
(2004) 07 CAL CK 0043

In the Calcutta High Court

Case No : C.R.R. No's. 1634, 1677, 1678, 1679, 1680, 1681, 1682, 2225, 2236, 2237 and 2318 of 1995, 229 and 230 of 1996 and 1997 of 2002

Ganapati Exports Ltd. and Others

APPELLANT

Vs

S. Pervez, Enforcement Officer and Another

RESPONDENT

Date of Decision : 30-07-2004

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 23, 50, 56, 57, 61(2)

Citation : (2005) 2 CALLT 244 : (2004) 4 CHN 293 : (2005) 128 CompCas 748 : (2006) CriLJ 2352 : (2006) 3 JCR 474 : (2006) 3 RCR(Criminal) 571 : (2005) 62 SCL 529

Hon'ble Judges : G.C. De, J; Debiprasad Sengupta, J; Arunabha Barua, J

Bench : Full Bench

Advocate : Anjan Kumar Mukherjee, Monoranjan Daw and Bishnu Pada Jana, Himanshu De, Saibal Mondal, Supratim Dhar and Suman De, for the Appellant;

Judgement

Debiprasad Sengupta, J.—Present reference to this Bench has been made by an order dated 15.10.1996 passed by the learned Single Judge of this Court. As similar point of law is involved in all the revisional applications, those are taken up analogously for disposal. Proceedings in the Court below were initiated on different allegations. In the present reference, we deal with the facts relating to CRR No. 230 of 1996.

2. Briefly stated facts leading to the present reference and the questions framed by the learned Judge are as follows :

The accused petitioner No.1 company during the year 1988-89 effected shipment of goods valued at Rs. 57,87,256.79 declared under the GRI forms and it transpired from the records that the accused No. 1 refrained from doing anything or taking any action which had the effect of securing the export proceeds to the tune of Rs.57,87,256.79, within six months from the date of shipment or within the time extended by the Reserve Bank of India as required under the law in contravention of Sections 18(2) and 18(3) of the Foreign Exchange Regulation

Act, 1973 (hereinafter referred to as FERA, 1973) and thereby committed an offence punishable u/s 56 of the said Act. The accused petitioner Nos. 2 and 3 being Chairman and Managing Director of the company (accused No. 1) and responsible for conduct of day to day business of accused No.1 are also liable for prosecution for the offence u/s 56 read with Section 68(1) of the Foreign Exchange Regulation Act, 1973. It was further alleged in the petition of complaint that opportunity notice as required u/s 61 of the said Act was issued and served upon all the accused persons giving them opportunity to furnish within 10 days any permission/extension obtained from the Reserve Bank of India or from any competent authority of Government of India, but the accused persons failed to comply with the notice.

3. In the circumstance as aforesaid complaints were filed in the Court of learned Chief Metropolitan Magistrate, Calcutta by the complainant being the Enforcement Officer, Enforcement Directorate, Foreign Exchange Regulation Act, 1973 being empowered by the Notification No. S.O.715-E Dated 24.9.93 issued by the Govt. of India, Ministry of Finance.

4. On receipt of the petitions of complaint as aforesaid, the learned Magistrate took cognizance of the offence and issued process against the accused persons, It is at this stage the petitioners came up before this Court with a prayer for quashing of proceeding.

5. Before the learned Single Judge, it was argued that unless the adjudication proceeding u/s 51 of the FERA, 1973 is complete and followed by a penalty, no prosecution u/s 56 of the said Act can be initiated. In other words, unless the adjudication proceeding is complete followed by a penalty it can not be decided whether any contravention of FERA, 1973 has been committed by the company and as such the complaints filed by the concerned authority are premature. Second point raised by the petitioners" learned Advocate was that the complainant has not been properly authorised to lodge the complaint in terms of Section 61(2)(ii)(b) of the Act.

6. The following questions have been framed by the learned Single Judge and referred to the larger Bench for adjudication :

" (1) Whether in the facts and circumstances complaint u/s 56 of the FERA, 1973 is premature since it was instituted before award of penalty u/s 50 of the said Act. In other words at what stage a complaint u/s 56 of the FERA, 1973 can be filed.

(2) Whether the complainant has been properly authorised to lodge the complaint u/s 61(2)(ii)(b) of the Act. In other words, whether in the matter of authorisation by the Central Government or Directorate of Enforcement a general authorisation will be sufficient or a special authorisation in cases alleging violations need be given."

7. Mr. Mukherjee, learned Advocate appearing for the petitioners at the very

outset places before us a short history of the Foreign Exchange Regulation Act. It is contended that the Act came into existence in 1947 prior to which Foreign Exchange Regulation matters used to be dealt with under the Defence of India Rules. From 1947 to 1956, there was only one provision for alleged violation of Foreign Exchange Regulation namely prosecution before a Magistrate. There was no provision for departmental adjudication. In 1957, an amendment was effected in the FERA, 1947 by introducing the adjudication proceeding. In accordance with the amendment of 1957 whenever there was an allegation of contravention of FERA, the department was to institute a departmental adjudication proceeding at the first instance and if in course of the departmental proceeding the adjudicating authority was of the view that the penalty which could be imposed by him would not be adequate, in such a case only he could file a complaint before the learned Magistrate. By referring to a judgement reported in 1975 SCC (Cri) 718, it is submitted by the learned Advocate of the petitioners that from paragraph 11 of the said judgement, it appears that between April, 1949 and April, 1956, the Reserve Bank of India completed investigation in about 200 cases, but prosecution could be launched only in 66 cases, out of which 60 cases ended in conviction. Mr. Mukherjee submits that no prosecution could be launched in other cases in view of the fact that legal evidence necessary to secure conviction in a Court was not forthcoming.

8. It is contended by the learned Advocate of the petitioners that there is an express legal bar in the FERA, 1973 regarding the stage at which complaint can be lodged and as such the present proceedings should be quashed in view of the judgement reported in State of Haryana and others Vs. Ch. Bhajan Lal and others, .

9. The learned Advocate for the petitioners refers to the opening line of Section 56 of FERA, 1973, which runs as follows :

"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,....."

10. It is submitted by the learned Advocate appearing for the petitioners that the words "without prejudice" specifically used by the legislature at the beginning of the Section 56 of FERA, 1973 has not been used in any other Act dealing with similar economic offences such as Customs Act, Income Tax Act, Central Excise Act, etc. These words have been added to Section 56 of the new Act of 1973. It is submitted by the learned Advocate, excepting the opening words of Section 56 of the Act of 1973, the said section is equivalent to Section 23(1)(A) of the Act of 1947. Mr. Mukherjee placed the old Section 23(1)(A) and new Section 56(1) and submitted that each and every word used by the legislature in the statute have its own play, Mr. Mukherjee relied upon a judgement reported in Municipal Corporation of Greater Bombay Vs. Mafatlal Industries and others, etc., , wherein it was held that natural and ordinary meaning of the words should not be departed from unless it is shown that the context in which the words are used requires a different meaning.

11. Mr. Mukherjee next relied upon a judgment of the Hon''ble Apex Court reported in AIR 1970 SC 494, Rayala Corporation (P) Ltd. and Another vs. Director of Enforcement. This is a case under the old Act of 1947 and it was held by the Hon''ble Apex Court that without having any material which could lead to the opinion that Director of Enforcement will not be in a position to impose adequate penalty, complaint filed without complying with the proviso to Section 23D(1) of the Act of 1947 was not maintainable.

12. Next judgement relied upon by Mr. Mukherjee is reported in Assistant Director, Enforcement Directorate Vs. N.P.V. Ramasamy Udayar, . On a perusal of the said judgement it appears that the Hon''ble Apex Court, while setting aside order of acquittal, held that the accused has to prove absence of culpable mental state beyond reasonable doubt. Onus is on the accused to prove that person who made advances was not resident outside India.

13. Next judgement relied upon by the learned Advocate is reported in 2001 (3) CHN 617, R. Kejriwal vs. State of W.B. & Another. It was held by the learned Single Judge of this Court that after the new Act of 1973 came into force, the twin systems of adjudication by the department and prosecution in Court have been provided for all sorts of violations of the provisions of this Act of 1973. Departmental proceeding and imposition of penalty etc. covered by Sections 50 and 51 and the prosecution in Court u/s 56 of the Act can now go hand in hand and question of double jeopardy does not arise in such a case.

14. Mr. Mukherjee next relies upon a judgement of the Hon''ble Apex Court reported in 2001 SCC (Cri) 544, Commissioner of Income Tax, Mumbai vs. B. Champaklai. From a perusal of the judgement, it appears that challenging criminal proceedings under the Income Tax Act, 1961, a writ petition was preferred on which criminal proceedings were stayed by the Bombay High Court. It was held by the Hon''ble Apex Court that when there was no prayer for quashing of criminal proceeding, the High Court was justified in granting interim order of stay. The said judgement, in our view, is not applicable in the present case, where the petitioners have come up before this Court with a prayer for quashing of criminal proceeding on the ground as stated above.

15. The next argument advanced by the learned Advocate of the petitioner is that the complainant has not been properly authorised to lodge the complaint in terms of Section 61(2)(ii)(b) of the FERA, 1973. In the present case, complaint has been lodged by the Enforcement Officer, Enforcement Directorate. In para 2 of the complaint, it is stated that by virtue of the Notification No. S.O. 715-E dated 24.9.93 issued by the Government of India, Ministry of Finance in accordance with Section 61(2)(b)(ii) of the FERA, 1973, the complainant was empowered to file the complaint in Court. It is submitted by the learned Advocate of the petitioner that the authorization by the Director of Enforcement or Central Govt. must be in writing for each individual case, but in case of authorization by Reserve Bank of India to its officers, it may be either general or special authorisation. In the present case, the complaint has been filed by the

Enforcement Officer, Enforcement Directorate being empowered by a general authorisation as provided in the notification dated 24.9.93 referred to above. It is the contention of the learned Advocate of the petitioner that such general authorisation is not sufficient for the purpose of lodging a complaint in any Court of law. Such authorisation must be in connection with each and individual complaint, in absence of which the complaint filed in the instant case is not in accordance with law and the cognizance of offence taken on such complaint also suffers from serious illegality.

16. Mr. Dey, learned Advocate appearing for the Union of India submits that the points raised by the petitioners in the present applications have already been settled by the Hon'ble Apex Court as also by other High Courts. It is contended by Mr. Dey that prosecution for offences are totally independent from penalty proceedings. Section 56 of the Act of 1973 opens with the words "without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes any of the provisions.....he shall be upon conviction by a Court be punishable". Under the present scheme of the Act of 1973 prosecutions for offences are totally independent from the penalty proceedings. The prosecutions are not made subject to the result of the departmental proceedings.

17. Mr. Dey relies upon a judgement of the Hon'ble Apex Court reported in Assistant Collector of Customs and Another Vs. L.R. Malwani and Another, , Asstt. Collector of Customs, Bombay vs. L. R. Melwani, wherein it was held by the Hon'ble Apex Court as follows :

"Criminal prosecution of the accused for alleged smuggling is not barred merely because proceedings were earlier instituted against him before the Collector of Customs.

Adjudication before a Collector of Customs is not a prosecution nor the Collector of Customs a "Court". Therefore, the rule of autre fois acquit cannot be invoked. Neither the issue estoppel rule is attracted. The issue estoppel rule is but a facet of the doctrine of autre fois acquit. Even though the accused was given benefit of doubt in earlier proceedings the decision of the Collector of Customs does not amount to a verdict of acquittal in favour of accused so as to attract the rule of issue estoppel."

18. Next judgement relied upon by Mr. Dey is reported in 1993 C Cri LR (Cal) 199, Vijay Kr. Jain & Anr. vs. S.C. Dutta & Anr. This is also a case under the Customs Act, where the question arose for determination was whether the adjudication proceedings and criminal proceedings are identical proceedings. It was held by the learned Single Judge of this Court that the Customs Act does not encompass that adjudication proceeding is a bar to criminal proceeding or vice-versa.

19. Mr. Dey also relied upon a judgement of this Court reported in 2001 C Cr. LR (Cal) 444, wherein it was held that after the new Act of 1973 came into force,

the twin systems of adjudication by the department and prosecution in Court, have been provided for violations of the provisions of FERA, 1973.

20. Next judgement relied upon by Mr. Dey is reported in P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, , P. Jayappan vs. S.K. Perumal. In the said judgement, it was held by the Hon"ble Apex Court that the pendency of a reassessment proceeding can not act as a bar to the institution of the criminal prosecution for offences punishable u/s 276C or Section 277 of the Income -tax Act. The institution of a criminal prosecution can not be said to be an abuse of the process of the Court in such circumstances.

21. Mr. Dey next relied upon a judgement reported in Elite Optical Industries Vs. Assistant Director of Enforcement, , Elite Optical Industries vs. Assistant Director of Enforcement, In paragraph 13 of the said judgement, it was held as follows :

"It is rather very well-settled proposition by the Apex Court of the judicial administration of this country that the adjudicatory proceedings and further prosecution in Criminal Court in respect of the same matter is legally permissible as the same is not amounting to double jeopardy falling within the tentacles of Article 20(3) of the Constitution of India. Further, the Adjudicating Authority cannot at all be construed as a "Court" trying an offence and giving a finding therefore in the said proceedings so that such a finding may be construed as one falling within the ambit of Section 300 of the Cr. PC. In this view of the matter, notwithstanding a finding had been recorded by the Adjudicating Authority giving a clean chit that the petitioners had not retained any foreign exchange to their credit with M/s. Menrad, West Germany, the petitioners cannot be stated to be immune from criminal prosecution and further it is open to the Criminal Court to arrive at a finding different from the one given by the Adjudicating Authority, on consideration of the materials and evidence placed before it."

22. In the next judgement reported in 1996 C Cr. LR (SC) 71, it was held by the Hon"ble Apex Court that any contravention under FERA, 1973 in breach of civil obligation which attracts penalty u/s 23(1)(A) of FERA, 1947 and a finding that the delinquent has contravened the provisions of the Act would immediately attract the levy of penalty u/s 23 of the Act, 1947. It was further held that even after an adjudication by the authority and levy of penalty, the defaulter can still be tried and punished for the commission of an offence and the bar under Article 20(1) of the Constitution of India in such a case would not be attracted.

23. In the judgement reported in 1986 Cri. LJ 645, Ramesh Chandra Gorabadu vs. State, it was held by the learned Single Judge of Orissa High Court that dropping of a confiscation proceeding before the Collector shall not have any effect on the criminal trial. It was further held that even if confiscation proceeding is dropped by the Collector, it has no effect on criminal proceeding beginning from the stage of taking cognizance of the offence.

24. Relying upon the aforesaid judgements, it is submitted by the learned Advocate of the opposite party that in view of the clear terms of Sections 51 and

56 of the FERA, 1973, there is no scope to contend that criminal prosecution is dependent upon the outcome of the adjudication proceedings.

25. So far as the second point regarding authorisation of the complainant is concerned, the learned Advocate of Union of India produces before this Court a notification being No. S.O. 715-E dated 24th September, 1993 which is as follows:

"GOVERNMENT OF INDIA MINISTRY OF FINANCE DEPARTMENT OF REVENUE
NEW DELHI,

THE 24th Sept, 1993.

NOTIFICATION

S.O. 715-E. In pursuance of Sub-clause (b) of Clause (ii) of Sub-section (2) of Section 61 of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and in supersession of the Government of India in the Ministry of Finance, Department of Economic Affairs notification No. GSR 73, dated the 26th January, 1974, the Central Government hereby authorises the following officers to make complaints in writing to any Court in respect of any offence punishable u/s 56 or Section 57 of the said Act, namely :

- (i) Additional Director of Enforcement;
- (ii) All Deputy Directors of Enforcement;
- (iii) All Assistant Directors of Enforcement;
- (iv) All Chief Enforcement Officers ;
- (v) All Enforcement Officers.

(A.K. Sinha) Desk Officer Ph : 3011718"

26. Referring to the aforesaid notification, it is submitted by the learned Advocate of the Union of India that the complainant being the Enforcement Officer of the Enforcement Directorate was duly empowered by such notification to lodge the complaint and the order of taking cognizance of offence on the basis of such complaint does not suffer from any illegality.

27. We have heard the learned Advocates of the respective parties. We have also perused the judgements referred to above. In our considered view, the words "without prejudice to any award of penalty" appearing at the very beginning of Section 56 of the FERA, 1973, has different connotations depending on the context in which the same is used. In our view, the very language of Section 56 of the Act of 1973 indicates that the proceedings for prosecution are in addition to, and independent of, those u/s 51 of the Act of 1973. Under the Act of 1973, the criminal proceedings initiated against the offender is different from and in addition to the proceedings initiated before an adjudicating officer u/s 51 of the Act. We also find support from a judgement of Andhra Pradesh High Court reported in 2003 Cr. LJ 2197, Anil Kumar Agarwal vs. K.C. Babu, wherein it was

held that the prosecution initiated u/s 56 of the FERA, 1973 is independent of the proceeding initiated or pending before the adjudicating officer u/s 5 of the Act of 1973.

28. We also find support from a judgement of Madras High Court reported in 1984 Excise and Customs Cases page 319, A.S. G, Jothimani Nadar vs. Deputy Director, Enforcement Directorate. In the said judgement it was held that in view of clear terms of Sections 51 and 56 of FERA, 1973 there is no scope to hold that the criminal prosecution is dependent upon the outcome of the adjudication proceeding. Section 51 of the Act, 1973 is the relevant section regarding adjudication proceeding and it is a complete and independent provision by itself.

29. In view of the discussion made above, and in the light of the ratio contained in the judgements referred to above, we are of the view that the criminal prosecution is not dependent upon the outcome of the adjudication proceeding and the complainant was very much competent to file the complaint during pendency of the adjudication proceeding u/s 51 of the Act.

30. As regards the second point regarding authorisation of the complainant, it is pertinent to mention that u/s 23 of the old Act, in certain matters only the Director of Enforcement was authorised to file a complaint. In certain other matters both the Director of Enforcement and any officer authorised in the matter by the Central Government or the Reserve Bank of India could file the complaint. Director of Enforcement himself was not authorised to give this power to file complaint to any of his officers. Now Section 61 of the Act of 1973 removes this lacuna. It means that unless the complainant has the necessary authority, the Court will have no jurisdiction to take cognizance of offence.

31. In terms of Sub-clause (b) of Clause (ii) of Sub-section (2) of Section 61 of the Act of 1973 cognizance of offences punishable u/s 56 or Section 57 of the Act can not be taken by the Court unless a complaint in writing is made by any of the following complainants :

- a) the Director of Enforcement; or
- b) any officer authorised in writing in this behalf by the Director of Enforcement or the Central Government; or
- c) any officer of the Reserve Bank of India authorised by the Reserve Bank of India by a general or special order.

32. As it appears from the aforesaid provision one of the authorities who can file a complaint in respect of the offences punishable u/s 56 or Section 57 of the Act of 1973 is "any officer authorised in writing in this behalf by the Director of Enforcement or the Central Government". Pursuant to this provision the notification dated 24.9.93, as referred to above, was issued by the Central Government authorising certain officers of the Enforcement Directorate to lodge complaints in writing in Court. The notification was issued by the Central Government in pursuance of Sub-clause (b) of Clause (ii) of Sub-section (2) of

Section 61 of the Foreign Exchange Regulation Act, 1973. In our considered view, such authorisation as given in the notification issued by the Central Govt. is sufficient empowering the concerned Enforcement Officer to lodge a complaint in the Court. Special authorisation, for each individual case, in our view, is not at all required for the purpose of lodging a complaint in Court.

33. It will be proper for us to summarise the position emerging from the above discussion :

(A) A complaint u/s 56 of the Foreign Exchange Regulation Act can never be said premature if it is instituted before award of penalty u/s 50 of the Act and such criminal proceeding being an independent proceeding can be initiated during pendency of the adjudication proceeding u/s 51 of the Act of 1973.

(B) The complainant in the present case has been duly authorised to lodge the complaint being empowered by the notification dated 24.9.93 issued by the Central Government as referred to above. General authorisation as given in the notification dated 24.9.93 is sufficient for the purpose of lodging a complaint in Court and no special authorisation is required for filing a complaint in each individual case.

34. The reference is answered accordingly.

35. Since similar points are involved in the other revisional application, this judgement shall also govern the other revisional applications under reference as follows :

C.R.R. Nos. 1634/95, 1677/95, 1678/95, 1679/95, 1680/95, 1681/95, 1682/95, 2225/95, 2236/95, 2237/95, 2318/95, 229/96, 230/96 & 1997/02.

36. The reference is answered accordingly. Let now the respective cases be placed before the concerned Courts, who will proceed with the matters accordingly. Since the proceedings are pending for a long time, the learned Trial Court is directed to see that such proceedings are expedited and are concluded with utmost expedition. Interim orders earlier granted by this Court in all the revisional applications stand hereby vacated.

37. Urgent xerox certified copy of this judgment may be supplied to the learned advocates of the parties.

G.C. De and Arunabha Barua, JJ.

38. We agree.