

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.A. 319/2007 and Crl.M.A. 5872/2007

Date of Reserve:09.04.2009
Date of Decision:04.05.2009

ABID MALIK

..... Appellant
Through: Mr. Pawan Narang, Mr.
Anish Dhingra, Mr. Pushkar
Gogoi, advs.

Versus

UNION OF INDIA & ANR.

..... Respondents
Through: Mr. Mayank Goel, adv.

**CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG**

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

MOOL CHAND GARG,J

1. This second appeal raises the following questions of law:
 - i) Whether the conviction of the appellant could have been based solely on the basis of retracted confession without there being any other corroborating evidence.
 - ii) Once the retraction of a confessional statement takes place then who is to prove that the confession recorded was voluntary.
 - iii) Whether the revision petition filed in this case was not within limitation.
 - iv) Whether the penalty imposed upon the appellant is justified.

2. This appeal has been filed under section 35 of the Foreign Exchange Management Act(hereinafter referred to as FEMA) which superseded Foreign Exchange Regulation Act, 1973 (hereinafter referred to as FERA)assailing the order dated 30.11.2006 passed by the Foreign Exchange Appellate Tribunal holding the appellant guilty under section 9(1) (a) of FERA and imposing upon him a penalty of Rs.3,00,000/-(Rupees Three Lakhs).

3. Section 9(1)(a) of FERA reads as under:

9. Restrictions on payments: (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) make any payment to or for the credit of any person resident outside India;

4. Briefly stating the facts of the present case are:

- i) That on receiving information that NRE accounts were being misused for deriving benefits under the Income Tax Act an enquiry was initiated by Directorate of Enforcement, which revealed that NRE account of Shri. N.N. Gupta resident of Dubai maintained with American Express Bank Ltd, New Delhi was wrongly used for deriving the aforesaid benefit. The scrutiny of the said account revealed that a cheque of Rs. 5 lacs dated 29.7.1993 was issued in the name of the Appellant from the said account.
- ii) According to the respondent the appellant in his statement recorded under Section 40 of FEMA on 04.01.1995 had stated that the aforesaid cheque was obtained by him at a premium of 12% and that the same had been declared by him as gift. The

investigations further revealed that the aforesaid transaction was made only to obtain benefit under Income Tax Act and the transaction was not a gift at all but payment of Rs.5.60 lacs was made by the appellant in lieu of the NRE cheque for Rs.5 lacs to the credit of Sh.N.N.Gupta, a Non Resident Indian in contravention of the provisions of section 9 (1) (a) of FERA. However, there is no evidence to this effect & the statement made under Section 40 on 04.01.1995 was retracted immediately vide his letter dated 13.01.1995 addressed to Director of Enforcement.

iii) A show cause notice was issued to the appellant on 16.7.1996 to show cause as to why adjudication proceedings under Section 51 of FERA be not initiated against him for the said contravention, to which a reply was sent by the appellant wherein he again stated that the confessional statement recorded by the Enforcement Officer was not voluntary but was under duress.

iv) The relevant portion of the reply dated 24.07.1996 to the said notice is reproduced hereunder:

"I had reiterated this fact in my submission also that there was no compensatory payment made to or for this benefit of Mr. N.N. Gupta But although the investigating officer was very cordial in his conduct, yet I was however, insisted to make the statement that this payment was made against premium, the legal implication of which I could not comprehend till I was explained by my lawyer, I was also told unless such admission was made, my case would not be closed.

I, however, sent my retraction statement immediately refuting any kind of payment to Mr. N.N. Gupta.

I, therefore, once again reiterate that I am a small time employee hardly in a position to make both ends meet and such compensatory payments

were possible only if I had such substantial funds at my disposal which is next to impossible.

In view of the same, how I can enter into a such wrongful deals and vilate the law easy to conclude.

I once again submit under oath that I have not made any payment to Mr. N.N. Gupta and therefore request your honour to drop the charges and the proceedings against me and oblige. The case may be decided on the basis of available documents without a personal hearing.

- v) The Adjudicating officer vide his order dated 21.8.1996, held the appellant guilty and imposed a penalty of Rs.11,000 on him. However against the aforesaid adjudicating order appellant filed an appeal before the Appellate Tribunal and the Tribunal vide order dated 30.6.1997 set aside the Adjudicating order and remanded the matter back for fresh adjudication proceedings to the Adjudicating officer. This time vide order dated 27.12.2004 the appellant was acquitted of the charge.
- vi) It was against the said order, the respondents filed a revision for examining the legality, propriety and correctness of the adjudication order under Section 52(4) of FERA r/w Section 19(6) of FEMA. The Tribunal vide its order dated 30.11.2006 held the appellant guilty of the contravention of section 9(1) (a) of FERA and imposed a penalty of Rs.3,00,000/-.

5. It has been submitted by the appellant that the Appellate tribunal passed the impugned order mechanically and without application of mind to the factual and legal position as pleaded by the appellant. It is also submitted that the Tribunal failed to appreciate that the adjudicating authority has itself mentioned in its order exonerating the appellant and that there is no independent and

corroborative legally admissible evidence against the appellant on record. It is stated that the Appellate Authority also failed to appreciate, that the statement of the appellant u/s 40 FERA was retracted and, thus, cannot be used without any other corroborative evidence on record.

6. The main ground urged by the appellant is that the confessional statement on the basis of which he has been convicted cannot be relied upon because that has been retracted by him and that it was not corroborated by any other independent evidence.

7. The appellant has relied upon the case of **Vinod Solanki Vs. U.O.I JT 2009 (1) SC1** where it has been held:

22. It is a trite to say that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded. {See Pon Adithan v. Deputy Director, Narcotics Control Bureau, Madras JT 1999 4 SC 540}

27. Reliance has been placed by the Tribunal on the decision of this Court in State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru JT 2005 (7) SC 1, commonly known as the 'Parliament Attack case.' Therein also this Court held:

“We start with the confessions. Under the general law of the land as reflected in the Indian Evidence Act, no confession made to a police officer can be proved against an accused. 'Confessions'-which is a terminology used in criminal law is a species of 'admissions' as defined in Section [17](#) of the Indian Evidence Act. An admission is a statement-oral or documentary which enables the court to draw an inference as to any fact in issue or relevant fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession. While Sections [17 to 23](#) deals with admissions, the law as to confessions is embodied in Sections [24 to 30](#) of the Evidence Act. Section [25](#) bars proof of a

confession made to a police officer. Section 26 goes a step further and prohibits proof of confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate. Section 24 lays down the obvious rule that a confession made under any inducement, threat or promise becomes irrelevant in a criminal proceeding. Such inducement, threat or promise need not be proved to the hilt. If it appears to the court that the making of the confession was caused by any inducement, threat or promise proceeding from a person in authority, the confession is liable to be excluded from evidence. The expression 'appears' connotes that the Court need not go to the extent of holding that the threat etc. has in fact been proved. If the facts and circumstances emerging from the evidence adduced make it reasonably probable that the confession could be the result of threat, inducement or pressure, the court will refrain from acting on such confession, even if it be a confession made to a Magistrate or a person other than police officer."

34. A person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by any inducement, threat or promise by a person in authority. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat, etc. if the same is to be relied upon solely for the purpose of securing a conviction. With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such.

35. In the instant case, the Investigating Officers did not examine themselves. The authorities under the Act as also the Tribunal did not arrive at a finding upon application of their mind to the retraction and rejected the same upon assigning cogent and valid reasons there for. Whereas mere retraction of a confession may not be sufficient to make the confessional statement irrelevant for the purpose of a proceeding in a criminal case or a quasi criminal case but there cannot be any doubt whatsoever that the court is obligated to take into consideration the pros and cons of both the confession and retraction made by the accused. It is one thing to say that a retracted confession is used as a corroborative piece.

8. The appellant has also relied upon the case of Noor Aga V. State of Punjab. 2008 (3) JCC 135 wherein it was held:

96. We may, at the outset, notice that a fundamental error has been committed by the High Court in placing explicit reliance upon Section 108 of the Customs Act.

97. It refers to leading of evidence, production of document or any other thing in an enquiry in connection of smuggling of goods. Every proceeding in terms of Sub-section (4) of Section 108 would be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. The inquiry contemplated under Section 108 is for the purpose of 1962 Act and not for the purpose of convicting an accused under any other statute including the provisions of the Act.

98. Appellant contended that the purported confessions recorded on 2.8.1997 and 4.8.1997 were provided by an officer of the Customs Department roughly and later the same were written by him under threat, duress and under gun point and had, thus, not been voluntarily made.

99. The High Court should have considered the question having regard to the stand taken by the appellant. Only because certain personal facts known to him were written, the same by itself would not lead to the conclusion that they were free and voluntary.

100. Clause (3) of Article 20 of the Constitution provides that no person accused of any offence shall be compelled to be a witness against himself. Any confession made under Section 108 of the Customs Act must give way to Article 20(3) wherefore there is a conflict between the two. **A retracted confessional statement may be relied upon but a rider must be attached thereto namely if it is made voluntarily.** The burden of proving that such a confession was made voluntarily would, thus, be on the prosecution. It may not be necessary for us to enter into the question as to whether the decisions of this Court that a Customs Officer is not a Police Officer should be revisited in view of the decision of this Court in **Balkrishna Chhaganlal Soni v. State of West Bengal**, (1974) 3 SCC 567, wherein it was stated:

“On the proved facts the gold bar is caught in the criminal coils of Section 135, read with Sections 111 and 123, Customs Act, as the High Court has found and little has been made out before us to hold to the contrary.”

101. It may also be of some interest to note the decision of this Court in **State of Punjab v. Barkat Ram**, AIR 1962 SC 276, holding:

“17. There has, however, arisen a divergence of opinion about officers on whom some powers analogous to those of Police Officers have been conferred being Police Officers for the purpose of Section 25 of the Evidence Act. **The view which favours their being held Police Officers, is based on their possessing powers which are usually possessed by the Police and on the supposed intention of the Legislature at the time of the enactment of Section 25 of the Evidence Act to be that the expression Police**

Officer, should include every one who is engaged in the work of detecting and preventing crime. The other view is based on the plain meaning of the expression and on the consideration that the mere fact that an officer who, by no stretch of imagination is a Police Officer, does not become one merely because certain officers similar to the powers of a Police Officer are conferred on him."

114. A statement made by an accused would become relevant in a prosecution under the Act. Only when, it can be used for the purpose of proving the truth of the facts contained therein. It deals with another category of case which provides for a further clarification. Clause (a) of Sub-section (1) of Section [138B](#) deals with one type of persons and Clause (b) deals with another. The Legislature might have in mind its experience that sometimes witnesses do not support the prosecution case as for example panch witnesses and only in such an event an additional opportunity is afforded to the prosecution to criticize the said witness and to invite a finding from the court not to rely on the assurance of the court on the basis of the statement recorded by the Customs Department and for that purpose it is envisaged that a person may be such whose statement was recorded but while he was examined before the court, it arrived at an opinion that is statement should be admitted in evidence in the interest of justice which was evidently to make that situation and to confirm the witness who is the author of such statement but does not support the prosecution although he made a statement in terms of Section [108](#) of the Customs Act. We are not concerned with such category of witnesses. Confessional statement of an accused, therefore, cannot be made use of in any manner under Section [138B](#) of the Customs Act. Even otherwise such an evidence is considered to be of weak nature.

9. On the other hand, the respondents in their counter affidavit have submitted that the order passed by the tribunal is detailed one and a reasoned order. It is stated that the appellant had infact purchased NRE cheque for Rs. 5lacs against the payment of Rs.5.60 lacs and the statement tendered by the appellant is a voluntary statement and without any duress and coercion. It is stated that confessional statement does not require any corroboration. However, it is their case that the cheque number and account number is an independent evidence which corroborates after the confessional statement though it is regarding the cheque of Rs.5 Lacs and not about repayment. It is also stated that the alleged impugned order

passed by the appellate tribunal is a detailed and a reasoned order and therefore there is no ground for the appellant to challenge the lawful revision order dated 30.11.2006. Ld counsel for the respondent has relied upon **“Surjeet Singh Chhabra vs. UOI 1997(1) SCC 508** wherein it was held:

3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a Kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The Customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call panch witnesses for examination and cross-examination by the petitioner.

10. However, the aforesaid judgment relied upon by the respondents do not apply to the facts of the present case as in the present case there is no admission on the part of appellant that he repaid the amount of cheque paid to him from the persons from whom he had received the gift cheque.

11. The Appellate Tribunal has disposed of the revision petition vide impugned order by holding that since no limitation has been prescribed under the provisions of Section 52(4) of FERA for filing of the revision petition is not barred by any limitation.

12. Regarding retraction of confession the Appellate Tribunal held as under:

Merely because the appellant made the confessional statement before the Enforcement Directorate, the confessional statement cannot be ousted from consideration. The pleaded duress is required to be narrated and explained in sufficient details that how and in what circumstances, such duress came into existence. The retraction of a confessional statement is experienced daily by Courts and Tribunals. The retraction letter does not disclose the type and nature of duress. The bare statement alleging duress cannot exclude that confessional statement altogether from consideration. The appellant was telling a lie at one occasion either when confession was made or when retraction brought to light. The bare statement of retraction with no details of duress does not lead to credence to the appellant. On the other hand there is corroboration in certain particulars to support the confessional statement. Hence the later is preferable in comparison to the former. Simultaneously, the legal position is quite clear that anybody working in Enforcement Directorate is not included among and is not a police officer under Section 25 and 26 of the Indian Evidence Act, 1872. Hence the plea of duress is liable to be rejected in particular circumstances of this case.

13. The aforesaid observation made by the appellate authority is contrary to the law laid down by the Supreme Court as discussed above which clearly lays down that the retracted confession alone cannot be the basis of conviction. The question as to whether the confession was voluntary or was taken under duress from any threat or coercion is required to be proved by the adjudicating authority once a plea is taken in this regard by the person alleged to have made the confession to remove the doubts and to prove that the confession was not under a threat, coercion or duress which becomes responsibility of the authority concerned to lead evidence of the officer who recorded the confession with a liberty of cross-examination to the person who made the confession and it is only thereafter a finding can be returned as to whether confession was given under duress or not.

14. Admittedly, in this case no such evidence has been brought on record. Moreover in the present case except for the confessional

statement which as stated above was immediately retracted, there is no other evidence which may establish that the appellant paid the money to Sh. N.N. Gupta along with interest to his credit which is the charge against the appellant. The Appellate Authority in its order also made the following observations;

There is another factor which is required to be taken into consideration. The respondent has repeatedly argued that payment in lieu of gift cheque is required to be proved to the hilt identifying the recipient in a clear manner. However, we fail to understand that the payment when it was made to whom else it can go when cheque from NRE account of Sh. N.N. Gupta is taken and payment is made in lieu thereof this is a common human conduct which can be taken into consideration while deciding this revision petition as total evidence has been discussed hereinabove so no purpose will be served if the matter is remanded back to the adjudicating authority for fresh adjudication. Therefore, this tribunal has taken upon itself to decide the matter.

15. These observations in the absence of any evidence showing that the appellant had returned a sum of Rupees Five Lacs along with interest by making a payment of Rs.5.60 Lacs are of no effect. In fact, even in his statement recorded under Section 40 of the Act, the appellant nowhere states that he has paid a sum of Rs.5.60 Lacs to Sh. N.N. Gupta. Rather in his communication dated 24.07.1996 he has very categorically stated that he has not paid any compensatory payment for the benefit of Sh. N.N. Gupta. There is no evidence to the contrary.

16. Accordingly I answer the questions of law as mentioned in para 1 of this judgment as follows:

- i) In view of the judgment delivered by the Apex Court in Vinod Solanki (Supra) and Noor Aga (Supra) and admission of the respondents that the statement made under Section 40 of the Act was retracted by the appellant, the conviction of the appellant cannot be sustained.

- ii) Once the retraction of a confessional statement takes place the burden to prove that the statement was voluntary is on the prosecution which burden has not been discharged.
- iii) A revision petition can be filed by the Department in view of Section 52(4) of the Act and for which no limitation is prescribed.
- iv) Since the impugned order is not sustainable, in view of my answer to the first question the penalty imposed upon the appellant is certainly unjustified and is illegal.

17. In view of the aforesaid I allow the appeal and set aside the impugned order dated 30.11.2006. The appellant would naturally be entitled to all consequential benefits. Interim orders are made absolute.

MAY 04, 2009
anb(nm)

MOOL CHAND GARG,J