

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

+ **Crl.REV.P. No. 146/2007**

% Date of reserve: 26.03.2009
Date of decision: 06.04.2009

PRAKASH CHAND YADAV ...PETITIONER
Through: Mr. R.K. Handoo, Mr. S.P. Pandey,
Mr. B.K. Sinha, advocates

Versus

ENFORCEMENT DIRECTORATE ...RESPONDENT
Through: Mr. A.K. Vali, Mr. Naveen K. Mata,
Mr. Anand Jha, Mr. Tuhin, advs.

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. Petitioner has filed the present petition under Section 397 Cr.P.C. with the following prayers:

- a) set aside the order on charge dated 25.11.06 and charge framed on 16.12.06 by the Ld. ACMM, Patiala House New Delhi.
- b) Any other order which the Hon'ble Court deems fit in the facts and circumstances of the case, and oblige.

2. Vide order dated 16.12.2006 which has been impugned in this petition, a charge has been framed against the petitioner by the Court of Addl. Chief Metropolitan Magistrate to the following

effect:

That during the year 1992 you and your co-accused Vikram Singh both persons resident in India not being an authorized dealer, otherwise acquired foreign exchange worth US \$ 10500/- from person (s) other than an authorized dealer without the previous general or special permission of RBI and thereby you contravened the provisions of Section 8(1) of FERA 1973 punishable under Section 56 of FERA 1973 and within my cognizance.

Secondly, during the year 1992 you and your co-accused Vikram Singh both being persons resident in India not being an authorized dealer in foreign exchange otherwise acquired foreign exchange worth US \$ 1,39,000/- outside India (including foreign exchange equivalent to Rs. 30 lakhs otherwise acquired and transferred to you both by your co-accused Prakash Chandra Yadav) without any general or special permission of Reserve Bank of India and thereby you both contravened the provisions of Section 8(1) of FERA 1973 punishable under Section 56 of FERA 1973 and within my cognizance.

You are directed to be tried by this Court for the aforesaid offences.

ACMM/ 16.12.06

3. The charge was framed on the basis of a complaint (a copy of which has been placed on record during the course of their petition filed under Section 8(5) read with Section 56 of the Foreign Exchange Regulation Act 1973 (hereinafter referred to as FERA) read with Sub-Section 3 & 4 of 49 of the Foreign Exchange Management Act 1999 (hereinafter referred to as FEMA) wherein following allegations were made by the respondent:

- (i) That an NRE A/c No. 70119 in the name of Shri Akbar Jaffarli Verjee C/o M/s Industries and Finazkontar Post Fach 339, Alternbach 8, FL 9/190 VADUZ, LETCHTENSTEIN was being maintained in the R.K. Puram Branch of Canara Bank during 1.7.1992 to 12.1.1993.
- (ii) That the following amounts were credited in the said NRE A/c towards proceeds of Foreign Exchange:-

- | | US\$ | Eqv. toRs. |
|------------|---------------|-------------|
| a) 1.7.92 | 500/- cash | 14,850/- |
| b) 4.7.92 | 10000/- cash | 2,95,000/- |
| c) 17.7.92 | 139000/- FITT | 42,29,756/- |
- (iii) That from the proceeds of foreign exchange so credited in the account the following cheques for payment were issued:-
- | | |
|---------|--|
| 17.7.92 | Ch.No.481 in favour of Shri Prakash Chandra for Rs. 30,00,000/- |
| 18.7.92 | Ch.No.482 in favour of Shri Vikram Singh for Rs. 5,00,000/- |
| 20.7.92 | Ch.No.483 in favour of M/s Vishwa Dharmayatan for Rs. 5,00,000/- |
| 12.8.92 | Ch.No.484 in favour of M/s Vishwa Dharmayatan for Rs. 5,00,000/- |
- (iv) That Shri Prakash Chandra @ Prakash Chandra Yadav stated that the amounts of Rs. 30 lakhs received by him from the NRE A/c was a loan/advance given by Shri Akbar J. Verjee for construction of a house for the latter which amount was later forfeited; Shri Vikram Singh declared the amount of Rs. 5 lakhs received from the NRE A/c to be gift from Shri Akbar J. Verjee, and M/s Vishwa Dharmayatan stated that the amount of Rs. 10 lakhs received from NRE A/c was a donation from Shri Akbar J. Verjee for construction of Ashram Building.
- (v) *That during the course of investigation Shri Akbar J.Verjee in his letter dated 18.10.01 addressed to Indian High Commission U.K. (which was duly authenticated by High Commission) in response to directive issued to him by the Enforcement Directorate stated inter-alia as under:*
- "It is true that the account at the Canara Bank was opened on 1st July 1992. I opened account at the request of Mr. Chandraswai*

who had befriended me in the autumn of 1991 when he was visiting London for meetings with one Mr. Adnan Khashogi Mr. Swami told me that it would be an NRI account and in the event that I did some business in India the account would enable me to conduct business. Later on I found this to be incorrect advice.

I was accompanied to the Canara Bank by Mr. Mahesh Ram of B.D. Steel at the request of Mr. Kumar who was at the time the Chairman of B.D. Steel and a disciple of Mr. Swami.

I cannot recall the quantum of the deposit paid into the account at the time of opening the account, I went to the bank only once because I was in India only for three days during that visit. I did not personally make any other or further deposits in the Canara Bank. They have been made by someone else.

After the bank account was opened I was given a cheque book and pay in book by the bank manager. When I returned to Ashram Mr. Swami asked me to hand the two books over to one Mr. Vikram Singh. Before I handed the books over to Mr. Vikram Singh Mr. Swami asked me to sign several cheques in the book.

You have stated several figures and dates when deposits were made into the said account I have not been in India on those occasions nor have I been personally involved in making those deposits at the Canara Bank. So in effect my question with regards to deposits are question I cannot answer.

Other than signing blank cheques and leaving them with the Swami I cannot recollect having written out any or all of the cheques specified in your letter. I do recall the name of Prakash Chandra Yadav. I was introduced to him at the Ashram during my stay. I recall him telling me that he was at the Ashram because he was expecting a sum of money from Mr. Swami. He also told me that his father was a senior Minister in the Government of the time.

Before I left the UK to travel to India Mr.

Swami told me that I should expect to receive an envelope which I carried with me to India and handed it over to Mr. Swami. He told me that this was gift to the Ashram. I cannot recall the exact amount but I remember it to be a very substantial figure.

I attach a copy of my passport for the details of my two visits to India in the relevant period. The first was in July 1992 and the second one was in September 1992, again at the behest of Mr. Swami offered to introduce me to some leading Indian businessmen who he said would help my ailing business in the UK.

I have never maintained an off shore account nor have I had an account at the Swiss Bank in Jersey.

I cannot recall sending a message to the Canara Bank to close my account. I do remember receiving a call from an officer of the bank asking me whether I wanted to continue to operate the account. By then I had read in Asian Age that Mr. Swami was in considerable local difficulties. I took the decision to ask for the account to be closed and the money to be sent to Mr. Swami as it did not belong to me. What the officer did with the money I do not know."

- (vi) That from the above it is clear that during the year 92, accused No. 1 and 2 persons resident in India not being authorized dealer, otherwise acquired foreign exchange to wit US\$ 10,500/- from person(s) other than an authorized dealer without the previous general or special permission of RBI.
- (x) That by otherwise acquiring and otherwise transferring foreign exchange equivalent to Rs. 30 lakhs in the aforesaid manner, accused No.3 shri Prakash Chandra Yadav has contravened the provisions of Section 8(1) of the FERA 1973 and has thereby rendered himself liable to be proceeded against under Section 56 of FERA, 1973.

4. It is also the case of the respondents that an opportunity notice was also given to the petitioner under Section 61(2)(II) of

FERA to produce on record any permission/ exemption from RBI to enter into aforesaid transaction but no such permission was brought to the notice of respondents and, therefore, they filed the aforesaid complaint for punishing the petitioner and two others.

5. Based upon the aforesaid complaint the ACMM vide order dated 25.11.2006 decided to frame charges against all the petitioners. In so far as the petitioners before this Court concerned, it has been observed that the pre-summoning evidence which came on record, prima facie, proves the involvement of the petitioner.

6. Relying upon the judgment delivered by the Hon'ble Supreme Court in the case of R.S. Malik Vs. A.R. Antuley AIR 1986 it was further held that:

“The truth, veracity and effect of the evidence which the prosecutor proposed to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally, is not exactly to be applied. At this state, even a very strong suspicion founded upon the material before the Magistrate which leads him to form a presumptive opinion as to existence of factual ingredients constituting the offence alleged may justify the framing of charge against the accused in respect of the commission of that offence”

7. Taking into consideration the ratio of the aforesaid judgment and the judgment in other cases, the ACMM also observed that:

I have considered the submission made before me. Ld. Counsel for the accused has vehemently argued that on merits no case is made out. He has relied upon the statement of Akbar Veerji and has argued that the NRE account was in the name of Akbar Veerji and that the accused no.3 admittedly was accepting money from

the accused no. 1 Nemi Chand Jain and not Akbar Veerji. He has argued that no offence has been made out in so far as the accused no.3 is concerned. It has been further stated that the opportunity notice has not been served upon the accused no. 3 hence the present complaint is not maintainable against him.

I have considered the material on record. Perusal of **Ex.PW1/J** shows that the said opportunity notice had been validity dispatched vide registered AD vide dispatch no. 1148, 49, 50. Once the dispatch from the office is proved through official channel, there is a presumption with regard to its service on all the three accused persons whose names and addresses on which it has been dispatched has been correctly mentioned. Whether the same has been received by the accused no.3 or is again a triable issue and it is open to the accused no. 3 to rebut the same by leading evidence in defence at appropriate state. However at the moment, prima facie the issuance of opportunity notice Ex. PW1/J to all the three accused is presumed to be issued.

Further I have gone through the various documents placed on record Ex.PW4/B-1 wherein the said Akbar Veerji has stated that the account at Canara Bank has been opened at the request of accused no.1 Nemi Chand Jain who had befriended him in the Autumn of 1991 when he was visiting London for meetings with one Adnan Khashogi. He has in his communication specifically stated that the accused no. 1 had told him that it would be an NRE account and in that event he did some business in India the account would enable him to conduct business which advice of accused no. 1 he later on found as incorrect. He has stated that he has visited the bank only once since he was in India for only 3 days and during the period he personally did not make any or further deposits and all of them have been made by someone else. He has further stated that in the Ashram of accused no.1 he was asked by him i.e. the accused no.1 to handover the two cheque books to the accused no.2 Vikram Singh and was also made to sign several cheques in the said books. He has also stated that he was not in India on all the occasions on which the deposits were made in the said NRE account nor he is involved in making the deposits. According to said Akbar Veerji he was introduced to the accused no. 3 in the Ashram of accused no. 3 who told them that he was excepting a sum of money from the accused no.1. Further the accused no.3 told him that his father was a senior Minister in the government at the relevant time. Sh. Akbar Veerji has further stated that when he left UK to travel to India the accused no.1 had told him that he should expect to receive an envelope which he should expect to receive an envelope which he should carry to India with him. Later he was delivered an envelope which he carried with him to India and handed it over to the accused no.1. He has stated that he does not recollect the exact amount but states that it was a substantial figure.

I have also gone through the documents Ex.PW4/B-2 and B-4 which are the details of the passport of Akbar Veerji showing his two visits in India, first in July 1992 and second in September 1992 which according to

him were at the behest of the accused no.1. I have also peruse the statement of T.M. Bhatt, Chief Manager of Canara Bank which statement is Ex.PW1/H wherein the aforesaid aspects had been mentioned as been mentioned by Akbar Veerji has been corroborated. He has specifically stated that a remittance of 1,39,000 US\$ had been received in the NRE account of Akbar Veerji in July 1992 through Swiss Bank Corporation (Germany) through their foreign exchange department which had received from their London Branch. He has stated that it was a Foreign Inward Telegraphic Transfer (FITT) and not a draft deposit by their customer. He has also stated that the said account had to be closed by their customer on 8.1.1993 when they received a telephonic call from their customer that he wanted to close his account and keep the balance with the branch till further instructions. He has specifically in his statement stated that he cannot say whether the deposits had been made by Akbar Veerji himself or by anybody else on his behalf.

I have gone through the various documents placed on record and also the pre-charge evidence. Prima facie there is sufficient material on record to show that all the accused could not furnish any general of special permission from the Reserve Bank of India for the aforesaid acquisition of foreign exchange as aforesaid despite being given an opportunity. I hereby hold that there is sufficient material on record on the basis of which there is a strong presumptive opinion to show that prima facie the accused no.1 to 3 have violated the provisions of Section 8(1) of FERA for which charge under Section 56 of FERA read with section 49(3) and (4) of FERA is required to be framed.

8. It is this order, which has been assailed under Section 397 Cr.P.C., *inter alia*, on the allegations that Shri Akbar Virji himself admitted in the communication to the Indian High Commissioner that the NRE account opened by him was the account from where the cheque in question was issued to the petitioner which was credited in his account in India. Thus, it is not a case of receiving any Foreign Exchange outside India. It is also submitted that all the deposits in the NRI account of Vikram Virji were made as per the permissible mode and, therefore, it was not a case where there was any violation of Section 8(1) of FERA. In this regard, the petitioner has also submitted:

- i) The petitioner submits that the precondition to attract

section 8(1) of the Foreign Exchange Regulation Act, 1973 would be “buy or otherwise acquiring or borrowing from or sell or otherwise transfer or lend to or exchange with any person not being an authorized dealer, any foreign exchange.” The provision alleged against the petitioner is “otherwise acquire”. The expression “acquire” must have a definite connotation and it must indicate first possession of foreign exchange and then right to appropriate the possessed foreign exchange. There is not an iota of material to indicate even possession of foreign exchange.

- ii) That Because the Ld. Court below failed to appreciate that the pre-condition for invoking section 8(1) of FERA, 73 is existence of “Foreign Exchange” and an NRE cheque of Rs. 30 lakhs issued by a bank in India, expressed in Indian rupees and deposited in India is not foreign exchange. Thus charge framed is unsustainable.
- iii) That the Ld. Court below failed to appreciate that deposit by way of foreign inward remittance or cash is the prescribed method of receipt of Foreign Exchange and the deposit is made in Bank and petitioner has received Indian rupees cheque. Hence charge is bad in law.
- iv) That the Ld. Magistrate has failed to appreciate that the allegations in the complaint are that petitioner was not even knowing Mr. Akbar Virji and was expecting money from A-1 chandraswamy, a person resident in India and if accused no.1 chose to make the payment to the petitioner from the NRE account of Akbar Virji, it may be a matter between accused no.1 and Akbar Virji but cannot be a basis for making a criminal charge against the petitioner must less of “otherwise acquisition”.
- v) That in terms of the letter of the Bank Manager Shri T.N. Bhatt the account in question had been opened by Shri Akbar Virji a non-resident Indian on 01.07.1992 and was closed on 08.01.1993 on the instructions of the holder of the account and, therefore, he was fully aware about the existence and operation of account till 08.01.1993. Thus, his communication relied upon by the respondents is of no consequence. It was also submitted that US \$ 1,39,000 came in the account of Vikram Virji according to the permissible mode and not from abroad and the said deposit was not made by way of physical deposit in India. It was, thus, submitted that it was not a case where the presumption ought to have been drawn that the acquisition of Rs. 30 lakhs by the petitioner on the basis of a cheque issued from the aforesaid account was petitioner’s own money or that he acquired foreign exchange in India without the permission of RBI.
- vi) That a NRI account holder is the master of his account once he is able to show that the remittances in the said account were by way of permissible mode. Disposal of that money in India by him does not attract Section 8(1) of FERA. It is, thus, submitted that it is not a case where there was any material on record which was sufficient to have formed an opinion that the petitioner was guilty of the offence alleged.

9. On the other hand the learned counsel for the respondents

submitted that in the present case even though the money has been received on the basis of a cheque drawn from the NRI account of Vikram Virji by the petitioner where deposits were also made in the authorized manner but Shri Vikram Virji in his communication written to the Indian High Commissioner himself admitted that the deposit in his account were not made at his instance and that the said deposits were not authorized. He also admitted his acquaintance with Chandraswami with whom he left his cheque books and also the present petitioner in whose favour the cheque of Rs. 30 lakh was drawn from the said account which account has been credited to the account of the petitioner in India and which money has been appropriated by him and therefore the presumption drawn by the respondent that this is the acquisition of Foreign Exchange from abroad without the permission of RBI which is the basis of his presumption in the complaint in accordance with Section 8(1) of FERA which reads as under:

8 - Restrictions on dealing in foreign exchange:-

(1) Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange:

Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money-changer.

Explanation. For the purposes of this sub-section, a person, who deposits foreign exchange with another person or opens an account in foreign exchange with another person, shall be deemed to lend foreign exchange to such other person.

10. Since there is evidence available with the respondents that the money which has come in the NRI account of Vikram Virji is not his money and the petitioner and others by manipulating the provisions of FERA have brought their own money from abroad or the money of their associates in India in a clandestine manner and thereafter have withdrawn the said amount for his own benefit. It amounts to receiving foreign exchange in India otherwise without the permission of Reserve Bank of India.

11. Regarding submissions made on behalf of the petitioner that the receipt from his account by way of a cheque in his account in India was not of the foreign exchange he has relied upon provisions of Section 2(h) of FERA, which defines foreign exchange as under:

(h) "foreign exchange" means foreign currency and includes-

(i) all deposits, credits and balances payable in any foreign currency and any drafts, traveller's cheques, letters of credit and bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency;

Any instrument payable, at the option of the drawee or holder thereof or any other party thereto, either in Indian currency or in foreign currency or partly in one and partly in the other.

12. In so far as the case of the petitioner is concerned, it rests on the presumption that there was proper remittance in the NRE account of the account holder. It also depends on the evidence which may be led by the petitioner to show that this amount was actually given to him by Vikram Virji. In the absence of any evidence to the contrary and the statement having been made by

Vikram Virji in his communication to Indian High Commissioner, prima facie, the case of the respondents that this money belongs to those who were benefiting out of it such as the petitioner in this case and the other accused person is prima facie sufficient for framing the charge against the petitioner. Therefore, to say that charges have been wrongly framed at this stage would not be justified in view of the detailed reasons given by the ACMM while framing the charges (supra). In so far as the defence of the petitioner is concerned, it can always be brought to the notice of Learned ACMM during the course of trial.

13. Thus, I do not find any reason to interfere with the order framing of the charge which has to be passed by taking a prima facie view of the matter and not on the basis of any concrete evidence which may establish that petitioner would certainly be convicted of the charges leveled against him. I need not repeat the judgments which have been already cited in the order framing the charges in this regard. Hence I do not find any merits in this case. Petition filed by the petitioner is dismissed. Let the parties appear before the Trial Court on 17.04.2009.

MOOL CHAND GARG, J.

APRIL 06, 2009
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