

(2012) 02 DEL CK 0370

In the Delhi High Court

Case No : Criminal M.C. No. 2155 of 2000

Arun Sood

APPELLANT

Vs

P.K. Roy

RESPONDENT

Date of Decision : 03-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 245(2), 482
Foreign Exchange Regulation Act, 1973 — Section 18(2), 56, 57, 68, 68(1)
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2012) 3 JCC 2107

Hon'ble Judges : V.K. Shali, J

Bench : Single Bench

Advocate : Sanjeev Narula, for the Appellant; Sachin Datta, CGSC with Mr. A. Kumar, for the Respondent

Judgement

V.K. Shali, J.—This is a petition filed u/s 482 Cr.P.C. for quashing of the proceedings against the petitioner in respect of complaint bearing no. 357/93 u/s 57 of the Foreign Exchange Regulations Act, 1973 (hereinafter referred to as "the Act") and also for quashing of the orders passed by the Learned ACMM, dated 06.02.1997, by virtue of which the application of the petitioner u/s 245 (2) of the Cr.P.C., was dismissed. It has also been prayed that the order of the learned Additional Sessions Judge, dated 05.10.1999, upholding the said rejection order passed by the learned ACMM be also set aside. Briefly stated the facts of the case are that a complaint u/s 57 of the Act was filed by Mr.P.K.Roy, Assistant Director, Enforcement, against M/s Kay Films, Chanakya puri, New Delhi and its Managing Director, Kuldeep Singh Sood and the present petitioner. It was alleged that the adjudicating authority, vide order dated 20.02.1989, had imposed a penalty of Rs. 45, 00, 000/- on M/s Kay Films and Rs. 5, 00, 000/- on Kuldeep Singh Sood, for violation of Section 18(2) of the Act. So far as the present petitioner is concerned, no separate penalty was imposed upon him. The complaint was filed by the respondent no. 1/P.K. Roy, Assistant Enforcement Director, in the capacity of a public servant. No pre summoning evidence was

recorded and notice was issued to all the three accused persons. The petitioner, on appearance, filed an application u/s 245 (2) of Cr.P.C. seeking discharge on the ground that so far as the petitioner is concerned, no penalty was imposed upon him by the adjudicating authority vide order dated 20.02.1989. The operative portion of the order dated 20.02.1989 read as under:

Sh.Kuldeep Sood is the Managing Director of M/s Kay Films and he was responsible and in-charge of its activities as far as these exports are concerned. Transactions with the importer are made by him and he only has been dealing with Government authorities also. Sh. Arun Sood in his statement dated 06.04.1993 had also stated that his father Sh. Kuldeep Sood was more conversant with the affairs of Kay Films. As such I hold Sh.Kuldeep Sood guilty of the contravention u/s 18(2) read with section 68 of Foreign Exchange Regulation Act, 1973 and impose on him a penalty of Rs. 5, 00, 000/- (Rs. Five lakhs only) No separate penalty is imposed on Sh. Arun Sood.

2. It was contended by the petitioner before the Trial Court that the proceedings against the present petitioner, u/s 56 of the Act, which were initiated by the respondent no. 1 were also quashed by Hon"ble Mr.Justice P.K.Bahri vide order dated 26.03.1990. It was contended that since no penalty has been imposed upon him and he has not been held as a Director of M/s. Kay Films, much less in-charge and responsible for the conduct of the business of the company, therefore, he could not be proceeded against by the respondent no. 1 by filing a complaint u/s 57 of the Act. This application of the petitioner was rejected by the learned ACMM vide order dated 06.02.1997, by holding that the petitioner is admittedly the Director of the company, M/s Kay Films and the Section 68 (1) of the Act clearly lays down that where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder 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 due diligence to prevent such contravention.

3. Reliance was also placed on Section 68(2) of the Act by the learned ACMM which states that notwithstanding what is contained in Section 68(1) if it is shown that the offence is committed with the consent or the connivance or is attributable to the neglect on the part of the Directors, Managers or Secretary or any other officer of the company then such a person shall also be deemed to be guilty of the contravention and can be proceeded against and punished. On the basis of reliance on Section 68 of the Act and by observing that admittedly the present petitioner being the Director of the company in question, he could not be discharged u/s 245 (2) of Cr.P.C.

4. The petitioner feeling aggrieved by the said order preferred a revision petition which came to be decided on 05.10.1999, by the learned Additional Sessions Judge, New Delhi, who upheld the order passed by the learned ACMM, on the basis of the same reasoning which had been given by the learned ACMM. The petitioner, feeling aggrieved by the aforesaid two orders as well as the complaint having been initiated against him, preferred the present petition u/s 482 Cr.PC. way back in the year 2000 which has been pending in this Court for almost 12 years.

5. I have heard the learned counsel for the petitioner as well as the learned counsel for the respondent.

6. The learned counsel for the respondent had taken time on previous occasions, to seek instructions against the present petitioner, on the ground that no penalty was imposed upon him by the adjudicating order dated 20.02.1989 and that there was no averment made in the complaint in question filed u/s 57 of the Act alleging that the present petitioner was a Director, but today when the matter was listed, the learned counsel for the respondent, Mr. Dutta did not concede and submits that the petitioner was also a Director of the company and therefore he was responsible for the offence and complaint against him is maintainable.

7. The contention of Mr. Dutta has been two fold. The first contention of the learned counsel for the respondent was that the present petition is not maintainable in as much as the petitioner's prayer for discharge has not only been rejected by the learned ACMM vide order dated 06.02.1997 but it has also been rejected by the learned Additional Sessions Judge, New Delhi on 05.10.1999. It was contended that now it was not open to the petitioner to rake up the said issue afresh by filing the present petition u/s 482 Cr.P.C. as it would tantamount to filing of a second revision which is not permissible.

8. I do not agree with this contention of the learned counsel for the respondent. The language of Section 482 Cr.P.C. starts with a non-obstante clause which lays down that notwithstanding anything to the contrary in any provision of Cr.P.C., the High Court may pass any order to prevent the abuse of processes of law or secure the ends of justice. Therefore, the plain reading of Section 482 Cr.P.C. would make it clear that exercise of a power u/s 245(2) Cr.P.C. is not restricted by any sellers, if it is satisfied that the proceedings in the Trial Court or the initiation of the complaint is resulting in the abuse of processes of law and/or an order is warranted to secure the ends of justice.

9. In the instant case also I feel that initiation of a complaint u/s 57 of the Act and the issuance of summons thereafter is resulting in gross abuse of processes of law, and therefore, the order is required to be passed by this Court to secure the ends of justice. I am holding this view on account of the fact that there are certain admitted facts which are not in dispute between the parties. It is not in dispute that the adjudication order dated 20.02.1989, passed by the respondent no. 1, imposed a plenty of Rs. 45, 00, 000/- on M/s Kay Films and a sum of Rs.

5, 00, 000/- as penalty on Kuldeep Sood, Managing Director of the said company. No separate penalty was imposed on the present petitioner. It is not in dispute that the complaint which was filed by the respondent no. 1, u/s 56 of the Act, against the present petitioner, was quashed by Hon"ble Mr. Justice P.K. Bahri vide order dated 26.03.1990 holding that at the relevant time when the offence u/s 18(2) of the Act is alleged to have been committed, the present petitioner was not in-charge and responsible for the conduct of the business of the company as there was no averment in this regard made in the complaint, much less the evidence. Therefore, now the question which arises for consideration is as to whether the complaint u/s 57 of the Act which has now been filed against the company, its Managing Director Kuldeep Sood, against whom penalty had been imposed, as well as the present petitioner against whom no penalty had been imposed is sustainable in the eyes of law or not.

10. It was contended by Mr. Sharma, the learned counsel for the petitioner that the present complaint could not have been filed against the present petitioner on account of the two reasons, firstly, neither he was visited with the penalty nor there was any occasion for him to pay the same, on behalf of the company as he was neither in-charge nor responsible for the conduct of the business of the company either at the time of commission of the contravention or even now. It is further pointed out by him that there is no averment in the complaint filed u/s 57 of the Act by the respondent no. 1 that the petitioner is in-charge and responsible for the conduct of the business of the company which is an essential requirement before summons could have been issued against him. For this reason, Mr. Sharma has relied upon the case titled S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, wherein it was observed that in order to make a Director vicariously liable, there must be an averment in the complaint that he is responsible for the conduct of the day to day business of the company.

11. I have gone through the said judgment. There is no dispute about the proposition of law laid down by the said judgment though it has been given in the context of Section 138 read with section 141 of the Negotiable Instruments Act, but the language of Section 141 is at pari materia with Section 68(2) of the Act, therefore, the said judgment squarely apply to the facts of the present case as well. As against this, it has been contended by the learned counsel for the respondent that de horse the quashing of the proceedings against the present petitioner, by the High Court, vide order dated 26.03.1990. The principle complaint u/s 57 of the Act is maintainable against the present petitioner would be maintainable only when the fine is sought to be realized or against the petitioner on the allegation that he is in-charge and responsible for the affairs of the company.

12. I feel that the submissions made by the learned counsel for the respondent are untenable in law. The complaint admittedly has been filed by the respondent no. 1 u/s 57 of the Act. The said Section reads as under:

Penalty for contravention of order made by adjudicating officer, appellate Board

and High Court.- if any person fails to pay the penalty imposed by the adjudicating officer or the Appellate Board or the High Court or fails to comply with any of his or its directions or orders, he shall, upon conviction by a court, be punishable with imprisonment for a term which may extend to two years or with fine or with both.

13. A perusal of the aforesaid Section would show that in case the amount of penalty remains unrealized then all the persons who are in-charge or responsible for the conduct of the business are liable to be proceeded against under the Section 68(2) of the Act. The said provision is at pari materia with Section 141 of the Negotiable Instruments Act. This necessarily takes the Court back to the complaint which has been filed by the respondent no. 1 against the present petitioner. In case one sees the complaint filed by the respondent no. 1, the name of the present petitioner has been mentioned in the title which has been shown as a Director then his note is to be mentioned in the complaint. There is not even an iota of averment that the present petitioner was in-charge and responsible for the conduct of the business of the company at the time when the contravention, in respect of which the penalty was imposed, took place. In *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another*, it has been categorically laid down by the Supreme Court that in order to make a Director vicariously liable there has to be necessarily an averment. There is no question of presuming such a vicarious liability in the absence of the averments. This is a complaint filed by the public servant/respondent no. 1, in the discharge of his official duties, and therefore, by virtue of proviso (a) to Section 200 Cr.P.C., the pre summoning evidence was dispensed with. In law, such cases where pre-summoning evidence is dispensed with, on account of the complaint having been filed by the public servant, a greater onus is caused on the public servant to show by way of averments made in the complaint and the documents relied upon in the complaint as to how the accused is sought to be proceeded against for any offence. In the instant case, neither there are averments in the complaint u/s 57 of the Act which has been filed against the petitioner, as to show how the petitioner was in-charge and responsible for the affairs of the company much less is there any proof of the same. The contention of the learned counsel for the respondent that the onus is on the petitioner to show that the offence has not been committed with his knowledge or connivance and with his consent, as envisaged u/s 68 (2) of the Act, is again without any merit. The Section 68 (2) of the Act would come into operation only when the petitioner deserves to be summoned. Where the respondent himself does not have a case for summoning against the petitioner the question of the petitioner showing that the offence was not committed with his connivance or without his knowledge or the onus getting shifted to him, does not arise.

14. I, accordingly, feel that the present complaint which has been filed by the respondent no. 1 is totally in gross abuse of processes of law and consequently the orders dated 06.02.197 passed by the learned ACMM and upheld by the learned ASJ vide order dated 05.10.1999, rejecting the application of the

petitioner for being discharged are untenable in law, and accordingly, the said orders also deserve to be set aside. For the reasons mentioned above, I set aside the complaint which had been filed by the respondent no. 1, qua the present petitioner, as well as the two orders dated 06.02.1997 and 05.10.1999 which have been passed by the Courts below. No order as to costs.