

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 19168/2004, W.P.(C) 723/2005 & W.P.(C) 20059/2004

Reserved on : 5th November 2007

Date of Decision : 4th February, 2008

1. W.P.(C) 19168/2004

R.M. MEHROTRA

.... Petitioner

Through Mr. Parag Tripathy, Sr. Advocate with
Mr. Harish Kumar, Ms. Vismai Rao, Mr. Yashwant Mathur,
Advocates

Versus

ENFORCEMENT DIRECTORATE & ORS.

..... Respondents

Through Mr. Sanjay Katyal, Advocate

2. W.P.(C) 723/2005

ASHOK KHANNA

..... Petitioner

Through Mr. Parag Tripathy, Sr. Advocate with
Mr. Harish Kumar, Ms. Vismai Rao, Mr. Yashwant Mathur,
Advocates

Versus

ENFORCEMENT DIRECTORATE & ORS.

..... Respondents

Through Ms. Rajdipa Behura, Mr. Narender Bist,
Advocates

3. W.P.(C) 20059/2004

C.M. DEVIKA

.... Petitioner

Through Mr. Parag Tripathy, Sr. Advocate with
Mr. Harish Kumar, Ms. Vismai Rao, Mr. Yashwant Mathur,
Advocates

Versus

ENFORCEMENT DIRECTORATE & ORS. .

.... Respondents

Through Mr. Rajeev Mehra, Ms. Rachitta Priyanka, Advocates

CORAM:

Mr. Justice S. Ravindra Bhat:

1. Whether reporters of local papers may be allowed to see the judgment.? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

MR. JUSTICE S. RAVINDRA BHAT:

1. In this batch of writ petitions, directions are sought from this Court for quashing the proceedings before the Enforcement Directorate, in respect of memorandum of show cause bearing No. T-4/10/D/95 (SCN-I) dated 24th February 1995.
2. The relevant facts of the case are follows. The petitioners joined the Standard Chartered Bank (hereafter “the Bank”) in 1979, 1981 and 1973 and were posted as cashiers with the Parliament Street Branch. In January 1992, certain foreign currency cash deposits were made in the NRE account of Dr. Subhash Gupta being Account No. 105/03/20009 with the said Branch of the Bank. The Petitioners aver that in their capacity as cashiers of the Bank, accepted bona fide, the said deposits in compliance with the provisions of the Foreign Exchange Regulation Act, 1973 (hereafter referred to as the “FERA”), the guidelines issued by the Reserve Bank of India (hereafter referred to as the “RBI”) and Rules and practices of the Bank. On 14th November 1994, they received summons from the first respondent, under Section 40 of the FERA. In due compliance with the summons appeared they before the first respondent on 29.11.1994; and their statements were recorded.

3. Thereafter, the RBI issued a clarificatory circular on 31.07.1995 in which certain measures for the operation of NRE accounts and acceptance of deposits in such accounts were prescribed. It is averred that, prior to the clarification, aspects concerning operation and acceptance of NRE accounts were dealt with under the Exchange Control Manuals, and that the measures contained in the clarificatory circular were not contained in the relevant Exchange Control Manual, at the relevant time.

4. It is averred that on 24th February 1995, a Memorandum of show cause bearing No. T-4/10/D/95(SCN/1) was issued to the Petitioners by the first Respondent, where it was alleged that some discrepancies relating to transactions made by Dr. Subash Gupta, were found and that he had allegedly contravened Section 8 (1) of the FERA. It was also alleged that one Mr. Aditya Aggarwal had abetted the offence by procuring foreign exchange from persons other than the authorized dealer and depositing them in the account of the former. Further, that the Petitioners as employees of the Standard Chartered Bank during the relevant period, had allegedly abetted the offence, through their negligence and were in contravention of section 8(1) of the FERA, and therefore, liable to be prosecuted under section 50 of the FERA.

5. It is averred by the Petitioners that, they received no communication from the first Respondent thereafter; therefore, felt, a genuine by and under bonafide belief that the show cause notice being ex-facie untenable, were discharged by the Respondents. However, on 9th November 2004, they were shocked to receive a notice of hearing before the Adjudicating Authority on 29th November 2004. Aggrieved by the show cause notice and the notice of hearing, the Petitioners filed the present writ proceeding.

6. The Petitioners allege that the initiation of the proceedings after an unexplained lapse of ten years *ipso facto* vitiates the proceedings and is proof of arbitrariness and non-application of mind by the Respondents. It is contended on their behalf that the alleged offence and abetment is sought to be imputed to them on the bases of an *ex post facto* clarificatory circular issued by the RBI in 1995, whereas the alleged irregularities occurred in 1992. There were no standing instructions relating to the acceptance of NRE accounts in 1992 and therefore the very basis of terming the transaction as illegal was absent during that time.

7. Mr. P.P. Tripathi, learned Senior counsels contend that the notice also did not contain any reason as to why the proceedings were being revived after a gap of ten years. Relying upon a decision of the Supreme Court reported as *Shanti Prasad v. Director of Enforcement, AIR 1962 SC 1764*, it is urged that proceedings under the FERA being quasi-criminal in nature, the Respondents were duty bound to disclose the precise particulars of the allegations, the provisions of law which were contravened and also the reasons for reviving the proceedings after a delay of ten years. Reliance on Section 49(3) of the Foreign Exchange Management Act, 1999 (hereafter referred to as the “FEMA”) is also placed; it stipulates that no Adjudicating Officer shall take notice of any contravention under section 51 of FERA after the expiry of a period of 2 years from the date of commencement of FEMA; which period expired on 31st May 2002. Therefore, he contends that the impugned notice is *ultra vires* the FEMA.

8. Learned counsel contends that the allegation in the impugned notice is that the Petitioners abetted the offence through negligence; however, he submits, that concept of abetment through negligence is alien to law and is *ex facie* a contradiction in terms. It is

submitted that to establish an offence of abetment, it must be shown that the alleged abettor had not only facilitated the offence but also done so with a knowledge and intention to facilitate such an offence and not mere negligence. He places reliance on the definition of “abetment” given under section 107 of the IPC and the decisions in *Tuposhi Chakaravarti v. State* (2000) 55 DRJ 267 and *Shiv Ram v. State of UP* (1975) 3 SCC 495. Moreover, the omission to mention the conclusiveness of guilt on the part of the principal offender, strikes at the very root of the impugned notice. It is also contended that since the Petitioners were employees of the Bank, the Bank also ought to have been made a party to the proceedings; in its absence, the allegations are vague and unsupportable.

9. The Respondents submit that the impugned notice was issued under Section 50 and 51 of the FERA and therefore cannot be said to be illegal. They aver that the present petition is not maintainable since the alternative remedies under section 52 of the FERA (corresponding to section 19 of the FEMA), have not been exhausted. They draw this Court’s attention to the decision of the Supreme Court in *Special Director v. Mohd. Ghulam Ghouse*, (2004) 3 SCC 440, where the Court held that

“Unless, the High Court is satisfied that the show cause notice was totally non-est in the eyes of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. Whether the show cause notice was found on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authorities issuing the very notice initially, before the aggrieved could approach the Court. Further when the court passes an interim order it should be careful to see that the statutory functionaries specially

and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is accorded to the writ petitioner even at the threshold by the interim protection, granted.”

10. The Respondents submit that this principle has been settled by the recent judgment of this Court dated 28.05.2004 in *S.K. Mittal Vs. Union of India & Ors. WP (Crl). No.699/2004* where it was held that the petition is not maintainable and it was observed that:

“... there appears no justification warranting any interference with the adjudicatory process pursuant to show cause notice as the petitioner is at liberty to agitate all the points available to him before the authority concerned to seek adjudication thereon.”

11. It is urged on behalf of the respondents that the contention of the Petitioners that the proceedings are time barred is unsustainable in terms of the judgment of the Supreme Court in *V.K. Aggarwal, Assistant Collector of Customs v. Vasantraj Bhagwanji Bhatia and Ors. AIR 1988 SC 648* where it was held that:

“The fact that twenty years have elapsed since the date of seizure is not ground for not proceeding further with the matter in as much as the offence in question is a serious economic offence, which undermines the entire economy of the Nation and also the fact that delay occasioned in the working of the judicial system by the ever increasing work load cannot provide an alibi for upholding such a plea.”

12. The power of the High Courts under Article 226 is indeed wide and any attempt to place a narrow construction upon its jurisdiction would militate the spirit of the Constitution itself. As was observed in *Dwarkanath v. ITO*, AIR 1966 SC 81 Article 226 “*ex facie confers a wide power on the High Courts to reach injustice wherever it is found*”. It is true that while exercising its power of review under Article 226 the Courts have a wide discretion, and would ordinarily, where alternative remedies exist, desist from exercising using them. But that cannot amount to a mechanical rejection of the power itself in the face of an alternative remedy. In *State of Tripura v. Manoranjan Chakraborty*, (2001) 10 SCC 740 the Supreme Court, speaking about the plenary nature of the jurisdiction under Article 226, stated as follows:

“As we see it, the point in issue is no longer res integra . This Court in Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad 1999 (4) SCC 468 dealing with an analogous provision, where discretion to waive pre-deposit was limited only to the extent of 25 per cent of the tax, was upheld by this Court. To the same effect is the decision of this Court in Shyam Kishore v. Municipal Corpn. of Delhi 1993 (1) SCC 22.

*4. For the reasons contained in the said decisions, we hold that the impugned provisions are valid. It is, of course, clear that **if gross injustice is done and it can be shown that for good reason the court should interfere, then notwithstanding the alternative remedy which may be available by way of an appeal under Section 20 or revision under Section 21, a writ court can in an appropriate case exercise its jurisdiction to do substantive justice.** Normally of course the provisions of the Act would have to be complied with, but the availability of the writ jurisdiction should dispel any doubt which a citizen has...*”

(Emphasis supplied)

Therefore, the contention of the Respondents that the Court must not exercise its jurisdiction under Article 226 because of the existence of an alternative remedy cannot be accepted. The impugned notice was issued way back in 1994, and after a lapse of fourteen years it would be unjust for this Court to direct the Petitioners to take recourse to the appellate procedures under the relevant enactments.

13. It no doubt true public interest dictates that economic offences are curbed and offenders duly prosecuted. The show cause notice in the present case was issued in 1994 much before the FERA was repealed. The notice of hearing is a mere continuation of the process, and therefore, it cannot be argued that action is time barred. However, the revival of proceedings after a time gap of ten years, without the notice of hearing disclosing any reason for the delay, is not a mere matter of impropriety; the respondents were under a duty to disclose what compulsions held up the adjudicatory process for so long. Absent such explanation, revival of the proceedings would be unlawful and arbitrary. The duty to give reason is a *sine qua non* of any executive action, without which the action is liable to be struck down.

14. This duty to give reasons, in the case of the impugned notice is necessarily accompanied by a duty to give furnish details regarding allegations contained in the notice. The purpose of issuing a show cause notice is to ensure that its recipient is not deprived of a fair and reasonable chance of showing cause and being heard. Taken so, an effective notice, containing at the a brief sketch of the facts leading to the allegations and the nature of the offence alleged, is a necessary corollary of the right to be heard. However, the Courts cannot lay down any straightjacketed standards in this regard and every case must be examined on its terms. The Supreme Court's decisions in *Canara Bank*

v. Debashish Das (2003) 4 SCC 557 and Food Corporation of India v. State of Punjab, (2001) 1 SCC 291 lend strength to the aforesaid proposition.

15. The relevant portions of the impugned notice are extracted below:

AND WHEREAS, it further appears that Smt. C.M. Devika, S/shi Ashok Khanna, R.M. Mehrotra, employees of Standard Chartered Bank, during the relevant period, abetted the aforesaid contravention by Dr. Subhash Gupta through their negligence namely by not ensuring that the foreign exchange being deposited was legally brought into India and the person depositing the same was genuine before accepting such foreign exchange at the counter and as such they also appears to have contravened the provisions of Section 8(1) read with Section 64(2) of Foreign exchange Regulation Act, 1973 and have thereby rendered themselves liable to be proceeded against under Section 50 of the said Act;

NOW THEREFORE, the said S/Shri Dr. Subhash Gupta, Aditya Agarwal, Ashok Khanna, R.M. Mehrotra and Smt. C.M. Devika are hereby required to show cause in writing (in duplicate) within 30 days of the receipt of this Memorandum as to why adjudication proceedings as contemplated in Section 51 of the Foreign exchange Regulation Act, 1973 should not be held against them for the aforesaid contraventions;

A perusal of the contents of the notice would show that there are no specific allegations in relation to the Petitioners' involvement in the alleged offence. Especially, in the light of the fact that the RBI circular regarding the operation and management of the NRE

accounts was issued a year later after the occurrence of the events mentioned in the notice, it should have contained specificities of the guidelines and norms violated.

16. Apart from this procedural impropriety, the show-cause notice also is liable to be struck down on substantial grounds. The offence is alleged to have been committed in 1994, when there were no regulations/guidelines in place. In the absence of explicit guidelines for the bank employees to transact NRE accounts, it would amount to *ex post facto* imposition of a liability on the Petitioners. Such imposition would be arbitrary and oppressive. Moreover, the notice alleges that the Petitioners' abetted the commission of the offence through their negligence. Neither the FERA nor the FEMA contain the definition of "abetment", therefore reliance must be placed on Section 3 (1) of the General Clauses Act, 1897. It declares that the phrase 'abet' with its grammatical variations and cognate expressions shall have the same meaning as in the Indian Penal Code, 1860 (IPC). Section 107 of the IPC, states that abetment of a thing can happen in three ways: through instigation, through intentional aid or through conspiracy. Various decisions of the Supreme Court including *Ramesh Kumar v. State of Chhattisgarh* (2001) 9 SCC 678, *State of Haryana v. Jaswinder Singh* (2000) 9 SCC 387 and *Mohan Chand v. State*, (2003) 109 Cr LJ 10, lend support to the proposition that the mental state of the accused must be conditioned by one of the following states: intention, knowledge or willful omission. The accused must have intentionally aided or incited or knowingly conspired or willfully omitted to do the act alleged. Negligence on the part of the Petitioners does not imply any of these mental states and therefore, the impugned notice in so far as it alleges that the Petitioners have abetted the offence, is not sound in law.

17. In view of the aforesaid findings, the impugned notices and all proceedings pursuant to them are hereby quashed. The writ petitions are accordingly allowed. No costs.

Dated : 4th February, 2008

(S. RAVINDRA BHAT)
JUDGE