

(1984) 02 MAD CK 0009

In the Madras High Court

Case No : Criminal M. P. No. 2288 of 1980

A.S.G. Jothimani Nadar

APPELLANT

Vs

The Deputy Director, Enforcement Directorate

RESPONDENT

Date of Decision : 24-02-1984

Acts Referred:

Constitution of India, 1950 — Article 14

Criminal Procedure Code, 1973 (CrPC) — Section 482

Foreign Exchange Regulation Act, 1973 — Section 13, 18, 19, 23, 44

Citation : (1984) 3 ECC 319

Hon'ble Judges : Natarajan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Natarajan, J.—By means of this petition u/s 482, Code of Criminal Procedure, the petitioner seeks quashing of the proceedings against him

in C.C. No. 2684 of 1980 on the file of the Chief Metropolitan Magistrate, Egmore, Madras. The said case has been taken on file in pursuance of

a complaint filed by the respondent herein, viz., the Deputy Director of Enforcement Directorate, Madras.

2. The petitioner is a repatriate from Sri Lanka and he is said to have been repatriated to India in or about 1972. On 3rd August, 1979, the

officers of the Enforcement Directorate searched the house of the petitioner and seized therefrom Indian currency to the value of Rs. 30,000.

When the petitioner was questioned, he gave a statement to the effect that one Cibar of Cibar Confectionary, Colombo, had requested him to

receive a sum of Rs. 40,000 on his behalf and hand it over to him, that subsequently, a sum of Rs. 40,000 was handed over to his shop manager,

Thiru Dhanasingh, and the shop manager had passed on the money to him, that subsequently, Cibar collected Rs. 10,000 from him and the balance of Rs. 30,000 was kept in the house and it was that amount which had been seized by the authorities. Adjudication proceedings were initiated against the petitioner and he was issued a show cause notice. The petitioner sent a reply on 5th September, 1979, resiling from his earlier statement and contended that the money seized from the house represented the proceeds of a sale transaction entered into by one K.A. Natesan of India and that the amount genuinely belonged to the said Natesan. The explanation was not accepted by the authorities and the petitioner was summoned for a personal hearing. The petitioner presented himself along with his counsel for the hearing and gave yet another version to the effect that the money actually belonged to him and he had repatriated the money through devious means from Sri Lanka since the Sri Lankan Government had imposed severe restrictions on repatriation of money from that country to India.

3. The Deputy Director, Enforcement Directorate, declined to accept the explanation given by the petitioner and passed an order of adjudication imposing a penalty of Rs. 4,000 on the petitioner and also confiscated the sum Rs. 30,000 that had earlier been seized. In addition, the Deputy Director also filed a complaint u/s 9(1)(b) of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the Act), in the Court of the Chief Metropolitan Magistrate, Madras. The learned Magistrate took the complaint on file and issued summons to the petitioner. It is that complaint, which the petitioner wants to be quashed.

4. According to the petitioner, the criminal proceedings against him are not sustainable on the following grounds:

(1) The petitioner has filed an appeal against the adjudication order dated 15th November, 1979, and the appeal is pending consideration by the Appellate Board. When the matter is at large before the Appellate Board, the Deputy Director is not entitled to file a criminal complaint. Moreover the petitioner will be left with no remedy, if the criminal Court convicts him, but the Appellate Board finds that he has not contravened the provisions of Section 9(1)(b) of the Act.

(2) Under the Act, only contraventions of Sections 44 and 58 would constitute criminal offences. There is no provision in the Act making the

contravention of any of the other sections including Section 9(1)(b) an offence so as to empower an adjudicating authority to prosecute a

contravener in addition to the imposition of penalty on him.

(3) The subjective satisfaction reached by the Deputy Director of filing a criminal complaint has been based on incorrect and irrelevant factors. The

Deputy Director has proceeded on the basis that the petitioner had committed certain contraventions of the Act in the year 1966, but the actual

position is that the petitioner was not a repatriate in 1966, but was only a non-resident holding temporary permit visa.

(4) The Deputy Director has failed to take into consideration the policy laid down by the Government of India in dealing with the unauthorised

repatriation of amounts by Indians forced to return to India from Sri Lanka. The Government of India has granted certain exemptions and relaxed

the rules in the matter of repatriation of funds to India by Sri Lankans. But, the spirit underlying the notification has been totally lost sight of by the

Deputy Director, when he made up his mind to file a complaint against the petitioner.

(5) The Deputy Director has committed an error in taking the view that the petitioner cannot be adequately dealt with in adjudication proceedings

and the interests of justice require his prosecution. He has failed to note that though the proviso to Section 23(1)(d) has been deleted, the principle

laid down there still holds good. The Deputy Director ought to have filed the complaint before the completion of the adjudication proceedings, but

not later. Consequently, after having imposed a penalty in the adjudication proceedings, he has no right in law to file a criminal complaint.

(6) The Deputy Director has not followed uniform standards, but has acted arbitrarily in filing a complaint against the petitioner. In the case of one

Amirdham, the Deputy Director has ordered the return of a sum of Rs. 20,000 out of Rs. 70,000 received by him through unauthorised channels

and did not launch prosecution. But in the case of the petitioner, the Deputy Director has imposed penalty, confiscated the amount and also

launched prosecution and this is in violation of Article 14 of the Constitution.

(7) Before filing the criminal complaint, the Deputy Director ought to have issued a show cause notice to the petitioner under the proviso to Sub-

clause (ii) of Sub-section (2) of Section 61 of the Act and since that provision has

not been complied with, there is procedural irregularity and on that one ground alone, the criminal proceedings deserve to be quashed.

5. The respondent has filed a counter-affidavit traversing the various contentions put forth by the petitioner in his affidavit. After setting out the facts

how the department came to search the house of the petitioner and seize cash therefrom, the respondent has referred to the adjudication

proceedings and the order of adjudication that was passed. He has then stated that the present complaint u/s 9(1)(b) of the Act has been filed

independently of the adjudication proceedings. He has stated that the Deputy Director did not inform the petitioner that the sum of Rs. 30,000

would be returned to him. He has then stated that the filing of the appeal by the petitioner before the Foreign Exchange Regulation Appellate Board

can have no impact on the criminal prosecution because the prosecution proceedings are of an independent character and not based on the findings

of the Deputy Director in the adjudication proceedings. The respondent has refuted the petitioner's contention that a prosecution can be launched

only for offences which are specifically created under the Act and that a prosecution cannot be launched for contravention of other sections except

Section 13, 18, 19, 44, 57 and 58. He also refuted the petitioner's submission that a prosecution can be launched only if a person could not be

adequately dealt with under adjudication proceedings. The respondent has characterised the reference to Section 23(1)(d) of the old Act as

irrelevant as the prosecution has been launched under the Act of 1973, and not under the old Act. With reference to the petitioner's contention

that he should have been issued a fresh notice u/s 51 before a complaint was filed the respondent has stated that Section 51 comprehends

adjudication proceedings as well as prosecutions and therefore, it is enough if a notice has been given at some point of time and not necessarily

before the filing of the criminal complaint. Lastly, the respondent has stated that the reference to the case of Amirdham is not warranted as that

case has no relevance to the petitioner's case.

6. The petitioner has filed a reply affidavit to reiterate his position and the respondent has filed an additional counter-affidavit to re-affirm the stand

of the department.

7. Taking up for consideration the various contentions put forth by Mr.

Chellaswamy, learned Counsel for the petitioner, the first ground of objection relates to the validity and propriety of the prosecution of the petitioner when the appeal filed by him against the order of adjudication is pending disposal. It was urged that an anomalous situation would develop if the criminal Court found the petitioner guilty u/s 9(1)(b) and convicted him but subsequently the Appellate Board rendered a finding that the petitioner had not contravened Section 9(1)(b) of the Act and therefore, the order of adjudication and the imposition of penalty was not called for. The argument contains a fallacy in it, because the power to adjudicate u/s 51 of the Act and the right to prosecute a person before the criminal Court u/s 56 of the Act are independent and not inter-dependent. A reading of the two sections will bring out this position very clearly. Section 56 begins with the following words: "Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes any of the provisions of this Act or of any rule, direction or order made thereunder, he shall, upon conviction by a Court, be punishable½." It is therefore obvious that a criminal prosecution under the Act is an independent proceeding and is not dependent upon the validity of the order of adjudication, nor is it a continuation of the adjudication proceedings.

8. In this connection, I may usefully refer to a few decisions relating to cases which arose under the Foreign Exchange Regulation Act, 1947, or

under the Sea Customs Act. It was held in A.M.S. Mohammed Kasim Vs. The Assistant Collector of Central Excise, Madurai, that:

(i) the imposition of a civil penalty, such as confiscation or seizure or a penal tax, by the administrative agencies employed to implement the law

relating to Income Tax, customs, etc., will not thereby absolve the transgressor from liability to criminal prosecution, if he is liable upon those

identical facts;

(ii) it will not be correct to say that where civil penalties are imposed by Customs Officers u/s 186, the offender may be liable to be proceeded

against under the penal provisions of some other statute such as the Penal Code, etc., but not for infringements under the Sea Customs Act such as

Section 167(81); and

(iii) Section 167(81) and Section 186 relate to totally different principles, and therefore, Section 186 does not bar the initiation of proceedings u/s

167(81).

9. In *Shaik Dawood v. Collector of Customs, Madras* ILR (1964) Mad. 555 a Bench of this Court held that the words ""without prejudice to the

provisions of Section 23"" occurring in Section 23-A of the Foreign Exchange Regulation Act can only mean that a contravention of the notification

made under Sub-sections (1) and (2) of Section 8 would expose the offender to two types of actions by the respective authorities, one by way of

criminal prosecution and the other u/s 19 of the Sea Customs Act, and consequently, the remedies available to the State are concurrent.

10. In *Vallabhdas Liladhar v. Assistant Collector of Customs* AIR 1965 SC 481, it was held that Section 186 of the Sea Customs Act was meant

for permitting prosecutions in addition to action under the Act in the shape of confiscation, penalty or increased rate of duty and it was never

intended to act as a bar to any prosecution that might be permissible after the award of confiscation, penalty or increased rate of duty.

11. In the light of the ratio contained in these decisions, and in view of the clear terms of Sections 51 and 56 of the Act, there is no scope whatever

for the petitioner to contend that the criminal prosecution is dependent upon the outcome of the adjudication proceedings and as such, the

respondent was not competent to file the criminal complaint when the appeal against the order of adjudication is pending disposal.

12. The second proposition put forward by the petitioner is that a cotravention of Section 9(1)(b) of the Act has not been made a specific offence

under the Act and as such, there cannot be a prosecution for an offence u/s 9(1) (b). In the words of the counsel, the enforcement authorities can

launch prosecutions only for offences under Sections 44 and 58 of the Act, but not for contravention of any other provision of the Act. The

contention runs totally counter to the words found in Section 56 which have already been extracted. Sections 44 and 58 deal with specific offences

which are likely to be committed by the officers of the Enforcement Directorate. It is on account of that factor, the two sections have been

incorporated. In so far as the other sections are concerned, Section 56 makes the contraventions of any of them, except Section 13, Clause (a) of

Sub-section (1) of Section 18, Clause (a) of Sub-section (1) of Section 19, Sub-section (2) of Section 44 and Sections 57 and 58, penal

contraventions. It is therefore futile for the petitioner to argue that there cannot be a prosecution for contravention of Section 9(1)(b) of the Act as

the contravention has not been made a specific offence under the Act.

13. The third contention put forth, proceeds on the basis that the criminal prosecution has been launched on the basis of incorrect and irrelevant

particulars. According to the department, the petitioner is not a first offender, because he had indulged in similar contraventions in the year 1966

itself and therefore, the petitioner's case warranted severe action. In the additional counter-affidavit filed by the respondent, it has been stated that

the petitioner was found guilty u/s 5(1)(aa) of the 1947 Act to the extent of Rs. 35,24,530 and the order of adjudication passed against him was

confirmed by the Appellate Board as well as by the High Court and that would conclusively show that the petitioner was habitually indulging in illicit

monetary transactions. The argument of Mr. Chellaswamy is that the adjudication proceedings related to certain contraventions of the year 1966

when the petitioner was not a repatriate, but was a non-resident holding temporary permit. I fail to see any merit or substance in the grievance put

forth by the petitioner. What is of relevance is the past conduct of the petitioner and not whether he had contravened the Act as a repatriate or as a

non-resident holding temporary permit visa. It cannot, therefore, be said that the Deputy Director had taken extraneous factors into consideration

or had proceeded on wrong surmises and launched the criminal prosecution against the petitioner.

14. The fourth submission made on behalf of the petitioner is that the petitioner is one of those unfortunate repatriates from Sri Lanka who could

not bring his assets to India on account of the stringent restrictions imposed by the Government of Sri Lanka and the misery and hardship suffered

by the repatriates was realised by the Government of India and the Government granted certain exemptions to relax the rules regulating repatriation

of funds to India from Sri Lanka, but in spite of that, the Deputy Director had not taken a sympathetic view, but had launched a criminal

prosecution against the petitioner. So far as this argument is concerned, the stand of the department is that the exemptions and relaxations of rules

granted by the Government of India came into force from a subsequent period and furthermore, the relaxations were made only for purposes of

Income Tax assessments and not to waive the restrictions contained under the Act. On a perusal of the communication relied on by the petitioner, I

find that it has been issued by the Central Board of Direct Taxes to all the Commissioners of Income Tax. The communication refers to assessees

bringing to India sums of money from Sri Lanka. They have been divided into two categories, viz., assessees who bring sums of money within a

ceiling of Rs. 50,000 and those bringing money in excess of the ceiling. The communication leaves no room for doubt that it was only intended to

help Income Tax assessees to explain the source of money shown in their account books, and not to enable people to repatriate money from Sri

Lanka in violation of the terms of the Act.

15. The fifth submission made on behalf of the petitioner is that if the Deputy Director was of opinion that the contravention committed by the

petitioner was of such magnitude that it cannot be adequately dealt with in adjudication proceedings and he must be prosecuted, the Deputy

Director ought to have stopped the adjudication proceedings and filed the complaint and it was not open to him to pass an order of adjudication

and then file a criminal complaint. Such an argument is advanced on the basis that under the old Act, Section 23-D provided that if the

circumstances of the case warranted the filing of a complaint, then the Director of Enforcement, instead of imposing any penalty, should make a

complaint in writing to the Court. The counsel would say that though there is no corresponding provision to Section 23-D in the present Act, the

spirit of that provision must be observed while launching prosecutions under the present Act.

16. I find no support whatever in the present Act for such a plea being countenanced. I have already referred to Section 56 which deals with

offences and prosecutions. Section 51 is the relevant section regarding adjudication and it is a complete and independent provision by itself.

Neither in Section 51 nor in Section 56 is there a provision that if a prosecution is to be launched, the adjudication proceedings must be stopped at

the stage of complaint and the criminal complaint alone should be proceeded with. This contention also therefore fails.

17. The penultimate submission of the petitioner's counsel is that the Deputy Director has adopted a conciliatory approach in the case of one

Amirdham, but in so far as the petitioner is concerned, he has taken an unduly harsh attitude. The petitioner's counsel would say that the differential treatment meted out to the petitioner is in violation of Article 14 of the Constitution. The Deputy Director has stated that the facts relating to the case of Amirdham were entirely different and furthermore, he was not a previous offender like the petitioner. In the face of this explanation, there is no room for the petitioner to contend that he has been singled out for prosecution. In any event, the question whether the department should launch a criminal prosecution in addition to the adjudication proceedings taken against an offender, will depend upon the facts of each case and the matter cannot be decided with reference to the delinquent acts of some other person. There is, therefore, no merit in the contention that the petitioner has been unjustly singled out for criminal prosecution.

18. We are only now left with the last ground of objection raised by the petitioner. According to Mr. Chellaswamy, the Deputy Director should have issued a show cause notice to the petitioner before he filed the complaint and the failure to send such a notice is fatal to the prosecution. For advancing such an argument, the learned Counsel placed reliance on the proviso to Section 61(2). Section 61 deals with the taking of cognizance of offences by Magistrates and their power to pass a sentence of imprisonment for a term exceeding two years or fine exceeding two thousand rupees, on any person convicted of an offence punishable u/s 56. Sub-clause (i) of Sub-section (2) of Section 61 imposes certain restrictions on the Court taking cognizance of offences u/s 44(2) and Section 58(1) against officers of the department. Sub-clause (ii) of Sub-section (2) is general in nature and refers to the taking cognizance, against any one, of offences punishable u/s 56 or Section 57 of the Act. Then, there is the proviso to Sub-section (2) and it reads as follows:

Provided that where any offence is the contravention of any of the provisions of this Act or of any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission.

Mr. Chellaswamy argues that the contravention complained of is with reference to repatriation of money from Sri Lanka by the petitioner without

permission, that as such, the Deputy Director ought to have issued a show cause notice before the complaint was launched and since no such

notice was issued, the complaint is vitiated. Mr. Krishnan, learned Standing Counsel for the department, stated that the proviso is only directory in

nature and not mandatory, and in support of this stand, he cited *Dalchand Vs. Municipal Corporation, Bhopal and Another*, . Mr. Chellaswamy,

however, refuted the Prosecutor's stand and argued that the proviso concludes the section, and to buttress the argument, he cited *Commissioner*

of *Commercial Taxes and Others Vs. Ramkishan Shrikishan Jhaver and Others*, . Mr. Chellaswamy also cited the several authorities noted below

for the proposition that the normal rule of construction of statutes is to give a plain interpretation to the words and that a different interpretation

could be given only if the legislature had not intended to say what it means or if the words used in the statute are found to be ambiguous or if the

normal interpretation of the words would defeat the object of the statute: *Haridwar Singh v. Bagun Sambrui* (1973) 3 SCC 895, *Narayanan*

Sankaran Mooss Vs. The State of Kerala and Another, , *Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra*

and *Others*, , *Shri Rangaswami, The Textile Commissioner and Others Vs. The Sagar Textile Mills (P) Ltd. and Another*, , *Lila Gupta v. Laxmi*

Narain : [1978]3SCR922 and *Bhagwant Singh Vs. Surjit Kaur*, .

19. On account of one factor, I do not think it necessary to go into the question whether the direction contained in the proviso for a show cause

notice being given is mandatory in character or directory in nature. Even if it is to be held that the proviso contains a mandate, the question for

consideration is whether a second show cause notice should be given to a person before a criminal prosecution is launched against him u/s 56 of

the Act. I find no basis in the proviso for holding that such a notice should be given. All that the proviso states is that before a Court takes

cognizance of an offence which relates to the contravention of any provision of the Act which prohibits the doing of an act without permission, the

complainant must have given an opportunity to the accused to show cause that he had such a permission. What follows from this is that at some

point of time prior to the filing of the complaint, the accused must have been given an opportunity to show that he had obtained the requisite

permission and he had not contravened the provisions of the Act in any manner. It is, however, not necessary that the show cause notice must have been issued immediately before the filing of the complaint. If a show cause notice had been issued before adjudication proceedings were started, it would undoubtedly constitute a valid notice under the proviso to Section 51(2). I have already held that a criminal prosecution is not a continuation of the adjudication proceedings. As such, a prosecution cannot amount to a second stage of the proceedings warranting the issue of a second show cause notice. It has been held in *New India Corporation Vs. The Director, Enforcement Directorate, Government of India and Another*, that Section 23(1) of the Foreign Exchange Regulation Act, 1947, does not provide for two procedures and the opportunity contemplated by the proviso to Section 23(3) [corresponding to proviso to Section 61(2) of the new Act] can also be afforded in the course of an adjudication u/s 23-D(1). The ratio would govern the facts of this case also, even though the present prosecution has been launched under the 1973 Act, because the proviso under the old Act of 1947 and that under the 1973 Act are identical in terms. Hence it is not open to the petitioner to contend that he ought to have been issued a second show cause notice before the launching of the prosecution and in the absence of such a notice, the complaint is not maintainable.

20. For all the foregoing reasons, the petition for quashing of the proceedings deserves to fail and will accordingly stand dismissed. The trial Court, is however, instructed to dispose of the case according to merits, and not to be influenced in any manner, by the dismissal of this petition, or by any of the observations contained herein.