

Lamber Singh Vs. Director of Enforcement

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Court : Appellate Tribunal for foreign Exchange New Delhi

Decided On : Jul-26-1996

Judge : Sarvesh Chandra, Chairman

Appeal No. : APPEAL NO. 140 OF 1992

Appellant : Lamber Singh

Respondent : Director of Enforcement

Advocate for Def. : Shri. Gadoo

Advocate for Pet/Ap. : Vikas Duggal for the Appellant. T.K. Gadoo for the Respondent.

Judgement :

1. This appeal together with dispensation application has been filed against the Adjudication Order No. SDE(R) V/8-12/92, dated 24-3-1992 under which a penalty of Rs. 1 lakh each has been imposed on the appellant for contravention of section 9(1)(b) and 9(1)(d) of the Foreign Exchange Regulation Act, 1973 ('the Act') on the allegations contained in a show-cause notice No. 1, dated 14-11-1990.

In his application seeking dispensation from pre-deposit of the amount of penalty the appellant has stated that he deals in sale and purchase of buffalo and does agriculture on rental basis and his annual income therefrom is about Rs. 20,000, that he is not assessed by the income-tax or wealth-tax, that he has no movable or

immovable property in India and that his cash in hand is about Rs. 6,500 and the balance in Kapurthala Central Bank was Rs. 104 at the close of business on 7-4-1992. Shri Vikas Duggal, the learned counsel for the appellant started that the appellant's financial position has gone down after he was booked under FERA and he has no means to deposit even a part of the penalty amount. Shri Gadoo, appearing for the respondents, submitted that the appellant had been doing the business of sale and purchase of buffalo apart from doing agriculture and he is not a person without any financial means. However, Shri Gadoo has not been able to produce any evidence to controvert the financial position as brought out by the appellant in his application. Shri Duggal also submitted that the appellant had a strong prima facie case to succeed in appeal inasmuch as he has not been given opportunity to cross-examine the persons whose statements have been relied on by the learned Adjudicating Officer to substantiate his findings. After hearing the parties and particularly having regard to the financial position as brought out by Shri Duggal, we decided to waive the requirement of pre-deposit and proceed with the hearing on merits. This final order disposes of the appeal.

2. It is seen from the impugned order that the finding of contravention of section 9(1)(d) on the part of the appellant is based on the incriminating documents seized from his premises. These documents include the statement of payment of amounts to several persons on instructions of one Shri Nirmal Singh, resident of United Kingdom. The seized documents also include certain letters and telegrams which indicate monetary transactions. The appellant has not disputed the Panchnama showing recovery of the said documents and the Indian currency of Rs. 48,000 from his premises. The learned Adjudicating Officer in arriving at his findings has sought corroboration from the statements of Shri Ranjit Singh, Shri Rajinder Kumar and Shri Pramod Ohri as also the appellant's own statement, all recorded under section 40 of the Act. All these persons, including the appellant, retracted their said statements. These statements were relied on in the show-cause notice issued to the appellant. The appellant contended that all the three persons being co-accused, their statements cannot be given any weightage. He also sought cross-examination of these persons, which was denied on the ground that all the three persons already retracted their statements and, therefore, cross-examination would have been an exercise in futility. It appears that the appellant

also sought cross-examination of certain persons to whom he had allegedly made the payments in violation of section 9(1)(d).

3. In our opinion, the learned Adjudicating Officer has rightly rejected the prayer for the cross-examination of the three co-accused for the reason that they had already retracted their statements. The effect of retraction obviously was as if there was no testimony of these persons in relation to the charge against the appellant, though it might have been relevant for the purpose of charges against these co-accused, depending on whether the retraction is accepted or rejected. Insofar as the retraction by the appellant of his own statements recorded under section 40 is concerned, it is to be seen whether the retraction or denial is justified and sustainable and if sustainable, whether it can be in respect of the entire statements or only some part of which, because it is not always the case that the entire statement recorded under section 40 has to be rejected, once it is retracted. It has to be seen, in the facts and circumstances of each case, as to whether the whole or any part of the statement can be considered to be a voluntary disclosure of facts and whether, the facts so disclosed can be believed to be true.

4. Keeping the above approach in view we find that in the present case, the appellant has not disputed the Panchnama, i.e., that the recovery of incriminating documents and the Indian currency from his premises.

He elaborated the contents of these documents during interrogation and took the Investigating Officer to the persons to whom he has distributed various amounts in violation of section 9(1)(d) and those persons also confirmed having received those amounts from the appellants. Even if the statement of the recipient of the amount is excluded, the fact remains that the appellant till date has not given any other explanation in respect of the seized documents than that purported to have been given to the department in his statement under section 40. Therefore, the mere retraction of the whole statement cannot have the effect of obliterating the evidence of section 40-statement in its entirety. In our opinion, for substantiating the charge of contravention of section 9(1)(d), the learned Adjudicating Officer was justified in relying on the statement insofar as it relates to the details of distribution of various amounts in violation of that section. In view thereof, we have no

hesitation in upholding the findings of contravention of section 9(1)(d) on the part of the appellant. While upholding this finding we are not taking into consideration the evidence of the statements of other persons from which the learned Adjudicating Officer has sought corroboration of his findings. We intend to express no opinion in respect of those statements because in our opinion the charge of contravention of section 9(1)(d) can be squarely sustained on the basis of the incriminating documents recovered from the appellant's premises and as explained by him.

5. As regards the charge of contravention of section 9(1)(b), namely, of having received various payments on behalf of Nirmal Singh of United Kingdom for onward distribution to various persons in India in violation of section 9(1)(d), the charge has been sustained on the basis of confirmatory statements made by ultimate recipients. However, even if that statement is excluded, it cannot be disputed that the appellant did make various payments, as alleged, in violation of section 9(1)(d). It is obvious that he could not have been able to make those payments unless he has received the amounts for onward distribution as he has neither averred nor led any evidence to show that the amount delivered or given to the various recipients was his own. In his statement under section 40, he had admitted that various amounts sent by Nirmal Singh of U.K. had been delivered to him from time to time for onward distribution. It is immaterial as to who delivered those amounts insofar as the charge of contravention of section 9(1)(b) on the part of the appellant is concerned. What is material is that the amount delivered to him was not remitted by Nirmal Singh through proper banking channel and he received those amounts in violation of section 9(1)(b). In the adjudication process under section 51, it is not necessary that the evidence on record be such as to substantiate each element of the charge with mathematical precision. In our opinion once the circumstances or other evidence are found to be adequate to lead to the conclusion that the amounts have been received in contravention of section 9(1)(b), it is not necessary to furnish such particulars as that of the person who had actually delivered the amounts, the date and time and the place at which and the various denominations in the currency of which the amounts were delivered, though, no doubt, the evidence of such particulars would further strengthen the conclusion. Since the finding of payment of the various amounts in

violation of

section 9(1)(d) has been established, we have no hesitation in holding that part of appellant's statement under section 40 as voluntary and true where he states about the receipt of those amounts. In view thereof, we are inclined to uphold the finding of contravention of section 9(b) on the part of the appellant.

6. As regards confiscation of the amount of Rs. 48,000, the sole evidence of the seized amount being connected with the contravention of section 9(1)(b) is the statement of the appellant recorded under section 40 of the Act. Let us see what the statement says in this regard. The relevant portion of the free english translation of the statement written in Gurumukhi is as follows :

"I further state that I have to make one payment yet of Rs. 44,000 to a person whose name is Banso. Shri Nirmal Singh wrote to me that Smt. Banso will collect payment from me at my village. She has not come yet. I have received instructions regarding this one month back. Out of the seized Rs. 48,000¹ was to make payment of Rs. 44,000 to Smt. Banso. This all the amount of Rs. 48,000¹ received on the instructions of Shri Nirmal Singh."

Since the statement was retracted, it was, in our opinion, the duty of the Adjudicating Officer to consider whether this part of the statement could be believed to be voluntary and true. The Investigating Officer did not enquire anything from the appellant about the said Smt. Banso. He did not enquire as to how he received the said amount of Rs. 48,000 - whether it was delivered to him at his village, like the amount received by him on other occasions, or, whether it was collected by him at the studio of Singh's brother. It is seen from his statement that he had been maintaining bank accounts of himself and of Nirmal Singh. There is nothing in the statement to show as to why he was keeping the amount, which was quite substantial, at this place, whereas he received the alleged instructions one month back. The Adjudicating Officer ought to have appreciated that it is for the department to establish the nexus to show, by appropriate evidence that the said amount was received in contravention of section 9(1)(b) because there is no provision in the Act that the department was entitled to presume from the mere possession, even of unaccounted Indian currency, that the amount is connected

with the contravention of the Act. A presumption, which is rebuttable, is available only in respect of foreign currency under section 71(3). Therefore, the fact that the appellant gave an explanation about the said amount of Rs. 48,000 after the seizure of the account led the learned Adjudicating Officer to draw an inference that the amount was connected with the contravention of section 9(1)(d). In our opinion, the department has not been able to produce adequate evidence to establish without any doubt that the said amount was the amount connected with the contravention of section 9(1)(d) and in our opinion, the appellant is entitled to the benefit of doubt in regard to that amount. In view thereof, we find it difficult to sustain the order of confiscation of the said amount.

7. In view of the above, we are not inclined to interfere with the finding of contravention of section 9(1)(b) and 9(1)(d) on the part of the appellant. However, the order of confiscation is liable to be set aside.

8. As regards the quantum of penalty, Shri Duggal submitted that the appellant is a poor tenant and sharing the agricultural produce with the owner of land. The income from sale of buffalo is not regular and not adequate to save much money. He pleaded, therefore, that the quantum of penalty is too excessive to enable him to pay the amount. He also stated that the sum of Rs. 48,000 has already been seized by the department and that it is clear from the facts as relied on by the Adjudicating Officer that the appellant is merely a carrier and, therefore, the quantum of amounts allegedly distributed by him in violation of the Act has nothing to do with his personal financial position. We find merit in the submissions made by Shri Duggal, though Shri Gadoo has argued that the appellant was a part of the team of persons involved in large scale violations of FERA provisions and deserves no leniency. In our opinion, in spite of the gravity of the charge, it is not the intention of the law to disregard the financial capacity of the person while determining the quantum of monetary penalty, particularly in view of the fact that the Act itself contains an additional mechanism to proceed against a guilty person by initiating criminal prosecution under section 51, particularly where the monetary penalty is not considered adequate to fully punish the guilty person. It is also necessary to bear in mind that though the charges of violation of section 9(1)(b) and section 9(1)(d) are independent of each other, yet in the facts and

circumstances of this case, the two transactions, of receiving and making payments are in the nature of two faces of the same coin. In view thereof, in our opinion, it would be adequate to impose penalty only for contravention of section 9(1)(d). For the reasons discussed, the penalty of Rs. 70,000 (Rupees Seventy thousand) would be adequate to meet the ends of justice.

9. In the result, the appeal is partly allowed. The findings of contravention of sections 9(1)(d) and 9(1)(b) are upheld but the amount of penalty is reduced from Rs. 1 lakh for each contravention to Rs. 75,000 only. The order of confiscation of Rs. 48,000 is set aside. The respondents shall be entitled to treat the amount of Rs. 48,000 already with them as part payment of the penalty amount. The appellant is directed to pay the balance amount of penalty of Rs. 27,000 within 45 days of the receipt of this order failing which the respondents shall have the liberty to recover the said amount of Rs. 27,000 being the balance amount of penalty, in accordance with the law.

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