

(1985) 10 DEL CK 0037

In the Delhi High Court

Case No : Criminal Miscellaneous (Main) Appeal No's. 713 of 1984 and 142 of 1985

Peter Samuel Wallace

APPELLANT

Vs

Assistant Director of Enforcement

RESPONDENT

Date of Decision : 03-10-1985

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 56

Citation : (1985) 28 DLT 458 : (1986) 10 DRJ 268 : (1985) 2 ILR Delhi 534 : (1986) 1 RCR(Criminal) 61

Hon'ble Judges : G.R. Luthra, J

Bench : Single Bench

Advocate : Arvind Kumar, K.V. Lalita and R.K. Malik, for the Appellant;

Judgement

G.R. Lathra, J.

(1) Both these petitions are being decided together because both of them involve only one question of law as to whether Section 56 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "Fera") is ultra virus Article 14 of the Constitution of India. Both these petitions were filed by the same petitioner and are against the respondent Assistant Director of Enforcement, New Delhi and judgment is being written in Criminal Misc. (Main) 713 of 1984. The petitioner is regional manager for India and Middle East of a foreign company known as "M/s European Research and Supply Corporation". He is residing at A-1/37, Safdarjung Enclave, New Delhi. His office is at Kamal Theatre building, Safdarjung Enclave, New Delhi.

(2) On May 17, 1984 acting u/s 37 of Fera, the officers -of the Enforcement Directorate carried out searches of the residence as well as office of the petitioner. It is alleged by the Enforcement Directorate that several incriminating documents showing contravention by the petitioner of the provisions of Section 8(1), 9(1) and 27 of Fera were recovered as a result of those searches,

(3) In June 1984 a complaint, was filed in the court of Addl. Chief Metropolitan Magistrate, New Delhi by Assistant Director of Enforcement u/s 56 of Fera for prosecuting and punishing the petitioner for contravention of the provisions of Section 8(1), 9(1) and 27 of Fera. In the said complaint full particulars of the contravention were mentioned.

(4) On the basis of the material collected from the said searches, the Assistant Director of Enforcement filed another complaint in respect of some other contraventions of Section 8 and 9 of Fera. That complaint was filed in October 1984. In that complaint also, particulars of the offences have been mentioned.

(5) The petitioner filed a petition registered as Criminal Misc. (Main) 713 of 1984 for quashing the first complaint. That petition was filed on July 7, 1984. After filing of the subsequent complaint, the petitioner filed a petition for quashing that complaint which was registered as Criminal Misc. (Main) 142 of 1985. That petition was filed on February 12, 1985. A copy of each of the complaints has been filed along with the both the petitions. Both these petitions are contested by the respondent.

(6) I have heard the learned counsel for the parties.

(7) For understanding the respective arguments of the counsel for the parties it is necessary to mention the relevant provisions of law which has been in force from time to time. Previously it was Fera 1947 which was in force. That statute was amended by Foreign Exchange Regulation (Amendment) Act 1952 and Foreign Exchange Regulation (Amendment) Act 1957. Ultimately the present Fera No. 46 of 1973 came into force and the previous statute was repealed.

(8) Prior to the coming into force of the present Fera 1973 the procedure for punishing the persons guilty of violations of the different provisions of law was different. The offences used to be taken cognizance of by Director of Enforcement or any other officer of Enforcement not below the rank of Assistant Director of Enforcement especially empowered in this behalf by the Central Government. Such officers used to be called Adjudicating Officers. Such Adjudicating Officer could impose penalties in terms of money. If the Adjudicating Officer was of the view that such penalties did not award adequate punishment, he was empowered to file a complaint before the magistrate for punishing the offender with imprisonment not exceeding 2 years besides fine. Section 23 provides for penalties. The relevant provision relating to procedure was Section 23-D of the previous statute.

(9) With the coming into force of the present FER.A, the procedure was changed. Now Section 50 of the present FER.A authorises an adjudicating officer to impose penalty not exceeding five times of the amount or the value involved in contravention or Rs. 5,000.00 , whichever is more. Now there is no necessity of his coming to an opinion that the imposing of the penalties will not be an adequate punishment and simultaneous with the adjudication proceedings, a complaint can be filed u/s 56. The magistrate has been empowered to award an

imprisonment for a term which shall not be less than six months but which may extend to seven year and fine if the offence involves the amount exceeding Rs. 1,00,000.00 and in case the amount so involved is less than Rs. 1,00,000.00 . the sentence of imprisonment which can be awarded should not exceed three years without fine or with both.

(10) The learned counsel for the petitioner contended that the procedure now prescribed by the present Fera is ultra virus the Constitution. He explains that an arbitrary power has been given to the Director of Enforcement to commence criminal proceedings in the court of a magistrate simultaneous with the adjudication proceedings, in respect of some persons while the said Directorate in case of some favored few can commence only adjudication proceedings and not the prosecution in the court of a magistrate. He urges that on account of that arbitrariness, the present provisions of Fera have become discriminatory and thus Section 56 authorising filing of a complaint in the court of a magistrate simultaneous with the adjudication proceedings offends the provisions of Article 14 of the Constitution. He suggested that in order to avert the striking down of Section 56 of Fera it is absolutely necessary that the provisions of Section 50 relating to the adjudication proceedings and Section 56 of Fera should be interpreted in such a manner that it lays down the same procedure as was prevalent under the provisions of Fera of 1947, i.e. first the offence should be taken cognizance of by the adjudicating officer and it should be only if at that stage of the enquiry he is of the opinion that having regard to the circumstances of the case, the penalty which he is empowered to impose will not be adequate that he shall instead of imposing any penalty himself, make a complaint in writing to the court. He explains that the aforesaid suggestion has been given because the attempt of the courts always is to save a provision from being struck down on the ground of offending against the provisions of the Constitution.

(11) Learned counsel for the petitioner argued that previously the view of the Supreme Court was that there was no necessity of a law providing for the taking away of liberty of a person to stand the test of Article 14 and that the relevant provisions in this respect were only Articles 21 and 22 of the Constitution. Article 21 and the relevant portion of Article 22 of the Constitution read as under :

"21.No person shall be deprived of his life or personal liberty except according to procedure established by law."

"22.(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty- four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

(12) The learned counsel pointed out that after that the view of the Supreme Court changed and it was held that so that a law should not be struck down as ultra virus it must not violate or contravene the fundamental rights including the ones enshrined in Article 14. He in this respect relied upon a judgment of the Supreme Court in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, . The following observations were made (in para 55)

"The law must, Therefore, now be taken to be well settled that Art. 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of personal liberty" and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article. This proposition can no longer be disputed after the decisions in *R, C. Cooper's case*, *Shambhu Nath Sarkar's case* and *Haradhan Saha's case*. Now, if a law depriving a person of "personal liberty" and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex hypothesis it must also be liable to be tested with reference to Article 14 "

That judgment was followed in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, and *A.L. Kalra Vs. Project and Equipment Corporation of India Ltd.*, . The proposition of law laid down in *A.L. Kalra Vs. Project and Equipment Corporation of India Ltd.*, reads as under :

"It thus appears well settled that Article 14 strikes at arbitrariness in executive/administrative action because any action that .is arbitrary must necessarily involve the negation of equality. One need not, confine the" denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equality of protection by law. The Constitution Bench pertinently observed in *Ajay Hasia's case* and put the matter beyond controversy when it said "wherever Therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action."

(13) The learned counsel particularly emphasised that arbitrariness of any action of even legislature has not been saved and that, Therefore, any law made by the legislature, in the present case being Fera 1973, is to be struck down on the ground of arbitrariness as offending Article 14. He further emphasised that the only escape of Section 56 of Fera from being struck down is to interpret in such a way that the procedure which was being followed under the Fera of 1947 is adopted.

(14) There is no difficulty as far as the present view of the Supreme Court is concerned. That is fully reflected by the judgments referred to above. So that a law should escape from being struck down, it must be consistent with all the

fundamental rights as enshrined in the Constitution including Article 14. But in my opinion, in the present case, Section 56 does not violate the provisions of Article 14. It is not arbitrary. The duty of deciding as to whether a complaint should be filed simultaneous with the adjudication proceedings has been given to a very high ranking officer, in the present Fera 1973. In this respect the relevant provision is Section 61 of the present Fera 1973 which relates to the taking of cognizance of the offence by the court. The relevant portion of the aforesaid provision is clause (ii) of Sub-section (2) of Section 61 which reads as under:

(2)No court shall take cognizance- (i) (ii) of any offence punishable u/s 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 Bank by a general or special order."

(15) It is apparent from the above that a complaint can be filed by either Director of Enforcement or any officer authorised in writing by the said Director of Enforcement or an officer authorised by Reserve Bank. That means that the decision has to be taken either by the Director of Enforcement who may himself lodge a complaint or he may get the complaint lodged through another person. The Central Government may also take a decision to lodge a complaint through an officer. Than the Reserve Bank can lodge a complaint through some officer authorised in that behalf. All the three authorities, namely. Director of Enforcement, the Central Government and the Reserve Bank are high ranking. In such cases it is hardly expected that there will be any arbitrariness or discrimination or favoritism .It is expected that these high ranking authorities shall decide every thing on merits.

(16) The Supreme Court expressed similar view in Chinta Lingam and Others Vs. Government of India and Others, . In that case three control orders were issued u/s 3(2)(d) of the Essential Commodities Act, 1955. The validity of those control orders was assailed as unconstitutional. One of the grounds of attack was as under :

"The Control Orders imposed unreasonable restrictions on the right of the petitioners to carry on trade as arbitrary powers had been conferred in the matter of issuing or withholding permits and there were no provisions for appeal or revision against refusal to grant a permit"

(17) It was held that the power to grant or .refuse permits was conferred on fairly high ranking officers such as District Collector or Deputy Commissioner of Civil Supplies, that Therefore abuse of power by such officers cannot be easily assumed and that hence it could not be said that the powers conferred were arbitrary and that the mere fact that there was no provision for appeal or revision against refusal to grant a permit did not make the control orders unreasonable and constitutionally invalid. The ratio of the aforesaid authority,

Therefore, is that when some discretion is given to a high ranking officer, it cannot be assumed that there will be abuse of power and the decisions will not be taken on merits. So, Therefore, in this case It cannot be assumed that the persons who had been authorised to file a complaint before the court will exercise that power arbitrarily or on the basis of favoritism .That being so, the provisions of Section 56 authorising the prosecution of an offender simultaneous with the adjudication proceedings u/s 50 of Fera cannot be held to be ultra virus of Article 14 of the Constitution.

(18) Similarly provisions of Sea Customs Act, 1878 were held by the Supreme Court in Manhar Lal Bhogilal Shah Vs. State of Maharashtra, intra virus of the Constitution and not offending against any of the fundamental rights. In that case Section 167 enumerates the offences and provides for the penalties. Item 8 of Section 167 says that if any goods, the importation of which is for the time being prohibited or restricted be imported into or exported from India contrary to such prohibition or restriction, such goods shall be liable to confiscation and the offender shall be liable to a penalty not exceeding three times the value of the goods or not exceeding Rs. 1000.00 . *That provision is similar to Section 50 of FERA. Then item 81 provides for punishment by a magistrate in respect of the aforesaid contravention. Item 81 of Section 167 of the Sea Customs Act says that in respect of such contravention, the offender shall on conviction before a magistrate be liable to imprisonment for any term not exceeding two years or to fine or to both. That provision is similar to Section 56 of FERA. Section 187-A of Sea Customs Act provides for the taking of the cognizance of the offence on making of a complaint by a Chief Customs Officer or any other officer of Customs not lower in rank than an Assistant Collector of Customs. That provision is similar to Section 61 of FERA. It was held that the aforesaid provisions were intra virus the Constitution. For similar reasons the relevant provisions of Fera 1973 are also intra virus the Constitution.

(19) Although the petitioner has prayed for quashing of the complaints pending before the Addl. Chief Metropolitan Magistrate, New Delhi on other grounds also like "double jeopardy" i.e. prosecution more than once for the same offence yet the learned counsel stated specifically that he did not press those grounds and that the petitioner will take any grounds he likes in defense before the learned magistrate in case these petitions failed. It may be mentioned that as far as the ground of "double jeopardy" is concerned, the same is hardly tenable because the complaints are not in respect of the same contraventions of the provisions of FERA. and there are different contraventions and hence two prosecutions are not for the same offence.

(20) Under these circumstances I dismiss both the petitions.

(21) CRI. Misc. (Main) 713/84 and Cri. Misc. (Main) 142/85 stand disposed of.