

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C. No.1621/2007**

Judgment reserved on: 24.9.2008
Judgment delivered on: 02.02.2009

K.K. Agarwal & Anr. Petitioner
Through: Mr. Neeraj Kumar Singh,
Advocate.

versus

Enforcement Directorate Respondent
Through: Ms. Rajdipa Behura, Advocate.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

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

KAILASH GAMBHIR, J.

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1 . By way of this writ petition filed by the petitioners under Section 482 Cr.P.C., the petitioners seek setting aside of the summoning order dated 30/5/2002 passed by the learned

trial court in complaint case no. 934/1/2002, wherein the learned trial court took cognizance on a complaint for alleged contravention of Sections 8 (1), and (2) r/w S.49 of Foreign Exchange Regulation Act, 1973.

2 . The short question which arises for consideration before this court is that as to whether after the order passed in the adjudication proceedings initiated by the Enforcement Directorate for contravention of the provisions of Sections 8 (1) 8 (2) , 49, 7 (1), 7 (3), and 7 (4) of the FERA, 1973 which resulted in complete exoneration of the petitioners, can the complaint filed by the Enforcement Directorate under Section 56 of the Foreign Exchange Regulation, Act, 1973 complaining violation of Section 49 (3) AND (4) 18 (2) r/w Section 18 (3) of FERA 1973 sustain against the petitioners.

3 . The facts which are not in dispute are that adjudication proceedings were initiated against the petitioners along with other noticees for contravention of the provisions of Section 8 (1) and (2) r/w Sections 49 , 7 (1), 7 (3) and 7 (4) of the FERA 1973 for illegal transfer of foreign exchange as referred in the order of the Adjudicatory Authority. Proceedings against the present petitioners were initiated on the ground that they were also Directors in M/s Sunrise Securities Ltd. and in the vicarious liability of the said

company the charges were extended to the petitioners as well. These petitioners claim their complete exoneration and absolvment in the adjudication proceedings mainly on the ground that they had already resigned from the Directorship of M/s Sunrise Securities Ltd. and claimed that no act of violation could be attributed to them for any violation or contravention made by M/s Sunrise Securities Ltd to the various provisions of FERA while the other directors were liable being responsible for the conduct and affairs of the company. The adjudicatory authority vide its order dated 24.11.2004 came to the conclusion that all the charges against the company as well as its Chairman and Director of M/s Sunrise Securities Ltd. are proved but nothing adverse was noticed against the present petitioners i.e. S./Shri K.K. Aggarwal and Mr. M.C. Maloo. Para 40 of the Order of the Adjudicatory Authority is referred as under:-

“In the light of the findings as discussed hereinbefore, I hold that the charges against the noticee company, namely, M/s Sunrise Securities Ltd. are proved. In respect of the charges against S/Shri S.L. Maloo, K.K. Aggarwal and M.C. Maloo in terms of Section 68 (1) of the FERA, 1973, I find that the evidence on record indicate that Shri S.L. Maloo was the Chairman and Managing Director of the company who was personally looking after and managing the business activities pertaining to its foreign exchange business and nothing adverse was noticed against the other directors viz. S/Shri K.K. Aggarwal and M.C. Maloo. In the circumstances, I hold the charges against Shri S.L. Maloo in terms of Section 68 (1) of

the FERA, 1973 are proved. The charges against S/Shri K.K. Aggarwal and M.C. Maloo are not sustained for reasons cited above.”

4 . Based on the said findings, the proceedings against the present petitioners were dropped while various penalties were imposed against the said company as well as other noticees. Based on the said order of the Adjudicatory Authority which completely exonerated the petitioners from the charges leveled against the petitioners along with the other co-noticees complaining contravention of provisions of Section 68 (1) of the FERA, 1973, the petitioners claim that the complaint filed by the respondent Enforcement Directorate under Section 56 of the Foreign Exchange Regulation Act, 1973 and in terms of Sub-Section (3) and (4) of Section 49 of the FEMA, 1999 seeking the conviction of the petitioners for alleged violation of Section 56 of Foreign Exchange Regulation Act, 1973 and in terms of Section 49 (3) & (4) of Foreign Exchange Management Act, 1999 for the violation of provisions of Section 18 (2) r/w Section 18 (3) of FERA, 1973 cannot sustain in the eyes of law and the said proceedings deserve to be quashed.

5 . The only question arising in the present petition is when the respondent Enforcement Directorate initiated adjudication proceedings under S. 51 of FERA while placing

reliance on the materials which are identical and similar to the criminal complaint filed before the Court of ACMM for contravention of Sections 8 (1), 8 (2) r/w S.49 of FERA, then in view of the order dated 24/11/2004 of the Adjudication Officer, which has Acquired finality, would the criminal case filed by the Enforcement Directorate sustain?

6 . The respondent Enforcement Directorate initiated adjudication proceedings against the petitioners and the company as contemplated under S. 51 of the FERA, wherein the adjudicating officer passed an order dated 24/11/2004 whereby the Adjudicating Officer after meticulously scrutinizing the contentions of the petitioners in the backdrop of the relevant materials on record dropped the charges against the present petitioner. Notwithstanding above, the Enforcement Directorate initiated adjudication proceedings vide memorandum bearing no. T-4/16-D/98 (SCN-II) dated 25/9/1998 under S.68 of FERA against the petitioners and M/s. Sunrise Securities Ltd.

7 . I have heard learned counsel for the parties and perused the record.

8 . The sole issue in the instant case is that whether upon exoneration of the petitioners in Adjudicatory proceedings, a criminal proceeding on the same facts sustain.

9 . As regards exercise of power under Section 482 CrPC, while relying on its earlier decision in **State of Karnataka v. L. Munniswamy and Ors., 1977(3) SCR 113**, the Apex Court has held in the case of **B.S. Joshi v. State of Haryana, 2003 CBC 393 (Supreme Court)** that it would not be expedient to allow a lame prosecution to continue and the ends of justice are higher than the ends of mere law. In this connection the following extract from paragraph 10 of the aforesaid case in B.S. Joshi is pertinent.

"In State of Karnataka v. L. Munniswamy and Ors., considering the scope of inherent power of quashing under Section 482, this Court held that in the exercise of this wholesome power, the High court is entitled to quash proceedings if it comes to the conclusion that ends of justice so require. It was observed that in a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice and that the ends of justice are higher than the ends of mere law though justice had got to be administered according to laws made by the legislature. "

10 . Also, it is no more res integra that the standard of proof required in criminal proceedings is higher than that required before adjudicating authority, therefore if an accused is exonerated before the adjudicating authority then criminal proceedings on same set of facts cannot be allowed to continue against him.

11 . The settled law as noticed and summarised by this Court in **Sunil Gulati v. RK Vohra 2007 [1] JCC 220** 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. In **Sunil Gulati's case (supra)**, A.K. Sikri, J. of this Court relying on the judgment of the Supreme Court in **Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors. 2006 (1) JCC 488** has held as under:

25. ...In fact, various cases of the Supreme Court, note whereof is taken above, deal with different situations. The principles which can be culled out from the aforesaid judgments, when all these judgments are read out harmoniously, would be the following:

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 res judicata 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 the 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, 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 or 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 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.

12 . From a perusal of the **Sunil Gulati's case (supra)**, it is apparent that a distinction has been drawn where exoneration in an adjudicating proceeding on a given set of facts and evidence is on merits vis-a-vis where exoneration in adjudicating proceeding is either not on merits or criminal proceeding is based upon different set of facts and evidence.

13 . Therefore, to ascertain the effect of the exoneration in the adjudication proceedings on the criminal proceedings, in a given case it has to be seen whether:

(i) The criminal prosecution is based on same set of facts/allegations and evidence which was before the adjudicating authority or not; and

(ii) Whether exoneration by the adjudicating authority is on merits or not.

14 . It is a settled legal position that an "acquittal on merits" is an acquittal after trial on a consideration of the facts duly proved as per rules of evidence as distinguished from the acquittals occurring due to technical defects such as want of sanction, fact not proved as rule of evidence not followed, benefit of doubt etc. To put it differently, an acquittal is said to be on merits when it is based on a positive finding of innocence of the accused. On the flip side if the exoneration in adjudicatory proceedings is on technical ground or by giving benefit of doubt and not on merits or the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings.

15 . In **PS Rajya v. State of Bihar (1996) 9 SCC 1** apart from adjudicatory proceedings against the petitioner 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 petitioner was completely exonerated in the adjudicatory proceedings. 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.

16 . In the backdrop of the aforesaid legal position, it has to be seen in the instant case as to whether the exoneration of the petitioners by the adjudicating authority passes the test of exoneration on merits. It is not in dispute that both the proceedings, i.e. criminal and adjudication are based upon the

same set of facts/allegations. 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 adjudicatory proceedings. In the instant case the charge in the adjudicatory proceedings and in the criminal proceedings is one and the same. If the charge which is identical could not be established in a adjudicatory proceedings then one wonders what is there further to proceed against the petitioner in criminal proceedings. 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, criminal proceedings on same set of facts cannot be allowed to continue against the petitioners.

17 . In view of the above discussion, the petition is allowed. The criminal proceeding in complaint case no. 934/1/2002, wherein the learned trial court took cognizance on a

complaint for alleged contravention of Sections 8 (1), 8 (2) r/w
S.49 of Foreign Exchange Regulation Act, 1973 is quashed.

February 02, 2009

KAILASH GAMBHIR, J