
(1977) 07 CAL CK 0012
In the Calcutta High Court

Bhagwati Prasad Khaitan

APPELLANT

Vs

The Special Director, Enforcement Directorate and Another

RESPONDENT

Date of Decision : 11-07-1977

Acts Referred:

Constitution of India, 1950 — Article 226
Foreign Exchange Regulation Act, 1973 — Section 51

Citation : (1977) CriLJ 1821

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Judgement

Sabyasachi Mukharji, J.

1. In this application under Article 226 of the Constitution the petitioner challenges a notice dated the 25th September, 1975, issued to the petitioner under Foreign Exchange Regulation Act, 1947.

2. The petitioner is ;a director of the Hindusthan Motors Limited. He is also a Solicitor of this Court. By the said notice the petitioner was required to show cause why adjudication proceedings contemplated by Section 51 of the Foreign Exchange Regulation Act, 1973 (Section 23-D of the Foreign Exchange Regulation Act, 1947) should not be held against the petitioner for the alleged contravention of Section 4(2) of the Foreign Exchange Regulation Act, 1947, by the Hindusthan Motors Ltd. Show cause notices were also issued to the said company and other directors and some officers of the said company on the said alleged grounds. The said notice alleged that the said company had entered into a contract with the United Commercial Bank Limited for the purchase of forward foreign exchange equivalent to Rs. 1.25 crores at the rate prevailing on the date of the said contract. If was, further, alleged that the said contract was entered into by the said company with the said Bank against its outstanding orders for import of raw materials, Bedford Trucks in CKD condition and components for which the said company had been granted import licences. It was alleged that there was violation of the provisions of the said Act by the said company in

making the said contract with the Bank to cover "up the said import. The petitioner, being a director, Was asked to show cause to the said charge. The company challenged the said notice on the ground that on the materials alleged there was no ground for issuing the impugned notice, and a rule Nisi was issued by this Court under Article 226 of the Constitution, The said application came up for hearing before Mr, Justice Amiya Kumar Mukherjee. By a judgment in United Commercial Bank V. Director, Enforcement Directorate 1977 Cal LJ 292, Mr. Justice Mukherjee has held that the said contentions could be agitated in the adjudication proceedings and, therefore, it was premature at this stage to go into the validity of the said contentions. He has accordingly discharged the rule nisi. In the instant case on behalf of the petitioner the same contentions were again raised before me. It was, further, argued however that the petitioner, who was a director, had been sought to be vicariously made liable because the petitioner was a director of the company. That vicarious liability of the petitioner will have to be judged by the averments made in the impugned notice. The said notice, after setting out the relevant allegations, inter alia, alleges as follows :

And Whereas the import bills as aforesaid amounting in aggregate to about ? 9,32,221-17-ld. were converted at the rate of eh. 1-5 29/32d = Re. 1 at the request in writing of the said company which writing was mostly signed by Shri %.. P. Sonthalia, an officer of the said Company and in a few cases by certain other officers of the said Company who signed for K. P. Sonthalia ;

And Whereas the said conversion was made on the basis of the forward exchange contract No. 130/66 booked by the said Bank on 4-6-66 at the request of the said company contained in a letter dated 4-6-66 signed by Shri R. P. Jhunjhunwala, Vice-President of the said Company ;

It further alleged--

And Whereas the said R. P. Jhunjhunwala furnished on 4-6-66 to the said Bank a list of orders alleged to have been placed with M/s. Vauxhall Motors Limited valued at Rs. 88,00,000 and also a list of steel orders alleged to have been placed with M/s. East Indian Produce Co. Ltd., U. K. and M/s. Mitsui Company Ltd., Japan valued at Rs. 30,00,000 and 9 printed acknowledgments of the East Indian Produce Co. Ltd.

Thereafter the impugned notice alleged as follows:

And Whereas at the time the aforesaid contravention was committed by the said Company, S/Shri B. M. Birla, Kasturbhai Lal Bhai, Badri Das Goenka, B. P. Khaitan, A. Pamaswari Mudaliar, Dharendra Nath Mitra. M. K. Valloidi, Rasesh M. Mafatlal and Khan Bahadur C. B. Taraporvala were the Directors and Shri S. L. Bhattar was the President of the said company ;

And Whereas it appears that the aforesaid Directors and the President who were in charge of, and were responsible to, the said company for the conduct of the business of the said company, have contravened the provisions of Section 4(2)

read with Section 230 of the said Act and have thereby rendered themselves liable to be proceeded against u/s 26(1)(a) of the said Act ;

And Whereas it appears that the aforesaid contravention has taken place with the consent and/or connivance of S/Shri R. P. Jhunjhunwala, W. D. Jones and K. P. Sonthalia respectively Vice-President (Finance), Director of Supply and Accountant of the said company at the material time.

It is, therefore, clear that apart from the officers, who have been specifically, mentioned, namely Shri R. P. Jhunjhun wala, Shri W. D. Jones, Shri K. P. Sonthalia, the said notice was issued to the other directors as well the petitioner on the ground that they were the directors of the company. In case of offences by companies, the vicarious liability of the officers and directors of a company for offences committed under the Foreign Exchange Regulation Act, 1947, arise u/s 23-C of the said Act, which is to the following effect.

23-C. (1) If the person committing a contravention is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the 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 shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all the due diligence to prevent such contravention.

23-C. (2) Notwithstanding anything contained in Sub-section (1), where a contravention under this Act 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 that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.-- For the purposes of this section,--

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

(b) "director", in relation to a firm, means a partner in the firm." Therefore, in order to be made vicariously liable the petitioner must be shown to have been a person who was in charge of or was responsible to the company for the conduct of the business of the company. This provision of the Act fell for consideration by the Supreme Court. As to the meaning of the "person in charge and responsible for the conduct of the affairs of the company" in the case of Girdhari Lal Gupta Vs. D.H. Mehta and Another, , the Supreme Court held that the director simpliciter as such can not be said to be the person who was in charge of and was responsible to the company for the conduct of its business. The Supreme

Court came to that conclusion having regard to the provisions of the Act, specially in view of Sub-section (2) of Section 23-C of the Act. Having regard to the averments made in this case, which I have set out hereinbefore, and in view of the said decision of the Supreme Court, it must be held that the petitioner as such, on the allegations made in the show cause notice, cannot be proceeded against by the impugned notice. It was, however, contended by the learned advocate on behalf of the respondent that the aforesaid decision of the Supreme Court was in respect of a criminal trial. It was, therefore, urged that the ratio of the said decision would not be applicable in the instant case, I am however, unable to accept this contention. It is true that the construction of Section 23-C and the effect thereof fell for consideration before the Supreme Court in a criminal case. But the effect of the construction will be valid for all purposes.

3. It was, then, contended on behalf of the respondent that in view of Article 226 of the Constitution as amended by the Constitution (42nd Amendment) Act, 1976, this application was not maintainable. On this aspect two arguments were made. It was, firstly, urged that there was remedy for the redress and secondly, it was urged that the injury complained of was not substantial. Now, so far as the question whether there is any other remedy for the injury complained of in this case, it has to be borne in mind that here the injury that the petitioner is complaining is the injury of being exposed to an adjudication proceeding where on the face of the proceeding or on the notice issued, there is no cause to adjudicate under the law. If the petitioner was complaining of improper adjudication, the adjudication provided by the Act would be sufficient remedy for the injury of improper adjudication. But there is no remedy provided for the injury of being exposed to an adjudication proceeding without any material or without any cause. If that is the position, then for such injury it cannot be said that there is any remedy available, or provided for under the law. The above view seems to be in consonance with the view of this Court in the case of *Monindra Mohan Sarkar v. Income Tax Officer, Project Circle, North Bengal, Siliguri* 1977 Cal HC 603 as well as with the decision taken by the learned single Judge of this Court in the case of *Surja Mohan v. State of West Bengal* 81 C WN S20 : 1977 T LR 77 and the ratio of the Full Bench decision of the Gujarat High Court in the case of *Ahmedabad Cotton Manufacturing Ltd. v. Union of India* AIR 1977 Guj 113 (FB).

4. I ,am also unable to accept the position that the injury was not substantial, because to be exposed to an adjudication leading to quasi-criminal consequences without any material, in my opinion, would be a substantial injury for which a person aggrieved can seek remedy under Article 226 of the Constitution. On behalf of the respondent reliance was placed on the observations of the Supreme Court in the case of *Chanan Singh Vs. Registrar, Co-op. Societies, Punjab and Others*, . In my opinion, the said observations in view of the facts and circumstances of this case would not be applicable because I have come to the conclusion that there is no remedy provided for being exposed to an improper adjudication without any material at all.

5. Learned advocate on behalf of the petitioner sought to contend that the Constitution (Forty-second Amendment) Act, 1976 in so far as it sought to amend Article 226 of the Constitution, was ultra vires. The said point had not been taken in this petition ; as a matter of fact it could not have been taken. Learned advocate sought adjournment on the ground that he proposed to make an application for amendment of the petition. In the view I have taken, it is not necessary for me to consider this prayer any longer,

6. This Rule, therefore, must succeed and impugned notice is quashed and the respondents are restrained from giving effect to the same so far as the petitioner is concerned. This, however, will not prevent the respondent authorities from issuing any fresh notice in accordance with law on proper materials, if they are so entitled. There will be no order as to costs.