IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 31.07.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. NO. 1926 OF 2009
and M.P.No.1 of 2009

P.R.Ganapathy .. Appellant/Appellant

- Vs -

The Special Director
Enforcement Directorate
Ministry of Finance
Lok Nayak Bhawan, 6th Fooor
Khan Market, New Delhi 110 003. .. Respondent/Respondent

Appeal filed under Section 54 of the Foreign Exchange Regulation Act, against the order dated 21.09.2007 passed by the Appellate Tribunal for Foreign Exchange, New Delhi and made in Appeal No.571/2004.

For Appellant : Dr. Anitha Sumanth

For Respondent : Mr. M. Dhandapani

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in dismissing the appeal, the appellant is before this Court by filing the present appeal. This Court, vide order dated 30.07.09, while admitting the appeal, framed the following substantial question of law for consideration :-

> "Whether on the facts and in the circumstances of the case the Appellate Tribunal is right in law in confirming the penalty of Rs.12 Lakhs levied for the alleged violation of Section 9 (1) (c) of the Foreign Exchange Regulation Act?"

2. The facts, in a nutshell, are as hereunder :-

Based on information that P.R.Ganapathy, the present appellant, residing in No.38A, 1st Street, Secretariat Colony, Kilpauk, Chennai 600 010, was indulging in Hawala transaction, the Enforcement Directorate conducted a search operation in terms of Section 37 of the Foreign Exchange Regulation Act, 1973 (for short 'FERA') at the residential premises of the appellant in addition to searching the residential premises of one Sinniah Bose of Dubai situated at No.7, Balakrishnapuram Main Road, Adambakkam, Chennai on 14.10.1997 resulting in seizure of some documents from the premises of Ganapathy. However, it is stated that nothing was seized from the premises of Sinniah Bose.

3. On the basis of the documents seized from Ganapathy, it appears that he received demand drafts totalling to US$ 3,84,000 from Sri. Chandra Johan and Smt.Pusuparani Rajendran, both of Singapore during the period August, 1993 to October, 1993. Statements were recorded from P.R.Ganapathy on 14.10.97, 16.10.97, 27.10.97 and 5.11.97 in terms of Section 40 of the FERA. The facts resulting to the receipt of this amount and the explanation given by the appellant is found in para 5 to 8 of the adjudication order and, for better clarity, the same is extracted hereinbelow:-

> "5. In his said statements, Shri Ganapathy stated, inter-alia, that he is a native of Zamindarpatty, Aralikottai Post, Via Thirukoshtiyur, Sivaganga Distt.; that his sister-in-law, Smt. Nalayini (wife's sister), is married to Shri S.Kannappan, former Minister of Tamil Nadu Government; that Shri Sinniah Bose, husband of Smt.Lakshmi (sister-in-law) is permanent resident of Dubai since 1990-91; that he is engage din the business of money lending under the name and style of M/s.Devaki Finance set up by his father-in-law in 1964; that the documents seized from his premises consisted of copies of air tickets for his travel to Singapore, copies of passport of Shri Chandra Johan, letters received from Shri Chandra Johan which were sent as per his request; and that Shri Chandra Johan is employed as agent in an Insurance company whom he knew since 1990, but he was not related to him.
>
> 6. While explaining page Nos.5 to 10 of the seized documents, Shri Ganapathy stated that the said documents were obtained by him on 29.8.1987 only for accounting the money he received during the year 1993; that he had gone to Singapore twice; that, during one of his visits to Singapore, he became acquainted with Shri Chandra Johan whom he met in a part as he was also speaking Tamil; that this acquaintance developed into friendship and he visited both the residence and office premises of Shri Chandra Johan; that, because of this friendship, Shri Chandra Johan gifted him the amounts specified in the said documents which revealed gift drafts worth US$ 2,14,000; that he did not know as to on whose instructions Shri Johan gifted such huge amounts; and that he met Shri Chandra Johan during the latter's

visit to Chennai when he promised to send the amount for business purposes. The said drafts were deposited in his account maintained in Indian Bank, Thousand Lights Branch and invested in the business. Page Nos.14 to 26 of the seized documents were explained by Shri Ganapathy as documents obtained from Smt. Pushparani Rajendran in the similar manner and related to gifts received by him from her; that Smt.Rajendran was introduced to him by Shri Sinniah Bose in the year 1989 and he again met herin August, 1997 in Singapore and, later on, also in Chennai; that she was a Director of a company, but was not able to recollect the name of the company; that Smt.Pushparani Rajndran also sent him gifts amounting to US$ 1,70,000 in the yar 1993; and that the said drafts were also deposited in the Indian Bank Account, Thousand Lights Branch and used for business purpose. Shri Ganapathy further stated that the seized documents namely, pages 5 to 10 and 14 to 26 were collected by him from Shri Chandra Johan and Smt.Pushparani Rajendran during his visit to Singapore in August 1997 as per the advice of his Chartered Accountant; and that the gifts so received were not declared during the assessment period 1994-95 or even during the period 1997.

7. Shri Ganapathy admitted that besides the money lending business which he was carrying on in the name of M/s.Devaki Finance, he was a partner in M/s.Karpagavinayagar Real Estate at coimbatore in which the other partners were Shri S.Kannappan and Shri Kannappan's brother-in-law, Shri Kalairajan; the firm being engaged in the business of flat promotion and was also a Director in M/s.Thiruvettai Ayyanar Spinning Mills Pvt. Ltd., at Madurai along with Shri Kalairajan wherein he had invested Rs.25 Lakhs out of the amounts received by way of gifts. Further, he was partner in Hotel Guru in Coimbatore and other partners were Shri Kalairajan and his wife, Smt.Kannathal, and Shri Kannappan's brother Shri Thiruvazzghu and his wife Smt.Sarawathi. He was maintaining an account in State Bank of India, Coimbatore. Certain gifts were received from NRIs namely, S/Shri Varghese, Thomas and George of Kerala and some of the drafts were deposited in the State Bank of India, Coimbatore. He admitted having purchased 100 acres of land in Virajpet in Karnataka for which his co-brother Shri Sinniah Bose had sent some payments through drafts in his name as well as in the name of his wife, Smt.Sulochana. Smt. Devaki Ammal whose name appeared in the seized documents is his mother-in-law.

> 8. Enquiries by the Directorate revealed that the address of Smt.Pushparani Rajendran of Singapore was, in fact, the address of M/s.Rahim & company, money changers in Singapore, run by Shri Abdul Rahim, son of Shri Fakeer Mohamed, a native of Tamil Nadu & resident of Singapore and the person behind the transactions was one Shri Yaseem of Ilayamkudi @ Thupakki Yaseem. It was also ascertained that, through an arrangement, amounts in foreign exchange were sent by way of drafts from Singapore as gifts after payment of commission of 4% by those persons who were getting the gift drafts. In the instant case of the gifts received by Shri Ganapathy, drafts worth US$ 3,84,000 were sent to Ganapathy after payment of US$ 16,000 (4%) as commission out of US$ 4,00,000 through Shri Chandra Johan and Smt.Pushparani Rajendran."

4. The details of the inward foreign remittances received by the appellant in his bank account, is recorded in para-9 of the adjudication order, which is extracted hereunder :-

> "9. Vide letter dated 27.10.1997, Indian Bank, Thousand Lights Branch furnished details of inward remittances received in the name of Shri P.R.Ganapathy."

5. In para-10 of the order, the adjudicating authority has given details of the two persons, who are stated to be persons of capacity and who are alleged to have given the amount as gift to the appellant. It is further observed by the adjudicating authority that the two persons, who are alleged to have given the amount, are in no way related to the appellant, but have stated that they have given the amounts out of natural love and affection.

6. The appellant, in his statement dated 14.10.97, has stated that the amounts sent by Chandra Johan and Pushparani Rajendran were for business purposes and were invested in a private company, which is recorded in para-11 of the adjudication order and the same is extracted hereunder :-

> "11. In his statement dated 14.10.1997, Shri P.R.Ganapathy stated that the amounts sent to him by Shri Chandra Johan and Smt.Pushparani were for business purposes and were invested accordingly in a private company. The amounts received by Shri.Kalairajan were also similarly invested."

7. On the basis of the above statement of P.R.Ganapathy, which shows that he has received the money, though stated to be in the nature of gift from those persons, the adjudicating authority held that it is in fact for the purpose of investment on their behalf. In this view of the matter, the adjudicating authority has exhaustively

examined the entire gamut of the transaction and recorded that the amounts received by P.R.Ganapathy should be treated as loan in the name of Chandra Johan and Pushparani Rajendran and recorded as hereunder :-

> "12. Examination of the case records revealed that Shri P.R.Ganapathy had visited Singapore only twice, i.e., in the years 1989 and 1997; that he met Shri Chandra Johan during his visit in the year 1989 when Smt.Pushparani was introduced to him by the said Shri Chandra Johan and both became friends with him; that both of them were not related to Shri Ganapathy; that gifts worth US$ 3,84,000 were allegedly given to him in the year 1993 by the said persons on the pretext of love and affection; that the records were constructed in the year 1997 to impart the colour of gift to the said transactions on the advice of Chartered Accountant and the said records were collected by Shri Ganapathy during his second visit to Singapore in August, 1997; that even though the gifts were received in 1993, the same were not declared to the Income Tax in the returns filed by Shri Ganapathy for the period 1993-94; that the same were brought in the books of accounts after detection by the Income Tax Department during search operations conducted in the year 1995 and that, when the Income Tax Department enquired about the source of the remittances, Ganapathy visited Singapore and brought the documents showing the remittances as gifts. These facts, in entirety, indicate that the amounts received by way of remittances from Singapore by Shri Ganapathy and subsequently shown as gifts on enquiries by the Income Tax Department can, at best, be treated as amounts taken as loan from the said persons, namely, Shri Chandra Johan and Smt.Pushparani Rajendran."

8. Considering the entire facts as also the records and other documents, the adjudicating authority concluded that what is reflected as gift from the two persons in favour of P.R.Ganapathy, is in fact loan, but documents were fabricated to reflect the amount as gift, and the amount was invested in the business run by the appellant in India and, therefore, the appellant has contravened the provisions of Section 9 (1) (c) of FERA. The relevant portion of the order of the adjudicating authority is extracted hereunder :-

> "14. From the foregoing facts of the case, it was revealed that Shri P.R.Ganapathy had contravened the provisions of Section 9 (1) (c) of the FERA, 1973, by receiving remittance of US$ 3,84,000, i.e., US$ 2,14,000 from Shri Chandra Johan and US$ 1,70,000

> from Smt.Pushparani Rajendran, both persons resident in Singapore, but reflected as gifts by fabricating documents and invested in business run by him in India. Smt.Devaki Ammal also contravened the provisions of Section 9 (1) (c) of FERA, 1973, by accepting the loan of Rs.1,50,000/-. Both Shri Ganapathy and Smt.Devaki Ammal had not obtained any permission from RBI for entering into the above transactions."

9. A show cause notice was issued to the appellant for contravention of Section 9 (1) (c) of FERA for which the appellant submitted his reply. On consideration of the same, the adjudicating authority, recorded his finding that the money was received from non-resident persons without prior approval of the Reserve Bank of India and it is an acknowledgment of debt in contravention of Section 9 (1) (c) of FERA, and recorded the finding as extracted hereinbelow :-

> "22. It is also a matter of record that while the transactions took place in the year 1993, the documentation showing the amounts as gifts was effected during the year 1997 and documents/papers collected by the noticee during his second visit to Singapore in August, 1997. In this context, it is pertinent to note that the noticee's passport indicated that he made only two trips to Singapore, during the year 1989 and thereafter in August, 1997, and the entire transactions involving such substantial sums materialized during these two visits.
>
> 23. The sum total picture thrown up at the investigation stage as well as during the course of present proceedings is that the construction of the gift documents and the noticee's claim of these amount being gifts are mere afterthought. Had the amounts been gifts in reality, the noticee would have definitely included the said amounts in the Income Tax returns and claimed benefits. The claim of gift surfaced only at that point of time when the Income Tax Department initiated enquiries about the source of investments of the said amounts by the noticee.
>
> 24. All considered, the circumstantial evidences as well as the material evidences relied by the department go against the noticees. I have no hesitation to conclude that while accepting the said amounts, the noticee had created a right in favour of Shri Chandra Johan and Smt.Pushparani Rajendran for repayment of the amounts. The noticee neither produced any permission from the RBI in respect of the receipt of the amounts from the said persons who were non-residents nor made any applications to the

RBI before accepting the amounts. The charge of contravention of Section 9 (1) (c) of FERA, 1973, framed against the noticee in the SCN-I under consideration is, therefore, held as established."

10. On the above finding, the Tribunal imposed penalty of Rs.12,00,000/= on the appellant, vide order dated 30.04.2004. Aggrieved by the said order, the assessee preferred appeal before the Tribunal, which was dismissed ex parte, against which the present appeal is filed by the appellant.

11. Dr.Anitha Sumanth, learned counsel appearing for the assessee primarily contended that there is a violation of principles of natural justice inasmuch as the plea for hearing in Chennai was rejected and no opportunity of hearing was granted to the appellant.

12. Heard the learned counsel appearing for the appellant/assessee and the learned standing counsel appearing for the respondent/Department and perused the materials available on record.

13. On a consideration of the entire facts, this Court is of the considered opinion that the order passed by the Tribunal warrants no interference at the hands of this Court.

14. On the issue raised by the appellant insofar as it relates to violation of principles of natural justice is concerned, we find from the order of the Tribunal that at the time of the first hearing, request was made by the appellant for hearing the matter at the Camp Court in Chennai for which the Tribunal stated that there was no likelihood of the Tribunal holding the Camp Court in Chennai in the near future and, accordingly, adjourned the matter. However, even on the next date of hearing, similar request was made by the appellant and, therefore, the Tribunal rejected the request as made by the appellant and, accordingly, heard the matter ex parte. In the above backdrop, this Court finds no reason to hold that there is violation of principles of natural justice. Adequate opportunity was granted to the appellant to present his side of the case, which the appellant miserably failed to do and, therefore, for the fault of the appellant, the Tribunal cannot be found fault with. Accordingly, we reject the contention as made by the learned counsel for the appellant.

15. On the merits of the case, the Tribunal, by referring to various provisions of law and decisions of the Apex Court, came to hold that there is no proof of gift and the presumption that the debt had been acknowledged in favour of the two non-residents and, therefore, contravention of Section 9 (1) (c) is attracted. For better clarity, the relevant portion of the order of the Tribunal is extracted hereunder :-

"13. In this appeal, the appellant has not disclosed the way of individual intimacy leading to gift by the donor. The origin as well as the growth of love and affection between two unrelated person either by blood or vaginal relations leading to the gift of a high amount needs a sufficient explanation from the appellant. The gift depending solely out of natural love and affection without any natural connection between two individuals have raised certain questions. These questions have not been answered by the appellant whose burden squarely lies on the appellant. Moreover long association also fail to permit high amount of gift in common human conduct unles the recipient is in total penury and financial doldrums which is not the case here. We may accept the version of appellant that immediate repayment is not made in lieu of gift cheques which has also been accepted by adjudication officer. However, after accepting appellant's version, the possibility of acknowledgment looms large and cannot be lost sight of in the particular factual scenario of this appeal. We have heard that Lord Krishna gifted away the valuables to his old friend Sudama due to latter's poverty. But that is not the case here. Therefore, the adjudication order cannot be faulted and is correctly passed."

16. The Tribunal also relied upon the decision of the Calcutta High Court in the case of Union of India - Vs - Bata India Ltd. (AIR 1991 Cal. 365), for the purpose of invocation of Section 9 (1) (c), the relevant portion is extracted hereinbelow :-

"9. According to Calcutta High Court in Union of India - Vs - Bata India Ltd., AIR 1991 Cal 365, Section 9 (1) (c) stipulates that (a) there should be an acknowledgment of debt; (b) the acknowledgment must give right to the non-resident person to claim the amount so that it can be recovered. There has to be an actionable claim whereby non-resident person is entitled to recover the amount. Similar is the position discussed in Diamond Carbon & Graphite Products Ltd. - Vs - Director of Enforcement (1998 (96) Taxman 571 (FERAB)."

17. The primary plea of the appellant appears to be that for the purpose of Income Tax Act, this amount was treated as gift and, therefore, it cannot be treated as liability arising under Section 9 (1) (c) of the FERA. It is the further stand of the appellant that the burden of proof lies on the department to prove that there is infraction of Section 9 (1) (c). However, the said plea of the appellant pales into insignificance in view of the statement of the appellant dated, 14.10.1997, wherein the appellant has categorically stated that the amounts sent to him by Chandra Johan and Pushparani Rajendran were for business purposes and were invested in a private company, which stands unrebutted. This unrebutted statement of the appellant, according to this Court, clinches the entire issue. There

is no question of shifting the burden on the department, when the appellant himself has accepted the receipt of the amount for business purpose. The appellant has further stated in his statement about the receipt of another amount from Kalairajan and its similar investment as well.

18. Be that as it may. The above plea of the appellant does not merit consideration in view of the judgment of the Supreme Court in K.T.M.S. Mohammed & Anr. - Vs – Union of India (1992 (197) ITR 196 (SC). In the said case, Supreme Court held that provisions under the Income Tax Act and the FERA operate in two different fields and the enquiry by the authorities under the respective taxing statutes should be independent irrespective of the other. In the said context, the Apex Court held as under:-

> "24. Needless to emphasise that the Foreign Exchange Regulation Act and the Income-tax Act are two separate and independent special Acts operating in two different fields.
>
> 25. This court in Rao Bahadur Ravulu Subba Rao v. CIT [1956] 30 ITR 163; AIR 1956 SC 604; [1956] SCR 577 (headnote of 30 ITR 163) has pointed out :
>
> "The Indian Income-tax Act is a self-contained code exhaustive of the matters dealt with therein, and its provisions show an intention to depart from the common rule, qui facit per alium facit per se."
>
> 26. Further, in Pannalal Binjraj v. Union of India [1957] 31 ITR 565 AIR 1957 SC 397; [1957] SCR 233, it has been observed thus (at pages 583, 584 of 31 ITR) :
>
> "It has to be remembered that the purpose of the Act is to levy income-tax, assess and collect the same. The preamble of the Act does not say so in terms, it being an Act to consolidate and amend the law relating to income-tax and super tax but that is the purpose of the Act, as disclosed in the preamble to the first Indian Income-tax Act of 1886 (Act II of 1886). It follows, therefore, that all the provisions contained in the Act have been designed with the object of achieving that purpose."
>
> Coming to the Foreign Exchange Regulation Act, it is a special law which prescribes a special procedure for investigation of breaches of foreign exchange regulations. Vide Shanti Prasad Jain v. Director of Enforcement [1963] 33 Comp Cas 231; [1963] 2 SCR 297. The proceedings under the Foreign Exchange Regulation

Act are quasi-criminal in character. It is pellucid that the ambit, scope and intendment of these two Acts are entirely different and dissimilar.

Therefore, the significance of a statement recorded under the provisions of the Foreign Exchange Regulation Act during the investigation or a proceeding under the said Act so as to bring them within the meaning of a judicial proceeding must be examined only qua the provisions of the Foreign Exchange Regulation Act but not with reference to the provisions of any other alien Act or Acts such as the Income-tax Act.

If it is to be approved and held that the authorities under the Income- tax Act can launch a prosecution for perjury on the basis of a statement recorded by the Enforcement Officer, then, on the same analogy, the Enforcement Authority can also, in a given situation, launch a prosecution for perjury on the basis of any inculpatory statement recorded by the Income-tax Authority, if repudiated subsequently before the Enforcement Authority. In our opinion, such a course cannot be and should not be legally, permitted.

Even if the Officers of the Enforcement Directorate intend to take action against the deponent of a statement on the basis of his inculpatory statement which has been subsequently repudiated, the officer concerned must take both the statements together, give a finding about the nature of the repudiation and then act upon the earlier inculpatory one. If, on the other hand, the officer concerned bisects the two statements and makes use of the inculpatory statement alone conveniently bypassing the other, such a stand cannot be legally permissible because the admissibility, reliability and the evidentiary value of the inculpatory statement would depend on the bench mark of the provisions of the Evidence Act and the general criminal law.”

19. The case of Vinod Solanki - Vs - Union of India (2009 (233) ELT 157 (SC)), relied upon by the learned counsel for the appellant does not in any way change the tenor of the decision in K.T.M.S. Mohammed's case (supra), insofar as it relates to applicability of Income Tax Act to FERA. All that has been dealt with in para-24 of the decision in Vinod Solanki's case (supra) relates to the inculpatory nature of the statement, if it is rebutted, which is not the issue in the present case. Therefore, the decision in Vinod Solanki (supra) has no application to the facts of the present case.

20. Even assuming that in the case of Commissioner of Income Tax - Vs - P.R.Ganapathy (2012 (26) Taxmann.com 354 (SC)), the Supreme Court had remanded the matter to decide whether there was financial capacity for those two persons to make a gift or not, we do not find any justification to come to the conclusion that the proceedings under the Income Tax Act had any occasion to consider the statement recorded under the FERA, which is the basis on which the allegation in the present case is made out and decided by the adjudicating authority. It is another matter for the Income Tax Department to deal with the claim as to whether it is a gift or income at the hands of the assessee.

21. In the light of the decision of the Supreme Court in K.T.M.S. Mohammed's case (supra), which we have set out above, we find no hesitation to hold that in an admitted case of acknowledgment of debt by the appellant through his own statement dated 14.10.97, the provisions of Section 9 (1) (c) stands squarely attracted and the order of the Tribunal warrants no interference. Accordingly, the substantial question of law is answered in favour of the Department and against the assessee/appellant.

22. For the reasons aforesaid, this appeal fails and the same is dismissed confirming the order dated 21.09.2007, passed by the Tribunal. However, in the circumstances of the case there shall be no order as to costs.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

GLN

To
1. The Asst.Registrar,
The Appellate Tribunal for Foreign Exchange
"Janpath Bhawan", 4th Floor, Janpath, New Delhi.

2. The Special Director
Enforcement Directorate
Ministry of Finance
Lok Nayak Bhawan, 6th Fooor
Khan Market, New Delhi 110 003.

+1 cc to Dr.Anita Sumanth, Advocate, sr.39161
+1 cc to Mr.M.Dhandapani, Advocate, sr.39716

C.M.A. NO. 1926 OF 2009

gr co, kra 14/9