

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

Reserved on: August 08, 2013

Pronounced on: September 02, 2013

+ **Crl. M.C. No.5096/2006 & Crl.M.A. No.11915/2006**

J.N. KHANNA & ORS. Petitioners

Through: Mr. Sumit Bansal, Mr. Ajay
Monga, Mr. Ateev Mathur & Ms.
Sumi Anand, Advocates.

versus

R.K. RAWAL & ANR. Respondents

Through: Ms. Rajdipa Behura, Advocate

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT

1. Quashing of complaint under Section 56 of *Foreign Exchange Regulation Act, 1973*, read with sub-Section (3) and (4) of Section 49 of the *Foreign Exchange Management Act, 1999* and Opportunity Notice of 12th May, 2002 (*Annexure P-3*) against the officers of ANZ Grindlays Bank who had handled the transactions of *Non Resident (External)* Account by Dr. P.K. Ramakrishnan, is sought. The precise ground upon which quashing of the proceedings arising out of the criminal complaint in question is sought by petitioners is that neither of petitioners had consented, connived or neglected in performance of their official duties attracting criminal prosecution under the aforesaid Act.

2. At the hearing, it was asserted by petitioners' counsel that once the charges of consent and connivance have been dropped in adjudication proceedings, the criminal prosecution in which the standard of proof is much higher, cannot be permitted to continue. To assert so reliance was placed upon *Radheshyam Kejriwal vs. State of West Bangal and Anr.* 2011 (3) SCC 581.

3. It was vehemently asserted by petitioners' counsel that delay of 11 years in lodging the criminal prosecution on the allegations of contravention of *Foreign Exchange Regulation Act, 1973* by petitioners who were the officers of the erstwhile ANZ Grindlays Bank caused serious prejudice to petitioners in defending themselves in these criminal proceedings as the operation of ANZ Grindlays Bank had been wound up in the year 2002 and, thus, petitioners' right to a speedy trial is violated. Reliance was further placed by petitioners' counsel upon a decision of this Court in Crl.M.C.No.2655/2006 *Kamal Suri vs. Dy. Director, Enforcement Directorate* decided on 11th January, 2008 to assert that continuation of criminal proceedings on identical facts cannot be permitted as in adjudication proceedings, petitioners were exonerated and so these criminal proceedings ought to be quashed.

4. Reliance was also placed upon a decision of this Court in Writ Petition (Civil) No.19168/2004 *R.M. Mehrotra vs. Enforcement Directorate* decided on 4th February, 2008 to contend that in the absence of explicit guidelines for the bank employees to

transact Non-Resident (External) Account (*henceforth referred to as 'NRE Account'*), the criminal prosecution amounts to ex-post facto imposition of penal liability on petitioners, which is arbitrary and oppressive. Opportunity Notice (*Annexure P-3*) was assailed by learned counsel for the petitioners by contending that it is vague and does not furnish the details regarding the allegations contained in the aforesaid Notice and so criminal prosecution on its basis is unwarranted. Thus, it was contended by learned counsel for the petitioners that negligence cannot be imputed to petitioners and in any case, as there was no loss of any foreign exchange to our country as foreign exchange in question has been remitted back to our country and so this complaint deserves to be quashed.

5. Ms. Rajdipa Behura, learned counsel for respondent staunchly defended the criminal prosecution of petitioners in pursuant to complaint (*Annexure P-1*) while drawing attention of this Court to a passage in aforesaid complaint, which is as under:-

“Vide reasoned order dated 14.05.2010, the learned Adjudication Authority found the petitioners to have neglected to disallow the credit of non-convertible rupee funds in Dr. P.K. Ramakrishnan’s NRE Account. They were accordingly held to have contravened provisions of Sections 6 (4) & 6 (5) read with Section 49 of FERA, 1973 and Section 8 (1) read with 64 (2) of FERA, 1973. Petitioner J.N. Khanna was additionally held to have contravened Section 8 (1) and 9 (1) (a) read with Section

64 (2) of FERA, 1973. Personal penalty of Rs.10,000,000/- was imposed on each of the petitioners.”

6. To contend that adjudication proceedings as well as criminal prosecution can be launched separately, learned counsel for respondents relied upon Apex Court’s decision in *Standard Chartered Bank and Others vs. Directorate of Enforcement and Others.*, (2006) 4 SCC 278. It was refuted by learned counsel for respondents that the Opportunity Notice (*Annexure P-3*) is vague and it was pointed out that the aforesaid Notice is quite detailed one and it also spelled out the contravention of the provisions of Foreign Exchange Regulation Act by petitioners. It was pointed out by learned counsel for the respondents that Apex Court’s decision in *Radheshyam* (Supra) is of no avail to petitioners because the adjudication proceedings against petitioners have not resulted in their exoneration and in fact penalty has been imposed upon petitioners in the adjudication proceedings. Attention of this Court had been drawn to the relevant portion of the order of 14th May, 2010 of Adjudicating Authority which reads as under:-

“16.22 The noticee no.2, 4 & 5 have pleaded that it is unwarranted and unsustainable in law to submit the noticee bank and its officers to penalty without attributing any act or illegal omission to them with the requisite mens rea. It is observed that the noticee no.2 has admitted in its letter dated 23.12.1991 that they were aware of the Guidelines laid down in the ECM 1987 issued by the RBI from time to time which prohibited

remittances such as those made for noticee no.1. The noticee 2, 4 and 5 as well as 3 have admitted that non-convertible funds were credited to NRE account meant for convertible funds and subsequently allowed to be drawn for transfer and payments abroad. The noticee bank and its employees were not only negligent in allowing such unauthorized credits and debits but also failed to call for information and declaration from noticee no.1 as to avoid such possibilities of unauthorized credits and debits. The noticee no.2 was negligent in issuing Cheques bearing NRE legend and in failing to concurrently inform about the non-convertible nature of funds transferred to Bank of America. Thus the noticee bank acting through its noticee officers neglected to comply with the conditions of its authorization.”

7. Relevantly, Noticee no.2 is ANZ Grindlays Bank, who has disclosed in its letter of 23rd November, 1991 that petitioners were aware of the guidelines laid down in Exchange Control Manual, 1987-(ECM) issued by the Reserve Bank of India from time to time which prohibits such remittances.

8. Upon hearing both the sides and on perusal of the Complaint (*Annexure P-1*), Opportunity Notice (*Annexure P-3*), the decision of Adjudicating Authority of 14th May, 2010 and the decisions cited, this Court is of the considered opinion that since petitioners have not been totally exonerated in the adjudication proceedings (i.e. the findings returned in adjudication proceedings are that there is overwhelming evidence of negligence on the part of petitioners),

therefore Apex Court's decision in *Radheshyam* (supra) is of no avail to petitioners. This Court is conscious of the fact that the order of 14th May, 2010 of the Adjudicating Authority must be subjudice but at the hearing, it was not brought to the notice of this Court that the operation of Adjudicating Authority's order of 14th May, 2010 has been stayed. In view thereof, continuation of proceedings arising out of the criminal complaint (*Annexure P-1*) cannot be scuttled.

9. In the face of the Communication of 23rd December, 1991 of ANZ Grindlays Bank regarding petitioners' being aware of the guidelines laid down in Exchange Control Manual, 1987 and Reserve Bank of India's Guidelines issued from time to time, it would be premature for this Court to conclude that continuance of criminal proceedings amounts to ex-post facto imposition of penal liability upon petitioners is unwarranted or that petitioners were not negligent. Reliance placed upon decision in *R.M.Mehrotra* (Supra) by the petitioners is clearly misplaced as in the aforesaid decision, it was found that there was absence of explicit guidelines for the bank employees but it is not so in the instant case.

10. Similarly, reliance placed by learned counsel for petitioners upon decision in *Kamal Suri* (Supra) is of no avail as in the said decision, the accused were exonerated in the adjudication proceedings, whereas it is not so in the instant case.

11. A bare perusal of the Opportunity Notice (*Annexure P-3*) reveals *prima facie* due application of mind and so this Opportunity Notice cannot be said to be vague. Merely because no loss is purportedly caused as the Foreign Exchange is said to have been remitted back to our country is an aspect, which is required to be considered at trial and not at the threshold of these proceedings as if it is so found, then it will not, by itself be sufficient to quash the proceedings arising out of the complaint in question.

12. On the aspect of limitation, the pertinent observations of Apex Court in *Udai Shankar Awasthi v. State of U.P.*, (2013) 2 SCC 435 are as under:-

“19. Section 468 Cr.PC places an embargo upon the court from taking cognizance of an offence after the expiry of the limitation period provided therein. Section 469 prescribes when the period of limitation begins. Section 473 enables the court to condone delay, provided that the court is satisfied with the explanation furnished by the prosecution/complainant, and where, in the interests of justice, extension of the period of limitation is called for. The principle of condonation of delay is based on the general rule of the criminal justice system which states that a crime never dies, as has been explained by way of the legal maxim, nullum tempus aut locus occurrit regi (lapse of time is no bar to the Crown for the purpose of it initiating proceeding against offenders). A criminal offence is considered as a wrong against the State and also the society as a whole, even though the same has been committed against an individual.

20. *The question of delay in launching a criminal prosecution may be a circumstance to be taken into consideration while arriving at a final decision, however, the same may not itself be a ground for dismissing the complaint at the threshold. Moreover, the issue of limitation must be examined in light of the gravity of the charge in question. (Vide Japani Sahoo v. Chandra Sekhar Mohanty [AIR 2007 SC 2762], Sajjan Kumar v. CBI [(2010) 9 SCC 368] and Noida Entrepreneurs Assn. v. Noida [AIR 2011 SC 2112] .)*

21. *The court, while condoning delay has to record the reasons for its satisfaction, and the same must be manifest in the order of the court itself. The court is further required to state in its conclusion, while condoning such delay, that such condonation is required in the interest of justice. (Vide State of Maharashtra v. Sharadchandra Vinayak Dongre [AIR 1995 SC 231] and State of H.P. v. Tara Dutt [AIR 2000 SC 297].)*

22. *To sum up, the law of limitation prescribed under CrPC, must be observed, but in certain exceptional circumstances, taking into consideration the gravity of the charge, the court may condone delay recording reasons for the same in the event that it is found necessary to condone such delay in the interest of justice.”*

13. The relevant averments in the complaint (*Annexure P-1*) which *prima facie* discloses the seriousness of the economic offence committed by petitioners are as under:-

“That the aforesaid contravention of section 8 (1) read with Section 64 (2) by ANZ Grindlays Bank in respect of the amount of Rs.1,15,00,000/- has taken place with the consent/connivance of and is attributable to the negligence on the part of the said officials of ANZ Grindlays Bank namely Ms. Judy Manners, Shri K.K. Kuda and Shri J.N. Khanna for the respective amounts handled by them i.e. Rs.60,00,000/- by the Ms. Judy Manners Rs.25,00,000/- by Shri K.K. Kuda and Rs.30,00,000/- by Shri J.N. Khanna also have contravened the provisions of Section 8 (1) read with Section 64 (2) in respect of the respective amounts as aforesaid by virtue of Section 68 of Foreign Exchange Regulation Act, 1973 and have thereby rendered themselves liable to be proceeded against under Section 56 of FERA, 1973.

That S/Shri K.K. Kuda and J.N. Khanna officials of ANZ Grindlays Bank, Sansad Marg, New Delhi had handled the aforesaid transactions of US \$ 57747.90 and US \$ 38473 respectively and the aforesaid contravention of Section 8 (AI) and 9 (1) (a) read with 64 (2) of Foreign Exchange Regulation Act, 1973 in respect of these amounts have taken place with the consent or connivance of or is attributable to any negligence on the part of the said Shri K.K. Kuda and Shri J.N. Khanna for the respective amounts handled by them, as such both Shri K.K. Kuda and Shri J.N. Khanna also have contravened the provisions of Section 8 (1) read with Section 64 (2) and Section 9 (1) (a) read with 64 (2) read with 68 of Foreign Exchange Regulation Act, 1973 and therefore they also have rendered themselves liable to be proceeded against under Section 56 of FERA, 1973.”

14. Regarding delay in launching the criminal prosecution in pursuance to complaint (*Annexure P-1*), suffice it would be to state that an effective opportunity needs to be granted to respondents to explain the delay at trial as explanation for the delay occasioned is required to be tested at trial. In any case, it is not shown by petitioners as to what prejudice petitioners suffer at this initial stage on account of the alleged delay occasioned. Attention of this Court has not been drawn to any provision of law which provides for any limitation for initiation of these proceedings. The delay plea is left open to be considered and tested at trial.

15. In view of the categorical finding returned by the Adjudicating Authority in its order of 14th May, 2010 and *prima facie* evidence of negligence on part of petitioners being there, prosecution of petitioners in the complaint (*Annexure P-1*) shall be confined to contravened by Section 6 (4) and (5) read with Section 49 and Section 8 (1) read with Section 64 (2) of Foreign Exchange Regulation Act, 1973. That is to say, the prosecution of petitioners in pursuance to complaint (*Annexure P-1*) shall be confined to the negligence on part of petitioners and not for petitioners having consented or connived in commission of the aforesaid offence.

16. In the ultimate analysis, it is found that though petitioners are not liable to be prosecuted for having consented or connived in commission of the offence in question, but certainly they are *prima*

facie liable to be prosecuted for being negligent resulting in commission of the offence in question.

17. Although petitioners have not responded to the Opportunity Notice (*Annexure P-3*) but, it is deemed appropriate to permit them to now respond to the aforesaid Notice within four weeks and if it is so done, then petitioners' response to the above-said Notice shall be taken into consideration while proceeding with the complaint (*Annexure P-1*) in accordance with law.

18. With aforesaid clarification, this petition seeking quashing of criminal complaint (*Annexure P-1*) and Opportunity Notice (*Annexure P-3*) is dismissed and interim order of 22nd May, 2003 stands vacated while refraining to comment upon merits of this case, lest it may prejudice petitioners at trial.

This petition and the application are disposed of in aforesaid terms.

(SUNIL GAUR)
Judge

September 02, 2013
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