IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 23.01.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

C.M.A. NO. 2020 OF 2009

Lalchand ...Appellant/Appellant/Appellant

- Vs -

Enforcement Directorate
Shastri Bhavan
Haddows Road
Chennai 600 006. ...Respondent/Respondent/Respondent

Appeal filed under Section 35 of the Foreign Exchange Management Act, against the order dated 16.2.09 passed by the Appellate Tribunal of Foreign Exchange, New Delhi, made in Appeal No.188/05.

For Appellant : Mr.J.Ferozkhan

For Respondents : Mr.M.Dhandapani

JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order passed by the Appellate Tribunal for Foreign Exchange, New Delhi, in allowing the appeal filed by him only in part, the appellant is before this Court by filing the present appeal.

2. Shorn of unnecessary details, the brief facts of the case are that on 10.4.90, one Haza Mohideen was subjected to a search by the Officers of the Enforcement Directorate and from his possession, Indian currency amounting to Rs.4 Lakhs and 2 chits were recovered. A search was conducted in respect of the appellant as well, but the said search did not result in recovery of any incriminating

documents. Few other persons were also searched and some documents were seized. Statement was recorded from Haza Mohideen, who deposed that he had indulged in hawala transactions. Similarly, on 10.4.90 and 11.4.90, statement of the appellant was recorded, who stated that he had a friend by name Abdullah, who was working in Dubai for six years and he admitted that he received a phone call from the said Abdullah informing him that one person would come to the house of the appellant and hand over Rs.4 Lakhs and that he should receive the amount and keep it. The appellant was also further informed by the said person that he should contact Haza Mohideen over phone and hand over the said amount for which the appellant would receive a commission of Rs.500/= for every one lakh. The appellant acknowledged this transaction in his statement and stated that on the said date, viz., 10.4.90, an unknown person came and handed over Rs.4 Lakhs and the appellant, in turn, contacted Haza Mohideen and handed over the amount of Rs.4 Lakhs as agreed.

3. On this premise, a show cause notice was issued and the same was adjudicated and in the said adjudication order, the appellate authority held that there was contravention of Section 9 (1) (b) and (d) of the Foreign Exchange Regulation Act, 1973 (for short 'FERA Act') and a penalty of Rs.1 Lakh was imposed on Haza Mohideen and a penalty of Rs.75,000/= was imposed on the appellant under Section 50 of the FERA Act. A sum of Rs.9 Lakhs was also ordered to be confiscated.

4. It is the grievance of the appellant that proper opportunity was not given to him to represent his side of the matter at the time of adjudication.

5. In the meanwhile, the Department also proceeded against all the accused persons, including the appellant, by way of criminal prosecution and a case was filed before the Economic Offences Court under Section 56 of the FERA Act. On 25.7.06, the Economic Offences Court acquitted the appellant holding that the prosecution has not proved the guilt of the appellant beyond all reasonable doubt.

6. After the end of the criminal trial, on 16.2.09, the appellant moved an appeal before the Appellate Tribunal for Foreign Exchange, viz., FERA Board and, the Tribunal, after considering the matter in depth, reduced the penalty in respect of the present appellant from Rs.75,000/= to Rs.50,000/=. It is informed by the learned counsel for the appellant that the appellant was directed to pre-deposit a sum of Rs.50,000/= for entertaining the appeal, which order the appellant complied with and after orders of the FERA Board modifying the penalty from Rs.75,000/= to Rs.50,000/=, the FERA Board has ordered that the said amount be adjusted towards penalty. However,

aggrieved by the order of the Tribunal in allowing the appeal filed by the appellant only in part, the present appeal is filed.

7. When the matter was taken up 8.1.15, it was brought to the notice of the Court that though the matter has been admitted, substantial question of law has not been framed. Accordingly, this Court, vide order dated 8.1.15, framed the following substantial question of law for consideration :-

> "Whether the finding of the criminal court is binding on the appellate authority in the facts of the instant case?"

8. Heard Mr.Ferozkhan, learned counsel appearing for the appellant and Mr.Dhandapani, learned counsel appearing for the respondent and also perused the materials available on record.

9. Learned counsel for the appellant placed reliance on the decision of the criminal court in acquitting the appellant and pleaded that in view of the acquittal of the appellant, no penalty should have been imposed on the appellant.

10. Per contra, learned counsel for the respondent placed reliance upon the decision of the Supreme Court in Standard Chartered Bank & Ors. - Vs - Directorate of Enforcement & Ors. (AIR 2006 SC 1301 :: 2006 (4) SCC 278), wherein the Supreme Court, while dealing with the provisions of Foreign Exchange Regulation Act, held as under :-

> "22. Counsel submitted that the devising of a special machinery for adjudication, the limiting of the "without prejudice" clause in Section 56 to any award of penalty and not the initiation of proceedings under Section 51 of the Act, the making of a contravention of any of the provisions of this Act as the key to both proceedings, would all indicate that an adjudication should precede a prosecution under Section 56 of the Act. There is nothing in the Act to indicate that a finding in an adjudication, is binding on the court in a prosecution under Section 56 of the Act. There is no indication that the prosecution depends upon the result of the adjudication. We have already held that on the scheme of the Act, the two proceedings are independent. The finding in one is not conclusive in the other. In the context of the objects sought to be achieved by the Act, the elements relied on by the learned senior counsel, would not justify a finding that a prosecution can be launched only after the

completion of an adjudication under Section 51 of the Act. The decision in K.C. Builders and another vs. Assistant Commissioner of Income Tax (2004 (2) SCC 731) is clearly distinguishable. The Court proceeded as if under the Income Tax Act, the prosecution is dependent on the imposition of penalty. That was a case where the prosecution was based on a finding of concealment of income and the imposition of penalty. When the Tribunal held that there was no concealment, and the order levying penalty was cancelled, according to this Court, the very foundation for the prosecution itself disappeared. This Court held that it was settled law that levy of penalties and prosecution under Section 276-C of the Income Tax Act are simultaneous and hence, once the penalties are cancelled on the ground that there was concealment, the quashing of the prosecution under Section 276-C of the Income Tax Act was automatic. We have held already that on the scheme of FERA, the adjudication and the prosecution are distinct and separate. Hence, the ratio of the above decision is not applicable. That apart, there is merit in the submission of the learned Additional Solicitor General that the correctness of the view taken in K.C. Builders (supra) may require reconsideration as the reasoning appears to run counter to the one adopted by the Constitution Bench in Assistant Collector of Customs, Bombay - Vs - L.R.Melwani & Anr. (supra) and in other decisions not referred to therein. For the purpose of these cases, we do not think it necessary to pursue this aspect further. Suffice it to say, that the ratio of that decision has no application here."

11. In view of the decision of the Supreme Court in Standard Chartered Bank's case (supra), which has also been rendered under the provisions of the Foreign Exchange Regulations Act, the plea of the appellant that on his acquittal in the criminal case, no penalty is imposable on him, does not merit consideration, since the Supreme Court has categorically held that adjudication and prosecution are two independent proceedings and the finding in one is not conclusive in the other. In view of the above decision of the Supreme Court, this Court finds no reason to interfere with the order passed by the Appellate Tribunal. Accordingly, the substantial question of law is answered in favour of the respondent and against the appellant.

12. In the result, warranting no interference with the order passed by the Appellate Tribunal, this appeal is dismissed. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar(R)

//True Copy//

Sub Assistant Registrar

GLN

To

1. Enforcement Directorate
   Shastri Bhavan
   Haddows Road
   Chennai 600 006.

2. The Appellate Tribunal for Foreign Exchange
   New Delhi.

Copy to

The Section Officer,
V.R.Section, High Court,
Madras.

1 CC to Mr.M.Dhandapani, Advocate SR.No. 3856

C.M.A. NO. 2020 OF 2009

BR (CO)
PSI (13.02.2015)