
(2008) 02 DEL CK 0143

In the Delhi High Court

Case No : Criminal M.C. No. 5094 of 2006 and Criminal M.A. 1088 of 2002

Rajan Bagaria

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-02-2008

Acts Referred:

Citation : (2008) 101 DRJ 385 : (2009) 2 RCR(Criminal) 401

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : C. Mukund A.K. Jain Amit Kasera Avneesh Garg and Shashank Sharma, for the Appellant; P.P. Malhotra, ASG and Navin Matta and Chetan Chawla, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—This is a petition u/s 482 of the Code of Criminal Procedure, 1973 (?CrPC?) seeking the quashing of Criminal Complaint titled Chief Enforcement Officer v. Ratan Exports & Industries and Ors. pending in the court of the learned Additional Chief Metropolitan Magistrate (?ACMM?), New Delhi insofar as it concerns the Petitioner.

2. The complaint in question was filed by the Enforcement Directorate u/s 56 of Foreign Exchange Regulation Act, 1973 (?FERA?) read with Sections 49(3) and 49(4) of the Foreign Exchange Management Act, 1999 (?Act?) against the company M/s. Ratan Exports & Industries Limited (?REIL?) and six other persons. The Petitioner Mr. Rajan Bagaria was arrayed as accused No. 5, in the complaint.

3. The complaint stated that by a letter dated 26th May, 1997 Reserve Bank of India (?RBI?) had informed the Enforcement Directorate that export proceeds to the tune of Rs. 22.95 crores were pending realization in the account of REIL. Earlier, for the purpose of investigation, a directive had been issued by the RBI to REIL on 19th September, 1996 u/s 33(2) FERA calling for the details of

outstanding exports. By a letter dated 23rd October, 1996 REIL informed RBI that during the period 1992-96 the Directors of the REIL were Shri Ratan Lal Bagaria, Shri Bijoy Bagaria, Shri Ajay Bagaria, Shri Mohan Churiwala, Dr. S.Rangana and Smt. Vidya Bagaria. Summons u/s 40 FERA was issued to the REIL on 17th September, 1997. Shri Palash Ganguly, Director of REIL appeared and made a statement on 17th October, 1997 before the Enforcement Directorate. Shri Palash Ganguly informed that:

Shri Ratan Bagaria is controlling all the operations and the day-to-day affairs of the company, the presently S/Shri Ratan Bagaria, Managing Director and S/Shri Bijoy Bagaria, N.K. Hara, S.N. Garg and Palash Ganguly (himself) are the Directors and are working on the instructions of Shri Ratan Bagaria that Shri Ratan Bagaria is out of country to Russia since January 1997; that REIL has an office in Moscow, Russia at 19, Begovarya Street and the phone No. is 9454880; that a total amount of Rs. 22,50,55,144.95 is pending realization on account of REIL, in respect of the exports made during 1992-96; that he was getting Rs. 5000/- as salary; that he cannot furnish details of efforts made to realize the huge outstanding as he was made a director in 1997; that S/Shri Ratan Bagaria, Bijoy Bagaria and Ajay Bagaria were well conversant and the first two were handling the business directly.

4. As part of the enquiries made by the Enforcement Directorate a directive was sent on 24th October, 1997 to the United Bank of India, 16, K.G. Marg, New Delhi to furnish the details of outstanding export proceeds and the details of proprietor/partners/Directors of REIL. By their letter dated 12th April 2001 United Bank of India wrote to the Enforcement Directorate informing inter alias that "Directors/Guarantors" of the company were the following:

1. Shri Rattan Bagaria
2. Shri Bijoy Bagaria
3. Smt. Vidya Bagaria
4. Shri Ajay Bagaria
5. Shri Rajan Bagaria
6. Shri Mohan Lal Churiwala.

5. After setting out Section 68(1) FERA, the complaint stated as under:

(xxiii) That the accused Nos 2 to 7 were the Directors/Guarantors of M/s. Ratan Exports & Industries Limited during the relevant period and were responsible to the accused No. 1 M/s. Ratan Exports and Industries Limited for the conduct of its day-to-day business.

6. An opportunity notice was issued by the Respondent to each of the accused including the Petitioner here on 11th May 2002 setting out inter alias the averments referred to hereinabove. On 23rd May 2002 the Petitioner through his

lawyer sent a reply to the said opportunity notice inter alias stating:

My client is very much surprised to receive your notice under reference and also to note the contents thereof. My client states that on 26th day of August 1990 my client resigned as the Director from M/s. Ratan Exports & Industries Ltd and after August 1990 my client is in no way connected or related with the said company, in any manner whatsoever. My client is not concerned with any alleged transaction allegedly held after 26th August, 1990 and more particularly during the year 1992 to 1996 as alleged in your notice nor is aware of the same. A copy of the Form No. 32 duly filed with the Registrar of Companies, Kolkata shall also be forwarded to you for your perusal and information in due course.

My client shall have to apply the same with Registrar of Companies, Delhi and to obtain the same.

7. A show cause notice was nevertheless issued on 9th May, 2002 issued by the Enforcement Directorate against the company and its Directors/Guarantors including the Petitioner here for contravention of Section 18(2) FERA. Simultaneously on 30th May 2002 a complaint was filed u/s 56 FERA against the company and its Directors/Guarantors including the Petitioner here. On 30th May 2002 the following order was passed by the learned ACMM:

30.5.2002

Present: SPP along with complainant.

New complaint presented. It be checked and registered. Photocopy of documents have also been filed along with complaint. Ahlmad is directed to check the documents as per index attached with these documents.

An application for exemption of personal attendance of complainant and for dispensing of recording of preliminary evidence has also been moved along with this complaint.

As this complaint has been filed by a public servant in discharge of his public duties hence recording of preliminary evidence dispensed with. Personal attendance of complainant has also been dispensed with. Complainant has been allowed to be represented through SPP.

Complaint and documents perused.

Heard.

After going through the complaint and document and arguments raised before me by learned SPP I am of the opinion that at this stage there are sufficient grounds to proceed against accused u/s 56 of FERA 1973. I take cognizance of offence u/s 56 FERA 1973. Issue summons to accused for 3.9.2002.

Sd/-

ACMM

8. On 9th February 2002 the present petition was filed and on 11th December, 2002 an interim order was passed permitting the Petitioner to appear before the learned ACMM through counsel. That interim order has continued till date.

9. The contention of Mr. C. Mukund, learned Counsel appearing for the Petitioner here is that the Petitioner is ceased to be a Director of REIL on 22nd August, 1990. Reference is made to a photocopy of the annual return along with the particulars of the Directors filed with the Registrar of Companies (ROC). It is submitted that since the period during which the contravention is alleged to have been taken place is 1992-96, the petitioner cannot be held liable for the offences if any committed by the company. In terms of Section 68(1) FERA the Petitioner was not a person in charge of the affairs of the company and responsible to it for the conduct of the business at the time the offence was committed. Reliance is placed upon the judgments in *Saroj Kumar Poddar Vs. State (NCT of Delhi)* and *Another, , S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, , Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, , Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, , Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, and J.N. Bhatia v. State* 139 (2007) DLT 361. It is submitted that it is not sufficient for the Enforcement Directorate to merely state in the complaint that the Petitioner was a Director/Guarantor, and was in charge of the affairs company. In fact the Petitioner was not a Director/Guarantor at the time when the offence was committed.

10. On the other hand it is submitted by Mr. P.P. Malhotra, learned ASG appearing for the Respondent that the Enforcement Directorate proceeded inter alias on the basis of the letter issued by the United Bank of India on 12th April 2001. That letter shows that even as on 12th April 2001 the Petitioner here was a "Director/Guarantor." If it was the Petitioner's case that he was not either a Director or a Guarantor then it was for him to show by producing evidence before the learned trial court to that effect. It is further submitted that the documents like the annual return cannot be examined in these proceedings and also have to be proved only at the trial. It is submitted that scope of interference by this Court u/s 482 CrPC is extremely limited and has to be sparingly used. A reference is made to the judgment of *Medchi Chemicals & Pharma (P) Limited v. Biological E. Limited* (2002) 3 SCC 269, *Om Wati v. State* 2001 AD (CrI) SC 69, *Maratt Rubber Limited v. J.K. Marattuklam* 2000 III AD (CrI) SC 1 and *State of Madhya Pradesh v. S.B. Johari* 2000 I AD (CrI) SC 421.

11. Section 68 FERA reads as under:

68 Offences by companies:

(i) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made there under is a company, every person who, at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be deemed to be guilty of the contravention and

shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in Sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made there under has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation - For the purposes of this section-

(i) "company" means any body corporate and includes a firm or other association of individuals; and

(ii) "director", in relation to a firm, means a partner in the firm.

12. The above section is more or less similar to the wording of Section 141 of the Negotiable Instruments Act, 1881 (?NI Act?). The law in this regard to the averments that are required to be made in a complaint for an offence u/s 138 NI Act has been fairly well settled in the recent judgment of the Supreme Court in *S.M.S. Pharmaceuticals Limited v. Neeta Bhalla and N. Rangachari v. BSNL* AIR 2007 SC 1682. The law as has been explained in the said judgments is that the complaint must contain averments to the effect that the individual directors which have been arrayed as co-accused are "persons in charge of the day-to-day affairs of the company or responsible to it for the conduct of its business." According to the judgment in *N. Rangachari* no further averments concerning the role of each directors is required for the criminal proceedings to continue.

13. The question that arises in the present matter is whether in fact the Enforcement Directorate had material before it even at the time of filing a complaint, to reasonably conclude whether the Petitioner here was a person who was in charge of the affairs of the company and responsible to it for the conduct of its business.

14. The records of the case reveal that the respondent's information about the Petitioner here being the Director/Guarantor of the company was a letter dated 12th April 2001 written by the United Bank of India. That letter does not specifically show which of the named persons are directors and which are guarantors at that time for the purpose of Section 68 FERA, the person in charge of the affairs of the company. Section 68(2) FERA also seeks to rope any employees of the company if it is shown that the offence took place in connivance with the director, manager, secretary and any other officer. There is no other category of persons like for e.g., the guarantors, who can be made

liable for the offences committed by a company u/s 138 NI Act. Likewise u/s 68 FERA, there is no question of a guarantor for being made liable the offences committed by a company.

15. The Petitioner has forcefully refuted the allegation that he was a Director of the company at the time of commission of offence. He has throughout maintained that he has resigned on 22nd August 1990 whereas the period for which the company has been charged for the offences is between 1992 and 1996. The Respondent has not been able to show that the Petitioner was in fact either charge of the company or responsible to it for the conduct of its business at the time when the offence was committed. It is one thing to say that the complainant is not expected to know initially the working of the company for the purpose of filing the complaint. It would be another thing when the complainant itself has taken certain steps for ascertaining who is in charge of the affairs of the company and also received replies which contradict such submission. In other words after receiving the reply of the Petitioner to the opportunity notice, the Enforcement Directorate simply ignored the Explanation and proceeded to file a complaint on the basis that the Petitioner was a guarantor of the company. The Enforcement Directorate was put on a notice whether the Petitioner has sent a reply to the opportunity notice denying the liability. By ignoring the reply filed by the Petitioner here to the opportunity notice issued by it, the Enforcement Directorate erred in making a standard averment that each of the accused including the Petitioner here were the directors of the company.

16. The letter written by the United Bank of India adds nothing to alter this position. It only mentions that the Petitioner was one of the "Directors/Guarantors." Having sought the help of United Bank of India to ascertain the names of the "Directors/Guarantors," the Enforcement Directorate could have followed up with the United Bank of India to find out which of the persons was a Director and which a guarantor. The further enquiry would be whether he continued as such at the time of the commission of offence. As far as the present complaint is concerned, this Court on a careful perusal of the complaint, concludes that the contents thereof do not even prima facie make out a case against the Petitioner for violation of the provisions of FERA.

17. In that view of the mater, the Complaint Case titled Chief Enforcement Officer v. Ratan Exports & Industries and Ors. pending in the court of the learned Additional Chief Metropolitan Magistrate (?ACMM?), New Delhi insofar as the Petitioner is concerned and all the proceedings consequent thereto are hereby quashed.

18. The petition is allowed with no orders as to costs. The pending application also stands disposed of.