(2023) 01 CAL CK 0047

In the Calcutta High Court

Case No : Criminal Appeal No. 654 Of 2012

Nil Kamal Ghosh APPELLANT

Vs

M/S. Dipak Commercial Shrijit International RESPONDENT

Date of Decision : 18-01-2023

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 56, 57, 61(2)(ii), 61(2)(ii)(b)
Evidence Act, 1872 — Section 57(7), 81

Citation : (2023) 01 CAL CK 0047

Hon'ble Judges : Rai Chattopadhyay, J

Bench : Single Bench

Advocate : Debjani Ray

Final Decision : Allowed

Judgement

Rai Chattopadhyay, J

1. Appellant who is the Officer of Directorate of Enforcement, Government of India, Kolkata has filed the appeal to challenge the judgment and order of the Metropolitan Magistrate, 11th Court, Calcutta dated 18th August, 2011.

2. Appellant has endeavored for service be effected upon the respondent though the service could not be completed and the service return is available along with the affidavit-of-service stating "NOT DELIVERED ADDRESSEE MOVED".

3. The appellant is not equipped with any other better particular of the respondent.

4. Considering the facts and circumstances, hearing of the appeal is taken up without the respondent.

5. In the impugned judgment dated 18th August, 2011 the Trial Court considered the following two points for decision,

"1. Whether the accused failed to pay the penalty amount in view of adjudication order no.66/2000/AD dated 30.11.2000 within the stipulated period of 45 days computing from the date of it's receipt inspite of receiving the said adjudication order ?

2. Whether the complaint was filed in compliance of the provisions of section 61 (2)(ii) of the FERA ?"

6. Without going into point no. 1 the Trial Court has found as regards point no. 2 that provisions under Section 61 (2) (ii) of the Foreign Exchange Regulation Act, 1973 was not complied with by the complainant/appellant. The Court found that by not complying with the said provision of law the complainant/appellant has failed to comply with the mandatory provision of law. On this ground, the Court found that taking cognizance of offence under Section 57 of the Foreign Exchange Regulation Act, 1973 by the Enforcement Directorate, in the adjudication proceedings was bad in law.

7. The appellant is aggrieved with this order and prefers this appeal.

8. Ms. Ray, learned Advocate appears for the appellant and submits that in finding the above in the impugned judgment, the Court has not taken into consideration the relevant and important documents including the Government notification no. SO 715 (E) dated 24th September, 1993 which is a public document too.

9. According to Ms. Ray, while passing the impugned judgment and order dated 18th August, 2011 the Court has misdirected itself as regards consideration of the available materials and also the provisions of applicable law and, thus, has come to an erroneous finding. Ms. Ray, has further submitted that on the basis of the evidence in the Trial Court and the documents relied on by the appellant the locus standi of the complainant is proved well beyond doubt and the complainant was entitled to proceed in the said case in accordance with law. According to her, since in the judgment the Court has wrongly appreciated the attending facts and circumstances and also wrongly interpreted the applicable law, this Court's interference to the said impugned judgment would be necessary.

10. She has prayed for setting aside the impugned judgment dated 18th August, 2011 and also for necessary other directions in this case.

11. The relevant portion of the impugned judgment may be extracted as hereinbelow:-

"Admittedly PW-1 filed this case as an enforcement officer and he was not the director of enforcement at the time of filing this complaint. PW-2 in his evidence stated that he substituted PW-1 and proceeded by virtue of government notification. This witness is also an enforcement officer and is not the director of enforcement. Neither the authorised letter for any of these witnesses is on record nor the government notification as stated by the PW-2 is found on record. The authority to file this complaint on behalf of the enforcement directorate is wanting and it is gross violation of the mandatory provision of the section 61 (2)

(ii) of the FERA. As such taking cognizance of offence u/s 57 of FERA is bad in law. On the observation this court find further discussion on the other points raised in argument and non payment of the adjudication money within 45 days is unnecessary and will no good to prosecution. The prosecution has failed to comply the mandatory recquirement for filing this case which washed out it's case and the accused plea of not guilty is upheld. He is entitled to get an order of acquittal."

12. Attention of this Court is drawn to exhibit- A which is a certificate/declaration issued by the Deputy Directorate of Enforcement, dated 22nd December, 2005 to authorize Sri. J.P. Sadhukhan, Enforcement Officer to represent the Director of Enforcement in this case before the Trial Court. The evidence of the concerned officer may also be gone into in this regard to find that he has duly exhibited the said authorization letter of him in the Court (Exhibit-A). It is very pivotal in this case to have a look to the notification of Ministry of Finance dated 24th September, 1993 which is published in the Official Gazette and may be extracted as hereinbelow:-

"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 under section 56 or 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."

13. Ms. Ray has also relied on the judgment of Rajasthan High Court in Provident Fund Inspector, Kota vs. M/s Jhumarlal Swarooplal & Ors. reported in 1991 SCC Online Raj 236 to submit that in a similar fact the Court has been pleased to hold that evidence by the concerned officer to have held a particular office would be a direct evidence u/s 60 of the Evidence Act and in absence of any challenge to the same, the Magistrate shall be erring in case such fact is not accepted. It was held that taking note of the publication in official gazette was imparative for the Magistrate.

14. It would be beneficial if the relevant provisions of law that is Section 61 (2) (ii) of the Foreign Exchange Regulation Act, 1973 be extracted before further discussions are made.

"61 (2) No court shall take cognizance-

……………………………………..

(ii) of any offence punishable under section 56 or section 57, except upon complaint in writing made by-

(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 authorised by the Reserve Benk by a general or special order. Provided that where any such offence is the contravention of any of the provisions of this Act or of any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such compliant shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission."

15. It appears that the law has enumerated and specified the officers who can maintain a criminal proceeding in a Court. According to the said provisions of law the Director of Enforcement or an officer authorised in writing on behalf of the Director or the Central Government or an authorized officer of the Reserve Bank shall be entitled to maintain a criminal case in a Court of law on behalf of the Enforcement Directorate.

16. 'Exhibit A' would be the relevant written authorization in terms of the said provisions of law.

17. It is beyond understanding as to what prevented the Court to take note of this authorization letter, as the Court has held that there is no written authorization in favour of the complainant. It is further noted that there is a notification published in Official Gazette, thereby is of impeachable nature of a public document, declaring as to the category of officers who would be eligible to represent the Enforcement Directorate in a Court of law.

18. According to the said notification as extracted above, "All Enforcement Officers" would be eligible to represent the complainant/appellant in a Court of law. I am in occurrence of opinion with the findings of the Rajastan High Court as referred to in this case, that the said document, irrespective of its being 'Exhibit' in the case, would carry the value for being accredited judicial notice.

19. The Magistrate has committed error in finding and emphasizing that to institute prosecution, the Director of Enforcement would be the appropriate person. Section 61 (2) (ii) of the Foreign Exchange Regulation Act, 1973 has provided the competent persons who can institute a case alleging offence under Section 57 of the said Act.

20. Accordingly, in this case where an offence under Section 57 of the Foreign Exchange Regulation Act, 1973 has been alleged against the accused person, the law provides that either the Enforcement Director or an officer authorised in writing on behalf of the Director or the Central Government or an authorised

officer of Reserve Bank, shall be eligible to institute a complaint. The Magistrate has also emphasized that the appellant would not have the locus standi to initiate prosecution in absence of any authorization, without however considering or taking judicial note of his evidence and Exhibit-A (i.e., authorization certificate dated (22.12.2005). By doing so, the material fact of the appellant holding the office at the particular period of time, has been left out of the purview of consideration. The Magistrate could not ignore the ocular and documentary evidence before it, more so, when all these were uncontroverted. By virtue of holding officer at the particular period of time and having been authorized vide 'Exhibit-A' there was no impediment for the appellant to institute prosecution, which thte Magistrate has not considered and such non-application of mind has rendered his findigs not tenable in the eyes of law.

21. Non-consideration of gazette notification dated 24th September, 1993 shall only be adding to the senile trait of the impugned order dated 18th August, 2011. Notification dated 24th September, 1993 is a public document and of unimpeachable nature. By virtue of Section 81 of the Evidence Act, there would be a presumption on the correctness of facts published in the Government Gazette. The Magistrate was duty bound to take note of the same, more particularly, in terms of Section 57(7) of the Evidence Act. It was a mandate of law. The notification dated 24th September, 1993 read with the direct evidence of the appellant before the Trial Court would unfailingly point out to the fact of the appellant to be competent officer under law, to institute prosecution on behalf of the Enforcement Directorate. By not considering all these factual and legal aspects, the Trial Court has committed gross error. The impugned judgment suffers from non-application of mind and illegality.

22. On this discussion as above, I am unable to place occurrence with the finding of the Court in the impugned judgment that provisions of Section 61 (2) (ii) of the Foreign Exchange Regulation Act, 1973 has not been complied with by the complainant in order to institute a case punishable under Section 57, as it is in this particular proceeding. In my considered opinion, the impugned judgment of the Trial Court suffers for non-application of mind and wrong appreciation of the fact situation as well as the settled provisions of law. Accordingly, the same would not be maintainable and liable to be set aside, being not in confirmity with the laws.

23. On the discussion as above, the impugned judgment dated 18th August, 2011 is set aside. It is however, learnt that concerned officer representing the appellant in the Trial Court, at the point of time when this appeal was preferred in the year 2012 is not holding the office any more. Accordingly it is directed that either the successor of the said officer, holding the office at present, or any other person prescribed under law and duly authorized shall represent the appellant/ complainant in the Trial Court. The Trial Court shall proceed in accordance with law and conclude the trial as expeditiously as possible, taking into consideration the time which is already elapsed during pendency of this appeal.

24. With this direction, this appeal is disposed of. Appeal is allowed.

25. All pending applications, if any, are consequently disposed of.

26. Certified website copies of this order, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

