

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.M.C. No.401/2004**

Decided on 09.02.2011

IN THE MATTER OF :

SHRI MUKESH KUMAR GUPTA Petitioner
Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Anurag Jain, Adv.

versus

STATE & ANR. Respondents
Through: Mr. M.N. Dudeja, APP for State.
Ms. Renu Bansal, Adv. for R-2/
Enforcement Directorate (FERA).

CORAM

*** HON'BLE MS.JUSTICE HIMA KOHLI**

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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 the Digest? | Yes |

HIMA KOHLI, J. (Oral)

1. The present petition is filed by the petitioner under Article 226 of the Constitution of India read with Section 482 of the Cr.P.C. praying *inter alia* for setting aside the order dated 18.3.2003 passed by the learned ACMM, by which the petitioner's application for recalling of process issued against him in Complaint Case No.860/1/2002 was dismissed.

2. Briefly stated, the facts of the case are that as per the complaint filed by respondent No.2/Enforcement Directorate under Section 56 of the Foreign Exchange Regulation Act,1973 (in short '**the FERA**') and sub-sections (3) and (4) of Section 49 of the Foreign Exchange Management Act,

1999 (in short '**the FEMA**'), a disclosure was made by the then captain of South African Cricket Team, Mr. Hansie Cronje, to the effect that the one-day international cricket matches played in India during the Seasons (1996-1997) between South Africa and India were heavily influenced through illegal betting, etc., and consequently on revelations made by Delhi Police, a Commission of Enquiry known as 'King Commission of Enquiry', was set-up by the President of South Africa, chaired by Hon'ble Judge E.I. King, which was to look into the illegal gratification which Mr.Hansie Cronje and other South African Cricket Team members, amongst others may have received. The said Commission furnished its report on 11.8.2000, which mentioned that the petitioner herein paid amounts to the tune of 1,10,000 US\$ to Mr. Hansie Cronje. On the basis of the said report, respondent No.2/Enforcement Directorate sought to prosecute the petitioner for violation of the provisions of Sections 8(1) and 9(1)(a) of the FERA read with Section 49(4) of the FEMA. Simultaneously, adjudication proceedings before the Enforcement Directorate were initiated against the petitioner under the said Acts. In the adjudication proceedings, an order dated 11.12.2003 was passed by the Special Director, Enforcement Directorate, imposing a penalty of Rs.2.00 crores on the petitioner for acquisition of foreign exchange from the persons other than the authorized dealer and for making payment to persons residing outside India, without any previous general or special permission of the Reserve Bank of India, in contravention of Sections 8(1) and (9)(1)(a) of the FERA.

3. Aggrieved by the aforesaid adjudication order, the petitioner preferred an appeal before the Appellate Tribunal for Foreign Exchange,

registered as Appeal No.144/2004. The aforesaid appeal was finally allowed, vide order dated 21.4.2008, and respondent No.2/Enforcement Directorate was directed to refund the pre-deposited amount, if any, while setting aside the impugned order. The aforesaid order passed by the Appellate Tribunal for Foreign Exchange was taken in appeal by respondent No.2/Enforcement Directorate by preferring a criminal appeal, registered as Crl.A.No.525/2009. The said appeal was accompanied by an application for condonation of delay of 360 days. Vide order dated 14.9.2009, the aforesaid application for condonation of delay was dismissed, as the learned Single Judge observed that respondent No.2/Enforcement Directorate, appellant therein, was unable to satisfy the court and show sufficient cause for not filing the appeal within the stipulated time. As a result, the criminal appeal also came to be dismissed. It is an undisputed position that the aforesaid order on appeal has attained finality as respondent No.2/Enforcement Directorate has not preferred any SLP against the said order.

4. At the outset, learned Senior Advocate for the petitioner states that in view of the order dated 21.4.2008 passed by the Appellate Tribunal dealing with the merits of the case, which order has attained finality, the present petition ought to be allowed and the pending criminal complaint preferred by respondent No.2/Enforcement Directorate against the petitioner ought to be quashed. In support of his submissions, he relies on the following judgments :

- i. Sunil Gulati vs. R.K. Vohra, **2007 (1) JCC 220**,
- ii. Biharij Mfg. Co.P. Ltd. vs. Commissioner of Central Excise, **2007 (94) DRJ 705**,
- iii. D.K. Rastogi vs. Union of India, **2007 (95) DRJ 660**, and

- iv. Anil Mahajan & Anr. vs. Union of India & Anr., **2008 (101) DRJ 473.**

5. Per contra, counsel for respondent No.2/Enforcement Directorate relies on a judgment of a coordinate Bench in the case of Joginder Gulati vs. IO, DRI, New Delhi, **166 (2010) DLT 789**, to submit that merely because the Appellate Tribunal for Foreign Exchange has set aside the adjudication order dated 11.12.2003 passed by Special Director, Enforcement Directorate, directing respondent No.2/Enforcement Directorate to refund the pre-deposited amount, the complaint filed by respondent No.2/Enforcement Directorate, subject matter of the present petition, ought not to be quashed and proceedings ought to continue and that once the trial court is satisfied that the petitioner ought to be discharged, then the same result would ensue.

6. Learned Senior Advocate for the petitioner however distinguishes the judgment in the case of Joginder Gulati(supra) relied upon by respondent No.2/Enforcement Directorate and submits that in the said judgment, even though the learned Single Judge had taken into consideration the judgment in the case of Sunil Gulati (supra), yet he had gone on to hold that since in the said case the exoneration of the petitioner had not been on merits, hence it would be open to the criminal court to decide the case on merits. Learned Senior Advocate for the petitioner submits that for these reasons, the petitioner therein was not held entitled for quashing of the criminal proceedings initiated against him, however, in the instant case, the order of the Appellate Tribunal was passed on merits and therefore the criminal proceedings are liable to be quashed.

7. This Court has heard the counsels for the parties and carefully considered their rival submissions. The law as culled out in the case of Sunil Gulati (Supra), included the judgments of the Supreme Court in both circumstances, i.e., one set of judgments where it was held that departmental proceedings and criminal cases are independent proceedings and that both can go on simultaneously, and the other set of judgments, wherein it was held that prosecution could not be sustained as there was a categorical finding exonerating the accused in the tribunal/departmental proceedings. After examining the judgments of both nature, the court held that there was no conflict between the views expressed in the two set of judgments and in fact, they would be read harmoniously in different sets of circumstances. The circumstances were set out in para 25 of the aforesaid judgment and the same are reproduced hereinbelow for ready reference :

“25. The conclusion arrived at by the Andhra Pradesh High Court, in my respectful submission, after relying upon *Assistant Collector of Customs v. L.R. Malwani* (supra), ratio whereof was misread and ignoring other judgments of the Apex Court would not be correct. What is needed is me harmonious reading of all these judgments as I do not even see any contradiction. 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 insofar 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 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 added)

8. In the light of the aforesaid judgment, followed by coordinate Benches of this Court in the cases of Sunil Gulati (supra), Biharij Mfg. Co.P. Ltd. (supra), D.K. Rastogi (supra) and Anil Mahajan (supra), this Court is required to go through the order passed by the Appellate Tribunal to see as to whether or not it is an order passed on merits and whether the foundational facts in the complaint are identical or not.

9. A perusal of the aforesaid order dated 21.4.2008 passed by the Appellate Tribunal reveals that the Tribunal considered the submissions made by both sides on merits and considered the documents mentioned in para 4 thereof, which include, amongst others, the interim report dated 11.8.2000 prepared by the King Commission of Enquiry, four sets of statements made by the petitioner on 5.7.2000, 10.7.2000, 21.11.2000 and 19.1.2001; statements of Mr. Manoj Prabhakar dated 12.12.2000 and that of Mr. Anand Saxena dated 20.12.2000. After taking into consideration the submissions made on behalf of the petitioner as also the arguments urged on behalf of respondent No.2/Enforcement Directorate, the Tribunal arrived at a conclusion that the confessions made by the petitioner in the course of investigation could not be relied on in any enquiry or trial. It was also observed that the adjudicating authority had depended solely on the reproduction of the statement of the petitioner in the CBI report without looking into the actual text of the statement, and hence the said statement

could not form the basis of the conviction. It was held that the department had been unable to establish the identity of the said Mukesh Gupta or 'M.K.' mentioned in the interim report of the King Commission and failure on the part of the department to get the petitioner identified by Mr. Hansie Cronje in the adjudication proceedings or for that matter, from Mr. Manoj Prabhakar and Mr. Anand Saxena, had weakened the case of the department considerably and it could not be established that the petitioner and the person named in the interim report of King Commission, i.e., Mukesh Gupta or 'M.K.' were the same person. Referring to a number of judgments on the issue that order of conviction could be passed only on evidence and not on hypothetical propositions or unwarranted inferences, the Tribunal concluded that the adjudicating officer was not justified in relying on hearsay evidence.

10. Furthermore, the factum of the passport of the petitioner remaining in the custody of the CBI after his interrogation, and the observation made in the interim report of the King Commission pertaining to the person identified as 'M.K.' was taken note of by the Tribunal, to observe that if the passport of the petitioner remained in the custody of the CBI, he could obviously not have appeared before the King Commission to make any statement, which factum was completely overlooked by the adjudicating officer. It was further held that respondent No.2/Enforcement Directorate had not brought any material on record, to establish the fact of acquisition of foreign exchange by the petitioner and of making payment to any person resident outside India. As a result of the aforesaid findings, the order of the adjudicating officer dated 11.12.2003 was set aside, while allowing the appeal of the petitioner.

11. In the aforesaid backdrop when the complaint filed by respondent No.2/Enforcement Directorate before the learned ACMM is perused, it is apparent that the facts averred in the adjudication proceedings and those averred in the complaint are more or less identical. The complaint also refers to the King Commission's report which has been extensively reproduced in the body of the complaint, from paras 143 to 156. The complaint also takes note of the report of the CBI prepared in October, 2000 and the statement of Mukesh Gupta @ M.K. @ John, who was interrogated by the CBI officials, pertaining to his admission that payments had been made by him to Mr. Hansie Cronje in the year 1996 during the India-South Africa Cricket Test Series held at Kanpur, India, and in South Africa. Further, reference is made to statements made by Mr. Manoj Prabhakar and Mr. Anand Saxena, who were stated to have been examined for the purpose of identifying the petitioner herein. The deposition of the petitioner before the CBI has also been adverted to, to claim that the petitioner had made payments to the tune of 1,10,000 US\$ to Mr. Hansie Cronje, without special permission from the Reserve Bank of India.

12. Having regard to the aforesaid facts and circumstances mentioned in the complaint, it is clear that the entire foundation laid in the complaint are based on the same facts which were examined by the Appellate Tribunal, while considering the appeal preferred by the petitioner against the adjudication order dated 11.12.2003. In view of the fact that the foundational facts forming the basis of the order of the Appellate Tribunal and that of the present complaint are identical and the Appellate Tribunal has passed an order on merits reversing the findings of the

adjudication officer while exonerating the petitioner, this Court is of the opinion that the exoneration has to be held as one on merits and not one on a technicality.

13. It is not in dispute that the order of the Appellate Tribunal exonerating the petitioner, has attained finality, after the appeal preferred by Respondent No.2/Enforcement Directorate in this Court was dismissed. Thus, following the decision in the case of Sunil Gulati (supra), which mandates that it would be unjust for the departmental authority to continue with the criminal complaint, when in the course of adjudication, categorical and unambiguous findings have been returned that there is no contravention of the provisions of the Act, and when the concerned person has been exonerated, no useful purpose shall be served by proceeding further with the criminal complaint in the instant case and the respondent agency cannot be permitted to prosecute the petitioner, having failed to establish the foundational facts to justify his prosecution. As a result, the present petition succeeds and criminal complaint No.860/1/2002 pending before the learned ACMM is quashed along with the proceedings arising therefrom.

The petition is disposed of.

FEBRUARY 09, 2011
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(HIMA KOHLI)
JUDGE