IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.07.2018
Pronounced on : 13.07.2018

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.No.29996 of 2011
and
M.P.Nos.1 & 2 of 2011

Ratna Mohammed ... Petitioner/Accused

Vs.

The Chief Enforcement Officer,
Enforcement Directorate,
Sastri Bhavan,
Haddows Road,
Madras - 600 006. ... Respondent/Complainant

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records of the respondent in C.C.No.1 of 2000 pending on the file of the E.O.II, Additional Chief Metropolitan Magistrate Court, Egmore, Chennai and quash the same.

For Petitioner : Mr.B.Kumar, Senior Counsel for Mr.Abdul Huck

For Respondent : Mr.N.Ramesh, Special Public Prosecutor for Enforcement Directorate.

ORDER

This Criminal Original Petition is filed to call for the records of the respondent in C.C.No.1 of 2000 pending on the file of the E.O.II, Additional Chief Metropolitan Magistrate, Egmore, Chennai and quash the same.

2.The above petition has been filed by the petitioner to quash the proceedings of C.C.No.1 of 2000 on the file of Additional Chief Metropolitan Magistrate, ECONOMIC Offences-II, Egmore, Chennai. The petitioner submits that the respondent on information searched the residence of one Abdul Samath and seized large amount of foreign currencies. The said Abdul Samath was taken to the respondent office and statement was recorded from him. In his statement recorded under Section 40 of the Foreign Exchange Regulation Act, the petitioner is said to have stated that foreign currencies were delivered to him for safe keeping, being the sale proceeds of gold and silver, which were brought to India. The gold so imported was sold to C.Balu, S/o.Chellan. As a follow up measure the said C.Balu was also contacted and statement recorded from him. In the said statement the said Balu had stated that he had purchased foreign marked gold biscuit and paid considerations in dollars. Both the said Abdul Samath and C.Balu were arrested. The statement of Abdul Samath implicated the person, who dealt with foreign currencies, who had given a portion of foreign currency to him. Thereafter, a case in EOCC No.1164 of 1994 came to be filed against the said Abdul Samath (A1), C.Balu (A2) and petitioner A.3 for the offences under Section 8(1) of the FERA 1973 punishable under Section 56(1) (i) of the said Act.

3.The contention of the learned counsel appearing for the petitioner is that the petitioner was not aware of the said proceedings filed against him. He further submits that the petitioner was not taken into custody and no statement was recorded by the respondent prior to the filing of C.C.No.1164 of 1994 and as such, the petitioner was not aware of any such proceedings. No notice was served on the petitioner. The petitioner had retired to his native place at Kilakarai. Surprisingly, the petitioner was taken into custody, pursuant to the order of detention on 02-11-1993. The Hon'ble Advisory Board, which reviewed the case of the petitioner held that there was no sufficient cause for detention of the petitioner and directed that he be set at liberty. The petitioner during the course of incarceration as detenu under COFEPOSA ACT came to know that the respondent had filed a complaint under Section 56 of the Act. Thereafter, he had appeared before the lower court and received the complaint copy and other documents.

4.The learned counsel for the petitioner further submits that in the meanwhile since NBW was pending against the petitioner, the case against the petitioner was split up from the main case EOCC.No.1164/94 and new number EOCC.No.1 of 2000 was assigned. The Gravamen of the complaint in EOCC No.1164 of 1994 in which the petitioner was shown as A3 is that the said A.Abdul Samath had given a statement to the respondent on 16-07-1993, based on which, the petitioner had been arrayed as an accused in the said case. The other accused, Balu though had given a statement and he had not whispered anything with regard to the petitioner.

5.It is seen from the complaint that the Officers of the respondent on 15-07-93 had conducted a search resulting in seizure of foreign currencies in bundles seized from Abdul Samath A1, who has given a statement on 15-07-93 and 16-07-93 before the respondent officials stating about his complicity in commission of the offence. He further states that on 14-07-93, he had paid and settled with the petitioner account and collected foreign currencies of US dollar 82,493 and

S.R.1,96,832 towards the sale of gold and silver, which amount formed part of the seized foreign currencies and the other seized foreign currencies of S.R.12,000/- UAE Dirham 70,500/- and Singapore $ 11. The said Abdul Samath and C.Balu who are A1 and A2 in C.C.No.1164 of 1994 were arrested under Section 35 of the FERA 1973 by the respondents and were produced before the lower court on 17-07-1993. This petitioner could not be traced inspite of sustained efforts made by the respondent. Hence, the petitioner was not tried along with Abdul Samath and Balu in C.C.No.1164 of 1994.

6.The petitioner submits that the petitioner is charged in C.C.No.1 of 2000 for contravening under Section 8(1) for purchase and acquiring foreign exchange and by selling foreign exchange to person other than authorized dealer in Foreign exchange during April and July 1993, without the previous general or special permission of the Reserve bank of India and thereby, rendered himself punishable under Section 56(1)(i) of FERA Act.

7.On going through the complaint, it could be seen that the petitioner has been arrayed as an accused only on the basis of the statement given by A1 Abdul Samath on 16-07-1993 in C.C.No.1164 of 1994 to the respondent. Other than this statement, there is no other material to connect the petitioner to the offences mentioned therein in the complaint in C.C.No.1 of 2000.

8.The petitioner submits that the EOCC No.1 of 2000 is a split up offshoot case of EOCC No.1164 of 1994, since the petitioner who was shown as A3 could not be served with summons, despite coercive steps of Non Bailable Warrant issued against him. The trial Court thereafter, split up the case as against the petitioner and the petitioner has been shown as single accused in EOCC No.1 of 2000. In this case the petitioner had appeared received the copies and has filed the above quash petition.

9.The learned counsel for the petitioner further contended that the petitioner is an innocent and he did not know anything with regard to the foreign currency which was in possession of A.Abdul Samath or purchase of gold, silver by C.Balu. Further, submits that there is no recovery, no statement from the petitioner. In fact, no notice was served to him even during the course of investigation. Now, the respondent attempts to proceed against the petitioner based on the statement of A.Abdul Samath, A1 in C.C.No.1164 of 1994, which cannot be marked or used against the petitioner in C.C.No.1 of 2000 in this case. In view of the same, no material to show the involvement of the petitioner in the above complaint. The complaint is groundless and liable to be quashed.

10.The learned counsel for the petitioner further contended that the precondition for entertaining a complaint against 56 of FERA Act is that before institution of proceeding a notice must be issued as required under Section 61(2) of FERA. No such notice has been issued to the petitioner at any time before the institution of the complaint or even thereafter. Without issuance of notice under Section 61(2) the prosecution is not maintainable. The petitioner further states that the FERA itself has been repealed as on 31-05-2000 and in its place FEMA Foreign Exchange Management Act had come into act. Under FEMA contraventions similar to section 8(1) has been enacted under Section 3 of FEMA and under FEMA no imprisonment is contemplated as punishment for contraventions. All contraventions under FEMA are treated as mere contraventions giving raise to civil consequences and not to any criminal offence.

11.The petitioner further submits that the alleged occurrence took place on 15-07-1993 and now 18 years have lapsed and the petitioner is aged about 77 years as on 2011. The delay in failure to properly prosecute the complaint have gravely prejudiced the petitioner and the whole proceedings have become violation under Article 21 of the Constitution of India. Thus, the charge against the petitioner are groundless. Continuance of the proceedings is also violative of 21 of Constitution of India and therefore, the same is liable to be quashed.

12.The learned Senior counsel who appeared for petitioner has also raised a legal submission along with the other submissions stating that the only material which the respondent relies upon to proceed against the petitioner is the confession statement of Abdul Samath, A1 dated 16-07-1993 in C.C.No.1164 of 1994. The petitioner therein was shown as A3. Since the above case has been split up and a new C.C.No.1 of 2000 has been assigned, the respondent now cannot place reliance on the statement of the Abdul Samath dated 16-07-1993 given to the officials of the respondent, which is barred under Section 30 of the Evidence Act and the same is extracted here under :

> Section 30. "Consideration of proved confession affecting person making it and others jointly under trial for same offence"

When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

13.The learned counsel for the petitioner had placed reliance on the following citations reported in AIR 1998 SC 3258 in the case of SURESH BUDDERMAL KALANI @ APPU KALANI VS. STATE OF MAHARASHTRA and 2009(2) MLJ 740 in the case of RAJESH SALECHA VS. INTELLIGENCE OFFICER NARCOTIC CONTROL OFFICER BUREAU CHENNAI.

14.On the contrary, the respondent opposed the quash petition stating that the petitioner was aware of the earlier proceedings and he had successfully avoided the summons and the Non bailable warrant and the petitioner was unable to be apprehended. This situation was the petitioner’s own making and the petitioner cannot now take advantage of it by evading his appearance in C.C.No.1164 of 1994.

15.The learned Special Public Prosecutor reiterated the contentions in the complaint and stated that the petitioner had independent role in commission of the offence in C.C.No.1 of 2000 and hence, he has to be proceeded and prosecuted. Further he contended that this quash petition has been filed to short circuit the due process of law.

16.Considering the rival submissions and on going through the complaint and the materials placed, it is an admitted case in C.C.No.1164 of 1994 where the petitioner was not arrested, no statement obtained and no recovery was made. This complaint proceeds only on the confession statement of A1 Abdul Samath and no other material could be found. Further, it is an admitted case that C.C.No.1 of 2000 is an split up offshoot separate case from C.C.No.1164 of 1994. Hence, the contentions of the respondent are not sustainable.

17.In this background, it is a well settled principle that consideration of confession affecting person making it and others jointly under trial tried for the same offence, jointly. Thus, a bare reading of Section would reveal that a joint trial is a pre-requisite to rely on Section 30 of the Indian Evidence Act to draw inspiration from the confession statement of co-accused. In the case on hand, this petitioner is the single accused in C.C.No.1 of 2000 and as such no reliance could be placed on the statement of Abdul Samath. Further, as rightly contended by the learned Senior Counsel relying on AIR 1998 SC 3258 presumption can be drawn only from the facts and not from other presumptions by a process of probable and logical reasoning.

18.On examining the evidence available in the case on hand and on the principle laid down by the Constitutional Bench of the Hon''ble Supreme Court of India in the case of

HARICHARAN KURMI VS. STATE OF BIHAR reported in AIR 1964 SC 1184, it is found that there is no sufficient evidence to proceed against the petitioner. In such circumstances continuance of the proceedings as against the petitioner would be without any material, which would be only an exercise in futility.

19.On coming to the conclusion that the confession statement of Abdul Samath cannot be acted upon as per Section 30 of the Evidence Act and in the absence of any independent material available to proceed against the petitioner, this Court allows the Criminal Original Petition filed by the petitioner, consequently the C.C.No.1 of 2000 pending on the file of Additional Chief Metropolitan Magistrate Court, Economic Offences-II, Egmore, Chennai stands quashed. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

ah

To

1.The Additional Chief Metropolitan Magistrate,
Economic Offence-II,
Egmore, Chennai

2.The Chief Enforcement Officer,
Enforcement Directorate,
Sastri Bhavan,
Haddows Road,
Madras - 600 006.

3.The Public Prosecutor,
High Court, Madras.

+ 1 cc to Mr. N. Ramesh, Advocate Sr.46052
+ 1 cc to Mr. S. Ramachantran, Advocate SR.46324

Crl.O.P.No.29996 of 2011

(CS-IV)
EU(27/07/2018)