

(2014) 09 DEL CK 0126

In the Delhi High Court

Case No : Crl. A. 450 of 2011 & Crl. M.A. 4157 of 2011

S.K. Mittal

APPELLANT

Vs

The Director, Enforcement Directorate

RESPONDENT

Date of Decision : 15-09-2014

Acts Referred:

Customs Act, 1962 — Section 108

Foreign Exchange Regulation Act, 1973 — Section 40, 6(4), 6(5), 72, 8(1)

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 67

Citation : (2014) 4 Crimes 125 : (2015) 215 DLT 409

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Manoj Ohri, Senior Advocate, Uttam Dutt and Siddhartha Kalita, Advocate for the Appellant; Anuj Aggarwal and Niti Jain, Advocate for the Respondent

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, J.—This appeal is directed against the order dated 24th December 2010 passed by the Appellate Tribunal for Foreign Exchange ("AT") in Appeal No. 283 of 2009 confirming the adjudication order ("AO") dated 24th March 2004 finding the Appellant guilty of the offence under Sections 6(4), 6(5), 8(1), 9(1)(a) and 9(1)(f)(i) of Foreign Exchange Regulation Act, 1973 ("FERA") and imposing a penalty of Rs. 5,00,00,000 on him.

2. According to the Enforcement Directorate ("ED"), Mr. Subhash Sethi, a resident of 121, Oakdale Drive, Heald Green, Cheshire, SK 3 SN UK, was maintaining a Non Resident External ("NRE") Account No. 320169733 with the American Express Bank Ltd. ("AMEX Bank") at Connaught Place, New Delhi. The Mandatee to the said Account was Mr. Umesh Mendiratta. It appears that on 18th May 1995, the ED, in the course of its investigation, recorded the statement of Mr. Mendiratta u/s 40 FERA in which he stated that he was an accounts clerk in the chartered accountant firm of Suresh K. Mittal & Co. and drawing a salary of

Rs. 3,000 per month. He stated that although he did not know Mr. Subhash Sethi, he had been instructed by his employer, Mr. S.K. Mittal, the Appellant herein, to become the Mandatee of the said account. He claimed to have signed the account opening form and the mandate card. He stated that he had to fill-up the vouchers and sign the cheques and issue slips for pay orders ("POs"), whenever instructed by the Appellant. He was asked to explain the deposit of Rs. 59,31,000 in the said account in the foreign currency. He stated that, after seeing the original deposit slips, some of the slips were in his handwriting and some were in the handwriting of the Appellant. When asked why the POs were issued to various persons, he explained that as certain persons wanted to get their black money converted into white, the Appellant used to sell the POs at a premium of 10% to 14%. The Appellant used to collect the Indian currency in advance and thereafter got the POs issued from the account of Mr. Sethi and hand over the same to the persons concerned.

3. The ED recorded the statement of the Appellant on 25th May 1995. He claimed to have met Mr. Sethi when he (Mr. Sethi) opened the NRE account with AMEX Bank. When asked specifically about operating the NRE Account for "depositing the cash foreign currency in the said account", he replied "I do not remember. This is very vague question." The Appellant was shown the original credit slips for the deposit of foreign currency but he denied that they were in his handwriting. He stated that he and his wife received the NRE gifts from Mr. Sethi. He could not, however, provide the details since the files had been seized by the ED. When asked to write certain names in capital letters, he declined to do so.

4. A letter dated 7th August 1995 was received by the ED from Mr. Sethi in which, inter alia, he stated that he had met Mr. Mittal in connection with a Portfolio Management scheme which according to Mr. Mittal, would assure an annual return of 30%. According to Mr. Sethi, at the instance of Mr. Mittal, he opened an NRE Account but stated that he could not deposit any foreign currency into the said account. He claimed to have only signed the first cheque and the cheque deposit requisition form to enable Mr. Mittal to invest on his behalf. He stated that "apart from these papers, I did not sign anything else." As regards the debits in the said NRE Account, he stated "I am totally unaware of them and I have at no stage gifted or parted with any money through this account simply because I had no money in that account and further I have never remitted any money from England." He also stated "I have never executed any gift deeds etc. to anyone for the simple reason that I have never gifted any amount to anyone." There was no further communication from Mr. Sethi to the ED.

5. Then, on 9th October 2000, AMEX Bank provided the ED with the statement of certain NRE accounts which included the NRE Account of Mr. Sethi. The statement showed that the NRE Account had been opened on 10th February 1993 and was closed on 12th October 1994. It gave the amount of US Dollars and Great Britain Pounds which was remitted into the account and the equivalent amount in Indian Rupees.

6. The ED issued a Memorandum dated 23rd April 2002 to the Appellant, Mr. Sethi, Mr. Mendiratta and AMEX Bank. As far as the Appellant is concerned, it is not in dispute that the said Memorandum was ultimately dispatched on the last date of the sunset period, i.e., 30th May 2002 and received on 31st May 2002. The allegation in the Memorandum was that the NRE Account of Mr. Sethi was misused by the Appellant and Mr. Mendiratta and that the Appellant in association with Mr. Mendiratta "used to arrange inward remittances from various persons outside India other than the A/c holder Sh. Subhash Sethi himself and the said inward remittances have been credited into the said NRE A/c time to time in the year 1993; that Sh. S.K. Mittal in association with the said Sh. Umesh Mendiratta made disbursements to various persons through Cheques/DDs/Pos by debit to the said NRE A/c from American Express Bank, New Delhi against premium @ 10% over & above the value of the said instruments from the recipients of such instruments in the garb of gifts and that they used to issue gift deeds to such beneficiaries which got pre-signed by the said NRE A/c holder Sh. Subhash Sethi." The Memorandum further alleged that from the records of AMEX Bank, it was revealed that there was total foreign inward remittances of Rs. 5,92,95,895 in the NRE Account of Mr. Sethi which was arranged by the Appellant in association with Mr. Mendiratta "during the period between 22nd February 1993 to 11th October 1993 from various persons out of India other than the account holder Sh. Subhash Sethi himself." A list of 59 such credit entries in the account of Mr. Sethi, totalling Rs.5,92,95,895 was set out in the Memorandum. The Memorandum/ Show Cause Notice ("SCN") alleged that there has been a contravention of Section 8(1), 9(1)(a) and 9(1)(f)(i) FERA. The noticees were directed to show cause as to why they should not be proceeded against.

7. At the outset, it requires to be noticed that by an order dated 18th December 2009, whereby the Division Bench ("DB") in WP(C) No. 7144 of 2002 allowed the batch of writ petitions, including that of Standard Chartered Bank (which took over AMEX Bank) quashing the proceedings arising out of the very same SCN qua the said Bank.

8. In the AO dated 24th March 2004, it was held that: (a) The Appellant had arranged foreign inward remittances in the NRE Account of Mr. Sethi. Such remittances were from illegal channels and "must have been organised through black money of the recipients of the gifts"; (b) the Appellant had "arranged and acquired foreign exchange equivalent to Rs. 5,92,95,895 outside India for the credit in the NRE Account of Shri. Sethi from abroad without the general or special permission of Reserve Bank of India (RBI)"; (c) The aforementioned amount had been acquired by the Appellant in foreign exchange equivalent from abroad and deposited in the NRE Bank Account of Mr. Sethi and no evidence was produced for the lawful possession of "such huge amount of foreign exchange." Consequently, the AO held that the Appellant had contravened Section 9(1)(a) FERA and Mr. Sethi had abetted him by opening the NRE Account and "giving pre-signed gift deeds"; (d) the Appellant having arranged foreign exchange

equivalent to the above amount, in the NRE Account of Mr. Sethi had contravened Section 9(1)(f)(i) FERA in which again Mr. Sethi abetted; (e) Mr. Mendiratta had abetted the Appellant in getting the foreign exchange from abroad, getting it credited to Mr. Sethi's NRE Account and then withdrawals from the said Account. Therefore, he had contravened Section 8(1) and Section 9(1) (a) and 9(1)(f)(i) FERA; and (f) AMEX Bank had violated para 13B 22(b) of the Exchange Control Manual, 1993 insofar as the credits of foreign exchange in the NRE Account of Mr. Sethi were concerned. AMEX Bank was also found guilty of contravention of Section 9(1)(a) and Sections 6(4), 6(5) and 8(1) FERA. However, the AO, as far as AMEX Bank is concerned, does not survive in view of the above order of the DB. As a result, the AO imposed a penalty of Rs. 1,00,00,000 each on Mr. Sethi and Mr. Mendiratta and Rs. 5,00,00,000 on the Appellant.

9. Aggrieved by the aforementioned order, the Appellant file Appeal No. 283 of 2009 before the AT. By the impugned order dated 24th December 2010, the AT concluded that the statement of Mr. Mendiratta made it clear that the Appellant used to purchase foreign exchange from various persons in black and used to deposit it in the account of Mr. Sethi and then issue cheques to persons after getting the commission. The account statement of AMEX Bank also showed cash deposits in foreign currency. The AT concluded that the statement of Mr. Mendiratta made it clear that the said amount was deposited either by the Appellant or with his help.

10. This Court has heard the submissions of Mr. Manoj Ohri, learned Senior counsel for the Appellant and of Mr. Anuj Aggarwal, learned counsel for the ED.

11. In the first place, it is not clear why, after recording the statements u/s 40 FERA of the Appellant and Mr. Mendiratta in May 1995, the ED waited till the last date of the sunset period, i.e., 30th May 2002 for issuing the Memorandum. The second feature is that the only relied upon documents in the Memorandum are the statements made by the Appellant and Mr. Mendiratta, the letter dated 7th August 1995 of Mr. Sethi and the statement of account provided by the AMEX Bank. In other words, the ED does not appear to have undertaken any further investigation in the seven years since it recorded the statements. In particular, there was no attempt made to undertake investigation outside India to find out the names of the persons who had made remittances into the NRE Account of Mr. Sethi.

12. A perusal of the account statement shows that the credit entries were of two types- one was cash deposit of foreign exchange and the other was inward remittances through banks outside India. The subject-matter of the Memorandum was not the cash deposits made in the NRE Account but the inward remittances. The specific allegation in para 4 of the Memorandum is that the total foreign "inward remittances of Rs. 5,92,95,895 were arranged to be received in the NRE Account No. 320169733 of Sh. Subhash Sethi by Sh. S.K. Mittal in association with Umesh Mendiratta during the period between 22nd

February 1993 to 11th October 1993 from the various persons outside of India other than the account holder Sh. Subhash Sethi himself."

13. Section 8(1) FERA envisages two kinds of acquiring, borrowing or selling off foreign exchange by a person resident in India without the general or special permission of the RBI. One is purchasing or otherwise acquiring or borrowing foreign exchange in India through a person other than an authorised dealer. The other is purchasing or acquiring or borrowing foreign exchange "outside India" through a person other than an authorised dealer. In the present case, the allegations in the SCN are that the Appellant arranged for foreign exchange outside India and had them inwardly remitted into the NRE account of Mr. Sethi without the general or special permission of the RBI.

14. In order to substantiate the charge u/s 8(1), the ED has relied upon three pieces of evidence. The first is the statement of Mr. Mendiratta which on the face of it is exculpatory inasmuch as Mr. Mendiratta claims not to have any knowledge of the inward remittances into the NRE account. Such an exculpatory statement by a co-noticee can hardly have any value and cannot be used to fasten the liability on the other noticees. In *Union of India (UOI) Vs. Bal Mukund and Others*, , the Supreme Court, in the context of a confessional statement u/s 67 of the Narcotics Drugs and Psychotropic Substances Act, 1985 held that the statement by a co-accused, implicating the another co-accused, cannot, ipso facto, be considered as substantive evidence in order to form the basis of a conviction. It was important to first analyse the evidence against the accused excluding such confession altogether and "see whether, if it is believed, a conviction should be sufficiently based on it." Recently, in *Ram Lal Mehta v. Director of Enforcement* (decision dated 11th March 2014 in Crl. A. No. 241 of 2008), it was held by this Court as under:

"14. Therefore, for the statement by one notice u/s 40 FERA to be used as evidence against another co-noticee it must be shown that the said statement inculcates the person making it. Otherwise such statement has no value whatsoever. Shri Datta referred to the decision in *K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin*, to point out that the statement made before the customs officials u/s 108 of the Customs Act is admissible evidence. While that proposition is unexceptionable, and would apply to statements made to the ED officials u/s 40 FERA, the question really is how far such statements can be used as evidence against the co-noticee. The law as explained in *Union of India v. Bal Mukund* is very clear that unless the statement inculcates the maker of the statement, apart from the co-noticee, it cannot be used against the co-noticee."

15. It is, therefore, not safe, in the present case, to rely on the exculpatory statement made by Mr. Mendiratta. Even otherwise, his statement does not implicate the Appellant as far as the inward remittances are concerned.

16. As regards the letter dated 7th August 1995 of Mr. Sethi, Mr. Ohri is right in

his contention that the said document has not been authenticated u/s 72 FERA read with the Foreign Exchange Regulations (Authentication of Documents) Rules 1976. This Court in Jain Engineering Co. Vs. Enforcement Directorate, and V.K. Chawla Vs. Special Director of Enforcement, Enforcement Directorate, held that such evidence obtained without complying with the mandate of Section 72 FERA cannot be relied upon in adjudication proceedings under FERA.

17. There is another aspect of the matter which has been missed both by the AO as well as the AT concerning the scope of the proceedings themselves. The cash deposits in the NRE account were not the subject-matter of the Memorandum and yet that was gone into by the AO and the AT to find contravention of Section 8(1) FERA. There was no statement of Mr. Mendiratta to show that any foreign exchange had been purchased in India by the Appellant and then deposited into the NRE account. The Memorandum itself was about the Appellant having arranged foreign exchange outside India. Mr. Sethi's letter was also exculpatory in that regard. He claimed to have no knowledge of any remittances in his account. Although the remittances were in the form of inter-bank transfers, no effort was made by the ED to ascertain the identities of the persons or entities who had made such remittances. In other words, in the absence of any investigation in that regard, there was no substantive material to bring home the contravention of Section 8(1) FERA against the Appellant.

18. Mr. Aggarwal referred to the other proceedings involving another SCN against the Appellant herein. However this is impermissible in view of the decision of the Supreme Court in GTC Industries Limited Vs. Collector of Central Excise, New Delhi, where it was emphasised that "each show cause notice must be limited to the case that is made out therein.... It is not within the jurisdiction of the Tribunal to direct otherwise; to do so is to go beyond its purely adjudicatory function."

19. Therefore, the Court is of the view that the AO dated 24th March 2004, and the impugned order of the AT to the extent they hold the Appellant liable for contravention of Section 8(1) FERA, cannot be sustained in law.

20. As regards contravention of Section 9(1)(a) and Section 9(1)(f)(i), the Court is unable to appreciate how the said provisions are at all attracted in the facts and circumstances of the case. The said provisions require a person resident in India having to make "any payment for the credit of any person outside India." The beneficiary under both the provisions is a person resident outside India. The allegations in the Memorandum do not make out any such case even prima facie. It is not the case of the ED that Mr. Sethi, who in the facts and circumstances was the only person resident outside India, was the beneficiary of any of the transactions in his NRE account. Consequently, the impugned order cannot be sustained even as regards the question of contravention of Section 9(1) FERA.

21. For the aforementioned reasons, the AO dated 24th March 2004 and the impugned order dated 24th December 2010 of the AT are hereby set aside. Any

amount deposited by the Appellant pursuant to the AO shall be refunded to him in accordance with law within a period of eight weeks from today. The appeal is allowed in the above terms.