

(2003) 05 JH CK 0042
In the Jharkhand High Court
Case No : Criminal M.P. No. 290 of 2003

Dr. K.M. Prasad and Others

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 06-05-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Foreign Exchange Management Act, 1999 — Section 49(3), 49(4)
Foreign Exchange Regulation Act, 1973 — Section 56, 64(2), 9

Citation : (2003) 51 BLJR 1313 : (2003) 3 JCR 452

Hon'ble Judges : Amreshwar Sahay, J

Bench : Single Bench

Advocate : Jitendra Singh and M.B. Lal, for the Appellant; A.K. Das, for the Respondent

Final Decision : Dismissed

Judgement

Amreshwar Sahay, J.—Heard the learned counsel for the parties.

2. The prayer of the petitioners, in this application is for quashing of the order dated 31.5.2002 taking cognizance of the offences punishable u/s 56 of the Foreign Exchange Regulation Act, 1973, r/w Section 49 (3) & (4) of the Foreign Exchange Management Act, 1999 as well as the entire criminal proceeding, being Complaint Case No. FEMA 2/2002, by the learned Special Judge, FERA/FEMA, Ranchi.

3. The facts of the matter, according to the complaint petition (Annexure 1) filed by the complainant-opposite party, against the petitioners are as under :--

"Pursuant to the order of Patna High Court and the Supreme Court, the Central Bureau of Investigation, Patna, took up the investigation of case No. RC 55(A)/96 registered under Sections 120B, 409, 420, 467, 468, 472, 484 and 402 of the Indian Penal code and Section 13(2) read with Section 13(1) (c) and (d) of the Prevention of Corruption Act, 1988. The allegation in brief is that the petitioner

No. 1, Dr. K.M. Prasad in conspiracy with others defrauded the Government to the extent of Rs. 7,09,92,000/- (Rupees Seven Crores Nine Lac and Ninety two thousand) during the period 1980-90, on the basis of fake allotment letters purportedly issued by the Director of Animal Husbandry, Government of Bihar for the purchase of medicines. But as a matter of fact, fake supply were shown by the suppliers and the money was withdrawn on the basis of fake allotment orders and the money was misappropriated by the accused persons.

It revealed that Dr. K.M. Prasad was involved in another case, investigated by the C.B.I. i.e. R.C. 4(A)/96, in which the allegation of defrauding the Government was to the tune of Rs. 19,81,66,460/-(Rupees Nineteen Crores, Eighty One Lakhs, Sixty Six Thousand Four Hundred and Sixty). Investigation revealed that the petitioner No. 1, Dr. K.M. Prasad had acquired huge move-able and Immovable assets, in his own name, and in the name of his children and others at different places. It further revealed that the petitioners No. 2 to 6 i.e. the sons and daughter of Dr. K.M. Prasad did receive foreign exchange remittances by way of foreign exchange instruments amounting US\$ 31,15,000/- and pounds 1000 during 1991-92. The said remittances were not actually genuine gift amount but were suspected to have been procured and involved in violation of FERA, 1973 by the persons involved in the Animal Husbandry Scam. The Enforcement Directorate, examined the accused persons and the relevant documents of Income Tax Department. From scrutiny of documents, it came to light that Smt. Rashmi Kumari (Petitioner No. 6) had received a total amount of US\$ 56,000/- by way of four demand drafts on four different dates, which were deposited in her Punjab National Banks of Dubai, UAE. On enquiry the senders of those drafts were found to be fictitious persons. During enquiry, Smt. Rashmi Kumari disclosed that she had no knowledge at all as to who had sent the said amount to her. She further stated that her brother Kamlesh Kumar was looking after the entire transaction.

Similar is the allegations against Rajesh Kr. Prasad (Petitioner No. 2) who received the total amount of US\$ 75,000/- in the form of four cheques/ drafts, which was credited in his account held with Oriental Bank of Commerce, New Delhi.

Similar is the allegation against Mukesh Kumar, (Petitioner No. 4), Abhishek Kumar (Petitioner No. 5) and Kamlesh Kumar (Petitioner 3) that they received US\$ 57,000/-, US\$ 57,000/-and US\$ 70,000/- and Pounds 1000/-respectively in similar manner.

Dr. K.M. Prasad is said to have admitted that his sons were having properties at Bombay, Bangalore, Delhi and Patna and further that he was working as the Assistant Director in Animal Husbandry Department at Ranchi and was getting a monthly salary of Rs. 7,000/- only.

It is alleged that the foreign exchange remittances totally US\$ 3,15,000/- and pounds 1000/- received by the petitioners No. 2, 5 to 6 were arranged by Dr.

K.M. Prasad to be received from abroad, in the name of his children by making payment in Indian Rupees equivalent to the said amount of foreign exchange, out of the aforesaid amount, without previous general or special exemption from the Reserve Bank of India and thereby contravened different subsections of Section 9 read with Section 64(2) of the FERA, 1973 punishable u/s 56 of the said Act."

4. On the basis of the complaint, the opposite party, prayed that the cognizance of the offence punishable u/s 56 of the FERA, 1973 read with Section 49 (3) and (4) of Foreign Exchange Management Act, 1999 (FEMA) be taken against the accused petitioners and they be prosecuted for committing the aforesaid offences.

5. The learned Special Judge by his order dated 31.5.2002, found prima facie case against all the petitioners and thereby took cognizance of the offences punishable u/s 56 of the FERA, 1973 read with Section 49 (3) and (4) of the FEMA, 1999 against all the petitioners and summoned them to face trial.

6. Being aggrieved against the order dated 31.5.2002 taking cognizance, the petitioners have filed the present application for quashing of the order taking cognizance as well as the entire proceeding against them.

7. Mr. Jitendra Singh, learned counsel for the petitioners submitted that the receipt of foreign exchange were made known to the Income Tax Authorities and the remittances in the foreign exchange received by the petitioners were accepted by the Income Tax Department. He submits that regarding the remittance of foreign exchange, no enquiry can proceed merely on the ground of receipt of foreign exchange by a person in India because of the fact that the Income Tax Authorities on the basis of declaration submitted alongwith the returns, filed by the petitioners, immunities were granted by the Income Tax Department and, therefore, the provisions of Section 9 read with Section 64(2) of the Act cannot be made applicable to prosecute the petitioners under the provisions of Section 56 of the Act.

8. It was next contended that the Act provides that whether any person has contravened any of the provisions of the Act or the Rules or not, it shall be Adjudicated by holding an. enquiry and if it is found that the person has contravened the provisions of the Act or the Rules, penalty can be imposed. But in the present case, without holding such enquiry or adjudication the complaint has been filed against the petitioners: The learned counsel for the petitioners has relied on the decision of Commissioner of Income Tax, Mumbai Vs. Bhupen Champak Lal Dalal and Another etc., . He has further relied on a decision rendered by the Patna High Court in the case of Prakash Kumar Sahay v. Union of India, reported in 2002 (3) PLJR 561.

9. On the other hand Mr. Amit Das, learned counsel appearing for the opposite party submitted that there is no irregularity or illegality in the impugned order and the learned Special Judge has rightly taken cognizance of the offences against the petitioners finding a prima facie case against them. He further

submits that in order to examine the submission made on behalf of the petitioners, this Court would have to meticulously examine the allegations made in the complaint which is not permissible at the stage of taking cognizance and, therefore, the finding of a prima facie case arrived at by the learned Special Judge cannot be interfered with at this stage. Relying on the decision of this Court in Vijay Kumar Mallik Vs. Union of India (UOI) and Others, and submits that one of the co-accused, namely, Vijay Mallik by filing W.P. (Cr.) No. 280 of 2002 before this Court had also prayed for quashing of the "entire criminal prosecution as well as the order dated 31.5.2002 whereby the Special Judge had taken cognizance of the offences. Since the same impugned order which has been challenged in the present application has already been tested by this Court and the said W.P. (Cr.) No. 280 of 2002 has already been dismissed by order dated 18.12.2002 by a Bench of this Court and, therefore, this application is also liable to be dismissed. The copy of the order of the aforesaid W.P. (Cr.) No. 280 of 2002 has been produced before me.

10. The decisions of the Supreme Court cited by the learned counsel for the petitioners i.e. Commissioner of Income Tax, Mumbai Vs. Bhupen Champak Lal Dalal and Another etc., is not at all applicable in the facts and circumstance of the present case. The facts of the case before the Supreme Court was that, against the assessment order under the Income Tax Act, appeals were preferred before the Commissioner of Income Tax Appeals or the Income Tax Appellate Tribunal and during the pendency of those appeals the criminal prosecution was initiated and were pending, therefore, the Supreme Court held that the criminal prosecution should await the decision and after conclusion of the appeals. But in the present case the facts are quite different and, therefore, this decision of the Supreme Court is not applicable in the facts and circumstance of the case.

11. The decision of the Patna High Court rendered in Prakash Kumar Sahay v. Union of India, reported in 2002 (3) PLJR 561 is also of no help to the petitioners. In the said case, it was alleged that the :

"Petitioner had gone to Australia with an amount of 2000 U.S. dollars with his uncle, who was to go for renal operation. According to the allegations, during the said period the petitioner purchased five Omega watches after taking some loan from his uncle Dr. S.B. Sinha and did not declare the said articles. The value of the said watches was 3297.90 Australian dollars. The prosecution says that during the course of the investigation the accused made a confessional statement and as he has committed breach of Section 8(1) of the Foreign Exchange Regulation Act, he was liable to be prosecuted and convicted.

The accused, inter alia, submitted in his original application for quashing that there were no allegations against him, alleged confession was retracted and that the said confession was made under the coercion and pressure of the officers and under the compelling reasons because the accused-appellant had to go to attend the cremation. Along with the Supplementary affidavit the order dated 7.12.2001 passed by the Special Director of Enforcement Directorate, Government of India,

New Delhi has also been pressed into service to contend the after making a detailed enquiry the concerned Spl. Director has recorded a positive finding that the Department/Prosecution has failed in proving violation of Section 8(1) of the FERA, 1973."

12. Therefore, it appears that on the basis of those facts, it was held that on preponderance of probabilities, the accused cannot be held guilty and it would be too much to say that the prosecution would be able to prove its case beyond the shadow of doubt or to a reasonable certainty as the Special Director had found that the department failed in proving the charges leveled u/s 8(i) of the Act.

But this is not the position in the present case and therefore, the case of Prakash Kumar Sahay (supra) is of no help to the petitioners and the same is on quite different footing.

13. Moreover, in view of the fact that this Court in the case of Vijay Kumar Mallik Vs. Union of India (UOI) and Others, has already held that criminal prosecution u/s 56 of the Act is not dependant upon the outcome of adjudication proceeding and the prosecution u/s 56 of the Act can be launched even when the adjudication proceeding is pending. Both the prosecution u/s 56 of FERA and adjudication proceeding are two separate aspects.

In view of the finding above by this Court, the submission of the learned counsel for the petitioners can't be accepted.

14. It has been held in catena of decisions by various High Courts and this Court as well as the Apex Court that the Courts while appreciating the charges u/s 482, cannot examine the allegations made in the complaint meticulously and the falsity or truthfulness of the prosecution cannot be examined at this stage. This Court cannot substitute its own finding over the finding of the learned Special Judge whereby he has found prima facie case against the petitioners.

15. In that view of the matter I do not find any illegality or irregularity in the impugned order of the learned Special Judge, in taking cognizance of the offences as aforesaid.

16. In the result, there is no merit in this application. It is, accordingly, dismissed.