REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL/CRIMINAL APPELLATE JURISDICTION

CIVIL APPEAL NO.9337 OF 2010

UNION OF INDIA & ANR. ...APPELLANT(S)

VERSUS

CITI BANK, N.A. ...RESPONDENT(S)

WITH

CIVIL APPEAL NOS.4228-4261 OF 2011

CRIMINAL APPEAL NOS.169-170 OF 2012

J U D G M E N T

B.R. GAVAI, J.

1. Since the facts and the question of law that arises for consideration in all the appeals are similar, all these appeals are being heard and disposed of by the present Judgment.

2. In Civil Appeal No. 9337 of 2010, the respondent- Bank was granted license to act as an authorized dealer under the provisions of sub-sections (4) and (5) of Section 6 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "the FERA"). The respondent-Bank had accepted cash in foreign currency, equivalent to Rs.23,17,630/- during the period from October 1992 to January 1993 to the credit of NRE (Non-Resident External) Account of Umakant Bhardwaj, a Non-Resident Indian (NRI). For the said transaction, a show-cause notice came to be issued on 25th February 2002 by the appellants, alleging therein that the respondent-Bank had contravened the provisions of Sections 8(1), 64(2), 64(4), 64(5) and 73(3) of the FERA. The said show-cause notice was replied by the respondent-Bank on 30th October 2002. It was the contention of the respondent-Bank that the restriction to the effect that only an NRI Account Holder shall deposit foreign currency in his NRE account was added only with effect from 31st July 1995 vide a Circular issued by the Reserve Bank of

India ("RBI" for short) of the same date. It was therefore submitted that the said Circular dated 31st July 1995 could not be given effect retrospectively.

3. However, vide notice dated 5th January 2005, the Adjudicating Officer held that the adjudication proceedings should be held against the respondent-Bank and fixed the matter for further proceeding on 25th January 2005. Being aggrieved by the decision of the Adjudicating Officer to proceed further, the respondent-Bank filed a petition being Writ Petition (Civil) No.1211 of 2005 before the High Court of Delhi. The learned Single Judge of the High Court, vide order dated 23rd March 2007, directed the Advocate for the respondent therein (appellant herein), i.e., the Enforcement Directorate to take specific instructions as to whether prior to 31st July 1995, foreign currency deposits could be made by individuals other than the NRI Account Holder in the NRE accounts of such NRIs. On 19th April, 2007, the Advocate for the appellants herein (respondents in the High Court) stated, on instructions,

that prior to 31st July 1995, foreign currency deposits could be made by individuals other than the NRI Account Holders in the NRE accounts of such NRIs. As such, the learned Single Judge of the High Court, vide order dated 19th April 2007, set aside the show cause notice as well as the proceedings pursuant thereto. The same was sought to be reviewed by way of Review Application No. 213 of 2007 before the High Court of Delhi. However, the learned Single Judge of the High Court dismissed the said Review Application vide judgment dated 16th January, 2009.

4. Being aggrieved by the judgment and order dated 19th April, 2007 passed in Writ Petition (Civil) No.1211 of 2005 and judgment and order dated 6th January 2009 passed in Review Application No.213 of 2007 of the learned Single Judge of the High Court, the appellants herein filed Letters Patent Appeal No.117 of 2009 before the High Court of Delhi. Vide the impugned judgment and order dated 26th March 2009, the Division Bench of the High Court dismissed the said Letters

Patent Appeal. Being Aggrieved thereby, Civil Appeal No. 9337 of 2010 has been filed by the appellants herein.

5. In Civil Appeal Nos. 4228-4261 of 2011, various show cause notices were issued by the Enforcement Directorate jointly to the respondent-Standard Chartered Bank and others in April and May 2002 for the transactions that took place in the year 1992-1993, alleging therein that the respondent-Banks, by accepting foreign currency deposits by individuals other than the NRI Account Holders in respect of the NRE accounts, have committed violation of the provisions of the FERA. The said show cause notices were challenged by filing Civil Writ Petitions before the High Court of Delhi. The Division Bench of the High Court of Delhi, vide impugned judgment and order dated 18th December 2009, relying on the earlier Division Bench Judgment and order dated 26th March 2009 of the said High Court, allowed the said writ petitions. Being aggrieved thereby, Civil Appeal Nos. 4228-4261 of 2011 have been filed by the Directorate of Enforcement and others.

6. In Criminal Appeal Nos. 169-170 of 2012, the proceedings in pursuance to similar such show cause notices culminated into adjudicatory orders dated 28th February 2005 and 4th April, 2006 passed by the Adjudicating Authority, thereby imposing penalty on the respondent-Bank. The same were challenged by way of Criminal Appeal Nos. 337 and 338 of 2009 before the High Court of Delhi. The learned Single Judge of the High Court of Delhi vide the impugned judgment and order dated 15th December 2010 allowed the said appeals and set aside the orders imposing penalty. Being aggrieved, the Directorate of Enforcement has filed Criminal Appeal Nos. 169-170 of 2012.

7. We have heard Ms. Aishwarya Bhati, learned Additional Solicitor General ("learned ASG" for short) appearing on behalf of the appellants, Mr. Rajeev K. Virmani, learned Senior Counsel and Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of Citi Bank, Ms. Sonia Mathur, learned Senior Counsel appearing on behalf of the Bank of America and

Mr. Sanjay Gupta, learned counsel appearing on behalf of the Standard Chartered Bank.

8. Ms. Aishwarya Bhati, learned ASG appearing on behalf of the appellants would submit that the authorized dealers, who have taken authorization from the RBI under the FERA, are mandatorily required to carry out due diligence and be satisfied that all three pre-conditions, namely, (i) the foreign currency is deposited by the account holder himself; (ii) the account holder is on a temporary visit to India; and (iii) the account holder is still normally resident abroad are mandatorily met before foreign currency is deposited in the account of a non-resident, even prior to the Circular dated 31st July 1995.

9. She submits that, under the provisions of sub-section (4) of Section 6 of the FERA, an authorized dealer is required to comply with such general or special directions or instructions as the RBI issues. She submits that as per the said provision, except with the previous permission of the RBI, an authorized dealer is not permitted to engage in any transaction involving

any foreign exchange which is not in conformity with the terms of his authorization.

10. Ms. Aishwarya Bhati submits that under sub-section (5) of Section 6 of the FERA, an authorized dealer, before undertaking any transaction in foreign exchange on behalf of any person, is required to obtain from that person a declaration and various information so as to satisfy himself that the transaction will not involve, and is not designed for the purpose of, any contravention or evasion of the provisions of the FERA or any rule, notification, direction or order made thereunder. She submits that the said provision also requires that when such person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorized dealer is required to refuse to undertake such transaction. It is submitted that if the authorized dealer has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person, the authorized dealer is required to report the matter to the RBI.

11. Ms. Aishwarya Bhati, learned ASG would submit that under sub-section (2) of Section 64 of the FERA, any person who attempts to contravene, or abets any contravention of, any of the provisions of the FERA, or of any rule, direction or order made thereunder, he is deemed to have contravened the said provision, rule, direction or order, as the case may be. She further submits that under Section 73(3) of the FERA, the RBI is empowered to give directions regarding the making of payment and the doing of other acts by bankers, authorized dealers, money-changers, stock brokers, etc. for the purpose of securing compliance with the provisions of the FERA and of any rules, directions or orders made thereunder.

12. Learned ASG further submits that under the Exchange Control Manual, 1987, particularly clause 29 B.8, the authorized dealer is required to be satisfied that the account holder is still normally resident outside India and that the proceeds of foreign currency/bank notes tendered by account holder were during his temporary visit to India.

13. Ms. Aishwarya Bhati, learned ASG, therefore submits that a conjoint reading of the aforesaid provisions of the FERA read with the Exchange Control Manual, 1987 would clearly show that the authorized dealer, before permitting the deposits of foreign currency, was required to satisfy himself that the foreign currency is deposited by the NRI Account Holder himself; that the account holder is on a temporary visit to India; and that the account holder is still normally resident abroad. She submits that the Circular dated 31st July 1995 only clarifies by abundant caution, what was already inherently and implicitly mandated by the FERA and the Exchange Control Manual, 1987. She submits that the High Court has grossly erred in holding that it was for the first time that the stipulation regarding the deposits of foreign currency by the account holder himself, was expressly provided for by Circular dated 31st July 1995 and therefore the Circular dated 31st July 1995 could not have had a retrospective operation. It is submitted that the said finding is erroneous. Learned ASG

relies on the judgments of this Court in the cases of ***Union of India and others vs. N.R. Parmar and others***[1] and ***S.S. Grewal vs. State of Punjab and others***[2] on the issue of retrospective operation of the clarificatory statute or statutory rules.

14. Per contra, Mr. Rajeev K. Virmani, learned Senior Counsel appearing on behalf of the respondent-Citi Bank, N.A. submits that the High Court has rightly held that the Circular dated 31st July 1995, for the first time, makes it mandatory that the deposits should be made in the NRE accounts only by the NRI Account Holder himself and that they cannot be made by any person other than the NRI Account Holder himself. It is submitted that different authorities have dealt with this issue differently. He relies on the order dated 10th February 2004 passed by Shri G.S. Sood, Assistant Director, Enforcement Directorate holding that during the relevant period, i.e., prior to 31st July 1995, an authorized dealer was not debarred from

1 (2012) 13 SCC 340
2 1993 Supp (3) SCC 234

accepting foreign currency from a person other than an account holder. However, in the present cases, the different Adjudicating Authorities had taken a contradictory stand.

15. Mr. Virmani further submits that in view of sub-section (3) of Section 49 of the Foreign Exchange Management Act, 1999, which came into effect from 1st June 2000, a sunset period of two years was provided from the date of commencement of the said Act, i.e. 1st June 2000, i.e., upto 1st June 2002. It is, therefore, submitted that the impugned show cause notices have been issued hurriedly just before the said sunset period was to expire prior to 1st June 2002. Learned Senior Counsel therefore submits that no interference with the impugned orders of the High Court is warranted.

16. Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of the respondent-Citi Bank submits that, assuming that the Circular dated 31st July 1995 was clarificatory, it cannot have a penal effect. It is submitted that by a Circular, a penal action cannot be provided and it can be done only by a statute.

Dr. Singhvi relies on the judgment of this Court in the case of ***Virtual Soft Systems Ltd. vs. Commissioner of Income Tax, Delhi-I***[3] in support of the proposition that unless it is specifically provided in the statute that the amendment is declaratory and applies to all pending cases/proceedings, it cannot be given retrospective operation.

17. Dr. Singhvi, relying on the provisions of the Banking Companies (Period of Preservation of Records) Rules, 1985 (hereinafter referred to as "the said Rules"), submits that Rule 3 of the said Rules provides that every banking company is required to preserve the records only for eight years. It is therefore submitted that the notices issued in the year 2002 for the transactions that took place between 1992 and 1993 were untenable, since they pertained to a period which falls beyond the period of eight years from the date of the transactions.

18. Though we have heard the learned counsels for the parties at length on various issues, we find it unnecessary to go into

3 (2007) 9 SCC 665

the said issues raised by the parties, inasmuch as, we are of the view that the show causes notices issued in the year 2002, i.e., after a period of almost one decade from the date of the alleged transactions of 1992-1993, were not tenable in law.

19. It is a settled proposition of law that when the proceedings are required to be initiated within a particular period provided under the Statute, the same are required to be initiated within the said period. However, where no such period has been provided in the Statute, the authorities are required to initiate the said proceeding within a reasonable period. No doubt that what would be a reasonable period would depend upon the facts and circumstances of each case. Reference in this respect could be made to the judgment given by a three-Judge Bench of this Court in the case of ***The State of Gujarat vs. Patil Raghav Natha and others***[4], wherein this Court has held thus:

> "**11.** The question arises whether the Commissioner can revise an order made under Section 65 at any time. ***It is true that***

4 (1969) 2 SCC 187

> ***there is no period of limitation prescribed under Section 211, but it seems to us plain that this power must be exercised in reasonable time and the length of the reasonable time must be determined by the facts of the case and the nature of the order which is being revised.***"
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> [emphasis supplied]

20. In the case of ***State of Madhya Pradesh vs. Bani Singh and another***[5], this Court found that the departmental proceedings initiated in the year 1987 for the alleged irregularities that took place between the years 1975-77 could not be permitted to be continued as it would be unfair and unreasonable.

21. In the case of ***Government of India vs. Citedal Fine Pharmaceuticals, Madras and others***[6], validity of Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, which did not provide for a period of limitation for

5 1990 (Supp) SCC 738
6 (1989) 3 SCC 483

initiating proceedings for recovery of escaped duty, was challenged. This Court in the said case observed thus:

> "**6.** Learned counsel appearing for the respondents urged that Rule 12 is unreasonable and violative of Article 14 of the Constitution, as it does not provide for any period of limitation for the recovery of duty. He urged that in the absence of any prescribed period for recovery of the duty as contemplated by Rule 12, the officer may act arbitrarily in recovering the amount after lapse of long period of time. We find no substance in the submission. While it is true that Rule 12 does not prescribe any period within which recovery of any duty as contemplated by the rule is to be made, but that by itself does not render the rule unreasonable or violative of Article 14 of the Constitution. ***In the absence of any period of limitation it is settled that every authority is to exercise the power within a reasonable period. What would be reasonable period, would depend upon the facts of each case. Whenever a question regarding the inordinate delay in issuance of notice of demand is raised, it would be open to the assesee to contend that it is bad on the ground of delay and it will be for the relevant officer to consider the question whether in the facts and circumstances of the case notice of demand for recovery was made***

> ***within reasonable period***. No hard and fast rules can be laid down in this regard as the determination of the question will depend upon the facts of each case."
>
> [emphasis supplied]

22. In the case of ***Mohamad Kavi Mohamad Amin vs. Fatmabai Ibrahim***[7], suo motu proceedings were initiated in September, 1976 by the Mamlatdar questioning the validity of sale deeds executed in December, 1972. In the said case, this Court, after noticing the earlier decisions on the issue, observed thus:

> "**2.** .....***where no time-limit is prescribed for exercise of a power under a statute it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time.*** We are satisfied that in the facts and circumstances of the present case, the suo motu power under Section 84-C of the Act was not exercised by the Mamlatdar within a reasonable time. ..."
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> [emphasis supplied]

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7 (1997) 6 SCC 71

23. Admittedly, in the present cases, the alleged transactions had taken place during the financial years 1992 and 1993. Show cause notices for the said transactions were issued in the year 2002 and that too just before the sunset period of FERA was to expire, i.e., on 1st June 2002. We are therefore of the considered view that show cause notices and the proceedings continued thereunder are liable to be set aside on this short ground.

24. It will also be relevant to refer to the relevant provisions of Rules 2, 3 and 4 of the said Rules, which read thus:

> **2.** Every banking company shall preserve, in good order, its books, accounts and other documents mentioned below, relating to a period of not less than five years immediately preceding the current calendar year.
> *Ledgers and Registers:*
> (1) Cheque Book Registers
> xxx xxx xxx
> xxx xxx xxx
> (6) Vault Registers.
> *Records other than Registers:*
> (1) Telegraphic Transfer Confirmations
> (2) Telegrams and Telegram Confirmations

3. Every banking company shall preserve, in good order, its books, accounts and other documents mentioned below, relating to a period of not less than eight years immediately preceding the current calendar year.
Ledgers and registers:
(1) All personal ledgers
xxx xxx xxx
(24) Clean cash books
Records other than registers:
(1) Bank cash scrolls
xxx xxx xxx
(11) Press-copy books

4. Notwithstanding anything contained in rules 2 and 3, the Reserve Bank may, having regard to the factors specified in sub-section (1) of section 35-A, by an order in writing, direct any banking company to preserve any of the books, accounts or other documents mentioned in these rules, for a period longer than the period specified for their preservation, in the said rules."

25. It can thus clearly be seen that the said Rules require every Banking Company to preserve records stated in Rule 2 for five years and eight years for records mentioned in Rule 3

respectively. No doubt that under Rule 4 of the said Rules, the RBI, having regard to the factors specified in sub-section (1) of Section 35-A, by an order in writing, is empowered to direct any banking company to preserve any of the books, accounts or other documents, etc. for a period longer than the period specified under the said Rules.

26. Undisputedly, no such order has been placed on record which required the respondents-Banks to preserve records concerning the transactions in question for a period longer than eight years.

27. It could thus be seen that even under the said Rules, the Banks are required to preserve the record for five years and eight years respectively. On this ground also, permitting the show cause notices and the proceedings continued thereunder of the transactions which have taken place much prior to eight years would be unfair and unreasonable.

28. In this view of the matter, we find no error in the impugned judgments of the learned Single Judge as well as the Division Bench of the High Court of Delhi. The Civil Appeals as also the Criminal Appeals are therefore dismissed. No order as to costs.

29. Pending application(s), if any, shall stand disposed of.

.....J.
[B.R. GAVAI]

.....J.
[PAMIDIGHANTAM SRI NARASIMHA]

NEW DELHI;
AUGUST 24, 2022.