

(2009) 03 DEL CK 0308

In the Delhi High Court

Case No : Criminal M.C. No's. 6648-49 of 2006 and Criminal M. No. 11218 of 2006

S.K. Bahadur

APPELLANT

Vs

Director, Enforcement Directorate

RESPONDENT

Date of Decision : 13-03-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226
Criminal Procedure Code, 1973 (CrPC) — Section 155(4), 190(1), 321, 482
Foreign Exchange Regulation Act, 1973 — Section 13, 18(1), 18A, 19(1), 44(2)
Prevention of Corruption Act, 1947 — Section 5(1), 5(2), 6(1)

Citation : (2009) 91 SCL 432

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

Bench : Single Bench

Advocate : P.P. Malhotra, Rajdipa Behura, Shanker Chhabra and C.S. Chauhan, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—The prayer in this petition by the Petitioner No. 1 Shri S.K. Bahadur and his wife Petitioner No. 2 Smt. Asha Bhatnagar is for the quashing of Complaint Cases titled J.C. Makhija, Assistant Director, Enforcement Directorate v. S.K. Bahadur and J.C. Makhija, Assistant Director, Enforcement Directorate v. Asha Bhatnagar both pending in the Court of learned Additional Chief Metropolitan Magistrate ("ACMM"), New Delhi u/s 8(1) of the Foreign Exchange Regulation Act, 1973 (FERA).

2. The aforementioned complaints state that on 4-12-1984 the premises at D-1/153, Satya Marg, Chanakya Puri, New Delhi under occupation of the Petitioners was searched by the Central Bureau of Investigation ("CBI") and foreign currency of US \$ 2,596 and U.K. Sterling pounds 1,220 and certain other incriminating documents were found and seized. It was alleged that Petitioner No. 1 who was at the relevant time working as Joint Secretary and Legal Adviser, Ministry of Commerce, Udyog Bhawan, New Delhi had visited abroad in May 1984

and had acquired Japanese Yen 2,94,100 and Hong Kong \$ 15,490 for purchases made abroad. It was stated in the complaint that u/s 8(1) FERA no person resident in India other than an authorized dealer in foreign exchange could acquire foreign exchange except with the special permission of the Reserve Bank of India ("RBI"). Since the acquisition of the aforementioned foreign currency by the petitioners contravened the provisions of Section 8(1) FERA, they were liable to be proceeded against u/s 56 FERA. Accordingly on 9-2-1987 the aforementioned complaints were filed against the petitioners.

3. According to the petitioners the total value of the foreign exchange seized from the premises was around Rs. 49,000 in terms of the rupee exchange value. In respect of the search and seizure by the CBI, a charge sheet was filed by it against the petitioners on 27-6-1986 for the offence u/s 5(2) read with Section 5(1)(e) of the Prevention of Corruption Act, 1947 ("PC Act") for possessing assets disproportionate to the known sources of income of Petitioner No. 1. The charge sheet was filed along with the sanction obtained u/s 6(1)(a) PC Act for prosecuting the Petitioner No. 1. The learned Special Judge took cognizance of the aforementioned offence u/s 190(1)(b) CrPC. The charge sheet alleged that Petitioner No. 1 possessed in his name or in the name of his family members assets both movable and immovable worth Rs. 46,45,497.40. In the list of the assets, at serial No. 4, the foreign exchange worth Rs. 49,452 seized from the premises of the petitioners was included.

4. It is stated that nearly two and a half years after the raid took place and more than seven months after the filing of the above charge sheet, the aforementioned two complaints u/s 56 FERA were filed against the petitioners. The petitioners state that despite the expiry of 22 years since the filing of the two complaint cases, charges are yet to be framed. At the time of the filing of this petition on 10-10-2006, petitioner No. 1 was 77 years old. Petitioner No. 2 was 78 years old. At present they are 79 and 80 years respectively. It is submitted that since petitioner No. 1 is already facing trial in respect of the offence of possessing assets, including the foreign currency seized, disproportionate to his known sources of income, a parallel complaint under the FERA in the Court of the learned ACMM is not going to serve any purpose except causing harassment to the petitioners.

5. Reference is made to Section 155(4) CrPC which states that where the facts of the case disclose the commission of both a cognizable as well as a non-cognizable offence then the case shall be deemed to be a cognizable one notwithstanding that the other offences are non-cognizable. It is submitted that when on the same set of facts the CBI has filed a charge sheet and cognizance has been taken of the offence u/s 5(1)(e) PC Act, a separate complaint for a non-cognizable offence under the FERA was not maintainable. The learned Special Judge who took cognizance of the PC Act offence was competent to take cognizance of the offence under FERA as well. Inasmuch as the learned Special Judge did not do so it is not open to the learned ACMM to entertain the

complaints and take cognizance of the offence under the FERA.

6. Petitioner No. 1 who appeared in person relied on certain circulars of the department to urge that since the value of the foreign exchange recovered in this case was less than Rs. 2.5 lakhs, the Enforcement Directorate ought not to be prosecuting these complaints. On the basis of the above submission the following order was passed by this Court on 2-11-2006:

Learned counsel for the respondent submits that the petitioner had earlier also filed Crl. M.M. No. 1479/2002 seeking quashing of the proceedings, which petition was dismissed vide order dated 10-5-2002 and, therefore, second petition of the same nature is not maintainable. However, it is pointed out by the petitioner, who appears in-person, that on earlier occasion the petition was filed on the ground that when second complaint on the same allegations was not maintainable. His primary argument now is that even as per the department's own circular, if the value of foreign exchange is less than Rs. 2.50 lakhs, the prosecution is not to be normally launched. In the present case, he submits that the value of the foreign exchange was Rs. 49,000 only. It is also pointed out that the petitioners are 77 and 78 years of age respectively and the trial has prolonged for 22 years and is still at the stage of framing of the charge.

Notice on this limited aspect, returnable on 14-11-2006. Ms. Rajdipa Behura, learned counsel for the respondent, accepts notice.

Till the next date, the trial court shall not proceed further in the matter.

Dasti under the signature of the Court Master.

7. Thereafter on 14-11-2006 the following order was passed by this Court:

Mr. Sudhir Nath, Director of Enforcement, is present in the Court, who was summoned in some other case. He is apprised of order dated 2-11-2006. The petitioner shall make a representation to him within one week from today stating his case, on the basis of which he wants withdrawal of the proceedings. On giving this representation within one week, the same shall be objectively considered by the Director of Enforcement and decision taken thereon within two weeks.

Renotify on 23-3-2007.

The trial court may, in the meantime, proceed with the matter.

8. The department then filed an affidavit on 6-3-2007 in which it was mentioned in para 2 that the representation dated 17-11-2006 of the petitioner had been considered by the Director, Directorate of Enforcement. It was stated in paras 2 and 3 of the said affidavit as under:

2. As u/s 321 of CrPC, the Central Government is the competent authority to take decision thereon for the withdrawal of case filed u/s 56 Foreign Exchange Regulation Act, 1973. The considered views of the Director were submitted to the

Government. It has been observed from the facts of this case, that the FERA adjudication, prosecution and subsequent appeal before the ATFE filed by Shri Bahadur are linked to the case or CBI relating to a matter under the Prevention of Corruption Act and therefore this matter cannot be seen in isolation. Though a small amount is involved, the general policy being followed in considering such matters in the case of prosecutions filed is that where a case/cases are part of a group case, or/and penalties have not been paid, even though small, cases should not be withdrawn. As regards, Shri Bahadur's contention that the foreign currency did not belong to him, it has been noted that the Adjudicating Authority's order on the issue has not been disturbed by the ATFE or any other court so far and further that the Adjudicating Authority had levied penalty against Shri S.K. Bahadur and Smt. Bahadur which have not been paid till now. As regards, prosecution being filed even before finalization of ATFE appeal, there does not appear to be any infirmity in this respect.

3. The Competent Authority has informed that this is not a fit case for withdrawal, in the light of the facts brought out above.

9. On 28-1-2008 after perusing the said affidavit dated 2-3-2007, this Court passed the following order:

1. This is an application seeking impleadment of Central Bureau of Investigation (CBI) as a party in the present case.

2. After going through the record in the present case, this Court does not find it necessary to implead the CBI since this is a matter concerning exclusively the Directorate of Enforcement which is prosecuting the petitioner for the offence under the Foreign Exchange Regulation Act (FERA). The application is dismissed.

Crl. M.C. No. 6648-49/2006

3. The affidavit dated 2-3-2007 on behalf of the Directorate of Enforcement states that although the value of the foreign exchange involved is small, since the prosecution under the FERA is linked with the case of the CBI under the Prevention of Corruption Act as well the adjudication proceedings under FERA, the matter cannot be seen in isolation. It is accordingly stated that the competent authority has opined that the case should not be withdrawn.

4. The file of the department has been perused. It appears that the opinion of the Director of Enforcement on the representation made by the petitioner for dropping the prosecution was that the case should not be withdrawn in view of the policy of the Central Government in such matters where the prosecution under FERA is linked to other cases involving the accused.

5. However, this Court finds that there are certain other factors which have not been accounted for in arriving at the aforementioned opinion. The criminal proceedings in the present case under FERA against the petitioners appear to have been commenced in the year 1987 when cognizance was taken. There is no dispute that the amount involved is Rs. 49,000. It is also not disputed that

despite the case having commenced in 1987, the case reached only the stage of arguments on framing of charge some time in November 2007. In fact, it is not even clear if the order framing charge has been passed as yet. The recording of evidence has not even commenced. Twenty-one years have elapsed. The petitioner and his wife are over 80 years of age. The Court wonders what purpose the prosecution of the petitioners is expected to achieve particularly given the lapse of time and the fact that the amount involved is well below the minimum limit set by the respondent for launching prosecution.

6. In the circumstances this Court would like the respondent, in consultation with the Central Government, to examine the representation of the petitioners for dropping the prosecution afresh in light of the factors pointed out herein before. It hardly needs stressing that the dropping of the criminal proceedings is not going to affect either the adjudication proceedings, which are pending in appeal before the Appellate Board or the trial of petitioner No. 1 for the offences under the Prevention of Corruption Act.

7. Mr. Malhotra, learned ASJ states that the matter will again be examined and a proper affidavit will be filed by the respondent in this Court within four weeks. Till the next date of hearing, the proceedings before the trial court shall remain stayed.

8. List on 13-3-2008.

9. Order be given dasti to learned counsel for the parties.

10. Pursuant to the aforementioned order further affidavit was filed by the Directorate of Enforcement on 24-3-2008. In paras 5 to 8 of the said affidavit it was stated as under:

5. That the Adjudicating Officer vide order dated 31-12-1986 had imposed a penalty of Rs. 2 lakhs and Rs. 25,000 on Shri S.K. Bahadur and Smt. Asha Bhatnagar respectively for contravention of the provisions of Section 8(1) of Foreign Exchange Regulation Act, 1973 and the said penalties have not been paid till date. The petitioner has filed an appeal before the then FERA Board now the Appellate Tribunal for Foreign Exchange against the said adjudication order dated 31-12-1986 and the same is pending.

6. That the respondent had filed complaints against the petitioners u/s 56 of FERA, 1973 in the Court of ACMM on 9-2-1987 and the same have been coming up periodically before the ACMM Court.

7. It is respectfully submitted that the prosecution in the Court of ACMM and the appellate proceedings in the Appellate Tribunal have not attained finality only due to dilatory tactics adopted by Shri S.K. Bahadur, the main petitioner. The petitioner Shri S.K. Bahadur filed a petition in the year 2002 before this Hon''ble Court u/s 482 of CrPC against the order dated 27-11-2001 of ACMM, New Delhi. This Hon''ble Court in its order dated 10-5-2002 while dismissing the said petition of Shri S.K. Bahadur did not find any illegality or impropriety in the

ACMM"s order dated 27-11-2001.

8. That in the matter of withdrawal of cases filed during the sun-set period i.e., between 1-6-2000 to 31-5-2002, the Competent Authority in the Central Government, inter alia, followed the general policy in respect of withdrawal of only such cases which are neither group nor linked cases and as well satisfy some other conditions like payment of penalty etc. The fact remains that in the present case, a criminal complaint was filed on 9-2-1987 u/s 56 of FERA, 1973 before the sun-set period. The Competent Authority in the Central Government re-examined the matter independently and rejected the representation of the petitioners for withdrawal of prosecution in the facts and circumstances of the case.

11. In his rejoinder the petitioner pointed out that the admitted position of the respondent was that the Central Government had in the instant case re-examined the need for continuing prosecutions under the FERA "in light of the general policy followed for the sunset period between 1-6-2000 to 31-5-2002 and not as per guidelines of 9-2-1987."

12. Petitioner No. 1 was heard at length. Along with his written submissions Petitioner No. 1 has produced copies of the Circular (Tech.) Order No. 6/78 issued on 5-2-1997 a reference to which was made in the judgment dated 11-5-1995 of a learned Single Judge of this Court in *Suman Kapoor v. Union of India* 1995 JCC 695. In paras 8 and 11 of the said decision a reference was made to the guidelines contained in para 4 of the said Circular which suggests that prosecution is required to be launched if non-repatriation is mala fide and deliberate and only if the evidence is adequate and "there is fair chance of successful prosecution." Reference was also made to certain other guidelines dated 14-8-1984, which inter alia stated that after the receipt of the copy of adjudication order, it will be the responsibility of the Investigation Officer to examine whether the case falls under the guidelines for prosecution pursuant to the Technical Circular Order No. 6/78. The petitioner also referred to the Circular Technical No. 1/92 dated 5-5-1992 whereunder prosecution u/s 56 FERA is to be considered only where the amount of seized foreign exchange is "equivalent to Rs. 2.5 lakhs or more." It is submitted that the guidelines of 5-2-1987 and 5-5-1992 cannot be overridden by the general policy of the Government concerning the filing of cases under the FERA in the sunset period between 1-6-2000 to 31-5-2002. It is submitted that the criteria set by the above Circulars for prosecuting cases ought to be adhered to by the Government particularly when the said Circulars have not been superseded or withdrawn.

13. In reply it is pointed out by Mr. P.P. Malhotra, the learned ASG appearing for the respondent that even earlier the petitioner had filed a petition seeking similar relief which was dismissed by this Court. It is then submitted that in the matter of withdrawal of cases filed during the sunset period between 1-6-2000 to 31-5-2002 the competent authority followed the general policy in respect of withdrawal only of such cases which were neither group cases nor linked cases.

The said policy would in any event not apply to cases launched long before the sunset period. It is submitted that where other cases in respect of similar offences were pending in the courts, "withdrawal of this case would send a wrong message." Circular (Tech.) Order No. 1/92 is stated to not apply to the present case since it did not have retrospective effect. Mr. Malhotra sought to suggest that foreign exchange valued at Rs. 49,000 was substantial in the year 1987 and, therefore, the respondent was justified in launching a prosecution u/s 56 FERA. In addition, Mr. Malhotra referred to an exhaustive list of dates showing the various proceedings in the complaint cases before learned ACMM from 9-2-1987 onwards. According to him it is the petitioners who have been seeking adjournments thus hampering the progress in the complaint cases. It was submitted that since the delay in completion of the proceedings in the complaint cases was attributable to the petitioners themselves, no leniency should be shown to them by entertaining the present petition seeking the quashing of the complaints.

14. The submissions of both sides have been considered. In the first place, the Court notices that the earlier petition met with an in limine dismissal without any discussion on merits. Moreover, the passage of time with no tangible progress in the criminal complaints does give rise to a fresh cause of action enabling the petitioners to approach this Court again for relief.

15. Certain facts which are not in dispute are that the total value of the foreign exchange seized from the premises of the petitioners is admittedly around Rs. 49,452. The complaint was filed in 1987 and 22 years have gone by and not even charge has been framed for the alleged offence under the FERA. The contention of Mr. Malhotra that irrespective of the value of foreign exchange that may have been found in possession of the petitioners, and irrespective of the lapse of time since the filing of the complaints, the criminal complaints ought not be quashed as that would send a wrong signal does not impress this Court.

16. In order to appreciate this submission a reference may be made to Section 56(1) FERA which reads as under:

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 (1) of Section 18, Section 18A, 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.

17. It requires to be noticed straightway that u/s 56(1) FERA there is a gradation of the offences depending on their gravity. Where the value of foreign exchange involved exceeds Rs. 1 lakh then the imprisonment is not less than six months and may extend to seven years and a fine. In all other cases the imprisonment is for a term which may extend for a period of three years and a fine or both. This is indicative of the legislative intent not to award the same punishment for the offence irrespective of the value of the foreign exchange involved. The punishment is obviously linked with the value of foreign exchange held, bought or sold in contravention of the provisions of the FERA. In the context of penal provisions of a statute, the duty to prosecute has to be counter-balanced with the right of the accused to trial within a reasonable period. Given the nature of the offences under FERA, and the likely maximum punishment if the petitioners are found guilty, a period of 22 years for even the charge to be framed can by no stretch of imagination be considered reasonable. Therefore this Court is unable to accept the submission of Mr. Malhotra that irrespective of the actual value of the foreign exchange seized from the Petitioners' premises they should nevertheless be prosecuted. No "wrong message" would be conveyed if the prosecution for the offence involving foreign exchange of the value of Rs. 49,452 is quashed on the ground that not even a charge for the offence has been framed for over 22 years.

18. As regards the Circulars, it is plain that the Circular setting monetary limits for launching prosecutions was intended to curb filing of cases where the value of foreign exchange seized was insubstantial. This Court has also perused the Circular (Tech.) Order No. 6/87 dated 3-6-1987 which set the minimum value of foreign exchange seized at Rs. 25,000 to justify the prosecution. The limit was raised to Rs. 2.5 lakhs in 1992. Still, the amount of Rs. 49,452 cannot be said to be so substantial that the quashing of a criminal complaint involving foreign exchange of that value pending for over 22 years can be said to send a wrong signal. Also, the case was to be reviewed at different levels in light of the applicable circulars before prosecution was actually launched. As far as the present case is concerned the affidavits filed do not indicate that there was application of mind by the Central Government or the Director as the case may be to the circulars in force concerning launching and withdrawal of prosecutions. Despite two orders of this Court, the Central Government has refused to reconsider its decision without really giving any reasons for such decision. This Court is unable to appreciate the stand of the Central Government in the matter.

19. The exhaustive list of dates produced does not persuade the court to hold that it is the petitioners alone who are responsible for the delay in the progress of the two complaint cases. Further it is not in dispute that despite there being no stay of the criminal proceedings the learned MM decided not to proceed with the complaints for the reasons stated in the orders. If the CBI felt that such

adjournments were not justified then it should have sought appropriate remedies for that purpose. For reasons best known to the CBI it did not file any application for expediting the criminal complaints against the petitioners.

20. The PC Act case and the adjudication proceeding are in any event pending. Therefore it is not as if with the quashing of the complaint cases for the offences under the FERA, all other proceedings against the petitioners would come to a close. The factors that weigh with this Court are that petitioner No. 1 is 79 years old and petitioner No. 2 is 80 years old. They have been facing ordeal of the pendency of the two criminal complaint cases for nearly 22 years now. Charge is yet to be framed. It is anybody's guess as to how many more years the trial of the case would take. This Court is unable to understand what purpose would be served by continuing the two criminal complaints. In the considered view of this Court, the petitioners have been able to demonstrate the violation of their fundamental right to a speedy trial under Articles 14 and 21 of the Constitution. They are entitled to seek remedies under Article 226 of the Constitution as well.

21. Keeping in view the above facts and circumstances, this Court is of the view that the pendency of the two criminal complaints against the petitioners who are 79 and 80 years old respectively and in particular where not even the arguments on charge have been heard for 22 years, will not serve the interests of justice. Accordingly, Complaint Cases titled J.C. Makhija Assistant Director, Enforcement Directorate v. S.K. Bahadur and J.C. Makhija Assistant Director, Enforcement Directorate v. Asha Bhatnagar both pending in the court of learned ACMM, New Delhi u/s 8(1) of the Foreign Exchange Regulation Act, 1973 and all proceedings consequent thereto hereby stand quashed. It is further made clear that the order passed in this petition will not affect the decision in the appeal (arising from the adjudication proceedings) pending before the Appellate Tribunal or the criminal proceedings under the PC Act, 1947. This order has been passed in the peculiar facts of the present cases.

22. The petitions are accordingly allowed but in the circumstances with no order as to costs. The application is disposed of. A certified copy of this order be sent to the learned ACMM concerned forthwith.