

(1996) 04 MAD CK 0065

In the Madras High Court

Case No : Criminal Appeal No. 676 of 679/86

Enforcement Directorate, Madras

APPELLANT

Vs

N.P.V. Ramasamy Udayar

RESPONDENT

Date of Decision : 23-04-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 248

Evidence Act, 1872 — Section 101, 103

Foreign Exchange Regulation Act, 1973 — Section 56, 59, 71, 72, 9

Penal Code, 1860 (IPC) — Section 494

Citation : (1997) 89 ELT 679

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : Shri K. Kumar, Special Public Prosecutor, for the Appellant; Shri K.A. Pachapagesan, for the Respondent

Judgement

1. These appeals have been filed in this Court by the Assistant Director, Enforcement Directorate, Madras, challenging the acquittal of the respondent in respect of the offences under Sections 9(1)(c), 9(1)(a) and 9(1)(d) of the Foreign Exchange Regulation Act (hereinafter referred to as "Act"), punishable u/s 56 of the Act, in E.O.C.C. Nos. 1252 to 1255 of 1985, on the file of the Additional Chief Metropolitan Magistrate (E.O. II), Egmore, Madras.

2. It is better to render common judgment in all these four appeals, since these cases relate to the seizure of documents from the house of the respondent on a single day and the Chief Enforcement Officer alone has been examined as P.W. 1 in all these cases.

3. The gravamen of the allegation in Criminal Appeal No. 676 of 1986, against the respondent/accused is that during 1980, the wife, son and daughters of the respondent/accused went to Malaysia, and purchased and brought foreign goods worth about Rs. 1,62,000/-, which amount was advanced by one Anthony, a person resident outside India, and that when the house of the respondent/

accused was searched on 23-11-1982, the respondent made a statement admitting the same and stated that an amount of Rs. 41,200/- remains to be reimbursed to the said Anthony, and thereby the respondent contravened Section 9(1)(c) of the Act, punishable u/s 56 of the Act.

4. The accusation against the respondent/accused in Criminal Appeal No. 677 of 1986, is that in connection with the advance made by Anthony, resident outside India, to the wife, son and daughters of the respondent, while they had been at Malaysia during 1980, the respondent made three payments each of Rs. 20,000/- two of them to Anthony and the third of his wife, while they visited India, without the previous general or special exemptions of the Reserve Bank of India, and thereby the respondent contravened Section 9(1)(a) of the Act, punishable u/s 56 of the Act.

5. The gravamen of the allegations against the respondent/accused in Criminal Appeal Nos. 678 and 679 of 1986 are that in connection with the advance made by Anthony, resident outside India, to the wife, son and daughters of the respondent, while they had been at Malaysia during 1980, the respondent made payment of Rs. 10,000/- to one Kuberan, Rs. 5,000/- to one Julee, the daughter of the said Anthony and Rs. 80,000/- to the Kaliamoorthy, by order and on behalf of the said Anthony, without the previous general or special exemption of Reserve Bank of India, and thereby the respondent contravened Section 9(1)(d) of the Act, punishable u/s 56 of the Act.

6. P.W. 1, Murugappan, a Chief Enforcement Officer, on the basis of the search warrant Ex. P1, issued by the Deputy Director searched the premises of the respondent at Door No. 25, C.V. Raman Road, Madras on 23-11-1982. In the presence of the respondent, P.W. 1 seized Ex. P3 a letter dated 10-11-1982, addressed to the respondent/accused written by Anthony, resident outside India and Ex. P4 visiting card of the respondent, which contains the address of Anthony also Ex. P2 Mahazar Ex. P3 letter refers about the amount of Rs. 1,62,000/- advanced by Anthony and the balance to be paid by the respondent/accused to Anthony would be Rs. 41,200/-. On seizure the respondent Was examined with reference to the said document. The respondent gave a statement Ex. P5, admitting that an amount of Rs. 41,200/- remains to be reimbursed to Anthony, resident outside India, and that the contents of the letter Ex. P3 to be true, and that during 1981-82 when Anthony and his wife visited India, the respondent made payments to the total of Rs. 60,000/- to Anthony and his wife and that by order and on behalf of the said Anthony, the respondent made payments of Rs. 10,000/- to one Kuberan Rs. 5,000/- to one Julee, the daughter of Anthony and Rs. 80,000/- to one Kaliamoorthy, towards the amount of Rs. 1,62,000/- advanced by Anthony to his wife, son and daughters for the purchase of foreign articles in Malaysia. Thereafter, Ex. P6, a show cause notice dated 2-11-1983 was issued to the respondent/accused, for which the respondent gave a reply Ex. P7 on 29-11-1983. On 3-8-1984, the Additional Director of Enforcement passed an order Ex. P8 in Adjudication proceedings, imposing a

total penalty of Rs. 12,000/- for the abovesaid contraventions. Then, the complaints were lodged in E.O.C.C. Nos. 1252 to 1255 of 1985, before the Additional Chief Metropolitan Magistrate (E.O. II), Egmore, Madras.

7. When the respondent/accused was questioned u/s 313 Cr.P.C. in all these cases, he stated that the evidence of P.W. 1 was not correct. However, no witness was examined on the side of defence.

8. The trial court, after termination of trial found the accused/respondent not guilty and acquitted him in respect of the above charges in all these four cases, helping that the offences were not proved against the respondent/accused.

9. The finding given by the trial court are as follows :-

(i) Ex. P3 letter written by Anthony, resident outside India, to the respondent was recovered from the house of the respondent under Ex. P2 Mahazar. Merely because the said Anthony, the author of the letter Ex. P3 has not been examined, it cannot be said that the document cannot be used in evidence Ex. P5, the statement of the respondent also would show that the same is in conformity with Ex. P3 u/s 72 of the Act, where any document has been seized from the custody of any person, the court shall presume, unless the contrary is proved, the truth of the contents of such document. This presumption has to be rebutted not by mere explanation, but by way of proof, as laid down in *Ram Krishna Bedu Rane Vs. State of Maharashtra*, . So, the contents of Ex. P3 letter have been properly proved. It is evident from Ex. F3 letter coupled with Ex. P5, statement of the respondent admitting the violations, which was not re-acted at any time before cross-examination, that the accused Violated Section 9(1) of the Act, punishable u/s 56 of the Act.

(ii) Section 9(1)(c) of the Act contemplates, that without 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 draw, issue or negotiate any bill of exchange or promissory note or acknowledge any debt, so that a right to receive a payment is created or transferred in favour of any person resident outside India. But, in these cases, the prosecution has not made any attempt to prove that the said Anthony, the author of Ex. P3 letter is a resident outside India. P.W. 1 admits that he has not done any separate investigation to find out as to whether Anthony was a resident outside India. Of course in Ex. P7, the reply to show cause notice Ex. P6, the respondent/accused has stated that Shri A. Antonie, Kuala Lumpur was his close friend and he is an Indian, settled in Kuala Lumpur. Through the statement made in Ex. P7 reply given by the respondent to the show cause notice issued by the department, appears to be in support of the case of the prosecution the admission of the respondent/accused would not be sufficient to prove the contravention. In *Smt. Priya Bala Ghose v. Suresh Chandra Ghosh* - AIR 1971 SCC 362, the Supreme Court while dealing with the case of appeal against conviction u/s 494 IPC, for an offence of bigamy, observed that the admission of

the accused relating to the second marriage cannot be treated as evidence and that in such a case, the second marriage must be proved by the prosecution by producing other materials. So, mere admission by the respondent/accused in the instant case, as found in Ex. P7 cannot be relied upon and it is for the prosecution to prove the case, independently that the said Anthony was a resident outside India. In view of the decision of the Supreme Court, as referred to above. As such, the accused is entitled to acquittal.

10. Thus, the trial court though gave a finding at the first instance, that on the basis of Exs. P3 and P5, it could be concluded that the respondent accused contravened Section 9(1) of the Act, has concluded on the basis of the second finding that the prosecution has not proved that the said Anthony was the person resident outside India and that the statement given by the respondent/accused in Ex. P7 cannot be taken as evidence in these cases. These present appeals have been resorted to by the appellant in this court, challenging the second finding by the trial court, on the basis of which the respondent/accused was acquitted.

11. Mr. K. Kumar, learned Special Public Prosecutor (FERA) appearing for the appellant, took me through the entire evidence and contended that the learned Magistrate miserably failed to understand the basic concept of the object and scope of the Act, while observing that the prosecution has not discharged the burden to prove regarding the fact as to whether Anthony was the person resident outside India, especially when he found that in view of Section 72 of the Act, the Court shall presume that the contents of the documents seized from the house of the respondent/accused shall be true and held that it was clear from Ex. P3 letter coupled with Ex. P5 statement, the respondent/accused violated Section 9(1) of the Act. He further strenuously contended that the trial court, ought not to have relied upon the Judgments of the Supreme Court, the rulings with references to the conviction u/s 494 I.P.C., for giving a finding, that the prosecution must separately prove the fact that Anthony was person resident outside India, which is not at all applicable to this case. He would further say, that there are other materials besides Ex. P7, such as Exs. P3 and P4, documents recovered from the custody of the respondent and Ex. P5, the statement of the Accused, from which it would be seen that the prosecution has produced material to show that Anthony was a resident outside India. It is also contended that when the case of prosecution was that the accused had a transaction with the person, resident outside India, as referred in all these cases the evidentiary burden under this Act, shifts on the accused to disprove the fact that Anthony was not a resident outside India, and the relevant section regarding this as contained in the Act has been overlooked by the Court below. In short, the contention by the learned Special Public prosecutor is that the verdict given by the trial court is not in accordance with law and the same is perverse, which has resulted in the flagrant miscarriage of Justice and so the same is liable to be set aside and the respondent/accused is to be convicted thereunder.

12. Mr. K.A. Panchapagesan, learned Counsel appearing for the respondent/accused, in all these appeals, though initially attempted to support the verdict of the trial court on the basis of the Judgment of the Supreme Court, subsequently contended, that in Ex. P7, the reply to show cause notice, the respondent/accused retracted the earlier statement Ex. P5 and so, on the basis of Ex. P7, the statement Ex. P5 cannot be acted upon. Ultimately he contended that even if this Court comes to the conclusion that offences were proved, the accused/respondent need not be punished, in view of the long lapse of time, and that mere pointing out the illegality is sufficient.

13. I heard both sides and perused the records. Mr. Kumar, learned Special Public Prosecutor cited number of decisions rendered by the Supreme Court as well as the other High Courts, to substantiate his submissions. He also submitted that the ground of long lapse of years may not be taken into consideration, for the serious offences, like this. Therefore, he requested this court, to set aside the Judgments or acquittal passed by the trial court in all these cases and to punish the respondent/accused in accordance with law, by convicting thereunder.

14. Before deciding this issue, let me refer about the relevant sections contained in the Act. Section 9 of the Act, deals with restrictions on payments. u/s 9(1) of the Act, no person in India, shall without any general or special exemption from the Reserve Bank of India, shall (a) make any payment to any person resident outside India, (b) receive any payment from any person resident outside India; (c) draw, issue or negotiate any bill of exchange or acknowledge any debt, so that a right to receive the payment is created or transferred in favour of any person resident outside India; (d) make any payment to any person by order or on behalf of any person resident outside India.

15. The Preamble of the Act discloses that this Act has been introduced to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export and of currency and bullion, for the conservation of the foreign exchange resources of the country and proper utilisation thereof in the interest of the economic development of the country.

16. A cursory perusal of the various provisions of this Act would reveal that no person, the resident of India, shall place any sum to the credit of any person, resident outside India, except in accordance with any general or special exemptions, which may be granted conditionally or unconditionally, by the Reserve Bank of India, in view of the proper utilisation of the foreign exchange resources, in the interest of the economic development of the country.

17. The mens rea is a necessary ingredient of an offence. But under this Act, no mens rea i.e. culpable mental state, has been prescribed for such contravention. In fact, there is a specific section in this Act, which shows that the existence of the culpable mental state shall be presumed by the Court. The relevant provisions of Section 59(1) of the Act, which reads as follows :

"In any prosecution for any offence under this Act, which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the fact charged as an offence in that prosecution."

"Explanation. - In this Section, "Culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact."

18. A plain reading of this section would make it clear, that presumption arising under the said sub-section may be rebutted by the accused, but the burden that is cast upon the accused to rebut the presumption is quite heavy. The accused has to prove absence of culpable mental state beyond reasonable doubt in the same way as is cast upon the prosecution in an ordinary criminal trial.

19. Section 71 of the Act, dealing with burden of proof, also would require, to be referred to, in the process of understanding the object of the Act.

"71. Burden of proof in certain cases. - (1) When any person is prosecuted or proceeded against for contravening any of the provisions of this Act, or of any rule, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him."

So, both these sections viz. Sections 59 and 71 would disclose that in a prosecution under this Act, the Court shall presume the existence of the mental state on the part of the accused and the burden of proof to disprove such mental state shall be on the offender and offender alone and not upon the prosecution.

20. Section 101 and Section 103 of the Evidence Act deals with the burden of proof, which provides when a person is bound to prove the existence of any fact, that the burden of proof lies on that person. But Section 71 of the Act, being a provision of the special statute provides for the burden of proof being shifted to the offender. It means, the burden of proof was not cast upon the prosecution. To put it in a nutshell, Sections 59 and 71 of the Act, fixed the onus on the part of the accused to prove that Anthony was not a resident outside India, or he had permission to transact with the said Anthony.

21. All the decisions of the Supreme Court, referred to in the Judgments of the trial court only refer to the appreciation of evidence in the ordinary criminal trial for the offences under 494 IPC as per the provisions of Sections 101 and Section 103 of the Evidence Act. These decisions would not be applicable at all in these cases, in view of Sections 59 and 71 of the Act, which has been unfortunately over-looked by the trial court, to the prejudice of the prosecution.

22. The first finding given by the trial court is that in view of Section 72 of the Act, the contents of the documents seized from the custody of the accused must be presumed to be true and so the contents have to be disproved by the accused, and since it was not done, Ex. P3 letter written by Anthony, a person

resident outside India, to the accused coupled with Ex. P5 statement given by the accused would establish that the respondent/accused violated the provisions of Section 9(1) of the Act. Having given such a finding, in the light of Section 72 of the Act, related to the presumption of the contents of the documents, I am at loss to understand, as to how, the trial court has come to the different conclusion, that the prosecution has to independently prove the said Anthony was a resident outside India. If the contents of Ex. P3 is accepted and acted upon by the trial court, then it is clear, from the said document that the said Anthony was a resident outside India. So, u/s 72 of the Act, it must be taken to mean, that not only acknowledgment of debt to Anthony was not disproved by the accused, the fact of Anthony being a resident outside India was also not disproved. So, the non-application of mind by the learned Magistrate is quite explicit in having come to the conclusion that the prosecution did not prove that Anthony was a resident outside India having held that the contents of Ex. P3 letter could be admitted in evidence and acted upon. The most unfortunate on the part of the trial Magistrate is the non-consideration of the other relevant sections, like Sections 59 and 71 of the Act, as referred to earlier.

23. Ex. P3 is the letter written by Anthony from Malaysia to the accused on 10-11-1982. In Ex. P3, it is stated as follows :

"I was informed by my Mrs. to let you know the exact position of the funds given to you and the balance that now is in your hands after receiving sums whilst my wife and I had been in India."

Ex. P4 is the visiting card of the respondent/accused, in which the residential address particulars of Anthony are written. In Ex. P4 the date has been put as 15-2-1982. Ex. P4 contains the address of the said Anthony as follows :

"A. Antonie

No. 1. A. Clifford Road,
Kualalumpur, Malaysia."

24. Ex. P5 is the statement given by the respondent/accused on 23-11-1982. Some of the relevant portions relating to the resident of Anthony as found in Ex. P5 are as follows :

25. If these documents alone de hers the other documents like Ex. P7 are taken into consideration, the contents of the same would be sufficient to establish that Anthony was a resident outside India, in the light of Section 72 of the Act. Even, according to the trial court, u/s 72 of the Act, the contents of the documents Exs. P3 coupled with Ex. P5 could be an admitted evidence.

26. The search was made on 23-11-1982. The show cause notice Ex. P6 was issued on 2-11-1983. The reply, Ex. P7 of the respondent/accused was given on 29-11-1983, nearly a year after the seizure of Ex. P3 letter. Even in Ex. P7 reply, the respondent/accused said that "Shri A. Antonie, Kualalumpur, is my close

friend and he is an Indian settled in Kuala Lumpur". This is fully in consonance with Exs. P3 and P5.

27. One another important document is Ex. P3, the order, dated 3-8-1984, passed in the adjudication proceedings. After receiving the reply, the respondent was called for a personal hearing on 26-7-1984 by the Additional Director. The authorised representative of the accused appeared and submitted a written statement to the department, which is as follows :-

"I have appeared before you in respect of the four show cause notices to N.P.V. Ramasamy Udayar issued on 2-11-1983 as per the authorisation given to me by Sri. N.P.V. Ramasamy Udayar for appearing before you today 26-7-1984.

You read explained four show cause noticed. The statement of Udayar was read and explained. This statement of Udayar. dated 22-11-1982 is voluntary and explains in details the transactions. He had authorised me to appear before you and plead guilty to all the charges. He wanted that a lenient view may be taken as he was ignorant of law.

28. This document also would reveal, that the charges against the respondent/accused as projected by the prosecution were consistent throughout from the date of search till the complaints were filed. As such, the statement Ex. P5 and the contents in Ex. P7 and the written statement as referred to in Ex. P8 have not been retracted at all. More so, there was no attempt whatsoever made to disprove the accusation as provided u/s 59 & 71 of the Act, that the respondent obtained money from a person, resident outside India and repaid to several persons under his order, which attracts the penal provisions of Section 56 of the Act.

29. Of course, as pointed out by Mr. Panchapagesan, learned Counsel for the respondent, in Ex. P7, the reply to show cause notice, the respondent stated he had not intended to pay any money to Anthony as acceptance of the loan and that he has not physically received any money, either in foreign exchange or Indian rupee from Anthony, nor he had given any bond, promissory note or any letter to Anthony. This aspect has been clearly discussed by the learned trial Magistrate, and a finding has been given that the accused has received the payment from Anthony, in the light of Section 72 of the Act. So, this submission that Ex. P7 which retracts Ex. P5 nullifies the voluntary nature of the statement Ex. P5 lacks substance. Moreover, subsequent to Ex. P7 reply, dated 29-11-1983, the respondent through his representative filed a written statement, admitting the receipt of the payment from Anthony, pleaded guilty and seeking to take a lenient view. So, the argument of Mr. Panchapagesan, cannot be accepted as a valid one.

30. In the light of the above discussion, I am of the considered opinion, that the trial court has taken a wrong view of the settled position of law in relation to the appreciation of evidence, concerning the cases under FERA, while acquitting, the respondent/accused. The principals referred to above, has also been expressed

by a Division Bench of this court in A.A.O. No. 830 of 1982, decided on 2-11-1995 (M/s. Sarathas" By Its Managing Partner Mr. T. Manavalan v. The Asstt. Director, Enforcement Directorate, Madras). Thus, I find that the offences with which the accused had been charged by the trial court, have been committed by the Accused/respondent.

31. The Apex Court in State of Gujarat Vs. Mohanlal Jitamalji Porwal and Another, , while dealing with the analogous provisions of the Customs Act, has taken into consideration, the scope of the Act, which was enacted for the economic development of the country and observed as follows :

"Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the state and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions. The community or the State is not a persona non-grata whose cause may be treated with disdain. The entire community is aggrieved if the economy offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is Committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National interest."

32. In the light of the above observation, the last request being to leave the acquittal of the respondent, as it is, by merely laying down the Law and not to punish the respondent, in view of the long lapse of years, made by Mr. Panchapagesan, learned Counsel for the respondent has got to be considered. However, Mr. K. Kumar, learned Special Public Prosecutor, object to this course with vehemence.

33. When a similar plea was made before the Supreme Court in State of Maharashtra Vs. Champalal Punjaji Shah, , a Customs case, the court observed as follows, negating the said plea :-

"The offence is one Which jeopardises the economy of the country and it is impossible to take a casual or a light view of the offence. It is true that where the offence is of a trivial nature such as a simple assault or the theft of a trifling amount, we may hesitate to send an accused person back to jail as it would not be in the public interest or in the interest of anyone to do so. But the offences with which we are concerned and the stakes involved clearly show that sympathy in this case would be misplaced."

Applying the principle enunciated by the Supreme Court, as referred to above, I am not able to persuade myself to agree with the learned Counsel for the

respondent/accused, to show sympathy on the respondent.

34. On the basis of the foregoing analysis of the various aspects of these cases, I am of the view, that the Judgments of acquittal, dated 24-3-1986 rendered in E.O.C.C. Nos. 1252 to 1255 of 1985, by the learned Additional Chief Metropolitan Magistrate (E.O. II), Egmore, Madras, are liable to be set aside, as the respondent/accused is found guilty of the charges under Sections 9(1)(c). 9(1)(a) and 9(1)(d) of the Act punishable u/s 56 of the Act. As such the appeals are allowed and the respondent accused is convicted for the above charges in all this 4 cases. Regarding the question of sentence, Mr. K.A. Panchapagesan, learned Counsel for the respondent submits that u/s 248(2) of Criminal Procedure Code, the respondent could be asked about the question of sentence through his counsel. For this course, there is no objection on the part of the appellant. Mr. K.A. Panchapagesan, submitted that there are totally seven cases, out of which three cases were ended in conviction and four cases were ended in acquittal. Against those four cases, the department filed this present appeals and against the conviction in the three appeals the respondent/accused filed the appeals before the Sessions Court, which are now pending before that court. He would also contend that the trial court while convicting the accused in those three cases sentenced him to pay a fine of Rs. 500/- on each count and so he requested on this basis to impose the same amount in these cases also. However, Mr. K. Kumar, Special Public Prosecutor requested this court to impose the fine amount at the rate of 40% of the amount involved in each case. However, the Special Public Prosecutor admits that against the sentence of imposing the fine of Rs. 500/- in the other cases. He has not preferred any appeal. As such I feel the ends of justice would be met if a fine of Rs. 500/- is imposed on the respondent in each of the cases and in default to undergo rigorous imprisonment for one month. As such the appeals are allowed. Time for payment of fine is four weeks from the date of this order.