

(2000) 04 AP CK 0002

In the Andhra Pradesh High Court

Case No : Criminal Revision Case No's. 1565 and 1575 of 1999

Om Prakash Kultia

APPELLANT

Vs

Chief Enforcement Officer

RESPONDENT

Date of Decision : 03-04-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428
Customs Act, 1962 — Section 135
Foreign Exchange Regulation Act, 1947 — Section 23(1), 23(3), 23B(1)
Foreign Exchange Regulation Act, 1973 — Section 23(3), 40, 51, 56, 56(1)
Gold (Control) Act, 1968 — Section 81(1), 86

Citation : (2000) 1 ALD(Cri) 912 : (2001) CriLJ 3122

Hon'ble Judges : K.B. Siddappa, J

Bench : Single Bench

Advocate : C. Padmanabha Reddy, for M. Jagadish Kumar, for the Appellant; B. Adinarayana Rao, SC, for the Respondent

Judgement

K.B. Siddappa, J.—This revision is directed against the judgment and sentence passed in Cri. Appeal No. 80 of 1997 on the file of the Special Judge for Economic Offences, Hyderabad.

2. The accused was found guilty of the offence punishable u/s 56(1)(i) of Foreign Exchange Regulation Act, 1973 (for short the "Act"). He was sentenced to undergo R.I. for one year and to pay a fine of Rs. 2,000/-, in default, to suffer S.I. for three months. The period of sentence already undergone was set off by application of Section 428, Cr.P.C. Hence the revision.

3. The story of the prosecution briefly stated is as follows :

The Police Officer along with Special Team, South Zone, Hyderabad, after receiving reliable information on 17-5-1986 at about 4.30 hours, under the supervision of Deputy Commissioner of Police, proceeded towards Meer Ka Diara and found one white Fiat Car coming fast towards Hari Bowli. The Police chased and intercepted it at Hari Bowli cross roads. They found the accused in the front

seat carrying a black briefcase. There were other four persons in the car. The briefcase, on verification, was found containing \$ 1,20,200/- (American) and Indian currency in an amount of Rs. 6,459/-. It is stated that on interrogation the accused confessed that he was dealing with foreign exchange along with other four persons, found in the car. Currency panchanama was prepared and a case was registered. It was entrusted to Enforcement Directorate for further investigation. The Enforcement Officer recorded the statement of the accused u/s 40 of the Act on the same date. Adjudication proceedings were initiated u/s 51 of the Act. Show cause notice was also issued to the accused and four others for acquisition of foreign currency without previous general or special permission of the Reserve Bank of India. They were found guilty for contravening the provisions of Section 8(1) read with 65 of the Act and the accused was imposed penalty of a sum of Rs. 5 lakhs and the foreign currency of US \$ 1,20,200/- was confiscated to the Central Government. Aggrieved by the said order, this appeal has been filed.

4. Sri. C. Padmanabha Reddy, learned Senior Counsel appearing for the petitioner submitted that notice as contemplated u/s 61 of the Act was not given before filing the complaint and this is mandatory and the violation of which entitles the accused to be acquitted. In support of his contention he relied upon the Division Bench judgment of the Bombay High Court in ANZ Grindlays Bank and Others Vs. The Directorate of Enforcement and Others, . In this case it was held in para 36 as follows (at page 2982) :

Para 36

Next, it is contended by Mr. Diwan, the learned counsel that the Company is entitled to be heard pursuant to the opportunity notice u/s 61 of the Act of 1973. This submission is also devoid of logic. Opportunity of being heard before launching a prosecution is not ordinarily known to any penal jurisprudence. Proviso to Sub-section (2) of Section 61 has a special feature. This, it appears, has been incorporated having regard to the nature of offence. Opportunity as envisaged is for a limited purpose. In case any prohibitive act is done without permission, it has been made obligatory on the part of the Directorate to give an opportunity to such a person of furnishing such requisite permission if available. The intendment of giving such opportunity is that the person in tact having the requisite permission need not suffer the prosecution. However, it does not and cannot in any way envisage any hearing or addressing the authority.

5. A contrary view was taken by the Madras High Court in Cri. M.P. No. 2288/80, dated 24-2-1984 in respect of the proviso to Section 61 of the Act. The observation is in the following terms :

Para-19 :

On account of one factor, I do not think it necessary to go into the question whether the direction contained in the proviso for a show cause notice being given is mandatory in character or directory in nature. Even if it is to be held that

the proviso contains a mandate, the question for consideration is whether a second show cause notice should be given to a person before a criminal prosecution is launched against him u/s 56 of the Act. I find no basis in the proviso for holding that such a notice should be given. All that the proviso states is that before a Court takes cognizance of an offence which relates to the contravention of any provision of the Act which prohibits the doing of an act without permission, the complainant must have given an opportunity to the accused to show cause that he had such a permission. What follows from this is that at some point of time prior to the filing of the complaint, the accused must have been given opportunity to show that he had obtained the requisite permission and he had not contravened the provisions of the Act in any manner. It is, however, not necessary that, the show cause notice must have been issued immediately before the filing of the complaint. If a show cause notice had been issued before adjudication proceedings were started, it would undoubtedly constitute a valid notice under the proviso to Section 61(2). I have already held that a criminal prosecution is not a continuation of the adjudication proceedings. As such, a prosecution cannot amount to a second stage of the proceedings warranting the issue of a second show cause notice. It has been held in *New India Corporation Vs. The Director, Enforcement Directorate, Government of India and Another*, that Section 23(1) of the Foreign Exchange Regulation Act, 1947, does not provide for two procedure and the opportunity contemplated by the proviso to Section 23(3) corresponding to proviso to Section 61(2) of the new Act can also be afforded in the course of an adjudication u/s 23-B(1). The ratio would govern the acts of [his case also, even though the present prosecution has been launched under the 1973 Act, because the proviso under the old Act of 1947 and that under the 1973 Act are identical in terms. Hence it is not open to the petitioner to contend that he ought to have been issued a second show cause notice before the launching of the prosecution and in the absence of such a notice, the complaint is not maintainable.

6. I considered the relevant provisions and the decision arrived at thereon in the above two judgments with great concern. Proviso to Sub-section (2) of Section 61 contemplates that no complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission. The purpose of introducing this condition is to give an opportunity to the accused before he faces prosecution. An opportunity is also envisaged when the proceedings were taken up u/s 51 of the Act. u/s 51, the Adjudication Officer shall hold an enquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter. If we read Section 51 and proviso to Sub-section (2) of Section 61 it culminates to the fact that a reasonable opportunity should be given before taking recourse to Section 51 and also Section 61 of the Act. In the present case, notice u/s 51 is already issued, that is to say, reasonable opportunity was given to the accused to say in his defence if he had any permission as contemplated in proviso to Sub-section (2) of Section 61 of the Act. He could have also shown such permission entitling

him to have possession of the foreign exchange, the American Dollars in this case. When opportunity was given u/s 51 of the Act, the accused was not precluded from producing the permission to have possession of this money. Admittedly such permission was not produced when an opportunity was given. Therefore, though there is slender dividing line between the opportunity contemplated u/s 51 of the Act and opportunity contemplated under proviso to Sub-section (2) of Section 61 of the Act, the resultant requirement is fulfilled by giving an opportunity in this case u/s 51 of the Act. Considering this aspect, the interpretation given by the Madras High Court referred to above is accepted. I respectfully disagree to follow the view taken by the Bombay High Court.

7. The next point urged is that only an authorised Officer specially empowered in this behalf by the Directorate of Enforcement or the Central Government by virtue of Section 61(2)(b) of the Act can file complaint. In this case PW-1 has filed the complaint for violation of Section 8(1) of the Act punishable u/s 56(1)(i) of the Act. PW-1 did not in so many words say that he was specially authorised as envisaged by the above provision. Therefore, it should be held that launching of prosecution itself is unauthorised.

8. It is true that PW-1 did not advert to this aspect in his evidence. No proceedings are marked authorizing PW-1 to file complaint. However, in the complaint itself the proceeding numbers are given, under which PW-1 is authorised. This in my view is sufficient to save the prosecution. Therefore this ground also is not available to the accused.

9. Sri C. Padmanabha Reddy, mainly contended and stressed the point that mere possession is not an offence u/s 8 of the Act. The possession of the foreign exchange nowhere is contemplated as violation of Section 8. In this case, there is no other evidence except the fact that the accused was having possession of the Dollars. There is no evidence to show that the accused was purchasing or acquiring or selling or transferring or lending or exchanging etc. to attract the penal provision of Section 8 and therefore, according to him, no offence is committed.

9A. In support of his contention he enlisted the assistance of the Judgment of the learned single Judge of Bombay High Court in Abdul Rashid Abdul Gani Vs. J.M. Jain, Deputy Director, Enforcement Directorate and Another, . In the above judgment the learned Judge relied upon the Judgment in Devilal Ganeshlal Mehta Vs. The Director of Enforcement and another, and held in para 3 as follows :

ILR Para 3 : The learned counsel for the petitioner Ms. Damania submits that the learned Magistrate was right in discharging the petitioner for the simple reason that mere possession of foreign currencies does not call for any prosecution in view of Section 8(1) of the F.E.R.A. Act. She also brought to my notice a Judgment of this Court in Devilal Ganeshlal Mehta Vs. The Director of Enforcement and another, wherein the scope of Section 8(1) of FERA has been examined by the Court and held that mere possession of foreign currencies will

not attract the mischief of Section 8(1) of the Act. As found out from the Section no word "possession" was used. What is objectionable u/s 8(1) is only "acquisition" or "dealing with the foreign exchange by transfer or custody". Mere possession simpliciter of the foreign currencies will not attract provisions of Section 8(1) of the Act. I fully agree with the view expressed by the learned single Judge in that decision and, therefore, I have no hesitation to hold that the learned Sessions Judge has committed error in setting aside the order of discharge passed by the learned Magistrate.

10. It may be seen that the learned Judge was carried away by the non-use of the words "in possession" in Section 8(1) of the Act. Dollars in this case cannot be called a mere possession and unless the Dollars are acquired, the question of possession does not arise. It is true the word "possession" is not used in Section 8(1) of the Act. That itself does not obliterate the Section and make possession not an offence. In my humble view, possession is the other side of acquisition. Without acquisition there is no question of possession. Dollars are not commonly available. By virtue of acquisition, by any means, possession has resulted. Certainly acquisition and possession are two sides of the same coin. Therefore acquisition also includes possession, which is made penal u/s 8(1) of the Act. According to me, this is the real intention of the Legislature, when they used "acquisition" in respect of the foreign currency. The interpretation given by the learned Judge in the above judgment may be relevant as far as Indian currency is concerned. But, nobody can be in possession of foreign currency unless it is acquired. Therefore, the possession which according to me is other side of acquisition is also penal, attracting proviso 8(1) of the Act. In the case on hand, the accused was in possession of US \$ 1,20,20,000. He did not account for the same and did not produce any permission for keeping the said money in his possession. Certainly this attracts Section 8(1) punishable u/s 56(1)(i) of the Act.

11. Sri C. Padmanabha Reddy, submitted that, even assuming that the offence is made out, the incident having taken place in the year 1986 i.e. nearly 14 years ago, the accused underwent mental agony for all these years and the entire amount of US \$ 1,20,200-00 is confiscated to the Central Government and it is a fit case where a lenient view may be taken. In support of his contention he relied upon the judgment in K.I. Pavunny Vs. The Asstt Collector, Cochin, . In that case the accused was found guilty of the offence punishable u/s 135 of the Customs Act, 1962 and under Sections 81(1)(a) and 86 of the Gold (Control) Act, 1968. The accused had been ordered to undergo R.I. for one year for the offence punishable u/s 135 of the Customs Act, 1962; and six months for the offence under Sections 85(1)(a) and 86 of the Gold (Control) Act, 1968. The Supreme Court considering the pendency period took a lenient view and directed the accused to pay a fine of Rs. 10,000/- and Rs. 5,000/- respectively on the two counts with default clauses. The substantive sentences stated above were modified into fine,

12. Taking into consideration the facts and circumstances of the case and the

fact that the case on hand is an old one, being of the year 1986, I confine the sentence to the period already undergone. However, I impose the fine of Rs. 10,000/-, which is in addition to Rs. 2000/- already imposed. The additional fine amount is directed to be paid within 15 days from the date of receipt of the judgment, failing which the petitioner shall undergo R.I. for six months. The revision is disposed of accordingly.