

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Crl. Appeal # 253-P/2017

1. Said Afzal s/o Abdul Ghafoor,
r/o Afghanistan presently Hayat
Abad Peshawar.
2. Said Essa s/o Sadr ud Din,
r/o Afghanistan, presently
Kurram Agency.

Appellants (s)

Versus

The State etc

Respondents

For Appellants :-	M/S Qazi Jawad Ehsan Ullah and Sahibzada Asadullah, Advocates.
State :-	Mr. Muhammad sohail, AAG.

Date of hearing: **17.10.2017**

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This appeal filed by Said Afzal and Said Essa, the appellants, calls in question the legality and propriety of judgment dated 26.04.2017, rendered by learned Additional Sessions Judge-VII/Tribunal Under FER, Peshawar, whereby both the appellants were convicted under sections 4/23 of the Foreign Exchange Regulation Act, 1947, *(to be referred hereinafter as FER, Act 1947)*, and sentenced them to undergo 01 year R.I. and to pay a fine of Rs.1,00,000/- each or in default thereof to further undergo 02 months S.I.. Appellant Said Essa was further convicted under

section 14 of the Foreigners Act, 1946 (*hereinafter to be referred as F.A, 1946*) and sentenced to undergo 01 year R.I. and to pay a fine of Rs.10,000/- and in default thereof to further undergo 02 months S.I., in case FIR No.107 dated 30.09.2016, registered under sections 4/23 FER Act 1947 and S.14 F.A., at Police Station FIA/CBC, Peshawar. The sentences have been directed to run concurrently and benefit of 382-B Cr.P.C. has also been extended to the appellants-convicts.

2. As per facts narrated in the FIR, the prosecution case is that on 29.09.2016 at 10.00 hours, Muhammad Arif ASI (PW.5) along with other police officials, during *Nakabandi at Arbab Tapu Check-post*, intercepted Motorcar bearing Registration No.FX-274-Islamabad for the purpose of checking. On query, driver of the car disclosed his name as Hafizullah, while his companion beside him in the car, as Said Essa. On search of the car, two packets of foreign currency, containing 1249820/- Saudi Riyals, were recovered beneath the driver's seat. Both the accused failed to offer any justification for keeping in possession the recovered foreign currency, resultantly, they were taken into custody along with motorcar and foreign currency and sent to the FIA Headquarter for registration of case. During investigation, appellant-convict Said Afzal appeared before the Investigating Officer and claimed ownership of the

recovered foreign currency, hence, he was also made as accused in the case.

3. After completion of investigation, challan was submitted against the appellants and co-accused Hafeezullah before the learned trial Court, where they were formally charge-sheeted to which they pleaded not guilty and claimed trial. To prove its case, prosecution examined as many as five witnesses. After closure of the prosecution evidence, statements of the accused-appellants were recorded under section 342 Cr.P.C. wherein they denied the allegations of their dealing in the business of foreign currency, however, admitted the recovery of aforesaid foreign currency from the motorcar in the mode and manner as alleged by the prosecution. They stated that the foreign currency was the ownership of appellant Said Afzal, who sold his business in Karkhano Market, Peshawar, to one Syed Naeem, who paid him the sale consideration in Saudi Riyals. On conclusion of trial, the learned trial Court, after hearing both the sides, convicted and sentenced the appellants mentioned above, however, acquitted driver accused Hafeezullah, hence, this appeal.

4. Arguments of learned counsel for the parties heard and record perused with their able assistance.

5. It appears from the record, particularly, from the statements of the appellants recorded under section 342 Cr.P.C., that the appellants have not denied the recovery of

1249820/- Saudi Riyals, in the mode and manner as alleged by the prosecution. It is the stance of appellant Said Afzal from the very first day of registration till his statement u/s 342 Cr.P.C. that he had received the recovered foreign currency from one Syed Naeem as sale consideration in lieu of his business in Karkhano Market which he had sold to him. It appears from the record that Syed Naeem has also been cited as prosecution witness in the case and he while appearing as PW.2, has fortified the stance of appellant Said Afzal by deposing that he had paid the sale consideration of business to appellant Said Afzal in Saudi Riyals. The stance of the appellant Said Afzal was also verified by Investigation Officer, in light whereof, it has been clearly mentioned in the challan that the stamp-paper produced by appellant Said Afzal qua selling of his business in Karkhano market to PW Syed Naeem, was found as correct. An iota of evidence either documentary or oral has not been brought on record by the prosecution to prove that they were buying, borrowing from or selling or lending to or exchanging the recovered foreign currency with any unauthorized person. In this view of the matter, it is a simple case of recovery of foreign currency from possession of a foreigner in Pakistan. The first legal question which pinches the mind of this Court is whether simple possession of the appellants, would constitute an offence under section 4 of the FER, Act, 1947. For the sake

of convenience and ready reference section 4 (1) of the Act (ibid) is reproduced below:-

“Restrictions on dealing in Foreign Exchange:- Except with the previous general or special permission of the State Bank, no person other than an authorized dealer shall in Pakistan, and no person resident in Pakistan other than an authorized dealer shall outside Pakistan, buy or borrow from, or sell or lend to, or exchange with, any person not being an authorized dealer, any foreign exchange”.

Bare reading of the above quoted provision of the law clearly postulates that unless a case of **buying or borrowing from or selling or lending to or exchange with any person not being an authorized dealer**, is made out, the provision of section 4 of the Act (ibid) cannot be attracted. It is not the case of the prosecution that the appellants were buying, borrowing from or selling to or lending to or exchanging the recovered foreign currency with any unauthorized person. The controversy of keeping in possession the foreign currency, cropped up before the Sindh High Court in case titled, **“Jalil Vs the State” (1978 P Cr L J (Karachi) 155)**, wherein it was held that “Merely coming into possession of foreign exchange by itself constitutes no offence”. While placing reliance on the judgment (supra), the same view has been reiterated by another bench of the same Court in case titled, **“Muhammad Saleem Vs the State Bank of Pakistan and another” (1984 P Cr L J 2083)**, in the following words:-

“The appellant cannot be charged under section 9 of the above Act as ingredients of section 9 are missing in the charge. There is no evidence to the effect that he was authorized by a notification to deal with the foreign currency. At the best he could have been charged under section 4 which provides that no person other than unauthorized dealer shall in Pakistan and no person resident of Pakistan other than an unauthorized dealer shall outside Pakistan buy or borrow from or sell or lend to, or exchange with, any person not being unauthorized dealer, any foreign exchange. But in the present case no such charge has been made against the present appellant. I refer to case of Jalil Vs the State (1978 P Cr L J 155) in which it has been held that mere possession of foreign exchange by itself constitute no offence within the meaning of section 4 of the Act, but prosecution is bound to prove for conviction under section 9 that the accused after becoming owner of foreign exchange, failed to offer prepare, same for sell within one month from his acquisition as required under notification.”

In view of the law on the subject and deriving guidance from the judgments (supra), I, see no ground, much less convincing and plausible to change my view with the one expressed by the worthy Sindh High Court, in the judgments (supra).

6. So far as the argument of learned counsel for the appellant that the Foreign Exchange Regulation Act, 1947, cannot be made applicable to persons other than citizen of Pakistan, is concerned, in this regard it would be advantageous to refer to section 1(2) of the FER, Act, 1947, governing the extent and applicability of the Act (ibid) which read as under:-

“1. Short title, extent and commencement:

(i). This Act may be called the Foreign Exchange Regulation Act, 1947

(2) It extends to the whole of Pakistan and applies to all citizens of Pakistan and persons in the service of Government wherever they may be.

(3).....

(4).....

The argument of learned counsel for the appellants is misconceived for the reasons that the first sentence used in subsection (2) mentioned in unambiguous terms extends the jurisdiction under the said Act to the whole of Pakistan and in the ambit of territorial jurisdiction foreigners are also included. The intention of the Legislature behind this Act can be gathered by looking at the title of the Act, its preamble and other provisions. The title of the Act is “Foreign Exchange Regulation Act”. The subject-matter is very evident that the Act deals with foreign exchange and in such transactions foreigners can also be included. Preamble further envisages that this Act has been enacted keeping in view the background that it is expedient in the economic and financial interest of Pakistan to provide for the regulation of certain payments, dealings in foreign exchange and securities and the import and export of currency and bullion. It is, therefore, clear that by regulating payments, dealing in foreign exchange and securities and import and export of currency and bullion, involvement of foreigners cannot be ruled out of consideration in totality. Dissection of the above quoted

section would reveal that it consists of three parts (i) It extends to whole of Pakistan (ii) applies to all citizens of Pakistan and (iii) to the persons in the service of Government wherever they may be. The first part describes the extent of jurisdiction of the Act, which covers the whole territorial limits of Pakistan meaning thereby that wherever in the territorial limits of Pakistan any foreign currency is brought by or used by an un-authorized person whether Pakistani or foreigner, the provisions of the Act would come into play. Second clause of the section (ibid) speaks about applicability of the Act i.e. to all citizens of Pakistan, and the third part deals with its applicability to Government servants wherever they may be. If the contention of learned counsel for the appellants is given weight, it will not only defeat but must devastate the whole theme and scheme of the Foreign Regulation Act, 1947, because there would be an irrational classification between the citizens of Pakistan and foreigners, dealing in unauthorized business of foreign exchange. In other words, it shall encourage the benami business and transactions of unauthorized dealing in foreign currency, which will frustrate the intent of Legislature so much so the very purpose of the Act.

7. Secondly, this Act is made, applicable to the whole of Pakistan, that shows territorial jurisdiction and within that territorial jurisdiction foreigners are fully

covered. If the intention was to exclude the foreigners, the Legislature would have specifically said so in express terms that this law extends to the whole of Pakistan with the exception of foreigners. Another aspect is that when this law is made applicable to the whole of Pakistan, it indicates territorial jurisdiction and shall most certainly apply to all persons irrespective of their nationality, whether Pakistani or legal or illegal immigrant, rather applicable to all those who are in Pakistan including foreigners who indulge in un-authorized dealings, specifically mentioned above and if any such person whether he is a Pakistani or a foreigner, contravenes the provisions of this Act, he is liable to be proceeded against as contemplated under the Act. The word ‘and’ in subsection (2) is used in conjunctive sense and caters for additional extra-territorial jurisdiction for application of the Act to all citizens of Pakistan and person in the service of Government wherever they may be, which shows that if they are outside Pakistan this law would apply to them extra-territorially. Guidance derived from case titled, **“Nasrullah Matamaken vs the State” (1983 P Cr L J Karachi 2322).**

8. For the reasons discussed above, the appellants have rightly been proceeded under the FER Act, 1947. As discussed earlier, the prosecution has failed to prove buying or borrowing from or selling or lending to or

exchange with any person not being an authorized dealer, to constitute an offence in terms of section 4 of the FER Act, 1947, against the appellants, hence, they have wrongly been convicted and sentenced under the said section of law by the learned trial Court.

9. So far as the confiscation of the recovered foreign currency is concerned, since the appellants, particularly, Said Afzal claiming the ownership of the same, has miserably failed to furnish justifiable explanation regarding bringing into Pakistan or having its possession under license or permit by any authorized person dealing in the foreign exchange, hence, the learned trial Court has rightly confiscated the same in favour of the State under section 23 FER Act, 1947. As regards the findings of the learned Trial Court with regard to conviction and sentence of appellant Said Essa under section 14 of the Foreigners Act, 1946, are concerned, it appears from his passport that after registration of the case he validated his stay in Pakistan by obtaining proper visa, therefore, while taking lenient view, appellant Said Essa, is also acquitted of the charge under section 14 of the Foreigners Act. This appeal is partially allowed, resultantly, the judgment of the learned trial Court to the extent of conviction and sentences of the appellants along with fine is set aside. The appellants are acquitted of the charge leveled against them. However, the judgment of the learned trial

Court/Tribunal to the extent of confiscation of the foreign currency i.e. 12,49,820/- Saudi Riyals is maintained. The appellants are on bail, their bail bonds stand cancelled and sureties are absolved from the liability of their bail bonds.

Announced:

17.10.2017

Siraj Afridi P.S.

JUDGE

S.B. Mr. Justice Rooh-ul-Amin Khan.