

(2009) 04 DEL CK 0065

In the Delhi High Court

Case No : Criminal A. 209 of 2002 and Criminal M.A. 770 of 2002

Union of India (UOI)

APPELLANT

Vs

Amarjeet Singh @ Billa and Another

RESPONDENT

Date of Decision : 21-04-2009

Acts Referred:

Citation : (2009) 04 DEL CK 0065

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Navin K. Matta, for the Appellant; Navin Malhotra, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—These two appeals u/s 54 of the Foreign Exchange Regulation Act, 1973 (FERA) read with Sections 35 and 49(5) of the Foreign Exchange Management Act, 1999 (FEMA) are directed against the impugned order dated 8th December 2001, passed by the Appellate Tribunal for Foreign Exchange (Tribunal), allowing Criminal Appeal Nos. 304/2000 and 305/2000, filed by Shri Amarjeet Singh @ Billa and Shri Pritpal Singh @ Gogi, respondents in Criminal Appeal Nos. 209 and 210 of 2002 herein respectively.

2. By the impugned order dated 8th December 2001, the Tribunal set aside an order dated 25th February 2000 passed by the Deputy Director, Enforcement Directorate, New Delhi (`Adjudicating Authority"), holding the respondents guilty of contravention of Sections 8(1) and 8(2) of the FERA for purchasing US \$ 67,951 and selling US \$ 45,000 illegally for which penalties of Rs. 3,00,000/- on Respondent Amarjeet Singh and Rs. 2,00,000/- on Respondent Pritpal Singh were imposed. US \$ 12951/- and US \$ 10,000/- respectively seized and recovered from Amarjeet Singh and Pritpal Singh, were ordered to be confiscated. Indian currency of Rs. 87,600/- was, however, not found to be involved in the contravention of Sections 8 (1) and 8 (2) and was directed to be adjusted against the amount of penalty imposed on Amarjeet Singh if it was not

paid by him within the stipulated time.

Objection as to maintainability

3. The first issue that arises for consideration is the maintainability of the appeals. Mr. Naveen Malhotra, the learned Counsel, appearing for the respondents raised a preliminary objection as to the maintainability of these appeals when they were heard on 23rd January 2009. He pointed out that in *Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Another*, it had been held by the Supreme Court that the Enforcement Directorate could not have filed an appeal before the Tribunal against the order of the Adjudicating Authority. It was only the Central Government which could have filed an appeal before the High Court in terms of Section 54 FERA.

4. Mr. P.P. Malhotra, the learned Additional Solicitor General of India, appearing on behalf of the appellant sought an adjournment on that date for making submissions. The case was then listed on 4th February 2009 on which date a further adjournment was sought on behalf of the learned ASG stating that he needed further time. As a last opportunity, the case was adjourned to 5th March 2009. On that date, none appeared on behalf of the appellant despite a pass-over. However, this Court while reserving orders permitted the appellant to file a written note of submissions within one week. A fifteen page written note of submissions on both maintainability as well as merits was filed by the appellant on 25th March 2009. The written submissions have been considered by the Court.

5. In *Mohtesham Mohd. Ismail*, the Special Director, Enforcement Directorate had by the order dated 6th October 1993 imposed a penalty of Rs. 2,50,000/- on the appellant *Mohtesham Mohd. Ismail* ("Ismail") after holding him guilty of contravening Sections 9(1) (b), 9(1)(d) and 9(3) FERA. The appeal preferred by Ismail was allowed by the Appellate Board (Board). Aggrieved by the decision of the Board, the Special Director, Enforcement Directorate filed an appeal before the High Court. The Central Government was not impleaded as party to the said appeal. However, the Board was impleaded as party "although it should not have been." Before the High Court, Ismail raised a question in regard to the maintainability of the appeal on the premise that it was the Central Government and not the Adjudicating Authority that should have preferred an appeal. Reliance was placed on the decision in *Director of Enforcement, Madras Vs. Rama Arangannal and Another*, as well as the decision of the Punjab and Haryana High Court in *Director of Enforcement v. Lal Chand* (1985) 6 ECC 55. The High Court negated the contention holding that the appeal could be filed by the Directorate of Enforcement "as instrumentality of the Central Government in matters covered by the Foreign Exchange Regulation Act, 1973, in cases decided against the Department..." On merits also, the High Court found the order of the Appellate Board to be erroneous and it was accordingly set aside. Ismail then appealed to the Supreme Court.

6. Before the Supreme Court, the Special Director placed reliance upon the

notification dated 22nd September 1989 by which the Special Director of Enforcement was appointed by the Central Government u/s 4(1) read with 3(e) FERA. Further under the said notification, the Central Government conferred upon the Special Director the power u/s 51 FERA to adjudicate cases of contravention of the provisions thereof. It was accordingly submitted that the Special Director as a delegatee of the Central Government, could have filed the appeal before the High Court. However, the Supreme Court found that "First Respondent did not file the appeal on behalf of or representing the Central Government. It was filed in its official capacity as the adjudicating authority and not as a delegate of the Central Government." It was accordingly held that the appeal in the said case could not have been filed by the Special Director, Enforcement Directorate.

7. It is pointed out in the written submissions of the appellant that there is a distinction in the wording of Section 54 of FERA 1973 and Section 35 of FEMA 1999. While Section 54 FERA reads: "An appeal shall lie to the High Court only on question of law from any decision or order of the Appellate Board...", Section 35 FEMA 1999 reads: "Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court...." It is not in dispute that the present appeal is relatable to Section 35 FEMA 1999. However, as pointed out by the Supreme Court in *Mohtesham Mohd. Ismail*, even u/s 35 FEMA, the Adjudicating Authority cannot itself file the appeal although provision begins with the words "any person aggrieved...." An Adjudicating Authority cannot be said to be an aggrieved party if its order is reversed by the Appellate Tribunal. It is a quasi-judicial authority. It cannot itself become a party to the proceedings at any stage. Therefore, where the noticee succeeds before the Appellate Tribunal, it is only the Central Government which can file an appeal u/s 35 FEMA and not the Adjudicating Authority whose order has been set aside.

8. As far as the present case is concerned, the cause title reads "Union of India through Directorate of Enforcement" as appellant. The memorandum of appeal is supported by the affidavit of Shri S.K. Poddar, Assistant Director, Enforcement Directorate. Nevertheless, unlike the appeal before the High Court in *Mohtesham Mohd. Ismail* which was not filed by the Enforcement Directorate on behalf of the Central Government, it is plain that the present appeal has been filed by the Central Government represented by the Directorate of Enforcement. Merely because it is filed through the Enforcement Directorate, it cannot be said that the Central Government has itself not filed the appeal. The decision in *Mohtesham Mohd. Ismail* does not suggest that that on the facts of the present case, the appeal is not maintainable at the behest of the Central Government.

9. The preliminary objection as to the maintainability of the appeal is accordingly overruled.

Decision on merits

10. Turning to the merits of the present appeals, according to the Enforcement

Directorate, its Delhi Zonal Office received an information on 8th December 1993 that Amarjeet Singh @ Billa and Pritpal Singh @ Gogi both residents of N-51, Kirti Nagar, New Delhi were engaged in unauthorized transactions of foreign exchange from their shop situated at 4569 Main Bazaar, Pahar Ganj, New Delhi. On the basis of the said information a team of officers was deputed for taking search u/s 37 FERA 1973. It is alleged that both residents did not cooperate in the search and in fact attacked the officers and threatened them with a saw and a sword. However, they were overpowered by the officers and personal search was undertaken on both persons u/s 34 FERA. The searches resulted in the recovery and seizure of the following currencies:

(i) US\$ 10,000/- from Pritpal Singh @ Gogi.

(ii) US\$ 3,000/- and Indian currency of Rs. 10,000/- from Shri Amarjeet Singh @ Billa.

(iii) US\$ 9,951/- and Indian currency of Rs. 87,600/-, one pay order of United Western Bank Ltd. Karol Bagh, New Delhi in the sum of Rs. 5 lakhs and certain documents from the briefcase in the hands of the Amarjeet Singh @ Billa.

11. It is alleged that some of the officers received injuries due to the assault on them by the two respondents. When Pritpal Singh made an attempt to flee after the recoveries had been made, a scuffle ensued wherein he received injuries. An FIR No. 574 of 1993 was registered against both the respondents.

12. It is stated that both Amarjeet Singh @ Billa and Pritpal Singh @ Goga made statements before the Enforcement Officer on 8th December 1993 corroborating the panchnama drawn on that date in respect of the recovery and seizure. They allegedly admitted to their illegal dealings in foreign exchange and seizures effected from them. Amarjeet Singh is supposed to have stated that the disposal of foreign exchange collected was mainly looked after by him and that Pritpal Singh helped him in the deal with Russian buyers for making delivery of foreign exchange to Afghans. The seized foreign exchange was accepted by them from their buyers @ Rs. 33.00 per US dollar.

13. Amarjeet Singh is stated to have confessed that he had been doing the business of illegal dealings in foreign exchange from one month and that the turnover was around US\$ 45,000/-. Pritpal Singh is also supposed to have confessed that US\$ 10,000/- recovered from him was received from Russian buyers. He confessed that Amarjeet Singh mainly handled the job of handing over/selling the dollars to Afghans and that around US\$ 45,000/- to US\$ 50,000/- were received by them at their shop from buyers and sold Afghans.

14. On the basis of the investigations, a Memorandum dated 3rd June 1994 was issued to Amarjeet Singh and Pritpal Singh by the Special Director, Enforcement Directorate for contravention under Sections 8(1) and 8(2) FERA 1973 and for acquiring foreign exchange in the sum of US\$ 67,951/- and sale of foreign exchange to the tune of US\$ 45,000/- without any previous permission, general

or special, of the Reserve Bank of India (RBI) and at the rates other than those authorised rates for the time being by the RBI. They were also asked to show cause why the foreign exchange of US\$22,951/- and Indian currency of Rs. 97,600/- should not be confiscated to the Central Government account u/s 63 FERA 1973.

15. Both respondents replied by separate letters dated 8th July 1994 denying the allegations and asserting that they had not contravened the provisions of Section 8(1) and 8(2) FERA 1973. It was pointed out that they had not been shown the search warrant and identity cards by the officers who were in plain clothes and search was not in accordance with the provisions of Section 37 and Section 165(4) CrPC and that some heated exchange took place between the respondents and the officers on that score. It was submitted that Amarjeet Singh was an exporter who was authorized to receive payments in foreign exchange from foreign buyers to take export orders as mentioned in the Foreign Exchange Manual. It was contended that the seized foreign currency was the proceeds received from foreign buyers from 8th December 1993. Since the relevant documents exchanged in this case thereto were already with the Enforcement Directorate, they were not being placed along with the reply. The respondents stated that they would like to cross-examine all the witnesses and also produce defence witnesses.

16. The Deputy Director, Enforcement passed an order on 25th February 2000 holding the respondents guilty of the contravention of Section 8(1) and 8(2) FERA 1973. It is seen from the said order that the case had been fixed on 17th January 2000 when the advocate for the notices had stated that "he would give specific lists for the purpose of cross-examination at the earliest." On the next date, i.e., 25th February 2000 no such list was given and instead written submissions were filed pointing out that the right to cross-examine the witnesses of the Enforcement Directorate had been declined to them by the Adjudicating Authority.

17. The Adjudicating Authority in the order dated 25th February 2000 held that the countries of final destination for the exports were Poland and Ukraine and therefore the receipt of US dollars for those exports was not "through an account appropriate to the country of final destination of goods". It was held that the affidavits of the firms in Poland and the encashment certificate did not support the tendering and accepting of foreign exchange. It was held to be inconceivable that the Polish businessman brought only US\$ 10,000/- in cash with him and therefore did not declare the port country from which he give US\$ 9984 to Amarjeet Singh and was surviving in India only with US\$ 16 left with him. The statement of other Polish national was also disbelieved. The receipts did not contain printed serial numbers and instead were manually numbered. For the aforementioned reasons, the explanation offered by the respondents was rejected by the Adjudicating Authority who proceeded to impose penalty on them in the manner indicated hereinbefore.

18. Aggrieved by the said order, the respondents approached the Appellate Tribunal. After discussing the evidence in great detail, the Tribunal held that the order of the adjudicating authority was not sustainable in law and accordingly set it aside. The authorities were directed to return forthwith the seized foreign and Indian currencies to the firm Blaze Exports of which the respondents were partners and in turn the appellants were directed to deposit the foreign exchange with their authorized dealers as per the law.

19. One of the contentions raised by the appellant is that the Section 59 states that the culpable state of the offender should be presumed. Likewise u/s 72 FERA, truth of the contents of the documents seized would also have to be presumed unless the contrary is proved. u/s 71(3) any person found to be in possession of any foreign exchange in excess of Rs. 15,000/- had to prove that the foreign exchange came to his possession lawfully. It is submitted that inasmuch as the respondents had to "prove" that they had lawfully acquired the foreign exchange, unless evidence is led by them in the manner known to law, the burden on them to rebut the presumption could not be stated to have been discharged. Reliance is placed upon the judgments in Assistant Director, Enforcement Directorate Vs. N.P.V. Ramasamy Udayar, , Prem Singh Chawla Vs. Director of Enforcement, , Ram Krishna Bedu Rane Vs. State of Maharashtra, , Collector of Customs, Madras and Others Vs. D. Bhoormall, , Kanungo and Company Vs. Collector of Customs and Others, and Kollatra Abbas Haji Vs. Government of India and Others, .

20. As far as the above submission is concerned, a perusal of the impugned order of the Tribunal shows that the explanation offered by the respondents was found by the Tribunal to be sufficient and trustworthy. The material produced by the respondents is adverted to in para 24 of the order of the Tribunal which requires to be set out in full as under:

24. The appellants have furnished a copy of the form No. CNX dated 12.2.93 for allotment of code number to them by the RBI as an exporter to their firm, namely, Blaze Exports. On 5.3.93, the RBI had allotted code No. DB 002983 to Blaze Exports. The appellants have further submitted copies of their contract No. B/E/93 dated 7.12.93 with M/s Andrej Kurowski Warsaw, Poland for 1280 woollen pullovers @ 7.80 US dollar for the total value of 9,984 US dollar. The appellants have also filed a copy of receipt dated 8.12.93 evidencing receipt of 9984 US dollar from M/s Andrej Kuowski. They have filed an affidavit of Shri Andrej Kurowski dated 13.12.93 wherein it has been confirmed by the deponent that he came to India on 29.11.93 and his Passport No. is AA0878740 and he is Polish national. The deponent further confirmed that he entered into a contract with M/s Blaze Exports for the purchase of 1280 pieces of woollen pullovers for US \$ 9984/- a copy of which contract is enclosed and further he paid US \$ 9984 to M/s Blaze Exports on 8.12.93 against receipt No. 3 dated 8.12.93. The appellants have filed copies of their contract No. B/E/93 dated 8.12.93 with M/s Carmen Import-Export, Warsaw, Poland and M/s Patiana Ponomarenko, Ukraine

respectively. These two contracts are respectively for 1240 pieces of woolen pullovers and 506 pullovers for US \$ 9796 and US \$ 3171. Copies of buyers passports are also filed. Copies of receipt dated 8.12.93 evidencing receipt of US \$ 3171. Copies of buyers passports are also filed. Copies of receipt dated 8.12.93 evidencing receipt of US \$ 3171 from the Ukraine buyer have been filed and affidavit of Shri Judzinska Zofia dated 14.12.93 confirming payment of US \$ 9796 to M/s Blaze Exports has also been filed. The appellants have also filed copies of statement of their bank account with Bank of Madura Ltd. as well as copies of 8 credit notes showing deposit of US \$ 34128 equivalent value in Indian currency being Rs. 7,33,934/- after deductions of bank commission during the period commencing from 18.1.94 to 4.10.95. The appellants have also filed copies of Foreign Exchange Regulation Rules, 1994. The learned Counsel for the appellants has drawn our special attention to Rule 9 dealing with Manner of Payment of export value of goods and extracts from Nabhi's Book on 'permitted currencies and methods of payment' and text of Exchange Control Regulations relating to Permitted Currencies and Methods of Payment. The appellants have relied on Notice to Exporter No. 1 of 1990 and Notice to Exporter No. 2 of 1992. It would be expedient to reproduce these notices as hereunder:

Notice to Exporters No. 1 of 1990

At present, all transactions of commercial and non-commercial nature between India and Poland are settled in non convertible Indian rupees. The Government of India and Poland have recently concluded a new trade and payments agreement in terms of which all transactions of commercial and non-commercial nature will be settled in free foreign exchange with effect from 1st January, 1991. Exporters are, therefore, advised that they should ensure that payments in respect of contracts for export of goods from India to Poland entered into on or after 1st January, 1991 are received by them in one of the permitted currencies such as US Dollar, Poland Sterling etc. For contracts entered into prior to 31st December, 1990, payments will continue to be received in non-convertible Indian rupees, as hitherto (sic hitherto).

Notice to Exporters No. 2 of 1992

As a sequel to formation of independent States in the erstwhile USSR, the Government of India and Government of Kazakhstan, Kyrgyzstan and Ukraine have recently concluded new trade agreements in terms of which all transactions of commercial and non-commercial nature with these countries will be settled in free foreign exchange with effect from 22.2.92, 18.3.92 and 27.3.92 respectively. Exporters are, therefore, advised that they should ensure that payments in respect of contracts for export of goods from India to these countries entered into on or after the above dates are received by them in one of the permitted currencies such as US Dollar, Pound Sterling, etc. Intending exports may approach authorized dealers in India to whom suitable instructions have been issued by the Reserve Bank of India.

21. It was also noticed that in terms of Para 6A.6 of the Exchange Control Manual, the RBI had granted permission for export proceeds to be received directly by the exporter from the buyers in the form of foreign exchange currency notes. It was held, therefore, that the seized foreign exchange had been lawfully acquired by the respondents. It was held that the presumption drawn by the Adjudicating Officer that the currency received in US dollar, was based on conjectures and surmises. As far as the respondents were concerned they had filed their affidavits to discharge their onus that they had acquired the foreign exchange through the valid foreign exchange export deals and that the proceeds in their possession were received from the buyers.

22. The Tribunal also found no merit in the contention that the US\$ 45,000/- earned through exports was in illegal possession of the respondents. It was held that if indeed the appellant had prior information of the clandestine activities of the respondents, they may have kept a surveillance to catch the respondents red handed while selling any foreign exchange to Afghans or any other person. It was held that the initial burden of showing that the possession of the said amount in the hands of the respondents is illegal, was on the appellant. In the instant case, the said burden had not been sufficiently discharged.

23. This Court does not find anything perverse in the findings, reasoning and the conclusions of the Tribunal. This Court is in agreement with the Tribunal that the respondents had in fact offered a satisfactory explanation for possessing the foreign exchange in their hands. This is a matter of pure appreciation of evidence. It cannot be said to raise any question of law. When the invoice and other documents produced by the respondents were found to be genuine, it cannot be said that the respondents have to nevertheless "prove" such documents by way of defence. The presumption of the culpable mental state u/s 59 FERA and the presumption u/s 72 of the genuineness of the documents relied upon by the Directorate of Enforcement are rebuttable. Once the respondents have been able to rebut the presumption, the burden shifted to the Enforcement Directorate to show that the defence was not plausible or credible.

24. In this context, having examined the order of the Adjudicating Authority, this Court is of the view that the manner of dealing with the affidavits filed by the buyers themselves is not satisfactory. It is based on conjectures. The deponents of the affidavits were not sought to be cross-examined by the Directorate of Enforcement. The Appellate Tribunal has rightly observed that once those affidavits were filed it was for the Directorate of Enforcement to rebut the same which it had not done. As regards the alleged sales of US\$ 45,000/- to Afghans, the Tribunal found that the Adjudicating Officer had not dealt with the issue. The above conclusions of the Tribunal are consistent with the law explained by the Supreme Court in *Ram Krishna Bedu Rane v. State of Maharashtra* (supra), *D.Bhoormul* (supra) and *M/s. Kanungo & Co.* (supra).

25. It was then contended that the respondents had themselves made voluntary statements to the officers which were not hit by Sections 25 of the Evidence Act

as explained by the Supreme Court in *Commander Head Quarter, Calcutta and others Vs. Capt. Biplabendra Chanda*, While this may be correct as a proposition of law, on the facts of the present case it is not possible to sustain a finding as to the contravention of the provisions of the FERA only on the basis of the confessional statements made by the respondents soon after their arrest. The Adjudicating Authority noticed in para 2 of its order that before the court of the learned Additional Chief Metropolitan Magistrate (ACMM) the respondents retracted their statements made to the officers of the Enforcement Directorate. The Tribunal has held that the medical certificates produced by the respondents as well as the officers showing that both had received injuries at the hands of each other took away the voluntary nature of the statements made by the respondents before the officers of the Enforcement Directorate. This finding of the Tribunal which is based on an appreciation of the evidence cannot again held to be perverse calling for any interference. Unless the statements made by the respondents satisfy the tests of voluntariness, it cannot constitute the sole basis on which a finding of contravention of the provisions of the FERA can be sustained. In its recent judgment in *Noor Aga v. State of Punjab* 3 (2008) DLT (CRL.) 795 (SC), the Supreme Court has interpreted Section 67 of the Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS Act) and held that notwithstanding the position that such statements are not hit by Section 25 Evidence Act 1872, the statements made by an accused to the Customs Officer would be admissible only if they survived the test of voluntariness. By analogy, the statements made to the officers of the Directorate of Enforcement recorded u/s 40 FERA would also have to be shown to be voluntary if they are sought to be relied upon as evidence. In the circumstances of the present case, the respondents had shown prima facie that the statements made by them u/s 40 FERA, which were subsequently retracted, were not voluntary and the Directorate of Enforcement had not discharged the burden of showing that they were.

26. In *Mohtesham Mohd. Ismail*, the Supreme Court held that in an appeal u/s 54 FERA, the High Court should exercise its appellate power only "when there existed a question of law and not a question of fact." Even u/s 35 FEMA, an appeal will lie only in regard to a "question of law arising out of such order appealed against." In the present case, the appellant has been unable to point out any such question of law that arises for determination from the impugned order of the Tribunal. What has been pointed out are essentially questions of fact, involving the appreciation of evidence.

27. Viewed from any angle, therefore, this Court does not find any error in the impugned judgment of the Tribunal. Consequently these appeals are without merit and are dismissed as such.