

(2008) 04 DEL CK 0004

In the Delhi High Court

Case No : Criminal MC No. 5095 of 2006 and Criminal MA 883 of 2002

Ajay Bagaria

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 29-04-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Foreign Exchange Management Act, 1999 — Section 19(3), 19(4), 49(3), 49(4)
Foreign Exchange Regulation Act, 1947 — Section 23C(1), 23C(2)
Foreign Exchange Regulation Act, 1973 — Section 18(2), 18(3), 33(2), 40, 56
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2008) 103 DRJ 324 : (2008) 3 RCR(Criminal) 492

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : S.B. Upadhyay, Santosh Kumar and Saurabh Singh, for the Appellant; P.P. Malhotra, Addl. Solicitor General of India and Navin Matta, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—This petition u/s 482 of the Code of Criminal Procedure, 1973 (CrPC) seeks the quashing of Criminal Complaint titled Chief Enforcement Officer v. Ratan Exports and Industries and Ors. pending in the Court of the learned Additional Chief Metropolitan Magistrate (ACMM), Delhi insofar as it concerns the Petitioner.

2. The complaint in question was filed by the Respondent No. 2 Enforcement Directorate through its Chief Enforcement Officer, Shri R.K. Rawal, Respondent No. 2 herein, u/s 56 of the Foreign Exchange Regulation Act, 1973 (FERA) read with Sections 49 (3) and 49(4) of the Foreign Exchange Management Act, 1999 (FEMA) against the Company M/s. Ratan Exports and Industries Limited (REIL) and six others. The Petitioner here was arrayed as Accused No. 4 in the complaint.

3. The complaint stated that by a letter dated 26th May, 1997 Reserve Bank of India (RBI) had informed the Enforcement Directorate that export proceeds to the tune of Rs. 22.95 crores were pending realization in the account of REIL. Earlier, for the purpose of investigation, a directive had been issued by the RBI to REIL on 19th September 1996 u/s 33 (2) FERA calling for the details of outstanding exports. By a letter dated 23rd October, 1996 REIL informed RBI that during the period 1992-96 the Directors of the REIL were Shri Ratan Lal Bagaria, Shri Bijoy Bagaria, Shri Ajay Bagaria, Shri Mohan Churiwala, Dr. S.Rangana and Smt. Vidya Bagaria. Summons u/s 40 FERA was issued to the REIL on 17th September 1997. Shri Palash Ganguly, Director of REIL appeared and made a statement on 17th October 1997 before the Enforcement Directorate. Shri Palash Ganguly informed that: Shri Ratan Bagaria is controlling all the operations and the day-to-day affairs of the company, the presently S/Shri Ratan Bagaria, Managing Director and S/Shri Bijoy Bagaria, N.K. Hara, S.N. Garg and Palash Ganguly (himself) are the Directors and are working on the instructions of Shri Ratan Bagaria that Shri Ratan Bagaria is out of country to Russin since January 1997; that REIL has an office in Moscow, Russia at 19, Begovarya Street and the phone No. is 9454880; that a total amount of Rs. 22,50,55,144.95 is pending realization on account of REIL, in respect of the exports made during 1992-96; that he was getting Rs. 5000/- as salary; that he cannot furnish details of efforts made to realize the huge outstanding as he was made a director in 1997; that S/Shri Ratan Bagaria, Bijoy Bagaria and Ajay Bagaria were well conversant and the first two were handling the business directly.

4. As part of the enquiries made by the Enforcement Directorate a directive was sent on 24th October, 1997 to the United Bank of India, 16, K.G. Marg, New Delhi to furnish the details of outstanding export proceeds and the details of proprietor/partners/Directors of REIL. By their letter dated 12th April 2001 United Bank of India wrote to the Enforcement Directorate informing inter alias that Directors/Guarantors of the company were the following:

1. Shri Rattan Bagaria
2. Shri Bijoy Bagaria
3. Smt. Vidya Bagaria
4. Shri Ajay Bagaria
5. Shri Rajan Bagaria
6. Shri Mohan Lal Churiwala.

5. An opportunity notice was issued by the Respondent No. 2 to each of the accused including the Petitioner here on 11th May 2002 setting out inter alias the averments referred to hereinabove. By his reply dated 20th May 2002, the Petitioner sent a reply to the said opportunity notice inter alias stating:

c) There is not an iota of material, documentary or otherwise, which connects me with the Company. There is no letter or document which shows any transaction in which I had acted as a Director of Rattan Exports and Industries Ltd.

d) I was not aware of the day to day business of the said Company, was not aware of outstanding export realization, and was not in charge and responsible to the affairs of the said Company in any manner.

e) No statement of any of the persons relied upon in the show cause notice connects me with the company.

f) No summons had also at any time been served upon me.

g) Simply because I was the Director of the said Company at the relevant time I cannot be fastened with any liability for violation of Sections 18 (2) and 18 (3) of the Foreign Exchange Regulation Act, 1973 by the said company.

h) Simply because it has been alleged by United Bank of India that I was one of the persons who was a guarantor in respect of loans and advances made by the said Bank to the said Company, the same does not make me a person responsible for the affairs of the Company. My being a guarantor is not a determining factor in any manner.

6. In reply to a show cause notice issued on 9th May, 2002 containing the very same allegations, a reply was sent by the petitioner on 3rd June, 2002 stating that he was one of the brothers of the Ratan Lal Bagaria who had floated REIL and at his request the Petitioner had lent his name for the Board of Directors. He stated that as far as I can remember I have never attended any Board Meeting of the said Company. I was never in charge nor responsible for the affairs of the said Company. It was further asserted as under:

c) There is not an iota of material, documentary or otherwise which connects me with the Company. There is no letter or document which shows any transaction in which I had acted as a Director of Ratan Exports and Industries Ltd.

d) I was not aware of the day to day business of the said Company, was not aware of outstanding export realization, and was not in charge and responsible to the affairs of the said Company in any manner.

e) No statement of any of the persons relied upon in the show cause notice connects me with the company.

f) No summons had also at any time been served upon me.

g) Simply because I was the Director of the Company at the relevant time I cannot be fastened with any liability for violation of Sections 18 (2) and 18(3) of the Foreign Exchange Regulation act, 1973 by the said Company.

7. The Petitioner has placed on record postal receipts to show that the reply dated 20th May 2002 was dispatched to the Respondent by speed post on 24th May 2002.

8. On 30th May 2002 a complaint was filed by Respondent No. 2 u/s 56 FERA against the REIL and its Directors/Guarantors including the Petitioner here in the Court of the ACMM. After setting out the aforementioned details, the complaint stated as under:

(xxiii) That the accused Nos 2 to 7 were the Directors/ Guarantors of M/s. Ratan Exports and Industries Limited during the relevant period and were responsible to the accused No. 1 M/s. Ratan Exports and Industries Limited for the conduct of its day-to-day business.

9. On 30th May 2002 the following order was passed by the learned ACMM:

30.5.2002

Present: SPP along with complainant.

New complaint presented. It be checked and registered. Photocopy of documents have also been filed along with complaint. Ahlmad is directed to check the documents as per index attached with these documents.

An application for exemption of personal attendance of complainant and for dispensing of recording of preliminary evidence has also been moved along with this complaint.

As this complaint has been filed by a public servant in discharge of his public duties hence recording of preliminary evidence dispensed with. Personal attendance of complainant has also been dispensed with. Complainant has been allowed to be represented through SPP.

Complaint and documents perused.

Heard.

After going through the complaint and document and arguments raised before me by learned SPP I am of the opinion that at this stage there are sufficient grounds to proceed against accused u/s 56 of FERA 1973. I take cognizance of offence u/s 56 FERA 1973. Issue summons to accused for 3.9.2002.

Sd/- ACMM

10. In the present petition filed by the Petitioner and on 9th October 2002 it was directed by this Court that the Petitioner could appear before the learned ACMM on date fixed and thereafter he would be admitted to bail. By order dated 22nd May 2003 the proceedings before the learned ACMM were stayed. That interim order has continued till date.

11. Mr. S.B. Upadhyay, the learned Senior Counsel, appearing for the Petitioner here submits that the complaint when read as a whole does not make out even a prima facie against the Petitioner for violation of Section 18 (2) and 18(3) FERA read with Section 56 FERA thereof and Section 19 (3) and 19(4) FEMA. Although the reply dated 20th May, 2002 was sent by the Petitioner on 24th May, 2002

and Therefore would have been received by Respondent No. 2 by 30th May 2002, the present complaint filed on that date was drawn up mechanically and in haste to meet the deadline of 30th May, 2002 for filing a complaint under the erstwhile FERA. The complaint itself indicates that the Respondent No. 2 was aware that while Ratan Bagaria and Bijoy Bagaria were handling the business of the Company directly, the petitioner was only stated to be well conversant with its business and that this did not satisfy the requirement of Section 68(1) FERA. Relying on the judgment in Girdhari Lal Gupta Vs. D.H. Mehta and Another, which concerned Sections 23-C(1) and 23-C (2) of the erstwhile Foreign Exchange Regulation Act 1947, he submits that there is no automatic presumption even under the old law as to the expression person in charge and responsible to the company for the conduct of the affairs of a company. He relies on the decision of the Supreme Court in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, [Neeta Bhalla-I] in relation to Section 141 of the Negotiable Instruments Act, 1881 (NI Act). He points out that following the said decision, this Court had in Rajan Bagaria v. Union of India 2008 (1) JCC 679, concerning the very same complaint case, discharged one other accused. He submits that the position as regards the present Petitioner is no different and Therefore the Petitioner must also be discharged.

12. Mr. P.P. Malhotra, the learned Additional Solicitor General appearing for the Respondent No. 2 Enforcement Directorate, relies on the specific averments in the complaint where it is stated that along with Ratan Lal Bagaria and Bijoy Bagaria the Petitioner here was well conversant with the conduct of the business of the Company. He Therefore submits that this case should not be equated with the case of Shri Rajan Bagaria. Referring to the judgment of Supreme Court in N. Rangachari Vs. Bharat Sanchar Nigam Ltd., he submits that the averment against the Petitioner in para (xxxiii) substantially satisfies the requirement of the law. He submits that a prosecution should not be throttled at the threshold particularly when these were serious violations resulting in economic offences for which legislatively a presumption could be drawn in terms of Section 18(3) and 59 FERA. He relies on the judgment in State of Haryana and others Vs. Ch. Bhajan Lal and others, to contend that the power u/s 482 CrPC should be sparingly used.

13. Section 68 FERA reads as under:

68. Offences by companies:

(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made there under is a company, every person who, at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section render any such person liable

to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in Sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made there under has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation For the purposes of this section

(i) company means any body corporate and includes a firm or other association of individuals; and

(ii) director , in relation to a firm, means a partner in the firm.

14. The above section is more or less similar to the wording of Section 141 of the NI Act. The law in regard to the minimum averment that is required to be made in a complaint for an offence u/s 138 NI Act has been fairly well settled in the judgment of the three Judge Bench of the Supreme Court in Neeta Bhalla I. It was held that the averment must contain the two mandatory elements, i.e., it should state the person sought to be arraigned as an accused, apart from the Company, was a person in charge of the affairs of the Company and responsible to it for the conduct of its business and further that such person was in that capacity at the time of the commission of the offence. The decision of the Bench of two judges in N. Rangachari to the effect that the complaint need not further aver that the director concerned was in charge of the affairs of the Company at the time of the commission of the offence is not consistent with the law as explained by the larger Bench in Neeta Bhalla I. Therefore the decision in Neeta Bhalla I would apply for interpreting the requirement of the minimum averment as regards a complaint against a company under FERA where liability is sought to be fastened on to a Director using Section 68 thereof.

15. The question that arises in the present case is whether in fact the Enforcement Directorate had material before it even at the time of filing a complaint, to reasonably conclude that the Petitioner here was, at the time of the commission of the offence, a person who was in charge of the affairs of the company and responsible to it for the conduct of its business.

16. The records of the case reveal that the information given to Respondent No. 2 by the United Bank of India about the Petitioner here being the Director/ Guarantor of the company was a letter dated 12th April 2001. That letter does not indicate which of the named persons were, at the time of the commission of the offence, directors and which guarantors. Even to bring a person within the ambit of Section 68(2) FERA the complaint must state that the offence took place

in connivance with the director, manager, secretary and any other officer. There is no other category of persons like for e.g., the guarantors, who can be made liable for the offences committed by a company u/s 68 FERA.

17. As far as the petitioner is concerned, the complaint itself states that of the three persons, i.e., Shri Ratan Lal Bagaria, Shri Bijoy Bagaria and Shri Ajay Bagaria the first two were handling the business directly. Therefore, the case of Ajay Bagaria, even according to Respondent No. 2 was different from Rajan Bagaria and Bijoy Bagaria who were the two persons who were handling the business directly. The only other source relied upon by the Respondent No. 2 is the letter from United Bank of India, which has already been discussed hereinabove does not clearly indicate whether the Petitioner was a Director or a Guarantor. Further, merely being a Director without an averment that he was in charge of the affairs of the Company and responsible to it for the conduct of its business at the time of the commission of the offence does not satisfy the requirement of the law as explained by the Supreme Court in Neeta Bhalla I. Having embarked upon an enquiry, by sending an opportunity notice to which a reply was sent by the petitioner, the Respondent No. 2 was expected to ascertain some material which would satisfy the minimum requirement of the law vis-a-vis the petitioner for making out a prima facie case.

18. The decision in Girdhari Lal Gupta in relation to Section 23-C of the erstwhile FERA 1947 is instructive on the presumption to be drawn and the need for construing such a provision strictly. The earlier Section 23-C is no different from Section 68(1) FERA. Interpreting the said provision, the Supreme Court Girdhari Lal Gupta held (SCC @ p. 190):

5. It seems to us quite clear that Section 23C(1) is a highly penal section as it makes a person who was in-charge and responsible to the company for the conduct of its business vicariously liable for an offence committed by the company. Therefore, in accordance with well-settled principles this section should be construed strictly.

6. What then does the expression ``a person in-charge and responsible for the conduct of the affairs of a company mean`` It will be noticed that the word "company" includes a firm or other association and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person "in-charge" must mean that the person should be in over all control of the day-to-day business of the company or firm. This inference follows from the wording of Section 23C(2). It mentions director, who may be a party to the policy being followed by a company and yet not be in-charge of the business of the company. Further it mentions manager, who usually is in charge of the business but not in over-all-charge. Similarly the other officers may be in charge of only some part of business.

19. Following the judgment of the Supreme Court in Girdhari Lal Gupta, it is clear that a complaint u/s 68 FERA read with 18(2) thereof would have to contain

some specific averment as regards each of the Directors before making them liable particularly where the filing of the complaint has been preceded by a notice to which a reply has been received from the Director concerned. At the bare minimum it would have to comprise the two mandatory elements as explained by the Supreme Court in *Neeta Bhalla I*. In the instant case, the averment in the complaint when read as a whole does not satisfy the requirement of the law in this regard as far as the petitioner is concerned.

20. For all the aforementioned reasons the petition is allowed. The Petitioner stands discharged in the complaint case titled Chief Enforcement Officer¹Ratan Exports and Industries and Ors. pending in the Court of the learned ACMM, New Delhi. However, the complaint will continue against the other accused, excluding Rajan Bagaria who has already been discharged by this Court by the order dated 8th February 2008 in Crl. Misc. No. 5094/2006.

21. The petition is accordingly allowed with no orders as to costs. The pending application also stands disposed of. A copy of this order will be sent by the Registry to the court of the learned ACMM immediately.