

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: February 13, 2009

Date of decision: April 6, 2009

CRL.M.C. No.1979 of 2006

BACHRAJ BENGANI

..... Petitioner

Through : Mr. Sidharth Luthra, Senior Advocate
with Sh. Yogesh Kumar Saxena, Mr. Madhav
Khurana and Mr. Arindam Mukherjee,
Advocates.

versus

A.K. ROY

..... Respondent

Through : Mr. Deepak Anand with Mr.
Chhinnbal Singh, Advocates for Ms. Rajdipa
Behura, Advocate.

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported Yes
in Digest?

J U D G M E N T

1. The challenge in this petition is to an order dated 16th March 2006 passed by the learned Additional Chief Metropolitan Magistrate ('ACMM'), New Delhi in a Complaint Case No. 180 of 1991 titled "*A.K.Roy, Assistant Director, Enforcement Directorate v. Bachraj Bengani*" under Section 174 IPC.

2. The case of the complainant Assistant Director, Enforcement Directorate (the Respondent herein) was that the petitioner wilfully

neglected and failed to appear on 5th April 1990, 29th November 1990 and 20th May 1991 despite the summons issued to him under Section 40(4) of the Foreign Exchange Regulation Act, 1973 ('FERA') for those dates and had therefore committed an offence under Section 174 IPC.

3. The learned ACMM took cognizance of the offence under Section 174 IPC on the basis of the said complaint on 21st August 1991. Summons was issued for the appearance of the Petitioner on 14th February 1992. The petitioner sought exemption from appearance by filing an application on 29th May 1992. Subsequently by an order dated 18th July 2002 he was declared a proclaimed offender and was arrested on 15th March 2004. In the meanwhile FERA came to be repealed by the Foreign Exchange Management Act, 1999 ('FEMA') which came into force on 1st June 2000. In terms of Section 49 (3) no court could take cognisance of an offence under FERA after a period of two years from the date of commencement of FEMA. Therefore, the sunset period during which complaints for commission of an offence under FERA was from 1st June 2000 till 31st May 2002. Admittedly, during this period the complainant did not file any complaint against the petitioner for the commission of any offence under the FERA.

4. On 28th February 2006 when the case was fixed for framing of notice under Section 251 CrPC before the learned ACMM, the Petitioner raised

the question of maintainability of the complaint. It was submitted that in terms of the judgment of the Supreme Court in *Enforcement Directorate v. M. Samba Siva Rao (2000) 5 SCC 431* the offence of non-compliance of a summons issued under Section 40 FERA was punishable only under Section 56 FERA and not Section 174 IPC. However, since in the interregnum the FERA stood repealed by FEMA and since no complaint was filed within the sunset period for the offence under Section 56 FERA, no cognizance was taken by the ACMM of that offence. Therefore, the complaint for the offence under Section 174 IPC could not proceed. Consequently there was also no question of converting the complaint filed for an offence under Section 174 IPC, punishable only with imprisonment of one month or fine (and therefore to be proceeded with by a summary trial under Section 260 CrPC) into a warrant case in terms of Section 259 CrPC.

5. The above submissions were resisted by the Respondent by pointing out that cognizance had already been taken of the offence of non-compliance with the summons issued under Section 40 FERA on 21st August 1991 itself. Only the correct provision, i.e. Section 56 FERA, was not mentioned. It was argued that it was possible that at a later stage the Court may decide to invoke the correct provision of the law and such irregularity was a curable one in terms of Section 465 CrPC. It was further urged that the since the offence of not answering the summons issued

under Section 40 FERA was punishable under Section 56 FERA with imprisonment of a period up to three years, the learned MM was empowered under Section 259 CrPC to convert the summons case to a warrant trial. It was submitted that in any event the summoning order passed on 21st August 1991 could not be recalled in view of the judgment of the Supreme Court in *Adalat Prasad v. Rooplal Jindal 113 (2004) DLT 356 (SC)* and therefore the learned ACMM was justified in not entertaining the plea of the petitioner. It was further pointed out that the Petitioner had evaded even the summons issued by the Court and was ultimately arrested only on 15th March 2004 and therefore should not be granted any indulgence. It was submitted that the accused had belatedly raised the plea of maintainability of the complaint only to delay the proceedings further.

6. By the impugned order dated 16th March 2006, the learned ACMM negatived the plea of the Petitioner. It was held that the predecessor ACMM had already taken cognizance of the offence of non-compliance of the summons issued under Section 40 FERA, which according to the law prevalent at that time was punishable under Section 56 FERA. It was held that “it is yet to be decided as to whether this Court should proceed under Section 174 IPC or under Section 56 FERA”. It was held that the mention of Section 174 IPC in the order dated 16th March 2006 of the learned ACMM “is an irregularity and not an illegality per se.” It was also held

that since the Petitioner had joined the proceedings only in 2002 he could not be heard to contend that cognizance could not be taken under Section 56 FERA by virtue of Section 49(3) FEMA. The case was accordingly listed for pre-charge evidence on 17th April 2006.

7. Mr. Sidharth Luthra, learned Senior counsel appearing for the Petitioner contends that the complaint filed by the Respondent did not even mention Section 56 FERA and the entire complaint was about the alleged commission of the offence under Section 174 IPC. It is pointed out that after the decision of the Supreme Court in *Enforcement Directorate v. M. Samba Siva Rao* the refusal to comply with a summons issued under Section 40 FERA can only be tried as an offence punishable under Section 56 FERA. It was not as if the Respondent was not aware of the sunset period under Section 49 (3) FEMA and could have easily made an application for taking of a cognizance of the said offence before 31st May 2002 when the sunset period expired. However no such application having been filed by the Respondent, no cognizance of the offence under Section 56 FERA could have been taken by the learned ACMM thereafter. Mr. Deepak Anand, learned counsel for the respondent, on the other hand reiterated the submissions made by the respondent before the learned ACMM. It was submitted that the cognisance of the offence under Section 56 FERA should be taken as dating back to 21st August 1991 when cognisance was first taken. This would then explain the conversion of the

complaint case to a warrant case.

8. This court finds merit in the contentions of the petitioner. By taking cognizance of the offence under Section 56 FERA by the impugned order of 14th March 2006, the learned ACMM appears in fact to have put the clock back by over 15 years to the date when the cognizance was originally taken. By observing that the predecessor court had not decided “whether this Court should proceed under Section 174 IPC or under Section 56 FERA” the learned ACMM sought to overcome the insurmountable bar created by Section 49 (3) FEMA. In the considered view of this Court, this is where the learned ACMM has erred, since this assumption is not borne out by the record.

9. A reading of the complaint filed by the Respondent shows that it referred only to the offence under Section 174 IPC and makes no mention of Section 56 FERA. Consequently, cognizance was taken by the learned ACMM by the order dated 21st August 1991 only of that offence. This is from the order dated 21st August 1991 which reads as under:

“New complaint filed today. It is checked and registered.

Present: Complainant with Shri S.P. Ahluwalia, Adv.

Heard on the complaint. **After going through the complaint and other documents placed on record I find that there is sufficient material on record to proceed against the accused U/s. 174 IPC. So I**

cognizance of the said offence. The accused be summoned for 14.2.92.

There is an application by the complainant for exemption from personal appearance. Heard. Since the complaint has been filed by a public servant the personal appearance of the complainant is exempted till further orders and he is allowed to be represented through Shri S.P.Ahluwalia Advocate.” (emphasis supplied)

The observation of the learned ACMM in the impugned order dated 14th March 2006 that “it is yet to be decided as to whether this Court should proceed under Section 174 IPC or under Section 56 FERA” is therefore contrary to the record.

10. On the other hand, it is clear that till the raising of the objection to maintainability of the complaint, the learned ACMM had proceeded with the complaint as one for the offence under Section 174 IPC. In ***M. Samba Siva Rao*** the Supreme Court referred to its earlier judgment in ***Central Bureau of Investigation v. State of Rajasthan (1996) 9 SC 735*** and unambiguously held that the offence of refusal to comply with a summons issued under Section 40 FERA can only be tried as an offence punishable under Section 56 FERA and not under Section 174 IPC. In doing so, the Supreme Court expressly overruled the judgment dated 9th July 1999 of the learned Single Judge of this Court in CrI. M.(M) Nos. 500 & 1299 of 1991 etc. where it was held that it would be possible to prosecute a person

disobeying a summons issued under Section 40 FERA for the offence under Section 174 IPC or any other relevant provision under Chapter 10 IPC. It was held as under (SCC, p.438):

“As has been stated earlier, bearing in mind the purpose for which an officer of the Enforcement Directorate has been empowered to summon persons, either to give evidence or to produce a document and the provisions of the Act, making the persons summoned, bound to state the truth, and further the investigation in question having been made to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code, on a plain literal meaning being given to the language used in Section 56 of the Act we are of the considered opinion that violation or contravention of the directions given under the summons under Section 40 would come within the purview of Section 56 and, therefore, would be punishable thereunder, and the impugned judgment of the Delhi High Court as well as the judgment of the Kerala High Court must be held to have been wrongly decided.”

11. In the light of the above categorical ruling of the Supreme Court there is no question of the petitioner being tried for the offence under Section 174 IPC for non-compliance with the summons under Section 40 FERA. The Complaint Case is therefore not maintainable as such and therefore the order dated 21st August 1991 passed by the learned ACMM taking cognisance of such offence is unsustainable in law.

12. The learned ACMM could not have possibly taken cognisance of the offence under Section 56 FERA when no application was filed by the Respondent for amending or altering the complaint to one under Section 56 FERA. As rightly pointed out by learned Senior counsel for the Petitioner that application was also required to be filed before 31st May 2002 in terms of Section 49(3) FEMA. After that date no court could take cognisance of a FERA offence. The failure by the Respondent to mention Section 56 FERA in the complaint and the consequential failure by the learned ACMM to take cognisance of that offence in the order dated 21st August 1991 is not a mere irregularity as held by the impugned order. That changed the very complexion of the complaint because the offence under Section 174 IPC is triable only in a summary manner. Consequently, the learned ACMM erred in converting the summons case into a warrant case by invoking Section 259 CrPC. There was no occasion to do so because, for the reasons already explained, the complaint could not be converted into one for the offence punishable under Section 56 FERA.

13. The fact that the Petitioner could be arrested only on 15th March 2004 makes no difference to the legal position. Provisions in statutes that attract penal consequences admit of a strict interpretation. They do not permit courts administering the criminal law to resort to pragmatism when faced with an insurmountable procedural hurdle. The deprivation of liberty is

constitutionally permissible only in accordance with the procedure established by law. In the instant case, it was legally impermissible for the learned ACMM to take cognizance of the offence punishable under Section 56 FERA after 31st May 2002. That position did not and could not change only because the accused did not appear in court prior to that day.

14. Accordingly, the impugned order dated 16th March 2006 passed by the learned ACMM is hereby set aside. The Complaint Case No. 180 of 1991 titled “*A.K.Roy, Assistant Director, Enforcement Directorate v. Bachraj Bengani*” and all proceedings consequent thereto hereby stand quashed. The petition is accordingly allowed and disposed of as such.

S. MURALIDHAR, J.

April 6, 2009
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