

(2005) 02 DEL CK 0187

In the Delhi High Court

Case No : Criminal Revision Petition No. 476 of 2001

Surendra Kumar Jain and Another

APPELLANT

Vs

M.G. Attri

RESPONDENT

Date of Decision : 10-02-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 29

Foreign Exchange Regulation Act, 1973 — Section 33(2), 40, 44(2), 52, 56

Citation : (2005) CriLJ 3768 : (2005) 120 DLT 450 : (2005) 3 RCR(Criminal) 186

Hon'ble Judges : Manju Goel, J

Bench : Single Bench

Advocate : Biswajit Bhattacharya and H.S. Bhullar, for the Appellant; A.K. Panda and N.K. Matta, for the Respondent

Final Decision : Dismissed

Judgement

Manju Goel, J.—On 3.5.91 the resident of the petitioner was raided and inter alias the following currency was seized:

"US 250 (Travellers" cheque)

US 593, Foreign currency

U.K. Pounds 300

D.M. (German Currency) 2,700

F.F. 300

H.K. Dollars 50

One note of Thai Bhat

2 Chinese currency notes of denomination of 10 each"

2. It was revealed during investigation that the currency belonged to the petitioner No.1 but had been handed over to the petitioner No.2 for safe keeping.

The Directorate of Enforcement after completion of the investigation filed a complaint u/s 61(2) (ii) read with Section 56 of the Foreign Exchange Regulation Act (FERA) 1973. The petitioners set up the circular No.1/92 to plead before the learned ACMM, New Delhi that the prosecution was incompetent. The learned ACMM accepted the objection raised by the petitioner and discharged them. The learned Court of Sessions however accepted the revision from that order and directed the ACMM to dispose of the complaint according to law. The present revision petition seeks to challenge this order of Sessions dated 7th May, 2001. Before proceeding further it is necessary to see the circular itself. The circular reads as under:

"ENFORCEMENT DIRECTorATE

FOREIGN EXCHANGE REGULATION ACT

No. T-22/2-Coord/92

Lok Nayak Bhawan, 6th Floor,

Khan Market, New Delhi

Dated: 5th May, 1992

CIRCULAR (TECH) ORDER NO.1/92

Sub:- Prosecutions u/s 56 & 57 of Foreign Exchange Regulation Act, 1973

Revised guidelines for prosecution u/s 56 and 57 were issued under Technical Circular No. 6/87 dated 3rd June, 1987. In supersession of the same, the following revised guidelines are hereby issued:-

1. Prosecution u/s 56 of the Act

(1) Criteria:

Prosecution u/s 56 should be considered in the following types of cases:

a) Unauthorised dealing in foreign exchange

(i) Carried on as a racket/business involving an amount of Rs. 5 lakhs or more;

(ii) where value of foreign exchange seized is equivalent to Rs.2.5 lakhs or more

b) Compensatory payments made on one or more occasions and being of the order of Rs. 25 lakhs or above

c) Foreign currency accounts opened illegally and being maintained as such and where amount of foreign exchange involved is equivalent to Rs. 1 lakh and above.

d) Export cases Where non-repatriation of export proceeds exceeds Rs. 5 lakhs and the non-repatriation is malafide and deliberate.

e) Any case involving amount of more than Rs. 5 lakh where the contravention is deliberate and malafide.

- f) In any other case where the amount involved is not ascertainable but the contravention is considered to be very serious vis-a-vis the objects of FERA or where the person is a habitual offender, amount involved would not be relevant
- g) for deliberate non-compliance of directive issued u/s 33(2) of summons sent u/s 40 of the FERA Act, 1973.

(2) Procedure

(a) Based on the criteria (1) above, prosecutions should be launched/recommended after satisfying the following:-

i. Adequacy of evidence

ii. Severity of the offence vis-a-vis the objects of the Act.

(b) Prosecution should normally be launched only after completion of the adjudication proceedings. All adjudication orders should, Therefore, be reviewed from the point of view of launching prosecution, latest within one month of the receipt of the order, in the following manner:-

i) In zones orders up to the level of Dy. Directors in consultation with Asstt. Legal Adviser.

ii) In Hqrs. orders of the Addl. Director of Enforcement; and above in consultation with Dy. Legal Adviser.

(c) Though prosecution as mentioned in (b) above should normally be launched only after completion of adjudication proceedings. There is not bar on launching prosecution either before or simultaneous to the starting of adjudication proceedings. In all suitable cases specially cases involving big foreign currency seizures, manipulation of documents, frauds etc. immediate launching of prosecution should be seriously considered. However, in all such cases where prosecution is proposed to be launched, before completion of adjudication proceedings, prior clearance should be obtained from the Hqrs.

Prosecution under Sec. 57 of the Act

(1) Criteria

Prosecution u/s 57 should be considered in the following types of cases:-

a) where amount of penalty realisable is Rs.50,000/- or more; and

b) where the parties have not preferred appeals to FERA Board u/s 52 within the prescribed time limit.

(2) Procedural aspects

Before launching prosecution u/s 57 it should be ensured:-

a) that the adjudication order has been served on the party and period of 45 days has since expired; and

b) that a notice has been sent to the party requiring him to produce evidence regarding depositing the penalty and to show cause why prosecution should not be launched for non-payment.

(I.K. SINGHVI)

DIRECTor"

3. It is contended that the value of currency seized is below the minimum amount mentioned in this circular and Therefore the Enforcement Directorate which is bound by the circular could not have launched prosecution against the the petitioners. The respondents seriously dispute this proposition and submit that the circular has no binding force and even according to this circular the prosecution could be launched against the petitioners who are habitual offenders.

4. It is submitted before this Court that the circular has been issued u/s 61 of the Foreign Exchange Regulation Act and Therefore it has statutory force. To consider this contention it is necessary to look at Section 61 of the Foreign Exchange Regulation Act:-

"61.Cognizance of offences:- (1) Notwithstanding anything contained in section 29 of the Code of Criminal Procedure, 1973, it shall be lawful for any metropolitan magistrate and for any magistrate of the first class to pass a sentence of imprisonment for a term exceeding three years or of fine exceeding five thousand rupees on any person convicted of an offence punishable u/s 56.

(2) No court shall take cognizance-

(i) of any offence punishable under Sub-section (2) of section 44 or sub- section (1) of section 58,-

(a) where the offence is alleged to have been committed by an officer of Enforcement not lower in rank than as Assistant Director of Enforcement, except with the previous sanction of the Central Government;

(b) where the offence is alleged to have been committed by an officer of Enforcement lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Director of Enforcement; or

(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 Reserve Bank authorised by the Reserve Bank 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 there under which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission."

This section does not say anywhere that the Enforcement Directorate can limit the provisions of Section 56 of the Foreign Exchange Regulation Act or that it can issue a departmental circular directing its officers not to initiate any prosecution in certain cases even if an offence has been committed by any person. By reading the circular and Section 61 of Foreign Exchange Regulation Act very carefully, I find no connection between the circular and the Section 61 of the Act. The learned counsel for the petitioner has not been able to point out any other section of this Act under which such a circular could have been issued. I am Therefore unable to hold that this circular has any statutory force.

5. It is pointed by Shri A.K.Panda appearing for the Directorate of Enforcement that this circular was only to serve as a guideline for the officers of the department and had not been published for communicated to the public at large and the same could not have any effect of overruling the statutory provisions of Section 56 of FERA. In fact, there can be no dispute on the point that an executive order issued by the Directorate of Enforcement cannot override the statutory provisions and cannot have the effect of amending a statute enacted by the Parliament. In the case of Vineet Narain and Others Vs. Union of India (UOI) and Another, , the Supreme Court categorically stated that statutory powers cannot be subjected to executive control. There can be no doubt that an executive guideline can be issued for the purpose of enforcement of an act but such a guideline cannot be issued to prevent enforcement of an act. Since the learned counsel for the petitioner have failed to show that these guidelines have any statutory value, the same cannot be set up to challenge the present prosecution which is filed under a statutory provision.

6. Even if the guidelines are read and enforced, the petitioner cannot escape from the prosecution. The guideline itself says in paragraph 1(f) that prosecution can be launched against any person irrespective of the amount involved in the offence in case he is a habitual offender. There are 8 other cases pending against the petitioners. Shri A.K.Panda argues that the petitioners are habitual offenders and Therefore even if the guidelines quoted above are given effect to, the petitioners will have to be prosecuted.

7. The learned counsel for the petitioners Mr. Biswajit Bhattacharya submits that so far in none of the cases, the petitioners have been convicted. This, however is not a relevant factor. The Directorate of Enforcement which has already started prosecution against the petitioners in several cases have to presume the petitioners to be habitual offenders and Therefore proceed to prosecute the petitioners in the present case also even if they want to go by the guidelines.

8. The petitioner's counsel further says that the prosecution against the

petitioners is a violation of equality principle and refers to a judgment of the Supreme Court in the case of E.P. Royappa Vs. State of Tamil Nadu and Another, in which the Supreme Court has observed that equality is antithetic to arbitrariness. I do not see any application of the judgment in this case. The petitioners have not set up a case of violation of equality principle and has not challenged the prosecution on that ground.

9. The petitioners further challenged the prosecution on the ground that the authorisation for prosecution itself is bad. The authorisation notification in this case issued by the Government of India, Ministry of Finance, Department of Revenue is dated 24th September, 1993. By this notification, the Central Government has authorised the following officers to make complaints in writing in any Court in respect of any offence punishable u/s 56 & 57 of the Act. These officers are as under:

- (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.

10. The complaint in question is submitted to the Court by Chief Enforcement Officer. The learned counsel for the petitioners say that this type of omnibus authorisation is bad and that the authorisation should have been issued in respect of a specific case in favor of a specific officer. However, apart from making the submission, no law is cited by the learned counsel for the petitioner to this point. I myself do not find anything to dispute the authorisation. The revision petition has no force and the same is accordingly dismissed.