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Court : Delhi

Decided On : May-05-1993

Reported in : [1995]83CompCas663(Delhi); 1994CriLJ1699; 51(1993)DLT133; 1993(26)DRJ379; 1995(50)ECC131

Judge : R.L. Gupta, J.

Acts : Foreign Exchange Regulation Act, 1973 - Sections 2 and 9(1)

Appeal No. : Criminal M(M). No. 929 of 1993

Appellant : Ravi Singhal

Respondent : Union of India and Another

Advocate for Def. : S.P. Ahluwalia, Adv.

Advocate for Pet/Ap. : D.C. Mathur and; Y.K. Jain, Advs

Judgement :

R.L. Gupta, J.

1. After remaining unsuccessful before the learned Additional Chief Metropolitan Magistrate (ACMM) and the learned Additional Sessions Judge, (ASJ), New Delhi, the petitioner has approached his court for grant of bail.

2. The brief facts appearing for the prosecution of the petitioner by the Enforcement Directorate under the Foreign Exchange Regulation Act, 1973 ('FERA' for short) are that during the course of enquiries under the FERA, the Department came to know that the petitioner was collecting payments in India on behalf of one Keith Fair Brother (Keith for short) of Eastern Suburbs Ltd. of the United Kingdom and had been receiving communications in this regard from him. He introduced him to U. K. Paints Industries, New Delhi, and received payments in the form of drafts on behalf of Eastern Suburbs from U.K. Paints and handed the same over to Keith. It is further alleged that there are four drafts dated october 12, 1991, of the Punjab and Sind Bank, New Delhi, favoring Eastern Suburbs Ltd. for to total amount of Rs. 36,96,443 and one draft of the same date of the State Bank of India, New Delhi, favoring the same company for Rs. 47,39,500. These drafts were deposited in the Standard Chartered Bank, Manchester who sent the same from Manchester to the Punjab and Sind Bank and the State Bank of India, both at Madras with advice to remit the proceeds in the Standard Chartered Bank, Bombay, for onward credit to the account of its Manchester Branch. The proceeds after collection from the Delhi bankers were accordingly credited in the Vostro account of the Standard Chartered bank, Manchester. During further enquiries it was also revealed that the aforesaid drafts had been purchased by U.K. Paints. The department interrogated K. S. Dhingra, president, G. S. Dhingra, vice president and Prem Narain Kapoor, director of U.K. Paints in February, 1993, and recorded their statements wherein they stated that the petitioner had brought Keith to them and told them Keith could provide export orders from Russia in case commissions is paid to Keith. They agreed on certain terms and conditions as follows :

1. 2.25 per cent. commission payable by Eastern Suburbs to Keith on export orders.

2. Commission was payable in the shape of bank drafts as per details to be provided by the petitioner and also to be handed over to him.

3. The aforesaid five drafts were the amount of commission for Keith, which were handed over to the petitioner by U.K. Paints. Some more documents were

collected from U.K. Paints which, according to the prosecution, make mention of these drafts having been received by the petitioner. Thereafter, the business and the residential premises of the petitioner were subjected to search on February 15, 1993. Some incriminating documents were allegedly removed from his business premises. Summons was issued under section 40 of the FERA to the petitioner for February 17, 1993, but he was reported to be abroad. The petitioner appeared before the Enforcement Officer on April 13, 1993. Perusal of his passport showed that he came to India on March 31, 1993, on a passport other than the one on which he travelled from India. It was also found from the passport that the obtained visa for U.K. at Russia. Despite a red alert he had crossed the airport. The statement of the petitioner was recorded where he is alleged to heave stated that the introduced Keith to U.K. Paints and further that he received the aforesaid drafts on behalf of Keith and handed over the same to him. The passport of the petitioner further indicated that the had gone abroad immediately after October 12, 1991, the date on which he had received the drafts. thereforee, according to the case of the department, the petitioner by receiving payments under instructions from and on behalf of Keith, a person resident outside India and by giving the same to him had violated the provisions of section 9 of the FERA. He was arrested on April 13, 1993, and produced before the duty Magistrate on April 14, 1993. Simultaneously an application for interim ail was moved on behalf of the petitioner before the duty Magistrate who directed that the application be put up before the court convened, i.e., the court of ACMM, New Delhi, on April 15, 1993, and till the he remanded him to judicial custody. I further appears that hereafter another application was moved before the duty Magistrate praying that the bail application was moved before the duty Magistrate praying that the bail application may be directed to be heard on the same day because the petitioner was suffering from chest pain. The application thereafter was heard by the ACMM on the same day with the consent of Sh. S. P. Ahluwalia, PP for the Enforcement Directorate and Sh. P. K. Rai, Assistant Director. The ACMM after hearing the parties directed on that date that the petitioner may be admitted to Sumit Clinic. Vasant Vihar, New Delhi, under judicial custody immediately and be produced on April 15, 1993, at 2 p.m. when his bail application will be heard on the merits. By a detailed order dated April 19, 1993, the prayer for interim bail on medical grounds was declined because, according to learned ACMM the petitioner himself admitted having taken away the five drafts of the total value of more than Rs. 84 lakhs and handing over the same to Keith, and further that the petitioner had gone abroad more than 30 times during the last 25 months and if he was actually keeping indifferent health there was no reason for him to have gone abroad so frequently. So taking into consideration the gravity of the offence, the interim bail was declined. Thereafter, the prayer for regular bail was also declined by the learned ACMM, vide order dated April 21, 1993. The petitioner then approached the learned ASJ who also, vide order dated April 28, 1993, showed reluctance to grant bail and rejected the application.

4. I have heard arguments at length on behalf of learned counsel for the parties. The first contention is that in the background of the facts and circumstances disclosed by the department, there was actually no prima facie case against the petitioner and he was being victimised, being a direct nephew of Shri Ashok Singhal, a leader of Vishwa Hindu Parishad (VHP). Since according to the prosecution the petitioner is guilty under section 9 of the FERA, and arguments have been addressed by both sides with reference to that provision, it is necessary to extract its relevant portion which is as follows :

'9. Restrictions on payments. - (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 -

(a) make any payment to or for the credit of any person resident outside India;

(b) receive, otherwise than through an authorised dealer, any payment by order or on behalf of any person resident outside India.

Explanationn. - For the purposes of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised dealer) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised dealer;

(c) draw, issue or negotiate any bill of exchange 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 favor of any person 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;

(e) place any sum to the credit of any person resident outside India;

(f) make any payment to, or for the credit of, any person or receive any payment for, or by order or on behalf of, any person as consideration for or in association with,- .....

(g) draw, issue or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment is created or transferred in favor of any person as consideration for or in association with any matter referred to in clause (f) ...'

5. It is contended on behalf of the petitioner that a comparison of clauses (a) and (c) of section 9 shows that payment to any person resident outside India is different form drawing or issuing a bill of exchange, i.e., a cheque or a draft, so that a right to receive a payment is created or transferred in favor of any person resident outside India. In other words, the argument further goes, simply because there is a separate mention of drawing and issuing the drafts, as in the present case, to a person outside India, it would not be payment by itself to or for the credit of any person resident outside India. In such a situation, it is argued, that it is the drawer or issuer of the cheque to person resident outside India who will be guilty of the commission of the offence under section 9, if it is done without obtaining the special or general exemption from the Reserve bank. Learned counsel further contended that the mere transfer of the drafts either through post or through any other person to a person resident outside India does not amount to making any payment to or for the credit of any person resident outside India because the

offence is complete merely by the drawing and issuing of the drafts. thereforee, payment under sub-clauses (a) and (b) of section 9 of the FEAR means, the actual payment in cash or by crediting the account of a person. BY mere handing over of a bill of exchange including a draft, only a right to receive payment in favor of the person in whose name it is issued, is created and it does not amount to making any payment to such person. By the mere receipt of a draft from U.K. Paints, it is argued, the petitioner has not committed any offence. Learned counsel for the department has vehemently refuted the arguments on behalf of the petitioner in this respect and has submitted that according to section 9 of the FERA, if it is shown by the prosecution that the petitioner received the drafts on behalf of keith, a person resident outside India, otherwise than through an authorised dealer and without caring to find out if there was any such exemption granted by the RBI in favor of Keith either conditionally or unconditionally, the petitioner was guilty under the said provision. He submitted that the Explanationn appended to section 9 was newly added to counter the mischief of the compensatory payment received from intermediaries through the medium of bank drafts which were earlier explained, not to be covered by clause (b) as the banks are authorise dealers. So, according to him, the Explanationn clarifies that unless there is a corresponding inward remittance from a place outside India the payment will be considered to have been received otherwise than through an authorised dealer although in fact the payment has been received through the authorised dealer. The Explanationn, thus, so contends learned counsel for the Enforcement, is aimed at roping in the compensatory payments received by a person in India from another person through bank drafts taken out by the carriers of money sent from abroad.

6. For determination of the rival contentions, it is now necessary to cull out the ingredient of section 9 of the FERA to find out whether the petitioner is prima facie shown to be guilty of the commission of the offence with reference to which investigation is going on. In this respect, it may by noted that it is not the intention of this court to give a final verdict at this stage because the investigation is still in its infancy and it is not the final stage after trial. It is begin judged only with respect to the allegations made against the petitioner at this stage and what ultimately happens after trial, cannot be predicted. The essential ingredients for applicability of section 9 appear to be as follows :

(i) No person in or resident in, India, to receive any payment by order or on behalf of any person resident outside India.

(ii) The receipt should not be otherwise than through an authorised dealer.

(iii) There is no generator special exemption, conditional or unconditional, granted by the Reserve Bank from the applicability of the provisions of this sub-section, i.e., sub-section (1) of section 9.

7. It is not the case of the petitioner that he is not a person not resident in India. thereforee, we must proceed on the premises that he is a person resident in India. According to the case of the prosecution, the petitioner received drafts for and on behalf of Keith, a person resident outside India. If the petitioner is shown to have received certain payments on behalf of a non-resident, he must show that there was a general or special exemption in favor of Keith, granted conditionally or unconditionally by the Reserve Bank, and further that the payment was received through an authorised dealer. If the petitioner is able to prove these factors, he may not be held guilty. Unless the petitioner is able to rebut all these presumptions and once he is shown to have received payments on behalf of a nonresident, he may be prima facie guilty of the violation of section 9 of the FERA. In this respect the contention of the learned counsel for the petitioner is that unless there was payment in actual cash or by crediting the account of a person resident outside India, no offence can be deemed to be committed because there is no separate provision in this section which makes liable the receipt of a draft or a bill of exchange covered by clause (c). Prima facie it is not possible for me to subscribe to the contention of learned counsel for the petitioner. The FERA, according to the preamble in the Act itself, is an Act for regulating certain payments, dealings in foreign exchange and securities transactions indirectly affecting foreign exchange, the import ad export of and bullion, currency for the conservation of the foreign exchange resources of our country and their proper utilisation in the interests of the economic development of the country. To keep effective control on the aforesaid transactions, currency is defined in section 2 of the FERA. It is an inclusive definition. It includes all coins, currency notes, bank notes, postal notes, postal orders, money orders, cheques, drafts, traveller's cheques, letters of credit,

bills of exchange and promissory notes. It is, thereforee, apparent that for the purposes of regulation of payments under this Act, currency not only means coins, notes, etc., but even cheques and drafts. Parliament in its wisdom, thereforee, by including drafts in the definition of currency can well be imputed with the intention that even without actual realisation of any bill of exchange like cheques, letters of credit, etc., they still remain within the domain of currency. thereforee, the argument that without actual realisation of the drafts alleged to be taken by the petitioner on behalf of Keith, handing over the same to him and without the credit of the actual proceeds of the drafts in the Vostro account for the benefit of Keith, the petitioner cannot be held guilty of any violation seems to be prima facie without force. Learned counsel for the petitioner also drew my attention to the case of Brijendra Kumar Banerjee v. Sirish Chandra Chatterjee, : AIR1954 Cal459 , in order to support the same argument. The facts of this case were that the respondent landlord filed a suit for ejectment against the appellant tenant on the basis of three consecutive defaults committed by the tenant. There were agreed blocks of two months each and it appears that if the tenant was in default of three units of two months each, he was liable to be ejected. There was no dispute regarding defaults of the units of two months each and the main dispute was with regard to the default of the third unit. The tenant had paid rent by cheque for November, 1951, on December 27, 1951, which was not credited to the account of the landlord till January 5, 1952. The Munsif did not hold default regarding the third unit of two months and dismissed the suit. The District Judge reversed the judgment and decreed the suit. Allowing the appeal, the High Court held, 'A debtor is required under the law to pay the creditor in current coins of the realm. A payment by cheque to the Rent Controller to the credit of the landlord is not payment in such current coins of the realms till the cheque is actually cashed into current coins and the cash is put into the landlord's account. 'I am afraid, the analogy of payment by cheque, unless encashed, as may be available with reference to the Rent Control Act may not be applicable to the provisions of the FERA because it is specifically provided in the definition of currency in section 2 of the FERA that the cheques, drafts, etc., are also currency which in the language of the aforesaid ruling may be equated with current coins of the realm. The FERA enlarged the definition of currency to such an extent for purposes of this Act that it included cheques, drafts and even letters of credit, etc., within its fold. thereforee, the learned ASJ before whom also this contention was raised seems to have rightly repelled it.

8. The next contention raised on behalf of learned counsel for the petitioner is with regard to principles for grant or refusal of bail. Learned counsel contended that the maximum sentence which can be imposed upon the petitioner under section 56 of the FERA for violation of section 9 is seven years and fine. Another thing pointed out is that it may not be possible for the FERA Department to conclude investigation in this case within sixty days for which maximum period the petitioner can be kept in judicial custody. The offence, if any, according to learned counsel, is only of a technical nature because he is just alleged to have passed on the drafts of Keith. The main accused persons like the officers of U.K. Paints or Keith have not yet been arrested. It is also a case in which the petitioner is not likely to flee from justice because he is a leading man in the field of computers and he is not even shown to have derived any benefit in the deal. It is further contended that he will not even be in a position to travel abroad now because his passport has been seized. So he may be allowed bail subject to imposition of certain conditions. On the other hand it is contended on behalf of the department that the investigation in this case is at a very initial stage and if the petitioner is allowed bail now, he is likely to hamper the course of investigation by alerting his contacts. It is also contended that according to the evidence collected so far the amount of commission due to Keith was more than Rs. 2 crores and till now the department could lay its hands only on transactions totalling about Rs. 84 lakhs. Since the department had yet to dig out the deals regarding the balance amount of commission payable to Keith, which U.K. Paints might have passed on to Keith through the petitioner, there is likelihood of a setback to the investigation. It is also refuted if the offence is of a technical nature because the petitioner was instrumental in handing over the drafts to Keith under agreed terms. It is further contended that the reasons for not arresting the officers of U.K. Paints till now are that they were co-operating with the investigation and only because of the information supplied by them this racket could be unearthed. The department, thereforee, did not hasten to arrest them. The reason for not arresting Keith was that till now his particulars were not available and since the same are now known

during investigation, steps for his arrest will be taken. It is also contended that the pass-port of the petitioner showed that during the last two years, he had gone abroad 34 times and it was still to be checked where and for what purpose he had gone. I have given my careful consideration to all the various factors narrated above for the grant or refusal of bail. The learned ASJ has rightly observed that the fact of the petitioner being highly connected was being blown out of proportion by the prosecution as well as the media with a view to prejudice the minds of the readers of various newspapers and the courts likely to deal with his case. But these high connections also provide a sure safeguard that if the petitioner is released on bail, he is not likely to flee from justice. So far as the question of hampering the course of investigation and alerting his contacts is concerned, it may be noted that most of the evidence in this case will be based on documents because if some other transactions have taken place in this case as is the apprehension of the prosecution, it is likely to be through bank drafts etc. which might have landed in the Vostro account for the benefit of Keith. Because of the publicity given to this case through the press, the contacts of the petitioner, if any, are already sufficiently alerted. It does not sound rational that officers of U.K. Paints have not been arrested because of the key information supplied by them. The department must realize that they are also in the category of the main accused person and so the petitioner should not be treated differently from them. The rule of law does not brook discrimination. Such discrimination was adversely commented upon by this court in Binoy Jacob v. CBI : 49(1993)DLT640 , when the main accused were not being arrested. The petitioner has already been in judicial custody since April 14, 1993, and during the course of arguments it has not been urged that he is required for investigation at the moment. Moreover, there will be full scope for his interrogation during further investigations also while on bail and for that purpose certain conditions can be imposed upon him, as agreed to by learned counsel for the petitioner himself. Arrest of Keith alone may not be accomplished in a period of 60 days, because he being a foreign national resort to extradition is likely to be taken. thereforee, taking the totality of circumstances into consideration, I think the ends of justice will be sufficiently met if the petitioner is admitted to bail subject to certain conditions to ensure that there is no hampering of the course of investigation. The petitioner is, thereforee, admitted to bail on furnishing a personal bond in the sum of Rs. 2 lakhs with one surety for the like amount to the satisfaction of the learned ACMM, New Delhi, and he will also be subject to the following conditions :

(1) The petitioner will not tamper with the evidence directly or indirectly.

(2) He will join investigation as and when required.

(3) He will not leave India except with the prior permission of the court.

(4) He will furnish advance information to the investigating authorities regarding the places of his visits in India, their duration and addresses thereof.

9. It is, however, clarified that any observations made herein shall have no bearing on the final merits of the case. These are made purely for the disposal of this application.

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