

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 07.10.2015

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN

AND

THE HONOURABLE MR.JUSTICE T. MATHIVANAN

C.M.A.No.1982 of 2010

and

M.P.No.1 of 2010

Kamal Batcha

...Appellant

Versus

1.Deputy Director of Enforcement,
Directorate,
Sastri Bhavan,
Chennai-600 006.

2.The Foreign Exchange Management,
Appellate Board,
Ministry of Law Justice
and Company Affairs,
Government of India,
4th Floor, Janpath Bhavan,
B-Wing,
New Delhi-110 011.
respondents

...

Prayer: Civil Miscellaneous Appeal is filed against the order passed by the Appellate Tribunal for Foreign Exchange, New Delhi in Appeal No.593 of 1992, dated 04.02.2010.

For Appellant :Mr.J.Raja Kalifulla, Senior Counsel for
Mr.J.Jayendra Krishnan

For R1 :Mr.M.Dhandapani

JUDGMENT

(Judgment of the Court

delivered by T. MATHIVANAN, J.)

1. Final order dated 04.02.2010 and made in Appeal No.593 of 1992 on the file of the Appellate Tribunal for Foreign Exchange, New Delhi, confirming the order of adjudication No.DD-MAS/304/92 dated 12.11.1992 on the file of the first respondent viz, the Deputy Director of Enforcement has been challenged in this appeal.

2. Heard, Mr.J.Raja Kalifulla, learned Senior Counsel appearing for the appellant and Mr.M.Dhandapani, learned counsel appearing for the first respondent.

3. It is manifested from the records that the order of adjudication was passed by the first respondent on 12.11.1992. The appellant appears to have filed his appeal before the second respondent immediately in the same year i.e., in the year 1992 itself. However, the final order in Appeal No.593 of 1992 was passed on 04.02.2010 i.e., after an abnormal interval of 18 years.

The judicial Parlance is ' ' the delayed justice is denied justice' '.

4. On perusal of the entire records, we understand that the Deputy Director of Enforcement, who is the first respondent herein, had mainly found basis on the alleged statement of the appellant, which was said to have been recorded by the Officers of the Directorate of Enforcement. The first respondent also had been heavily banking on the document(document serial No.35, sheet No.11 of bunch A) alleged to have been seized from the premises of one Mr.Jahubar Nissar.

5. The appellant's main contention is that the alleged statement dated 30.04.1991 was obtained under duress and threat of arrest, coercion and intimidation of family members. According to the appellant, he had retracted the above statement at the earliest point of time and that the so-called statement had got no value and hence it ought to have been eschewed completely. It is also the contention of the appellant that the statement dated 30.04.1991, which was subsequently retracted by him had no sanctity and therefore no credence could be attached without any corroboration from any independent evidence. He has also projected his contention saying that the alleged confessional statement, which was retracted at the earliest point of time could form basis for initiating proceedings under the provisions of the Foreign Exchange Regulation Act.

6. This appeal came to be admitted on the following substantial questions of law:

(1)

Whether the respondents are justified in ordering confiscation of entire amount seized from the appellant's premises and imposing penalty in the absence of any independent material to show that the said amount was obtained by any unfair means?

(2)

Whether, in the facts and circumstances of the case and material on record, any offence under the F.E.R. Act is made out, much less any offence under Section 9(1)(b) of the Act is established?

(3)

Whether the respondents are justified in ordering confiscation on the basis of alleged inculpatory statement without any corroborative material, especially when the statement has been retracted and a positive assertion made that the same was obtained under coercion, duress, threat of arrest and humiliation in public?

(4)

Whether the respondents are justified in taking proceedings against the appellant herein based on the alleged documents seized from Juhubar Nissar, when a specific question was raised before the Tribunal as regards the absence of opportunity to examine Jahubar Nissar?

(5) Whether the Appellate Tribunal is right in imposing penalty on the appellant?

7. The facts which are germane to the present case are as under:

Based on the documents seized from the premises of one Mr. Jahubar Nissar (document serial No.35, sheet No.11 of bunch A), the Officers of the Directorate of Enforcement, Chennai had searched the premises of the appellant Kamal Batcha, bearing Door No.35, Easwari Nagar, Thanjavur on 30.04.1991. While so, they had seized a sum of Rs.1,20,000/- under the cover of a Mahazer. The Officers had also recorded his statement. In his statement, the appellant is reported to have stated that on the instruction of one Mr. Mohamed Hilal, who was an employee in Kuwait, an unknown person had handed over a sum of Rs.1,00,000/- on 05.01.1991 and another sum of Rs.1,20,000/- in the first week of February. The appellant had totally received a sum of Rs.2,20,000/-. It is also stated that out of Rs.2,20,000/-, he had spent a sum of Rs.90,000/- and the

remaining balance was kept in his residence, which was said to have been seized by the Officers of the Directorate of Enforcement Wing on 30.04.1991.

8. A show cause notice dated 07.06.1991 was issued to the appellant. In this notice, it is alleged that the appellant had received a sum of Rs.2,10,000/- on behalf of Mohamed Hilal, a resident of Kuwait, contrary to the provisions of Section 9 (1) (b) of the Foreign Exchange Regulation Act and therefore, he was asked to show cause as to why an adjudication proceedings should not be initiated against him and the seized amount of Rs.1,20,000/- should not be confiscated. It is important to note here that in this show cause notice dated 07.06.1991, reliance was placed on the document said to have been seized from the premises of one Jahubar Nissar.

9. That on 17.06.1991, the appellant had given a reply disowning the statement dated 30.04.1991, saying that the statement was obtained from him under duress, threat of arrest, coercion and intimidation of the family members. In his reply, the appellant had specifically refuted the alleged acquaintance with any person including Jahubar Nissar and also denied any knowledge of the documents seized from his residence.

10. According to the appellant, the said document which was said to have been seized from the residence of Jahubar Nissar was not at all disclosed to him at any point of time. While rebutting the allegations levelled against him, the appellant has stated that he had withdrawn the above said amount of Rs.1,20,000/- from the bank and kept in his residence for his business purpose.

11. From the above context, the following crucial question is arisen for our consideration.

"whether the alleged confessional statement dated 30.04.1991, which was subsequently retracted by the appellant in his reply dated 17.06.1991 could be trusted or found basis for maintaining the charge that the appellant had contravened the provisions of Section 9 (1) (b) of Foreign Exchange Management Act, without any corroboration from any independent evidence.

12. Admittedly, the document (document serial No.35, sheet No.11 of bunch A), said to have been seized from the premises of Mr. Jahubar Nissar was neither put to the appellant nor its contents were disclosed to him. No penal action was initiated against the above said Jahubar Nissar, nor any statement was obtained from him. He was not even examined in this case to substantiate the case of Directorate of Enforcement.

13. It is pertinent to note here that no statement was obtained from Mohamed Hilal, on whose instructions the above said amount was said to have been given to the appellant by an unknown person. In fact, the said Mohamed Hilal was also not examined in this case. Who is that unknown person?. What is his identity?. Which is the residential place of that man?. No material is forth coming from the Directorate of Enforcement. The vacuum existing in respect of the answer of these questions would lead us to conclude that the said person might be fictitious.

14. We have carefully perused the records including the alleged statement dated 30.04.1991, said to have been recorded from the appellant. It is inculpatory in nature.

15. Mr.M.Dhandapani, learned counsel appearing for the first respondent has submitted that the alleged statement dated 30.04.1991 was the confessional statement of the appellant and that there might not be any impediment in placing reliance upon the said statement, despite the fact it was retracted, subsequently in the reply given by the appellant. He has also argued that in his statement, the appellant had admitted everything including the receipt of Rs.2,20,000/- from the unknown person on instructions given by Mr.Mohamed Hilal from Kuwait.

16. In this regard, we would like to point out much of the confusion relative to the exact meaning of the word 'confession' is the result of failure to distinguish between 'admission' and 'confession'. A statement or a declaration of an independent fact from which guilt may be inferred is not a confession. It is an admission of a particular fact pertinent to the issue and evidence of that fact, but it is not 'confession'. The distinction drawn between admission and confession in criminal law is substantial one. Confession involves a voluntary acknowledgement of guilt. To make an admission or a declaration, a confession, it must amount to a clear acknowledgement of guilt.

17. The following observations of HOLLOWAY .J in an American case (State Vs. Guie, 56 Mont 485, cited wig Section 821), explains this proposition as under:

"The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement, but based upon substantive differences of the character of the evidence deduced from each. A confession is a direct acknowledgement of guilt on the part of the accused, and, by the very force of the definition, excludes an admission, which, of itself, as applied in

criminal law, is a statement by the accused, direct or implied of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorise a conviction''.

18. A distinction is certainly in existence between an admission and a confession. As envisaged under Section 24 of the Indian Evidence Act 1872, the term confession means ''a confession made by an accused person which it is proposed to prove against him to establish an offence. For such a purpose, a confession might be inadmissible, which yet for other purposes would be admissible as an admission under section 18 of Evidence Act.

19. As defined by the Apex Court in Aghnool Vs. State (AIR 1966 Supreme court 119), it would thus appear that a confession is a species of which admission is the genus. In other words, all admissions are not confessions but all confessions are admissions. Only voluntary and direct acknowledgement of guilt is a confession. But when a confession falls short of actual admission of guilt, and is not taken down according to law, it may nevertheless be used as evidence against the person who made it, as an admission under Section 21.

20. We also find it expedient that the decision of the Apex Court in Pyare Lal Bhargava Vs. The State of Rajasthan (AIR 1963 Supreme Court 1094, (volume 50, C 164) would be of much help to arrive at a fair conclusion in this case. In the above case a four Judges Bench of the Apex Court has observed as under:

''Under S.24: a confession would be irrelevant if it should appear to the court to have been caused by any inducement, threat or promise. The crucial word is the expression ''appears''. The appropriate meaning of the word ''appears'' is ''seems''. It imports a lesser degree of probability than proof. The standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed. Even so, the laxity of proof permitted does not warrant a court's opinion based on pure surmise. A prima facie opinion based on evidence and circumstances may be adopted as the standard laid down. To put it in other words, on the evidence and the circumstances in a particular case it may appear to the court that there was a threat, inducement or promise, though the said fact is not strictly proved. It is not possible or advisable to

lay down an inflexible standard for guidance of courts, for in the ultimate analysis it is the court which is called upon to exclude a confession by holding in the circumstances of a particular case that the confession was not made voluntarily.

21. In State of Karnataka Vs. A.B.Nagaraj and another (AIR 2003 Supreme Court 666), the Apex Court has observed that:

"it is unsafe to base the conviction on a retracted confession unless it is corroborated by trustworthy evidence. There is no definite law that a retracted confession cannot be the basis of the conviction but it has been laid down as a rule of practice and prudence not to rely on retracted confession unless corroborated".

22. Mr.J.Raja Kalifulla, learned Senior Counsel appearing for the appellant, in support of his argument has placed reliance upon the following decisions.

(1) Vinod Solanki Vs. Union of India and another ((2008) 16 Supreme Court Cases 537)

(2) R.Rajagopal Vs. Assistant Director, Enforcement Directorate, Madras & another (AIR 100 L.W. -445).

In Vinod Solanki Vs. Union of India and another cited first supra, it is observed that :

"Indisputably, a confession made by an accused would come within the purview of Section 24 of the Evidence Act, 1872. The proceeding under the Foreign Exchange Regulation Act, 1973 is quasi-criminal in nature.

It is a trite law that evidence brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidence, which would lend adequate assurance to the court that it may seek to rely thereupon.

In R.Rajagopal Vs. Assistant Director, Enforcement Directorate, Madras & another cited second supra, it is observed that,

"a confession should not be accepted merely because it contains a wealth of detail which could not have been invented. Unless

the main features of the story are shown to be true, it is unsafe to regard mere wealth of uncorroborated detail as a safeguard of truth and that no hard and fast rule can be laid down regarding the necessity of corroboration in the case of a retracted confession in order to base a conviction thereon.''

23. On coming to the present case on hand, it is apparent that the alleged confessional statement dated 30.04.1991, said to have been recorded from the appellant by the Officers of the Directorate of Enforcement has not been corroborated by any independent witness. Further, neither Mohamed Hilal of Kuwait, nor Jahubar Nissar, from whose residence the alleged document was said to have been seized was examined in this case. Their statements were also not recorded.

24. It is apparent that neither the copy of the seized document (document serial No.35, sheet No.11 of bunch A) was furnished to the appellant nor its contents were disclosed to him. In the absence of independent and cogent evidence, it cannot be heard to say that the alleged confessional statement dated 30.04.1991, said to have been recorded from the appellant was proved by the Directorate of Enforcement.

25. It is also significant to note here that the alleged statement was subsequently retracted by the appellant in his reply.

26. While advancing his argument Mr.Raja Kalifulla, learned Senior counsel appearing for the appellant has drawn our attention to pages 3 to 6 and 7 to 10 of the typed set of papers to substantiate the fact that the seized amount of Rs.1,20,000/- was withdrawn by the appellant from his bank for the purpose of his business.

27. Viewing from any angle, we are of the considered opinion that the retracted confession cannot be trusted and form basis to maintain the charge that the appellant had contravened the provisions of Section 9 (1) (b) of the Foreign Exchange Management Act 1999. Since the Directorate of Enforcement has miserably failed to substantiate their case, presumptions has to be drawn as contemplated under Section 114 of the Evidence Act in favour of the appellant. Accordingly, all the questions of law are answered in favour of the appellant.

28. In the result, the appeal is allowed and the order of adjudication dated 12.11.1992 passed by the Deputy Directorate of Enforcement, Chennai and the final order dated 04.02.2010 passed by the Appellate Tribunal in appeal No.593 of 1992 are

set aside and the appellant is discharged from the charge levelled against him under Section 9 (1) (b) of the Foreign Exchange Regulation Act 1999, as the same is not proved to our satisfaction. The penalty of Rs.25,000/-, if paid by the appellant and the confiscated amount of Rs.1,20,000/- are directed to be refunded to the appellant.

dn

07.10.2015

After pronouncement of the Judgment, Mr.M. Dhandapani learned standing counsel expressed an apprehension that the appellant may claim interest on the amount.

2. But, in respect of pending amounts levied in criminal or quasi criminal proceedings, the question of payment of interest does not arise.

rs

07.10.2015

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

1. Deputy Director of Enforcement,
Directorate,
Sastri Bhavan,
Chennai-600 006.
2. The Foreign Exchange Management,
Appellate Board,
Ministry of Law Justice and Company Affairs,
Government of India,
4th Floor, Janpath Bhavan,
B-Wing, New Delhi-110 011.

+1cc to Mr.B. Rabu Manohar, Advocate, S.R.No.54308
+1cc to Mr.M.Dhandapani, Advocate SR.54326

KSJ(CO)
EU(28/10/2015)

C.M.A.No.1982 of 2010
& MP. No.1 of 2010