(2004) 11 MAD CK 0151

In the Madras High Court

Case No : Criminal Revision Case No. 1872 of 2003 and Criminal M.P. No. 12290 of 2003

The Enforcement Officer, Enforcement Directorate — APPELLANT

Vs

A. Muthusamy, Managing Director, P.V. Krishnamani, Vice-President and New Line Finance Ltd. — RESPONDENT

Date of Decision : 05-11-2004

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 397, 401, 482

Citation : (2005) 1 LW(Cri) 380

Hon'ble Judges : S. Sardar Zackria Hussain, J

Bench : Single Bench

Advocate : K. Kumar, Special, for the Appellant; P.N. Prakash, for the Respondent

Judgement

S. Sardar Zackria Hussain, J.—The revision is filed by the Enforcement Officer, Enforcement Directorate, Chennai-600 006, against the order dated 31.10.2003 and made in M.P. No. 393 of 2003 in C.C. No. 447 of 2002 on the file of the Additional Chief Metropolitan Magistrate (Economic Offences-I) Court, Egmore, Chennai-8.

2. The respondents 1 and 2/accused 2 and 3 in C.C. No. 447 of 2002 filed M.P. No. 393 of 2003 u/s 305(6) of Criminal Procedure Code seeking to issue summons to M/s.New Line Finance Ltd., the first accused and direct them to send an authorised representative to defend them in the proceedings in C.C. No. 447 of 2002. As per order dated 31.10.2003, the petition was allowed ordering summons to be issued to the company, the first accused and one S.Ramasamy, Manager of the said company for appearance. The order is challenged by the revision petitioner.

3. The respondents 1 and 2/accused 2 and 3 filed the petition in M.P. No. 393 of 2003 stating that in the complaint preferred by the revision petitioner/ complainant, the Enforcement Officer, Enforcement Directorate, has arrayed M/

s.New Line Finance Ltd., as the first accused denoting the accused 2 and 3 as representing the first accused company. The second accused has resigned from the post of Managing Director of M/s.New Line Finance Ltd., with effect from 6.2.1997, which has been accepted by the Board of Directors vide Resolution dated 6.2.1997 and which has also been notified to the Registrar of Companies by submitting Form No. 32 dated 3.3.1997. It is also brought to the notice of the complainant by way of reply to the show cause notice. The third accused was only an employee occupying the position of Vice-President of the first accused company and was never in the Board of Directors of the first accused company. The third accused has resigned as early as in December, 1996 and as such, the accused 2 and 3 have no locus standi to represent the first accused company, which is a public limited company incorporated under the Indian Companies Act. It is the corporation within the meaning of Section 305(1) Cr.P.C. and as such, the said company alone can appoint a representative for facing the prosecution. The complainant is not empowered to make the accused 2 and 3 to represent the first accused company. Since the first accused company is a juristic person and on the date of launching the prosecution, the accused 2 and 3 had severed all ties with the first accused company, the accused 2 and 3 cannot plead on behalf of the first accused company u/s 246(2) Cr.P.C. and also cannot answer the questions u/s 311 Cr.P.C. At present, the first accused company is not being represented by any competent person authorised by the first accused company to participate in the proceedings. As per the resolution dated 6.2.1997 by the Board of Directors of the first accused company, one S.Ramasamy has been authorised to institute and defend legal proceedings both civil and criminal. Therefore, they prayed to issue summons to the first accused company to direct them to send an authorised representative to defend the first accused company in the proceedings.

4. The said petition was opposed by the revision petitioner/complainant in the counter that the complaint has been validly laid against the first accused company and also against the accused 2 and 3 under the provisions of Section 68 of Foreign Exchange Regulation Act, 1973 (herein after referred to as "FERA") fully satisfying the requirements. At the time of committing the contravention of the provisions of the Act, the accused 2 and 3 were in-charge of and responsible to the first accused company and therefore, liable to be proceeded against and punished for the offence. FERA is a special enactment and as such, recourse to the provisions of Section 305(6) Cr.P.C. is not maintainable. In view of the specific provisions of Section 68 in the special enactment, this specific provision will prevail over the general provisions of Cr.P.C. As per section 4(2) Cr.P.C., special powers has been conferred on the complainant.

5. The respondents 1 and 2/accused 2 and 3 filed rejoinder-cum-written arguments stating that the first accused company being a juristic person, only fine can be imposed and its properties can be attached, if the fine is not paid. Section 68 of FERA is parimateria to Section 141 of the Negotiable Instruments Act, Section 38 of the NDPS Act and Section 10 of the Essential Commodities Act

and dealing with white collar offences. As per Section 68 of FERA, the persons, who were managing the affairs of the company''s business at the time of offence "as well as the company" can be proceeded against and punished accordingly. Since, Section 68 of FERA being a substantive provision and not a procedural provisions, the first accused company can be prosecuted only u/s 305 Cr.P.C.

6. The learned Additional Chief Metropolitan Magistrate (Economic Offences-I), Egmore, Chennai considering the materials available on record and after hearing both sides, by allowing the petition in M.P. No. 393 of 2003, passed the order as set out above. The order is challenged by the complainant, the Enforcement Officer, Enforcement Directorate, Chennai in this revision.

7. Heard the learned Special Counsel for Enforcement Directorate and the learned counsel for the respondents/accused 1 to 3.

8. The learned Special Counsel for Enforcement Directorate appearing for the revision petitioner reiterating the stand taken in the counter in M.P. No. 393 of 2003 and referring to Section 68 of FERA and Section 4(2) of the Criminal Procedure Code argued that since the accused 2 and 3 were in-charge of the first accused company at the time of committing the contravention of the provisions of FERA and were responsible to the first accused company for the conduct of the business of the first accused company during the relevant period, they shall be deemed to be guilty of the contravention of the provisions of FERA and shall be liable to be proceeded against and punished accordingly. The learned Special Counsel for Enforcement Directorate also argued that the petition filed u/s 305(6) Cr.P.C. is not maintainable, since the offence, alleged u/s 68 of the Special Enactment FERA, will prevail over the general provisions of Cr.P.C.

9. The learned Special Counsel for the Enforcement Directorate appearing for the revision petitioner relied on the decision in Directorate of Enforcement Vs. Deepak Mahajan and another, , in which the Apex Court ruled in paragraph 33:-

"The provisions of the FERA and Customs Act were passed for any other purpose rather than their ostensible purposes, the vital of which being the economic development of the country and augmentation of revenue."

It is further held in paragraph 122:-

"As regards the applicability of provisions of Section 167(2) of the Code in relation to Section 4(2) to a person arrested under FERA or the Customs Act and produced before the Magistrate, a reading of Section 4(2) read with Section 26(b) which governs every criminal proceeding as regards the course by which an offence is to be tried and as to the procedure to be followed, renders the provisions of the Code applicable in the field not covered by the provisions of the FERA or Customs Act."

The other decision relied on by the learned Special Counsel for Enforcement Directorate appearing for the revision petitioner is Central Bureau of Investigation Vs. State of Rajasthan and others, , in which the Supreme Court ruled in paragraph 22 thus:-

"FERA is a special legislation relating to regulation of foreign exchange. FERA is also a Central legislation enacted at a later point of time than the DSPE Act which was enacted in 1946. In our view, Sections 4 and 5 of the Code of Criminal Procedure will not come in aid of the investigation of the offences under FERA by a member of police force like an officer of DSPE in accordance with the Criminal Procedure Code. Sections 4 and 5 of the Code of Criminal Procedure provide that in the absence of any provisions regulating investigation, inquiry or trial of non-I.P.C. offences i.e. offences under any other law, the investigation, inquiry and trial shall be in accordance with the Code of Criminal Procedure. But FERA is a self-contained Code containing comprehensive provisions of investigation, inquiry and trial for the offences under that Act. .... The provisions of Section 5(2) of the Code apply to the present case in matters which are not provided by the Act. This contention too has no basis. Section 5 provides that all offences under any law other than the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions contained in the Code of Criminal Procedure, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. The Act is a special Act and it provides u/s 19 for the necessary investigation into the alleged suspected commission of an offence under the Act, by the Director of Enforcement. The provisions of the Code of Criminal Procedure therefore will not apply to such investigation by him, assuring that the expression "investigation" includes the retaining of the documents for the purposes of the investigation."

10. The learned counsel for the respondents/accused 1 to 3 reiterating the stand taken in the Crl.M.P. No. 393 of 2003 and the submissions made in the rejoinder for the counter, argued that the petition in M.P. No. 393 of 2003 as filed u/s 305(6) Cr.P.C. is maintainable, in view of the fact, the first accused M/s.New Line Finance Ltd., is a juristical person and as such, "corporation" within the meaning of Section 305(1) Cr.P.C. and only the first accused company can appoint a representative to face the trial in C.C. No. 447 of 2002, in view of the fact, the accused 2 and 3 as stated above, have resigned from the first accused company, which resignations were also accepted as per the resolutions of the Board of Directors. It is further argued that since the first accused is a company, it cannot be sent to jail and only fine can be imposed ordering attachment of its properties, if fine is not paid and the persons, who have managed the affairs of the company''s business at the time of offence, "as well as the company" alone can be proceeded against and punished it accordingly and since the accused 2 and 3 have already resigned even before filing of the complaint and have no say in the aforesaid company, the order made by the learned Additional Chief Metropolitan Magistrate (E.O.I), Egmore, Chennai for issuance of summons to the first accused company directing one Mr. S.Ramasamy, Manager of the company for appearance, is proper, in view of the fact, as per the resolution of the Board of Directors of the first accused company, the said S.Ramasamy has

been authorised to institute and defend legal proceedings both civil and criminal.

11. The learned counsel for the respondents/accused 1 to 3 relied on the decision of the Supreme Court in The Assistant Commissioner, Assessment-II, Bangalore and Others Vs. Velliappa Textiles Ltd. and Others, arising under the Income Tax Act and in dealing with the punishment that can be imposed to the accused, a Full Bench of the Supreme Court has ruled in paragraph 18 thus:-

"18. This question has also been examined by some of the High Courts. In Municipal Corpn. of Delhi v. J.B.Bottling Co.(P) Ltd.1975 C L J 1148 , a Full Bench of the Delhi High Court held that the conviction of a company u/s 16 of the Prevention of Food Adulteration Act and award of fine only would be perfectly valid even though it cannot be sentenced to imprisonment which was the mandatory requirement of law. Similar view was taken by a Full Bench of the Allahabad High Court in Oswal Vanaspati & Allied Industries v. State of U.P. (1993)1 C LJ 172(All) and it was held that a company cannot enjoy immunity from prosecution on the ground that mandatory punishment of imprisonment cannot be awarded to it. In both these cases it was held that the company can be prosecuted and if found guilty, a sentence of fine alone can be awarded. In Manian Transports v. S.Krishna Moorthy (1991) 72 Company Cases 746 it was held by a learned Single Judge of the Madras High Court that a company or firm can be prosecuted under Sections 276-C and 277 of the Act and if convicted, a sentence of fine alone could be awarded. I am of the opinion that the view taken in these cases is the legally correct view."

Further, in paragraph 20, the Full Bench of the Supreme Court ultimately with the majority view has ruled in paragraphs 57 and 58 thus:-

"Corporate criminal liability cannot be imposed without making corresponding legislative changes. .... Under the present Indian law it is difficult to impose fine in lieu of imprisonment though the definition of "Person" in the Indian Penal Code includes "company".

12. The fact remains that the complaint has been filed against the first accused company and also against the accused 2 and 3 under the provisions of Section 68 of FERA that the first accused company had contravened the provisions of Sections 8, 6(4), 6(5), 7 read with Section 49 by selling U.S. Dollars 30,00,000/- in Travellers Cheques and currencies and the second accused Muthusamy, Managing Director and the third accused, Krishnamani, Vice-President, Foreign Exchange, who were responsible to the company and for the conduct of the business of the company during the relevant period, are liable to be punished for the contravention in terms of Section 68 of the Foreign Exchange Regulation Act, 1973. Further, it is alleged in the complaint that by selling the foreign exchange of U.S. Dollars 30,00,000/- at Chennai and U.S. Dollars 2,23,600/- at Trichy, without the previous special or general permission of Reserve Bank of India, the accused 1 to 3 had contravened the provisions of Sections 6(4), 6(5), 7, 8(1), 49 and clause 11 of FLM; Memorandum of instructions to Full Fledged Money

Changer issued by the Reserve Bank of India u/s 73(3) of Foreign Exchange Regulation Act, 1973. The first accused represented by the accused 2 and 3 persons responsible to the company and for the conduct of the business during the relevant period, have thereby rendered themselves liable to be prosecuted u/s 56(1) of the Foreign Exchange Regulation Act, 1973.

13. The relevant period during which such offences were committed according to the complainant is from December, 1995 to April, 1996. Therefore, it is clear that such offences were committed before the second accused resigned from the post of Managing Director with effect from 6.2.1997 which was accepted by the Board of Directors as per the resolution of the same date and notified the same to the Registrar of Companies as per Form No. 32 dated 3.3.1997 and the third accused resigned as early as in December, 1996 for which there is no supporting documents, in which case they are answerable for the offences alleged to have been committed by them, following the provisions of the Foreign Exchange Regulation Act and which can be gone into during the trial of the Criminal case.

14. According to the accused 2 and 3 one S.Ramasamy has been authorised by the Board of Directors of the first accused company to institute and defend the legal proceedings both civil and criminal as against the first accused company and so summons have to be issued to the first accused company directing the company to send the said authorised representative to defend the first accused company.

15. The maintainability of the Criminal proceedings launched against the first accused company had not been challenged in M.P. No. 393 of 2003, the order of which is challenged in this revision. It is for the trial Court to decide as to whether punishment can be imposed to the first accused company and if so, what kind of punishment after conclusion of enquiry following the principles of law as per the ruling of the Full Bench of the Apex Court extracted above.

16. As rightly argued for the revision petitioner/complainant, the FERA being a special enactment, recourse to the provisions of Section 305(6) Cr.P.C. cannot be made and as such, the petition in M.P. No. 393 of 2003 filed before the learned Additional Chief Metropolitan Magistrate (E.O.-I), Egmore, Chennai-8 is not maintainable as held by the Apex Court in Directorate of Enforcement Vs. Deepak Mahajan and another, . It is not disputed that the second accused was Managing Director and the third accused was Vice-President of the first accused company during the relevant time and when the alleged offences are committed from December, 1995 to April, 1996 and till the second respondent resigned from the post of Managing Director of the first accused company with effect from 6.2.1997 which was accepted by the Board of Directors as per the resolution of the same date and notified the same to the Registrar of Companies as per Form No. 32 dated 3.3.1997 and the third accused resigned in December, 1996. Therefore, it is clear that in such capacities as the Managing Director and as the Vice-President of the first accused company, the accused 2 and 3 represented the first accused company during the relevant time i.e., from December, 1995 to April,

1996, in which case, there is nothing to determine as to who is to represent the first accused company. In that view of the matter also, the petition filed in M.P. No. 393 of 2003 before the Additional Chief Metropolitan (Economic Offences-I), Egmore, Chennai u/s 305(6) Cr.P.C. is not maintainable. The argument advanced for the revision petitioner/complainant that Section 68 of the FERA being Special Enactment will prevail over the general provisions of Criminal Procedure Code and since special powers has been conferred on the complaint by virtue of Section 4(2) of Cr.P.C., the complaint in the criminal case in C.C. No. 447 of 2002 has been properly laid is correct.

17. The learned Additional Chief Metropolitan Magistrate (E.O.-I), Egmore, Chennai-8 has not considered all these aspects, which resulted in the miscarriage of justice in allowing the petition in M.P. No. 393 of 2003 filed u/s 305(6) Cr.P.C., as per which the summons were ordered to be issued to the first accused company and one Mr. S.Ramasami, Manager of the first accused company for appearance. Therefore, the order of the learned Additional Chief Metropolitan Magistrate (E.O.-I), Egmore, Chennai being illegal and improper is to be set aside.

18. In the light of the discussions made above, this Criminal Revision Case is allowed. The order dated 31.10.2003 made in M.P. No. 393 of 2003 in C.C. No. 447 of 2002 on the file of the Additional Chief Metropolitan Magistrate (Economic Offences-I) Court, Egmore is set aside. The said Court is directed to dispose the criminal case in C.C. No. 447 of 2002 by April, 2005. Consequently, the petition in Crl.M.P. No. 12290 of 2003 is closed.