

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

+ **CRL.REV.P. 518/2007 & CrI.M.A. 9107/2007 (interim stay)**

%

Reserved on: 12th April, 2012

Decided on: 2nd May, 2012

S.K.JAIN

..... Petitioner

Through: Mr. Arvind Nigam, Sr. Advocate with
Mr. Pavan Narang, Mr. Puskal Gogoi
and Mr. Anish Dhingra, Advocates.

versus

M.G.ATTRI

..... Respondent

Through: Mr. Ashok Kumar Panda, Sr.
Advocate with Mr. Satyabrata Panda
and Mr. N.K. Matta, Advocates for
ED.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition, the Petitioner challenges the order dated 19th March, 2007 directing framing of charge and charge framed against the Petitioner for offence under Section 8(1) of the Foreign Exchange Regulation Act, 1973 (in short 'FERA') punishable under Section 56 of the FERA in complaint case No. 54/1/1996 titled as 'Shri M.G. Attri Vs. S.K. Jain and Anr.'.

2. Learned counsel for the Petitioner contends that the foreign exchange was not recovered from the Petitioner. The foreign exchange allegedly recovered from the co-accused does not belong to the Petitioner. The statement of co-accused has been manipulated. Further the statement of the co-accused cannot be used against the Petitioner as it is not a confession.

Even if it is said to be a confession made by the co-accused J.K. Jain, since it is exculpatory qua J.K. Jain, the same cannot be used in evidence against the Petitioner in terms of Section 30 of the Evidence Act. Further, even if this Court comes to the conclusion that it is a confession of the co-accused and admissible against the Petitioner, there is no evidence on record against the Petitioner except the said confession and the same not being substantive evidence, no charge can be framed against the Petitioner merely on the basis of the confession of the co-accused. Reliance is placed on *Pakala Narayan Swami Vs. Emperor AIR 1939 Privy Council 47*, *Bhuboni Sahu Vs. The King AIR (36) 1949 PC 257*, *Haricharan Kurmi Vs. State of Bihar AIR 1964 SC 1184 (V 51 C 149)*, *Shri Chand Gupta Vs. Santosh Kumari & Anr. 2008 (2) JCC 1040* and *Union of India Vs. Bal Mukund & Ors. 2009 (2) JCC Narcotics 76 (SC)*.

3. Learned counsel for the Respondent on the other hand contends that in terms of Section 71(1)(2) & (3) of the FERA, the burden of proof of the acquisition is on the person from whose possession it is recovered. Further when a person is prosecuted for the contravention of any provision, the burden of proving that he has the requisite permission lies on the said person. Despite opportunity notice being given, the Petitioner failed to give any explanation. The statement of J.K. Jain recorded by the Respondent is not exculpatory as only a part of the statement is being looked into by the Petitioner. A comprehensive reading of the entire statement of J.K. Jain shows that he admits recovery of the foreign exchange from his possession and also confesses about his writings in the diary. He only states that the foreign currency, Indian currency and Indira Vikas Patra were owned by the

Petitioner. Thus, it is a confession, which is not exculpatory in nature. Since the statement inculcates the maker i.e. J.K. Jain also, the same is admissible against the Petitioner under Section 30 of the Evidence Act as both of them are being tried together for the same offences. Besides the confession of the co-accused, there are other pieces of evidence in the form of recovery of the foreign exchange and the seizure memo. This being not the only evidence, prima facie there is sufficient evidence at this stage to raise a strong suspicion against the Petitioner of having committed the offence and the veracity of the evidence and whether a conviction can be based thereon would be decided during the trial. Further, Section 71(3) FERA casts a burden on the Petitioner to prove that the possession by the co-accused on behalf of the Petitioner was lawful. Further in terms of Section 106 of the Evidence Act also since the facts are in the special knowledge of the Petitioner, he was bound to disclose the same. Reliance is placed on *Sarbananda Sonowal v. Union of India And Anr. AIR 2005 SC 2920*. Both the Petitioner and J.K. Jain admit that they have an employer-employee relationship and thus an inference can be drawn that J.K. Jain was holding the foreign currency on behalf of the S.K. Jain, the Petitioner herein. Referring to *Union of India Vs. Bal Mukund & Ors. 2009 (2) JCC Narcotics 76* it is contended that though the decision impliedly overrules the decision in *Naresh J. Sukhwani Vs. Union of India AIR 1996 SC 522*, however *Naresh J. Sukhwani* has been approved by a Bench of three Judges in *K.I. Pavunny Vs. Assistant Collector (HQ) Central Excise Collectorate, Kochin (1997) 3 SCC 721*. The statement of J.K. Jain before the CBI admitting that the foreign currency belonged to him is not admissible in evidence and cannot override the statement recorded by the Respondent under Section 40 of the

FERA. Hence, there is no infirmity in the impugned order and the petition be dismissed.

4. I have heard learned counsel or the parties.

5. Briefly the facts giving rise to the filing of the present petition are that on 20th April, 1991 CBI registered RC No. 5(s)/91-SIU-V. Consequently on 3rd May, 1991, CBI conducted searches at various places including the residential premises of J.K. Jain, the co-accused. During the search, foreign exchange amounting to USD 250 (Travellers Cheque) and foreign currency USD 593, U.K. Pounds 300, D.M. 2,700/-, French Franc (FF) 300, Hongkong HK \$ 50, one currency note of Thai Bhatt 10/- and two Chinese currency notes of 10/- were recovered along with Indian currency of Rs. 58,09,000/-. On 17th September, 1993, the officers of CBI recorded the statement of co-accused J.K. Jain wherein he stated that seized foreign currency, Indian currency and the Indira Vikas Patra belong to him. The matter was referred to Enforcement Directorate, who took over the investigation and seized the foreign currency from the CBI vide Panchnama dated 6th October, 1995. On 14th April, 1995, statement of the Petitioner was recorded under Section 40 of the FERA by the Enforcement Directorate wherein the Petitioner admitted that the co-accused J.K. Jain was his employee. According to learned counsel for the Petitioner, no questions were asked from the Petitioner regarding the foreign exchange seized from co-accused J.K. Jain's residence. On 17th April, 1995, pursuant to summons issued to J.K. Jain under Section 40 of the FERA, his statement was recorded wherein he stated that the seized Indian currency and Indira Vikas Patras belonged to the Petitioner and the seized foreign currency was given to him

in an envelope by the Petitioner for keeping with him. On 16th August, 1995, an opportunity notice under proviso to Section 61(2)(ii) of the FERA was given to the Petitioner to explain whether they had any permission/exemption of the Reserve Bank of India for entering into the aforesaid transactions. If so, copy(ies) of such permission/exemption may be furnished to the Directorate. The Petitioner in response to the opportunity notice denied acquisition of the foreign exchange and also sought the documents relied upon by the Department. Consequently, the abovementioned complaint was filed before the Learned ACMM on 11th July, 1996 wherein the impugned order was passed after the pre-charge evidence was led and the statements of four prosecution witnesses were recorded.

6. It is well settled that a statement recorded by an officer of the Directorate Enforcement under Section 40 of FERA or by an officer of the Customs Department under Section 108 of the Customs Act is deemed to be a statement recorded in judicial proceeding. The person, who is summoned under Section 40 of FERA, is bound to appear and state the truth while giving evidence. If he does not do so, he makes himself liable for prosecution under Sections 193 and 228 IPC. Their Lordships in *Percy Rustomji Basta v. State of Maharashtra*, 1971 (1) SCC 847 held:

“22. We are not inclined to accept the contention of Mr Chari that in the circumstances mentioned above any threat has proceeded from a person in authority to the appellant, in consequence of which the statement Ex. T was given. Section 108 of the Act gives power to a Customs Officer of a gazetted rank to summon any person to give evidence in any inquiry in connection with the smuggling of any goods. The inquiry made

under this section is by virtue of sub-section (4) deemed to be judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. A person summoned under Section 108 of the Act is bound to appear and state the truth when giving the evidence. If he does not answer he would render himself liable to be prosecuted under Section 228 IPC. If, on the other hand, he answers and gives false evidence, he would be liable to be prosecuted under Section 193 IPC for giving false evidence in a judicial proceeding. In short, a person summoned under Section 108 of the Act is told by the statute itself that under threat of criminal prosecution he is bound to speak what he knows and state it truthfully. But it must be noted that a compulsion to speak the truth, even though it may amount to a threat, emanates in this case not from the officer who recorded the statement, but from the provisions of the statute itself. What is necessary to constitute a threat under Section 24 of the Evidence Act is that it must emanate from the person in authority. In the case before us there was no such threat emanating from PW 5, who recorded the statement of PW 19, who was guiding the proceedings. On the contrary the officers recording the statement were only doing their duty in bringing to the notice of the appellant the provisions of the statute. Even if PW 5 had not drawn the attention of the appellant to the fact that the inquiry conducted by him is deemed to be a judicial proceeding, to which Section 193 IPC applies, the appellant was bound to speak the truth when summoned under Section 108 of the Act with the added risk of being prosecuted, if he gave false evidence.”

7. In *Ramesh Chandra Mehta v. The State of West Bengal*, AIR 1970 SC 940, the Constitution Bench while examining the admissibility of a statement recorded under Section 171A of the Sea Customs Act, 1878 (now repealed) corresponding to Section 108 of the Customs Act, 1962 held:-

“24. In certain matters the Customs Act of 1962 differs from the Sea Customs Act of 1878. For instance, under the Sea Customs Act search of any place could not be made by a

Customs Officer of his own accord: he had to apply for and obtained a search warrant from a Magistrate. Under Section 105 of the Customs Act, 1962, it is open to the Assistant Collector of Customs himself to issue a search warrant. A proper officer is also entitled under that Act to stop and search conveyances: he is entitled to release a person on bail, and for that purpose has the same powers and is subject to the same provisions as the officer in charge of a police station is. But these additional powers with which the Customs Officer is invested under the Act of 1962 do not, in our judgment, make him a police officer within the meaning of Section 25 of the Evidence Act. He is, it is true, invested with the powers of an officer in charge of a police station for the purpose of releasing any person on bail or otherwise. The expression “or otherwise” does not confer upon him the power to lodge a report before a Magistrate under Section 173 of the Code of Criminal Procedure. Power to grant bail, power to collect evidence, and power to search premises or conveyances without recourse to a Magistrate, do not make him an officer in charge of a police station. Proceedings taken by him are for the purpose of holding an enquiry into suspected cases of smuggling. His orders are appealable and are subject also to the revisional jurisdiction of the Central Board of Revenue and may be carried to the Central Government. Powers are conferred upon him primarily for collection of duty and prevention of smuggling. He is for all purposes an officer of the revenue.

25. For reasons set out in the judgment in Criminal Appeal No. 27 of 1967 and the judgment of this Court in *Badku Joti Savant case*, 1966-3 SCR 698 = (AIR 1966 SC 1746), we are of the view that a Customs Officer is under the Act of 1962 not a police officer within the meaning of Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Indian Evidence Act.”

8. One of the grievances of the Petitioner is that in the pre-charge evidence neither the officer who recorded the statement nor J.K. Jain who

made the statement has been examined, thus denying the Petitioner a valuable right to cross-examine. It may be noted that in the present case statement of J.K. Jain, co-accused was recorded under Section 40 of FERA by Shri R.K. Rawal, an officer of the Respondent on 17th April, 1995. However, in the pre-charge evidence, the statement of J.K. Jain, co-accused was exhibited by PW-4 M.G. Attri, Assistant Director of Enforcement, the complainant in the present case, though he had not recorded the statement. In this regard it may be noted that as laid down by the Hon'ble Supreme Court in *Phool Kumar Vs. Delhi Administration*, AIR 1975 SC 905 any objection as to the mode of proof of a document has to be taken at the earliest opportunity i.e. when the document was exhibited in the presence of the Petitioner. Since no objection was taken at that stage, the Petitioner cannot take such an objection now. Further Section 80 of the Evidence Act raises a presumption as to the documents produced as record of evidence.

9. Learned counsel for the Respondent has strenuously pressed into service Section 80 of the Evidence Act to say that the statement once exhibited by the Investigating Officer is per se admissible under Section 80 of the Evidence Act. In this regard, it may be noted that Section 80 of the Evidence Act has nothing to do with the admissibility of any particular kind of evidence, which question has to be decided by reference to other Sections of the Evidence Act. Section 80, Evidence Act only dispenses with the necessity of formal proof in case of certain documents taken in accordance with law. In *Madi Ganga v. State of Orissa*, (1981) 2 SCC 224, their Lordships held-

“5. We desire to express no opinion on the question whether the extra-judicial confession made to PWs 2 to 5 is barred under Section 24 of the Evidence Act. It is unnecessary for us to say anything on this question, since we are satisfied that the learned Sessions Judge was wholly wrong in excluding and the High Court was certainly right in acting upon the confessional statement made to the Magistrate. The learned Magistrate has put to the accused all the necessary questions to satisfy himself that the confession was voluntary. He has also appended the necessary certificate. We do not accept Shri Jain's submission that the learned Magistrate should have been examined as a witness. Section 80 of the Evidence Act makes the examination of the Magistrate unnecessary. It authorises the court to presume that the document is genuine, that any statements as to the circumstances under which it was taken are true and that such confession was truly taken in accordance with law. Shri Jain submitted that if the Magistrate had been examined as a witness, the accused might have been in a position to show, by cross-examination that the confession recorded by the Magistrate was not voluntary. The Magistrate has appended a certificate that he was satisfied that the confession was voluntary. No circumstance has been brought out in the evidence justifying the calling of the Magistrate as a witness. We do not think that the circumstances of the case justify any comment on the alleged failure of the prosecution to examine the Magistrate as a witness.”

10. Thus, the statement of the co-accused being admissible in evidence and duly exhibited, it is now to be seen whether there is any other evidence on record against the Petitioner or in the absence of any other evidence on record whether charge can be framed merely on the statement of the co-accused. The statement of J.K. Jain recorded under Section 40 of the FERA admits seizure of incriminating documents Indian currency, Indira Vikas Patra and foreign currency from his house. J.K. Jain also admits that the

seized documents were written in his hand-writing. It is a detailed statement wherein he admits number of other transactions including the ledger and the seized files to be in his hand-writing. To see whether a statement is inculpatory or not, the entire statement will have to be looked into. Merely because the co-accused J.K. Jain in his statement besides inculcating himself has stated that the seized Indian currency and Indira Vikas Patra belong to the Petitioner and the seized foreign currency was given to him in an envelope by the Petitioner for keeping with him, the statement will not become exculpatory qua J.K. Jain. Since the statement of co-accused J.K. Jain inculcates both himself and the Petitioner, the same is duly admissible under Section 30, Evidence Act. However, the evidentiary value that can be attached to a statement of the co-accused is only that it can be taken into consideration to lend assurance as held by the Constitution Bench in *Haricharan Kurmi* (supra). This can certainly not be treated as substantive evidence and can be pressed into service when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence.

11. In the case at hand, there is a recovery of foreign currency from the co-accused. The relationship of employer and employee has been admitted both by the Petitioner and the co-accused. The statement of the co-accused and the other documents seized show that the co-accused was acting on the behest of the Petitioner. At this stage, the Court will not dissect the evidence against each accused and come to the conclusion that the only evidence against the Petitioner is the statement of the co-accused and that being not substantive evidence, no charge can be framed against him. It is well settled

that in a case a conspiracy if there is reasonable ground to believe that two or more persons have conspired together to commit an offence then by virtue of Section 10 of the Evidence Act, anything said, done or written by one of such persons in reference to their common intention, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy, as for the purpose of showing that any such person was a party to it. At this stage, it has only to be seen whether a prima facie case exists against the Petitioner. From the facts of the present case, prima facie a strong suspicion arises that the Petitioner along with the co-accused committed the offence as alleged. Whether the said evidence is sufficient for sustaining a conviction would be seen after the witnesses are examined and the entire evidence is adduced. Thus, I find no infirmity in the impugned order.

12. The Petition and application are dismissed. Trial Court Record be sent back.

(MUKTA GUPTA)
JUDGE

MAY 02, 2012
‘ga’