

# Mohtesham Mohd. Ismail vs Spl. Director, Enforcement ... on 9 October, 2007

**Author: S.B. Sinha**

**Bench: S.B. Sinha, Harjit Singh Bedi**

CASE NO. :

Appeal (crl.) 1216 of 2001

PETITIONER:

Mohtesham Mohd. Ismail

RESPONDENT:

Spl. Director, Enforcement Directorate & Anr

DATE OF JUDGMENT: 09/10/2007

BENCH:

S.B. Sinha & Harjit Singh Bedi

JUDGMENT:

**J U D G M E N T** S.B. SINHA, J :

1. A short but an interesting question as to whether a Special Director appointed under the Foreign Exchange Regulation Act, 1973 (for short, the Act ) himself can prefer an appeal before the High Court against an order passed by the Foreign Exchange Regulation Appellate Board (for short, the Board ) arises for consideration herein.

2. Before embarking upon the said question, we may briefly state the fact of the matter.

Appellant herein was served with a show cause notice by the Enforcement Directorate on 04.07.1991 for alleged contravention of the provisions of Section 9(1)(b), 9(1)(d) and 9(3) of the Act, alleging, inter alia, that during the period June 1989 to July 1990, he caused to remit various payments aggregating to Rs.2,81,73,700/- to India from United Arab Emirates (UAE) through persons other than authorized dealers. Cause was shown thereto by the appellant. The Special Director, however, adjudicated the matter and by an order dated 06.10.1993 imposed a penalty of Rs.2,50,000/- on the appellant in terms of Section 9(3) of the Act. Penalty was also imposed on one Shri Champalal Singhvi.

3. Aggrieved by and dissatisfied therewith, an appeal was preferred by the appellant before the Board. The Board allowed the said appeal, inter alia, holding :

2. It would appear from the above discussion that neither in the documents seized from Champalal Singhvi and those seized from the premises of Yousuf Kazia, nor in the statements of Champalal Singhvi and Kazia Brothers, there is any evidence of actual remittance of any amounts from abroad as alleged, even though prima facie that evidence may indicate distribution of amounts in India on the instructions from persons abroad . It was further observed :

In our opinion, in view of the conclusions already made by us that the charge of contravention of section 9(3) cannot be made out on the basis of the facts as assumed by the Department, it is not necessary to consider other grounds on which the adjudication order has been impugned in this appeal. We are of the view that consideration of those grounds would amount to expressing opinion in respect of the evidence which tends to implicate Kazia brothers and Champalal Singhvi and therefore, any pronouncement on those grounds should be avoided if possible.

4. Respondents herein preferred an appeal thereagainst before the High Court. The Central Government was not impleaded as a party therein. The appellate authority, namely, the Board, however, was impleaded as a party, although it should not have been.

5. Before the High Court, the appellant, inter alia, raised a question in regard to the maintainability of the appeal at the instance of the respondents herein on the premise that it was the Central Government who could prefer an appeal and not the adjudicating authority itself. Reliance, in this behalf, was placed on a decision of the Madras High Court in Director of Enforcement, Madras v. Rama Aranganal and Another [AIR 1981 Madras

80) as well as on a decision of the Punjab & Haryana High Court in Director of Enforcement v. Lal Chand and Another [(1985) 6 ECC 55 : CFC (P&H) 24].

6. Before the High Court, it was furthermore contended that the finding of fact arrived at by the Board cannot be interfered with by the High Court having regard to the scope and purport of Section 54 of the Act. On the first contention, the High Court opined that as the respondent has been appointed under the Act, in terms whereof he was authorized to enforce the provisions thereof, an appeal at its instance would be maintainable, stating :

A perusal of sub-section (3) of Section 4 of the Foreign Exchange Regulation Act, 1973 per se reveals that unless and until the Central Government has put certain conditions or limitations on the powers of the officers of the Enforcement Directorate, the law authorizes and requires the officers of Enforcement Directorate to exercise powers and to discharge the duties conferred and imposed upon them under the Act. No doubt, under Section 5 of the Foreign Exchange Regulation Act, 1973 the Central Government is empowered subject to the conditions and limitations to authorize other officers such as officers of the Central Excise, or any Police Officer or any other officer of the Central Government or State Government to exercise the powers and to discharge the functions of the Enforcement Directorate or any other

officer of the Enforcement Directorate under the Act as may be specified. So far as the entrustment of the functions of or authorization to exercise powers of the Directors or other officers of the Enforcement Directorate in favour of the officers other than those of Directors Enforcement consisting of Directors of Enforcement, Additional Directors of Enforcement, Deputy Directors of Enforcement, Assistant Directors of Enforcement and such other class of officers of Enforcement is concerned the Central Government is empowered under Section 5 of the Act to confer those powers on the officers referred to as above i.e., the officers of the Customs Department, Central Excise etc. But, the officers of the Enforcement Directorate as mentioned in Section 4(3) of the Foreign Exchange Regulation Act, 1973 can exercise the powers by virtue of the provisions of the Act. Section 54 of the Foreign Exchange Regulation Act, 1973, does not specifically mention and provide that the Principal officers of Enforcement Directorate cannot file the appeal. It cannot be assumed in the absence of such a bar that the Enforcement Directorate could not file the appeal. The appeal could be filed by the Directors of Enforcement as instrumentality of the Central Government in matters covered by the Foreign Exchange Regulation Act, 1973, in cases decided against the Department, as appeals could be filed either under the Income Tax Act, or under the Land Acquisition Act. Explanation (2) to section 54 of the Foreign Exchange Regulation Act, 1973 cannot be read as providing that the appeal cannot be filed by the Directors of Enforcement which is instrumentality of the Government of India or the Central Government . On the second contention, it was held :

Thus considered and applying the above principles of law to the effect that if the sender of money from a foreign land or from foreign country collects money and directs to his own men in India to distribute the said amount to the persons concerned to whom it was meant to be paid and then that person under the instructions of the former distributes the said amount of money to the persons for whom it has been sent and to them is paid in Indian currency, it can well be said to be a case of remittance or remitting of money or causing to remit money from a foreign land into India for distribution and disbursement, in such a case charge of Section 9(3) of the Act may be found to have been established and in the present case the charge against the respondent remitting the amount otherwise than in accordance with law under Act in India stands established. Thus, considered in our opinion the order of the Appellate Board is not only erroneous on facts, but also is erroneous in law as it is based on failure to apply its mind to the essential requisites of section. The order passed by the adjudicating authority appears to be correct, just and proper and has to be restored after setting aside the order of the Appellate Board.

7. Mr. Harjinder Singh, learned Senior Counsel appearing on behalf of the appellant, inter alia, would submit that on a plain reading of Section 54 of the Act, it would appear that only officers authorized in this behalf could prefer an appeal.

It was further submitted that the High Court having failed to consider the question that the appellant had retracted from his confession, the impugned judgment is wholly unassailable.

8. Mr. Ashok Bhan, learned Counsel appearing on behalf of the respondents, however, relied upon a notification dated 22.09.1989, which reads as under :

In exercise of the power conferred by sub- section (1) of Section 4, read with clause (e) of section 3 of the Foreign Exchange Regulation Act, 1973 (46 of 1973), the Central Government hereby appoints Shri S.S. Ranjhan to be an officer of Enforcement with the designation of Special Director of Enforcement, for the purpose of enforcing the provisions of the said Act; and in exercise of the powers conferred by Section 51 of the said Act hereby empowers him to adjudicate cases of contravention of any of the provisions thereof, other than section 13, clause (a) of sub-section (1) of section 18 and clause (a) of sub-section (1) of section 19 or of any rule, direction or order made thereunder.

9. Before embarking upon the rival contentions raised on behalf of the parties, let us have to look at the relevant provisions of the Act.

10. Section 3 of the Act provides for classes of officers of Enforcement. Section 4 of the Act empowers the Central Government to appoint such persons, as it thinks fit, to be officers of Enforcement and for the said purpose confer power thereupon. Sub-section (3) of Section 4 reads as under :

(3) Subject to such conditions and limitations as the Central Government may impose, an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act. Section 5 providing for delegation of the powers in relation to functions of the Director or other officers of Enforcement, reads as under :

Entrustment of functions of Director or other officer of enforcement -

5. The Central Government may, by order and subject to such conditions and limitations as it thinks fit to impose, authorise any officer of customs or any Central Excise Officer or any police officer or any other officer of the Central Government or a State Government to exercise such of the powers and discharge such of the duties of the Director of Enforcement or any other officer of Enforcement under this Act as may be specified in the order. Section 9 provides for restrictions on payments; clauses (c) and (d) of sub-section (1) thereof read as under :

Restrictions on payments -

9. (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-

(c) draw, issue or negotiate any bill of exchange or promissory note or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment is created or transferred in favour of any person resident outside India;

(d) make any payment to, or for the credit of, any person by order or on behalf of any person resident outside India;

Section 52 of the Act provides for an appeal to the Board. Section 53 thereof provides for the powers of the adjudicating officers and the Board to summon witnesses, etc. Section 54 which provides for an appeal to the High Court, reads as under :

#### Appeal to High Court

54. An appeal shall lie to the High Court only on questions of law from any decision or order of the Appellate Board under sub-section (3) or sub section (4) of section 52:

Provided that the High Court shall not entertain any appeal under this section if it is filed after the expiry of sixty days of the date of communication of the decision or order of the Appellate Board, unless the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

Explanation. In this section and in section 55, "High Court" means-

(i) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and

(ii) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondents, any of the respondents, ordinarily resides or carries on business or personally works for gain.

11. The Act imposes restrictions on transactions of money from one country to the another. The Central Government for the purpose of enforcing the provisions of the Act is empowered to appoint officers. From a bare perusal of Section 5 of the Act, it would be evident that notifications are required to be issued by the Central Government delegating specific functions under the Act.

12. From the notification dated 22.09.1989, whereupon reliance has been placed by Mr. Bhan, it would appear that the officer authorized by the Central Government for the purpose of enforcing the provisions of the Act was specifically empowered to adjudicate upon the dispute. The said notification itself is a pointer to the fact that for the purpose of exercising the functions of the Central Government under one provision or the other, the officer concerned must be specifically empowered in that behalf. A general empowerment would, however, be permissible. Before the High

Court, no notification was filed to show that the authority concerned was empowered to prefer an appeal on behalf of the Central Government. The Central Government was not even impleaded as a party to the appeal. First Respondent did not file the appeal on behalf of or representing the Central Government. It was filed in its official capacity as the adjudicating authority and not as a delegatee of the Central Government.

13. An adjudicating authority exercises a quasi-judicial power and discharges judicial functions. When its order had been set aside by the Board, ordinarily in absence of any power to prefer an appeal, it could not do so. The reasonings of the High Court that he had general power, in our opinion, is fallacious. For the purpose of exercising the functions of the Central Government, the officer concerned must be specifically authorized. Only when an officer is so specifically authorized, he can act on behalf of the Central Government and not otherwise. Only because an officer has been appointed for the purpose of acting in terms of the provisions of the Act, the same would not by itself entitle to an officer to discharge all or any of the functions of the Central Government. Even ordinarily a quasi-judicial authority can not prefer an appeal being aggrieved by and dissatisfied with the judgment of the appellate authority whereby and whereunder its judgment has been set aside. An adjudicating authority, although an officer of the Central Government, should act as an impartial Tribunal. An adjudicating authority, therefore, in absence of any power conferred upon it in this behalf by the Central Government, could not prefer any appeal against the order passed by the Appellate Board.

The Madras High Court in Rama Arangannal (supra) opined :

. On the question as to the maintainability of the appeal, it is seen that the Explanation to Section 54 of the Foreign Exchange Regulation Act 1973 treats only the Central Government as an aggrieved party for the purpose of filing an appeal to the High Court in respect of orders passed by the Foreign Exchange Regulation Appellate Board under that section. Therefore, only the Central Government can file and prosecute an appeal against the order of the Appellate Board, and not any other authority. In this case, the appeal has been filed by the Director of Enforcement, who is the initial authority who passed the adjudication order against the respondents and whose order has been set aside by the Appellate Board on an appeal filed by them. Therefore, the Director of Enforcement cannot be said to be aggrieved by the order of the Appellate Board merely because its order of adjudication has been set aside by the Appellate Board. The Punjab and Haryana High Court in Lal Chand (supra) followed the said decision.

14. The High Court was, in our considered view, not correct to take a contrary view.

Furthermore, the jurisdiction of the High Court could be exercised only when there existed a question of law and not a question of fact. The Board, as noticed hereinbefore, arrived at a finding of fact that there did not exist any material for holding that any violation of Section 9(3) of the Act had taken place.

15. Apart therefrom the High Court was bound to take into consideration the factum of retraction of the confession by the appellant. It is now a well- settled principle of law that a confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of the conclusion deducible therefrom. [See Haricharan Kurmi etc. v. State of Bihar - AIR 1964 SC 1184; Haroom Haji Abdulla v. State of Maharashtra - AIR 1968 SC 832; and Prakash Kumar alias Prakash Bhutto etc. v. State of Gujarat - (2007) 4 SCC 266].

16. We may, however, notice that recently in Francis Stanly @ Stalin v. Intelligence Officer, Narcotic Control Bureau, Thiruvanthapuram [2006 (13) SCALE 386], this Court has emphasized that confession only if found to be voluntary and free from pressure, can be accepted. A confession purported to have been made before an authority would require a closure scrutiny. It is furthermore now well-settled that the court must seek corroboration of the purported confession from independent sources.

17. In *The Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd.* - JT 2000 (8) SC 530], this Court held :

The inculpatory statement made by any person under Section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the court in the same manner as confession made by an accused person to any non-police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted officer must also pass the tests prescribed in Section 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in Section 24 that statement becomes useless in any criminal proceedings.

18. In the facts and circumstances of the case, the High Court, in our opinion, should not have interfered with the findings of fact arrived at by the Appellate Board; without arriving at a finding that the same was perverse or in arriving thereat, the Board ignored legal principles.

19. For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.