

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

+ **Crl. L.P. No. 167/2011**

Date of Decision : 20.04.2011

Directorate of Enforcement

.....Appellant

Through: Mr.Rajesh Manchanda,
Advocate.

Versus

M. Shamba Shiva Rao

..... Respondent

Through: Nemo

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

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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 ? | NO |
| 3. | Whether the judgment should be reported in the Digest ? | NO |

V.K. SHALI, J. (Oral)

1. This is a leave to appeal under Section 378 sub clause (4) Cr.P.C. against the order of acquittal dated 13.10.2010 passed by the learned ACMM-01, New Delhi in complaint case bearing no. 64/1/1996.
2. Briefly stated the allegations against the respondent are that on 30.08.1996 the appellant herein had served summons on the respondent through his counsel under Section 40 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred as the 'Act') requiring him to appear on 30.08.1996 itself at 9.00 P.M. in Enforcement Directorate, Office of Foreign Exchange Regulation, Lok Nayak Bhawan,

Khan Market, New Delhi. The summons were served at 8.35 P.M. by the appellant on the respondent who was in Jail no. 2 through his counsel who made an endorsement on the summons that the respondent would appear on 31.08.1996 at 2.00 P.M. It is alleged that the respondent neither appeared on 30.08.1996 nor on 31.08.1996, this led to filing of a complaint under Section 56 of the Act against the respondent. Since the complaint was filed by the appellant through Enforcement Officer Mr. J. P. Kujur in the official discharge of his duty, therefore, summons were straightway issued against the respondent and he was put to trial for having committed an offence under Section 56 of the Act.

3. The appellant in order to prove his case examined three witnesses PW-1/Sh. J. Shankar, Enforcement Officer, PW-2/Sh. J.P. Kujur, Enforcement Officer and PW-3/Sh. Sushil Kumar, Assistant Enforcement Officer. The statement under Section 313 Cr.P.C. was recorded, and thereafter, the respondent examined seven witnesses in support of his defence, namely, DW-1/Sh. K. K. Taneja, Assistant L.G. Secretariat, Raj Niwas, DW-2/Sh. A. K. Roy, Assistant Manager Hindustan Times, DW-3/Sh. Har Prashad, Jail Supdt., DW-4/Sh. B. C. Tiwari, Ahalmad in the Court of Sh. B. S. Mathur, the then Special Judge, CBI, DW-5/Sh. K. C. Abraham, Enforcement Officer, DW-6/Sh. J.P.Singh, Enforcement Officer, DW-6/Sh. Rakesh Paliwal, Additional

Director, DW-7/Mr. Roshan Lal Hathwal, Sr. S.S.O Central Telegraph Officer.

4. After hearing the arguments, the learned ACMM acquitted the respondent of the offence under Section 56 of the Act on the ground that the respondent could not be expected to appear at 9.00 P.M. in the Enforcement Directorate when the summons itself were served on him at 8.35 P.M. near the Central Jail when he had been released after about 90 days from the Jail. It was stated by the learned ACMM that the respondent did not have any speed vehicle with him so as to appear on the same day at 9.00 PM and moreover the officers of the appellant themselves reached at their office at Lok Nayak Bhawan at 9.15 P.M. and if this was the factual situation, it is unreasonable to accept, the respondent, who had been just released from the Jail to appear before the officials of the appellant at 9.00 P.M. So far as the non-appearance of the respondent on 31.08.1996 is concerned, it has been observed by the learned ACMM that as the respondent has been released from Jail after 90 days, there were certain much more important family matters, which required immediate attention apart from this. The appellant had not issued any direction to the respondent to appear on 31.08.1996 and keeping in view the totality of circumstances, the learned ACMM did not consider it to be a case where the allegations against the respondent were established and he had voluntarily disobeyed the summons

or directions issued by the appellant or its officers warranting his conviction under Section 56 of the Act.

5. I have heard the learned counsel for the appellant and have also gone through the record.
6. I do not consider it to be a fit case where leave to appeal should be granted to the appellant. The first reason is that Section 40 of the Act laid down that the Enforcement Officer is competent enough to summon any person to give evidence or produce document.
7. Relevant portion under Section 40 sub clauses (1) and (3) reads as under:

40. Power to summon person to give evidence and produce documents:-

(1) Any gazette officer of Enforcement shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document during the course of any investigation or proceeding under this Act.

(2)

(3) All persons so summoned shall be bound to attend either in person or by authorized agents, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents as may be required;

Provided that the exemption under Section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

8. Section 56 of the Act deals with offences and prosecutions lays down as under:

- (1)
- (2) *If any person convicted of an offence under this Act (not being an offence under Section 13 or clause (a) or sub-section (1) of (section 18 or section 18A) or clause (a) of sub-section (1) of section 19 or sub-section (2) of section 44 or section 57 or section 58) is again convicted of an offence under this Act (not being an offence under Section 13 or clause (a) of sub-section (1) of (section 18 or section 18A) or clause (a) of sub-section (1) of section 19 or sub-section (2) of section 44 or section 57 or section 58), he shall be punishable for the second and for every subsequent offence with imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;
Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months."*

9. The case of the appellant is that the respondent has committed an offence by willfully disobeying the summons issued to him.
10. A perusal of these sections show that before a person can be held to be guilty of disobeying the summons, the summons must be served on him and he must have willfully disobeyed the summons with a view to hamper the investigation or not to produce the document. In the instant case, admittedly the summons were not served on the respondent himself which I feel was the first infirmity in

the entire process. If the service of summons on the counsel is treated as service of the summons on the respondent even then the learned ACMM has rightly observed that the summons required the respondent to appear at 9.00 P.M. while as the same was served on the counsel at 8.35 P.M., when the respondent was still in Jail or was about to be released. The possibility of the respondent being in Jail is reflected by the endorsement of the counsel, who mentions Jail no. 2 on his endorsement which prima facie can be taken to show that at the relevant time the respondent was in Jail. The learned ACMM has rightly observed that when the summons were served at 8.35 P.M., it is unreasonable to expect from the respondent to appear at 9.00 P.M. in their office which was at a distance of approximately 15 kms. and more so when the officials who had gone to serve the summons had themselves reached at 9.15 P.M. or so. Apart from this, a person on being released from the Jail after about three months would not be in a proper mental frame to appear before the investigating agency, instead he would like to go home and take rest rather than appearing in response to the summons. It is because of this reason probably that the counsel is purported to have made an endorsement on the summons that the respondent would appear on the next date i.e. 31.08.1996 at 2.00 P.M. which he did not do. Although, he ought to have appeared on the next date, but

even if it is taken that he had not kept his assurance for appearance on the next date that cannot be taken as a ground for initiating prosecution against him under Section 56 of the Act because under Section 56 when summons are issued to a person to appear or produce a document, a command thereby is issued to such a person which has the sanction of law rather than voluntary assurance purported to have been given by the respondent.

11. For these reasons, I feel that there is no infirmity, illegality or incorrectness in the judgment of the learned ACMM which would warrant interference of this Court. So far as the judgment which has been cited by the learned counsel for the appellant is concerned, that was a case where the respondent had refused to accept the service of summons itself & therefore is distinguishable from the facts of the present case.
12. In view of the above-mentioned facts and circumstances, I am of the view that it is not a fit case where the leave to appeal ought to be granted. Accordingly, the petition is dismissed.

V.K. SHALI, J.

APRIL 20, 2011
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