IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.06.2024

CORAM

THE HONOURABLE MRS. JUSTICE **R.HEMALATHA**

Crl.R.C. No.746 of 2019 &
CrlM.P. Nos.10451, & 10452 of 2019

A. Abdul Samadh ...Petitioner

Vs.

The State represented by
The Chief Enforcement Officer,
Enforcement Directorate
"Shastri Bhavan",
Chennai 600 006. ...Respondent

Prayer: Criminal Revision Case filed under Section 397 & 401 Cr.P.C. praying to set aside the judgment and orders dated 11.03.2019 passed in C.A. No.90/2009 by the Principal Sessions Judge, Court of Sessions, Chennai, confirming the judgment and orders dated 29.04.2009 passed in E.O.C.C. No.443/2004 by the Additional Chief Metropolitan Magistrate, E.O.II, Egmore, Chennai.

For Petitioner : Mr. V.S. Venkatesh

For Respondent : Mr.Rajesh Pathiyal
Special Public Prosecutor
for Enforcement Directorate

ORDER

Challenging the conviction and sentence passed by the learned Principal Judge, City Civil, Chennai, vide his judgment and orders dated 11.03.2019 in C.A. No. 90/2009, confirming the conviction and sentence passed by the learned Additional Chief Metropolitan Magistrate, E.O.II, Egmore, Chennai, in the judgment and orders dated 29.04.2009 passed in E.O.C.C. No.443/2004, the present Criminal Revision Case is filed.

2. The revision petitioner is the accused in E.O.C.C. No.443/2004 and he has been convicted and sentenced detailed hereunder:

Conviction	Sentence
Under Section 8(1) r/w 56(1)(i) of Foreign Exchange Regulation Act, 1973 (2 counts)	Rigorous Imprisonment for two years for each count and a fine of Rs.25,000/- (for each count). Total fine amount Rs.50,000/-
The aforesaid sentences were ordered to run concurrently. The period of sentence already undergone by the accused shall be set off under Section 428 Cr.P.C.	

3. The case of the prosecution as could be discerned from the

oral and documentary evidence is as follows:

3.1. Thiru.P.V. Balasubramaniam (P.W.1), the Enforcement Officer, Enforcement Directorate, Chennai, along with his team of Enforcement Officers including Thiru. Ganghadharan (P.W.2), Thiru.Shankar (P.W.3), Thiru.Mani (P.W.4), Thiru. Boopal Rao (P.W.5) went to the residence of the petitioner/accused A. Abdul Samath, at Door No.2, Ground Floor, Mosque Street, Padi, Madras-50, after getting a search warrant (Ex.P1) from the Director of Enforcement. They showed the search warrant (Ex.P1) to the accused and obtained his signature on it. Thereafter, a search was conducted in the presence of two independent witnesses, one of whom was Thiru.Devasundaram (P.W.6), Branch Manager, Union Bank of India, Ayanavaram Branch.

3.2. The officials of Enforcement Directorate recovered 1,92,493 US dollars, 5,44,000 Saudi Riyals, 12,000 Qatari Riyals, 70,500 UAE Dirhams, 11 Singapore Dollars, which were concealed in four bundles of newspapers in a wooden almirah in the bed room of petitioner/A1. The said amounts were seized under the cover of a mahazar (Ex.P2) duly signed by the petitioner/A1 and witnesses. The newspapers which were used for wrapping the bundles were marked as Ex.P3 series. The officials of the Enforcement Directorate thereafter, took A1 to the Enforcement Directorate where he gave his voluntary statement (Ex.P5) on 15.07.1993 before P.W.1. Since the 1st accused informed the officials that he was feeling tired, he was sent home on the same day and on 16.07.1993, he once again appeared before the Enforcement Directorate officials and gave a voluntary statement (Ex.P12). Thereafter, the officials of the Enforcement Directorate went to the residence of A2 at No.110, Thayappa Mudali Street, I Floor, Chennai-1 and conducted a search in pursuance of a search warrant (Ex.P6) dated 15.07.1993 issued by the Assistant Director of Enforcement Directorate, Chennai. They also conducted a search in the shop of A2 as per the search warrant (Ex.P9) dated 16.07.1993. Thereafter. the accused 1 and 2 were arrested by P.W.1 on the same date, i.e., 16.07.1993 and produced before the Chief Metropolitan Magistrate on 17.07.1993 and remanded to judicial custody.

3.3. P.W.2 to P.W.6 corroborated the versions of P.W.1 in all material particulars. The Chief Enforcement Officer, Enforcement Directorate, thereafter filed a complaint against A1 to A3 in E.O.C.C. No.1164/1994 for contravening the provisions of Section 8(1) of the Foreign Exchange Regulation Act, 1973 (in short FERA Act), which is punishable under Section 56(1)(i) of FERA Act, 1973. Charges were framed against the accused 1 and 2 for the abovesaid offences and since the 2nd accused pleaded guilty, he was convicted by the trial court on 08.11.2004 for the offence punishable under Section 8(1) r/w 56(1)(i) of FERA Act, and was sentenced to undergo Rigorous Imprisonment for three months and to pay a fine of Rs.15,000/-. The case in E.O.C.C. No.1164/94 was split up and the present petitioner's case was renumbered as E.O.C.C. No.443 of 2004.

3.4. The specific allegation of the prosecution against the present revision petitioner/A1 was that he purchased and otherwise acquired foreign exchange to the tune of Rs.2,94,50,120/- from persons other than the authorised dealers in Foreign Exchange and thus contravened the provisions of Section 8(1) of FERA Act. The next charge was that the accused, without previous general or special permission from Reserve Bank of India, transferred foreign exchange to the tune of Rs.1,77,50,120/- to various persons other than the authorised dealers in Foreign Exchange and thus contravened the provisions of Section 8(1) of FERA Act.

3.5. The prosecution, in order to prove the guilt of the petitioner/accused, examined 6 witnesses and marked 25 documents.

3.6. When the petitioner/accused was questioned under Section 313 Cr.P.C., with regard to the incriminating circumstances appearing in evidence against him, he denied of having committed any offence. However, he examined Thiru.Govindarajan, Additional Superintendent, Central Prison, Coimbatore, as D.W.1 and marked Ex.D1 to Ex.D5.

3.7. The learned Additional Chief Metropolitan Magistrate, E.O.II,Egmore, Chennai, after analysing the oral and documentary evidence on record, convicted and sentenced the present revision petitioner as stated in paragraph No.2.

3.8. On an appeal by the accused/petitioner before the Principal Judge, City Civil Court, Chennai, the conviction and sentence passed by the trial court Judge was confirmed.

3.9. Aggrieved over the same, the present Criminal Revision Case is filed by the accused/petitioner.

4. Heard Mr. V.S. Venkatesh, learned counsel for the petitioner and Mr.Rajesh Pathiyal, learned Special Public Prosecutor for Enforcement Directorate/respondent.

5. The defence taken by the defence counsel before the trial court as well as the appellate court are summarised as under:

I. Though the residence of A1 is situate in a busy locality, no local persons were called by the officials of the Enforcement Directorate to be a witness to the search and seizure and therefore, the same is fatal to the case of the prosecution.

II. The statements of the accused (Ex.P5 and Ex.P12) were obtained under threat and coercion.

III. Enforcement Officials did not issue any summons to the accused under Section 40 of FERA Act.

IV. The Enforcement Department in the counter statement filed in Crl.R.C.No.85/2000 had alleged that they seized the foreign currencies in Burma bazaar, Chennai and therefore, the seizure of foreign currencies is not from the house of the accused.

V. The foreign currencies seized from the accused are not also produced before the trial court.

VI. The prosecution did not examine any witness to prove that the revision petitioner/A1 sold gold and silver brought by foreign passengers from Singapore (sent by one Haja Allaudin of Singapore) and that there is no evidence to show that A1 transferred foreign currencies to persons other than the authorised dealer in Foreign Exchange. No passengers from Singapore has been examined in this regard.

VII. Non issuance of notice under proviso to Section 61(2) (ii) of FERA Act, 1973, also vitiates the case of the prosecution. The burden of proof is on the prosecution and they have not proved their case beyond reasonable doubts.

6. Both the courts below had analysed threadbare the evidence on record and dealt with the above grounds raised by the defence as mentioned hereunder:

Ground I. - It is seen from the evidence of P.W.1 that since the revision petitioner/A1 was Inspector of Police, the neighbours were not ready to be a witness to the search and seizure. P.W.1, in fact had made an attempt to get independent witnesses who are in the same locality.

Ground II - The accused gave his confessional statement to P.W.1 in his own handwriting and they were marked as Ex.P5 and Ex.P12. While Ex.P5 runs to 1½ pages, Ex.P12 runs to 7 pages. In Ex.P5, the revision petitioner/accused had given the details about his family and also about the schools and colleges where he studied, which was recorded by P.W.1. P.W.1 had in fact granted time to the accused at his request and the accused appeared again before the officials of Enforcement Directorate on 16.07.1993 and gave further statement (Ex.P12). Therefore, it cannot be stated that the statements Ex.P5 and Ex.P12 were obtained under threat and coercion. Moreover, the details contained in the statements (Ex.P5 and Ex.P12) are within the personal knowledge of the accused. It is also settled law that the statements recorded by the Enforcement Officers, under the FERA Act either during investigation or during adjudication proceedings are not that of an accused within the meaning of Section 24 of the Indian Evidence Act, as the Enforcement Officer under the FERA, 1973 is not a police officer, within the meaning of Section 24 of the Indian Evidence Act. So the arguments of the counsel for the defence that the statements of the accused (Ex.P5 and ExP12) cannot be used against the accused and the same can be treated only as a statement under Section 161(3) Cr.P.C cannot be accepted.

Ground III : Section 40 of FERA Act empowers any Gazetted Officer of the Enforcement to summon any person whose attendance he considers necessary and to give evidence or to produce a document during the course of the investigation. As per Section 40(4) of FERA Act, every such investigation or proceeding is deemed to be a judicial proceeding within the meaning of Section 193 and 228 of the Indian Penal Code. Therefore, it can be safely concluded that the statements Ex.P5 and Ex.P12 were recorded only in exercise of powers conferred under Section 39 and 40 of FERA Act. P.W.1 was working as the Enforcement Officer and he had recorded the statements of the accused under the provisions of Section 40 of FERA Act for bringing him within the meaning of judicial proceedings. All that is required under Section 40(1) of the FERA Act is that such officer recording the statement must be holding a gazetted post of an officer of Enforcement. So the statement given by the accused before P.W.1 is a proceeding under Section 40 and the same is deemed to be a judicial proceeding by Section 40(4) of FERA Act. Issuance of notice is not also necessary.

<u>Ground IV</u> - In the counter filed in Crl.R.C. No.85/2000, it was inadvertently mentioned that the seizure of foreign currencies was from Burma bazaar. However, in M.P. No.717/99 filed before the trial court, it was categorically stated that the foreign currencies were recovered from the residence of the accused. Further the accused filed a petition before the Deputy Director of Enforcement for return of the seized foreign currencies from his residence by engaging a counsel Mr.Ajmir Ali. The said petition was dismissed. Subsequently, he filed a Writ Petition before this Court in W.P. No.19332/1997 and it was also dismissed on 23.07.2004, as evidenced by Ex.P25. The vakalat filed by the counsel for the accused was marked as Ex.P24. Though it is contended by the accused that he did not authorise Ajmir Ali, Advocate, to file the Writ Petition in W.P. No.19332/97,it is seen from the records that the present petitioner filed a petition before the trial court through the very same counsel Ajmir Ali, in M.P. No.717/99 to dismiss the complaint under Section 61 of FERA Act and Section 280 Cr.PC in E.O.CC No.1164/1994 and the same was dismissed. If really Ajmir Ali, Advocate, had not been engaged by the present petitioner, he would not have filed the above said writ petition.

Ground V - The Enforcement Directorate moved an application under Section 42(5) r/w 42(6) of FERA Act,1973 for encashing the foreign currencies before the trial court and the trial court also granted permission under Section 47(4) of FERA Act for depositing the foreign currencies. A certificate to that effect was issued by the trial court and the same was marked as Ex.P4. The order of the trial court was not challenged by the accused. In the circumstances, the contention of the revision petitioner/accused that the foreign currencies seized from him are not produced before the trial court, cannot be accepted.

Ground VI: A1 and A2 had confessed that A1 purchased gold and silver and sold the same to A2 and A3 in open market. They were not authorised dealers in foreign exchange. The passengers who brought gold and silver from a foreign country need not be examined as the seizure of foreign currencies from the residence of A1 is proved.

Ground VII - The show cause notice issued by the Deputy Director, Enforcement Directorate, to the accused under Section 51 of FERA Act was marked as Ex.P20 and the accused had also received the same. The records show that the Enforcement authority had given sufficient opportunity to the accused under Section 57 of FERA Act and therefore non issuance of opportunity notice as contemplated under proviso to Section 61(2)(ii) of FERA Act, 1973, would not vitiate the case of the prosecution.

7. As already observed, both the courts below had analysed the evidence of P.W1. to P.W.6 and the documents Ex.P1 to Ex.P25 and had come to a conclusion that there is no illegality in the search and seizure conducted by the Enforcement Directorate and the accused had not rebutted the presumption in favour of the prosecution by adducing acceptable evidence. In fact there is no reason for this Court to interfere with the concurrent findings recorded by both the courts below.

8. Mr. V.S. Venkatesh, learned counsel for the revision petitioner in all his fairness conceded that both the courts below had

properly analysed the evidence on record. His only contention is that since the revision petitioner is suffering from cancer, some leniency may be shown in the sentence. He also filed the Discharge Summary dated 01.01.2013 issued by the Cancer Institute, (WIA), Chennai-20. His specific contention was that the revision petitioner was diagnosed with Carcinoma of lower Rectum and underwent surgery for the same in Ayesha Hospital,Chennai in September 2012. It is his contention that the small intestine of the petitioner/accused was removed and is undergoing continuous treatment at Cancer Institute, Adyar, Chennai.

9. This Court on 12.04.2024 directed the respondent department to find out the genuineness of the medical records submitted by the revision petitioner and file a report. Accordingly a memo was filed by the Special Public Prosecutor along with medical records on 25.04.2024. Dr.A.S.Ramakrishnan, M.S.MCH., Professor of Surgical Oncology, Cancer Institute (W.I.A), in his certificate dated 24.04.2024, had stated thus:

"TO WHOMSOEVER IT MAY CONCERN

Mr. Abdul Samadh, a 61 year old gentleman with DM, was diagnosed with carcinoma of lower rectum and underwent surgery for the same at Ayesha Hospital, Chennai, in September 2012. HPE was suggestive of moderately differentiated denocarcinoma extending upto the perirectal tissue pT3 N1 (2/3 nodes). He received adjuvant radiation at Cancel Institute (WIA) from 26.11.2012 to 01.01.2013, followed by chemotherapy from 07.03.2013 to 04.09.2013. During follow up colonoscopy, few polyps were found. Colonoscopic polypectomy was done on 12.11.2013. He has been on follow up since then. Last documented follow up visit at the institute was on 6/2/21."

The medical records submitted by the Special Public Prosecutor for the Enforcement Directorate further show that the revision petitioner is taking treatment continuously in the Cancer Institute, (WIA), Adyar.

10. Section 56(1) (i) of FERA Act, reads thus:

Section 56 in The Foreign Exchange Regulation Act, 1973

56. Offences and prosecutions .- (1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes any of the provisions of this Act other than section 13, clause (a) of sub-section (1) of [section 18, section 18-A,] clause (a) of sub-section (1) of section 19, sub-section (2) of section 44 and sections 57 and 58, or of any rule, direction or order made thereunder, he shall, upon conviction by a Court, be punishable,-

(i) in the case of an offence the amount or value involved in which exceeds one lakh of rupees, with imprisonment for a term which shall not be less than six months, but which may extend to seven years and with fine:

Provided that the Court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months;

11. While the conviction passed by both the courts below is confirmed, considering the medical condition of the present petitioner, the sentence passed by the appellate court, for the offences punishable under Section 8(1) r/w 56(1)(i) of Foreign Exchange Regulation Act, 1973 (2 counts) is reduced to three months.

12. In the result,

i. The Criminal Revision Case is partly allowed. Consequently, connected miscellaneous petitions are closed.

ii. While the conviction passed by both the courts below is confirmed the sentence is modified as under:

Conviction	**Sentence**
Under Section 8(1) r/w 56(1)(i) of Foreign Exchange Regulation Act, 1973 (2 counts)	Rigorous Imprisonment for three months for each count and a fine of Rs.25,000/- (for each count). Total find amount Rs.50,000/-
The aforesaid sentences shall run concurrently. The period of sentence already undergone by the accused shall be set off under Section 428 Cr.P.C.	

iii. Since the accused had already been in judicial custody for 102 days, the accused need not surrender before the trial court.

12.06.2024

Index: Yes/No

Internet: Yes/No
Speaking/Non-Speaking order
bga

To

1. The Principal Sessions Judge, Court of Sessions, Chennai.
2. The Additional Chief Metropolitan Magistrate Court, E.O.II, Egmore, Chennai.
3. The Section Officer, Criminal Section, High Court, Madras.

R. HEMALATHA, J.

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