

(2002) 12 JH CK 0056
In the Jharkhand High Court
Case No : Writ Petition (CR) No. 280 of 2002

Vijay Kumar Mallik

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-12-2002

Acts Referred:

Constitution of India, 1950 — Article 226
Foreign Exchange Management Act, 1999 — Section 49(3)(4)
Foreign Exchange Regulation Act, 1973 — Section 56

Citation : (2003) 2 JCR 362

Hon'ble Judges : D.N. Prasad, J

Bench : Single Bench

Advocate : M.M. Banerjee, for the Appellant; Rajesh Kumar and A.K. Das, for the Respondent

Final Decision : Dismissed

Judgement

Deoki Nandan Prasad, J.—This application under Article 226 of Constitution of India has been filed for quashing the entire criminal prosecution initiated as against the petitioner including the order dated 31st May, 2002, whereby and whereunder the. learned Special Judge took cognizance for the offences u/s 56 of the Foreign Exchange Regulation Act, 1973 r/w Sections 49(3) and (4) of the Foreign Exchange Management Act, 1999 in connection With Case No. FEMA 2 of 2002.

2. One Complaint case has been filed against the accused persons including the petitioner for defrauding a huge amount of Government money to the extent of Rs. 7,09,92,000/- during the period 1980-90 on the basis of fake allotment letters and the petitioner took active part in getting money by way of certain foreign exchange remittance in total of US \$ 3,15,000/- and Pounds 1000 as detailed in Annexure-1 during the year 1991-92. It was found that it was not actually the genuine gift but were suspected to be involved in violations of the provisions of Foreign Exchange Regulation Act. The petitioner admitted to had

opened bank accounts in the names of five children of Dr. K.M. Prasad, the main accused, with Punjab National Bank, Roshnara Road, New Delhi in December, 1991 and he helped those persons to deposit and withdraw the money from the said accounts. He had also helped the children of Dr. K.M. Prasad for filing the Declaration Forms before the Income Tax Department and he had deposited the foreign exchange drafts and exchanges received in the name of his children. He further admitted that he used to bring money from Patna to Delhi for the purpose of Dr. K.M. Prasad and sometimes in 1995 he had carried huge amount of about one crore to Bombay for his sons.

Accordingly, the case was filed before the learned Chief Judicial Magistrate but later on make over the case to the Court of Special Judge, who took cognizance by the order impugned for the offences.

3. Mr. M.M. Banerjee, the learned counsel for the petitioner made three fold submissions in challenging the order impugned. Firstly, the petitioner though has not filed his show cause as yet but without forming any opinion in the adjudication proceeding, this case has been filed when it is well settled under the provisions of FERA, the prosecution will be launched only when during the adjudication proceeding the authority comes to the conclusion that the penalty provided in the said adjudication proceeding is not sufficient as well as in the present case no adjudication proceeding has yet been initiated, rather merely a show cause notice had been issued to the petitioner and in hot haste a prosecution report was filed before the Court of the Chief Judicial Magistrate, Ranchi.

Secondly, he submitted that under the provisions of FERA, the offence is exclusively triable by the Court of Judicial Magistrate, Ist Class or any Metropolitan Magistrate as envisaged u/s 61 of FERA. But, in the instant case, the Special Judge took cognizance by the order impugned who has got no jurisdiction.

Lastly, he submitted that the Special Judge was empowered only to try the case and he had no jurisdiction to take cognizance, as Special Judge was not empowered to take cognizance under the provisions of FERA but the complaint has been registered as FEMA case and the Special Judge has got no authority or jurisdiction to take cognizance of an offence and, therefore, order taking cognizance is fit to be quashed.

4. On the other hand, Mr. A.K. Das, learned counsel for the respondents contended before me that the learned Special Judge has rightly took cognizance in the matter and there is no illegality in the order impugned as the learned Special Judge has been duly notified by the Law Department, Government of Jharkhand vide Notification dated 17th May, 2002 for trying the case under Foreign Exchange Management Act, 1999. It is further submitted that adjudicatory proceedings and criminal trial are two separate aspects with which a criminal Court addresses the criminal justice system and that is entirely different

from that of a Tribunal or an adjudicatory proceeding and filing of criminal case cannot be said to be illegal, as it is well settled that even if a person is exonerated of his charges in adjudicatory proceedings, there cannot be any bar for a criminal prosecution against the said person. The Complainant (Enforcement Officer) has been authorized to institute the present prosecution vide Notification No. 50715 E dated 24.9.1993 issued by the Government of India, Ministry of Finance, Department of Revenue and in pursuant to Sub-clause (2) of Sub-section (2) of Section 61 of the Foreign Exchange Regulation Act published in the Gazette of India, the complainant has been duly empowered to file the present complaint petition and the whole matter will be thrashed out in the trial itself.

The learned counsel also drew the attention of the Court to Section 460 of the Code of Criminal Procedure which provides that even if there is irregularity in taking cognizance that will not vitiate the entire proceeding. Therefore, there is no illegality in the order impugned.

5. There is no denial about the allegations made in the complaint as well as the petitioner admitted to be involved in the crime alongwith the main accused Dr. K.M. Prasad. The petitioner admitted that he knew Dr. K.M. Prasad and he opened Bank Account with Punjab National Bank in New Delhi in December 1991 in the name of five children of Dr. K.M. Prasad and he had also withdrawn money from the Bank through the cheques signed by them. It is true that the complaint was filed before the Chief Judicial Magistrate, Ranchi who was duly authorized to try the case falling under the Foreign Exchange Management Act. There is no denial of the said Notification published by the Law Department, Government of Jharkhand dated 17th May, 2002 whereby Shri Prabhu Tiwary, special Judge was empowered to try the cases under Foreign Exchange Management Act, 1999 also. It is also admitted position that the petitioner received an addendum issued by the Directorate, Ministry of Finance, in the month of April, 2002 in which the petitioner was given 30 days time to file his show cause, but he has not filed his show cause. Criminal prosecution u/s 56 is not dependent upon the outcome of adjudication proceedings. A prosecution u/s 56 therefore can be launched when the adjudication proceeding is pending. Both the prosecution u/s 56 of FERA and adjudication proceeding u/s 50 of FERA are two separate aspects. Adjudicatory proceedings and further prosecution in Criminal Court in respect of the same matter is legally permissible as the same is not amounting to double jeopardy.

6. Section 49 of the Foreign Exchange Management Act, 1999 reads as follows :

"Repeal and saving (1) The Foreign Exchange Regulation Act, 1973 (46 of 1973) is hereby repealed and the Appellant Board constituted under Sub-section (1) of Section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved,

(2) On the dissolution of the said Appellant Board, the person appointed as Chairman of the Appellant Board and every other person appointed as Member

and holding office as such immediately before such date shall vacate their respective offices and no such Chairman or other person shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service.

(3) Notwithstanding anything contained in any other law for the time being in force, no Court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention u/s 51 of the repealed Act after the expiry of a period of two years from the date of commencement of this Act.

(4) Subject to the provisions of Sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

(5) Notwithstanding such repeal,

(a) anything done or any action taken on purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

(b) any appeal preferred to the Appellate Board under the Sub-section (2) of Section 52 of the repealed Act but not disposed of before the commencement of this Act shall stand transferred to and shall be disposed of by the Appellant Tribunal constituted under this Act;

(c) Every appeal from any decision or order of the Appellate Board under Sub-section (3) or Sub-section (4) of Section 52 of the repealed Act shall, if not filed before the commencement of this Act, be filed before the High Court within a period of sixty days of such commencement;

Provided that the High Court may entertain such appeal after the expiry of the said period of sixty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period.

(6) Save as otherwise provided in Sub-section (3), the mention of particular matters in Sub-sections (2), (4) and (5) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal."

7. Clause 3 of Section 49 of FEMA clearly indicates that after coming of FEMA in force, no Court shall take cognizance of an offence under the repealed Act. But the Special Judge, who was duly authorised by Notification to try the cases under FEMA, has taken cognizance for the offences under FEMA also. Thus submissions made by the learned counsel for the petitioner on any score are not sustainable.

The Special Judge has duly been empowered by the State Government with the concurrence of Jharkhand High Court by the said Notification dated 17th May, 2002 to try the cases also under Foreign Exchange Management Act, 1999 and therefore he was having jurisdiction to take cognizance for the said offences.

8. There cannot be any bar for a criminal trial even if no opinion has been formed in the adjudication proceeding and also for the same the entire criminal proceeding cannot be thrown away when there is no denial about the allegation made in the complaint. Where a Court has jurisdiction to try, it is immaterial whether it has taken cognizance of the offence without even being empowered to do so.

9. Analysing from any angle of the matters, it is evident that the Court below was duly authorized in the matter to proceed with the case. Thus, in my view, the Court below rightly took cognizance of the offences.

10. In the result, I do not find any merit in this application, which is dismissed.