(1972) 10 CAL CK 0001

In the Calcutta High Court

Case No : Criminal Revision No. 275 of 1972

A.K. Ghosh APPELLANT

Vs

The State RESPONDENT

Date of Decision : 04-10-1972

Acts Referred:

Constitution of India, 1950 — Article 136
Evidence Act, 1872 — Section 58

Citation : 77 CWN 441

Hon'ble Judges : P.K. Chanda, J;P.C. Borooah, J

Bench : Division Bench

Advocate : G. Mitter, A.G., P.C. Ghosh and B.C. Roy, for the Appellant; S.K. Acharya, S. Roy Chowdhury, Tapan Banerjee and Benoy Krishna Rej for the Opposite Party No. 2 and J.M. Banerjee for the State, for the Respondent

Judgement

P.K. Chanda, J.—By the instant application, A.K. Ghosh, Director Enforcement Directorate, Government of India, has prayed for setting aside the order No. 21 dated 29.1.72 passed in Case No. C/943 of 1970 by the learned Presidency Magistrate, 10th Court, Calcutta by which the learned Magistrate has discharged Dharam Chand Jain, O. P. No. 2, u/s 253(1) Cr. P. C. holding that prosecution under Sec. 23F of the Foreign Exchange Regulation Act is not maintainable and the materials on record are, not sufficient to warrant the conviction of the accused. The circumstances under which the complaint was filed may be briefly stated :--

Dharam Chand Jain, O. P. No. 2 was one of the Directors of M/s. Missirlal Dharam Chand (P) Ltd. engaged in the business of export of manganese ore with a foreign company namely, Messrs Ferro Metal and Chemical Corporation Ltd., having its office at London and New York. On the allegation that M/s. Missirlal Dharam Chand (P) Ltd. was maintaining and operating accounts in foreign countries illegally, adjudication proceedings were started by the Director of enforcement u/s 23 (1) (a) and 23D of the Foreign Exchange Regulation Act after issuing a show cause notice to Missirlal Jain, father of Dharam Chand Jain, as

Director of M/s. Missirlal Dharam Chand (P) Ltd. In reply to the show cause notice it was stated by the Company that certain contraventions had taken place due to ignorance of law and the adjustments had been made without the prior permission of the Reserve Bank of India. It was also stated that the case might be taken up for adjudication immediately. On receipt of this reply to the show cause notice, the Director afforded an opportunity for personal hearing to Missirlal Jain as Director of the company and 31.10.63 was fixed for the purpose. On 30.9.63 as it appears from the record, Dharam Chand Jain with one C. R. Banerjee, for and on behalf of M/s. Missirlal Dharam Chand (P) Ltd. company appeared before the Director. On 30.9.63, Dharam Chand Jain in his personal capacity pleaded guilty to the charges contending that contraventions arose due to ignorance of law. It was further submitted by him that all transactions were undertaken by him alone and none of the Directors of the company was responsible for the contraventions and he added--"I would therefore, be grateful if you would take up the case for adjudication to-day itself and I would abide by the decision taken by the Director of Enforcement. Further I state that I would not prefer any appeal against the order passed by the Director of Enforcement and as such would be grateful if you would pass orders for the release of the documents on the strength of the undertaking given by us". Dharam Chand Jain at the relevant time was an M. P. The Director swallowed the proposal made by Dharam Chand Jain and returned all the seized documents, it seems, in unseemly hurry, to Dharam Chand Jain. The Director passed the following order on the submission of Dharam Chand Jain.

Admittedly Sri Dharam Chand Jain has contravened the provisions of Section 4(1) read with Section 9 and 5(1) (a) of the Act and I find him guilty. But in view of the facts and circumstances under which the contraventions were committed by Sri Dharam Chand Jain, I take a lenient view and impose on him a penalty of Rs. 175000/- only u/s 23(1) (a) of the Act as under :--

(a) for contravening the provisions of Section 4(1) read with Section 9 of the Act.

A penalty of Rs. 1,50,000/- is imposed.

(b) for contravening the provisions of Section 5 (1) (a) of the Act;

a penalty of Rs. 25,000/- is imposed.

I further direct u/s 23 (1B) of the Act that the entire foreign currency in ? and which is lying in his credit in U.K. and U.S.A. be repatriated to India within one month of the date of this order and that a certificate of repartriation be filed in this Directorate within the same period.

The penalty imposed should be deposited in the Calcutta office of this Directorate within 30 days of the date of this order.

2. Thereafter, Dharam Chand Jain paid Rs. 20,000/- in cash towards the penalty and as regards balance of Rs. 1,55,000/- he authorised the Director to repatriate the foreign exchange and appropriate the same towards the balance amount of

the penalty. Accordingly, the requisite amount of foreign exchange due to him was repatriated and the entire amount of penalty has since been paid.

3. It was stated by Dharam Chand Jain in the letter dated 4.8.65 that ? 3143-4-8 d. and 65,634.10 were due from M/s. Ferro Metal Chemical Corporation in London and New York. He submitted that inspite of strenuous effort to repatriate the appropriate foreign exchange he was unable to realise the same because the parties had begun to deny that they owed him any further amount. Thereafter, several correspondence passed between the Director and Dharam Chand--Director demanding repatriation of the entire amount and Dharam Chand explaining his difficulty. Ultimately, by his letter dated 12.12.66, Dharam Chand denied his liability. Thereafter, he was directed to show cause why proceedings in a court of law should not be intimated against him as provided u/s 26F of the Act. Dharam Chand gave reply to it. Attention of Dharam Chand was drawn to section 26F of the Foreign Exchange Regulation Act which provides that if any person fails to comply with any of the directions or order passed by the Director of Enforcement he shall be liable to punishment. After this caution a petition of complaint was filed before the learned Chief Presidency Magistrate by the Union of India through T. N. Kaul, Assistant Director, Enforcement Directorate, Cabinet Secretariat, Department of Personnel, Government of India, against Dharam Chand Jain for taking cognizance of the offence u/s 23F of the Foreign Exchange Regulation Act. The learned Chief Presidency Magistrate took cognizance. The case was ultimately transferred to the Presidency Magistrate, 10th Court, who discharged the accused by his order No. 21 dated 29.1.71 after examining six prosecution witnesses including the applicant.

4. Section 23F of the Act lays down that if any person fails to pay the penalty imposed by the Director of Enforcement or the appellate Court or the High Court, or fails to comply with any of the directions or orders, he shall, on conviction before a Court be punishable with imprisonment for a term which may extend to two years or with fine or with both. In the instant case O. P. No. 2 paid the fine imposed upon him. But the direction u/s 23 (1B) that the entire foreign currency in ? and sterling to be repatriated to India and that a certificate of repatria ion be filed within one month of the order has not been complied with.

5. In para. 2 of the petition of complaint it is stated that Dharam Chand is a Director of M/s. Missirlal Dharam Chand (P) Ltd. Company. In para. 3 it is stated that the company M/s. Missirlal Dharam Chand (P) Ltd. was maintaining and operating accounts in foreign countries through M/s. Ferro Metal and Chemical Corporation Ltd., at London and New York and making payments to persons residing outside India out of the said accounts in foreign countries in contravention of the provisions of Section 4(1) and 5(1) (a) of the Foreign Exchange Regulation Act. Then the petition of complaint refers to the adjudication proceedings against Missirlal Jain, one of the Directors of M/s. Missirlal Dharam Chand (P) Ltd. after show cause notice to Missirlal and subsequent appearance of Dharam Chand and his admission as earlier referred

to. The learned Magistrate, it appears read in the petition of complaint that there was contravention of the provisions of Foreign Exchange Regulation Act by the Company and the complaint having not been filed against the Company it was not maintainable against 0. P. No. 2 although the direction in the adjudication proceedings was against Dharam Chand. On a reading of the petition of complaint it is manifestly clear that the complainant alleged that the direction was not followed by O. P. No. 2. If any lawful direction was given to O. P. No. 2 in his individual capacity for repatriation of foreign currency under sub-section 1(B) of Section 23 of the Act there could be no bar to prosecution. So, we turn to the question whether the direction given to O. P. No. 2 who figured as accused in the criminal proceeding purported to be u/s 23(1B) is a legal one or without jurisdiction. To appreciate this point raised before us--and to deal with it properly we may reproduce below section 23 (1B) of the Act; Any Court trying a contravention under sub-section 1 or sub-section 1(A) and the authority judging any contravention under clause (a) of sub-section 1 may, if it thinks fit and in addition to any sentence or penalty which it may impose for such contravention, direct that any currency, security, gold or silver, or goods any other money or goods any other money or property in respect of which the contravention has taken place, shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the person committing the contravention or any part thereof shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

Section 23D lays down that the Director of Enforcement shall hold enquiry in the prescribed manner after giving a reasonable opportunity to the persons proceeded against. The Adjudication proceedings and Appeal Rules, 1957 lay down the procedure which is to be followed. Under Rule 3 of the said Rules the Director is required in the first instance to issue notice to the person against whom adjudication proceedings are contemplated requiring such persons to show cause within the prescribed period (not less than 10 days) from the date of the service of the notice why adjudication proceedings should not be held against him. Every notice must indicate the nature of the offence alleged against him. After considering the cause shown, if any, if the Director considers that the adjudication proceedings should be held, then he fixes a date on which the person proceeded against is entitled to appear in person or through lawyer or authorised representative. On the date of the hearing the Director initially explain the charge and then gives an opportunity to the party to produce oral or documentary evidence. After consideration of the evidence if the Director is satisfied that the person has committed a contravention, then he may by order in writing, impose such penalty as he deems fit u/s 23 of the Act and also direct representation of foreign exchange holdings. The proceedings from the very nature of the provisions of Section 23D and Adjudication and Appeal Rules are of a judicial nature. The Director of Enforcement though an administrative tribunal exercises judicial or in any event quasi-judicial functions (In this connection reference may be made to the cases reported in (1) F.N. Roy Vs. Collector of

Customs, Calcutta, and (2) Leo Roy Frey Vs. The Superintendent, District Jail, Amritsar and Another, . The Director must comply strictly with all the conditions laid down by law before initiation of the proceedings. The prescribed procedure is mandatory. In the instant case no enquiry had been instituted by the issue of any show cause notice as contemplated by Rule 3 of the Adjudication Proceedings and Appeal Rules, 1957. No accusation was made against O. P. No. 2. In fact, the adjudication proceedings were not started against the O. P. No. 2. The proceeding that was started was, in fact, a proceeding in personam for the purpose of penalising the company which is a legal entity, for the contravention of the provisions of Foreign Exchange Regulations. The Director passed order against O. P. No. 2 in his personal capacity and as such the doctrine of vicarious liability which makes a person guilty of an offence actually committed by another is not involved in this case. In the instant case, the condition precedent i.e. service of notice under Rule 3 (i) to the vesting of jurisdiction in the special tribunal, I mean, the Director of Enforcement, having not been fulfilled and no proceeding having been started against him following any such notice the order passed by the Director against O. P. No. 2 is null and void.

"The Rule adopted in Taylor v. Taylor (1876) 1 Ch. D. 426 is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the Act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provisions might as well not have been enacted." (Observations of Sarkar, J. as his Lordships then was, in (3) State of Uttar Pradesh Vs. Singhara Singh and Others,).

The learned Advocate General has referred to the cases reported in (4) The Bahrein Petroleum Co. Ltd. Vs. P.J. Pappu and Another, , (5) M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others, (6) Hriday v. Ramchandra 24 C.W.N. 723 for establishing the proposition that existence of jurisdiction is different from exercise of jurisdiction. In all those cases there were properly constituted proceedings before a court. In (7) Bharat Bank Ltd., Delhi v. The Employers of the Bharat Bank Ltd., Delhi, reported in AIR 1950 S.C. 788, the Supreme Court made a distinction between the word ''Tribunal'' and the word ''Court'' as used in Art. 136 of the Constitution and Their Lordships have in (8) Durga Shankar Mehta Vs. Thakur Raghuraj Singh and Others, reiterated the same distinction. In (9) Saskatchewan Labour Relations Board v. John East Iron Works Ltd. 53 C.W.N. 389 : AIR 1949 P.C. 129 the distinction between the Board constituted under the Trade Union''s Act and a ''Court'' was given in the following words :--

It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between the parties whether between Grown and subject or between the subject and subject and that is is the duty of the Court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings.

We are in agreement with the learned Advocate General that there is a clear-distinction between the jurisdiction of the court to try and determine a matter and the erroneous action of such court in the exercise of that jurisdiction and so far as jurisdiction itself is concerned it is wholly immaterial whether the decision upon particular question be correct or incorrect. If the decision is erroneous it is open to the wronged party to have recourse to the proper available forum. In the Full Bench case, (6) Hriday Nath v. Ram Chandra, 45 Cal 126, 24 C.W.N. 723. It was pointed out that there is a clear distinction between the jurisdiction of the court to try and determine a matter and the erroneous action of such court in the exercise of that jurisdiction; and so far as the jurisdiction itself is concerned it is wholly immaterial whether the decision upon the particular question be correct or incorrect. Mukherjee A. C. J. in delivering the judgment of the court has said;

Given such jurisdiction we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction, for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of the jurisdiction.

Then His Lordship pointed cut that the authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction and that when there is jurisdiction of the persons and subject-matter, the decision of all other questions arising in the case is but an exercise of the jurisdiction. Then His Lordship observed;

The extent to which the conditions essential for creating and raising the jurisdiction of a court or the restraints attaching to the mode of exercise of that, jurisdiction, should be included in the conception of jurisdiction itself, is sometimes a question of great nicety as is illustrated by the decisions reviewed in the order of reference in Sukhlal v. Tarachand 33 Calcutta 68 F.B. and Khosh Muhammad v. Nazir Mohammad ILR 33 Cal. 352, See also the observations of Bord Parket in Raghunath v. Sunder Das 42 Calcutta 72 at p. 83. But the distinction between existence of jurisdiction and exercise of jurisdiction has not always been borne in mind and this has sometimes led to confusion.

It will thus appear from the above observations that the conditions essential for creating and raising the jurisdiction of a tribunal or the restraints attaching to the mode of exercise of the jurisdiction are included in the conception of jurisdiction, though the extent to which they may be included is sometimes a question of nicety. We are of opinion that the question whether a condition necessary for exercise of power exists or not is a matter included in the conception of jurisdiction and is not related to the exercise of jurisdiction. The preliminary condition for initiating a proceeding for violation of Foreign Exchange Regulation is that the Director must issue notice to the party who is alleged to have violated Foreign Exchange Regulations. This is an imperative condition and not merely directory. The Act conferring the power on the Director has expressly laid down conditions for the exercise of that power. That is the imperative conditions upon which the jurisdiction of the Director depends. As earlier pointed out not only no notice under rule 3 was issued, the proceedings were also not started against O. P. No. 2. No power has been conferred by the Act on the Director to take any action against any persons without notice and without starting any adjudication proceedings against him. O. P. No. 2 in his personal capacity was not accused of any contravention of the provisions of the Act and he was not proceeded against. The Director functioning under the special enactment has got his jurisdiction circumscribed by the provision of the Act creating it. The jurisdiction of the Director being statutory, however admirable his intention may be, he is not entitled to go outside the provision of the Act. As pointed out by their Lordships of the Privy Council in the case (10) Colonial Bank v. William, (1874) L.R. 5 P.C. 417(G)--where an order of a quasi-judicial authority is objected to it has to be seen whether preliminary proceeding was necessary to give jurisdiction to it. (This case has been referred to at p. 203 in the case of (11) Parkash Textile Mills Ltd. Vs. Mani Lal and Others,). If this is established the order is coram non judice and of no effect. There are, therefore, authorities in support of the principle that if the condition imposed by a statute is of a peremtory character the proceedings of the authority empowered under the Statute are wrong ab initio and without jurisdiction if that condition is not complied with (12) Sudhansu Kanta Acharyya Vs. State of Bihar and Others, . In (13) Sm. Krishnamoni Dasi Vs. Baser Mondal and Others, it has been held that a statutory tribunal must act within the scope of its powers given to it or limited by the statute.

It is true that though the proceedings were not initiated against him under the provisions of the Act, O. P. No. 2 appeared before the Director and accepted the entire responsibility in the matter. Question of acquiescence, estoppel and admission can arise in a proceeding when a person is a party thereto and when that proceeding is legally instituted. In the instant case no proceeding was instituted against O. P. No. 2. The learned Advocate-General has referred to us the case of (14) Probodh Lal Mukherjee Vs. Rai Sahib Chandanmull karnani and Others , where the court held that the order passed on consent in winding up proceedings cannot be challenged by a consenting party in a separate suit. The appeal arose out of the judgment and decree dismissing the plaintiff''s suit wherein he sought a declaration that certain agreement entered into between himself and the respondent was void and inoperative, as also certain orders of the court in a proceedings under the Companies Act. The Court held that u/s 344 of the Companies Act, 1913, the court has wide powers and it has the powers to sanction a compromise between different parties before the court. In holding so, their Lordships considered the question of existence of jurisdiction and exercise of jurisdiction. This case is of no avail to the petitioner inasmuch as the compromise that was given effect to was between the parties in the proceedings pending before the Court. At the risk of repetition we say that O. P. No. 2 was not a party in the proceedings initiated by the Director and the admission made by O. P. No. 2 being that of a stranger to the proceedings could not confer jurisdiction to the Director to pass any order against him without complying with the provisions of the Act. It amounted to traversty of justice. Estoppel against a party cannot confer jurisdiction on the Director when he failed to act in conformity with the fundamental principles of judicial procedure.

Section 58 of the Evidence Act deals with admissions during trial i.e. at or before the hearing. Proof of such facts is dispensed with for the simple reason that the facts admitted require no proof. It is a substitute for evidence and admission in this sense is a formal act done in the course of judicial proceedings which waives or dispenses with the production of evidence by conceding for the purpose of litigation that the pro position of fact alleged by the opponent is true. Admission only binds the parties to a proceeding and their agents only and not a stranger. A judicial admission may some times be conclusive in the sense that it formally waives all rights to deny for the purposes of the particular trial. Estoppel is a rule or civil action. It has no application in criminal proceedings. (Powell on Evidence 9th Edition p. 449). There can be no estoppel against the Statute. The estoppels only bind the parties and their privies. Here O. P. No. 2 was neither a party nor its privy. He was merely a stranger to the proceedings. There can be no estoppel where statutory requirement is violated.

There are of course provisions in the Criminal Procedure Code which authorise the court to punish an accused in a criminal trial on admission of guilt. But Criminal Procedure Code has nowhere authorised a magistrate or a judge to punish a person against whom no legal proceedings has been taken out under the Code. Where no proceedings in fact was taken out according to the provisions of a Foreign Exchange Regulation Act, 1947, against O.P. No. 2 he could not be punished in the way as has been done by the Director.

It has been contended by the learned Advocate General with reference to section 23E and 23EE and the Rules 6 and 7 of Adjudication Proceedings and Appeal Rules, 1957, that where provisions for appeal have not been availed of by O. P. 2 he cannot be allowed to say that the order of the Director is not binding on him. An appeal to the Appellate Board can be preferred only against the order of the Director made u/s 23, Section 23EE lays down that an appeal shall lie to the High Court only on question of law from any decision or order of the Appellate Board. It is only a person against whom a proceeding is lawfully started under the Act, and not a stranger to a proceeding, who can prefer appeal. The order passed by the Director being void and not being enforceable no appeal was required to be filled by O. P. No. 2. In this connection we may refer to certain observations of His Lordship in Hriday Nath''s case reported in 24 C.W.N. (733).

We must not overlook the cardinal position that in order that the jurisdiction may be exercised there must be a case legally before the court and hearing as well as the determination.

The order against O. P. No. 2 having not been passed according to the provisions of the Foreign Exchange Regulation Act, and the Adjudication Proceedings and

Appeal Rules, 1957, it was without jurisdiction and illegal and O.P. No. 2 could not be proceeded against in the criminal Court for non-compliance with the order and directions of the Director. We find no substance in the instant application.

The Rule is accordingly discharged.

P. C. Borooah, J

I agree

