

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of order : 11th January, 2008

CRL.M.C. 2655/2006

KAMAL SURI

..... Petitioner

Through Mr. R. K. Handoo, Advocate

versus

DY.DIRECTOR, ENFORCEMENT DIRECTORATE Respondent

Through Ms. Rajdipa Behura, advocate

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

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| 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 Digest? | Yes |

ORDER

Dr. S. Muralidhar, J. (open court)

1. This petition under Section 482 of the Code of Criminal Procedure 1973 (CrPC) seeks the quashing of Criminal Complaint No. 262/1/2002 and 841/1/2002 filed by the respondent against the petitioner in the Court of the learned Additional Chief Metropolitan Magistrate (ACMM), New Delhi under Section 56 of the Foreign Exchange Regulation Act, 1973 (FERA) and Sections 49 (3) and 49 (4) of the Foreign Exchange Management Act, 1999 (FEMA). The petitioner also seeks the quashing of an order dated 21.1.2006 passed by the learned ACMM whereby, after noticing that there were two criminal complaints on the same set of facts and for the same offences, it was directed that both should be tried jointly.

2. M/s. Sahil Trends is a proprietary firm of which the petitioner is the sole

proprietor. In regard to certain exports made by it to Germany a Show Cause Notice No. T-4-76-D-2006 dated 18.9.2001 was issued to the firm by the Directorate of Enforcement, Government of India, the Respondent herein. It was alleged that the petitioner's firm had effected shipment of goods valued at US \$ 77,67,356 under the cover of GR forms without any permission from the Reserve Bank of India (RBI) in violation of Sections 18 (2) and (3) FERA read with a Central Government Notification dated 1.1.1974. Admittedly, on the same set of facts and for the same alleged contravention a second Show Cause Notice No. T-4-87-D of 2002 dated 2.5.2002 was issued to the petitioner by the Respondent.

3. Following the first show cause notice issued on 18.9.2001, the Respondent filed Criminal Complaint No. 262/1/2002 against the petitioner in the court of the learned ACMM, New Delhi on the same set of facts for proceeding against the petitioner under Section 56 FERA for the offences under Sections 18 (2) and 18 (3) FERA, the Central Government notifications dated 1.1.1974 and Sections 49 (3) and 49 (4) FEMA. On 16.4.2002 the learned MM took cognizance of the complaint. Since the complaint was filed by a public servant in the discharge of his official duties, the presence of the complainant and the recording of pre-summoning evidence was dispensed with. After going through the complaint, the learned MM issued a summoning order for the appearance of the petitioner on 25.7.2002.

4. Following the second show cause notice issued on 2.5.2002, a second Criminal Complaint No. 841/1/2002 was filed by the Respondent in the court of the learned ACMM, New Delhi for proceeding against the petitioner under

Section 56 FERA. By an order dated 31.5.2002 cognizance was taken by the learned MM and an order was issued summoning the petitioner to appear on 18.9.2002. It appears that petitioner applied to ACMM for recalling the summoning order but it was not entertained in view of the judgment of Hon'ble Supreme Court in *Adalat Prasad v. Rooplal Jindal AIR 2004 SC 4674*.

5. In the meanwhile, in the adjudication proceedings pursuant to the show cause notices dated 18.9.2001 and 2.5.2002, a hearing took place and a detailed order dated 29.7.2004 was passed by the Special Director, Enforcement Directorate, Government of India dropping the proceedings against the petitioner in both the show cause notices.

6. Thereafter the aforementioned criminal complaints were heard by the learned ACMM on 21.1.2006. Apart from bringing the above development to the notice of the court, it was pointed out that these were two criminal complaints on the same set of facts. It was submitted on behalf of the Respondent Enforcement Directorate before the learned ACMM that they would have no objection if a joint enquiry/trial was ordered in both cases. The learned MM was also informed that an application of withdrawal of the criminal complaints was pending consideration with the Respondent. While adjourning the case to 12.5.2006 the learned MM in the impugned order dated 21st January 2006 observed that if the cases were not withdrawn by the next date, the application filed by the petitioner seeking discharge would be proceeded with.

7. The present petition was thereafter filed on 5.5.2006 by the petitioner seeking the reliefs as noticed earlier. On 20th July 2006 this court passed the following

order:

“The contention of the learned counsel for the petitioner is that the Enforcement Directorate filed complaint bearing Complaint Case No. 84/01 under Section 56 of the Foreign Exchange Regulation Act, 1973 and in terms of sub-section (3) and (4) of Section 49 of the Foreign Exchange Management Act, alleging that during the year 1995-96 the petitioner (accused in the said complaint) had effected shipment of goods valued at US \$ 77,67,356 under the cover of GR forms without any permission from RBI etc. In this complaint summoning orders dated 16th April 2002 were issued. However, on the same allegations and in respect of the same transaction the Enforcement Directorate filed another complaint under the same provisions, which is Complaint Case No. 262/02. In this case also summoning orders dated 31st May 2002 have been issued. It is further stated that realizing that the two complaints are in respect of the same alleged offence, the learned ACMM has now passed order dated 21st January 2006 clubbing the two complaints and directing that they be tried jointly. Submission of learned counsel for the petitioner is that for the same alleged offence two complaints cannot be filed and, therefore, there is no question of having joint trial and the second complaint was clearly impermissible. Learned counsel for the State wants to take instructions in the matter. At her request, adjourned to 23rd August 2006.”

8. Learned counsel for the petitioner points out that thereafter by a letter dated 11.4.2007 the Department of Revenue conveyed to the Director of Enforcement the decision of the Central Government to unconditionally withdraw some of the FERA complaints subject to condition that the cases should still be pending in the court. In the list of the cases appended to the said letter Criminal Complaint No. 841/1 of 2001, which is the latter of the two complaints on the Crl.M.C. No. 2655/2006

same set of facts, has been included at Sl. No.2. However, the learned counsel for the respondent states that the respondent has decided not to withdraw the latter complaint since the petitioner has never appeared before the court of the MM on any hearing thus far. The respondent will abide by the decision of the court as to which of the two complaints should be dropped.

9. Learned counsel for the petitioner then submits that anyway in view of the exoneration of the petitioner on merits in the adjudication proceedings, the criminal proceedings on the same set of facts although launched simultaneously cannot be proceeded with and have to be quashed. He placed reliance upon the judgment of this court in ***Sunil Gulati vs. RK Vohra 2007 [1] JCC 220*** in support of this proposition. He further submitted that without prejudice to the contention that the second complaint on the same set of facts is not maintainable, in view of the exoneration by the complainant Directorate of Enforcement itself in the adjudication proceedings, neither criminal complaint can be sustained in law and they would both have to be quashed.

10. Learned counsel for the respondent on the other hand relied upon the judgment of Hon'ble Supreme Court in ***Standard Chartered Bank & Ors. V. Directorate of Enforcement 2006 [1] JCC 488*** to contend that for violation of the relevant provisions of the FERA, it is permissible to have the criminal proceedings as well as adjudication proceedings launched simultaneously. She refers to some of the paragraphs of the said judgment where the Supreme Court has held that criminal proceedings do not have to abate with the conclusion of the adjudication proceedings and that finding in one need not be conclusive or binding on the other. It was held that the adjudication proceedings and the

prosecution are distinct and independent and the launch of the prosecution did not depend on the result of the adjudication.

11. The issue that arises for determination in this case is not whether the criminal proceedings could have been launched simultaneously with the adjudication proceedings. The affirmative answer to that issue stands settled by a series of judgments of the Supreme Court including *Standard Chartered Bank vs. Directorate of Enforcement* (supra). The issue in the present case, on the other hand, is whether the exoneration of the petitioner on merits in the adjudication proceedings would render the pending criminal proceedings unsustainable in law. It requires to be noticed although the adjudication order is an appealable one, the Enforcement Directorate has chosen not to challenge it and it has, therefore, become final.

12. The adjudication order is a detailed one on merits. In regard to the principal allegation against the petitioner's firm that it had not taken steps to recover the US \$ 7767356, the Special Director came to the following conclusions:

“From the above it is clear that the said noticee acted prudently and anticipated the situation to their best interest by retaining the advance remittance and import payment. The notice after having anticipated the deteriorating financial condition of the foreign buyer immediately took action by filing claim against the German buyer before the German Court. Number of documentary evidence furnished by the notice leaves no doubt in my mind that notice tried his best efforts to realize the export proceeds simultaneously apprising their bank and RBI of the development. The advance received from abroad has been adjusted by the Global Trust Bank by releasing the GRs as discussed

hereinabove. The German buyer has also given consent to the said notice to adjust the value of import toward their outstanding GRs. The German buyer has gone bankrupt and no claim amount is expected to be received from them and write off of GRs is pending before RBI.

The reasonable and prudent steps taken by the notice for realizing the export proceeds are very much apparent from the following facts:

1. They have made adjustment of the available advance received from the same buyer available with them to the tune of US \$ 32,77,976 and the payment to be made to same buyer against imports to the tune of US \$ 2144874 have not been made. Thereby adjusting a total of US \$ 5422850. By this action the noticee has shown a prudent behavior which is expected from a genuine exporter, whose export outstanding from a buyer is held up and the buyer's money is available with him.

2. The notice has also taken up a number of correspondence with the Counsel General of India, Germany by writing letters dated 28.6.02, 18.6.01, 20.12.01 and 12.10.00 for helping out in ensuring recovery/realization of export proceeds in question which were of no avail.

3. They have filed claim of US \$ 2344506/- which was the remaining outstanding export proceeds in the German District Court against the foreign buyer who had gone bankrupt and there is no doubt that the foreign buyer has gone bankrupt. The bankruptcy proceedings were initiated, continued by both the notice and their authorised dealer, i.e. Global Trust Bank. However, due to non-availability of funds neither the notice nor the Bank could get any claim.

4. The authorised dealer, i.e., Global Trust Bank had recommended the noticee's case for write off to the RB I as informed vide their letter dated 8.12.03 where they have pointed out as below:

“We have recommended for write off of export bills

mentioned in your letter to RBI, pertaining to M/s Sahil Trends, along with Euro Exports and Tulits, the copy of which addressed to RBI is enclosed hereto for kind perusal. Further, we inform you that in spite of good efforts by the bank, even by filing suit in Germany, amount could not be recovered from the foreign buyer and the drawee/foreign buyer company has gone into liquidation.

Hence, we have forwarded the write off representation of the party to RBI”.

In view of above I do not hold the said notice guilty of the said contravention for non-realisation of export proceeds to the extent of US \$ 7767356/-....”

13. On the facts of the present case, it appears to this Court that the decision of this Court in *Sunil Gulati* applies on all fours. This is evident from the following paragraph where after discussing the judgment of the Supreme Court in *Standard Chartered Bank* this Court observed:

“16. However, in the present case, we are not concerned with this question. A fine distinction of the issue involved in the case before the Supreme Court and before us in the present case has to be borne in mind. No doubt, as per the aforesaid judgment of the Supreme Court, adjudication proceedings as well a criminal proceedings can be initiated simultaneously. In fact, for initiating criminal proceedings one does not have to wait for the outcome of the adjudication proceedings. Therefore, filing of the criminal proceedings by the department against the petitioner in the instant case cannot be termed as bad in law. However, the question with which we are concerned is the impact of the findings which is recorded on the culmination of adjudication proceedings, on criminal adjudication. To put it in simple words, the issue is, it in the adjudication proceedings the petitioner is exonerated can state that criminal proceedings should also be dropped. Case of the petitioner is that since it is held by the adjudicating authority itself

that the petitioner has not committed any violation of FERA provisions, same authority cannot be allowed to continue the criminal proceedings.”

14. In *Sunil Gulati* this Court discussed the earlier judgments of the Hon’ble Supreme Court in *Assistant Collector of Customs v. LR Malwani (110) ELT 317 (SC)*, *G.L. Didwania v. Income Tax Officer 1995 Suppl. (2) SCC 724* and *Uttam Chand vs. Income Tax Officer (1982) 133 ITR 909* and came to the following conclusions:

“1. On the same violation alleged against a person, if adjudication proceedings as well as criminal proceedings are permissible, both can be initiated simultaneously. For initiating criminal proceedings one does not have to wait for the outcome of the adjudication proceedings as the two proceedings are independent in nature.

2. The findings in the departmental proceedings would not amount to resjudicata and initiation of criminal proceedings in these circumstances can be treated as double jeopardy as they are not in the nature of “prosecution”.

3. In case adjudication proceedings are decided against a person who is facing prosecution as well and the Tribunal has also upheld the findings of the adjudicators/assessing authority, that would have no bearing on the criminal proceedings and that criminal proceedings are to be determined on its own merits in accordance with law, uninhibited by the findings of the Tribunal. It is because of the reason that in so far as criminal action is concerned, it has to be proved as per the strict standards fixed for criminal cases before the criminal court by producing necessary evidence.

4. In case of converse situation namely where the accused persons are exonerated by the competent authorities/Tribunal in adjudication proceedings/Tribunal in adjudication proceedings, one will have to see the reasons for such exoneration to determine

whether these criminal proceedings could still continue. If the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits of the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings. **If, on the other hand, the exoneration in the adjudication proceedings is on merits and it is found that allegations are not substantiated at all and the concerned person(s) is/are innocent, and the criminal prosecution is also on the same set of facts and circumstances, the criminal prosecution cannot be allowed to continue. The reason is obvious criminal complaint is filed by the departmental authorities alleging violation/contravention of the provisions of the Act on the part of the accused persons. However, if the departmental authorities themselves, in adjudication proceedings, record a categorical and unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal complaint and say that there is sufficient evidence to foist the accused persons with criminal liability when it is stated in the departmental proceedings that ex-facie there is no such violation.** The yardstick would, therefore, be to see as to whether charges in the departmental proceedings as well as criminal complaint are identical and the exoneration of the concerned person in the departmental proceedings is on merits holding that there is no contravention of the provisions of any Act.” (emphasis supplied)

15. *Uttam Chand* and *GL Didwania* were cases where the prosecution was launched simultaneously with the adjudication proceedings on the same set of facts. There was a complete exoneration on merits in the adjudication proceedings. The court then concluded that such exoneration would render the criminal proceedings unsustainable in law. In *PS Rajya vs. State of Bihar (1996) 9 SCC 1* apart from departmental proceedings against the appellant for

owning assets disproportionate to his known sources of income, proceeding were launched to prosecute him under the Prevention of Corruption Act 1947. Thereafter the appellant was completely exonerated in the departmental enquiry. While holding that the pending criminal proceedings were unsustainable in law, the Supreme Court explained the rationale in para 17 as under:

“17. At the outset we may point out that the learned counsel for the respondent could not but accept the position that the standard of proof required to establish the guilt in a criminal case is far higher than the standard of proof required to establish the guilt in the departmental proceedings. He also accepted that in the present case, the charge in the departmental proceedings and in the criminal proceedings is one and the same. He did not dispute the findings rendered in the departmental proceedings and the ultimate result of it. On these premises, if we proceed further then there is no difficulty in accepting the case of the appellant. For if the charge which is identical could not be established in a departmental proceedings and in view of the admitted discrepancies in the reports submitted by the values one wonders what is there further to proceed against the appellant in criminal proceedings.”

The settled law as noticed above and as summarised by this Court in *Sunil Gulati* is that where there is a complete exoneration on merits in the adjudication proceedings, the continuation of criminal proceedings on the same set of facts cannot be sustained.

16. The conclusion as a result of the above position is that the criminal proceedings against the petitioner in the instant case cannot validly continue.

The Respondent has itself exonerated the petitioner in the adjudication

proceedings on merits and its order has attained finality. The continuation of criminal proceedings on identical facts and requiring a higher degree of proof cannot be justified. Consequently there is no need for this Court to decide which of the two criminal complaints can be proceeded with. The conclusion is that neither can.

17. Criminal Complaints Nos. 262/1/2002 and 841/1/2002 pending before the ACMM, New Delhi and all proceedings consequent thereto including the impugned order dated 21.1.2006 passed by the MM hereby stand quashed. The petition is allowed with no order as to costs.

S. MURALIDHAR, J.

JANUARY 11, 2008

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