

FEMA, BANKING & INSURANCE : Where appellant, a citizen of Islamic Republic of Pakistan holding a passport of that country was granted long term visa by Government of India and was subsequently, granted full citizenship as a naturalized citizen, and he purchased immovable property in India without taking any permission from RBI or any other Government body in contravention of regulation 7 of FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 and appellant paid penalty imposed by Adjudicating Authority, levy of further penalty of Rs. 50 thousand was not justified

APPELLATE TRIBUNAL SAFEMA, NEW DELHI

Arjun Das Malhotra

v.

Special Director Directorate of Enforcement, Delhi

MUNISHWAR NATH BHANDARI, CHAIRMAN

AND V. ANANDARAJAN, MEMBER

MP-FE-143/DLI/2022 (MISC.)

FPA-FE-86/DL1/2022

SEPTEMBER 5, 2023

Regulation 7 of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000, read with section [16](#) of Foreign Exchange Management Act, 1999 - Prohibition on acquisition or transfer of immovable property in India by citizens of certain countries - Appellant was a citizen of Islamic Republic of Pakistan and held a passport of that country - He purchased immovable property in India - Before acquiring said property, appellant did not take any permission from RBI or any other Government body - Thus, a show cause notice was issued by ED against appellant for contravention of regulation 7 and Adjudicating Authority imposed a penalty of Rs. 3 lakh on appellant - Against said order ED preferred an appeal to Special Director (Appeals) on ground that amount of penalty did not correspond with quantum of contravention and as such penalty should be enhanced and property should be confiscated - Special Director (Appeals) by an impugned order remanded back matter to Adjudicating Authority to pass order afresh - Accordingly, de novo adjudication proceedings were held and Adjudicating Authority, while holding that there was no case for confiscation of property, imposed a further penalty of Rs 50 thousand on appellant - It was noted that appellant and his family arrived in India after grant of long term visa to them by Government of India - They were subsequently granted full citizenship as a naturalized citizen - Further, there was no absolute bar on a Pakistani citizen acquiring property in India and only requirement was to obtain permission and ends of justice had been met with penalty of Rs. 3 lakh imposed upon appellant in first instance which was duly paid - Whether thus, levy of further penalty of Rs. 50 thousand on appellant was not justified - Held, yes - Whether accordingly, impugned order passed by Adjudicating Authority was to be set aside - Held, yes [Para 11]

FACTS

- The appellant was a citizen of the Islamic Republic of Pakistan, and held a passport

of that country. He purchased an immovable property in Dehradun, Uttarakhand, India, *i.e.*, a shop in Dehradun, India for a consideration of Rs. 1 lakh in year 2000. Before acquiring the aforesaid immovable properties, the appellant did not take any permission from the Reserve Bank of India (RBI) or any other Government body as required under regulation 7 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000.

- In view of the above, a complaint dated 11-6-2015 was filed by the Assistant Director, Directorate of Enforcement, Dehradun under section 16(3) of FEMA, 1999 against appellant.
- Accordingly a show cause notice dated 13-7-2015 was issued to the appellant for contravention of regulation 7. The appellant filed a reply to the show cause notice. After considering the reply dated 25-8-2015 to the show cause notice, the authority decided to hold adjudication proceedings. In conclusion of the proceedings, and after considering the submissions of the appellant, the Adjudicating Authority imposed a penalty of Rs. 3 Lakh on the appellant. The appellant deposited the said penalty amount of Rs. 3 Lakh.
- Aggrieved by the order of the Adjudicating Authority, the Deputy Director, Enforcement Directorate preferred an appeal to the Special Director (Appeals) under section 17(2) of FEMA, 1999 on the ground that the amount of penalty imposed did not correspond with the quantum of the contravention and as such the penalty should be enhanced and the properties should be confiscated.
- The Special Director (Appeals), after considering the facts and circumstances of the case, passed an order remanding back the matter to the Adjudicating Authority to pass a fresh order after examination of the documents submitted by the respondents.
- Accordingly, *de novo* adjudication proceedings were held. The Adjudicating Authority, while holding that there was no case for confiscation of the property under section 13(2) of FEMA, 1999, imposed a further penalty of Rs. 50 thousand on the appellant.
- Aggrieved by the said order, the appellant filed an appeal under section 17 of FEMA before the learned Special Director (Appeals) challenging the order of the Adjudicating Authority. The Special Director (Appeals), through a detailed speaking order upheld the order of the Adjudicating Authority and dismissed the appellant's appeal.
- On appeal :

HELD

- Considering the totality of facts including the background in which the appellant arrived in India with his family, grant of long-term visa to him by the Government of India followed eventually by grant of full citizenship as a naturalized citizen. The fact that there was no absolute bar on a Pakistani citizen acquiring property in India and the only requirement was to obtain permission. The fact that the amount of original penalty of Rs. 3 lakh imposed upon him and his son was duly paid, and the intended purpose of the legislation in question (FEMA, 1999) which was to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India, the appellant has made out a case for grant of relief. No doubt ignorance of the law is not a defence and every

person is presumed to know the law to which he or she is subject. Nevertheless, in view of the facts mentioned above which are not in dispute, we are of the view that the ends of justice have been met with the penalty of Rs 3 lakh imposed upon the appellant in the first instance which was duly paid, and levy of further penalty of Rs. 50 thousand was not justified in his case. Accordingly, the same is hereby set aside.[Para 11]

- Consequent to the above, the instant appeal stands allowed and the further penalty of Rs. 50 thousand imposed by the Adjudicating Authority, and upheld by the Special Director of Enforcement (Appeals) through the impugned order, are set aside. [para 12]

Prashant Pandey, Manish Mishra and Nitin Verma, *Advs. for the Appellant*. **Shomendu Mukherji, Ms. Akansha Gupta and Ms. Megha Sharma**, *Advs. for the Respondent*.

ORDER

FPA-FE-86/DLI/2022

1. The present appeal arises from the order dated 22-9-2022 passed by the learned Special Director (Appeals), FEMA, upholding the order of the Adjudicating Authority imposing a penalty of Rs. 50,000/- on the appellant for contravention of regulation 7 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property In India) Regulations, 2000.
2. The relevant facts of the case are that the appellant was a citizen of the Islamic Republic of Pakistan, and held a passport of that country. He purchased an immovable property in Dehradun, Uttarakhand, India, *i.e.*, a shop admeasuring 203 sq. ft. in Peepal Mandi, Dehradun for a consideration of Rs. 1 lakh in 2000. Before acquiring the aforesaid immovable properties, the appellant did not take any permission from the Reserve Bank of India (RBI) or any other government body as required under regulation 7 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000.
3. In view of the above, a complaint dated 11-6-2015 was filed by the Assistant Director, Directorate of Enforcement, Dehradun under section 16(3) of FEMA, 1999 against appellant, praying for issuance of Show Cause Notice to him for the above-mentioned contravention.
4. Accordingly a Show Cause Notice dated 13/07/2015 was issued to the appellant for contravention of Regulation 7. The appellant filed a reply to the Show Cause Notice. After considering the reply dated 25-8-2015 to the Show Cause Notice, the authority decided to hold adjudication proceedings. In conclusion of the proceedings, and after considering the submissions of the appellant, the Adjudicating Authority imposed a penalty of Rs. 3,00,000/- on the appellant *vide* its order dated 15-10-2015. The appellant deposited the said penalty amount of Rs. 3,00,000/-.
5. The matter, however, did not end there. Aggrieved by the order of the Adjudicating Authority, the Deputy Director, Enforcement Directorate preferred an appeal to the Special Director (Appeals) under section 17 (2) of FEMA, 1999 on the ground that the amount of penalty imposed *vide* the above-mentioned order does not correspond with the quantum of the contravention and as such the penalty should be enhanced and the properties should be confiscated.
6. The learned Special Director (Appeals), after considering the facts and circumstances of the case, passed an order remanding back the matter to the Adjudicating Authority to pass a fresh order after examination of the documents submitted by the respondents.
7. Accordingly, *de novo* adjudication proceedings were held. The Learned Adjudicating Authority, while

holding that there was no case for confiscation of the property under section 13(2) of FEMA, 1999, imposed a further penalty of Rs. 50,000/- on the appellant, Shri Rajkumar Malhotra.

8. Aggrieved by the said order, the appellant filed an appeal under section 17 of FEMA before the learned Special Director (Appeals) challenging the order of the Adjudicating Authority. The Learned Special Director (Appeals), through a detailed speaking order passed on 22-9-2022, upheld the order of the Adjudicating Authority and dismissed the appellant's appeal. It is this order of the Learned Special Director (Appeals) which has been impugned before us in the present appeal.

9. The learned counsel for the appellant submits that the appellant and his family, being Pakistani nationals, took refuge in India in 1992 as they were being persecuted and tortured in Pakistan for being Hindus. The appellant came with his family 26 years ago to settle permanently on political asylum. They applied for naturalization under the immigration laws and were granted a naturalization certificate by the Ministry of Home Affairs, Government of India on 15-2-2017. He is presently residing in Dehradun, India with his wife and children. He submits that the appellant is a law-abiding individual and has never been involved in any criminal or anti-social activity. He came to India under very difficult circumstances, with the intention of permanently settling here. He has been leading a precarious existence doing petty business with the help of his relatives here who had also similarly immigrated from Pakistan. He acquired the property in question, but as the legal intricacies were not known to him, he could not comply with the statutory requirement. He submits that he has already paid the original penalty of Rs. 3,00,000/- which was imposed upon him and his son by the Adjudicating Authority. However, the Deputy Director of Enforcement preferred an appeal against the adjudication order, which resulted in the imposition of further penalty. The main contentions of the appellant against imposition of further penalty on him are as follows:

- That the appellant was granted citizenship of India on 15-2-2017 and a certificate of naturalization was issued by the Ministry of Home Affairs under the Citizenship Act, 1955 on that date. In view of this, he submits, the adjudicating authority ought to have considered that the transaction pertaining to the purchase of the immovable property has been "automatically regularised" and the appellant cannot be treated as a Pakistani national for the purpose of FEMA regulations
- That there was no involvement of any foreign exchange in the instant case as the properties were purchased in India with the help of relatives who lived in India and through money earned in India. FEMA, 1999 was enacted to deal with violations pertaining to foreign exchange laws. There is no such violation in the instant case.
- The appellant is a hardworking and law-abiding person without being involved in any anti-social activity. He had sought political asylum in India on account of facing persecution in Pakistan. He will have to face severe consequences and irreparable loss will be suffered if the impugned order is not set aside.
- That there was no mens rea on the part of the appellant to contravene any provisions of the Act. That purchase of property by a Pakistan national is not prohibited and the only requirement is to obtain the approval of RBI.
- The Hon'ble Supreme Court in *Hindustan Steel Limited v. State of Orissa* 1969 to SCC 627 has held that Penalty will ordinarily not be imposed for a technical or venial breach which flows from *bonafide* belief, unless the party acted deliberately in defiance of law or was guilty of contumacious or

dishonest conduct or acted in conscious disregard to his obligation. Penalty will also not be imposed only because it is legal to do so. Whether a penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. The authority concerned would be justified in refusing to impose the penalty. Certain other case laws have also been cited by the Appellant in favour of his case.

10. The learned counsel for the respondent has strongly contested the contentions put forward on behalf of the appellant. It is submitted that at the relevant time the appellant was not a citizen of India but citizen of Pakistan and ignorance of law cannot be a defence. It is also contended that the order of the Adjudicating Authority which has been upheld by the learned Special Director(Appeals) was reasonable and fair in so far as the learned appellate authority did not find any merit in the proposal for confiscation under section 13(2) of FEMA, 1999, but merely imposed a further penalty upon the Appellant.

11. We have given careful consideration to the facts before us and the rival contentions of the parties. Considering the totality of facts before us, including the background in which the appellant arrived in India with his family, grant of long-term visa to him by the Government of India followed eventually by grant of full citizenship as a naturalized citizen. The fact that there was no absolute bar on a Pakistani citizen acquiring property in India and the only requirement was to obtain permission. The fact that the amount of original penalty of Rs. 3,00,000/- imposed upon him and his son was duly paid, and the intended purpose of the legislation in question (FEMA, 1999) which was to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India, we are of the view that the appellant has made out a case for grant of relief. No doubt ignorance of the law is not a defence and every person is presumed to know the law to which he or she is subject. Nevertheless, in view of the facts mentioned above which are not in dispute, we are of the view that the ends of justice have been met with the penalty of Rs. 3,00,000/- imposed upon the appellant and his son in the first instance which was duly paid, and levy of further penalty of Rs. 50,000/- was not justified in his case. Accordingly, the same is hereby set aside.

12. Consequent to the above, the instant appeal stands allowed and the further penalty of Rs. 50,000/- imposed by the adjudicating authority, and upheld by the Learned Special Director of Enforcement (Appeals) through the impugned order, are set aside.

Megha