(2014) 02 DEL CK 0211

In the Delhi High Court

Case No : Criminal A. No. 77 of 2008

Suresh Kejriwal APPELLANT

Vs

Special Director, Enforcement Directorate RESPONDENT

Date of Decision : 03-02-2014

Acts Referred:

Contract Act, 1872 — Section 25(1)
Evidence Act, 1872 — Section 106 64(2) 9(1)(d)
Foreign Exchange Regulation Act, 1973 — Section 50 64(2) 9(1)(d)
Transfer of Property Act, 1882 — Section 122

Citation : (2014) 3 AD 358 : (2014) 141 DRJ 325 : (2014) 3 JCC 2172

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : R.K. Handoo, for the Appellant; P.K. Sharma, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—This appeal is directed against the order dated 13th November 2007 passed by the Foreign Exchange Appellate Tribunal (''AT'') dismissing the Appellant''s Appeal No. 784 of 2004 thereby confirming the adjudication order of 29th April 2004 passed by the Assistant Director (''AD''), Enforcement Directorate (''ED'') holding the Appellant guilty of violation of Section 9(1)(d) of the Foreign Exchange Regulation Act, 1973 (''FERA'') and imposing a penalty of Rs. 25,000 u/s 50 thereof. A show cause notice dated 25th June 1996 was issued to the Appellant stating that he had received a payment of Rs. 5 lakhs by a pay order dated 27th October 1994 from a Non-Resident External (''NRE'') Account No. 8 with State Bank of Indore, Green Park, New Delhi which was held by Smt. Sarita Mediratta resident of the United Kingdom. It was further stated that the Appellant had through his relative Shri Hari Ram Aggarwal made a payment of Rs. 5,25,000 to Shri Sunil Narang, a resident of Malviya Nagar, New Delhi on behalf of Smt. Sarita Mediratta, a person resident outside India without obtaining an exemption from the Reserve Bank of India (''RBI''). It was further stated that by making the aforementioned payment of Rs. 5,25,000 on behalf of a person resident outside India, the Appellant appeared to have contravened Section 9(1)(d) FERA. As regards Smt. Sarita Mediratta, the show cause notice stated that by abetting the aforementioned contravention, she had contravened Section 9(1)(d) FERA read with Section 64(2) FERA and thereby rendered herself liable u/s 50 thereof.

2. In the reply dated 26th August 1996 to the show cause notice, the Appellant denied making such payment on behalf of Smt. Sarita Mediratta. It was stated that the receipt of payment from an NRE Account of a person resident out of India by a person resident in India was the prescribed method of receipt of payment under the FERA. It is further pointed out that Shri Sunil Narang to whom the alleged payment was made was not issued any show cause notice.

3. The documents relied upon by the AD were the statement dated 15th April 1996 of Shri Hari Ram Aggarwal and the statement dated 10th May 1995 of Shri Sunil Narang. Learned counsel for the Appellant wrote a letter dated 17th September 2003 to the AD pointing out that the statements did not implicate the Appellant in any manner. Further it was stated that the retracted statement of the Appellant did not support the case. A copy of the letter of retraction was also enclosed with the said letter dated 17th September 2003.

4. In the adjudication order dated 29th April 2004 it was observed that in a statement recorded on 15th April 1996 the Appellant admitted to having received Rs. 5 lakhs by a pay order from the NRE Account of Smt. Mediratta through Shri Hari Ram Aggarwal after paying a premium of 5% over and above the said amount of Rs. 5 lakhs. It was held that the Appellant admitted to not knowing either Smt. Mediratta or Shri Sunil Narang. In his statement dated 17th May 1996, Shri Hari Ram Aggarwal had admitted to having provided a pay order in the sum of Rs. 5 lakhs in the garb of a gift to his relative Shri Suresh Kejriwal from the NRE Account of Smt. Mediratta. The adjudication order took note of a statement dated 10th May 1995 of Shri Sunil Narang wherein he stated that he used to arrange drafts from the NRE Account of his sister Smt. Mediratta and would hand over the same to persons who approached him. He used to receive the counter-part payment along with the agreed payment which used to be between 5% and 15% from such persons in cash and would thereafter hand over the cash to Shri Harsh Vohra of Punjabi Bagh, New Delhi. It was further observed that the facts referred to in the statement of the Appellant were known only to him; the statement was authentic and the denials made subsequently by the Appellant were an afterthought. Accordingly the Appellant was found guilty of the contravention of Section 9(1)(d) FERA and asked to pay a penalty of Rs. 25,000 u/s 50 thereof.

5. The AT, by an order dated 25th November 2004, directed the Appellant to deposit Rs. 10,000 as a condition for hearing his appeal. He complied with the said order on 7th December 2004.

6. In the impugned order dated 13th November 2007, the AT held that the

statement of the Appellant had been corroborated by statements of Shri Hari Ram Aggarwal and Shri Sunil Narang. There was nothing on record except the gift deed to show that the Appellant had any acquaintance with Smt. Mediratta. No inference could be drawn in favour of the Appellant only because Shri Narang did not specifically name the Appellant in his statement. It was held that "the Appellant was required to prove the outflow of love and affection for gifting away any valuable property u/s 122 of the Transfer of Property Act, 1882 or Section 25(1) of the Indian Contract Act, 1872." The Appellant had no acquaintance with Shri R.K. Verma, NRI thus "the fact of love and affection between NRI and Appellant is ruled out".

7. The AT also held that certain facts were within the special knowledge of the Appellant which he was required to prove u/s 106 of the Evidence Act, 1872. Since normal human conduct did not permit gifting away of a huge sum of money to some unknown persons, a presumption could be drawn against the Appellant. Since the evidence on record raised questions which were not answered by the Appellant, he should be held guilty of the contravention of Section 9(1)(d) FERA.

8. This Court has heard the submissions of Mr. R.K. Handoo, learned counsel for the Appellant. The counter affidavit and the written note of arguments of learned counsel for the Respondent have been considered.

9. The AD appears to have relied upon the statement of Shri Sunil Narang dated 10th May 1995. He stated that Shri Harish Vohra was the brother-in-law of Shri Satinder Mehta who was close friend of his brother-in-law Mr. Randhir Mediratta. He claimed to have been informed by his sister Smt. Mediratta that she would send him signed blank cheques and would also give him instructions on the telephone to fill in the value of the cheques and collect the premium ranging between 5% and 15% from such persons in cash and pass it on to Shri Harsh Vohra of Punjabi Bagh, New Delhi. He claimed not to have personally received any monetary benefit. He mentioned specifically a pay order for Rs. 10 lakhs issued to one Shri Ravinder Juneja and another amount of Rs. 90,000 to his own wife. He made no mention whatsoever of the Appellant.

10. A perusal of the statement of Shri Hari Ram Aggarwal shows that he met Shri Sunil Narang during a wedding ceremony where he mentioned that through the NRE Account of Smt. Mediratta, he could arrange a gift for anybody by charging 5% to 15% premium. He then stated that in October 1994 the Appellant asked him to gift Rs. 4 lakhs and in that connection he contacted Shri Sunil Narang and thereafter on 27th October 1994 Shri Narang gave him a pay order for Rs. 5 lakhs from the NRE Account of his sister Smt. Mediratta. Shri Narang is stated to have told Shri Aggarwal that he should be paid a 5% premium by the Appellant on receipt of which he would give the pay order to the Appellant. Shri Aggarwal gave the pay order to the Appellant on 27th October 1994 itself and on 28th October 1994 he got Rs. 5,25,000 from the Appellant and gave the said amount to Shri Narang.

11. As far as the statement of the Appellant is concerned, he initially admitted to receiving the pay order of Rs. 5 lakhs from the NRE Account of Smt. Mediratta and that the said pay order was made available by Shri Hari Ram Aggarwal on 5% premium as service charge. He stated that in lieu of the said pay order he gave "only Rs. 5,25,000". He claimed not to know either Smt. Mediratta or Shri Sunil Narang. He stated that he received the pay order along with a gift deed. However, in his retraction statement, the Appellant denied receiving any gift cheque and stated that he was coerced into making the said statement. He denied paying any premium on the amount of the pay order.

12. Section 9(1)(d) FERA reads as follows:

9(1) Save as may be provided in and in accordance with 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

(a) to (c)...

(d) Make any payment to, or for the credit of, any person by order on behalf of any person resident outside India.

13. It is seen on the facts stated and the evidence that has come on record that there is nothing to show that the Appellant made payment of Rs. 5.25 lakhs "in lieu/as compensation for" to the credit of Shri Sunil Narang on behalf of Smt. Mediratta. Neither Shri Hari Ram Aggarwal nor Shri Sunil Narang appears to have any nexus with the Appellant as such. He is not shown to have entered into any transaction with R.K. Verma, an NRI whose name finds mention in the adjudication order.

14. The Court finds that the key element for finding that the Appellant violated Section 9(1)(d) read with Section 64(2) FERA is missing in the present case. The statement of Shri Narang regarding arranging the NRE draft from his sister''s account does not by any mean implicate the Appellant Suresh Kejriwal.

15. Likewise, the Court finds that the AT too has not adverted to the facts concerning the Appellant. Neither the statements of Shri Hari Ram Aggarwal nor of Shri Narang incriminate the Appellant. That was the central question as far as the Appellant was concerned. The facts concerning Shri Narang, Shri Aggarwal and their transactions, if any, with Smt. Mediratta cannot be stated to be within the personal knowledge of the Appellant. The so-called admission statement of the Appellant, which was retracted by him, could not be relied upon in the absence of independent corroboration.

16. The Court finds that there is no material on record to hold the Appellant guilty of violation of Section 9(1)(d) FERA.

17. Consequently, the adjudication order dated 29th April 2004 of the AD as well as the impugned order dated 13th November 2007 of the AT, are held to be

unsustainable in law and are accordingly set aside. Any amount that may have been deposited with the AT or the ED pursuant to the AO shall be refunded to the Appellant, together with interest, if any, accrued thereon, within a period of eight weeks, in accordance with law. The appeal is allowed in the above terms but in the circumstances with no order as to costs.

