

Prem Singh Vs. Special Director, Enforcement Directorate

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Court : Delhi

Decided On : Apr-24-2014

Judge : S. Muralidhar

Appellant : Prem Singh

Respondent : Special Director, Enforcement Directorate

Advocate for Pet/Ap. : Mr. S.S. Gandhi, Mr. Akshay Anand

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 276 of 2008 PREM SINGH Appellant Through: Mr. S.S. Gandhi, Senior Advocate with Mr. Akshay Anand, Advocate. versus SPECIAL DIRECTOR ENFORCEMENT DIRECTORATE Through: None. Respondent With CRL.A. 277 of 2008 RAJENDER SINGH Appellant Through: Mr. S.S. Gandhi, Senior Advocate with Mr. Akshay Anand, Advocate. versus SPECIAL DIRECTOR ENFORCEMENT DIRECTORATE Through: None. Respondent And CRL.A. 278 of 2008 TARLOCHAN SINGH Appellant Through: Mr. S.S. Gandhi, Senior Advocate with Mr. Akshay Anand, Advocate. versus SPECIAL DIRECTOR ENFORCEMENT DIRECTORATE Through: None. Respondent CORAM: JUSTICE S.MURALIDHAR

ORDER

2404.2014 1. These appeals are directed against the common order dated 30 th November 2007 passed by the Appellate Tribunal for Foreign Exchange (AT)

dismissing the Appeal Nos. 618 of 2005, 619 of 2005 and 620 of 2005 thereby confirming the adjudication order (AO) dated 13 th June 2005 passed by the Special Director (SD), Directorate of Enforcement (DoE) holding that the Appellants had contravened Sections 8(1) and 8(2) of the Foreign Exchange Regulation Act, 1973 (FERA) and imposing a total penalty of Rs. 50 lakhs on the Appellant, Prem Singh (Appellant in Criminal Appeal No.276 of 2008), and a penalty of Rs. 10 lakhs each on the Appellants, Rajendra Singh (Appellant in Criminal Appeal No.277 of 2008) and Tarlochan Singh (Appellant in Criminal Appeal No.278 of 2008).

2. A raid was undertaken by the officials of the Enforcement Directorate (ED) in the intervening night of 6th/7th March 1991 at the residential premises of Prem Singh at S-291, Greater Kailash, Part-II, New Delhi resulting in the recovery and seizure of Indian currency of Rs. 20,36,000 and some documents. It was stated that during the course of the raid, the Appellant, Rajendra Singh, son-in-law of Prem Singh was also present. He too was searched under Section 34 FERA. The search resulted in the seizure of some documents including Indian currency Rs.

1750. When the car of Rajendra Singh was searched some documents were recovered from the brief case belonging to him. His residential premises at J-209, Saket, New Delhi was also searched on 6th March 1991 resulting in the seizure of Indian currency of Rs. 80,000 and certain documents. Searches were also undertaken at the residential premises of Mr. Hanwant Singh father of Tarlochan Singh @ Bittoo at JG-3/81-C, Vikaspuri.

3. Rajendra Singh is stated to have made a statement on 7 th March 1991. When he was asked to explain about the seized documents recovered from the residence of Prem Singh, he denied knowing about the said documents. As far as Prem Singh and Tarlochan Singh were concerned, it is stated that they were avoiding appearance to the summons under Section 40 FERA. They finally appeared before the ED on 17 th/18th December 1991. According to Tarlochan Singh, whatever Prem Singh is stated to have admitted in his statement on 17 th/18th December 1991 about their illegal dealings in foreign exchange were true and correct. The entries written against Bittoo on the reverse of page 3, 7 and 11

of the bunch of loose sheets seized from the residence of Prem Singh showed that he had purchased/sold foreign exchange for Tarlochan Singh at the rates of Rs. 22.30 and Rs. 25 per dollar which was different from the rates prescribed by the Reserve Bank of India (RBI) to the extent of Rs. 19,60,520. Prem Singh is stated to have confessed that the Indian Currency of Rs. 20,36,000 seized from his residence on 6 th March 1991 was the sale proceeds of foreign exchange sold by him and this was without the permission of the RBI. He is stated to have confessed that from January 1991 to 6th March 1991 he had purchased and sold foreign exchange worth Rs. 1.5 crores.

4. Rajendra Singh filed a statement before the learned Additional Chief Metropolitan Magistrate (ACMM) on 8th March 1991 itself stating that he had been subjected to torture and threatened that if he did not make a statement in writing as per the decision of the ED, they would implicate his wife in this recovery and put her behind bars. The other two appellants, Prem Singh and Tarlochan Singh, by separate communications dated 18th December 1991 retracted their respective statements on the ground that they were obtained under coercion and threats.

5. The entries in the bunch of loose sheets recovered from the residence of Prem Singh, on which the ED placed reliance, were admittedly not in English or Hindi. The ED did not translate them. Reliance was entirely placed on the purported explanation of the writings on the loose sheets by Prem Singh in his statement under Section 40 FERA which was in Hindi. Interestingly Prem Singh denied that he could write in English or Hindi and maintained that he was mentally tortured by the officials of the ED. He denied that the writings on the loose sheets were his.

6. The entire case of the ED revolved around the entries on the loose sheets as is evident from the perusal of the memorandum and showcause notice (SCN) dated 3rd March 1992 issued to the Appellants. It was alleged therein that they had without the permission of the RBI purchased and sold foreign exchange totalling Rs. 1.5 crores and thus contravened Sections 8 (1) and 8 (2) FERA read with Section 63 FERA.

7. In reply to the SCN each of the Appellants had denied violation of the provisions of FERA. They pointed out that besides the entries on the loose sheets there was

no evidence and that their retracted statements under Section 40 FERA could not be relied upon.

8. A perusal of the impugned AO dated 13 th June 2005 showed that learned counsel for the Appellants had asked for cross-examination of the officials of the ED. This request was declined by the SD for the following reasons:

15.2 As regards counsels demand for cross-examination of officers and co-noticees, I find that documents/ statements relied upon have been furnished to the noticees and they were given adequate opportunity by way of personal hearing over the years as well as for written replies/submissions etc. The noticees had sufficient time and opportunities to defend their case. It is an established legal position that in quasi-judicial proceedings, the opportunities of cross-examination cannot be claimed as a matter of right. The ends of justice would be met by furnishing the statements/documents to the notice to facilitate them to defend their case. In view of above, I do not find it necessary to allow cross-examination of officers/co-noticees as sought by the advocate as it would tantamount to further delay in finalizing the proceedings. Accordingly, I reject the said request.

9. The AO proceeded to rely upon the retracted confessional statements of Prem Singh and Tarlochan Singh and held that three Appellants had contravened Sections 8 (1) and 8 (2) FERA. They were levied penalties as noted earlier. The money seized from the residences of the Appellants was directed to be confiscated under Section 63 FERA.

10. Appeal Nos. 618 of 2005, 619 of 2005 and 620 of 2005 filed by the Appellants were dismissed by the AT by the common impugned order dated 30th November 2007. Relying on the decision of the Supreme Court in KTMS Mohamed v. Union of India (1992) 3 SCC178 the AT held that the retracted confessional statements could only be relied upon since there was other corroborative evidence. As regards the rejection of the request for cross-examination, the AT held that neither the recovery of the currency from the residence of the Appellants nor the ownership thereof was disputed. Therefore, the SD was justified in rejecting the request. The AT further held that the non-supply of the English translation of the entries in Pushto in the bunch of loose sheets did not result in violation of the

principles of natural justice since the author of the document is none other than the Appellant Prem Singh himself.

11. While admitting the appeals against the impugned order of the AT, this Court stayed the operation of the impugned orders after noting that 25% of the respective penalty amounts had already been deposited before the ED by the appellants.

12. One other development that had taken place during the pendency of these appeals was that in the criminal proceedings initiated against them under Section 56 FERA, the Appellants were discharged by an order dated 2nd November 2012 of the learned ACMM. In the said order it was noted by the learned ACMM that the writings on the loose sheets were mostly in the Gurmukhi language which did not signify anything in respect of transactions of foreign exchange. It was noted that the ED had failed to produce the translation of these documents in Hindi or in English in order to show that such inscription was made by Prem Singh in the documents or that they actually related to the transactions of foreign exchange. The learned ACMM also noted that the ED had failed to prove the so-called voluntary statements of the Appellants under Section 40 FERA in accordance with law. It was held that the ED had failed to produce any material against the Appellants to establish that they had entered into foreign exchange transactions. In that view of the matter, the Appellants were held entitled to be discharged.

13. This Court has heard the submission of Mr. S.S. Gandhi, learned Senior counsel for the Appellants. Although none appeared for the ED despite a pass over, this Court has perused the replies filed by the ED in the present appeals.

14. The ED appears to have relied essentially upon the retracted confessional statements of Prem Singh and Tarlochan Singh which purportedly explained the writings on the loose sheets. While the documents were in Gurmukhi language as noticed by the learned ACMM in the order dated 2nd November 2012. The fact of the matter remains that those writings were not translated by the ED either into Hindi or into English in order to show that they pertained to transactions of buying and/or selling foreign exchange. Significantly, no foreign exchange was recovered during the raids of the residences of the Appellants.

15. The first issue that arises is to what extent could the ED rely on the retracted confessional statements of Prem Singh and Tarlochan Singh?. Rajendra Singh made no confession as regards the foreign exchange transactions. In terms of the law explained by the Supreme Court in *KTMS Mohamed v. Union of India* if confessional statements were retracted, the SD was required to examine whether the claim of the three Appellants that they were coerced into making those statements, was credible. In the said decision, the Supreme Court observed:

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 his obligations in at least subjectivity 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.

16. Further, in *Telstar Travels Private Limited v. Enforcement Directorate* (2013) 9 SCC549 it was held that the burden is on the authority/prosecution to show that the statement sought to be relied upon was voluntary and that the Court while examining the voluntariness of the statement is required to consider the attending circumstances and all other relevant facts.

17. Recently in *Shahid Balwa, Vinod Goenka v. Directorate of Enforcement* 201 (2013) DLT211(DB) the Division Bench of this Court has explained the legal position in regard to request for cross-examination by a noticee in proceedings initiated under the Foreign Exchange Management Act, 1999 (FEMA) as under:

29. The legal position that would follow is that normally if the credibility of a person who has testified or given some information is in doubt or if the version or the

statement of the person who has testified is in dispute normally right to cross-examination would be inevitable. If some real prejudice is caused to the complainant, the right to cross-examine witnesses may be denied. No doubt, it is not possible to lay down any rigid rules as to when in compliance of principles of natural justice opportunity to cross-examine should be given. Everything depends on the subject matter. In the application of the concept of fair play there has to be flexibility. The application of the principles of natural justice depends on the facts and circumstances of each case.

18. The impugned order of the AO fails to discuss this aspect although it has noticed the submission of learned counsel for the Appellants that the said statements had been retracted as they had been given under threat and coercion. In order to determine whether the claim of the Appellants that they were subjected to torture, threat and coercion was a credible one, the SD ought to have permitted the Appellants to cross-examine the officers of the ED who recorded the statements. As regards Prem Singh, his statement is stated to have been recorded by A.K. Narang, Assistant Director. The statement of Rajendra Singh was recorded by Devender Malhotra. Neither of these officers was tendered for cross-examination. In the considered view of the Court, in the context of the specific allegation that the retracted confessional statements were obtained under torture and coercion, that aspect ought to have been examined by the SD. In the circumstances, the reasons given by the SD in the impugned AO for disallowing the request of the Appellants for cross-examination of the ED officials only because it would tantamount to further delay in finalizing the proceeding were not tenable or justified. The denial of cross-examination of the ED officials by the Appellants indeed has caused them severe prejudice since the ED was relying on the said statements as if they were by themselves substantive evidence.

19. In light of the legal position explained in the decisions noted hereinbefore, the Court is of the view that in the present case there was miscarriage of justice in denying the request of the Appellants for cross-examination of the ED officials. Allowing the request would have enabled the SD to determine whether the claim that the confessional statements were recorded under threat and coercion was credible.

20. The law explained by the Supreme Court in *KTMS Mohamed v. Union of India* and the subsequent decision in *Telstar Travels Private Limited v. Enforcement Directorate* is that a retracted confessional statement could be relied upon as long as it is corroborated by other evidence. In the present case the Court finds that the ED had failed to place before the SD any credible or reliable corroborative material other than the notings on the loose sheets which were not translated. The entire AO as well as the impugned common order of the AT proceeded on the basis that the retracted confessional statements could be used as substantive evidence. This again was a serious legal infirmity which vitiates the impugned AO and order of the AT.

21. Although the mere discharge of the Appellants in the criminal proceedings will not ipso facto result in their being exonerated in the adjudication proceedings, it is significant that even in the criminal proceedings the ED was unable to prove the so-called confessional statements of the Appellants under Section 40 FERA in accordance with law. A perusal of the original records shows that only the photocopies of the loose handwritten sheets are available. The originals of the Section 40 statements have not been marked as exhibits by examining the persons who recorded them.

22. The AT also erred in proceeding on the basis that the failure to supply English translations of the seized documents was not violative of natural justice since the author of the documents was Prem Singh. The writings on the loose sheets were in Gurmukhi and not Pushto as thought by the ED during the adjudication proceedings. If reliance was going to be placed on the said loose sheets, then surely they ought to have been translated if they had to corroborate the retracted statements of Prem Singh and Tarlochan Singh.

23. For the aforesaid reasons, this Court is of the view that the impugned common order dated 30th November 2007 of the AT as well as the AO dated 13th June 2005 of the SD cannot be sustained in law. They are accordingly set aside.

24. The Appeals are allowed but in the facts and circumstances of the case, with no orders as to costs. The amounts deposited by the Appellants and money seized by the ED and confiscated under Section 63 FERA shall be refunded to the

Appellants in accordance with law within a period of eight weeks from today. S.
MURALIDHAR, J.

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