised for contravention of the provisions of Section 10(l)(a) of FERA, 1947 and since in the instant case, the existence of mens-rea had not been found by the Directorate or the Appellate Board, the award of punishment by way of levy of penalty under Section 23(1)(a) of FERA, 1947 was not justified, This appeal by special leave has been filed by the Directorate of Enforcement, questioning the correctness of the order of the High Court.

Principally, there are two, questions which require our consideration in this appeal : (1) Whether existence of "mens-rea" is a necessary ingredient for establishing contravention of Section 10 punishable under Section of 23 FERA, 1947, and (2) whether Section 10(1) of FERA, 1947 is not an independent provision making its contravention by itself punishable under Section 23(1)(a) of FERA 1947 or whether its contravention can arise only if there is breach of some directions issued by the Reserve Bank of India under Section 10(2) of FERA. 1947, With a view to answer these questions, it would be appropriate to first notice the relevant provisions of Section 10 and 23 of FERA, 1947, as they stood as the Material time, (prior to the amendment of the FERA in 1964 and 1973). Those provisions read thus, :

S.10. Duly of persons entitled to receive foreign exchange, etc. (1) No person who has a right to receive any foreign exchange or to receive from a person resident outside India a payment in rupees shall, except with the general or special permission of the Reserve Bank, do or refrain from doing any thing or take or refrain from taking any action which has the effect of securing -

(a) that the receipt by him of the whole of part of that foreign exchange or payment is delayed, or

(b) that the foreign exchange or payment ceases in whole or in part to be receivable by him.

(2) Where a person has failed to comply with the requirements of sub- section (1) in relation to any foreign exchange or payment in rupees, the Reserve Bank may given to him such directions as appear to be expedient for the purpose of securing the receipt of the foreign exchange or payment as .the ease may be.

S. .23. Penalty and procedure. -

(1) If any person contravenes the provisions of section 4, .section 5, section 9. section 10. sub-section (2) of section 12, section 17. section 18 A or section 18B or of any rule, direction or order made thereunder, he shall -

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which she contravention has taken place, or five thousand rupees, whichever is more, us may be adjudged by the Directorate of Enforcement in the manner hereinafter provided, or

(b)..... .....

23.(1A)..... .....

23.(1B).....:..... ....,.....

23A..... .....

23B.....,..... .....

23C.....,..... .....

23D.....,..... .....

23E..... .....

23EE..... .....

23EEE..... .....,.....

23F. If any person fails to pay the penalty imposed by the Director of Enforcement or the Appellate Board, or fails to comply with any of their directions or orders, he shall, on conviction before a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

The Preamble to FERA, 1947 provides key to the general purpose, of the Act, that purpose is to regulate certain payments and dealings in foreign exchange etc. for the conservation of foreign

exchange resources of the country and for proper utilisation thereof. The Act is designed to safeguard and conserve foreign exchange, which is essential for the economic life of a developing country like India Conservation of foreign exchange resources of the country being the imperative need, it follows that any action, positive or negative, which disenables this country from utilising the foreign exchange to which it has right, to sub-serve the common good, would be violative of the relevant provisions of FERA. 1947 punishable under Section 23(1)(a) of FERA, 1947, which provision lays down one of the modes of punishment for the contravention of the provisions of various sections enumerated therein, including Section 10, or of any rule, direction or order made thereunder. It is in this background that we shall address ourselves to answer the two questions (supra).

The High Court, while dealing with the first question opined that Section 23 is a penal provision" and, the proceedings under Section 23(1)(a) are "quasi-criminal" in nature and therefore, unless "criminality" is established, the penalty provided under Section 23(1) (a) of the Act cannot be imposed on any person. The High Court thus held the existence of "mens-rea" .as a necessary ingredient for the commission of an "offence' under Section 10 of the Act and in the absence of a finding about the presence of "mens-rea" on the part of the offenders, no punishment under Section 23(l){a) of FERA, L947 could be imposed. For what follows, we cannot agree.

"Mens-rea" is a stale of mind. Under the criminal Saw, means-rea is considered as the "guilty intention" and unless it is found that the "accused" had the guilty intention to commit the "crime" he cannot be held "guilty" of committing the crime. An offence under Criminal procedure Code and the General clauses Act, 1897 is defined as any act or omission "made punishable by any law for the time being in force". The proceedings under Section 23(1)(a) FERA, 1947 are "adjudicatory" in nature and character and are not 'criminal proceedings'. The officers of the Enforcement Directorate and other administrative authorities are expressly empowered by the Act to "adjudicate' only. Indeed they, have. to act "judicially" and follow the rules of natural justice to the extent applicable but, they are not "Judges' of the "Criminal Courts" trying an accused for commission of an offence, as understood in the general context. They perform quasi-judicial functions and do not act as "Courts" but only as "administrators' and "adjudicators'. In the proceedings before them, they do not try "an accused" for commission of "any crime" (not merely an offence) but determine the liability of the contravenor for the breach of his "obligations" imposed under the Act, They impose penalty for the breach of the 'civil obligations' laid down under the Act and not impose any "sentence" for the commission of an offence. The expression "penalty" is a word of wide .significance. Sometime, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a. 'penalty'. When penalty is imposed by an adjudicating officer, it is done so in 'adjudicatory proceedings' and not by way of fine as a result of "prosecution" of an 'accused' for commission of an "offence" in a criminal Court. Therefore, merely because "penalty" clause exists in Section 23(l)

(a), the nature of the proceedings under that Section is not changed from "adjudicatory" to 'criminal' prosecution. An order made by an adjudicating authority under the Act is not that of conviction but of determination of the breach of the civil obligation by the offender.

It is thus the breach of a "civil obligation" which attracts "penalty" under Section 23(1)(a) FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10 FERA, 1947 would immediately attract the levy of 'penalty' under Section 23. irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential. for the "prosecution" to establish that the "accused" had the necessary guilty intention or in other words the requisite 'mens-rea' to commit the alleged offence with which he is charged before recording his conviction, the obligation on me part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947. It is the delinquency of the defaulter itself which establishes his "blameworthy" conduct, attracting the provisions of Section 23(l)(a) of FERA, 1947 without any further proof of the existence of "mens-rea". Even after an adjudication by the authorities and levy of penalty under Section 23(1)(a) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law, where the act of the defaulter also amounts to an offence under the penal law and the bar ;.under Article 20(2) of the Constitution of India in such a case would not be attracted. The failure to pay the penalty by itself attracts "prosecution' under Section 23F and on conviction by the 'court' for the said offence imprisonment may follow.

In Maqbool Hussain v. State of Bombay, AIR (1953) SC 325=[l953] SCR, 730 a Constitution Bench of this court while considering the nature of proceedings under the Sea Customs Act and FERA, 1947 dealt with the principle and scope underlying Article 20(2) of the Constitution. In that case gold was found in possession of the appellant therein when he landed at the Santa Cruz Airport, The appellant was detained and searched by the Customs Authorities and gold was seized from his possession. Proceedings under Section 167 (8) of the Act were taken by the Customs Authorities and after recording evidence, an order was passed confiscating gold and giving an option to the owner to pay fine in lieu of such confiscation under Section 188 Sea Customs Act. Since nobody came forward to redeem the gold, a complaint was filed in the Court of the Chief Presidency Magistrate, Bombay against the appellant charging him with having committed an offence under Section 8 FERA, 1947, The appellant thereupon filed a petition, in the High Court of Bombay under Article 226 of the constitution seeking quashing of the complaint by contending that his prosecution in the Court of the Chief Presidency Magistrate was in violation of his fundamental right guaranteed under Article 20(2) of the Constitution. It was the case of the appellant before the High Court that since the complaint before the Chief Presidency Magistrate also proceeded on the footing that the appellant had committed an offence insofar as he brought gold into India without any permit from the Reserve Bank of India on which allegations alone the gold stood already confiscated by the authorities under the Sea Customs Act during the confiscation proceedings, he was being punished twice for the same offence which was not permissible in law in view of Article 20(2) of the Constitution. The High Court was of the opinion that the appellant could claim protection of Article 20(2) only if he was the owner of gold which had been confiscated. The Chief Presidency Magistrate was, therefore, directed to first .determine the question of fact. After recording some evidence the Chief Presidency Magistrate returned a finding that the appellant was the owner of gold. The High Court, however, reversed the finding and sent the case back to the trial court for its trial in accordance with law after refusing the benefit to the appellant of the protection under Article 20(2)

of the Constitution. By special leave the appellant filed an appeal in this court. It was in this background that the Constitution Bench proceeded to determine whether the appellant could be said to have been prosecuted when proceedings for confiscation were taken by the Sea Customs Authorities for if it was found that the appellant had been prosecuted when proceedings were taken by the Sea Customs Authorities to confiscate gold, there was no scope left for the argument that he had not been punished by the confiscation of gold and the option given to him to pay fine in lieu of such confiscation. The Court examined in detail the ambit, scope and applicability of the principle of "double jeopardy" in the light of the fundamental right guaranteed under Article 20(2) of the Constitution. The Court opined :

"It is clear that in order that the protection of Art. 20(2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a Court of law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The very wording of Art 20 and the words used therein: "convicted", "commission of the act charged as an offence" "be subjected to a penalty", "commission of the offence", "prosecuted and punished" "accused of any offence", would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a Court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."

The Court then laid down various tests for determining when a tribunal can be considered to be a judicial tribunal and after referring to a catena of authorities relevant provisions of the Sea customs Act, 1878 and the nature of the adjudicatory proceedings as contained in that Act, opined that an adjudicatory authority functioning under the Act was merely an administrative machinery for the purpose of adjudging confiscation, determination of duty or the increased rate of duty and for imposition of penalty as prescribed under the Act and not a judicial tribunal. The Court opined:

"We are of the opinion that the Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a Court or Judicial tribunal' necessary for the purpose of supporting a plea of double jeopardy.

It therefore follows that when the Customs Authorities confiscated the gold in question neither the proceedings taken before the Sea Customs Authorities constituted a prosecution of the appellant nor did she order of confiscation constitute a punishment inflicted by a Court or judicial tribunal on the appellant. The appellant could not be said by reason of these proceedings before the Sea customs Authority to have been "prosecuted and punished" for the same offence with which he was charged before the Chief Presidency Magistrate, Bombay in the complaint which was filed against him under S.23. Foreign Exchange Regulation Act."

The Constitution Bench then laid down that though the administrative authorities functioning under the Sea Customs Act had the jurisdiction to confiscate gold, illegally brought into the country, and levy penalty on the defaulter, none the less the authorities were not trying a criminal case but deciding only the effect of a breach of the obligations by the defaulter under the Act, On a parity of reasoning what holds true for the adjudicatory machinery under the Sea Customs Act holds equally true for the administrative or adjudicatory machinery, designed to adjudge the breach of a civil statutory obligation and provide penalty for the said breach, under the FERA, 1947, whether the breach was occasioned by any guilty intention or not is irrelevant.

In "Corpus Juris Secundum" volume 85, at page 580, paragraph 1023, it is slated thus :

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws".

We are in agreement with the aforesaid view and in our opinion, what applies to "tax delinquency" equally holds good for the "blameworthy" conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that mens-rea (as is understood in criminal law) is not an essential ingredient for holding a delinquent liable to pay penalty under Section 23(1)(a) of FERA 1947 for contravention of the provisions of Section 10 of FERA, 1947 and that penalty is attracted under Section 23 (I)(a) as soon as-contravention of the statutory obligation contemplated by Section 10(1)

(a) is established. The High Court apparently fell in error in treating the "blameworthy conduct" under the Act as equivalent to the commission of a "criminal offence,", overlooking the position that the "blameworthy conduct" in the adjudicatory' proceedings is established by proof only of the breach of a civil obligation under the Act, for which the defaulter is obliged to make amends by payment of the penalty imposed under Section 23(1)(a) of the Act irrespective of the fact whether he committed the breach with or without any guilty intention. Our answer to the first question formulated by us above is, therefore, in the negative.

Coming now to the second question: In the instant case, on facts there is no dispute that for more than 15 years, the foreign exchange owned by the respondents had been lying in Malaysia and respondents had taken no action or steps whatsoever to repatriate that foreign exchange which they had the right to receive in India and had thereby failed to secure the receipt of the foreign exchange in India. Did the respondents thereby contravene the provisions of Section .10(l)(a) of FERA, 1947 or could it be said that unless the respondents had violated a direction given under Section .10(2), the "offence" under Section 10(1)(a) could not be said to have been committed, attracting the levy of penalty under Section 23(l)(a) of FERA,, 1947? This precisely is the core of the second question framed by us above.

The Scheme of Clause (1) of Section 10 in our opinion, unambiguously indicates that any person who has right to receive in foreign exchange or its payment in rupees in India shall not do or refrain from doing anything nor take or refrain from taking any action, which has the effect of either delaying or making the receipt of the whole or part of that foreign exchange or its payment in rupees totally

cease except, where he is expressly or by some general direction authorised or permitted by the Reserve Bank of India to do so. The default is complete on the failure to get the foreign exchange, receivable in India, repatriated, within a reasonable time after the right to receive the same accrues. What is "reasonable time" would depend upon the facts and circumstances of each case and it is neither possible nor desirable to lay down any general formula in that behalf. Where the delay in repatriation is not unreasonable no contravention of Section 10(l)(a) can be said to have been committed. Section 10(l)(a), enacts a contravention punishable under Section 23{1) of FERA, .1947. Section 10(2) enacts a distinct & separate contravention flowing from disobedience of an order or directions issued by the Reserve Bank of India to the person who has already committed a contravention under Section 10(1). It lays down that where a person has failed to comply with the requirement of sub-section (1) of Section 10 for the repatriation of any foreign exchange or its payment in rupees, the Reserve Bank of India may give to that person such directions as appear to the Reserve Bank of India to be expedient for the purpose of securing the receipt of foreign exchange or payment in rupees, as the case may be and the violation of those directions would attract the penalty under Section 23{ i)(a) of FERA. 1947. The opening phrase of sub-section (2) viz : "where a person has failed to comply with the requirements of sub-section (1)....." shows that the directions under sub-section (2) may be given only after a person has contravened the provisions of Section 10(1). Thus, sub-section (2) is attracted alter the contravention of sub-section (1) is established meaning thereby that contravention of sub-section f 1) is a distinct offence, independent of the breach" which may be committed subsequently by disobedience of any order or direction issued under sub- section (2) and the violation of the directions issued under sub-section (2) is not necessary to complete the commission of an offence under sub- section (1) of Section 10.

Sub-sections (1) and (2) of Section (10) take care of two distinct situations. There is therefore no warrant to hold that the contravention under Section 10(1) is not possible unless there has been violation of the directions issued under Section 10(2). Both sub-sections operate in different spheres and the issuance of directions under sub-section (2) and the breach of those directions is not the sine-qua-non for establishing the contravention contemplated by sub-section (1) of Section 10 whereas failure to comply with the requirements of sub-section (1) of Section 10 is necessary to enable the Reserve Bank of India to issue specific or general directions under sub-section (2) of Section 10. The obligation to repatriate the foreign exchange, receivable in India, is a statutory obligation and is not dependant upon any specific direction to be issued by the Reserve Bank of India in that behalf under sub-section (2) of Section 10, The object of enactment of Clause (2) of Section 10 appears to be that the defaulter, may after having been penalised for contravention of Section 10(1) be still directed to repatriate the foreign exchange, in whole or in part, by the Reserve Bank of India and his failure to comply with those directions by itself would invite penalty under Section 23(1)(a) of the Act, notwithstanding the imposition of penalty upon him for the breach of Section 10(1) (a) of FERA, 1947. Notwithstanding the imposition of penalty under sub-section (1) of Section 10, the. Reserve Bank of India retains the authority to issue directions for repatriation etc. of the foreign exchange held by the defaulter abroad as the power to regulate dealings in Foreign Exchange do not get extinguished by imposition of some penalty on the defaulter during adjudicatory proceedings.

Section 23 of FERA. 1947 prescribes penalties for contravention of the provisions of Section 4, section 5, Section 9, Section 10, sub-Section (2) of Section 12, Section 17, Section 18A or Section 188 or of any rule, direction or order made thereunder. On its plain reading, Section 23(l)(a) does not restrict its application to only one of the sub-sections of Section 10. Contraventions envisaged by both the sub-sections of Section 10 attract penalty under Section 23 (1)(a), unlike Section 12, of which only sub-section (2) invites the imposition of penalty under Section 23(1)(a). Had the Legislature intended to restrict the applicability of the provisions of Section 23 (l)(a) to only one of the two sub-sections of Section 10, it would have manifested its intention in the Section itself by mentioning the specific sub-section. We arc, therefore, of the opinion that contravention of sub-Section (1) of Section 10 would invite penalty under Section 23 (1) (a) and penalty shall also be leviable for contravention of any of the directions which may be issued by the Reserve Bank of India to such a person under sub-section (2) of Section 10 after his failure to comply with sub-section (1) of Section 10, notwithstanding the imposition of penalty for contravention of Section 10(1)(a) of FERA upon that person. The High Court was in error, if we may say so with respect, to construe that the contravention under Sub-section (1) of Section 10 is not complete unless there is also a violation of the directions issued by "the Reserve Bank of India under Sub-section (2) of Section 10 of FERA, 1947. That interpretation docs violance to the language of sub-section (2) of Section 10 and defeats the very object of the Act and renders the statutory obligation to repatriate the foreign exchange receivable in India as non- statutory, dependant, upon issuance of specific or general directions by the Reserve Bank of India. Our answer to the second question, formulated in the earlier part of this judgment, therefore is in the affirmative and we hold that for establishing contravention of sub section (1) of Section 10 it is not necessary to establish that the defaulter has disobeyed any directions issued by the Reserve Bank of India under Section 10(2) with regard to the repatriation of the foreign exchange receivable by him in India. The contrary view taken by the High Court is not sustainable.

In view of our answer to both the questions above the judgment of the High Court, impugned in this appeal, cannot be sustained and we accordingly set it aside.

So far as the amount of penalty is concerned, the appellate Board, as .already noticed, has modified the amount of penalty as imposed by the Directorate of Enforcement. The learned Addl. Solicitor General, Mr. Tulsi, Submitted that the appellant has no objection to the waiving of the entire amount of penalty in so far us each one of the Directors is concerned, some of whom are reported to have died during the pendency of the proceedings in this Court but that the penalty imposed upon the Company on both the charges does not call for any interference, because of the inordinate delay in repatriation of the foreign exchange, which according to him has not been repatriated even till dale as that failure on the part of the Company has deprived this country to use the foreign exchange to sub-serve the common good, all these years. Learned counsel for the respondents does not controvert that the foreign exchange which was receivable in India from Malaysia has not been repatriated even till date. We, therefore, in view of the submissions made at the Bar set aside the penalty imposed upon each of the Directors of the Company but maintain the penalty imposed upon the Company, as modified by the Appellate Board. The appeal succeeds and is allowed in the above terms. In the peculiar facts and circumstances of the case, the parties shall bear their own costs.