$~R-21.

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **Date of Decision: 09.01.2015**

% **CRL.A. 86/2009**

H.R.SIDDIQUE ..... Appellant
Through: Mr. Rohit K. Aggarwal, Advocate.

versus

DIRECTOR, ENFORCEMENT DIRECTORATE .....Respondent
Through: Mr. Kirtiman Singh, CGSC along with Mr. Waize Ali Noor, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The appellant has preferred the present appeal under Section 54 of the Foreign Exchange Regulation Act, 1973 (FERA) read with provisions of Foreign Exchange Management Act, 1999 (FEMA) to assail the order dated 03.10.2008 passed by the Appellate Tribunal for Foreign Exchange (Appellate Tribunal) in Appeal No.241/2005, whereby the appellant's first appeal has been dismissed by the Appellate Tribunal, and the penalty imposed upon the appellant under Section 50 of the FERA in the adjudication order dated 28.01.2005 of Rs.1.5 Lakhs, has been sustained.

2. One Dinesh Kumar Goel @ Titu was found to be engaged in receiving and selling gold sent by one Ummu from Dubai. The sale proceeds were then distributed to several persons under the instructions of

Ummu. One of the persons whose name was disclosed by Dinesh Kumar Goel as the recipient was the appellant. Dinesh Kumar Goel had stated in his statement recorded before the officers of the Enforcement Directorate (ED) on 16.11.1994 under Section 40 of the FERA that in the morning of 16.11.1994, he had received instructions from Ummu of Dubai to distribute the payments to 17 persons, including the appellant – of Rs.5 Lakhs. He had also stated that on the day of search, i.e. 16.11.1994, he had made payment, *inter alia*, of Rs.5 Lakhs to the appellant. Follow up action was taken at the residential premises of the appellant on the following day, i.e. 17.11.1994 and his statement was recorded, in which he stated that on 16.11.1994, he had received a payment of Rs.5 Lakhs from some unknown persons under instructions of Ubaidullah of Dubai – his brother. He also admitted having received earlier payments of Rs.3 Lakhs and 5 Lakhs in a similar manner, and stated that he had distributed the payments under instructions of Ubaidullah of Dubai.

3. On the aforesaid basis, a show-cause notice dated 15.05.1995 was issued, *inter alia*, to the appellant for receiving, and thereafter distributing, the amount of Rs.13 Lakhs on the instructions of the said Ubaidullah, which tantamounts to contravention of Sections 9(1)(b) and 9(1)(d) of FERA. In the proceedings, Dinesh Kumar Goel sought to retract his statement by claiming that he was physically tortured and pressurized to write an involuntary statement under Section 40 of FERA. He claimed that he was forced to give the names of various persons regarding whom he had already received instructions from Ummu for payment of Indian currency. The appellant also sought to retract from his statement recorded on 17.11.1994

under Section 40 of FERA during the course of the personal hearing.

4. In his statement recorded on 15.12.2004, the appellant stated to the effect that his brother Ubaidullah was situated at Dubai, who had sent money for household expenses. To establish his relationship with Ubaidullah, he stated that he can produce the ration-card and photocopy of passport of Sh.Ubaidullah, which would show that the father's name is Sh. Rahimutullah Siddique. He claimed that he had given his earlier statement in his own hand-writing as per dictation of the officers of Enforcement, as he did not have knowledge of legal implications of his earlier statement. He further stated that he was not aware that receiving money from abroad at the instance of person staying abroad was an offence and that, subsequently, he had been receiving money from his brother in rupees through demand drafts by Rakji Bank at Saudi Arabia through his cousin brother. He stated that he could submit copy of his passport and bank certificates regarding the deposits through demand drafts as well as photocopy of passport of his brother Ubaidullah by 31.12.2004. He prayed for leniency while dealing with his case. Subsequently, he submitted certain bank documents to substantiate his contentions.

5. The adjudicating authority, while dealing with the case of the appellant, observed as follows:

> *"19. Regarding Shri H.R. Siddique I find that as a follow up action his residential premises at Jamia Nagar, New Delhi was searched on 17.11.94 as a result of which one note book diary containing written pages 1 to 12 and a bunch of loose sheets marked 1 to 43 were recovered and seized. His statement was recorded on the same day i.e. 17.11.94. He in his statement*

dated 17.11.94 stated that he received total Rs.13,00,000/- only as per instructions of Ubaidullah his brother based in Dubai. He also stated that the documents seized him mostly relate to payments made by him under instructions of Ubaidullah of Duabi. He disclosed 21 names to whom he had distributed the payments amount-wise on commission basis. He also stated, that the list at page 30 had been sent to him by Ubaidullah of Dubai by fax and was received by him through fax machine of Bhargawa Community Centre, New Friends Colony, New Delhi. This list was sent to him on 14.11.94 and he has so far made one payment of Rs.20,000/- from this list and rest payments are awaited. He also stated that on this list and rest payments are awaited. He also stated that on this list amount has been mentioned in Arabic language and indicated the amount of Rs.3.05 lakhs meant to be delivered to 9 persons.

19.1 However, at the time of personal hearing on 15.12.04 Shri Siddiqui had stated that Ubaidullah was sending the money to him for household expenses. The noticee contention that he had given his statement dated 17.11.94 as per dictation of the officers is wrong because there are certain thing in the statement which are only known to Sh. H.R. Siddique. for example Telephone Nos, Postal Address, etc. was only known to him. I have also find that he has also disclosed the seized documents from which it was revealed he was regularly in touch with Sh. Ubaiduallah and he was receiving and making payments on the instructions of Shr Ubaidullah of Dubai. I am fully satisfied mat whatever Sh. H.R. Siddique had disclosed in his statement was voluntary. I do not agree with the submissions dated 15.12.2004 furnished by Shri H.R. Siddique at the time of personal hearing.

19.2 In view of above I find that in all Sh. H.R. Siddique had received and made payments to the extent of Rs.13,00,000/- in the aforesaid manner and had contravened the provisions of Section 9(1)(b) and 9(1)(d) of FERA, 1973 and I find him guilty for the said contraventions."

6. As noticed above, the Appellate Tribunal rejected the appellant's first

appeal. The submission of the appellant that his retracted statement could not form the basis of his being held guilty, was considered and rejected by the Appellate Tribunal by observing that a retracted confessional statement may be a sufficient ground for conviction of the offender, provided there is sufficient corroboration to prove the charges against the offender. In this regard, the Appellate Tribunal placed reliance on the judgement of the Supreme Court in ***K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin***, (1997) 3 SCC 721; and ***K.T.M.S. Mohd. Vs. Union of India***, (1992) 3 SCC 178. The Appellate Tribunal held that the appellant had not brought on record any factors to substantiate the claim of inducement, threat, or pressure, or physical torture. The Appellate Tribunal held that there were no factors vitiating the appellant's confessional statement, which contains the appellant's own admission of wrong doing.

7. Learned counsel for the appellant submits that no recovery was made from the appellant of the amount of Rs.5 Lakhs, or any part thereof. He submits that according to the respondent, the appellant had admitted to have received Rs.5 Lakhs and distributed Rs.20,000/-. Thus, the appellant should have been in possession of Rs.4.80 Lakhs, which ought to have been recovered, had there been any truth in the allegation against the appellant.

8. He further submits that the appellant was attributed with an admission that monies received were to be distributed to several persons as per instructions received from Ubaidullah of Dubai through fax message. However, no further inquiry was made from any of those persons, whose details were allegedly voluntarily submitted by the appellant, whether they had, or were expecting to receive any money from the appellant.

9. He further submits that though the respondent claimed to have recovered certain loose sheets apart from other documents upon search of the appellant's household on 17.11.1994, it was not disclosed as to what was contained in those loose sheets.

10. In these circumstances, he submits that the confessional statement could not have been relied upon to penalize the appellant. Learned counsel submits that the benefit of doubt should have been given to the appellant, who is a poor person and the penalty of Rs.1.5 Lakhs was harsh.

11. On the other hand, the submission of learned counsel for the respondent is that the retraction of the confessional statement containing admission by the appellant was made after more than ten years. The original statement had been recorded on 17.11.1994, whereas the retraction came only on 15.12.2004.

12. He further submits that in the written submission of the appellant placed before the adjudicating authority, no retraction was made in the manner sought to be urged by the appellant. He submits that the retraction was sought to be made on the basis of exercise of coercion, pressure and physical torture. However, no details were disclosed in respect thereof by the appellant. He further submits that there was corroborative evidence in support of the confessional statement produced by the appellant, namely, the list and details of the persons to whom the monies received from Ubaidullah of Dubai had to be distributed, which had been received by fax on 14.11.1994.

13. Having heard learned counsels and perused the record, including the

adjudicating order and the impugned appellate order, I am of the view that there is no merit in this appeal. As noticed above, the retraction of the confessional statement containing admission of wrong-doings by the appellant came after more than ten years, at the stage of personal hearing only, and not before that. Had the appellant been subjected to threat, coercion or pressure – as alleged by him rather belatedly, he would have retracted his confessional statement soon after making the same, once the alleged threat, coercion or pressure ceased to influence the action of the appellant. It is not his case that the said factors continued to influence him for 10 long years. Moreover, the appellant failed to disclose as to how he was pressurized, coerced, or tortured, and by whom, when he made the earlier confessional statement. The confessional statement was also duly corroborated by the aforesaid independent evidence viz. the list of persons to whom the monies had to be distributed, received by fax from Ubaidullah of Dubai.

14. The Supreme Court in ***K.I. Pavunny*** (supra) observed as follows:

> *"It would thus be seen that there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. Practice and prudence require that the court could examine the evidence adduced by the prosecution to find out whether there are any other facts and circumstances to corroborate the retracted confession. It is necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confessional statement. The court is required to examine whether the confessional statement is voluntary; in other words, whether it was not obtained by threat, duress or promise. If court is satisfied from the evidence that it was voluntary, then it*

is required to examine whether the statement is true. If the court on examination of the evidence finds that the retracted confession is true, that part of the inculpatory portion could be relied upon to base the conviction. However, prudence and practice require that court would seek assurance getting corroboration from other evidence adduced by the prosecution."

15. Similarly, in ***K.T.M.S. Mohd.*** (supra), the Supreme Court observed:

"We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine quo non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected brevi manu. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the FERA or the Customs Act etc. the detaining authority should consider the subsequent retraction and record

its opinion before accepting the inculpatory statement lest the order will be vitiated."

16. Thus, the plea of the appellant, founded upon his so-called highly belatedly retraction of his confessional statement, has to be rejected. Pertinently, though the appellant sought to produce bank transaction statements to show that he had been receiving monies from Ubaidullah of Dubai after the incident in question, and his consistent case is that he had been receiving monies from Ubaidullah of Dubai even earlier, he did not produce any material evidence to show that monies were earlier being received through a legal banking channel.

17. The appellant has been let off rather lightly considering that he had admitted to having received Rs.13 Lakhs in all, i.e. Rs.5 Lakhs on 16.11.1994 and Rs.8 Lakhs in all, on two earlier occasions. The maximum fine, in these circumstances, could have been to the tune of Rs.65 Lakhs. However, the appellant has been let off with a nominal fine of Rs.1.5 Lakhs.

18. In these circumstances, I find no merit in this appeal and dismiss the same. The balance fine shall be deposited by the appellant within four weeks.

VIPIN SANGHI, J.

JANUARY 09, 2015
B.S. Rohella