

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

+ Crl.Rev.P.557/2007 & Crl.M.A.No. 9924/2007

% Date of reserve : 15.12.2009
Date of decision: 17.12.2009

PIYUSH SAXENA ...PETITIONER
*Through: Mr.R.K.Handoo, Mr.Aditya Chaudhary
and Mr.Manish Shukla, Advocates*

Versus

ENFORCEMENT DIRECTORATE ...RESPONDENT
*Through: Ms.Rajdipa Behura and Mr.C.S.Chauhan,
Advocates*

WITH

+ Crl.Rev.P.558/2007 & Crl.M.A.9926/2007

SUDESH SAXENA ...PETITIONER
*Through: Mr.R.K.Handoo, Mr.Aditya Chaudhary,
and Mr.Manish Shukla, Advocates*

Versus

ENFORCEMENT DIRECTORATE ...RESPONDENT
*Through: Ms.Rajdipa Behura and Mr.C.S.Chauhan,
Advocates*

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. By this common order I shall dispose of the above-said two revision

petitions filed under Section 401 r/w Section 397 Cr.P.C. r/w Section 482 Cr.P.C. against the order dated 30.05.2007 passed by learned ACMM, Patiala House, New Delhi, whereby the learned ACMM framed charges against the petitioners under Section 56 of the FERA for the alleged violation under Section 9(1)(f)(i) and Section 8(1) of FERA r/w Section 64(2) of FERA, 1973.

2. Briefly stating the allegations against the present petitioners are that the petitioner, Piyush Saxena had made export of ball pen valued at US \$ 6,11,200.90 to M/s Triwood Limited, Hongkong, under 24 GRS Forms. The whole case of the prosecution is based upon the statement of Sudesh Saxena dated 9.7.98 which was recorded under Section 40 of FERA, 1973, who deposed that the total value of export was US \$ 6,00,000, out of which US \$ 4,00,000 were realised and the balance amount of US \$ 2,00,000 is pending realization. The total export value which was shown as US \$ 6,00,000 for numbers of ball pens of 1714285 approximate exported to M/s Triwood Limited, Hongkong was not a correct value. The real value was US \$ 3,00,000. The difference between the real value and inflated value is US \$ 1,00,000 and the said amount was paid back to the overseas buyer through hawala. The petitioner received remittances to the tune of US\$ 2,07,232.90 equivalent to Rs.77,80,807 against the said export which were adjusted by the authorized dealer against the GR Forms in question. According to the petitioner, this indicates that the export value of the consignment was US \$ 6,11,200.90 as declared by the petitioner in the GR Forms and other relevant

documents whereas the actual value of the said shipment was US \$ 3,03,968.00 and thus, the shipments were over invoiced by an amount of US \$ 6,11,200.90. It is also alleged against the petitioners that during the year 1995 the petitioner has made a payment of Rs.31,50,000/- to a person in India which was otherwise transferred to M/s Triwood Limited, Hongkong. In the year 1998-99 the petitioner received further payment to the tune of US \$ 2,07,232.90 equivalent to Rs.77,80,807/- in the guise of balance proceeds of exports, but they had no right to receive the said amounts as the actual value of the exports had already been realized from the foreign buyer in the year 1994-95 which clearly indicated that the petitioner has otherwise acquired US\$ 2,07,232.90 outside India from a person other than an authorized dealer and otherwise transferred the same to M/s Triwood Ltd., Hongkong, without the general or special permission of the RBI.

3. It is also alleged that by making payment totaling to Rs. 31,50,000/- in the manner as aforesaid and by otherwise acquiring and otherwise transferring foreign exchange to wit US \$ 3,07,232.90 equivalent to Rs.109,30,807/- the petitioner contravened the provisions of the FERA. Further an opportunity notice dated 23.8.2001 and 26.11.2001 under Section 61(2) of FERA, 1973 were given to the petitioners to state in writing whether they had in terms of Section 9(1)(f) and (i) and 8(1) r/w Section 64(2) of FERA, 1973 obtained any general or special permission of the RBI for the said transaction. Since both the petitioners were not found available at their address, therefore, the notices were served upon them through

affixation. The petitioners failed to produce such permission despite service of notices. In order to prove its case, the complainant examined seven witnesses at the pre-charge stage. Thereafter, the learned ACMM framed charges against the petitioners as aforesaid.

4. It is submitted on behalf of the petitioners that the whole case of the prosecution is based on the retracted statement of Sudesh Saxena, who, admittedly informed the IO that his wife Smt. Piyush Saxena is badly ill and he appeared on behalf of his wife on 09.07.1998 and was compelled to write dictated statement on 09.07.1998 without even being served with the summons under Section 40. However, he further retracted his statement dated 09.07.1998 vide his letter Mark X. It is further submitted that the allegations that the money was sent back to overseas buyer by making payment of Rs. 31,50,000/- through some unknown persons in Delhi under instruction of overseas buyer are baseless as no evidence substantiating the aforesaid allegations was adduced by the respondent. It is also submitted that quantity, quality, description and the value of the goods is checked by the Customs Authorities under the Customs Act at the time of export and in this case Customs Authorities have not alleged over invoicing. Those allegations qua the petitioners are untenable. It is also submitted that the value declared for the export stands realized in foreign exchange through proper banking channels and therefore, the case against the petitioners is contrary to the documentary evidence showing the value of the export coupled with remittances received. It is also submitted that the retracted

statement of the petitioner does not satisfy the test of a confession as per law as the same is vague and loose. There is a distinction between “confession” and “admission” as the confession must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence. Since the statement of the petitioner is not a confession, the same cannot be relied upon for the purpose of framing the charges against the petitioner. Even the statement of the petitioner does not make out any case against the petitioner as the essential ingredients of Section 9(1)(f)(i) as well as Section 8(i) as the person to whom the alleged amount was given is not known and admittedly such person is neither identified in the statement nor brought out during investigations. It is also submitted that the law with regard to confession clearly reveals that for admission of confession in evidence, the confession must have been given voluntarily and without any coercion. It is also submitted that framing of charge on the basis of such uncorroborated retracted statement is bad in law.

5. On behalf of the petitioner/Piyush Saxena, it is also submitted that she cannot be roped in for the contravention and that the same cannot be said to have been committed by her. There is also nothing on record to draw that she had played any active role in business transaction of the firm and that not even a single document was signed by her. She is only a house wife and had no concern with the business of the firm.

6. It would also be appropriate to take note of the relevant portion of order on charge, which is reproduced hereunder:-

“I have gone through the documents placed on record which have been duly showing that the same had been duly produced by the accused Piyush Saxena before the IO. Ex.PW6/B shows that as per the information received from PNB the copies of GR shows that Proprietor of M/s Roop International is Smt.Piyush Saxena and their address as per the record is 412, Gagan Vihar, First Floor, Delhi.

Hence the plea of the accused Piyush Saxena that she is not the incharge of the business and that she was a housewife does not prima facie seem to be correct, however, this issue is left open. However at the moment this issue cannot be decided and it would be open to accused Piyush Saxena to lead suitable evidence at the pre charge stage in his defence in support of her contentions.

However, on the basis of statements of various witnesses and the documents placed on record, I hereby hold that accused no.1 is the proprietor of the firm and all the documents have been accepted under her name and signatures and it was accused no.2 who was actually responsible for the day to day business of the firm also being related as husband and wife. Hence, I hold that prima facie there is sufficient material to frame charge against the accused for the offence under Section 56 of FERA for the alleged violation under Section 9(1)(f)(i) and Section 8(1) of FERA read with Section 64 (2) of FERA, 1973.”

7. A bare reading of the aforesaid order does not show as to how offence under Section 56 of the FERA is made out.

8. In the case of *Vinod Solanki Vs. U.O.I, JT 2009 (1) SC 1*, 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.

9. Similarly, in the case of *Noor Aga V. State of Punjab, 2008 (3) JCC*

135 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 voluntary.** 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 its 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.

10. In the present case also there is nothing on record which may go to show that any evidence has been led on behalf of the respondents to rebut the contentions of the petitioners that the alleged confessional statement which is the sole evidence relied upon by the prosecution had not been obtained without torturing the petitioner and further that the said statement was not retracted immediately. Rather, there is an admission on the part of the respondents that the said statement had been retracted. There is also no corroboration of the said statement. This matter was listed for clarification on 15.12.2009 when again counsel appearing for the respondents accepted the position that there is nothing on record to show that any evidence has been led on behalf of the respondents to rebut the case of the petitioners that the confessional statement was recorded under duress. The factum of retraction is also not disputed. In view of the judgments delivered by the Apex Court in *Vinod Solanki (Supra)* and *Noor Aga (Supra)* and admission of the respondent that the statement made under Section 40 of the Act was retracted by the petitioner, the order of charge against the petitioners cannot be sustained. 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.

11. Accordingly, the revision petitions filed by the petitioners are allowed and the order dated 30.05.2007 framing charge against the petitioners is set aside. Pending applications also stand disposed of. The bail bonds, if any, of the petitioners stand discharged.

MOOL CHAND GARG, J.

December 17, 2009
dc