

IN THE HIGH COURT OF DELHI AT NEW DELHI

Crl.A. No. 134 of 2008

Reserved on: February 6, 2014

Decision on: February 19, 2014

RAKESH KAPOOR

..... Appellant

Through: Mr. Puneet Mittal with
Mr. Nitin Sharma, Mr. Ankur
Aggarwal and Mr. Ankit Goel,
Advocates.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Anupam Yadav, Advocate for
Mr. Vineet Malhotra, Advocate
for UOI.
Mr. Subhash Bansal with
Mr. Shashwat, Advocates for
Directorate of Enforcement.

Crl.A. No. 138 of 2008

RAJEEV WADHWA

..... Appellant

Through: Mr. Puneet Mittal with
Mr. Nitin Sharma,
Mr. Ankur Aggarwal and
Mr. Ankit Goel, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Anupam Yadav, Advocate for
Mr. Vineet Malhotra, Advocate
for UOI.
Mr. Subhash Bansal with Mr.
Shashwat, Advocates for
Directorate of Enforcement.

Crl.A. No. 188 of 2008

ARUN SHARMA

..... Appellant

Through: Mr. H.S.Bhullar with
Ms. Safia Gupta and
Ms. Rajyashree Banerjee,
Advocates.

versus

ATUL VERMA, DEPUTY DIRECTOR,
ENFORCEMENT DIRECTORATE

..... Respondent

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

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

19.02.2014

1. These three appeals are directed against the common order dated 12th December 2007 passed by the Appellate Tribunal for Foreign Exchange (AT) dismissing the Appeal Nos. 443, 450 and 451 of 2004, thereby affirming the common Adjudication Order (AO) dated 17th February 2004 passed by the Deputy Director (DD), Enforcement Directorate (ED) imposing the penalty of Rs. 5 lakhs each on each of the Appellants under Section 8 (1) and 8 (2) of the Foreign Exchange Regulations Act, 1973 (FERA).

2. The background facts are that on 28th April 1989, the officers of the ED, Delhi Zonal Office conducted a number of searches at the Oberoi Hotel in Delhi resulting in the recovery of foreign exchange, Indian

currency etc. from the front office as well as the guest lockers in the hotel. Relevant to the present appeals, the ED is stated to have recovered from guest locker No. 21 maintained by Arun Sharma (the Appellant in Crl. A. No. 188 of 2008), who was the cashier-cum-night auditor, Indian currency totalling Rs. 49,500 and foreign currency, including US\$, UK£, French Francs, Hong Kong Dollars etc., seven gold biscuits, two small gold coins of all foreign origin and one gold pendant. From the other locker No.38 also stated to have been allotted to Arun Sharma, a file with a bunch of 42 pages was recovered. From the person of Rajeev Wadhwa (the Appellant in Crl. A. No. 138 of 2008), who was cashier-cum-night auditor, ED officials recovered one Diners Club international card, 25 US\$, 20 French francs and a bunch of 8 loose sheets. From the Employees Locker No. 49 stated to be allotted to and held by Rajeev Wadhwa, 1 Rouble and Indian currency of Rs.8,000 and a bunch of 10 loose sheets were recovered.

3. As regards Rakesh Kapoor (the Appellant in Crl. A. No. 134 of 2008), the search of guest locker No. 55 stated to be held by him yielded 100 Hong Kong Dollars, 57 Singapore Dollars, 1 US\$, 50 Deutsche Marks etc. and Indian currency of Rs 8000 apart from a bunch of loose sheets.

4. According to the ED, during the course of investigation it was noticed that as on 28th April 1989 Arun Sharma, Rajeev Wadhwa and Rakesh Kapoor were authorised signatories of the Oberoi Hotel in terms of the Reserve Bank of India (RBI) changer licence dated 20th November 1986

valid up to 31st December 1989. They were required to issue certificates of encashment in form ECR and information of the purchase of foreign currency towards settlement of bills for services rendered irrespective of whether the encashment certificate was asked for. According to the ED, their investigation, however, revealed that these three persons did not issue the requisite certificates against the foreign currency tendered to them and they instead purchased/acquired other foreign exchange tendered by the public without any previous general or special permission of the RBI.

5. According to the ED, the investigations revealed that during 1987 to April 1989, Arun Sharma had purchased/acquired foreign exchange worth Rs. 6 lakhs and foreign exchange of various denominations of US\$, UK£ etc. and that he also sold foreign exchange worth Rs. 6 lakhs to Rakesh Kapoor at rates of exchange other than those authorised by the RBI without any previous general or special permission of the RBI, and that the seven gold biscuits, two small gold coins had been seized from the locker held by Mr. Arun Sharma and the sum of Rs. 29,500 out of the seized sum of Rs. 49,500 were towards the proceeds of the foreign exchange sold.

6. The allegation against Rajeev Wadhwa was that during the same period, he acquired foreign exchange to the extent of US\$ 72,800 and that he had sold US\$ of that worth to Rakesh Kapoor without any previous general or special permission of the RBI.

7. As regards Rakesh Kapoor, the allegation was that during the same period he purchased/otherwise acquired foreign exchange worth Rs. 6 lakhs from Arun Sharma and US\$ 72,800 from Rajeev Wadhwa and sold the same to persons other than those authorised dealers in foreign exchange which was recovered from Guest Locker No. 55. The charge against these three persons was that they failed to comply with the conditions of the Money Changers Licence by not issuing encashment certificates of the foreign exchange tendered to the Oberoi Hotel.

8. A statement was purportedly recorded of Rajeev Wadhwa on 29th April 1989 itself. Statements were also recorded on 1st May 1989 of Rakesh Kapoor and Arun Sharma. All three of them were arrested and produced before the learned Additional Chief Metropolitan Magistrate (ACMM), New Delhi on 29th April 1989 itself and sent to judicial custody. In a letter dated 3rd May 1989 addressed to the learned ACMM, New Delhi, Arun Sharma retracted the statement made by him stating that he had given it under threat of arrest and was told that, if he wrote whatever was dictated, he would be permitted to go. He claimed that he had nothing to do with the currency or gold recovered from the guest locker. He further stated that “nothing has been recovered from my locker, I, therefore, want to retract my statement made before the Enforcement Officer”. As regards Rajeev Wadhwa, he too retracted the statement made by him.

9. On the above basis, almost one year after the alleged search, a

Memorandum/Show Cause Notice (SCN) 26th April 1990 was issued to the three Appellants as well as to M/s Oberoi Hotel, New Delhi and P.R.S. Oberoi who was at that time its Vice Chairman/Managing Director. They were alleged to have contravened the provisions of Section 7, 8(1) and 8(2), 49, 73(3) of the FERA read with para 2(i) and 2(ii), 9 and 18 of the Memorandum of Instructions applicable to money-changers. The Appellants replied to the Memorandum on 31st May 1990 denying the allegations and requested for examination of the official and public witnesses. In his reply Arun Sharma requested for inspection of the relied upon documents.

10. On 17th February 1992, a hearing was fixed before the Special Director (SD), ED and Arun Sharma on that date requested for issuance of summons for cross-examination of Sunil Kher, witness. This requested was reiterated on 20th May 1992. By a letter dated 22nd June 1992, the SD rejected the request and fixed the hearing on 31st August 1992. The hearings on 31st August 1992; 30th April 1993 and 15th June 1994 were adjourned at the request of the noticees. Thereafter more than one year and four months, no effective hearing took place. The case was listed on 19th October 1995 and again adjourned. At the next hearing on 10th January 1996, none appeared. According to the Appellants, no intimation was received of the dates of hearing on 26th July 1996, 31st July 1996; 6th December 1996; 4th February 1997; 22nd March 2000; 27th March 2000; 14th August 2002 and 22nd December 2013. One of the striking features of the case is the inordinate delay in disposal of the Memorandum/SCN by the DD.

11. In the meanwhile, the FERA was repealed by the Foreign Exchange Management Act, 1999 (FEMA). The proceedings purportedly continued thereafter.

12. According to the Appellants, no intimation was given of the hearings fixed in March 2000, August 2002 and December 2003. From the AO dated 17th February 2004 passed by the ED holding the Appellants guilty of violating Sections 8(1) and 8(2) FERA, it is seen that the DD received a letter dated 2nd December 2003 from the Advocate appearing on behalf of M/s Oberoi Hotels and P.R.S.Oberoi and he was permitted to file a rejoinder by 26th December 2003. It is not clear from the AO whether the other noticees were made aware of the said proceedings. As far as Rakesh Kapoor and Rajeev Wadhwa are concerned, the AO notes that they resubmitted their earlier replies dated 23rd December 1996; 29th January 1997 and 3rd April 2000.

13. One feature of the case which is apparent from the record is that there has been an inordinate delay in the passing of the AO dated 17th February 2004. If according to the Appellants, no hearing took place at all after 1996, it is possible that the officer holding the post of SD who conducted the proceedings prior thereto was obviously not the same officer who actually issued the AO in 2004. The letter dated 3rd April 2000 written by counsel for Rakesh Kapoor to the ED states that after the previous hearing in 1996 no AO followed and the matter was relisted on 22nd March 2000 but no arguments took place. Counsel enclosed with

the said letter a resume of the submissions. Clearly, therefore, no hearing took place immediately prior to the passing of the AO.

14. The second aspect of the matter concerns the examination of witnesses. The letter to the SD dated 23rd December, 1996 written by counsel for Rakesh Kapoor, states that R.K. Handoo was examined as a witness for the ED but his cross-examination by the noticees did not take place. It appears that for some reason, the SD decided not to continue the recording of the evidence of the said witnesses. The request of Rakesh Kapoor for cross-examination of Rajiv Kaul, Assistant General Manager, Oberoi Hotel and the right to cross-examine Arun Sharma and Rajeev Wadhwa remained unanswered.

15. The proceedings before the SD and later the DD were quasi-judicial in nature and the legal requirement was that the principles of natural justice had to be followed. This was enshrined in Section 51 FERA which reads as under:

51. Power to adjudicate. For the purpose of adjudging under section 50 whether any person has committed a contravention of any of the provisions of this Act (other than those referred to in that section) or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section.

16. In the context of the present case, 'reasonable opportunity' to the noticees included affording them an opportunity of cross-examining the witnesses of the ED. Placed on record is the letter dated 14th January 1991 written by Rakesh Kapoor to the ED making a specific request for cross-examination. He reiterated this request in the letter dated 23rd December 1996. Yet, the record does not show that any such opportunity was granted. On the other hand, it shows that without assigning any reasons, it was decided by the SD not to further proceed with the examination of the witnesses. There is no doubt, therefore, that an adequate opportunity was not granted to any of the Appellants to cross-examine the witnesses for the ED thereby violating the statutory requirement in terms of Section 51 FERA.

17. On merits, one of the main pieces of evidence relied upon by the ED was the confessional statement of Rajeev Wadhwa and in particular the following answers given by him:

“Q. What gain you were deriving from purchase & sale of the said foreign exchange.

A. Approx. Rs. 2000/- per month.

Q. How much foreign exchange has been purchased and sold by you in this manner during last two years.

A. I do not remember exactly but it was on the average approx. US \$ 700 per week during my shift. I may also state that I along with some of my colleagues working as front office

cashier used to collect / purchase / F. Exchange collectively and used to share the profit earned on the sale of the said F. exchange as stated.

Sd/-
29/4/89

Rajeev Wadhwa
29.4.89”

18. The above statement was, of course, retracted by Mr. Wadhwa. It could not have been relied upon except where it was corroborated in material particulars by other reliable evidence. As regards Arun Sharma, as already noticed, although he is purported to have made a statement implicating himself and the co-accused, he retracted the said statement at the first available opportunity when he was produced before the learned ACMM on 3rd May 1989. In a subsequent statement recorded on 18th February 1992, he stated that his statement:

“.....was taken under duress, stress & emotional blackmailing saying of torturing my wife and son and that too after keeping me for more than 25 hours at their office which no ordinary person can take it. I told them also to write what they want and I'll sign it but told me to write it as they say and sign it. Sir, that was all under threat and stress which on the first chance when I got it I retracted that statement writing to the Honourable ACMM on 3rd May 1989.”

19. The AO, as well as the impugned common order of the AT, proceeds on the basis that the confessional statement when voluntary and truthful is the best evidence and that “.....a bald statement alone of the appellants

alleging threat and coercion against reliance on admissional statement” was not acceptable. For a retracted confession to be admissible, it must be shown to have been made voluntary and further it should be corroborated in material particulars by other reliable evidence. In ***Vinod Solanki v. Union of India (2008) 16 SCC 537*** the Supreme Court held (SCC @ p. 548):

“26.....The initial burden to prove that the confession was voluntary in nature would be on the Department. The special or peculiar knowledge of the person proceeded against would not relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It may only alleviate that burden to discharge and very slight evidence may suffice.”

20. Again in ***Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate (2007) 8 SCC 254***, it was observed as under (SCC @ p. 263):

“20. We may, however, notice that recently in *Francis Stanly v. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram (2006) 13 SCC 210*, this Court has emphasised that confession only if found to be voluntary and free from pressure, can be accepted. A confession purported to have been made before an authority would require a closer scrutiny. It is furthermore now well settled that the court must seek corroboration of the purported confession from independent sources.”

21. Apart from the above statements of the co-accused which were

retracted, there was no independent reliable evidence placed on record in the instant case by the ED to corroborate the said retracted statements in order to substantiate the charges in the SCN.

22. The facts in *Naresh J. Sukhawani v. Union of India* 1996 SCC (Cri) 76, relied upon by Mr. Bansal, are distinguishable. There was nothing in the said case to show that the confessional statement made was retracted. Again in *Telstar Travels Private Ltd. v. Enforcement Directorate* (2013) 9 SCC 549, on the facts of the case it was held that the subsequent retraction of the statements validly were a mere afterthought. The Court did not in any way dilute the legal requirement as explained in *K.T.M.S. Mohd. v. Union of India* (1992) 3 SCC 178 in the following words (@ SCR p. 899):

“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 quo 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 subjectively 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.”

23. Neither the AO nor the impugned order of the AT, have dwelt on the recovery of the foreign exchange from the guest lockers, and connected those recoveries with the Appellants. The specific case of Rakesh Kapoor was that he did not have in his possession the keys of Guest Locker No. 55 and the duplicate key was provided by the hotel management though the locker was not found to be allotted to any person. It is only from the statements of the co-accused which were in any event retracted, that the connection between Rakesh Kapoor and Locker No. 55 was sought to be made. Therefore, the evidence in this regard was weak and not corroborated by other independent witnesses. Moreover, it is not as if all the lockers were checked by the ED to determine which of the guest lockers were in fact being used by the Appellants, if at all.

24. Mr. Bansal, learned counsel for the ED, referred to Section 72(1) of the FERA and to the fact that the slips recovered from the lockers were sufficient to show that the Appellants had acted in contravention of Section 7, 8(1), 8 (2), 47, 49 and 73(3) of the FERA read with Section 68(2) thereof. The proving of the said slips recovered from the lockers also depended on the statements of the Appellants themselves. There was no statement made by Rakesh Kapoor to explain the slips. The statements by Rajeev Wadhwa and Arun Sharma have been retracted. Consequently the ED cannot take advantage of Section 72 FERA as regards presumption of the correctness of those documents. The presumption was a rebuttable one and in the present case must be held to have stood rebutted on account of the statements of the co-accused being retracted.

25. It also appears that no valuation was done of the currencies seized from the guest lockers. Learned counsel for the Appellants has shown that the total value of the currency purportedly seized from the guest locker of Rajeev Wadhwa was Rs. 11,560 and that from guest Locker No. 55 of Rakesh Kapoor Rs. 42,679.65. This was different from what was alleged in the Memorandum/SCN. In particular, there appears to be no reliable and independent evidence to show that Arun Sharma acquired foreign exchange worth Rs. 6 lakhs and sold foreign exchange of that value to Rakesh Kapoor or that Rajeev Wadhwa acquired foreign exchange of US\$ 72,800 and sold them to Rakesh Kapoor or that Rakesh Kapoor acquired foreign exchange of the above worth from Arun Sharma and Rajeev Wadhwa.

26. It was further contended by the learned counsel for Rakesh Kapoor that his name has been wrongly mentioned as 'Kailash Kapoor', in the Memorandum/SCN as well as in the AO and that this showed non-application of mind by the ED. A perusal of the AO does bear out the above submission.

27. For the aforementioned reasons, this Court is of the view that both the AO dated 17th February 2004 and the impugned order dated 12th December 2007 of the AT are unsustainable in law and are accordingly hereby set aside.

28. The appeals are allowed in the above terms.

29. The amounts, if any, respectively deposited by the Appellants during the pendency of the proceedings will be refunded to them within eight weeks together with interest, if any, accrued thereon.

S. MURALIDHAR, J.

FEBRUARY 19, 2014

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