

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. 241 of 2008

RAM LAL MEHTA Appellant
Through: Mr. Abhishek Vikram, Advocate
for Mr. Viraj R. Datar, Advocate.

versus

DIRECTOR OF ENFORCEMENT Respondent
Through: Mr. Sachin Datta, CGSC
and Mr. Vikram Aditya Narayan, Advocate.

And

CRL.A. 264 of 2008

PARVEEN KUMAR MEHTA Appellant
Through: Mr. Gyananath Kumar Singh for
Mr. Viraj R. Datar, Advocate.

versus

DIRECTOR OF ENFORCEMENT Respondent
Through: Mr. Sachin Datta, CGSC and
Mr. Vikram Aditya Narayan, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
11.03.2014

1. These two appeals are directed against the common order dated 15th June 2007 passed by the Appellate Tribunal for Foreign Exchange ('AT') dismissing Appeal Nos. 785 and 792 of 1990. By the impugned order, the AT affirmed the order dated 30th August 1990 passed by the Special Director ('SD'), Enforcement Directorate ('ED'), holding the

Appellants to be guilty of contravention of Sections 8(1) and 8(2) read with Section 64 of Foreign Exchange Regulation Act, 1973 ('FERA') and imposing a penalty of Rs. 10,00,000 each.

2. The background to these appeals is that, on 23rd April 1986, the SD, ED issued a Memorandum/Show Cause Notice ('SCN') to the two Appellants, Shri Ram Lal Mehta, being the father, Shri Praveen Kumar Mehta, being the son and one Shri Rikhab Chand Sirohya @ Rikhab Chand Jain, requiring them to show cause as to why they should not be proceeded against for contravention of Sections 8(1) and Section 8(2) read with Section 64(2).

3. In the SCN dated 23rd April 1986, it was stated that the officers of the ED had simultaneously searched the residential premises at L-33, Kalkaji, New Delhi; Shop No. 57, Shankar Market, Connaught Place, New Delhi; Stall Nos. 14, 16 and 17, Shankar Market, Connaught Place, New Delhi and a scooter bearing registration No. DIH 9647 parked in front of Shop No.57, Shankar Market, Connaught Place, New Delhi. Incriminating documents and Indian currency of Rs. 2,50,500 was stated to have been recovered from the residential premises occupied by Shri Ram Lal Mehta. From Shop No.57, Shankar Market, Connaught Place, New Delhi, one diplomat spiral note book with 19 written pages was recovered. From the dickey of the scooter, cash of Rs. 1,50,000 and a black diary of the Bank of Rajasthan Limited was recovered. Nothing incriminating was recovered from the stalls 14, 16 and 17, Shankar Market, Connaught Place, New Delhi.

The search at the residential premises was conducted in the presence of Smt. Chander Mehta and Smt. Neena Mehta, wife and daughter respectively of Shri Ram Lal Mehta. The search at Shop No. 57 and the dickey of the scooter was conducted in the presence of the co-noticee, Shri Rikhab Chand Jain.

4. Statements under Section 40 FERA were recorded, *inter alia*, of the two Appellants, Shri Rikhab Chand Jain, Shri Pawan Kumar, an employee of Ram Lal Mehta at stall No. 14, Shankar Market, Connaught Place, New Delhi, Bhim Sain, the Manager at stall No. 14, Shankar Market, Connaught Place, New Delhi, Shri Om Prakash Mehta, the elder brother of Shri Ram Lal Mehta, Shri Sunil Kumar Gogia and Smt. Chander Mehta.

5. The SCN alleged that the documents recovered contained entries relating to illicit sale and purchase of foreign exchange from and to unknown persons. The SCN referred to all the above statements and charged Shri Praveen Kumar Mehta with having acquired and sold foreign exchange of (i) US Dollar ('USD') 4,17,762; (ii) UK£63,442; (iii) other various foreign currencies of 25,03,721 and (iv) foreign exchange equivalent to Indian Rupees 4,21,74,898 from and to unknown persons other than the authorised dealers at rates other than the rates of exchange authorised by the RBI without the previous general or special permission of the RBI. The SCN further stated that Shri Ram Lal Mehta and Shri Rikhab Chand Jain had assisted Shri Pawan Kumar Mehta in otherwise acquiring and selling the

aforementioned foreign exchange without the general or special permission of the Reserve Bank of India ('RBI'), thereby, also violating Sections 8(1) and 8(2) read with Section 64(2) FERA. They were also asked to show cause as to why the cash of Rs. 1,50,000 recovered from the dicky of the scooter and Rs. 2,50,000 recovered from the residential premises occupied by Shri Ram Lal Mehta should not be confiscated in terms of Section 63 FERA.

6. The so-called confessional statements made by Shri Ram Lal Mehta, Shri Praveen Kumar Mehta, Shri Rikhab Chand Jain and Shri Pawan Kumar were subsequently retracted by each of them as having been given under the duress and coercion. Shri Rikhab Chand Jain sent a telegram on 6th May 1985 itself, making the above allegations against the officers of the ED. Shri Pawan Kumar also sent a telegram on the same date, making similar allegations. The stand of the ED was that the said allegations were an after-thought and were baseless.

7. In the impugned Adjudication Order ('AO') dated 30th August 1990 passed by the SD, ED, extensive reference was made to the statements made by the two Appellants and Shri Rikhab Chand Jain, apart from the statements made by certain others. At the outset, the SD recorded in the AO that retractions made by Mr. Rikhab Chand Jain and Pawan Kumar were "rather intriguing as their statements are not inculpatory." As a result, according to the SD, despatching of retractions "by all the persons, though they have not implicated themselves is meaningless." According to the SD, it conveyed the message that "they had been

made firstly for the sake of retraction and secondly at the behest of someone else to bail him out of the alleged contravention, which the Department had been investigating.” According to the SD, Shri Parveen Kumar Mehta had explained the various entries in the seized diaries concerning the illegal sale and purchase of foreign exchange. The statements made by Shri Rikhab Chand Jain, Shri Pawan Kumar, and Shri Parveen Kumar Mehta revealed that Shri Parveen Kumar was indulging in the sale and purchase of foreign exchange. The SD then referred extensively to the statement of Shri Parveen Kumar Mehta explaining the entries in the diaries. The SD rejected the plea that the evidence of Shri Parveen Kumar was hearsay. It concluded that the statement of Shri Pawan Kumar, employee and close relative of Shri Ram Lal Mehta, disclosed the details about the foreign exchange dealings involving the noticees. Shri Rikhab Chand Jain had also disclosed that Shri Parveen Kumar Mehta was indulging in the sale and purchase of foreign exchange. Dealing with the retractions again, the SD observed that they were mere denials and “all the basic facts enumerated in their own statement have not been rebutted with any corroborative evidence to make the retraction meaningful and worthy of credence.” The plea of the Appellants that there was no evidence revealing any particular transaction of foreign exchange was rejected by holding that “it is not necessary in cases of such clandestine dealings to prove a case with mathematical precision to a demonstrable degree.” It was held that recovery of Indian currency from the dicky of the scooter and from the residential premises was “another vital factor in this case.”

8. The AT has, in the impugned judgment, relied on the decision in *Naresh J. Sukhwani v. Union of India 1966 SCC (Cri) 76* to the effect that the statements recorded by the ED officials was a material piece of evidence which can “certainly be used against a co-noticee when the person giving statement is also tarnishing his image by making admission of guilt.” The AT held that “in these appeals admittance of guilt clearly flows from the statement of the Appellants.” Reference was also made to the decision in *Collector of Customs, Madras v. D. Bhoormull AIR 1974 SC 859* to hold that the Department was not required to adduce perfect proof. It was nothing more than “a prudent man’s estimate as to the probabilities of the case”. According to the AT, the writings in the documents were “plain and clear” and further the Appellants were not able to explain how they acquired the Indian currency recovered from the scooter and the residence. Accordingly, the appeals were dismissed.

9. This Court has heard the submissions of Mr. Abhishek Vikram and Mr. Gyananat Kumar Singh, learned counsel for the Appellants and Mr. Sachin Datta, learned Standing counsel for the Respondent.

10. This Court has examined carefully the statements of the Appellants and Shri Rikhab Chand Jain made under Section 40 FERA. Taking up the statement made by Shri Parveen Kumar Mehta first, it is seen that he does not implicate himself. In response to a specific question “was any other business being carried out secretly by you and Shri Rikhab Chand Jain from Shop No. 57?”, he answered: “I know that Shri

Rikhab Chand Jain was indulging in doing the business of illicit purchase and sale of various foreign currencies.”As regards the modalities of the transactions, he explained that “frequent telephone calls used to come on telephone No. 3313242 which is installed in the Shop No. 57, inquiring about rate of exchange of various foreign currencies from Rikhab Chand Jain. Since Rikhab Chand Jain used to go out frequently for purchasing foreign exchange I used to receive message in his absence and used to pass on such messages to Shri Rikhab Chand Jain on his return to the shop. He used to tell me to keep such talks secrets. He also used to tell me that I should not disclose his secret activities to anyone else including to my father Shri Ram Lal Mehta. This is how I know that he (Rikhab Chand Jain) used to sell and purchase various foreign currencies.”

11. In response to another question as to who was the owner of the seized currency of Rs. 1.5 lakhs and the black diary recovered from the dicky of scooter No. DIH 9647, Shri Parveen Kumar Mehta stated:

“I have to state that the above scooter normally remained with Shri Rikhab Chand Jain as stated earlier in the morning of 5th May 1985 when I demanded the keys of the said scooter from Shri Rikhab Chand Jain. He confidentially told me that some foreign exchange that is US Dollars and other currencies were lying in the dicky of the said scooter which foreign exchange he has to dispose off to some persons of Chandni Chowk and after doing so he would give the scooter back to me in the evening of 5th May 1985. I agree with him. Naturally therefore, the currency of Rs. 1,50,000 belonged to Shri Rikhab Chand Jain, I have nothing to do with this seized currency.”

12. When confronted with the diplomat spiral note book containing written pages 1 to 19 from the Shop No. 57, Shri Parveen Kumar Mehta stated that Shri Rikhab Chand Jain had requested him to keep his business as secret. He further stated that “I was writing accounts of foreign exchange in this diary as per directions of Mr. Rikhab Chand Jain. I may state that I have no interest of my own in writing account as per directions of Shri Rikhab Chand Jain. I could not resist obliging him because of our relationship with him. I never knew that writing this account on the directions of Shri Rikhab Chand Jain could implicate me.” He then explained the entries made in the diary but maintained that all entries had been written “on instructions of Shri Rikhab Chand Jain. I do not know recollect as to what they reflect.” Certain entries were explained by stating: “foreign exchange representing some currency has been sold at the rate of 4.10 to secure a figure a figure of Rs.1,90,650” Interestingly there is no reference to any particular foreign exchange like dollar or pound in the statement.

13. An examination of the statements of Shri Parveen Kumar Mehta made on 19th July, 23rd July, 5th August and 18th December 1985 reflects that he nowhere implicated himself. The statements cannot, therefore, be said to be an admission by him of his guilt. His refrain was that it was Shri Rikhab Chand Jain who was dealing in the foreign exchange and not Shri Parveen Kumar Mehta.

14. It has been explained in several decisions of the Supreme Court that the statement made by a co-accused cannot be relied upon against

other co-accused if it is not inculpatory of the person making the statement. It cannot be used as substantive evidence against the other co-accused. In *Union of India v. Bal Mukund (2009) 12 SCC 161* it was explained that “if an accused makes a confession in terms of the provisions of the Code of Criminal Procedure or otherwise, his confession may be held to be admissible in evidence only in terms of Section 30 of the Evidence Act and not otherwise. If it is merely a statement before any authority, the maker may be bound thereby but not those who had been implicated therein.” In *Naresh J. Sukhawani v. Union of India* it was held that a statement made before the Custom Officials under Section 108 of the Customs Act is a material piece of evidence because “that material incriminates the Petitioner inculcating him in the contravention of the provisions of the Customs Act.” In that case it was held that such a statement can be used to connect the Petitioner in the contravention since it clearly inculcates not only the maker of the statement but also the Petitioner.

15. Therefore, for the statement by one noticee under Section 40 FERA to be used as evidence against another co-noticee it must be shown that the said statement inculcates the person making it. Otherwise such statement has no value whatsoever. Shri Datta referred to the decision in *K.L. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin (1997) 3 SCC 721* to point out that the statement made before the customs officials under Section 108 of the Customs Act is admissible evidence. While that proposition is unexceptionable, and would apply to statements made to the ED officials under Section

40 FERA, the question really is how far such statement can be used as evidence against the co-noticee. The law as explained in *Union of India v. Bal Mukund* is very clear that unless the statement inculcates the maker of the statement, apart from the co-noticee, it cannot be used against the co-noticee.

16. The statement of Shri Parveen Kumar in the present case does not inculcate him at all. Even when he admits to making the entries in the diaries, he seems to wriggle out by explaining that he did it at the instance of Shri Rikabh Chand Jain. He also does not seem to have been aware of the implications of making of those writings as is clear from his statement that “I never knew that writing this account on the directions of Shri Rikhab Chand Jain could implicate me.” Therefore, it is futile for the department in the present case to rely on the statement of Shri Parveen Kumar Mehta as substantive evidence to hold him and the co-noticee guilty of contravention of Sections 8 (1) and 8 (2) of the FERA.

17. It was then sought to be argued by Shri Datta that even if the statement of Shri Parveen Kumar Mehta cannot be relied upon as substantive evidence, it stood corroborated by the statement of the other noticees apart from the entries in the diary and the seized cash.

18. This Court has carefully examined the statement made by Shri Ram Lal Mehta. He again does not inculcate himself at all. He also does not inculcate Shri Parveen Kumar Mehta. According to him, Shri

Parveen Kumar Mehta was doing some 'secret' business. The statements of Shri Pawan Kumar and Shri Rikhab Kumar Jain were, as noticed in the AO, retracted on the very next day after they were made. The approach of the SD in rejecting the said retractions as 'meaningless', is clearly erroneous. The proposition noted by the SD that corroborative evidence is needed "to make the retraction meaningful and worthy of credence" is also erroneous. In fact, since the said admissional statements were retracted even the admissible portion, if any, of the said statements would require corroboration by other independence evidence. This legal position was entirely missed by both the SD as well as the AT.

19. The statement by the AT that "in these appeals admittance of guilt clearly flows from the statement of the Appellants" is contrary to the record. As noted hereinbefore, none of the statements of the Appellants implicate the maker of the statement. Each statement spoke to the guilt of another noticee and not the maker himself. There is no independent corroborative evidence other than the retracted statements of the noticees. Consequently, the Court has no hesitation in concluding that there was no substantive evidence to prove the guilt of the Appellants for contravention of Sections 8 (1) and 8 (2) of the FERA.

20. What is also striking in the present case is that while the Indian currency was recovered from the residence and dicky of the scooter, no foreign exchange was recovered. The mere fact that Indian currency was recovered does not establish the violation of the FERA by the

Appellants. It had to be shown that the said money was related to illegal transactions falling within the ambit of FERA.

21. For all the aforesaid reasons, the AO dated 30th August 1990 passed by the SD and the impugned order dated 15th June 2007 passed by the AT are hereby set aside. The sums deposited by the Appellants pursuant to the aforementioned orders and any interim order of this Court shall be refunded to them, in accordance with law, within eight weeks. The appeals are allowed in the above terms.

MARCH 11, 2014

Tp/Rk

S. MURALIDHAR, J.

