(2008) 07 P&H CK 0051

In the Punjab And Haryana At Chandigarh

Balhar Chand and Others APPELLANT

Vs

State of Punjab and Others RESPONDENT

Date of Decision : 01-07-2008

Acts Referred:

Constitution of India, 1950 — Article 20
Criminal Procedure Code, 1973 (CrPC) — Section 102, 300, 457
Foreign Exchange Management Act, 1999 — Section 3, 37
Income Tax Act, 1961 — Section 131, 132A, 16, 3
Penal Code, 1860 (IPC) — Section 411, 414

Citation : (2008) CriLJ 4783

Hon'ble Judges : Kanwaljit Singh Ahluwalia, J

Bench : Single Bench

Judgement

Kanwaljit Singh Ahluwalia, J.—The present Criminal Misc. No. 43953-M of 2005 preferred by Balhar Chand and others is directed against the order passed by the Additional Chief Judicial Magistrate, Jalandhar on 17-12-2003 (Annexure P6) and order dated 27-5-2003 (Annexure P-7) passed by the Additional Sessions Judge, Jalandhar, whereby he affirmed the order, Annexure P-6 passed by the Additional Chief Judicial Magistrate, Jalandhar.

2. A quick glance at the facts reveals that Tarsem Lal, SI, Police Station Sadar, Jalandhar was on patrol duty and was checking the suspected vehicles, he received an information that Balhar Chand @ Billa, Balwinder Kumar, Avtar Singh @ Tari and Mohan Lal son of Gurdas Ram were distributing the huge hawala money while travelling in a Maruti Car bearing registration No. PB37A-3173 of the white colour in the villages falling within the jurisdiction of Police Station Sadar, Goraya, Phagwara and Phillaur. The information so received was recorded and was sent for registration of case which led to lodging of FIR No. 311 dated 27-4-2001 at Police Station Sadar, Jalandhar under Sections 411/414 IPC read with Sections 3(b) and 3(c) of FEMA Act, 1999.

3. A perusal of the record reveals that a cash of total amount of Rs. 11,80,000/- during nakabandi was recovered from Balhar Chand @ Billa, Balwinder Kumar,

Avtar Singh @ Tari and Mohan Lai. The petitioners have relied upon the complaint (Annexure P-2) filed by S.P. Subramanian, Assistant Director of Enforcement Directorate, FEMA, Ministry of Finance, Govt, of India. In the compliant, it has been stated that the statements of Balhar Chand @ Billa, Balwinder Kumar, Avtar Singh @ Tari and Mohan Lal were recorded u/s 37 of Foreign Exchange Management Act, 1999 read with Section 131 of the Income Tax Act, 1961. Balhar Chand in his statement stated that on 27-4-2001 when he along with his cousin brother Balwinder Kumar and his friend Avtar Singh were going in a Maruti car driven by Mohan Lal, they were stopped by the police personnels near Chungi (octroi post) Paragpur and from their car Rs. 2 Lacs were recovered. On his disclosure statement, police took him to his house at Bachhowal and recovered a sum of Rs. 9,80,000/-. He further stated that the whole money does not belong to him and out of recovered amount, Rs. 4 Lacs belonged to Balwinder Kumar and Rs. 3,80,000/- belonged to Avtar Singh @ Tari. On the complaint so filed, a show cause notice (Annexure P-3) was issued by the Enforcement Directorate, Foreign Exchange Management Act, Government of India. Reply to show cause notice Annexure P-4 was filed. The Enforcement Directorate passed order Annexure P-5 in which the following stand of the accused was noticed:

1. Balhar Chand @ Billa

That after this on 15-4-2001 an unknown person came to his house at village Bachhowal at about 10 AM and he after enquiring his name and father''s name, gave him Rs. 4 lacs in cash and told him that this money had been sent by his brother Prem Kumar from Dubai.

2. Balwlnder Kumar son of Karnail Singh

That on 15-4-2001 an unknown person came to his house at Prempura, Phagwara and after enquiring his name and name of his father and elder brother residing abroad, he gave him Rs. 4 lacs in cash and told him that the same were sent by his brother Kulwinder Kumar residing in Dubai.

3. Avtar Singh @ Tari

That on 15th or 16th April, 2001 an unknown person came to his house at village Patti Natha and after making enquiries regarding him, his father and brother residing abroad, he paid Rs. 4 lacs to him and told him that this money had been sent by his brother Amarjit residing abroad.

4. The Enforcement Directorate after noticing the contention in Annexure P-5 passed the following order:

I have carefully gone through the evidence on record, the written replies to the show cause notice and oral submissions made during the course of personal hearing. I find that the noticees have received the payment of Rs. 4,00,000/- each at the instruction of their brothers residing abroad in violation of the provisions of Section 3(c) of the said Act. This fact has been admitted by them during the course of investigation as well as the adjudication proceedings. However, the Ld. Advocate pleads for leniency, as his clients were not aware that receiving money in this manner is an offence; that they are very poor and backward people and that the money was to be used for purchasing Tata Sumo cars which they would have plied as taxis to earn livelihood and sustain their families. The charge is thus established and as such I find the noticees guilty. I would like to add here that ignorance of law is no excuse, however looking into the circumstances of the case, I also find that no racketeering is involved in this case and if the "entire amount is confiscated it will cause enormous financial hardship to the families of the noticees as they will loose their chance to earn the livelihood. I therefore, take a lenient view and in exercise of the powers conferred upon me in terms of Sub-section (1) of Section 16 of the said act, I impose a penalty of Rs. 1,33,000/- each (Rupees One lac thirty three thousand only) against S/Sh. Balhar Chand @ Billa, Avtar Singh @ Tari and Balwinder Kumar. The total penalty of Rs. 3,99,000/- (Rupees three lac ninety nine thousand only) should be deducted from the seized amount of Rs. 11,80,000/- and the balance amount be released to the noticees, which I feel will meet the ends of justice.

5. After the order Annexure P-5 was passed, Deputy Director of Income Tax (Investigation)-II, Jalandhar filed an application dated 3-4-2002 in the Court of Chief Judicial Magistrate, Jalandhar which was assigned to Additional Chief Judicial Magistrate, Jalandhar. In the same, it was stated that the amount recovered from the accused, prima facie, was unaccounted amount and Income Tax Department had reasons to believe that the accused were involved in Income Tax evasion. In the application it was prayed that Court should direct the S.H.O., Police Station Sadar, Jalandhar to hand over the amount to Income Tax Department. On the notice issued, reply was filed and it transpired that the Deputy Director, Enforcement Department in lieu of penalty after levying an amount of Rs. 3,99,000/- had released the balance amount of Rs. 7,81,000/- to the accused and thereby Income Tax Department was deprived of their right to take over the amount. Two issues were raised before the Trial Court:

(a) Whether the amount recovered which was a case property could be handed over by the S.H.O. to the Assistant Director, Enforcement Directorate, FEMA without the orders of the Court?

(b) Whether the Enforcement Directorate was justified in releasing the amount to the accused which was a case property of case of FIR No. 311 dated 27-04-2001 registered at Police Station Sadar, Jalandhar under Sections 411/414 IPC read with Section 3(b) and 3(c) of FEMA Act, 1999?

6. The learned Additional Chief Judicial Magistrate, Jalandhar, after examining the contentions of the parties held as under:

I have considered the contentions of the learned Counsel for the applicant and have also gone through the case law cited by the learned Counsel for the applicant Deputy Director, Income Tax (Investigation)-II Jalandhar. It has unequivocally held by the Division Bench of our own Hon''ble High Court in Amandeep Singh v. Director of Income Tax (Investigation), Ludhiana 2001 T LR 711 (supra) that it was the duty of the S.H.O. to obtain an order u/s 457, Cr.P.C. before parting with the property or before the delivery of possession of the seized amount to the respondent and the act of the S.H.O. in releasing the amount without obtaining the order of the court is clearly contrary to the provisions of Cr.P.C. Thus it has to be held that the act of the S.H.O. in releasing the amount in question to the FEMA authorities was illegal as he had not obtained any order from the court prior to releasing this amount to the FEMA Authorities. Similarly, the FEMA authorities also did not seek permission of the court before releasing the seized amount to the accused, with the result that the investigation which the Income Tax Department intends to initiate against the accused persons by requisitioning the amount in question u/s 132-A(i) of the Income Tax Act stood hampered. In these circumstances, it would be just and proper if the accused are directed to deposit the remaining amount released in their favour by the FEMA Authority with the S.H.O., Police Station Sadar, Jalandhar so that the same may be ordered to be released to the Income Tax Department in accordance with the request made u/s 132A(i) of the Income Tax Act.

In the light of the above discussion, the application filed by the Deputy Director (In-vestigation)-II, Jalandhar is hereby allowed and the accused are hereby directed to deposit the amount released to them by the FEMA authorities which come to Rs. 7,81,000/- with the S.H.O., P.S. Sadar, Jalandhar within a period of one month from today and the S.H.O. of P. Section Sadar, Jalandhar will not release this amount in favour of anybody without the permission of the court. The application stands disposed of accordingly.

7. Revision preferred against the impugned order Annexure P-6 passed by the Additional Chief Judicial Magistrate, Jalandhar was dismissed by the Additional Sessions Judge, Jalandhar, vide Annexure P-7. The Additional Sessions Judge, Jalandhar, had concluded as under:

There is no doubt about the fact that sum of Rs. 11,80,000/- recovered from the accused/revisionists was the case property in FIR No. 311 registered u/s 411/414, IPC read with Sections 3(b) and 3(c) of FEMA. This amount was handed over by the SHO, Police Station Sadar, Jalandhar, without getting the orders from the court. Section 102 of Cr.P.C. deals with the powers of Police Officer to seize certain property and its Clause (3) to deals with the manner in which the custody of seized property can be handed over to any other person on his executing a bond undertaking to produce it before the court as and when required and to give effect to the further orders of the court as to the disposal of the same. Similarly, Section 457 of Cr.P.C. deals with the procedure to be followed by the police upon the seizure of property when the same is reported to a Magistrate under the provisions of Cr.P.C. Clause (2) of this Section further deals regarding the manner in which the Magistrate can pass order regarding the release of property to the person who is entitled to receive the same. Keeping in view these provisions, it is clear that S.H.O., P.S. Sadar, Jalandhar, handed over the case property of this case i.e. cash of Rs. 11,80,000/- to the F.E.M.A. authorities without getting any order from the competent court. It is also matter of record that even the F.E.M.A. authorities did not obtain any order from the competent court before releasing the amount in favour of the accused/revisionists. Because of this the investigation which was to be carried out by the Income Tax Department u/s 132A of Income Tax Act has been adversely affected. The authority relied upon by the learned lower court in the case of Amandeep Singh v. Director of Income Tax (Investigation), Ludhiana 2000 TLR 711 (supra) is fully applicable to the facts of case. In view of my above discussion, I do not find any illegality in the order passed by the lower court. Therefore, the order dated 17.12.2003 is upheld. The revision preferred by the Revisionists is dismissed. Lower court file be sent back along with copy of the order for 16.11.2005. Present criminal revision file be consigned to the Record Room.

8. Mr. O.P. Nagpal, learned Counsel for the petitioners has contended before me that once the penalty had been imposed by the Enforcement Directorate, the order of the Court to deposit the amount was in violation of Article 20 of the Constitution of India and Section 300 of the Criminal Procedure Code as it will amount to double jeopardy. Therefore, order passed by Enforcement Directorate Annexure P-5 has attained finality and the criminal court and the Income Tax Authorities have got no jurisdiction.

9. I am unable to accept this contention raised by the counsel for the petitioners. Enforcement Directorate, Income Tax Authorities and criminal court adjudicate in their own sphere. Accused have admitted that the amount recovered was sent by their brothers who were residing abroad. Therefore, there was a violation of provisions of FEMA Act and under Enforcement: Directorate had to act and penalty imposed by him was a consequence to the act of the petitioners who had received cash amount from abroad through channels which were not permissible, but it does not absolve petitioners as the amount so received was to be declared before the Income Tax Authorities. Non-declaration of the amount will amount to evasion of tax and Income Tax Authorities are within their right to proceed under Income Tax Act in accordance with the provisions of law. The amount recovered was also subject-matter of criminal proceedings which had been initiated by lodging the case FIR No. 311, dated 27.04.2001.

10. Counsel for the parties are unable to state about the outcome of FIR No. 311, dated 27.04.2001 registered at Police Station Sadar, Jalandhar under Sections 411/414, IPC read with Sections 3(b) and 3(c) of FEMA Act, 1999. Counsel for the petitioners is also ignorant regarding the result of proceedings initiated by the Income Tax Department whether the amount has been assessed or whether Income Tax Authorities have imposed any penalty or not? Counsel for the petitioners is not forthcoming.

11. Orders Annexures P-6 and P-7 are perfectly legal and no interference is called for, but by a efflux of time, ground realities and circumstances may have changed. In case, trial of FIR No. 311, dated 27.04.2001 has concluded, the petitioners may have been convicted or acquitted. This will change the rigor of the direction that amount of Rs. 7,81,000/- be deposited back. Furthermore, in case, Income Tax Authorities had assessed the amount and imposed the penalty, the requirement of depositing the amount of Rs. 7,81,000/- will also lose its sting, in case the penalty and the income tax assessed has been deposited.

12. Therefore, even though I have held that the impugned orders are perfect and legal taking various facts mentioned above, still there is scope for variance in the directions to deposit the amount. Accordingly, I remand the matter back to the Court of Additional Chief Judicial Magistrate, Jalandhar, to take into consideration the outcome of trial in case FIR No. 311 dated 27.04.2001 and proceedings before Income Tax Authorities. In case, trial had not proceeded and Income Tax Authorities had not concluded proceedings against petitioners, orders Annexures P-6 and P-7 are to be complied with and no variation is called for. In case, Income Tax Authorities and the trial in the last three years have made some headway, then the Additional Chief Judicial Magistrate, Jalandhar, will pass afresh order after hearing Income Tax Authorities, counsel for the State and the petitioners.

13. With these observations, the present Criminal Misc. No. 43953-M of 2005 is disposed of.

