

(2008) 09 MAD CK 0031

In the Madras High Court

Case No : Criminal Original Petition No. 5718 of 1996

N. Sasikala

APPELLANT

Vs

The Enforcement Officer, Enforcement Directorate, Shastri
Bhawan, Madras-6

RESPONDENT

Date of Decision : 24-09-2008

Acts Referred:

Citation : (2008) 09 MAD CK 0031

Hon'ble Judges : K.N. Basha, J

Bench : Single Bench

Advocate : A. Navaneethakrishnan, Venkatesh and L.P. Shanmugasundaram, for the Appellant; M. Ravindran, A.S.G. for Mr. M. Dhandapani, Special Public Prosecutor for Enforcement Directorate, for the Respondent

Judgement

K.N. Basha, J.—The petitioner, who has been implicated for the alleged offence u/s 56(I)(ii) of the Foreign Exchange Regulations Act,

1973, for the alleged contravention of the provision u/s 40 (3) of the Foreign Exchange Regulations Act, 1973, has come forward with this petition

seeking for the relief of quashing the proceedings pending in E.O.CC. No. 70 of 1996 on the file of the Additional Chief Metropolitan Magistrate;

E.O.I, Egmore, Chennai-600 008.

2. For the sake of convenience the Foreign Exchange Regulations Act, 1973 is hereinafter referred to as ""the Act"".

3. Mr. A. Navaneethakrishnan, learned counsel appearing for the petitioner put forward the following contentions :

Section 56 of the Act refers about the offences with particular reference to an amount or value involved and as such the non-compliance of

summons u/s 40 (3) of the Act cannot be computed in terms of value or amount

and therefore, the penal provision u/s 56 of the Act is not applicable to the instant case;

The petitioner had responded to the summons issued by the Department by sending replies and seeking time to appear on health grounds and therefore, the question of refusal or disobedience of the summons does not arise ;

The materials available on record discloses that the petitioner had not mute but had answered all the summons and produced her passport and the bank statements of accounts and further issue of the summons by the Department has to be presumed that they have accepted her explanation for seeking time to appear and as such non-compliance of Section 40 (3) of the Act not at all arises; and

The petitioner responding to the summons issued u/s 40 (3) of the Act appeared before the respondent on 20.06.1996 and she was interrogated, arrested and remanded to judicial custody. Even assuming and if not admitting that the petitioner had not appeared pursuant to the summons served on her, the issue of further summons to the petitioner directing her to appear before the respondent thereafter amounts to both in law and in fact condonation of her nonappearance to the earlier summons.

Therefore, it is submitted by the learned counsel for the petitioner that the proceedings is liable to be quashed.

4. Per contra, Mr. M. Ravindran, learned Additional Solicitor General appearing for the respondent/complainant vehemently contended that the allegations contained in the complaint constitute the contravention of the provision u/s 40 (3) of the Act as the petitioner had not appeared before the authorities concerned on receipt of the summons on several occasions. It is also contended that even at the initial stage, the summons sent through post were returned unserved and as such, the petitioner is having knowledge and in spite of the same she evaded to receive the summons which amounts to refusal to comply with the summons issued by the Department. It is contended that though the Department has chosen to send fresh summons even after filing the impugned complaint and on such summons, the petitioner has appeared before the authorities and thereafter, arrested that itself would not absolve the criminal liability of the petitioner in view of the non-compliance of the summons earlier served on her. The

learned Additional Solicitor General has taken through the provisions of Section 40 as well as Section 56 of the Act and the decision of the

Hon''ble Supreme Court in Enforcement Directorate and Another v. M. Samba Siva Rao and others reported in AIR 2000 SC 2128 and

submitted that the Hon''ble Supreme Court has held that violation or contravention of the summons issued u/s 40 of the Act would fall within the

purview of the penal provision u/s 56 of the Act and the concerned person is liable to be punished under such provision.

5. The learned Additional Solicitor General without prejudice to his earlier contentions would further submit that even assuming that the petitioner

all along sought for time for appearing before the Department on the ground of illness, that itself would amount to evasion and disobedience of the

summons attracting the penal provision u/s 56 of the Act. In support of his contention, learned Additional Solicitor General placed reliance on the

decision of this Court in Muthukrishna Varadarajulu Vs. Chief Enforcement Officer, Enforcement Directorate, . It is further submitted by the

learned Additional Solicitor General that in a similar case in C. Sampath Kumar and others Vs. Enforcement Officer, this Court has taken a view

that the noncompliance of Section 40 of the Act would not attract the penal provision of Section 56 of the Act and the Department challenged the

decision of this Court and preferred appeals before the Hon''ble Supreme Court and though the Hon''ble Supreme Court has dismissed the

appeals in Crl. A. Nos. 143 and 144 of 1998 by keeping the question of law open by order dated 20.07.1998 on the ground that the concerned

petitioner in that matter was already arrested and remanded after interrogation, the order of the Hon''ble Supreme Court would not amount to a

precedent and it may be only an obiter dictum.

6. The learned Additional Solicitor General would further proceed to contend that there is no illegality or there is no bar for the department to issue

fresh summons even after filing of the impugned complaint and every summons would give rise to a fresh cause of action and as such, the non-

compliance of the provision u/s 40 on earlier occasion would definitely make out a prima facie case of contravention of the provision attracting the

penal provision u/s 56 of the Act. It is also contended by the learned Additional Solicitor General that the trial itself already commenced and P.W.I

was examined and cross-examined and P.W.2 examined in chief and as such, the question of quashing the proceedings at this stage does not arise

and the petitioner is entitled to raise her point before the trial court.

7. I have carefully considered the rival contentions put forward by either side and perused the impugned complaint as well as the entire materials

available on record including the filed by the complainant/respondent.

8. Before proceeding to consider the rival contentions put forward by either side, this Court is of the considered view that it is relevant to refer the

provisions under Sections 40 and 56 of the Act which read hereunder:

Section 40. Power to summon persons to give evidence and produce documents.

(1) Any Gazetted officer of Enforcement shall have power to summon any person whose attendance he considers necessary either to give evidence

or to produce a document during the course of any investigation or proceeding under this Act.

(2) A summons to produce documents may be for the production of certain specified documents or for the production of all documents of a certain

description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by authorised agents, as such officer may direct; and all persons so

summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such

documents as may be required:

Provided that the exemption u/s 132 of the Code of Civil Procedure, 1908, shall be applicable to any requisition for attendance under this section.

(4) Every such investigation or proceeding as aforesaid shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of

the Indian Penal Code.

* * *

Section 56. Offences and prosecutions?

(1) 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

other than Section 13, clause (a) of sub-section(I) of Section 18, Section 18-A, clause (a) of sub-section (1) of Section 19, sub-section (2) of

Section 44 and Sections 57 and 58, or of any rule, direction or order made

thereunder, he shall, upon conviction by a court, be punishable,?

(i) in the case of an offence the amount or value involved in which exceeds one lakh of rupees, with imprisonment for a term which shall not be less

than six months, but which may extend to seven years and with fine:

Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term

of less than six months;

(ii) in any other case, with imprisonment for a term which may extend to three years or with fine or with both.

(2) If any person convicted of an offence under this Act not being an offence u/s 13 or clause (a) of sub-section (1) of Section 18 or Section 18-A

or clause (a) of sub-section (1) of Section 19 or sub-section

(2) of Section 44 or Section 57 or Section 58 is again convicted of an offence under this Act not being an offence u/s 13 or clause (a) of sub-

section (1) of Section 18 or Section 18-A or clause (a) of sub-section (1) of Section 19 or sub-section (2) of Section 44 or Section 57 or Section

58, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which shall not be less than six months but

which may extend to seven years and with fine:

Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term

of less than six months.

(3) Where a person having been convicted of an offence under this Act not being an offence u/s 13 or clause (a) of sub-section (1) of Section 18

or Section 18-A or clause (a) of sub-section (1) of Section 19 or sub-section (2) of Section 44 or Section 57 or Section 58 is again convicted of

an offence under this Act not being an offence u/s 13 or clause (a) of subsection (1) of Section 18 or Section 18-A or clause (a) of sub-section (1)

of Section 19 or sub-section (2) of Section 44 or Section 57 or Section 58, the court by which such person is convicted may, in addition to any

sentence which may be imposed on him under this section, by order direct that, that person shall not carry on such business as the court may

specify, being a business which is likely to facilitate the commission of such offence, for such period not exceeding three years, as may be specified

by the court in the order.

(4) For the purposes of sub-sections (1) and (2), the following shall not be considered as adequate and special reasons for awarding a sentence of

imprisonment for a term of less than six months, namely?

(i) the fact that the accused has been convicted for the first time of an offence under this Act;

(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods in relation

to such proceedings have been ordered to be confiscated or any other penal action has been taken against him for the same offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party in the

commission of the offence;

(iv) the age of the accused.

(5) For the purposes of sub-sections (1) and (2), the fact that an offence under this Act has caused no substantial harm to the general public or to

any individual shall be an adequate and special reason for awarding a sentence of imprisonment for a term of less than six months.

(6) Nothing in the proviso to Section 188 of the Code of Criminal Procedure, 1973 shall apply to any offence punishable under this section.

9. At the outset, this Court is constrained to state as per the position of law settled by the Hon'ble Apex Court that the violation or contravention

of Section 40 of the Act would fall within the purview of the penal provision u/s 56 of the Act.

10. The Hon'ble Apex Court in *Enforcement Directorate and Another v. M. Samba Siva Rao and Others* reported in AIR 2000 SC 2128 has

held that,

The summons issued under S.40, if not obeyed, must be held to be a contravention of the provisions of the Act and at any rate, a contravention of

a direction issued under the Act, and therefore, such contravention would squarely come within the ambit of S.56 of the Act. Further it cannot be

said that the direction or order inasmuch as it is only when directions pertaining to some money value involved is disobeyed, such disobedience is

punishable under S.56 Cls.(i) and (ii) of S.56 (1) are material for deciding the quantum of punishment and further, there is no reason why the

expression ""in any other case"" in S.56 (I)(ii) should be given any restrictive meaning to the effect that it must be in relation to the money value

involved. Therefore, S.56(I) would get attracted even though no amount or value is involved in the contravention in question.

11. In view of the above principle of law laid down by the Hon''ble Apex Court in the decision cited supra, this Court is constrained to reject the

contention of the learned counsel for the petitioner to the effect that Section 56 of the Act refers about the offences with particular reference to an

amount or value involved and as such the non-compliance of summons u/s 40 (3) of the Act cannot be computed in terms of value or amount and

therefore, the penal provision u/s 56 of the Act is not applicable to the instant case.

12. Now let me consider whether the allegations contained in the complaint on the face value constitute the contravention or violation of the

summons issued u/s 40 (3) of the Act by refusing or disobeying to respond to the summons.

13. In order to consider the above said question it is pertinent to go into the allegations contained in the complaint. A perusal of the impugned

complaint discloses that for the first summons issued u/s 40 of the Act dated 23.09.1995, the petitioner responding through her letter dated

25.09.1995 gave certain explanation and on receipt of such reply the Department has chosen to send further summons on 11.04.1996 and

06.05.1996 which were returned unserved and only the courier service was served and the petitioner responding to the summons, sent a letter

dated 10.05.1996 seeking time for full compliance as she was suffering from eye ailment and under intensive treatment. It is seen that the next

summons was issued to the petitioner to appear on 20.05.1996 and the petitioner responding to such summons replied through a letter dated

20.05.1996 stating that she was still under treatment and sought time for appearance. Thereafter, further summons issued to the petitioner for her

appearance on 30.05.1996 and for that the petitioner sent a letter dated 28.05.1996 through her brother one Mr. T.V. Sundaravadanam seeking

for a fortnight time and her brother Mr. T.V. Sundaravadanam sent another letter dated 30.05.1996 seeking adjournment for two weeks. It is

pertinent to be noted that all these admitted versions of the complainant further re-iterated in the counter itself. Therefore, it is crystal clear that the

petitioner all along only sought time for appearance and she has expressed her intention and inclination to appear before the respondent and sought

time to appear as she was undergoing treatment for illness.

14. It is pertinent to be noted from the materials available on record that all the summons were in the printed forms filled up with the relevant dates

for appearance and it is seen that the petitioner by responding to such summons already submitted her passport and bank statements of accounts

and as such it is crystal clear that the petitioner was all along giving co-operation to the respondent. It is also seen that the materials available on

record discloses that the petitioner enclosed the medical certificates for seeking the relief of extension of time to appear. Therefore, in view of the

admitted version of the respondent/complainant in the impugned complaint as well as in the counter filed before this Court, it is crystal clear that the

petitioner all along only sought for time to appear and she never refused to appear or disobeyed the summons at any point of time. Therefore, in

view of the overwhelming materials available on record, there is absolutely no prima facie case made out by the respondent to show that the

petitioner refused or disobeyed the summons issued to her u/s 40 (3) of the Act.

15. The Hon''ble Apex Court in a landmark case in State of Haryana and others Vs. Ch. Bhajan Lal and others, stipulated certain guidelines for

quashing numbering 7 and the following guidelines viz.,

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their

entirety do not prima facie constitute any offence or make out a case against the accused.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the

commission of any offence and make out a case against the accused.

stipulated by the Hon''ble Apex Court are squarely applicable to the facts of the instant case as in this case also as already pointed out even as per

the admitted version and the allegations contained in the complaint as well as in the counter filed by the respondent, the contravention and violation

of Section 40 (3) of the Act is not at all made out and as such allowing the proceedings to continue against the petitioner would amount to a clear

case of abuse of process of Court and the same is liable to be quashed.

16. This Court unable to accept the contention of the learned Additional Solicitor General to the effect that the petitioner having sought time for appearing before the Department on the ground of illness itself would amount to an evasion and disobedience of the summons. The decisions of this Court relied by the learned Additional Solicitor General is not applicable to the allegations contained in the case on hand. It is seen that this Court in Muthukrishna Varadarajulu Vs. Chief Enforcement Officer, Enforcement Directorate, has held that the petitioner in that case replied to the summons stating that he was hospitalised and such reply would lead to a conclusion that the petitioner was evading summons to appear before the competent authority would certainly amount to disobedience. From the reading of the above said decision of this Court it is not clear that whether the petitioner in that case has sought for time to appear or merely stated that he is unable to appear. But as far as the instant case is concerned, as already pointed out by this Court, the petitioner not only sent mere letter seeking for time to appear on health grounds, but also furnished certain documents, viz., passport and statements of accounts and apart from that the allegations contained in the complaint as well as in the counter filed before this Court disclose that by sending the replies seeking time to appear, the petitioner expressed her inclination and intention to appear before the respondent and therefore, from the conduct of the petitioner by no stretch of imagination it could be construed to be an evasion to appear before the respondent.

17. Yet another important feature could not lost sight of this Court in this case is that admittedly after the institution of the impugned complaint, the respondent has chosen to send further summons dated 17.06.1996 for her appearance on 20.06.1996 as per the admitted version of the respondent in his counter filed before this Court. It is seen that the impugned complaint was filed on 04.06.1996 and thereafter, the above said further summons dated 17.06.1996 was served on the petitioner and as a matter of fact, as admitted by the respondent herein in the counter, the petitioner had appeared before the respondent and after interrogation she was arrested and remanded to judicial custody on the same day. Therefore, this Court is able to see much force in the contention put forward by the learned counsel for the petitioner to the effect that even

assuming and if not admitting that the petitioner had not appeared before the respondent on the earlier occasions after the respondent issued further

summons directing her to appear thereafter would amount to both in law and in fact a condonation of her earlier non-appearance to the summons.

18. At this juncture, it is relevant to note the decision rendered by the Hon''ble Apex Court in Enforcement Directorate and Another v. M. Samba

Siva Rao and Others reported in AIR 2000 SC 2128 (cited supra). In that decision the Hon''ble Apex Court has also incorporated the order

passed by the Hon''ble Apex Court in an earlier similar matter, viz., The Enforcement Officer v. C. Sampathkumar & Another in Crl. A. Nos. 143

and 144 of 1998 against the order of this Court in C. Sampath Kumar and others Vs. Enforcement Officer, and it is better to incorporate the

relevant paragraph of the decision of the Hon''ble Apex Court which reads hereunder:

4. A learned Single Judge of the Kerala High Court considered this question in the case of Itty v. Asstt. Director. On a conjoint reading of Sections

40 and 56 of the Act, the learned Judge came to the conclusion that the failure to obey the summons issued u/s 40(1) cannot be held to be a

contravention of the provisions of the Act, rule, direction or order inasmuch as it is only when directions pertaining to some money value involved

are disobeyed, such disobedience is punishable u/s 56 of the Act. The learned Judge applied the ordinary rules of construction that penal statutes

should receive a strict construction and the person to be penalised must come squarely within the plain words of the enactment. We are unable to

accept the constructions put in the aforesaid judgment as in our view clauses (i) and (ii) of Section 56(1) are material for deciding the quantum of

punishment and further, there is no reason why the expression ""in any other case"" in Section 56(1)(ii) should be given any restrictive meaning to the

effect that it must be in relation to the money value involved, as has been done by the Kerala High Court. The summons issued u/s 40, if not

obeyed, must be held to be a contravention of the provisions of the Act and at any rate, a contravention of a direction issued under the Act, and

therefore, such contravention would squarely come within the ambit of Section 56 of the Act. The question came up for consideration before a

learned Single Judge of the Madras High Court in the case of C. Sampath Kumar v. A.N. Dyaneswaran and was disposed of by the learned Judge

of the Madras High Court by judgment dated 1-8-1997. The Madras High Court also came to the conclusion that the entire Section 56 of the Act

is identified and substantiated only in terms of the extent and value of the money involved in the offence, and therefore, violation or contravention of

summons, issued u/s 40 of the Act unrelated to the money involved in the investigation cannot be held to be punishable u/s 56. Against the

aforesaid judgment of the Madras High Court, the department had preferred appeals to this Court, which were registered as Criminal Appeals

Nos. 143-44 of 1998, but the question raised was not necessary to be answered as the persons concerned appeared before the Enforcement

Authorities and were arrested by the said Enforcement Authorities and, therefore, this Court kept the questions of law open by its order dated 20-

7-1998. In yet another case, the question arose for consideration before the Madras High Court in Criminal OP No. 5718 of 1996 and a learned

Single Judge did not agree with the earlier decision of the said High Court in Criminal OPs Nos. 5468 and 5629 of 1996 and referred the matter

to a Division Bench by his order dated 13-8-1997 and it was submitted at the Bar that the Division Bench has not yet disposed of the matter. The

question came up for consideration before the Andhra Pradesh High Court in the case of P.V. Prabhakara Rao v. Enforcement Directorate,

Hyderabad and the said High Court has taken the view that failure to attend and give statement in pursuance of summons issued u/s 40 of the Act,

clearly amounts to disseverance of the directions given by the authority concerned and therefore, provisions of sub-section (1) of Section 56 apply.

The learned Judge of the Andhra Pradesh High Court interpreted the expression ? in any other case? in clause (ii) of Section 56(1) to mean that the

said provision would get attracted even though no amount or valuer involved in the contravention in question. The aforesaid view of the Andhra

Pradesh High Court appears to us, is the correct interpretation of the provisions contained in Sections 40 and 56 of the Act. (Emphasis supplied

by this Court)

19. It is seen from the decision cited supra that this Court has taken view in a similar matter in C. Sampath Kumar and others Vs. Enforcement

Officer, to the effect that non-compliance of the summons issued u/s 40 (3) of the Act would not attract the penal provision u/s 56 of the Act and

against the decision of this Court appeals were preferred by the Department before the Hon"ble Apex Court in Crl. A. Nos. 143 and 144 of 1998

and the Hon"ble Apex Court has held that the question raised was not necessary to be answered as the persons concerned appeared before the

Enforcement authorities and were arrested by the Enforcement Directorate and therefore, the question of law was kept open by the order dated

20.07.1998. Therefore, the view taken by the Hon"ble Apex Court is squarely applicable to the facts of the case on hand as in this case also as

already stated, even as per the admitted version of the respondent in his counter that the fresh summon was served on the petitioner and in

compliance, the petitioner appeared before the respondent on 20.06.1996 and she was interrogated, arrested and remanded to judicial custody on

the same day. In view of this admitted fact, this Court is of the considered view that allowing the petitioner to undergo the ordeal of trial by

continuing the trial proceedings would amount to a clear case of abuse of process of Court.

20. It is also contended, as stated above, by the learned Additional Solicitor General that the trial in this case already commenced and P.W.I was

examined and cross-examined and chief examination of P.W.2 is in progress and as such the quashing petition at this stage is not maintainable. This

Court is constrained to state that normally this Court would not entertain the petition for quashing after the commencement of trial except in

exceptional cases. This Court is also constrained to state that the question involved in this matter is not relating to appreciation of evidence but

relating to question of law to the effect that even as per L.e. admitted version of the respondent/complainant and as per the materials available on

record, the contravention of Section 40 (3) of the Act is made out or not. Therefore, this Court can very well exercise the inherent power u/s 482

Cr. P.C. in order to secure the ends of justice or to prevent the abuse of process of Court.

21. It is also painful to note that this petition was kept pending for more than a decade and neither the petitioner nor the respondent has taken any

steps to expedite the hearing of this petition and only recently the learned Special Public Prosecutor has taken steps to expedite the hearing.

22. Subsequent to the filing of this petition, as already pointed out, in a similar matter in *The Enforcement Officer v. C. Sampathkumar & Another*

in Crl. A. Nos. 143-144 of 1998 by order dated 20.07.1998, the Hon"ble Apex Court thought it fit not to go into the question involved by

disturbing the beneficial order passed by this Court in favour of the persons concerned in view of the fact that the concerned persons already

appeared before the enforcement authorities and were arrested by them. Therefore, this Court, in order to secure the ends of justice, is constrained

to give the similar benefit to the petitioner who is also standing on the same footing as she has also appeared before the respondent, interrogated,

arrested and remanded to judicial custody and as such continuation of further proceedings by subjecting the petitioner to undergo the ordeal of trial

would amount to a clear case of abuse of process of Court.

23. For the foregoing reasons, the proceedings pending against the petitioner in E.O.C.C. No. 70 of 1996 on the file of the learned Additional

Chief Metropolitan Magistrate, E.O.I, Egmore, Chennai, is hereby quashed.