

(1981) 02 KL CK 0009
In the High Court Of Kerala
Case No : M.F.A. No. 15 of 1977

P.S. Barkathali

APPELLANT

Vs

The Director of Enforcement, New Delhi

RESPONDENT

Date of Decision : 04-02-1981

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 230(1)
Evidence Act, 1872 — Section 24, 25
Foreign Exchange Regulation Act, 1947 — Section 19A, 19E, 19F

Citation : AIR 1981 Ker 81 : (1983) 54 CompCas 46

Hon'ble Judges : U.L. Bhat, J;G. Viswanatha Iyer, J

Bench : Division Bench

Advocate : P.K. Shamsuddin, K.A. Abdul Salaam and A.A. Abdul Hassan, for the Appellant; T.R.G. Warriar, for the Respondent

Final Decision : Dismissed

Judgement

Bhat, J.—This is an appeal u/s 23 EE of the Foreign Exchange Regulation Act, 1947 (for short the Act) directed against the order passed in an appeal u/s 23-E of the Act.

2. The appellant is a resident of Cho-wghat in Trichur District having properties, a house and a shop in the area. His father, Saidali, is a resident of Malaysia. When he comes down to India he resides with his son. On the basis of information that the appellant was receiving compensatory payment in violation of Section 5 (1) (aa) of the Foreign Exchange Regulation Act, 1947, the house and shop were searched on 16-8-1972 by the Officers of the Calicut Unit of the Directorate of Enforcement, in the presence of the appellant's father but in the absence of the appellant. Foreign currency notes as well as certain documents were seized. On the same day, Saidali gave a statement admitting that he had been sending money through unauthorised agents to his son the present appellant between 1966 to 1972. Subsequently, the appellant was served notice u/s 19-E of the Act for the purpose of recording his statement. The statement

was so recorded on 27/9/72; the appellant admitted that he had been receiving such payments from abroad through unauthorised agents. On the next day he appears to have sent a letter to the Deputy Director of Enforcement, Madras, raising objections in regard to this statements. As per memorandum dated 7-8-1973 the Additional Director attached to the Directorate at New Delhi issued a show cause notice to the appellant (as well as to Saidali) alleging that he had been receiving such payments as alleged in contravention of Section 5 (1) (aa) of the Act without any authority and rendering himself liable u/s 23 (1) (a) of the Act and directing him to show cause why adjudication proceedings u/s 23-D of the Act should not be held against him and why Rupees 31000/- blocked in his S. B. A./C. No. 4 of 1970, with the Catholic Syrian Bank, Trichur, should not be confiscated u/s 23 (1B) of the Act. The appellant submitted a statement dated 30-11-1973, pleading his innocence and also challenging the statement dated 27-9-1972. The memorandum also informed him that inspection of documents relied on by the department can be had after fixing an appointment. It appears that an inspection was requested, allowed and availed of in the course of proceedings. The matter was heard and the Additional Director passed order holding that the appellant has violated Section 5 (1) (aa) of the Act and rendered himself liable u/s 23 (1) (a) of the Act, Accordingly, a penalty of Rs. 5000/- was imposed on him. Further, the amount of Rs. 31,000/- lying in Bank was also directed to be confiscated u/s 23 (1B) of the Act as the amount was found to be involved in the violation of Section 5 (1) (aa) of the Act.

3. In appeal, the Foreign Exchange Regulation Appellate Board, confirmed the finding and penalty imposed u/s 23 (1) (a) of the Act but set aside the confiscation ordered and remanded the proceedings for fresh adjudication on the question of confiscation. The appellant is not aggrieved by the order of remand regarding confiscation but challenges only the confirmation of the finding in regard to the violation of Section 5 (1) (aa) of the Act and the penalty imposed.

4. It has to be noticed that the appeal to this Court provided u/s 23-EE of the Act is limited only to questions of law arising in the proceedings.

5. The appellant is a resident of Chowghat in Trichur District. He is an agriculturist and a businessman. His father Saidali is a resident of Malaysia. It is alleged that during the period 1966-72, the appellant received payments totalling Rs. 65,000/- from persons other than the authorised dealers of the foreign exchange by order and on behalf of his father Saidali, a resident of Malaysia, without an appropriate exemption from Reserve Bank of India and in violation of Section 5 (1) (aa) of the Act. Though Saidali is a resident of Malaysia, on Ms visits to India he resides with his son at Chowghat. On 16-8-1972, the house as well as the shop of the appellant was searched by the Officers of the Calicut Unit of the Directorate on the basis of information that the appellant was receiving compensatory payments. Foreign currency notes were found in the house. Currency notes are said to belong to Saidali. On the same day he gave a statement wherein he stated that he has been sending money unauthorisedly to

his son, the present appellant. In view of this statement, a notice was issued u/s 19-E of the Act to the appellant. In response, he appeared and gave a statement on 27-9-1972, wherein he made specific admission of the receipt of money through unauthorised sources under instructions from his father.

6. If the contents of the statements given by the appellant and his father are to be accepted as true, there can be no doubt that the contravention alleged has been established beyond all doubt. However, according to the learned counsel for the appellant, these statements are inadmissible and at any rate, should not have been relied upon. The appellant gave his statement on 27-9-1972. There is no dispute on 28-9-1972 he sent a letter to the Joint Director at Madras raising objection about the statement. According to the appellant, this is a case where "confession" was "retracted" on the very next day and this was not noticed by the Additional Director who held adjudication proceedings. It is true that the Additional Director did not note that "retraction" was made on the very next day. On the other hand, he proceeded on the basis that the "retraction" was made only in the statement dated 30-11-1973, submitted by the appellant in response to the show cause memorandum. But the order of the Additional Director has merged in the order of the Appellate Board. The Appellate Board has taken due notice of the fact that on 28-9-1972 the appellant had raised objections regarding the statement dated 27-9-1972. Therefore, the fact that the Additional Director did not notice the alleged "retraction" made on the next day is of no moment. That is also not a question of law requiring attention at the hands of this Court.

7. It is argued that the statement dated 27-9-1972, is a "confession" hit by Sections 24 and 25 of the Indian Evidence Act. Section 25 bars proof of a confession made to a Police Officer as against a person accused of an offence. Can it be said that the officer of the Enforcement Directorate who issued a notice u/s 19-E of the Act and recorded the statement of the appellant is a Police Officer as contemplated u/s 25 of the Evidence Act? We have to examine the scheme of the Act to understand the powers of an Officer discharging his duties under the Act. Section 19-A of the Act deals with power of an Enforcement Officer to search suspected persons. Section 19-B deals with power of an Enforcement Officer to arrest persons suspected of being guilty of any offence punishable under the Act. On such arrest the person arrested must be informed of the ground of arrest and produced without unnecessary delay before a Magistrate. The provision also deals with the power of Officer to release a person on bail or otherwise. Section 19-C deals with power of an Officer to search a vehicle under certain circumstances. Section 19-D deals with power of an officer to search premises and seize the articles secreted. Section 19-E authorises the Director, during the course of an enquiry in connection with any offence under the Act, to require any person to produce any relevant document and to examine any person acquainted with the facts and circumstances of the case. Section 19-F provides power in the Director to summon any person whose attendance he considers necessary to give evidence and produce document in connection with any enquiry being held

under the Act. It also provides that the person so summoned shall be bound to attend and produce the documents and state the truth upon any subject in respect of which he is examined. The proceedings shall be deemed to be a judicial proceeding for the purpose of Sections 193 and 228 of the I.P.C. Section 19-G authorises an officer to retain documents produced in the course of the proceedings.

8. An officer under the Act is not an officer in charge of a police station. No doubt he has certain powers which are similar to the powers of a Police Officer. The Act does not confer on him the power to lodge a report before a competent Magistrate u/s 173 of the Cr. P. C. The only way an officer under the Act could approach a Magistrate is under proviso to Section 23D(1) of the Act and that could only be by filing a complaint. He is not competent to submit a report u/s 173 of the Code. The powers vesting in such an officer under the Act are not sufficient to equate him with a Police Officer. Powers of investigation as contemplated under the Cr. P. C. are not conferred on an officer acting under the Act. Hence he cannot be said to be a Police Officer. It has been repeatedly held by the Supreme Court that a Customs Officer discharging duties under the Customs Act or the Sea Customs Act is not a Police Officer coming within the purview of Section 25 of the Evidence Act (vide *Romesh Chandra Mehta Vs. State of West Bengal*,), *Percy Rustomji Basta Vs. State of Maharashtra*,) and *Balkrishna Chhaganlal Soni Vs. State of West Bengal*,). On the same analogy, it has to be held that an Officer recording a statement of a person under the provisions of the Act is not a Police Officer for the purposes of Section 25 of the Evidence Act.

9. The applicability of Section 25 of Evidence Act is also negated for another reason. On the date on which the statement was recorded the appellant was not a person accused of any offence. A person can be said to be accused of an offence only when an F.I.R. is lodged against him before a competent Magistrate under the provisions of the Criminal Procedure Code or where a complaint is lodged against him before a competent Magistrate. The mere fact that the person is arrested or is questioned or that some proceedings are initiated under the Act under the belief that he has violated the provisions of the Act is not sufficient to hold that he is accused of an offence. If he is not accused of an offence, Section 25 of the Evidence Act will not apply.

10. Section 24 of Evidence Act states that a confession made by an accused person is irrelevant in a criminal proceeding if it appears to the Court that the confession was obtained under circumstances mentioned in the Section. This section will also apply only to a confession made by a person who was at that time an accused person. On 27-9-1972, the appellant was not an accused person. Adjudication proceedings are not criminal proceedings, though they may be quasi criminal in nature. Hence the applicability of Section 24 of the Evidence Act also has to be negated.

11. Therefore, the principles governing the admissibility of a confession of an

accused person and the manner in which a retracted confession is to be dealt with by a Court of law, cannot be applied to the instant case. The principle that a retracted confession- though it is not on a par with evidence of an accomplice or such other tainted evidence, requires corroboration to satisfy the conscience of the Court that the statement is true, will not apply to the statement recorded under the provisions of the Act.

12. However, this does not mean that such a statement can be freely relied on like any other piece of evidence in adjudication proceedings under the Act. It is true that whenever a statement is challenged as having been obtained by unfair and unlawful means, law cannot presume that it has been so obtained. It must be shown to have been obtained by such unfair means and is not voluntary. In such a case, the contents of the statement can have no value. Even when, as a matter of fact, it is not shown that the statement is so vitiated, the authority which is called upon to accept the statement as evidence must bear in mind the possibility of such unfair means having been used and approach this evidence with caution.

13. Learned counsel for the appellant also submitted that the statement of the appellant was recorded by use of force or coercion. Such a ground has been taken in reply to the show cause notice where the appellant stated as follows.

"After a few days I received a summon to present in the presence of Assistant Enforcement Directorate, Kozhikode, on 26th September, 1972 at 11.30 a. m. and as such myself gone there and presented in obedience to their summon, but they did not question me on the same day even though I was stayed in the night. On 27-9-1972, again I presented there and waited up to 7.45 p.m. and afterwards they threatened and compelled me to write some statements and sign, which was not my own intention and as such I wrote according to them, but I could not remember what they said nor even allowed me to read what I stated as per their choice, and the officer induced and compelled me to put my signature in their said statement and I have no other alternative. I put my signature in it. When I asked them to show a copy of it they did not give me the same".

But in his letter dated 28-9-1972 to the Joint Director at Madras, he had an entirely different story to tell. He stated therein:

".....accordingly I appeared before him for giving some answers and statements, But he did not asked any questions nor any statements on the same day though I waited up to evening. In the following day from morning till evening up to 7.45 p.m., I was waiting there and he took my statements without my own consciousness but the said statements were not mine. I am unaware of the matters included in the above statement. I have not been given any true copy of my statements. When asked to issue one copy they frightened and threatened me.....".

14. It may be seen in his earliest version he did not say his signature was taken

or his statement was recorded under threat or compulsion. He only alleged that he was threatened when he asked for a copy of the statement and he gave the statement without really knowing the contents. That is quite different from stating that he was compelled to affix his signature or give his statement under threat or compulsion. Such a case was put forward not on the earliest occasion but only about a year later in response to the show cause notice. It was only on 30-11-1973 that he, for the first time, stated that he was compelled and threatened to put his signature to a statement. The appellant also did not place any material before the authorities or before this Court to lend strength to his belated allegation about the statement having been recorded by compulsion or threat. The statement has been recorded by an officer of a fairly high standing. Courts will not readily infer that any unfair means has been used to record a statement unless there is some material or circumstance which would lend strength to such a case. The way in which the appellant has been treated would indicate the contra. He was not questioned immediately after his house was searched. He was given due notice or summons to appear to give a statement. On the first day he was not asked any question. It was only the next day that he was questioned. Nothing was done in a hurry. The contents of the statement also tally with the contents of the statement which his father gave earlier. There is nothing to indicate that the statement was not voluntary.

15. Learned counsel for the appellant strenuously contended before us that his client was not made aware of Saidali's statement and the same was not put to him. Learned counsel went to the extent of stating that the statement was not among the documents of which inspection was allowed to the appellant. If this contention is true, it is a matter of which serious notice has to be taken. However we find that no such complaint was made before the appellate Board or in the memorandum of appeal preferred in this Court. The order of the Additional Director specifically refers to the statement given by Saidali and the contents of the statement which go against the appellant. In fact a copious extract from the statement given by Saidali is seen in the order. If really this statement had not been brought to the notice of the appellant and if that statement was not among the documents of which inspection was allowed subsequently, one would expect the appellant to raise it as a specific ground in the memorandum of appeal before the appellate Board. We do not find any such ground as having been raised. The memorandum of appeal objected to reliance being placed on the statement of Saidali not because the statement was not made known to the appellant but because the statement also was alleged to be "retracted". In the memorandum of appeal filed in this Court; it is alleged that Saidali's statement should not have been relied on. But the reason urged is not. that the statement was not made known to the appellant but because it was given in connection with another case and was "retracted". Thus, it is clear at no stage till the learned counsel for the appellant urged it in the course of his arguments was the ground taken that Saidali's statement was not made known to the appellant at the appropriate time. We are not therefore prepared to accept the contention that Saidali's

statement was used against the appellant without his being informed that such a material is sought to be used against him.

16. We find from the order of the-appellate Board that it approached the statement of the appellant with the required degree of caution. That made the Board see if there is some other material to support the admission in the appellant's statement. The Board found such support from the contents of the statement given by the appellant's father Saidali. Having gone through the two statements we have no doubt that the contents of the statement of Saidali fully support the admissions contained in the statement of the appellant and the two taken together are sufficient to establish the charge against the appellant.

17. In a case where there is some evidence against the appellant the question whether the evidence would be sufficient or not is not a question of law arising for consideration in an appeal u/s 23-EE of the Act. However, we have gone into the matter out of deference to the strenuous and vehement arguments of Shri Shamsuddin, counsel for the appellant. The order of the appellate Board does not deserve interference,

18. Before parting with the case we would like to dwell upon an important aspect of the adjudication proceedings. We have rejected the contention raised at the Bar by the learned counsel for the appellant that his client was not informed about the statement of Saidali and that it has been used against him in such a manner as to take him by surprise. We have rejected this argument not on merits but on the ground that such a contention has not been taken before the appellate Board or in the memorandum of appeal filed in this Court. We deplore any possibility of any material or evidence being used against a person, facing adjudication proceedings without such material being put to him fairly and squarely. The material against him must be put before him in such manner that he can properly defend himself. It has to be remembered that the proceedings are quasi-criminal in character and penalties which can be imposed against such a person are really serious. Unfortunately the rules dealing with adjudication proceedings are not sufficiently explicit in this matter. We would suggest that along with the memorandum or show cause notice, instead of merely saying that inspection of documents can be had, the concerned officer must give at least a list of such documents sought to be relied on. It would even be desirable to give copies of the documents to him. However, where there are practical difficulties standing in the way of copies being given, at least a list of such documents could be provided to the person, so as to alert him regarding the materials against him. If at least this precaution is not taken, whenever a complaint is raised that a person facing an adjudication proceedings was not aware of the material against him, the complaint may be treated as justified unless records show that the material was as a matter of fact placed before the person. In the result, the appeal is dismissed.