

REPORTED

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

% DATE OF RESERVE: April 23, 2009

DATE OF DECISION: May 05, 2009

+ **CRL.M.C. 3724/2008 and CRL. M.A. 13899/2008**

AMRIK SINGH SALUJA Petitioner
Through: Mr. Pawan Narang, Mr. Anish Dhingra
and Mr. Puskal Gogoi, Advocates.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Vineet Malhotra and Mr. K. Singhal,
Advocates

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

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

: REVA KHETRAPAL, J.

1. Admit.
2. With the consent of the parties, the matter was taken up for final hearing and after hearing the parties, the orders had been reserved.
3. By this petition under Section 482 of the Code of Criminal Procedure, 1973, the petitioner prays for quashing of the complaint pending before the learned trial court titled as ***“Niranjan Subudhi vs. Amrik Singh Saluja”*** for

the violation of the provisions of Section 57 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as FERA).

4. The brief facts leading to the filing of the present petition are that on 15.08.1997, the residential premises of the petitioner were searched under Section 37 of FERA, which allegedly resulted in the recovery and seizure of Indian currency to the tune of Rs.1,18,00,000/- (Rupees One Crore Eighteen Lakhs only), one bunch of loose sheets (29 in number) and one currency note of Rs.50/- bearing No.5AA 69JJ95, as per the details given in the panchnama. Follow-up searches were conducted at various places, including the premises of one Raj Kumar Kedia at Calcutta, one J.P. Soni at Delhi and Rajiv Gopalani at New Delhi. The documents and other investigations revealed that the appellant was indulging in the acquisition and transfer of foreign exchange as well as receiving and making payments in India in accordance with instructions received from abroad. Resultantly, four Show Cause Notices were issued to the appellant and other co-noticees for alleged violation of Sections 9(1)(b), 9(1)(d), 9(1)(f) (i) and 8(1) FERA, 1973, all dated 14.08.1998, and subsequently when the proceedings were almost complete in the said four Show Cause Notices, the Enforcement Directorate three years thereafter issued a fifth Show Cause Notice dated 08.05.2001 to the appellant alone.

5. By an order dated 09.10.2001, the learned Adjudicating Authority, i.e.,

the Special Director, FERA, held the appellant guilty for violation of the provisions of the aforesaid Sections of the FERA in all the five Show Cause Notices and imposed a total penalty of Rs.20,75,000/- (Rupees Twenty Lakhs and Seventy Five Thousand only) and further ordered the confiscation of Rs.1,15,90,000/- (Rupees One Crore Fifteen Lakhs Ninety Thousand only). The Adjudicating Authority also ordered that the amount of Rs.2,10,000/- (Rupees Two Lakhs Ten Thousand only) lying deposited with the Department along with interest accrued on the seized currency which was converted into fixed deposits to the tune of Rs.12,41,360/- (Rupees Twelve Lakhs Forty One Thousand Three Hundred Sixty only) be adjusted towards penalty levied on the appellant. In this manner, a total of Rs.14,51,360/- (Rupees Fourteen Lakhs Fifty One Thousand Three Hundred Sixty only) was appropriated as penalty amount against the total penalty of Rs.20,75,000/- (Rupees Twenty Lakhs Seventy Five Thousand only), leaving a balance of Rs.6,23,240/- (Rupees Six Lakhs Twenty Three Thousand Two Hundred Forty only).

6. Aggrieved by the findings of the learned Adjudicating Authority, the appellant preferred an appeal before the Appellate Tribunal for Foreign Exchange, registered as Appeal No.478/2001, along with an application seeking waiver of pre-deposit of the balance penalty amount on the ground that the appellant had a *prima facie* case. The appellant having deposited another

Rs.2,00,000/- (Rupees Two Lakhs only) out of the balance penalty amount, the learned Appellate Tribunal vide order dated 27.05.2002 was pleased to dispense with the pre-deposit of the remaining amount of penalty of Rs.4,40,000/- (Rupees Four Lakhs Forty Thousand only) on the ground that the deposit thereof would cause undue hardship to the appellant.

7. Notwithstanding the aforesaid, the respondent on 31.05.2002 filed a complaint under Section 57 of the FERA, 1973 before the learned ACMM, Patiala House Courts for the non-deposit of the penalty amount of Rs.6,23,240/- (Rupees Six Lakhs Twenty Three Thousand Two Hundred Forty only) in terms of the orders and directions issued by the Adjudicating Authority, whereas, admittedly on the said date the balance penalty amount was only Rs.4,40,000/- (Rupees Four Lakhs Forty Thousand only) and the deposit of the same too had been dispensed with by the Appellate Tribunal.

8. Subsequently, however, the Appellate Tribunal, New Delhi by its order dated 04.01.2008 dismissed the appeal of the appellant and sustained the order of the Adjudicating Authority, FERA. Aggrieved with the aforesaid order of the Appellate Tribunal, the petitioner filed an appeal before this Court bearing Crl. A. No.120/2008. In the said appeal, this Court by an order dated 29.07.2008, after hearing both the parties, stayed the recovery of the balance amount of Rs.4,40,000/- (Rupees Four Lakhs Forty Thousand only), during the

pendency of the appeal, by passing the following order:-

“Crl. M.A. No.1777/2008

Reply to the stay application has not been filed despite time sought by the respondent. Mr. Vineet Malhotra, counsel appearing for the respondent states that he does not wish to file any reply to the stay application. Mr. Pawan Narang, counsel appearing for the appellant states that penalty of Rs.20,75,000/- was imposed upon the appellant. Counsel further submits that an amount of Rs.12,41,360/-, which accrued as interest on the seized amount of Rs.1,18,00,000/- has already been adjusted by the respondent towards the said penalty. Counsel further submits that an amount of Rs.2,10,000/- was lying with the Department as total amount of Rs.1,15,90,000/- was confiscated by the Department under Section 63 of FERA. Counsel further submits that even an amount of Rs.2 lakhs was further paid by the appellant at the time of filing of the appeal before the Appellate Tribunal. Counsel thus states that in all the appellant has already paid a sum of Rs.16,51,360/- and only Rs.4,40,000/- is left to be payable towards the remaining penalty amount. Since an amount of Rs.16,51,360/- is already lying with the respondent Department, therefore, recovery of the balance amount shall stand stayed till the final disposal of the appeal.

The application stands disposed of.

Crl. A. No.120/2008

Let the reply be filed by the respondent to the present appeal within a period of four weeks. Rejoinder, if any, be filed within two weeks thereafter.

List this matter on 22nd September, 2008.”

9. As already stated hereinabove, the petitioner has filed the present petition challenging the filing and continuance of proceedings in the complaint filed by the respondent in the meanwhile under Section 57 of the FERA, 1973, on which I have heard Mr. Pawan Narang, the learned counsel for the

petitioner and Mr. Vineet Malhotra, the learned counsel for the respondent.

10. The principal contention of the learned counsel for the petitioner Mr. Narang is that as on the date of the filing of the complaint under Section 57 of the FERA, 1973, i.e. on 31.05.2002, there was no willful default on the part of the petitioner in not complying with the orders of the Adjudicating Authority, FERA or any other authority, which could have made the petitioner liable to be prosecuted under Section 57 of the said Act. By its order dated 27.05.2002, the Foreign Exchange Tribunal had already dispensed with the deposit of the amount of Rs.4,40,000/-, which was the balance penalty amount due from the petitioner, and, therefore, there was no occasion for the respondents to allege that the petitioner had not deposited the balance penalty amount, and that too amounting to Rs.6,23,240/- (Rupees Six Lakhs Twenty Three Thousand Two Hundred Forty only), and to file a complaint on the basis thereof, whereas the balance penalty amount due on 31.05.2002 (i.e. on the date of filing of the complaint) was even otherwise Rs.4,40,000/- (Rupees Four Lakhs Forty Thousand only).

11. The learned counsel also contends that the malafides of the respondents are crystal clear from the fact that despite the orders dated 27.05.2002 of the Tribunal staying the deposit of the balance penalty amount, the respondents filed the complaint exactly four days after the said order, i.e. on 31.05.2002.

The Department at that point of time had full knowledge of the fact that the deposit of the penalty amount had been dispensed with by the Tribunal, that there was no willful default on the part of the petitioner in not complying with the orders of the Adjudicating Authority under FERA, that the petitioner had filed an appeal against the orders of the Adjudicating Authority immediately after the passing of the orders of the Adjudicating Authority dated 9th October, 2001 (being Appeal No.478/01) and that in the said appeal the Appellate Tribunal had waived the pre-deposit of the balance amount of penalty. The learned counsel urges that the haste shown by the appellant in filing the complaint during the existence of a judicial order passed by the Appellate Authority was in view of the fact that the respondents were in a hurry to file all the complaints before the sunset clause came into operation, for which the last day was 31.05.2002. Thus, even though there was no valid demand pending in favour of the Enforcement Department vesting in them the right to file the complaint under Section 57 of the FERA as on 31.05.2002, the Department without looking into the validity of its actions did not hesitate to file the complaint, for which it is liable to appropriately compensate the petitioner. Finally, the learned counsel for the petitioner contended that though the appeal itself was dismissed by the Appellate Tribunal, the operation of the waiver order in respect of the pre-deposit is still in abeyance by virtue of the orders of

this Court dated July 29, 2008 passed in Crl. A. No.120/08, reproduced hereinabove, and even as on date, the respondents have no right to file a complaint under Section 57 of the FERA.

12. Mr. Vineet Malhotra, the learned counsel for the respondents, on the other hand, contended that the petitioner having failed to make the deposit of the balance penalty amount within 45 days of the order of the Adjudicating Authority, the Enforcement Directorate was fully within its right to file the complaint under Section 57 of the Act.

13. The provisions of Section 57 of the FERA, which are the subject matter of the present petition, are apposite and are reproduced hereunder:-

“If any person fails to pay the penalty imposed by the Adjudicating Officer or the Appellate Board or the High Court or fails to comply with any of his or its directions or orders, he shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years or with fine or with both.”

14. A bare perusal of the provisions of the aforesaid Section make it abundantly clear that failure on the part of the person concerned to pay the penalty imposed is the *sine qua non* for conviction under the said Section. Such failure, needless to say, must exist on the date of the filing of the complaint. In the present case, in my considered opinion, there was no failure on the part of the petitioner to pay the penalty imposed, for the reason that the Appellate Tribunal itself had waived the deposit of the balance penalty

amount, i.e., the sum of Rs.4,40,000/- (Rupees Four Lakhs Forty Thousand only), after taking note of the fact that out of the balance penalty amount of Rs.6,23,240/- (Rupees Six Lakhs Twenty Three Thousand Two Hundred Forty only), the petitioner had paid a sum of Rs.2,00,000/- (Rupees Two Lakhs only) after the passing of the order of the Adjudicating Authority.

15. The contention of the learned counsel for the petitioner that the failure to pay the penalty amount by the petitioner within the time prescribed was neither deliberate nor willful is, therefore, not sans merit, the petitioner having already filed an appeal in the Tribunal with an application for stay seeking waiver of the pre-deposit amount under the proviso to Section 52(2) of the FERA and the Appellate Tribunal in exercise of its powers under Section 52(2) having waived the pre-deposit amount. In the circumstances, in my view, it cannot be said that an offence under Section 57 of the FERA had been committed by the petitioner, so as to make the petitioner liable to the penalty imposed by the said Section. The adjudication order was the subject matter of an appeal and during the pendency of the appeal, the Appellate Tribunal had waived the condition with regard to pre-deposit of the balance penalty amount. After the dismissal of the appeal by the Appellate Tribunal also, the High Court in Crl. A. No.201/08 had stayed the recovery of the balance penalty amount. Had the adjudication order attained finality, which it had not in view

of the appeal pending before the Tribunal, or had the stay granted by the Appellate Tribunal been vacated by a superior Court/Tribunal, the respondents may have been justified in launching proceedings against the petitioner under Section 57 of the FERA. It is not, however, comprehensible how the petitioner became liable under the provisions of the said Section despite having obtained a judicial order in his favour from the Appellate Tribunal and despite his appeal being pending before the said Tribunal. Failure to pay, as set out above, implies a deliberate and willful act. How the act of the petitioner can be said to be either deliberate or willful when the Appellate Tribunal itself had waived the penalty amount, has not been explained by the respondents. The haste shown by the respondents in initiating the complaint proceedings by itself, in my opinion, speaks eloquently of the malafides of the Department.

16. In the facts and circumstances aforesaid, I have no hesitation in holding that the offence under Section 57 of the FERA has not been committed by the petitioner and in fact the basic ingredients of the same are missing in the instant case. The petitioner cannot, therefore, be visited with the penal consequences envisaged by the said Section. Resultantly, the complaint filed by the respondent No.2 titled ***“Niranjan Subudhi vs. Amrik Singh Saluja”*** under Section 57 of the FERA is quashed albeit with the clarification that in the event the appeal is decided in favour of the respondents and against the

petitioner or in the event the aforesaid stay for any reason is vacated by this Court and the petitioner fails to pay the penalty amount, the respondent No.2 will be at liberty to take action in accordance with law.

CRL.M.C. 3724/2008 and CRL. M.A. 13899/2008 stand disposed of in the above terms.

REVA KHETRAPAL, J.

MAY 05, 2009

km