

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 19.02.2020

+ **CRL.A. 529/2016**

MANAK KALA

....Appellant

versus

UNION OF INDIA & ANR.

...Respondents

Advocates who appeared in this case:

For the Appellant : Ms Vibhooti Malhotra, Mr Bhuvnesh Satija, Mr Ajinkya Tiwari and Mr Siddharth Manocha, Advocates.

For the Respondents : Mr Amit Mahajan, CGSC with Ms Mallika Hiremath, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal under Section 35 of the Foreign Exchange Management Act, 1999 (hereafter 'FEMA') read with Section 54 of the Foreign Exchange Regulation Act, 1973 (hereafter 'FERA') impugning an order dated 28.02.2016 (hereafter 'the impugned order') passed by the Appellate Tribunal for Foreign Exchange (hereafter 'the Tribunal') in Appeal No. 62/2014 captioned

‘Sh Manak Kala v. Special Director (Appeals), Enforcement Directorate’.

2. By the impugned order, the Tribunal dismissed the appeal preferred by the appellant against an order dated 24.09.2014 (hereafter referred to as ‘the Appellate Order’) passed by the Special Director (Appeals). By the Appellate Order, the Special Director (Appeals) reduced the penalty that was imposed on the appellant by an order dated 17.02.2014 passed by the Deputy Director of Enforcement (hereafter the ‘Adjudicating Authority’). By that order, the Adjudicating Authority had imposed a penalty of ₹75,00,000/- on the appellant and directed confiscation of the amount of ₹7,95,000/- seized from his office, under Section 63 of FERA.

3. Briefly stated, the relevant facts necessary to address the controversy arising in this appeal, are as under:

3.1 On 21.03.1995, a search was conducted at the residence of one Sh. Satish Kumar Sharma @ Pappu, at 3959, Gali Ahiran Pahadi Dhiraj, New Delhi. An aggregate amount of ₹8,25,000/- and various documents were seized. It is alleged that the said documents disclosed distribution of certain Hawala payments. It is stated that the statement of Sh. Satish Kumar Sharma @ Pappu to the effect that he was engaged in the business of receipt and distribution of payments in India under the instructions of one Munna Bhai of Dubai, was recorded. He stated that certain payments that were disclosed in the documents seized from his residence were made under instructions from Dubai. According to

the Enforcement Directorate, the said documents disclosed that certain payments had been made to one Ashish, telephone no. 528214. Inquiries revealed that the telephone connection corresponding to the said telephone number (528214) was installed in the office of M/s Anukampa Tours and Travels (P) Ltd., 3061, Desh Bandhu Gupta Road, Gali Sangtarashan, Paharganj and one Sh. Ashish Jain was employed with the said concern.

3.2 On 04.10.1995, the business premises of M/s Anukampa Tours and Travels was searched and Indian currency amounting to ₹7,95,000/- and various documents were found in the said premises. It is alleged that on that date, Sh. Ashish Jain made a statement that he was employed with M/s Anukampa Tours and Travels for the last one and a half years and was an employee of Sh. Manak Kala (the appellant herein). He stated that Sh. Manak Kala had a travel agency in Jaipur under the same name and that he had instructed him to receive payments, which came from Dubai and distribute them under the instructions of some persons resident in Dubai. He also stated that he had received an aggregate sum of ₹68,50,000/- (₹11,00,000/- on 15.11.1994; ₹10,00,000/- on 12.10.1994; ₹15,00,000/- on 24.09.1994; ₹22,50,000/- on 23.11.1994 and; ₹10,00,000/- on 03.11.1994) from some unknown persons. A sum of ₹7,95,000/- was found in Indian currency at the said office and the same was seized.

3.3 According to the Enforcement Directorate, Sh. Ashish Jain had stated that the said amount was received from some unknown person

under the instruction of a person resident in Dubai in the morning of 04.10.1995.

3.4 Sh. Ashish Jain retracted his statement on 05.10.1995 (immediately, on the next day of the search).

3.5 Thereafter, the residential premises of the appellant were searched on 07.10.1995. However, no incriminating documents were found.

3.6 On 29.08.2014, a show cause notice (memorandum dated 29.08.2014) was issued to the appellant as well as Sh. Ashish Jain, calling upon them to show cause as to why adjudication proceedings, as contemplated under Section 51 of FERA, should not be commenced for the alleged contravention of Section 9(1)(b) of the FERA. This was founded on the allegation that the appellant/Ashish Jain had received a sum of ₹76,75,000/- (₹68,50,000/- stated to have been received by Sh. Ashish Jain and ₹7,95,000/- seized from the office premises) in contravention of Section 9(1)(b) of FERA. The appellant was also called upon to show cause as to why a sum of ₹7,95,000/- be not confiscated under Section 63 of FERA.

3.7 It appears from the record that the said show cause notice was challenged by way of a writ petition before this Court. The fate of the writ petition is not mentioned. However, it is assumed that the said petition was dismissed.

3.8 The appellant responded to the said show cause notice and filed his written submissions. He, *inter alia*, contended that the said amount seized was entirely in Indian currency and was duly reflected in the books of account of M/s Anukampa Tours and Travels. He emphasized that M/s Anukampa Tours and Travels did not have any dealings in foreign currency or with any foreigner or any person resident abroad. And, its business was entirely confined to domestic business activities. It was also pointed out that Sh. Ashish Jain had retracted his statement as the same had been recorded forcibly and under coercion.

3.9 On 17.02.2014, the Adjudicating Authority passed an order holding that it would be reasonable to infer that the appellant received funds from different persons in India on instructions of persons resident outside India for distribution of compensatory payments. It was further held that Sh. Ashish Jain was only an employee and carried out orders of his employer (the appellant). In view of the said conclusion, the Adjudicating Authority imposed a penalty of ₹75,00,000/- and further ordered confiscation of the sum of ₹7,95,000/- being the amount seized under Section 63 of FERA.

3.10 Aggrieved by the aforesaid order, the appellant preferred an appeal before the Special Director (Appeals), Enforcement Directorate (hereafter 'the Appellate Authority'). Before the Special Director (Appeals), it was contended that the Adjudicating Authority had found no document which would indicate violation of any provisions of FERA. It is also pointed out that the Adjudicating Authority (Deputy Director, Enforcement Directorate) had specifically recorded in the

order dated 17.02.2014, that the documents did not reveal anything of interest from a FERA perspective. The appellant further called upon the Enforcement Directorate to produce Sh. Ashish Jain if any of his statement were sought to be relied upon against the appellant, as Sh. Ashish Jain was no longer employed with the appellant.

3.11 On merits, it was stated that the currency seized was duly reflected in the books of accounts and therefore, the same could not be retained. The appellant explained that the books reflected that an amount of ₹8,00,000/- had been sent from the registered office of M/s Anukampa Tours and Travels at Jaipur. Out of the aforesaid amount, a sum of ₹5,000/- had been taken by one of the directors (Mr Ramesh Joshi) for expenses and the remaining amount was available in the office. It was also explained that the said amount was for paying the booking amount of a chartered flight on behalf of certain groups that had desired to charter a flight from Delhi to Bombay, Bombay to Jaipur, Jaipur to Bombay and back to Delhi. This charter was scheduled for 29.10.1995 and Archana Airways had been contacted for the same. The said concern had estimated charges to be ₹11,94,166/- and had demanded 50% of the said amount as advance. The petitioner also challenged the jurisdiction of the Enforcement Directorate to commence any proceedings as there was no material to indicate that the appellant was involved in any transaction in foreign exchange or with foreign entities.

3.12 The Appellate Authority [Special Director (Appeals)] noted down the contentions advanced by the appellant; however, returned no

finding in that regard. In conclusion, the Appellate Authority reduced the penalty to ₹7.95 lacs and directed that the same be adjusted against the amount seized.

3.13 Aggrieved by the said order dated 24.09.2014 (the Appellate Order), the appellant preferred an appeal before the Tribunal.

3.14 The Tribunal noted the facts and held that the Adjudicating Authority had observed that the statement of Sh. Ashish Jain had no evidentiary value and therefore, had imposed a penalty on the appellant without taking into account that said statement made by Ashish Jain on 04.10.1995.

3.15 Despite the aforesaid observations, the Tribunal rejected the appellant's appeal by an order dated 28.02.2016 (which is impugned herein).

4. I have heard the learned counsel for the parties.

5. The questions that arise for consideration in this appeal are:

- (i) Whether it is established that the appellant can be held guilty of violation of provisions of FERA solely on the basis of the statement of Ashish Jain recorded on 4.10.1995?
- (ii) If the answer to the above question is in the negative, whether there is any other material or material to establish that the appellant had violated the provisions of Section 9(1)(b) of FERA?

6. Ms Malhotra, the learned counsel who appeared for the petitioner submitted that there was no material or evidence on record which could establish commission of any offence under FERA. She submitted that the original order dated 17.02.2014 passed by the Adjudicating Authority, did not even mention any violation of provisions of FERA but merely imposed a penalty of ₹75,00,000/-. She submitted that the Appellate Authority had examined the provisions of Section 9(1)(b) of FERA, but did not return any finding to the effect that the said provision was violated. She contended that there was also no evidence on record to even remotely indicate any such violation.

7. Mr Mahajan, learned counsel who appeared for the respondents submitted that there was no infirmity with the impugned order.

Reasoning and Conclusion

8. At the outset, it is necessary to observe that although, in the initial stages, the respondent had raised an objection regarding the maintainability of the present petition; however, no such contentions or objections challenging the maintainability of the present petition were advanced at the time of final hearing. It is, thus, not necessary to examine the same.

9. There is considerable merit in the contention that there is no material on record, which even remotely establishes that the appellant is guilty of an offence under Section 9(1)(b) of FERA.

10. It is relevant to refer to Section 9(1)(b) of FERA, which is set out below:-

“9. Restrictions on payments. — (1) Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by the Reserve Bank, no person in, or resident in, India shall—

(a) x x x

(b) receive, otherwise than through an authorised dealer, any payment by order or on behalf of any person resident outside India.

Explanation.—For the purposes of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised dealer) without a corresponding inward remittance from any place outside India, then such person shall be deemed to have received such payment otherwise than through an authorised dealer;”

11. In order to establish the commission of an offence under Section 9(1)(b) of FERA, it would be necessary to establish that the appellant had received payments by order or on behalf of any person resident outside India and through any person without corresponding inward remittance. In the present case, there is no such evidence or material whatsoever that indicates that the appellant had received any amount by order or on behalf of any person resident outside India. No such evidence or material has been placed on record. The original order dated 17.02.2014 passed by the Adjudicating Authority does not even mention the name of the persons from whom the appellant is alleged to have received any funds.

12. The prosecution's case is that the appellant had received certain funds from Sh. Satish Kumar Sharma @ Pappu who, in turn, had received certain funds and had distributed the same at the instance of one Munna Bhai from Dubai. In order to establish this offence, it would be necessary for the Enforcement Directorate to have produced material to the effect that Sh. Satish Kumar Sharma @ Pappu had made payments to the appellant by order or on behalf of a person resident outside India.

13. Although it is alleged that the documents seized from the residence of Sh. Satish Kumar Sharma @ Pappu indicated payments made to Sh Ashish Jain, no such material has been placed on record. Further, the original order passed by the Enforcement Directorate does not mention (i) the particulars of any such documents; (ii) the payments allegedly recorded therein; or (iii) any material to establish that the said payments were in fact, made. The question as to who had made these payments and to whom, remains completely vague.

14. The original order was passed by the Adjudicating Authority solely on the basis of an alleged statement of Sh Ashish Jain, an employee of the appellant. He alleged that he had received a sum of ₹68,50,000/- at the instance of a person resident in Dubai. However, there is no material brought on record to establish the person who had delivered the said amounts to Ashish Jain and to whom he had distributed it. Admittedly, Sh Ashish Jain had retracted his statement on the very next day of making such statement, that is, on 05.10.1995. The appellant had also alleged that the statement of Sh Ashish Jain was

recorded forcibly and under coercion. The Appellate Authority had noted in the Appellate Order that Ashish Jain had retracted his statement on 05.10.1995. It is important to note that the Tribunal proceeded on the basis that the Appellate Authority had imposed a penalty without taking into account the statement of Sh. Ashish Jain. The relevant extract of the said impugned order reads as under:

“The Special Director (Appeals) also specifically recorded in the impugned that the statement of Sh. Ashish Jain being retracted has no evidentiary value. Therefore, he imposed penalty on the Appellant without taking into account his statement.”

15. Thus, it does appear from the impugned order that the Tribunal had accepted that the statement made by Sh Ashish Jain had no evidentiary value and yet upheld the Appellate Order.

16. Admittedly, Ashish Jain had retracted his statement on the very next day. Further, it is also apparent that the said statement was not corroborated by any credible material/evidence. Sh Ashish Jain had neither disclosed the persons from whom he had allegedly received any money nor disclosed the names of any person to whom he had distributed the same. Sh Ashish Jain was also not produced in any of the proceedings in order for the appellant to cross examine him. Thus, this Court is of the view that even if the statement had not been retracted, it would have been of little value. However, in fact, Ashish Jain had retracted his statement on the very next day. It is now well settled that confessions and statements, which have been retracted, have little value unless they are corroborated by other material.

17. In ***Vinod Solanki v. Union of India and Anr.: (2008) 16 SCC 537***, the Supreme Court held as under:

“23. 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. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded. (See: *Pon Adithan v. Narcotics Control Bureau: (1999) 6 SCC 1*)”

18. In ***K.T.M.S. Mohd. V. Union of India: (1992) 3 SCC 178***, the Supreme Court had held that the voluntary nature of a statement is *sine qua non* for the authorities to act on it. The Court had also explained that merely because a statement is retracted does not mean that the said evidence was unlawfully obtained, however, the court intending to act on such statements as being voluntarily made, is required to apply its minds to its retraction and to reject the same for reasons to be set down in writing. The relevant extract of the said decision is set out below:-

“34. ...But suffice it 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 the Enforcement under the relevant provisions of the respective Acts is a *sine qua 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 its 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.”

(emphasis supplied)

19. In the present case, neither the Adjudicating Authority (Deputy Director, Enforcement Directorate) nor the appellate authority (Special Director, Appeals) had applied their minds on the question whether the statement made by Ashish Jain was voluntary in view of its retraction on the very next day. In fact, the Tribunal had proceeded on the basis that it was accepted by the Appellate Authority (Special Director, Appeals) that the statement of Ashish Jain had no evidentiary value.

20. This Court is of the view that the statement of Sh. Ashish Jain could not be relied upon as, first of all, it was retracted on the very next day. And, secondly, the statement was very vague and bereft of any

particulars, inasmuch as, it did not name or describe any person from whom funds had been received and whom the said funds had been distributed to. As noticed above, neither the adjudicating authority nor any of the appellate authorities, including the Tribunal, had applied their minds as to whether the said statement was voluntary or not. Thus, the question whether the appellant could be held guilty for violation of provisions of Section 9(1)(b) of FERA, on the sole basis of the statement of Sh. Ashish Jain, must be answered in the negative.

21. The next question to be addressed is whether there is any material on record to establish that the appellant was guilty of violation of provisions of Section 9(1)(b) of FERA if the statement of Sh. Ashish Jain is ignored. Clearly, the answer to the above question must also be in the negative as there is no material whatsoever on record to establish the same. None of the orders of the authorities below, namely, the Adjudicating Authority, the Appellate Authority or the Tribunal refer to any cogent material to substantiate the allegation of the commission of an offence under Section 9(1)(b) of FERA.

22. In view of the above, this Court is of the view that confiscation of the amount of ₹7,95,000/- from the office of the appellant is unsustainable. Consequently, the present appeal must be allowed. The order dated 17.02.2014 passed by the Adjudicating Authority (Deputy Director, Enforcement Directorate); the order dated 24.09.2014 passed by the Appellate Authority (Special Director, Appeals); and the impugned order passed by the Tribunal are unsustainable and are, accordingly, set aside.

23. The amount seized from the premises of the appellant are liable to be returned to the appellant.

24. The appellant has been deprived of his funds for a considerable period of time. As observed earlier, the confiscation of the amount is wholly illegal and unsustainable. This Court notes that Rule 8 of the Foreign Exchange Management (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000 provides for repayment of interest at the rate of 6% per annum from the date of seizure till the date of payment. Thus, this Court is of the view that the said amount is required to be returned to the appellant along with interest at the rate of 6% per annum. It is so directed.

25. The appeal is allowed in the aforesaid terms.

FEBRUARY 19, 2020
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VIBHU BAKHRU, J