

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. 340 of 2008

Reserved on: May 21, 2014

Decision on: May 29, 2014

S.K. JAIN

..... Appellant

Through: Mr. H.S. Bhullar, Advocate.

versus

UNION OF INDIA & ANR

.... Respondents

Through: Mr. Ashok Panda, Senior Advocate

with Mr. Naveen Kr. Matta, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

29.05.2014

1. This appeal under Section 35 of the Foreign Exchange Management Act 1999 ('FEMA') read with Section 54 of the Foreign Exchange Regulation Act, 1973 ('FERA'), is an off-shoot of the 'Jain Hawala Diaries' case which ended in the quashing of the criminal proceedings as a result of the judgment of the High Court upheld by the Supreme Court in *Central Bureau of Investigation v. V.C. Shukla (1998) 3 SCC 410* [hereinafter referred to *the V.C. Shukla case*].

2. The present proceedings which emanated under FERA are stated to stand on a different footing, not affected by the closure of the criminal proceedings since FERA is a complete code in itself.

The Background

3. The background to the present appeal is that the Central Bureau of Investigation ('CBI') searched the residential and office premises of Mr. J.K. Jain on 3rd and 4th May 1991 under FIR No. RC 5(S)/91-SIU(V) dated 20th April 1991. Besides, recovery of some Indian and foreign currencies, some documents were recovered. The documents included two spiral note books (marked MR 68/91 and MR 71/91), two small spiral pads (marked MR 69/91 and MR 70/91) and two files, each containing some loose sheets of papers (marked MR 72/91 and MR 73/91). MR-71/91 was considered to be the main 'mother' diary as far as the criminal proceedings were concerned. In the FERA proceedings MR 71/91 was marked as MR 209/93 and MR 77/91 was marked as MR 207/93.

4. The CBI registered FIR No. RC 1(A)/95 ACU (VI) on 4th March 1995 against Mr. S.K. Jain and Mr. J.K. Jain, the Appellants herein and certain others for the offence both under the Prevention of Corruption Act, 1988 ('PCA') as well as FERA. The FIR stated that the entries in the diaries revealed that payments to 119 persons through *hawala* channels "were partly explained by the accused S.K. Jain who is the master of the said documents and the employer of the accused J.K. Jain who had maintained the documents in his own handwriting in the coded words and figures." The total amount disbursed was estimated to be about Rs. 65.47 crores during the years 1985 to 1991. It was stated that the major part of the above amount, i.e., Rs.53.5 crores (approx) had been transferred to a number of

named persons illegally through *hawala* channels and that this constituted an offence under Section 56 read with Section 8 (1) FERA. The FIR further stated that in relation to the alleged payment through *hawala* channels “a report of the SP has been sent to the Directorate of Enforcement who are the competent authority to file the statutory/complaints under the provisions of FERA 1973. It has been recommended to the Directorate of Enforcement to launch prosecution case against 15 persons who were found to have violated the provisions of FERA 1973.” Letters were also stated to have been sent to the Income Tax and Customs Departments for appropriate legal action under the concerned statutes.

5. Two of the show cause notices (‘SCNs’) issued by the Enforcement Directorate (‘ED’) as a consequence of the above FIR form the subject matter of the present appeal. The first is SCN No. IX dated 19th February 1996 which pertained to the mother diary, i.e. M-209 of 1993. Preceding the issuance of the SCNs the statements of both Mr. J.K. Jain and Mr. S.K. Jain were recorded by the ED under Section 40 of FERA. Mr. S.K. Jain was questioned on 14th, 20th, 25th April 1995 and 4th October 1996 and Mr. J.K. Jain was questioned on 17th, 20th April 1995, 21st November 1995, 8th January 1996, 17th June 1996 and 10th July 1996.

The statement of S.K. Jain

6. As far as Mr. S.K. Jain is concerned, on 14th April 1995 he was shown a photocopy of the diary marked MP-209/93, i.e., the mother

diary, and asked whether he had made any statement in relation thereto before the CBI on 11th March 1995. He then gave the following reply:

“I am accused already. Hence it is incriminating to me. I further state that I had been interrogated in CBI and whatever I was knowing about these documents. I have explained the same in my statements before CBI even when I was in police remand after 4th March 1995. I have already been made accused by CBI vide their FIR dated 4th March 1995 and now have the protection of Article 20 (3) of the Constitution. I will not make any statement which incriminates me.”

7. Mr. S.K.Jain was then asked a specific question that page 1 in the reverse side of diary marked M-209/93 seized by the CBI on 3rd May 1991 contained the details regarding conversion of foreign exchange into Indian rupees at *hawala* rates. He replied: “I am already an accused and I have the protection of Article 20 (3). Since this question incriminates me I will not answer the question.”

8. Mr. S.K. Jain stated that Mr. J.K. Jain was still his employee and that he had never cheated or misappropriated the funds. On 20th and 25th April 1995 Mr. S.K. Jain declined to make any statement invoking the protection under Article 20 (3) of the Constitution.

9. Chargesheet No. 4 was filed by the CBI in the criminal court on 16th January 1996 and Chargesheet No. 8 on 23rd January 1996. The subject matter of both chargesheets was the offence under the PCA

and not FERA. Effectively therefore, the FERA proceedings got separated.

10. Mr. S.K. Jain was again questioned on 4th October 1996. This time he did not invoke Article 20 (3) of the Constitution. On that date he was shown the photocopy of the planner diary (Ex.M-207/93) stated to be containing 20 conversion details. When he was asked to explain, he stated: "I have no knowledge about these calculations. These are not written by me." He was then confronted with the statement made by Mr. J.K. Jain on 10th July 1996 and 5th August 1996 under Section 40 of FERA where he stated that he used to write many things in the diary as per instructions of Mr. S.K. Jain. He replied stating "I have knowledge and idea of those calculations which were written by J.K. Jain." The attention of Mr. S.K. Jain was drawn to one specific calculation on 9th October in the said seized diary and he was asked whether it reflected the conversion of rupees into US dollars. He stated that he had no knowledge about these entries. He was then asked whether Mr. V.K. Beri whose name was written under the date 9th October was the landlord of G-36, Saket, New Delhi which was taken on rent by his company where Mr. J.K. Jain was residing. He replied:

"I have never met Mr. Beri and I cannot say anything about this, Companies as routine has taken several houses on rent for the employees and I do not remember the names of landlords."

11. The attention of Mr. S.K. Jain was further drawn to the other entries and he stated that he did not know anything as they were not written by him.

The statement of J.K. Jain

12. On his part, Mr. J.K. Jain in his statement under Section 40 FERA made on 17th April 1995 stated that the details in the said diaries and spiral pads were written from time to time as per the instruction of Mr. S.K. Jain, his employer. On 17th April 1995 he was shown the mother diary and the entries therein and asked to explain “the details of conversion of foreign exchange into Indian Rupees at *hawala* rates.” He took the plea that he had protection under Article 20 (3) of the Constitution and stated that he would not reply. When asked to give details of the amounts received by him under instructions from abroad, he again invoked the protection under Article 20 (3) of the Constitution.

13. He maintained the above stand on 20th April 1995 and 21st November 1995 as well as on 8th January 1996. On 10th July 1996 when he was shown the photocopy of the planner diary and his attention was drawn to the entry under 9th October and certain calculations written under the name V.K. Beri, Credit Suisse Rue Versonnex 11 1211 Geneva-3 A/c No. 105116-92-1 and asked to explain he stated as under:

“I have seen photocopy of the aforesaid page of my diary of 1989 and have put my dated signatures today on the same in token of having seen the same. These are written

in my hand. At present I do not recollect in what context the said calculations were written by me since I used to write many things in the diary as per instructions of my employer (Mr. S.K. Jain).”

14. Mr. J.K. Jain stated that he could not confirm whether it was the same Mr. V.K. Beri whose name appeared allegedly in the diary who was his landlord but he confirmed that the said house was purchased by him and his wife from one Mr. V.K. Beri in the year 1992-93. When asked about the entries thereunder, he stated that he himself wrote as per the instruction of the employer and also “I do not recollect the nature of the calculation and why it has been written.” When he was shown another specific entry, he reiterated that “I have no knowledge of the above calculations and it relates to what I am not able to recollect. I used to write many things as per instruction of my employer in the diary. This I might have written as per instruction of Sh. S.K. Jain.”

Show Cause Notice No. IX

15. SCN No. IX dated 14th February 1996 issued by the ED to Mr. S.K. Jain and Mr. J.K. Jain pertained to one entry on the reverse of page 1 of the mother diary which reads: ‘At Dubai 1.90 Jan 89’. On the basis of the above entry it was alleged that Mr. S.K. Jain had otherwise acquired foreign exchange equivalent to Rs.1,90,000 at Dubai from persons not being authorized dealers in foreign exchange and that he failed to surrender the said foreign exchange to an authorized dealer thereby contravening Section 8 (1) and 14 of FERA.

It was further alleged that Mr. J.K. Jain and Mr. S.K. Jain had abetted the Appellant in the commission of the above contraventions. The documents relied upon as far SCN IX was concerned included the statements under Section 40 FERA of Mr. S.K. Jain and Mr. J.K. Jain.

Show Cause Notice No. XVIII

16. As far as SCN No. XVIII dated 6th November 1996 was concerned, the subject matter was the personal diary of Mr. J.K. Jain for the calendar year 1989 seized by the CBI from his chamber in Bhilai Engineering Corporation Limited, New Delhi where he was employed. A reference was made to the entry under 9th October 1989 which read as under:

“Mr. V.K. Beri
CREDIT – SUISSE
RUE VERNONNEX, 11
1211 GENEVA -3.
A/C No. 105116-92-1
6 Lac @ 20.50 29268.29
86400@171= 5082.35
Paid in 84
72000/- divided by 11/- (6545).”

17. The specific allegations in the said SCN XVIII were that both Mr. S.K. Jain and Mr. J.K. Jain otherwise acquired foreign exchange equivalent to US\$ 29,268.29 (equivalent to Rs. 6 lakhs @ Rs. 20.50 per US\$), US\$ 5082.35 (equivalent to Rs.17 per US\$) and US\$ 6545 (equivalent to Rs. 11/- per US\$) in all totalling to US\$ 40,895.64 equivalent to Rs. 7,58,400 during the period 1984 to October 1989,

“from persons not being authorized dealers in foreign exchange and otherwise transferred the said foreign exchange to wit US\$ 40,895.65 to Shri V.K. Beri, a person not being authorized dealer in foreign exchange.” It was further alleged that the transactions involved conversion of Indian rupees into foreign exchange at rates of exchange other than the rates for the time being authorized by RBI. The aforesaid amounts of foreign exchange, to wit US\$ 29,268.29 + 5082.35 + 6545 totalling US\$ 40,895.64 (equivalent to Rs. 7,58,400) were paid to Shri V.K. Beri r/o 33 – Chamber Crescent, Harrow Middlesex, U.K., a person resident outside India.

18. On the basis of the above allegations, it was alleged that both Mr. J.K. Jain and Mr. S.K. Jain had contravened Section 8 (1), 8 (2) and 9 (1) (a) of FERA. The relied upon documents included the statements recorded under Section 40 FERA of both Mr. S.K. Jain and Mr. J.K. Jain.

The V.C. Shukla Case

19.1 An important development that took place even while the adjudication on the above SCNs were pending, was that on 8th April 1997 the Delhi High Court reversed the order of the trial Court which held that a prima facie case had been made against the accused in the two charge sheets after holding that documents relied upon by the prosecution were admissible in evidence under Section 34 of the Indian Evidence Act, 1872 ('IEA').

19.2 The above order was taken up in appeal by the CBI to the Supreme Court. In the judgment dated 2nd March 1998 in *the V.C. Shukla case*, the order of the High Court was affirmed by the Supreme Court. It was held that two spiral notebooks Ex. MR 68/91 and MR 71/91 (marked M-209 of 2013 under FERA proceedings) and two spiral pads Ex.MR-69/91 and Ex.MR 70/91 were 'books of account' within the meaning of Section 34 IEA, but not the loose sheets of papers contained in the two files. It was further held that "the activities of the Jain brothers, as sought to be projected by the prosecution now on the basis of the materials collected during investigation (detailed earlier) would, therefore, be 'business' for they were being carried on continuously in an organized manner, with a set purpose (be it illegal) to augment their own resources. MR-71/91 is, therefore, a book of account kept in the course of business." It was further held that MR-71/91 had been regularly and systematically maintained. However, it was added:

"whether the system in which the book has been maintained guarantees its correctness or trustworthiness is a question of its probative value and not of its admissibility as a relevant fact under Section 34. The other three books, namely MR 68/91, MR69/91 and MR70/91 would not however come within the purview of the above section, for, even though some of the monetary transactions entered therein appear to be related to those in MR71/91, they (the three books) cannot be said to be books of account regularly kept. We need not, however, at this stage consider whether the entries in these three books will be relevant under any other provisions of Chapter II of the Act."

19.3. The Supreme Court further held that the statements of the four witnesses who had admitted receipt of the payments as shown against them in MR 71/91, could at best be proof of the reliability of the entries so far as they were concerned and not others. The above conclusion was based on the principle that even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness, fix a liability upon a person. It was held that the entries in the diaries “as against Jains” “may be proved as admissions under Section 18 read with Section 21 of the Act (IEA)” provided they relate to “any fact in issue or relevant fact”. Needless to say, what will be “facts in issue” or “relevant facts” in a criminal trial will depend upon, and will be delineated by, the nature of accusations made or charges levelled against the person indicted.”

The Adjudication Order

20. By the common adjudication order (‘AO’) dated 7th November 2001 the Special Director (‘SD’), ED disposed of both SCNs IX and XVIII. The findings in the AO could be summarized as under:

(a) Diary, M207/93 was maintained by Mr. J.K. Jain as per the instruction of the employer, Mr. S.K. Jain and therefore, the diary related to both of them. The entries were not deliberately explained by Mr. J.K. Jain. If one looked into the diary, “there remains no doubt that this diary contained details of monetary transactions.”

(b) Since neither Mr. J.K. Jain nor Mr. S.K. Jain could be considered

legally as being accused of the offences mentioned in FERA as at the relevant time the ED had not filed any complaint under Section 56 of FERA, neither of them were entitled to the protection under Article 20 (3) of the Constitution. The mere erroneous judgment of the CBI in mentioning the FERA proceedings in the FIR would not entitle Mr. S.K. Jain and Mr. J.K. Jain to protection under Article 20 (3) of the Constitution.

(c) Neither noticee cooperated in the investigation and thus it was open to the “Investigating Officer of the competent agency to make allegations as per their interpretation of the documents under Section 72 of FERA, 1973”.

(d) Although it was not proved that the amount as alleged in the SCN had been paid to Mr. V.K. Beri, it was clear that Mr. S.K. Jain “had paid in 1984, 10,000 US\$ to somebody”. Since no explanation had been given by him and as he had not produced any general or special permission of RBI, it was held that S.K. Jain had contravened the provisions of Section 8 (1) of FERA, 1973 “inasmuch as he illegally acquired and paid US\$ 10,000.”

(e) The charges against Mr. J.K. Jain had not been proved and the mere maintenance of books of accounts or the act of writing a diary would not constitute a contravention under FERA.

(f) SCN IX relating to mother diary (M-209/93) confirmed that it had month-wise accounts and details which indicated flow of funds every

month. The logical conclusion as regards entry No. 5 which when read together with the other entries on the said page lead to the conclusion that Mr. S.K. Jain at whose behest the diary was maintained, acquired foreign exchange at Dubai equal to Rs. 1,90,000 in violation of the provisions of Section 8 (1) of FERA and did not surrender it to an authorized dealer. However, there was no evidence to show that Mr. J.K. Jain played any role in the above transaction and therefore, the charges against him were not proved.

21. Consequently, by the impugned AO, the SD imposed penalty of Rs. 75,000 each on Mr. S.K. Jain and Mr. J.K. Jain in respect of SCN Nos. XVIII and IX for contravening provisions of Section 8 (1) of FERA and the proceedings against Mr. J.K. Jain were dropped.

The order of the Appellate Tribunal

22. Appeal No. 509 of 2001 was filed by Mr. S.K. Jain against the aforementioned AO before the Appellate Tribunal for Foreign Exchange ('AT'). By the impugned order dated 3rd January 2008 the AT dismissed the appeal and held that since Mr. S.K. Jain had exclusive knowledge of the entries, he was bound on an analogy of Section 106 of IEA to explain them. His failure to do so would invite an adverse inference being drawn against him in terms of Section 114 of IEA. As regards entry No. 5 in the mother diary M209/93, the AT held as under:

“The recovered diary describes the amount of Rs. 1,90,000 with a further figure of foreign currency by abbreviation when this description is not explained in any

other different manner then this Tribunal is not explained in any other different manner then this Tribunal does not feel it otherwise than to accept it as unauthorized acquisition of foreign currency in lieu of India money.”

Submissions of counsel

23. Mr. H.S. Bhullar, learned counsel appearing for the Appellant submitted that the Appellant had validly invoked the protection against self -incrimination under Article 20 (3) of the Constitution while refusing to answer the question put to him regarding the entries in the diaries on a date when charge sheet had not been filed by the CBI. Mr. Bhullar pointed out to the SCN in which a specific reference was made to the FERA provisions in respect of which proceedings were not started by the ED at the time of registration of the FIR.

24. Mr. Bhullar pointed out that as far as SCN IX was concerned, it was confined to a single entry in the column of the first page of the mother dairy. He took the Court through the relevant documents and the statements under Section 40 FERA and submitted that since the entries had not been made by Mr. S.K. Jain, he was justified in not offering any explanation. He submitted that in the circumstances an adverse inference could not be drawn against Mr. S.K. Jain. He referred to the criminal proceeding under Section 56 FERA whereby the Additional Chief Metropolitan Magistrate had discharged Mr. S.K. Jain in Complaint Case No. 75/1/1996. The said order was upheld by this Court by its order dated 26th February 2013 in Criminal Miscellaneous Case No. 2011 of 2007 (M.G. Attri v. S.K. Jain).

25. Apart from relying on several passages of *the V.C. Shukla case*, Mr. Bhullar also referred to the decision in *Union of India v. Abdul Mohamed (2000) 10 SCC 169* which held that mere possession of foreign currency was insufficient to hold that the accused had “otherwise acquired” it in contravention of FERA. In the present case no foreign exchange had been recovered from Mr. S.K. Jain. No attempt had been made by the ED to carry out any investigation in Dubai or elsewhere to verify if any foreign exchange had been acquired by the Appellant. Relying on the decision of the Supreme Court in *Ramanlal Bhogilal Shah v. D.K. Guha (1973) 1 SCC 696*, he submitted that even in the proceedings under FERA an accused could decline to give information regarding matters which tended to incriminate him. Reliance was also placed on the decision in *M.P. Sharma v. Satish Chandra AIR 1954 SC 300*.

26. In reply, Mr. Ashok Panda, learned Senior counsel appearing for the ED, first submitted that the scope of the proceeding under Section 35 of the FEMA was limited to questions of law as explained by the Supreme Court in *Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement (2010) 4 SCC 772*. Reliance was also placed on the decision of Delhi High Court in *Union of India v. Prem Khanna 2005 (85) DRJ 379* to urge that unless the findings of the AO were found to be perverse this Court could not interfere in appeal.

27. Mr. Panda further submitted that in the present case the SD had, after analysing the relevant entries in the mother diary, come to the

conclusion that they did pertain to receipt of money transactions and foreign exchange conversion transactions. Further in *the V.C. Shukla case*, the Supreme Court had only dealt with the culpability of Mr. V.C. Shukla and Mr. L.K. Advani. As far as the Jains were concerned, the Supreme Court had clearly held that the entries could be taken to be admissions, provided that they related to any fact in issue. He further submitted that the entries at Serial No. 5 in the mother diary should be read along with other entries and in particular entries on page 9 which even the Supreme Court understood to be one pertaining to the Jains.

28. Referring to the decision in *K.T.M.S. Mohd. v. Union of India 1992 (3) SCC 178*, Mr. Panda submitted that FERA was a complete code in itself. Mr. Panda also referred to the decision of the Supreme Court in *Central Bureau of Investigation v. State of Rajasthan 1996 (9) SCC 735* to emphasize that the CBI had no jurisdiction as far as FERA was concerned. He submitted that Section 40 read with Section 39 FERA mandated that the noticee spoke the truth. He submitted that there were several occasions for the noticee to do so. The first was when statements were recorded under Section 40 FERA. The next was in reply to the SCN. The third occasion was the adjudication proceedings in terms of Rule 3 of the Adjudication Proceedings and Appeal Rules, 1974. Referring to the decision in *Directorate of Enforcement v. Deepak Mahajan AIR 1994 SC 1775* and *Poolpandi v. Superintendent, Central Excise 1992 (3) SCC 259* he submitted that the noticee under FERA could not be treated as an accused for the

purpose of Article 20 (3) of the Constitution. Since the chargesheets filed by the CBI made no reference to FERA, there was no occasion for the Appellant to decline to answer the questions put to him while recording the statement under Section 40 FERA.

29. Mr. Panda also referred to the decision in *Issardas Daulat Ram v. Union of India 1962 Supp (1) SCR 358* and *Shah Guman Mal v. State of Andhra Pradesh 1980 (2) SCC 262* to urge that in the present case since the diaries were admittedly maintained by Mr. J.K. Jain on the instructions of Mr. S.K. Jain, the entries therein were in the exclusive knowledge of Mr. S.K. Jain. He was obliged on an analogy of Section 106 IEA to explain those entries. Referring to the decision in *Enforcement Directorate v. M. Samba Siva Rao 2000 (5) SCC 431*, Mr. Panda submitted that it was obligatory on Mr. S.K. Jain to have explained the entries. Reference was made to Section 71 FERA and the decision in *Prem Singh Chawla v. Directorate of Enforcement ILR (1987) 1 Delhi* to urge that the entries in the mother diary which was a book of account as held in *the V.C. Shukla case*, should be taken to prove the unauthorised dealings in foreign exchange transactions. Mr. Panda repeatedly urged that the entries in the diaries had to be seen in totality and not in isolation.

Right against self-incrimination

30. In the present case the impugned AO of the SD, ED and the impugned order of the AT proceeded on the basis that the Appellant could not have validly invoked the right against self-incrimination

under Article 20 (3) of the Constitution since he was not accused in any criminal proceeding initiated under FERA at the time his statement was recorded under Section 40 FERA. Both orders further proceeded to draw an adverse inference as regards his refusal to explain the entries found with the seized diaries.

31. It is seen that the FIR of the CBI dated 4th March 1995 mentioned the provisions of both the PCA as well as FERA. At that stage the proceedings under FERA were yet to commence. It was noted in the FIR that the Superintendent of Police had sent to the ED a report for filing a statutory complaint under FERA. It is, therefore, clear that at the time when the statements of Mr. S.K. Jain and Mr. J.K. Jain were initially recorded, i.e., in April 1995 no proceedings under FERA had commenced.

32. The second factor to be noted is that it is only at the stage of filing of the charge sheets by CBI on 16th and 23rd January 1996 that it became clear that the cases filed by the CBI did not govern the violations of FERA. Therefore, till that date the two noticees, Mr. J.K. Jain and Mr. S.K. Jain were justifiably advised that they could invoke their right under Article 20 (3) of the Constitution so as to not incriminate themselves while making their statements under Section 40 FERA.

33. The situation obviously changed once the chargesheets were filed by the CBI. After the filing of the chargesheets Mr. J.K. Jain stated

that he was unable to recall what the entries were about. He merely stated that he had written many entries on the instructions of Mr. S.K. Jain. As regards Mr. S.K. Jain, he maintained that he would not be able to explain entries since they were not made by him.

34. There are two strands of litigation that emanate under FERA. One is the adjudicatory proceedings and the other the criminal proceedings under Section 56 FERA. In ***Ramanlal Bhogilal Shah v. D.K. Guha***, the Supreme Court explained that a person served with the summons under the FERA is an accused within the meaning of Article 20 (3) of the Constitution. It was held that this did not mean that he need not give information regarding matters which do not tend to incriminate him. In other words, it was open to a noticee not to answer such questions as would tend to incriminate him.

35. It is, therefore, clear that for the purpose of FERA, the noticee can, to the extent that he is required by the ED officers to give answers that might tend to incriminate him in the criminal proceedings under FERA, decline to do so. The resultant position as far as the present case is concerned is that on the dates of their examination in April 1995 the Appellant and Mr. J.K. Jain were 'accused' in terms of the FIR registered by the CBI and this continued till the filing of chargesheets by the CBI in January 1996. Therefore, the two noticees were entitled to invoke their right against self-incrimination under the Article 20 (3) of the Constitution. No adverse inference could be drawn against them for having exercised that right. Even thereafter,

since admittedly criminal proceedings were also launched against the noticees under Section 56 FERA, they continued to be 'accused'. Their refusal to explain the entries could not lead to an adverse inference being drawn against them.

36. At this stage it requires to be noticed that Mr. Panda, learned Senior counsel for the ED sought to contend that since the ED officers were not police officers, the statements made to them under Section 40 FERA would be admissible in evidence. According to him, as a corollary, such a noticee under FERA could not claim to be an accused.

37. In *Directorate of Enforcement v. Deepak Mahajan* the Supreme Court, was dealing with the question “Whether a Magistrate before whom a person arrested under sub-Section (1) of Section 35 of the Foreign Exchange Regulation Act of 1973 which is in pari material with sub-Section (1) of Section 104 of the Customs Act of 1962, is produced under sub-Section (2) of Section 35 of the Foreign Exchange Regulation Act, has jurisdiction to authorise detention of that person under Section 167 (2) of the Code of Criminal Procedure.”

The question was answered in para 99 as under:

“99. From the foregoing discussion, it is clear that the word 'accused' or 'accused person' is used only in a generic sense in Section 167(1) and (2) denoting the “person” whose liberty is actually restrained on his arrest by a competent authority on well-founded information or formal accusation or indictment. Therefore, the word 'accused' limited to the scope of Section 167(1) and (2) - particularly in the light of Explanation to

Section 273 of the Code includes 'any person arrested'. The inevitable consequence that follows is that 'any person is arrested' occurring in the first limb of Section 167(1) of the Code takes within its ambit 'every person arrested' under Section 35 of FERA or Section 104 of the Customs Act also as the case may be and the 'person arrested' can be detained by the Magistrate in exercise of his power under Section 167(2) of the Code. In other words, the 'person arrested' under FERA or Customs Act is assimilated with the characteristics of an 'accused' within the range of Section 167(1) and as such liable to be detained under Section 167(2) by a Magistrate when produced before him."

38. While it is true, as explained in *Enforcement Directorate v. M. Samba Siva Rao* and *K.T.M.S. Mohd. v. Union of India*, that FERA is a complete code in itself and every proceeding under FERA is deemed to be a judicial proceeding, it does not straightway follow that a refusal by a noticee to answer a question which would incriminate him should be taken to be a contravention of FERA.

39. The decisions in *Issardas Daulat Ram v. Union of India* and *M/s. Kanungo & Company v. Collector of Customs (1973) 2 SCC 438* were given in a context very different from that of the present case. In each of those cases the imported goods had been seized and therefore, the burden was on the person who was found in possession to explain how he came to be in possession of such goods. Merely because Mr. J.K. Jain was found in the possession of diaries in which he purportedly made entries at the behest of Mr. S.K. Jain does not *ipso facto* shift to Mr. S.K. Jain the burden of showing that they did not pertain to transactions involving foreign exchange. It was erroneous

on the part of the AT to invoke the analogy of Section 106 of IEA when in the instant case in respect of both SCN IX and SCN XVIII, the ED has failed to produce credible evidence to even prima facie show that the Appellant had contravened Section 8 (1) read with Section 8 (3) FERA. The question of therefore shifting the burden to the Appellant to show that he had not contravened the said provisions was not permissible or justified.

The purport of the entries in the mother diary

40. Since extensive reference was made to the decision in *the V.C. Shukla* case relating to the very same entries in the mother diary, the said entries need to be dealt with at some length. The entries in pages 1 and 2 of the diary of which entry No. 5 forms part, read as under:

1	4 x 16.50 1 x 17.00	66.00 17.00	April
2	1 x 17.00	17.00	June
3	1 x 16.70 1 x 17.00	33.70	Sept
4	1.5 x 18.00	27.00	Nov
5	At Dubai	1.90	Jan 89
5	3 x 17.60	52.80	Feb
6	1 x 19.75 2 x 19.50	58.75	July 89

7	2 x 20.00	40.00	July 89
8	10 x 20.50	205.00	Oct
9	30 x 20	600.00	Nov
	10 x 20	200.00	
	10 x 20	200.00	
10	5 x 20.30	101.50	Dec
11	10 x 19.75	197.50	Jan 90
12	4 x 20.15	80.60	Feb 90
13	5 x 20.10	100.50	Feb 90
14	5 x 20.10	100.50	Mar 90
15	3 x 20.10	60.30	April 90
16	10 x 20.15	200.50	May 90
17	15 x 20.85	312.00	June 90
18	5 x 21.40	211.00	Aug 90
	5 x 20.80		
19	10 x 20.90	209.00	Sept 90
20	5 x 21.00	105.00	Sept/Oct
21	2 x 21.25	42.50	Oct 90
22	5 x 21.50	107.50	Nov 90
23	5 x 21.60	108.00	Jan 91
24	5 x 21.00	322.50	Feb 91
	5 x 21.50		
	5 x 22.00		
25	20 x 23	460.00	Mar 91
26	20 x 23.50	470.00	Apr 91

41. As can be seen there are 26 entries and none of them is prefixed by any foreign currency symbol. The entry at Serial No. 5 is the one in respect of which SCN No. IX had been issued. At this juncture it also requires to be noticed that according to ED, there is a corresponding entry on the reverse of page 4 which simply reads 'A 1.90 Dub' and is entered under 'March 1989'. However, this entry does not find mention in the SCN.

42. In *the V.C. Shukla case*, the Supreme Court discussed the mother diary MR 71/91 (M-209/93) in some detail. The said discussion in para 9 reads as under:

“Since according to the prosecution MR 71/91 is the main (mother) book we first take the same for scrutiny. Page 1 of the book begins with the heading "A/C given upto 31st January on 31.1.1998;" and then follows serially numbered entries of various figures multiplied by some other figures on the left hand column and the product thereof on the next column for each month commencing from January, 1990 to April, 1991. The overleaf ('o' for short) of the page contains similar entries for the period from April, 1988 to December, 1989 and it ends with the words "2.77' we have to receive". In the subsequent pages the book records monthly receipts of monies/funds from inconspicuous persons/entities during the period commencing from the month of February, 1988 to April 1991 maintained on '2 columns' basis. The left hand column represents the receipts and the right hand column disbursements. In the column of receipts the source is indicated in abbreviated form on the left of the figure representing the sum received. On the right side of the said figures a number is mentioned which co-relates with the serial number of the account of receivers recorded on pages 1 and 1(o) of the diary for the period subsequent to 31.1.1988. So far as the names of the payees are concerned the same have also been recorded in abbreviated form, alphabets or words.

The entries, however, do not give any indication of any sale, purchase or trading and show only receipts of money from a set of persons and entities on one side and payments to another set of persons and entities on the other, both reckoned and kept monthly. As regards the actual amounts received and disbursed we notice that the figures which have been mentioned briefly against the respective names are not suffixed with any symbol, volume or unit so as to specifically indicate whether they are in lakhs, thousands or any other denomination. It is noticed that in most of the entries the figures against transactions extend to 2 places after decimal which seem to suggest that the figures in money column may be in thousands, but then in some of the months, namely, 11/88, 6/89, 10/90, 2/91, 3/91, 4/91, figures extend to 5 places after decimal point in money column. This gives an impression that the figures are in lakhs; and this impression gains ground from other transactions. For example, at page 9 of the book in the transactions relating to the month of September 80, a figure of 32,000 prefixed by (sterling pound symbol) indicates that it is 32,000 sterling pounds and the same has been multiplied by Rs. 40/- per pound which was possibly the conversion rate of pound according to Indian currency at that time) and the total has been indicated at 12.80 as against the product of Rs. 12,80,000/-. That necessarily means that the 2 places after decimal denotes that figures are in lakhs. The book further indicates that it was from time to time shown to some persons and they put their signatures in token thereof." (emphasis supplied)

43. Great emphasis was laid by Mr. Panda on the highlighted lines of the above passage which referred to the entry pertaining to 32,000 Sterling pounds. The said entry is found on page 9 of the diary. It must be noted that neither SCN IX nor SCN XVIII refers to this entry. As regards entry No. 5, it does not contain any symbol of any foreign currency. In the absence of any other evidence to explain what is exactly meant by the above entries, it is not possible to conclude that

the said entry No. 5 indicates that Mr. S.K. Jain received foreign exchange worth Rs. 1,90,000 in Dubai from a person other than an authorised dealer or that he had failed to sell the said foreign exchange to an authorized dealer in India within three months from the date he acquired it in Dubai. Likewise it is not possible to draw any such inference as regards the solitary entry of 32,000 sterling pounds. From who was such foreign exchange obtained if at all and when? At the cost of repetition it must be noted that the SCN does not reflect any credible evidence having been gathered by the ED through independent investigations at Dubai or any place outside India to substantiate the allegations in the SCNs. The above entries by themselves cannot constitute substantive evidence of such allegations.

44. What is significant is that this is not a case where a confession was initially made under Section 40 FERA which thereafter was retracted. Here the noticee either declined to answer or gave an answer which did not help the ED since he claimed that had no knowledge of the entries in the diaries. Mr. Panda sought to contend that the said answers should be construed as either false or misleading or both. The Appellant said that he was unable to explain the entries because they were not written by him. The latter part of the answer was a fact since the entries were admittedly made by Mr. J.K. Jain. While Mr. J.K. Jain claimed that he did so on the instructions of Mr. S.K. Jain, the AO itself noted that there was no evidence whatsoever to show involvement of Mr. J.K. Jain in the transactions of foreign exchange. The Supreme Court has in *the V.C. Shukla case* held that the so-

called 'admissions' in relation to the entries by Mr. J.K. Jain in his statement under Section 40 FERA cannot be used against Mr. L.K. Advani or Mr. V.C. Shukla. It was, however, clarified that they could be proved against the Jains as admissions under Section 18 read with Section 21 IEA provided they relate to 'any fact in issue or relevant fact.' The initial burden of proving that the entries related to 'any fact in issue or relevant fact' was on the ED. This it could have discharged by placing before the SD credible substantive evidence gathered through independent investigation conducted abroad and here. The above entries in the diaries were at best corroborative and not substantive evidence. By themselves such entries were insufficient to prove the allegations against Mr. S.K. Jain in SCN No. IX.

45. As regards SCN XVIII the charge against Mr. S.K. Jain was that he had paid US\$ 40,895.65 to Shri V.K. Beri of U.K. outside India without obtaining permission of the RBI thus contravening the Sections 8 (1), 8 (2), and 9 (1) (a) FERA. Although the AO found that there was no material whatsoever to prove that any such payment was made to Mr. V.K. Beri, Mr. S.K. Jain nevertheless was held to have paid 10,000 USD to "somebody". That was not the allegation against Mr. S.K. Jain in SCN XVIII and yet because he did not give an explanation regarding payment of USD 10,000 to "somebody", he has been held to have violated Section 8 (1) FERA.

46. When such allegation was not even the subject matter of SCN XVIII and therefore, not put to Mr. S.K. Jain he could not be held to

have failed to explain such transaction. In *Prem Singh Chawla v. Directorate of Enforcement* apart from the books of accounts there were statements of witnesses who, during the adjudication proceedings, “admitted the receipt of the amount from the Appellant and corroborated the entries appearing against their names in the account books”. In the present case there is no statement constituting 'admission' by Mr. S.K. Jain or anyone else to the ED regarding transaction of foreign exchange involving the Appellant. The entries in the mother diary, even if it is taken to be a 'book of accounts', at best constitute a corroborative piece of evidence and not substantive evidence of violation of Section 8 (1) FERA.

47. In the considered view of this Court, the AO passed by the SD, ED and the impugned order of the AT are contrary to the settled legal principles and also based on an improper appreciation of the probative value of the evidence produced by the ED to support the allegations in the two SCNs. The said impugned orders are, therefore unsustainable in law.

Scope of the appeal

48. As regards the submission of Mr. Panda on the scope of Section 35 FEMA, it may be noticed that in *Union of India v. Prem Khanna*, it was explained by this Court that a perverse finding could also give rise to a question of law within the meaning of Section 35 FEMA. In the present case the Court has, for the reasons explained hereinabove, come to the conclusion that the impugned AO and the impugned order

of the AT are not supported by the evidence on record and have been passed without appreciating the correct position in law.

Conclusion

49. For the aforementioned reasons, the Court sets aside the impugned order dated 7th November 2001 of the SD, ED and the impugned order dated 3rd January 2008 of the AT.

50. The appeal is accordingly allowed with no order as to costs. The penalty amount deposited by the Appellant pursuant to the impugned orders of the SD and AT will be refunded to him in accordance with law within a period of eight weeks.

MAY 29, 2014

Rk

S. MURALIDHAR, J.