IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 7.8.2015.

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HON'BLE MR.JUSTICE T.MATHIVANAN

C.M.A.No.2345 of 2009,
M.P.Nos.1 and 2 of 2009 and M.P.No.1 of 2015

J.Ramachandiran ...Appellant/Appellant/Respondent

vs.

1. The Appellate Tribunal for Foreign Exchange,
   4th Floor, B-Wing, Janpath Bhavan,
   Janpath, New Delhi-3.
   ...Respondent/Appellate Authority/Not an Authority

2. The Special Director,
   Enforcement Director,
   Foreign Exchange Regulation Act,
   6th Floor, Lok Nayak Bhavan,
   New Delhi - 3. ... Respondent/Not an Authority/Original Adjudication Authority

3. The Enforcement Director,
   Government of India,
   Southern Zone, III Floor,
   III Block, Shastri Bhavan,
   No.26, Haddows Road,
   Chennai - 6. ...Respondent/Respondent/Enforcement Officer

Civil Miscellaneous Appeal filed u/s.35 of the FERA 1973 against the order dated 30.4.2009 in Appeal No.20 of 1993 on the file of the Appellate Tribunal for Foreign Exchange, New Delhi confirming the order dated 20.11.1992 made in No.SDE(R) IV/119/92 File No.T-4/25-M/91 passed by the Adjudicating Authority.

For appellant : Mr.N.Jothi for Mr.M.C.Govindan
R1-Tribunal
For RR2 and 3 : Mr.M.Dhandapani, Standing Counsel for Enforcement Directorate.

JUDGMENT

(Judgment of the Court was delivered by V.RAMASUBRAMANIAN, J.)

This appeal arises out of the dismissal of the statutory appeal filed under section 52(1) of the Foreign Exchange Regulation Act, 1973 by the Appellate Tribunal for Foreign Exchange.

2. Heard Mr.N.Jothi, learned counsel appearing for the appellant and Mr.M.Dhandapani, learned Standing Counsel appearing for respondents 2 and 3.

3. On the basis of information received by the Enforcement Directorate, the office premises of a Concern by name Venkateswara Fisheries was searched and Indian currency to the tune of Rs.2,40,000/- was seized. Statements were recorded on the date of seizure viz., 7.6.1990 from three persons by name Ramchandran, who is the appellant herein Mr.S.B.Rajan and Mr.S.Karikalan on the same day. Thereafter, show cause notices were issued on 8.6.1991 by the Special Directorate of Enforcement calling upon the appellant to show cause as to why adjudication proceedings under section 51 of the Act,1973 (46 of 1973) should not be initiated and also to show cause as to why the amount seized from Venkateswara Fisheries should not be confiscated.

4. The appellant gave a reply on 18.11.1991. Not satisfied with the reply, the Adjudicating Authority passed an order on 20.11.1992 imposing upon the appellant a total amount of penalty of Rs.1,40,000/-, for the alleged violation of section 9(1)(a), 9(1)(b) and 9(1)(d) of the Act. The other two persons viz., S.B.Rajan and S.Karikalan were also imposed with penalties of lesser amounts.

5. As against the order of adjudication, the appellant filed a statutory appeal under section 52(2) to the Tribunal alongwith applications for stay and for waiver of pre-deposit condition. The appeals were, admittedly, filed in time.

6. It appears that in the meantime, prosecution was launched for non-payment of fine. Immediately, the appellant filed a writ petition in W.P.No.2726 of 1995 seeking a declaration that section 57 of the Foreign Exchange Regulation Act, 1973, which made the non-payment of penalty imposed by the Adjudicating Authority a punishable offence, is unconstitutional. The writ petition was dismissed by a learned Judge by an order dated 27.9.2002. Therefore, the appellant filed appeal in W.A.No.1548 of 2003.

7. When the writ appeal came up for hearing, the appellant pointed out that the appeal filed by him before the Tribunal was already pending for nearly ten years and that therefore, he would be satisfied if a direction is issued to the Appellate Tribunal to dispose of the appeal within a time frame and to keep the criminal proceedings in abeyance until disposal of the appeal. Therefore, the writ appeal was disposed of by order dated 28.10.2008 directing the appellate Tribunal to dispose of the appeal within a time frame and to keep the criminal proceedings in abeyance until the disposal of the appeal.

8. According to the appellant, the criminal proceedings suddenly started taking off on the ground that the Appellate Tribunal had dismissed the application. Therefore, the appellant got a certified copy of the order passed by the Appellate Tribunal, from the file of the Court of Additional Chief Metropolitan Magistrate on the ground that he was not aware of nor communicated with the order passed by the Appellate Tribunal. With the certified copy of the order so furnished, the appellant has come up with the above appeal under section 54 of the Foreign Exchange Regulation Act, 1973.

9. The grievance of the appellant is that the Adjudicating Authority did not follow the procedure prescribed by law before passing an order under section 51 and that the appellate Tribunal did not even put him on notice of hearing of the appeal, which was kept pending before the Tribunal before the Tribunal for nearly 16 years.

10. We have carefully considered the abovesaid submissions.

11. The power to adjudicate is conferred upon the competent authority under section 51 of the Foreign Exchange Regulation Act, 1973. For the purpose of adjudging whether a person has committed a contravention of any of the provisions of the Act, the Adjudicating Officer is required to hold an enquiry "in the prescribed manner" after giving that person a reasonable opportunity of making a representation in the matter.

12. Since section 51 left it to the rule maker to prescribe the manner in which an enquiry is to be held, the Central Government issued a set of Rules known as Adjudication Proceedings and Appeal Rules, 1974 in GSR No.75 dated 1.1.1974 in exercise of the powers conferred by section 79 of the Foreign Exchange Regulation Act, 1973. Rule 3 of those Rules prescribes an elaborate procedure for the conduct of the adjudication proceedings. The Rule requires to be extracted in view of the limited nature of the dispute raised in this proceedings. Hence,

it is extracted as follows:-

"3(1) In holding an inquiry under section 51 for the purpose of adjudging under section 50 whether any person has committed contravention as specified in section 50, the adjudicating officer shall, in the first instance, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why adjudication proceedings should not be held against him.

(2) Every notice under sub-rule (1) to any such person shall indicate the nature of offence alleged to have been committed by him.

(3) If after considering the cause, if any, shown by such person, the Adjudicating Officer is of the opinion that adjudication proceedings should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his lawyer or other authorised representative.

(4) On the date fixed, the Adjudicating Officer shall explain to the person proceeded against or his lawyer or authorised representative, the offence, alleged to have been committed by such person indicating the provisions of the Act or of the rules, directions or orders made thereunder in respect of which contravention is alleged to have taken place.

(5) The Adjudicating Officer shall then give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and, if necessary, the hearing may be adjourned to a future date; and in taking such evidence the Adjudicating Officer shall not be bound to observe the provisions of the Indian Evidence Act, 1872(1 of 1872).

(6) If any person fails, neglects or refuses to appear as required by sub-rule (3) before the Adjudicating Officer, the Adjudicating Officer may proceed with the inquiry in the absence of such person after recording the reasons for doing so.

(7) If, upon consideration of the evidence produced before the Adjudicating Officer, the

> Adjudicating Officer is satisfied that the person has committed the contravention, he may, by order in writing, impose such penalty as he thinks fit in accordance with the provisions of section 50:
> Provided that the notice referred to in sub-rule(1), and the person hearing referred to in sub-rules (3), (4) and (5) may, at the request of the person concerned, be waived."

13. But, a perusal of the order of adjudication passed on 20.11.1992 would show that after serving a copy of the show cause notice upon the appellant and after receiving his reply, the Adjudicating Authority proceeded to pass an order under section 51. The detailed procedure prescribed under Rule 3 has not been followed despite an indication in the last paragraph of the show cause notice that Rule 3 would be followed. Therefore, the challenge made by the appellant to the order of the adjudication on the ground of violation of the procedure prescribed by law was well-taken. But, unfortunately, what appears to have happened before the Tribunal is that on one particular day, viz., 30.4.2009, the Appellate Tribunal took up appeals filed by the appellant as well as two other appeals and disposed of the appeal itself in the absence of the appellant. The reason given by the Tribunal is that the appellant was not present earlier on three occasions viz., 27.11.2008, 10.2.2009 and 3.3.2009 despite service of notice. The Tribunal has also recorded that the postal authority made an endorsement reading "left" or "no such person" on the envelop. It will be useful to extract that portion of the Tribunal, where the Tribunal sought to proceed and dispose of the appeal in the absence of the appellant. The relevant portion of para 2 of the order of the Tribunal reads as follows:-

> "The appellant were also not present earlier on (i) 27.11.08, (ii) 10.02.09 and (iii) 03.03.09 despite notice. The postal authority has endorsed a remark of "left" or "no such person" on the envelop. Therefore, looking towards dismal picture of representation we take up these appeals for final disposal exparte after granting dispensation of pre-deposit of penalty due to long pendency of separate applications in this regard."

14. Therefore, it is the contention of Mr.M.Dhandapani, learned Standing Counsel for respondents 2 and 3 that the Tribunal was compelled to take up the matter at an early date for disposal in view of the direction obtained by the appellant

himself in Writ Appeal No.1548 of 2003 dated 28.10.2008.

15. However, without going into the dispute as to whether notices were, in fact, sent or were returned by the postal authority or not and without going into the contentious issue raised by the appellant that no notices were either served on him, it may be seen that Rule 10 of the Adjudication Proceedings and Appeal Rules, 1974 prescribe a procedure for service of notice. Rule 10 reads as follows:-

> "A notice or an order issued under these rules shall be served on any person in the following manner, that is to say,--
> (a) by delivering or tendering the notice or order to that person or his duly authorised agent;
> (b) by sending the notice or order to him by registered post with acknowledgement due to the address of his place of residence or his last known place of residence or the place where he carries on, or last carried on, business or personally works, or last worked, for gain; or
> (c) If the notice or order cannot be served under clause (a) or clause (b), by affixing it on the outer door or some other conspicuous part of the premises in which that person resides or is known to have last resided, or carried on business or personally works or last worked for gain and that written report thereof should be witnessed by two persons."

16. Rule 10(c) stipulates that if a notice, sent either to the person concerned or to the duly authorised agent by registered post, could not be served on him, the Adjudicating Authority or the Tribunal is obliged to affix the notice on the door or some other conspicuous part of the premises in which that person resides or known to have last resided and a written report thereof should be witnessed by two persons. There is no indication in para 2 of the order of the Tribunal that the procedure prescribed by Rule 10(c) was followed. If only an appeal, which was pending from 1993 till 2009 for a full period of 16 years, which was directed to be disposed of, at the instance of the appellant, within six months, by this court, had been disposed of by following Rule 10(c), we would have no difficulty in upholding the order of the Appellate Tribunal.

17. We do not wish to confine ourselves to the question of opportunity by the Appellate Tribunal to the appellant. This is why we have gone into the procedure adopted by the Adjudicating

Authority also. We are conscious of the fact that if an order of the nature under challenge is questioned on the ground of violation of principles of natural justice or the denial of sufficient opportunity, the matter should go back to the Tribunal or to the original authority. But, this is a case where the original show cause notice was issued in 1991, the order of adjudication was passed in 1992 and the appeal was filed in January 1993. Without any effort on the part of the appellant or the respondents, the appeal was kept pending for about 16 years before the Appellate Tribunal. Even the writ petition filed by the appellant did not relate to the appeal. It related only to the prosecution launched which was challenged in a proceedings seeking a declaration that section 57 of the Act was unconstitutional. Therefore, atleast the appellant cannot be found fault with for the pendency of the appeal before the Tribunal for 16 years from 1993 to 2009.

18. If the appellant had had an opportunity to present his case before the Tribunal, he could have pointed out two things before the Tribunal viz., (a) that the Adjudicating Officer did not follow the procedure prescribed by Rule 3; and (b) that when the currency of Rs.2,40,000/- was seized from some other Company, the statements recorded from the appellant and the co-accused, which they also sought to retract, could not have been relied upon. The appellant did not have the opportunity to canvass these two points before the Tribunal.

19. De hors the amount seized from a Company by name Venkateswara Fisheries, the Adjudicating Officer had before him the confession statements of the appellant and two others, a statement recorded from a Thaiwan National and the Diary seized from the appellant. Therefore, the question as to whether there was corroboration or not and the question as to whether the retracted statements could be relied upon or not, could have been canvassed by the appellant before the Tribunal if he had sufficient opportunity to represent before the Tribunal.

20. In A.TAJUDEEN v. UNION OF INDIA ((2015) 4 SCC 435), the Supreme Court has laid down the principles that should be kept in mind before inculpatary statements could form the basis for passing an order of adjudication. In para 27 and 28 of the said decision, the Supreme Court pointed out as follows:-

> "27. First and foremost, we shall endeavour to examine the veracity of the statements made by the appellant A. Tajudeen and his wife T.Sahira Banu on 25.10.1989 and 26.10.1989 to the officers of the Enforcement Directorate. Before proceeding with the factual controversy, it is essential to record, that

from the view we have taken in the ultimate analysis, the innocence or guilt of the appellant will have to be determined on the basis of the statements made by the appellant and his wife (on 25.10.1989 and 26.10.1989) to the officers of the Enforcement Directorate. Therefore, for the case in hand, the above statements are not to be referred to as corroborative pieces of evidence, but as primary evidence to establish the guilt of the appellant. It is in this background, that we shall endeavour to apply the legal position declared by this Court, to determine the veracity and reliability to the statements, which later came to be retracted by the appellant and also by his wife. Insofar as the above statements are concerned, there is no doubt whatsoever, that they were all made either at the time of the raid, which was carried out by the officers of the Enforcement Directorate at the residence of the appellant, or whilst the appellant was in custody of the Enforcement Directorate. Immediately after the appellant was released on bail by the Additional Chief Metropolitan Magistrate, Madras on 27.10.1989, on the same day itself, both the appellant A. Tajudeen and his wife T.Sahira Banu addressed communications to the Director, Enforcement Directorate, New Delhi resiling from the above statements, by clearly asserting that they were recorded under coercion and undue influence, and would not be binding on them.

28. Having given our thoughtful consideration to the aforesaid issue, we are of the view that the statements dated 25.10.1989 and 26.10.1989 can under no circumstances constitute the sole basis for recording the finding of guilt against the appellant. If findings could be returned by exclusively relying on such oral statements, such statements could easily be thrust upon the persons who were being proceeded against on account of their actions in conflict with the provisions of the 1973 Act. Such statements ought not to be readily believable, unless there is independent corroboration of certain material aspects of the said statements, through independent sources. The

nature of the corroboration required, would depend on the facts of each case. In the present case, it is apparent that the appellant A.Tajudeen and his wife T.Sahira Banu at the first opportunity resiled from the statements which are now sought to be relied upon by the Enforcement Directorate, to substantiate the charges levelled against the appellant. We shall now endeavour to examine whether there is any independent corroborative evidence to support the above statements."

21. As we have pointed out earlier, the amount of Rs.2,40,000/- was seized not from the office premises of the appellant, but, from the office premises of Venkateswara Fisheries. That amount has already been confiscated. Therefore, in such circumstances, to impose a liability upon the appellant under section 9(1)(a), 9(1)(b) and 9(1)(d) solely on the basis the confessions of all the three accused and the diary entries to show that he had received Indian currency in India from a foreign National does not appear to be in accordance with law. Therefore, instead of remitting the matter back to the Tribunal for fresh consideration, when the appeal is about 22 years old, we allow the appeal and set aside the orders of Adjudicating Officer and the Appellate Tribunal, as the exercise of remanding the matter would be one in futility. However, the statements made by the counsel for the appellant that the appellant does not have anything to do with the currency of Rs.2,40,000/- is recorded. No costs. The connected miscellaneous petitions are closed.

sd/-
Assistant Registrar(Cs-III)

/TRUE COPY/

Sub-Assistant Registrar

ssk.

To

1. The Appellate Tribunal for
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+2 CC to MR.M.C.Govindan Advocate. SR.NO. 40966
+1 CC to MR.M.Dhandapani Advocate. SR.NO. 40982

CO-CA
JD 08/01/2016