

(1987) 02 DEL CK 0060

In the Delhi High Court

Case No : Criminal Appeal No. 244 of 1976

Prem Singh Chawla

APPELLANT

Vs

Director of Enforcement

RESPONDENT

Date of Decision : 09-02-1987

Acts Referred:

Foreign Exchange Regulation Act, 1947 — Section 50

Citation : (1988) 64 CompCas 877 : (1987) CriLJ 1579 : (1987) 12 DRJ 303 :
(1987) 12 ECC 35 : (1987) ILR Delhi 151

Hon'ble Judges : M.K. Chawla, J

Bench : Single Bench

Advocate : E.C. Aggarwal, Neeraj Chawla, Rekha Sharma and S.P. Singh, for the Appellant;

Judgement

M.K. Chawla, J.

(1) On receipt of certain information about the contravention of Foreign Exchange Regulations by Prem Singh Chawla, the present appellant, his residential premises near Panipat was searched by the Officers of the Enforcement Directorate on 19-1-1971, as a result of which, apart from Rs. 4,600.00 in cash, several documents, account books, diaries, etc. were seized. The appellant was interrogated with reference to the seized documents on that very day and subsequently also. On the basis of these statements, seized documents and further enquiries made from various quarters the appellant was issued the following three memos :-

1.Memo No. Ill (12)/71(SCN-1) dated 6-1-72 for having received Rs. 3,68,000.00 in contravention of Section 5(I)(aa) of Foreign Exchange Regulation Act.

2.Memo No. Iii (12)/71 (SCN-II) dated 6-1-72 for making 51 payments amounting to Rs. 2,54,700.00 in contravention of Section 5(I)(c) of the Foreign Exchange Regulation Act.

3.Memo No. III (12)/71 (SCN-III) dated 6-1-72 for placing to the credit of a person resident of outside India a sum of Rs. 4200.00 is contravention of Section 5(l)(d) of the Foreign Exchange Regulation Act.

(2) The appellant filed the reply to the three show cause memos. denying the allegations. The Department as well as the appellant produced witnesses during the course of the adjudication proceedings. The Special Addl. Director on the basis of the material on record came to the conclusion that the total transactions involved in the memo u/s 5(l)(aa) of the Act are 9 involving a sum of Rs. 3,68,000.00 and imposed a penalty of Rs. 45,000.00 . As against the contravention of Section 5(l)(c), the finding was that there are as many as 51 disbursements involving a sum of Rs. 2,54,700.00 for which a penalty of Rs. 2,55,000.00 was imposed. As regards the third, the appellant was held to have contravened the provisions of Section 5(1)(d) and imposed a penalty of Rs. 5,000.00 .

(3) Against this order, the appellant filed an appeal which was heard and disposed of by the Chairman of the Appellate Board on 14-5-1976. As against the first two memos, the penalty was reduced to a sum of Rs. 42,000.00 and Rs. 2,40,000.00 respectively while in the third memo, the penalty of Rs. 500.00 was imposed. The appellant is not satisfied with the outcome of appeal and has filed the present appeal before this Court.

(4) The first and the foremost contention of the learned counsel for the appellant is that even if the averments of the show cause memos, for the contravention of the provisions of the Act are admitted . to be correct, the authorities below could not have imposed the penalty of more than Rs. 5,000.00 for each memo, inasmuch as only one charge was framed for having received the amount of Rs. 3,68,000.00 and the disbursement of Rs. 2,54,700.00 to 51 persons. There is no averment in the first charge nor is there any evidence to show that this amount was received in 9 Installments. Similar is the case with regard to the second charge. In fact, without examining the persons to whom the alleged payments were made, the appellant could not have been held. liable for excess penalty. Further more, the authorities below went wrong in relying on the entries of the books of accounts without any corroboration from any independent source. The appellant also challenged the genuineness of the recovery of documents/books of accounts from his house which was conducted in the absence of any independent witnesses. Learned counsel for the respondent however, disputes the correctness of the submission and relies upon the provisions of Section 5 of the Act which fairly and squarely brings the case of the present appellant within its ambit. According to her, even if there is one charge of the receipt and disbursement of the consolidated amounts, but if the receipts and the payments have been made on different dates, and to different persons, the authorities below were justified in imposing the penalty on each of the amounts received and disbursed.

(5) I have considered the rival contentions of the parties and have gone through the record carefully. It is not disputed that the first charge relates to the receipts

of Rs. 3,68,000.00 from a non-resident otherwise than through the authorised dealer in contravention of provisions of Section 5(I)(aa). According to the Department, this amount was received in nine Installments. The first 7 Installments were proved from the appellant's statement recorded on 19th and 20th January, 1971 together with corresponding entries in the cash book/ diary. For the remaining two receipts of Rs. 5,000.00 and Rs. 2,800.00 , reliance is placed on the statement of the appellant dated 24-5-71. According to the learned counsel, if the appellant had admitted the receipt of this amount in nine Installments, the authorities below were justified in imposing the penalty of Rs. 45,000.00 for each receipt/transaction. For the second charge, the similar situation prevails, except one distinction that Along with the memo, the Department also filed the Annexures showing the payment of various amounts to 51 persons. This list allegedly was prepared from the entries. found in the diary.

(6) The finding of fact given by the courts below to my mind is in? conformity with law and facts proved on the record. Even though the appellant has challenged the correctness of the procedure adopted in the recovery of the account books but the learned Counsel has not been able to over come the convincing evidence of the Panch witnesses, who not only admitted their signatures on the recovery memo, but also the documents seized from the house of the appellant. It is not the case of the appellant that the documents. were either planted by the Department or they belonged to somebody else. Recovery under these circumstances is valid.

(7) Learned counsel then contended that the bare entries in the books: of accounts without proof cannot be treated or considered as an evidence in the case. Reliance was placed on Section 34 of the Evidence Act. In order to apply this provision, learned counsel submits, it would be essential to establish that the account books were regularly kept in the ordinary course of business. The entries made in such account books would then become relevant and might be considered Along with other evidence to charge any person with liability but these entries alone .would not be sufficient to fasten the liability on the appellant. The entries in the account books are, Therefore, merely corroborative and primary evidence is always needed to prove the transaction mentioned therein. It is also urged that the department cannot merely rely upon the existence of certain entries. It has further to show by some independent evidence that the entries represent real and honest transaction and that the monies were received or paid in accordance with those entries.

(8) This argument prima-facie is quite contrary to Section 71 of the Foreign Exchange Regulation Act, which lays down that where any person is prosecuted or proceeded against for contravening any of the provisions of this Act or any rule, direction or order made there under, which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him. Similarly, presumption of correctness. to the documents recovered/seized from the custody or control of any person. can also be raised.

Heavy onus lay on the accused to prove the contrary. In this case, no attempt has been made by the learned counsel for the petitioner to show as to how the department was under an obligation to abide by the strict rules of evidence or for that matter an adverse presumption can be raised against the department. If a fact, the statement of the accused coupled with the entries in the account books and other related documents, recovered from his possession clearly proves the borrowing and lending of foreign exchange/monies to different persons and at different times. In such like cases, it is just not possible for the department nor they are required under law to examine each and every witness, who allegedly received the amount as otherwise they themselves would be liable for prosecution. In spite of this difficulty the department did summon and examine few of the witnesses, who during the adjudication proceedings, admitted the receipt of the amount from the appellant and corroborated the entries appearing against their names. 306 in the account books. This was the maximum the respondent could do, and they succeeded to establish their case. As regards the first charge of the receipt of Rs. 3,68,000.00 in nine Installments, the Department not only placed reliance on the admission of the appellant but also found corroboration from the account books as well as the letters of the non-residents. The crux of the matter is that the appellant has not been able to furnish any valid Explanation to the receipt of this amount and its disbursement to 48 persons. Admittedly he had no authority or permission from the competent quarters to accept the amounts from a non-resident Indian, and on his instructions to distribute the same to various persons. The appellant has failed to discharge the heavy onus and the courts below in my opinion, were justified in raising the presumption against the appellant. No interference in this finding is called for.

(9) Learned counsel then submitted that the charge being for a consolidated amount, the penalty under the Act could be imposed on one count, even though the receipts and disbursements are alleged to have been made to different persons. Reliance in this behalf is placed on the unreported D.B. judgment of Madras High Court in K. Ganapathy v. Director, Enforcement Directorate, Writ Appeal No. 278 of 1958 (decided on 13-7-73). In that case, in the charge u/s 5(IXaa), only the amount of Rs. 60,000.00 was mentioned. The Department, however, proved the receipt of this amount in two Installments of Rs. 30,000.00 each. Hence the department levied the penalty of Rs. 10,000.00 . This order was set aside on the short ground that the Enforcement Directorate having treated the receipt of the amount of two Installments of Rs. 30,000.00 each, as one count as is clear from the memo, the Director was not entitled to treat the same as two counts and levy the penalty of Rs. 5,000.00 each. According to the learned counsel, this judgment fairly and squarely applies to the facts of this case. The department under these circumstances could not impose the penalty for more than Rs. 5,000.00 each for the three memos.

(10) On careful consideration, I do not find myself in agreement with the counsel for the appellant. This judgment is quite distinguishable from the facts of the

present case. Firstly, in the second memo, itself there is mention of 51 disbursements. Moreover, the department has annexed the list of 51 persons to whom the payments have been made. The appellant was duly given the notice of the case by the department which he failed to answer. In the first memo, the appellant himself has admitted the receipt of the total amount of Rs. 3,68,000.00 in nine Installments on different dates and proved the same from the entries in his hand in the account books maintained by him in the regular course of business. The appellant has not challenged the correctness of any of these entries and as such at this stage it cannot be said that because the consolidated amount of Rs. 3,68,000.00 was mentioned in the memo, the penalty could only be of Rs. 5,000.00 .

(11) In his last submission, the learned counsel contended that the amount of penalty imposed on the appellant is very much on the higher side. He pointed out that in the memo, annexed with the second charge, many of the recipients are in the range of Rs. 1,000.00 to Rs. 2,000.00 . There was no Justification for imposing the maximum penalty of Rs. 5,000.00 for each of the disbursements. According to learned counsel, it is a fit case in which at least the penalty be reduced to a minimum. Learned counsel for the respondent has opposed the prayer by alleging that u/s 50 of the Act, for every contravention, the accused is liable to such penalty not exceeding three times the amount or value involved in any contravention or Rs. 5,000.00 whichever is more. No discretion is left with the court to reduce the penalty, once the authorities below on facts have come to a definite conclusion about the No... of contraventions.

(12) This very controversy was the subject matter of a decision reported as Sudershan Boury and etc. Vs. The Director of Enforcement, New Delhi, . While interpreting the provisions of Section 50" it was held as under :-

" THUS, Section 50 speaks of maximum penalty to be levied. That being: five times the amount or value involved in any such contravention or Rs. 5,000.00 whichever is more.- When the Section speaks of the maximum penalty ,it is obvious that the authority has the discretion to impose any fine less than that also. This discretion which is conferred on the authority by the Section has to be exercised in a judicial manner and the exercise of such discretion is a question of law and it is needless for us to point out that the Supreme Court of India has been at pains to point out in recent years that sentencing is an important branch of law and that it is a complex process involving intricate questions of fact and law. That being so, we are satisfied that the present appeal where the quantum of penalty and exercise of judicial discretion are concerned ,involve questions of law and as such the appeals are entertainable by this Court."

Applying the said ratio, the penalty on the accused was reduced to a half. I am in entire agreement with the ratio-decided of the Judgment of the Division Bench of Karnataka High Court. Learned counsel for the respondent has not been able to distinguish the same or cite any contra-authority. Keeping in view the facts that very small amounts were given to numerous persons, under a bonafide

belief, in my opinion, the interest of justice will be fully met if the amount of penalty is reduced by Rs. I lakh.

(13) With these observations, the appeal is partly accepted. The amount of penalty imposed by the department on the appellant is reduced to" Rs. 1,82,500.00 .