
(2009) 07 MAD CK 0399

In the Madras High Court

Case No : Criminal O.P. No. 23931 of 2002 and Criminal M.P. No's. 9997 and 9998 of 2002

G. Ganapathisubamania

APPELLANT

Vs

The Chief Enforcement Officer, Enforcement Directorate,
Government of India

RESPONDENT

Date of Decision : 29-07-2009

Acts Referred:

Foreign Exchange Management Act, 1999 — Section 49(3), 49(4)

Foreign Exchange Regulation Act, 1973 — Section 18(2), 18(3), 37, 50, 56

Citation : (2009) 07 MAD CK 0399

Hon'ble Judges : C.S. Karnan, J

Bench : Single Bench

Advocate : Ram and Ram, for the Appellant; K. Ramasamy, Special Public Prosecutor for Enforcement, for the Respondent

Final Decision : Dismissed

Judgement

C.S. Karnan, J.—The petitioner / accused No. 8 has filed the above Criminal Original Petition No. 23931 of 2002 to call for the records in C.C. No. 502/2002 on the file of the Additional Chief Metropolitan Magistrate (Economic Offences E.O.II, Chennai - 8) and quash the proceedings as against the petitioner.

2. The Respondent/Complainant had initiated these proceedings against the petitioner for offences under Sections 18(2), 18(3) r/w 68 and u/s 56(1)(i) of the Foreign Exchange Regulation Act, and submits as follows:

The respondent/complainant filed the case against ten accused persons on an alleged offences under Sections 18(2), 18(3) r/w 68 and u/s 56(1)(i) of the said Act, r/w. Sub-section 3 and 4 of Section 49 of the Foreign Exchange Management Act, 1999. The complainant stated that on the basis of reference from the RBI and Intelligence collected search operations u/s 37 of Foreign Exchange Regulation Act were carried out at the premises of the first accused, M/s. M.V.R. Industries Ltd, and its group companies situated at 5th floor, "Rayala Towers",

No. 781, Mount Road, Chennai-2 and certain other connected premises on 26.09.1996. Search was also conducted in certain other premises on 7/8.11.1996. As a result of the above searches, certain documents were seized. The said search was conducted in ten places of the accused persons.

3. The intelligence collected indicated that there was large scale non-realisation of export sale proceeds of the Cashew Kernels exported by them and there had been huge over-invoicing of the raw cashew nuts imported by them from various countries. There are eight group companies of M.V.R. Group in India. Besides, there were four more companies in Singapore, which were the counterpart companies of the said M.V.R. Group Companies in India. All these companies were cumulatively run by one Mr. M.V. Varadarajulu @ M.V. Raja. The said Raja was not available on the date of search. He was arrested in the year 2001 in France on the request of C.B.I, and a separate letter of Rogatory has been issued from this Honourable Court on 23.04.2002. It is submitted that a non-bailable warrant was issued by this Honourable Court for offence u/s 56 of Foreign Exchange and Regulation Act. The same is pending execution.

4. The complainant further contended that on the basis of initial scrutiny of documents, statements were recorded from the important functionaries of the Companies namely, (1) S.P. Vairavan, who was the Managing Director of the Group Companies in India, (2) Mr. Sai Jagannathan, legal adviser to the M.V.R. Group companies in India and (3) Mr. Subramanian, Chartered Accountant as well as the Statutory Auditor of the M.V. Group of Companies. Some other Directors of the company on record were present. Apart from this several directors of the group companies were examined. The complainant also collected statements from 36 persons in this regard.

5. During the course of investigation, it was learnt that the Central Bureau of Investigation, Chennai, who were probing the Indian Bank Scam had searched the premises of M.V.R. Group of Companies in India and had recovered certain documents. Those documents were kept in the custody of Economic Offences Wing of C.B.I, Chennai and Bank Securities, Fraud Cell, C.B.I, Bangalore.

6. On the basis of these statements, enquiries and search, show cause notice were issued to the accused persons.

7. The said M.V. Raja, was the person behind the operation of M.V.R. Group of Companies. Under him, all the other accused persons are functioning. It was observed by the complainant in the course of investigation that there had been huge quantum of non-realisation of export sales proceeds of the Cashew Kernels processed and exported by the Group of Companies in India during the period 1993-1996. The amount involved in these transactions was Rs. 209.13 crores. The company exports goods to U.S.A, European Countries etc. While the goods were consigned directly to the respective buyers, the bills were raised in the name of their counterpart companies. The goods were exported on "Delivery on acceptance" basis. However, the bills were not paid for years together. As per the

undertaking given in the form G.R., under which the exports were made, the companies had to realise the invoice amounts within six months from the date of export.

8. However, the counterpart companies, who had received the goods sold the same and realised the proceeds from the overseas buyers did not repatriate the sale proceeds to the Indian Companies. Thus, there was a huge non-reputation of the export sale proceeds to the Indian Companies to the extent of Rs. 209.13 Crores. In order to avoid pressure from the banks for repatriation of the sale proceeds, the counterpart companies made quality claims on the Indian Companies even for the goods exported by them several years before, and refused payment for the same. Thus, an amount of Rs. 209.13 crores remained unrealised. It is pertinent to note that cashew kernels exported by M.V.R. Group of companies in India were subjected to quality checks by internal quality control personnel as well as external quality control agencies like "SGS India Ltd". Further, the complainant contended that the Companies in India willingly paid higher prices for the raw cashew nuts imported by them and even opened irrevocable letters of credit in India for payment to Singapore based companies. It is alleged that the raw cashew nuts imported by one company were transferred in the name of the other company without the knowledge of the bankers, who had financed the import.

9. It was further alleged that though the actual price of raw cashew nuts ranged from US 425 dollars per metric tonne to about 1000 dollars per metric tonne, the same goods were filled for about US 1050 dollars per metric tonne to US 1255 dollars per metric tonne by the overseas suppliers. The Singapore companies raised letters of credit in the names of supplies abroad from Indian bank and other Banks in Singapore and paid the same. For goods received in India, Group companies have raised irrevocable letter of credit in favour of the companies situated in Singapore and paid for goods received by them. The special Director of enforcement, New Delhi issued show cause memorandum on 25.9.1997 to the A1 company proposing penalties on the companies u/s 50 of FERA. After giving notice, sufficient opportunity was given to the accused to send in their statements in writing whether they had any permission/ exemption of the R.B.I to enter into the aforesaid transactions. But no documentary evidence was produced by the accused regarding permission / exemption of the RBI.

10. Therefore the complainant has lodged a complaint against the accused persons with the additional Chief Metropolitan Magistrate Court, E.O.II, Chennai. Supporting his case, 15 prosecution witnesses have been mentioned besides the relevant documents. The same has been taken on file by the Learned Magistrate on his file and summons were issued.

11. It is alleged by the petitioner that on perusal of the complaint, he had come to know that M.V.R Industries Ltd has been arrayed as the 1st accused. Besides that, 10 others were also arrayed as accused. The petitioner has been arrayed as 8th accused.

12. The petitioner seeks to quash the complaint as against him on the following grounds.

1) The petitioner submits that he joined MVR Industries on 19th March 1996 and resigned from the Board of Directors on 4th December 1996. Form - 32 was duly filed before the Registrar of Companies, Pondicherry to this effect.

2) The petitioner submits that he was Director of Satyam foods Ltd i.e., from the inception of the company. He resigned from the Board of Directors on 1st April 1996. Form - 32 was duly filed before the Registrar of Companies, Pondicherry, showing that the petitioner had resigned on 1.4.1996. The prosecution had been initiated against the company by invoking Section 68 of repealed provisions of Foreign Exchange Regulation Act. It is alleged by the petitioner that every person employed or holding the position as Director cannot be prosecuted for any violations of the provisions of the Act by the company, it has to be identified whether he is in-charge and responsible for the conduct of the business of the company at the relevant time.

3) The petitioner has also contended that in the complaint it has been mentioned that only the 2nd accused (Mr. M. Varadarajulu @ M.V. Raja) has been excising overall control and was issuing instructions to officials of the company, that the 2nd accused was observed to have taken all the policy decision of the companies and the companies in India, and that even petty matters like monthly over head demands had to be approved by him from Singapore. The petitioner has alleged that nowhere in the complaint has it been stated that the petitioner was in charge of and was responsible for the conduct of the business of the company at the relevant time when the offence was committed. The petitioner has contended that the onus of proving this fact is on the prosecution.

4) It is further alleged that there is not even a whisper or a shred of material nor anything else to show that the petitioner had committed or omitted to do any act from which a reasonable inference could be drawn that the petitioner also could be vicariously liable. In the absence of such an averment, the prosecution cannot survive against the petitioner .

5). The petitioner has further relied on the Judgements reported in the following Journal, for the above contention State of Haryana Vs. Brij Lal Mittal and Others, . Further the petitioner has contended that for prosecution u/s 56 of the Foreign Exchange Regulation Act, the averment "in charge and responsible" is sine qua non. In this regard, two citations have been relied upon.

A) Girdhari Lal Gupta Vs. D.H. Mehta and Another, .

B) 2002 (6) SCALE 169 - Smt. Katta Sujatha v. Fertilisers and Chemicals, Travancore and Anr.

13. Considering the contentions raised by the Learned Counsels arguing for their respective parties, the Court is of the view that,

a) As per Section 68, Sub-section 2, "---- where a contravention of any of the provisions of this Act or of any rule, direction or order made there under 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 ---, such director---- shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. And hence, it becomes all the more necessary for the petitioner to establish the fact that he, being a Director of the Satyam Foods Ltd, at the relevant period, had not consented or connived with the accused - 2, in the irregularities mentioned in the complaint.

b) The petitioner has contended that he had resigned as Director from the said Satyam food Ltd on 1.4.1996. But it has been alleged in the complaint that there had been huge quantum of non-realisation of export sales proceeds of the cashew kernels processed and exported by the group companies in India during the period 1993 - 1996 and that the amount involved in these transactions was Rs. 209.13 crores. As such, the question of the petitioner's involvement in the alleged irregularities arise;

c) The petitioners contention that only the 2nd accused is totally responsible for exercising overall control and that all other Directors or officers do not have any role is a point in dispute, which has to be sorted out in a trial Court, after examination of documents and witnesses.

14. The Court, therefore, opines that the petitioner/accused 8 is a necessary party and as such the complaint as against the petitioner cannot be quashed and hence the Criminal Original Petition No. 23931 of 2002 is dismissed. Consequently, connected Miscellaneous Petitions are closed.