

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: March 26/27, 2014

Decision on: April 16, 2014

CRL.A.No. 120 of 2008

AMRIK SINGH SALUJA

..... Appellant

Through: Mr. Pawan Narang with
Mr. Anish Dhingra, Ms. Vasundhara Chauhan
and Mr. Shivam Takiar, Advocates.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Subhash Bansal, Advocate
for R-2.

AND

CRL.A.No. 250 of 2008

RAJIV GOPALANI

..... Appellant

Through: Mr. Harish Gulati with
Mr. Anindiya Malhotra, Advocates.

versus

THE DIRECTOR OF ENFORCEMENT,
ENFORCEMENT DIRECTORATE

..... Respondent

Through: Mr. Subhash Bansal with
Mr. Shashwat Bansal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

16.04.2014

1. These appeals are directed against the common order dated 4th January 2008 passed by the Appellate Tribunal for Foreign Exchange ('AT') dismissing the Appeal Nos. 474 and 478 of 2001 thereby affirming the adjudication order dated 9th October 2001 passed by the Special Director ('SD'), Enforcement Directorate ('ED').

2. Criminal Appeal No. 120 of 2008 has been filed by Mr. Amrik Singh Saluja and Criminal Appeal No. 250 of 2008 has been filed by Mr. Rajiv Gopalani.

SCN - I

3. The facts leading to the filing of the present appeals are that on 14th August 1998 a show cause notice (SCN-I) was issued to Mr. Amrik Singh Saluja alleging that he had made payments totalling Rs.1.18 crores to Mr. Arvind Shah @ Subhash Ganatra, a person resident in India, without any special or general permission of the Reserve Bank of India ('RBI') acting on the instructions of his brother Dr. Rajinder Singh Saluja of the United Kingdom, a person resident outside India, and thereby contravened Section 9 (1) (d) of Foreign Exchange Regulation Act, 1973 ('FERA'). SCN-I was also issued to Mr. Arvind Shah for receiving the aforementioned payment and to Mr. Raj Kumar Kedia for aiding and abetting Mr. A.S. Saluja in making the aforementioned payment.

4. SCN-I came to be issued as a result of the officers of the ED, acting on an intelligence input, searching the residential premises of Mr. A.S.

Saluja at E-32, Greater Kailash-I, New Delhi on 15th August 1997 and seizing Rs.1.18 crores, one bunch of loose sheets containing 29 pages and one currency note of Rs.50 from the pocket of the shirt of Mr. A.S. Saluja. During the search, Mr. Arvind Shah @ Subhash Ganatra was found present in the premises. His search led to the seizure of 6 pages of loose sheets. It is stated that from the seized documents, as well as a telephone index diary surrendered by Mr. A.S. Saluja on 16th August 1997, it was revealed that Mr. Saluja was a British national holding a British passport and residing in India continuously since 1970 and had been indulging in acquisition and transfer of foreign exchange as well as receiving and making payments in India on instructions from abroad.

5. A confessional statement of Mr. A.S. Saluja was recorded under Section 40 FERA on 16th August 1997. According to the ED, in the said statement, Mr. A.S. Saluja stated that in August 1997 his brother Dr. Rajinder Singh Saluja, a resident of London, UK informed him about a deal of Pound Sterling ('GBP') 1,85,000 and asked Mr. A.S. Saluja if he could arrange Indian currency for the same. Mr. A.S. Saluja then contacted Mr. R.K. Kedia of Calcutta who agreed to purchase the said GBP and desired that it should be deposited in the account of M/s. Hilco Corporation with the Swiss Banking Corporation, New York. Mr. Kedia also gave the details of two persons i.e. 'Mr. JP' and 'Mr. Mohan' who would deliver the Indian currency amount to Mr. A.S. Saluja in Delhi. Accordingly, Mr. JP delivered Rs.50 lakhs and Mr. Mohan delivered Rs.65,90,000 to Mr. A.S. Saluja. Dr. Rajinder Singh

Saluja informed Mr. A.S. Saluja that Mr. Arvind Shah would contact him and would show a Rs. 50 note bearing No. 5AA 691195 and that he should hand over the Indian currency equivalent to GBP 1,85,000 to Mr. Shah.

6. Mr. Shah came to Mr. A.S. Saluja's residence on 15th August 1997 at 5.30 pm, disclosed his identity and showed him the Rs. 50 currency note bearing No. 5AA 691195. Mr. Saluja took the said Rs. 50 currency note from Mr. Shah and kept it in his shirt pocket. Mr. Saluja then handed over Rs.1.18 crores in cash to Mr. Shah. The said Rs. 50 note was recovered by the ED officials from the shirt pocket of Mr. Saluja. The details of the aforesaid transactions were noted in pages 22, 23, 24 and 29 of the bunch of loose sheets seized from Mr. Saluja's residence.

7. In regard to the entries in the loose sheets, Mr. Saluja stated, *inter alia*, that at page 19 thereof the details of the account of one Gita Soni with the Midland International Finance Corporation were given. Mr. Saluja disclosed that US Dollars ('USD') 50,000 was paid to the said account on the instructions of Mr. Rajiv Gopalani on 4th August 1997. The telephone number of Mr. Gopalani was also given. Mr. Saluja disclosed that he had received payment equivalent to USD 50,000 from Mr. Rajiv Gopalani relating to the said entry which was reflected in the rear of page 27. He also explained that the entries of USD 33600+25000+15000 written against 'Rajiv' at page 26 of the

documents seized from his residence also related to Mr. Rajiv Gopalani.

8. SCN-I proceeded to set out the explanation given by Mr. Shah in his statement under Section 40 FERA. Mr. Shah stated that he was a permanent resident of London. He was approached by one Mr. Amar Nath in London in the third week of July 1997 and offered an air ticket to India and back plus GBP 4000 to act as a carrier for receiving an amount of Rs.1.18 crores from Mr. Saluja and pass it to the person whose details were to be informed to him later. Mr. Shah agreed to the said proposal and came to India on 14th August 1997. He checked in to Hotel Centre Point, Kasturba Gandhi Marg, New Delhi under the assumed name of Arvind Shah as advised by Mr. Amar Nath. He then telephoned Mr. Saluja who later visited him in the hotel room. On 15th August 1997, at about 4 pm, Mr. Shah received a call from Mr. Saluja asking him to reach Mr. Saluja's residence. After receiving the Indian currency in the value of Rs.1.18 crores, Mr. Shah handed over the Rs. 50 currency note to Mr. Saluja.

9. The ED officials searched the premises of Mr. R.K. Kedia in Calcutta on 18th and 19th August 1997 and seized certain documents. The statement of Mr. Kedia under Section 40 FERA was recorded on four dates. Mr. Kedia confirmed that his telephone numbers were mentioned in page 31 of the telephone diary surrendered by Mr. Saluja. However, he denied knowing Mr. Saluja or having any business relations or having spoken to him either from his office or residence.

Mr. Kedia further denied having spoken to either Mr. JP or Mr. Mohan over the telephone.

10. As a follow up action, the residential premises of Mr. Rajiv Gopalani as well as his business premises were searched by the ED officials on 20th August 1997 and documents were recovered. The statement of Mr. Gopalani under Section 40 FERA was recorded on 21st August 1997. He confirmed his telephone number as mentioned in the documents recovered from Mr. Saluja. Mr. Gopalani, however, refused to make any statement or offer any comments in respect of entries appearing against his name in the documents seized from Mr. Saluja. From the investigations it was revealed that in 1995-97, Mr. Gopalani had made payments equivalent to USD 1,93,600 as consideration for receipt of foreign exchange abroad without any general or special exemption from the RBI.

SCNs II to V

11. A second show cause notice (SCN-II) was issued to Mr. Saluja for acquiring and otherwise transferring foreign exchange comprising USD 9,88,431.16, GBP 3050, Glider 1250, French Francs 4500 without previous general or special permission of the RBI and for receiving payments in Indian rupees equivalent to USD 1,93,660 from Mr. Rajiv Gopalani as consideration for receipt of foreign exchange abroad without any general or special exemption from RBI in contravention of Sections 8 (1) and 9 (1) (f) (i) FERA. SCN-II was also issued to Mr. Gopalani for making payment in Indian rupees

equivalent to USD 1,93,660 to Mr. Saluja as consideration for receiving foreign exchange abroad, without any general or special exemption from RBI thus contravening Section 9 (1) (f) (i) FERA.

12. In the loose sheets recovered from the residence of Mr. A.S. Saluja there were entries in page 14 which were explained by Mr. Saluja. In terms of the said entries, he had received Rs.2 lakhs on 24th July 1997 from Mr. R.P. Chauhan on the instructions of one Dr. Lal of Australia. The entries in page 6 showed that during 1996-97 he had paid a sum of Rs.3,35,000 to his aunt Api Chodhary, a resident of Australia, as consideration for receipt of USD 10,700 equivalent to Australian Dollars 12,850 by his son Rajiv who was studying in Australia. SCN-III was accordingly issued on 14th August 1998 to Mr. Saluja for making payments totalling to Rs.3,97,495 to persons in India as per instructions of persons resident outside India. SCN-III also stated that Mr. Saluja had received payments of Rs.2 lakhs on 24th July 1997 on instructions of Dr. Lal of Australia without any general or special exemption from the RBI in contravention of Section 9 (1) (b) and Section 9 (1) (d) FERA. The SCN-III was issued to Mr. R.P.Chauhan for paying Rs.2 lakhs on 24th July 1997 to Mr. Saluja on the instructions of Dr. Lal of Australia without any general or special exemption from the RBI in contravention of the provisions of Section 9 (1) (d) FERA.

13. SCN-IV was issued on 14th August 1998 to Mr. Saluja for making payment of Rs.3,35,000 as consideration for receipt of foreign

exchange in the sum of USD 10,700 without general or special exemption of the RBI thus contravening provisions of Section 9 (1) (f) (i) FERA.

14. SCN-V was issued on 8th May 2001 to Mr. A.S. Saluja for receiving the payment totalling to Rs.1.18 crores on behalf of person resident outside India without any general or special exemption from RBI in contravention of the provisions of Section 9 (1) (b) FERA. Mr. Saluja and Mr. Shah were also asked to show cause as to why Indian currency in the value of Rs.1.18 crores seized from the residence of Mr. A.S. Saluja should not be confiscated by the Central Government account in terms of Section 63 FERA. SCN-I to Mr. Shah was received undelivered from postal authorities with the remarks 'out of India'.

Adjudication Order of the Special Director

15. In the impugned AO, the SD has discussed SCNs I and V together. Before the SD, Mr. Saluja contended that his statement recorded on 16th August 1997 was under coercion and threat. He also referred to the fact that he had filed an application before the learned Metropolitan Magistrate ('MM') on 17th August 1997 stating that his statement had been recorded under coercion and threat. Mr. R.K. Kedia in his statement under Section 40 FERA denied that he arranged Rs.1,15,90,000 for making payment to Mr. Shah. By an affidavit filed on 26th July 2001, he denied knowing Mr. Saluja or Mr. Shah. As far as Mr. Shah was concerned, although he participated in the proceedings,

he denied his role in the alleged payment and denied knowing either Mr. Saluja or Mr. Kedia. Mr. Kedia, however, never participated in the proceedings.

16. As far as Mr. Saluja was concerned, he contended that the ED had not questioned Mr. JP or Mr. Mohan to establish their case. He further submitted that the ED also did not make enquiries to ascertain whether there was an account of Hilco Corporation with the Swiss Banking Corporation, New York and whether Mr. Kedia had any connection with the said account. Mr. Saluja also contended that the moneys seized from his residence had already been declared by him to the Income Tax authorities under the voluntary disclosure of income scheme ('VDIS').

17. In the impugned AO dated 9th October 2001, the SD analysed the statement of Mr. Kedia recorded on 3rd September 1997. It was found that as many as 7 calls had been made between 10th February and 6th March 1997 by Mr. Kedia from his office to Mr. Saluja. The details of the STD calls made from Mr. Kedia's telephone were obtained from the Department of Calcutta Telephones, Calcutta. They confirmed that the said telephone was in the name of M/s. Lugo Traders of 3-B, Lal Bazar Street, 5th Floor, Room No.6, Calcutta. The said calls were analysed. It was found that the calls were made at the telephone numbers installed at the residence of Mr. Saluja. From the entries made in the telephone diary and the loose note sheets it was clearly established that Mr. Saluja had a close nexus with the telephone

numbers installed at the residence of Mr. Kedia. However, Mr. Kedia in his affidavit dated 24th July 2001 gave an explanation that the telephone installed at his residence and the telephone numbers were used by visitors, guests and family members who resided with him. Mr. Kedia denied any connection with Mr. Saluja.

18. The nexus between the noticees Mr. Saluja and Mr. Shah was evident from the further call details. There was also a nexus between the telephone of Mr. Kedia and the telephone of Mr. JP and the calling pattern confirmed that intense activity took place between Mr. Kedia, Mr. JP and Mr. Saluja. As regards the submission of Mr. Saluja that his statement had been recorded under coercion and threat, the SD observed as under:

“The Investigating officers would not like to create evidence against themselves in case they intended to coerce or torture Shri Saluja because evidence of the son who is 18 years of age would go against them. Moreover, 18 years son is not a child on whose cries Shri Saluja would have given a statement favourable to the Department. Eighteen years individual is an adult, a young man with statement. There is no allegation against the Investigating Officers that they tortured the son of Shri Saluja to take a confession from noticee No.1. Moreover, there is no evidence on record to prove that Mr. Saluja was either hit or coerced”.

19. On behalf of the ED, Mr. K.C.Abraham, Enforcement Officer was examined and cross-examined. He stated, *inter alia*, that during his

questioning Mr. Saluja, after each question, consulted the seized documents, paused for a while and recorded his answers. He never complained of any chest pain. The SD concluded that as a result of the recovery of the Rs. 50 currency note and the explanation offered by Mr. Saluja for the entries in the loose sheets, it was clear that Mr. Shah had come to the residence of Mr. A.S. Saluja for receiving the money. From the cross-examination of Mr. Vats of the ED, it was clear that incriminating documents were recovered during the search which justified seizure of the currency under Section 37 FERA.

20. The SD also noted that the official exchange rate i.e. Rs.62.50 per GBP worked out to Rs.1,15,62,500 for GBP 1,85,000. The money arranged by Mr. Kedia through Mr. JP and Mr. Mohan was also worked out at that rate. Mr. Shah in his statement further stated that when he delivered the Rs. 50 currency note to Mr. Saluja “he had almost received the money”. Had the premises of Mr. Saluja not been raided by the officers of the ED and CEIB on 15th August 1997, Mr. Shah would have escaped with the money. Although Mr. Saluja stated that he had declared the amount seized under the VDIS, he had not disclosed the source of the said sum. A similar plea had also been raised before the Additional Chief Metropolitan Magistrate (‘ACMM’), Delhi at the time of filing of the bail application by Mr. Saluja which had also been rejected. Secondly, the SD concluded that Mr. Saluja acted at the behest of his brother Dr. R.S.Saluja and that the Indian currency seized was liable to confiscation under Section 63 FERA.

21. As regards the statement of Mr. Saluja made on 16th August 1997, the SD held it to be voluntary and true and that its retraction was not valid. The SD discussed the detailed entries in the loose sheets and concluded that Mr. Saluja had contravened Section 8 (1) and Section 9 (1) (f) (i) FERA. As regards Mr. Shah, he was held to have contravened Section 9(1) (b) FERA and was held liable to penalty under Section 50 FERA.

22. As regards Mr. Gopalani, the SD discussed his replies to the questions and his refusal to make any statement or give any explanation to the entries made in the loose sheets seized from Mr. Saluja. The hand writing expert also confirmed that the writing on page 19 of the loose sheet was that of Mr. Gopalani. No queries were raised on the report of the hand writing expert. The noticee also did not ask for the expert to be cross-examined. The SD proceeded to impose the penalty of Rs.10 lakhs on Mr. Saluja as regards the SCNs-I and V, Rs.10 lakhs as regards SCN-II, Rs.50,000 as regards SCN-III and Rs.25,000 as regards SCN-IV. The SD dropped the proceedings against Mr. Kedia under SCN-I. A penalty of Rs.50,000 was imposed on Mr. Shah and Rs.1 lakh on Mr. Gopalani. A penalty of Rs.10,000 was imposed on Mr. R.P.Chauhan. The confiscation of Rs.1,15,90,000 out of the seized amount of Rs.1.18 crores was ordered.

Order of the Appellate Tribunal

23. The AT first examined whether the statement of Mr. A.S. Saluja under Section 40 FERA could be said to be voluntary. It was held that

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it was difficult to believe a bald assertion of threat and coercion without any evidence being produced in that behalf. A substantial sum of Rs.1.18 crores had been recovered and the burden of explaining the origin and possession thereof was on the Appellant. The mere fact that he had disclosed this under the VDIS did not mean that the contravention of provisions of the FERA would not be investigated. The recovery of 19 loose sheets along with the currency note of Rs. 50 as well as the details of telephone calls of different numbers could not be explained by anyone other than the Appellants themselves. In the circumstances, the AO was affirmed by the AT.

Submissions of Counsel

24. Mr. Pawan Narang, learned counsel appearing for Mr. Saluja, submitted that the confessional statement dated 16th August 1997 under Section 40 FERA was not voluntary. It was retracted by Mr. Saluja at the first available opportunity. He submitted that from the cross-examination of Mr. K.C. Abraham it was clear that Mr. Saluja's son was also called to the office of the ED and this substantiated the plea that Mr. Saluja was subjected to threat and coercion. Relying on the decision in ***Central Bureau of Investigation v. V.C. Shukla 1998 CrL LJ1905***, Mr. Narang submitted that there could be no presumption regarding entries in loose sheets of paper, which did not form part of regularly maintained books of accounts. Mr. Narang submitted that the mere fact that there were some loose sheets of papers with writings on them could not constitute substantive evidence of contraventions of the provisions of FERA.

25. Mr. Narang submitted that no notice was issued to Dr. Rajinder Singh Saluja, on whose instructions the transactions were supposed to have taken place. Also, the calculation of the equivalent sum in Indian currency of the GBP supposed to have been delivered abroad did not explain how the amount was arrived at with reference to the prevalent exchange rate. Mr. Narang pointed out that summons was issued to Mr. Saluja to appear at 1 am when he was picked up much earlier and was in custody throughout. This also showed that the paper work associated with the arrest and the recording of his statement was unreliable. Relying on the decisions in *Noor Aga v. State of Punjab* 2008 [3] JCC [Narcotics] 135, *Vinod Solanki v. Union of India* (2008) 16 SCC 537, *Union of India v. Bal Mukund* (2009) 12 SCC 161, *Francis Stanly v. Intelligence Officer, Narcotic Control Bureau* 2007 [1] JCC [Narcotics] 1, *Abid Malik v. Union of India* 2009 [3] JCC 2012 and *Vinod Kumar Sahadev v. Union of India* 2009 [4] JCC 2636 Mr. Narang submitted that in the present case it would be unsafe to place any reliance on the so-called confessional statement made by Mr. Saluja under Section 40 FERA.

26. Appearing on behalf of Mr. Rajiv Gopalani, Mr. Anindya Malhotra, learned counsel, submitted that the entire case against Mr. Gopalani hinged upon the so-called confessional statement of Mr. Saluja under Section 40 FERA. As far as Mr. Gopalani himself was concerned, he had made no statement incriminating himself when examined by the ED. He submitted that in the hand written portion at page 19, there was no mention of any foreign exchange. Nothing was

recovered from Mr. Gopalani himself. Whatever statements he had made on 21st August 1997 under Section 40 FERA was retracted by him on the very next date i.e. 22nd August 1997. The Court had, in fact, ordered an enquiry into his complaint of being subject to custodial violence. The medical report confirmed that he had suffered injuries. As far as the report of the hand writing expert is concerned, Mr. Malhotra submitted that there was no enquiry made from the bank concerned in order to corroborate the version of the ED and it was unsafe to rely on the said hand writing expert's report in the absence of such corroboration.

27. Appearing for the ED, Mr. Subhash Bansal, learned counsel relied on the decisions in *Vinod Solanki and Collector, Customs v. D. Bhoormull AIR 1974 SC 859* and submitted that once the initial burden of proving that there was contravention of FERA was discharged by the ED, the onus shifted to the Appellants to prove the contrary. The ED was not required to prove its case with mathematical precision. He submitted in the present case that the very detailed statement made by Mr. Saluja under Section 40 FERA could not have possibly been fabricated by the officials of the ED. They could not be expected to know so many minute details. The only conclusion possible was that it was voluntarily given by Mr. Saluja himself. Even in his retraction, the case of Mr. Saluja was not that he apprehended that his son was going to be tortured. There was no evidence to support the bald assertion of coercion and torture.

28. As far as Mr. Gopalani was concerned, Mr. Bansal pointed out that from the report of the hand writing expert it was clearly proved that the noting on page 19 of the loose sheets recovered from Mr. Saluja was in the hand writing of Mr. Gopalani. There was no way Mr. Gopalani's phone numbers could have been mentioned in the loose sheets unless there was a business connection between him and Mr. Saluja. This clearly substantiated the statement of Mr. Saluja that those transactions were undertaken by him on the instructions of Mr. Gopalani. Mr. Bansal also referred to Section 71 FERA and submitted that there was a presumption as to the genuineness of the documents recovered during the raid of the residential and office premises of Mr. Saluja.

The statement of Mr. Saluja under Section 40 FERA

29. The ED has placed considerable reliance on the statement made by Mr. Saluja under Section 40 FERA. Apart from the fact that a sum of Rs.1.18 crores was recovered from the residence of Mr. Saluja, there were also loose sheets containing numerous entries. The said entries were explained in great detail by Mr. Saluja in his aforementioned statement, which he then retracted alleging that it was made under threat of coercion and torture. The two questions that arise are, firstly, whether it could be said that the said statement was voluntary and, secondly, could it be said to be truthful?

30. As regards the voluntariness of the statement, the question that then arises is whether the retraction of the said statement by Mr. Saluja was for valid reasons? In his cross-examination Mr. K.C. Abraham of the

ED detailed the manner in which the ED elicited information from Mr. Saluja during interrogation. Mr. Abraham stated:

“After going through the documents I went to the room where Shri Saluja was sitting. I introduced myself and he also told me who he is. Then I started examining him and also started recording the statement. It took about half an hour for me to interrogate him before recording his statement. The interrogation was in respect of general things and also about the seized documents. I did not remember how many documents were there but I asked him questions in respect of most of the matters for enquiry. There were many calculations and many names written. There was a paper showing account with credits and debit entries. There were some papers showing bank accounts abroad with hand written amount and the like. I met another person also who had also come to office. I do not know who had brought or summoned him to the office. He had initially told his name as Rajan Shah. Then I asked him his real name and he stated that his name was Subhash Ganatra. I recorded his statement also. After recording some part of the statement of Shri Saluja, I went to him and interrogated him in respect of the matters covered by Shri Saluja’s statement and also some other matters. I mean Saluja’s statement in so far as it pertains to him. Since I recorded both the statements in pieces in the intervening periods it took little long. They were arrested at about 10.45 pm (the exact time will be a matter of record) on the same day. Recording of their statement lasted until night time when I arrested them, may be half an hour before preparing the arrest memo.”

31. Mr. Abraham was asked about Mr. Saluja's son. His explanation was as under:

“As per law, I was supposed to inform the members of his family that he had been arrested and make arrangement of his bail and I did. I think his son was in the office and he was informed about his arrest. I did not see his son until I arrested him. After each question he consulted the relevant documents, paused for a while and recorded the answer. I had curiously gone through the Panchnama of the recovery made from the house. I know that the entire amount seized was Rs.1,18,00,000/-”

32. Mr. Abraham further stated as under:

“It is absolutely wrong that I recorded Mr. Saluja's statement only in the night between 16th and 17th night of August, 1997. It is absolutely wrong that I had been threatening him to record the statement as per my dictations or that I threatened him that we will bring his wife and son to the office and arrest his son unless he did not make a statement as per my dictation and that his son was actually brought to the office in order to pressurise Mr. Saluja to make a statement as required by me. I did not know whether his son had made nay entry in the reception register when he came to our office. In fact somebody in the office told me after the arrest that his son was present in the office otherwise I was going to inform by telephone to his family about arrest of Shri Saluja. It is wrong to suggest that I interrogated on 15th night. As already stated I came to office on 16th morning at about 9.30 am. He never complained of his chest pain while I was

interrogating him. I cannot say whether he complained of his chest pain to anybody before my arrival.”

33. As far as Mr. Saluja’s retraction statement is concerned, it reads as under:

“I was taken away at midnight on 15.8.1997 in their car I was interrogated all night in the morning I had heart/chest pain for nearly 2 hours I kept on asking for doctor no one came. I was on the table lying down for all that time. The statements were taken under threat and I was even hit twice on the 16th afternoon with a threat that they would bring my wife and my son who is barely 18 years was brought saying if you want to see your father come to the office and when he came they kept him till 1 am on 17th morning. Only then he was allowed to go home. I was even hit and told to write as they say. Hence I had to agree and write what they said.”

34. It is seen from the above that it was not the case of Mr. Saluja that the ED officials had threatened to falsely implicate his son if he did not make a statement. Also, apart from the bare allegation of torture, Mr. Saluja was unable to show that he was in fact subject to any coercion or duress by the ED officials.

The decision in the Telstar case

35.1 The question whether a retracted confession can be acted upon in the context of Section 40 FERA was examined in detail by the Supreme Court in ***Telstar Travels Private Limited v. Enforcement Directorate (2013) 9 SCC 549***. The facts of that case were that Telstar
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Travels Private Limited (TTPL) was carrying on a travel agency and specialized in ticketing of crew members working on ships. According to an arrangement that TTPL entered into with a travel company Clyde Travels Ltd. (CTL) in Glasgow, UK, CTL was to send a prepaid ticket advice ('PTA') to TTPL in India based on which TTPL would secure a ticket from the airline concerned. The money for the tickets would then be credited into the Swiss Bank account of Bountiful Ltd. ('BL'), a company registered in British Virgin Islands. Out of the money so received, BL would transfer funds to CTL towards the price of the tickets apart from realising 3% of the ticket price towards commission payable to TTPL.

35.2 According to the ED, the above transactions involved violation of FERA. During the course of investigation it was revealed that BL was entirely held by TTPL which controlled its operations and financial management. One of the pieces of evidence on which the ED relied on were the retracted statements of those in charge of TTPL that they were also in control of BL. TTPL argued that the above statements had been retracted and were not voluntary and, therefore, could not be relied upon.

35.3 In holding that the statements were both voluntary and incriminating, the AO noticed that the statements made contained such minute details which could have been given only out of the personal knowledge of the maker of the statement. It could not have been fabricated by the officers who recorded the said statement. The AT

which confirmed the AO also noted that the persons in charge of TTPL had in great detail explained the functioning of TTPL and the statements were made in their own hand writing and in a language known to them.

35.4 The Supreme Court dismissed the appeal filed by TTPL. It referred to the earlier decision in *KTMS Mohd. v. Union of India (1992) 3 SCC 178* where it was held as under:

“34. We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected *brevi manu*. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise, etc. to establish that such improper means has been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectivity applying its mind to the subsequent retraction to hold that the inculpatory statement was

not extorted. It thus boils down that the authority or any court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the FERA or the Customs Act, etc. the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order will be vitiated.”

35.5 The Supreme Court in *Telstar Travels Private Limited* observed that the decision in *Vinod Solanki* is an authority for the proposition that “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”. However, the Court explained that “the burden is on the authority/prosecution to show that the statement sought to be relied upon was voluntary and that the Court while examining the voluntariness of the statement is required to consider the attending circumstances and all other relevant facts. The decision does not hold that even when a statement is founded upon consideration of the relevant facts and circumstances and also found to be voluntary, it cannot be relied upon because the same was retracted”.

35.6 The Supreme Court in *Telstar Travels Private Limited* found that

the statements made by them was corroborated by either documentary evidence, and, therefore, was rightly relied upon by the ED.

36. In the considered view of the Court, the decision in *Telstar Travels Private Limited* holds the field as far as the admissibility of retracted statements under Section 40 FERA is concerned. The decision in *Noor Aga* was in the context of the statements made by suspects detained under the Narcotic Drugs and Psychotropic Substances Act 1985 ('NDPS Act'). The question examined in that case was whether a statement recorded by a customs officer under Section 108 of the Customs Act 1972 could be relied upon for the purposes of the proceedings under the NDPS Act. That question was answered in the negative. There was no occasion for the Supreme Court in *Noor Aga* to consider the effect of a retracted statement under Section 40 FERA.

Discussion of Mr. Saluja's case

37. There can be no doubt that a retracted statement under Section 40 FERA, cannot form the sole basis for determining whether the maker of such a statement is guilty of contravening any of the provisions of FERA. It shall have to be corroborated by other independent evidence. In determining whether such a retracted statement can be relied upon, it will have to be examined whether the statement could be said to have been made voluntarily.

38. In the present case, the statement made by Mr. Saluja contains a wealth of details on the transactions undertaken by him at the behest of

either his brother Dr. R.S Saluja or others. He has explained in minute detail the entries in the loose sheets. The details on every page of the loose sheets could not have been explained by anyone other than one fully conversant with the transactions. It is impossible for such details to have been fabricated by the officials of the ED. There is nothing credible brought on record by Mr. Saluja to persuade the Court to conclude Mr. Saluja was under threat, duress or any form of coercion that at the time when he made the statement and that he did not make it voluntarily.

39. There was an obligation on Mr. Saluja to explain how he came into possession of Rs.1.18 crores. His plea that he had declared it under the VDIS is belied by the fact that there was no mention of any such application having been made in his bail application filed before the learned MM. As noted by the learned ACMM, there were two bail applications filed. In the first application filed on 17th August 1997, it was stated that the money recovered from the residence of Mr. Saluja “was to be declared under the VDIS”. In the subsequent bail application, however, it was stated that “the said amount was declared under the VDIS”. The explanation offered by the counsel for Mr. Saluja was that the earlier application was drafted in a hurry is belied by the fact that even in the retraction statement made on 17th August 1997, he did not mention that the amount recovered from his residence had already been declared under the VDIS. Moreover, in order to avail the benefit under the VDIS, 30% of the tax had to be deposited. It was admitted before the learned ACMM that no such tax was deposited.

40. As regards the postal slips produced by Mr. Saluja Appellant in proof of having dispatched the application under the VDIS on 14th August 1997 itself, the enquiry conducted by the ED officials shows that those slips were not genuine. In the facts and circumstances, the ED was able to demonstrate that the plea of Mr. Saluja that he had declared the sum of Rs.1.18 crores recovered from his residence under the VDIS even prior to the raid by the ED was false.

41. The entries/notings in the loose sheets recovered from his residence as explained by Mr. Saluja in his statement under Section 40 FERA fully substantiated the case of the ED that he had involved himself in transactions in violation of the FERA. Further corroboration was from the details of the STD calls exchanged between Mr. Saluja, Mr. Kedia and Mr. Shah. The fact that the foreign exchange may not have been recovered from the residence of Mr. Saluja does not weaken the case of the ED. According to the ED, the Indian currency paid to Mr. Saluja was for delivery of foreign exchange abroad. As noted in the AO, the details of the foreign bank accounts were available in the documents seized from the residence of Mr. Saluja.

42. In the considered view of the Court, the case against Mr. Saluja stood established by his retracted statement under Section 40 FERA, corroborated by the documentary evidence recovered from his residence.

43. As regards the penalties imposed on Mr. Saluja they cannot be said

to be unreasonable given the amount involved. In the circumstances, this Court is not persuaded to interfere with the impugned order of the AT as far as the appeal of Mr. Saluja is concerned.

The case of Mr. Gopalani

44. Turning to the appeal of Mr. Rajiv Gopalani, as noticed in the AO, all incriminating evidence was put to Mr. Gopalani and he declined to make a statement. When asked why he had not explained the transactions, he stated that he was not replying as anything said by him may be used against him.

45. The telephone number of Mr. Gopalani was found in the loose sheets recovered from the residence of Mr. Saluja. One of these loose sheets at page 19 contained instructions in writing by Mr. Gopalani. This was confirmed by the report of the hand writing expert. Mr. Gopalani did not challenge the report of the handwriting expert. He did not seek to cross-examine the expert. The report, therefore, corroborated the retracted statement of Mr. Saluja that he had received instructions from Mr. Gopalani to pay USD 50,000 to Geeta Soni. The aforementioned evidence was sufficient to conclude that Mr. Gopalani had contravened Section 9 (1) (f) (i) FERA.

46. As regards the penalty amount of Rs. 1 lakh imposed on Mr. Gopalani, it can hardly be said to be excessive given the amount involved in the violation. Consequently, even as regards the appeal of

Mr. Gopalani, the Court is not persuaded to interfere with the order of the AO as affirmed by the AT.

Conclusion

47. The common order dated 4th January 2008 passed by the AT dismissing Appeal Nos. 474 and 478 of 2001 is upheld. The appeals are accordingly dismissed but, in the circumstances, with no order as to costs.

APRIL 16, 2014
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S. MURALIDHAR, J.

