Rajesh Kumar Prasad Vs. The State of Jharkhand Through Enforcement Directorate

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Court : Jharkhand

Decided On : May-22-2015

Appellant : Rajesh Kumar Prasad

Respondent : The State of Jharkhand Through Enforcement Directorate

Judgement :

IN THE HIGH COURT OF JHARKHAND AT RANCHI Cr. M.P. No. 1605 of 2014 Rajesh Kumar Prasad @ Rajesh Kumar, S/o Dr. K.M.Prasad, R/o Ashok Nagar, PO Ashok Nagar, PS Argora, Ranchi, Jharkhand Petitioners Versus State of Jharkhand through Enforcement Directorate..................... Opp. Party Coram: The Honble Mr. Justice R.R.Prasad For the petitioner : Mr. Anil Kumar, Sr. Advocate Mr. Ashutosh Kr. Singh, Advocate For the E.D. : M/s. A.K.Das, Jyoti Nayan, Advocates O R D E R C.A.V. On 08/05/2015 Delivered on 22/05/2015 7/22.05.2015 The question, which does arise in this case is as to whether offences, punishment of which extend to seven years, under the Foreign Exchange Regulation Act, 1973 (in short FERA), being noncognizable in terms of Section 62 of the Act, are bailable or nonbailable? 2. Before adverting to the submissions, advanced on behalf of the parties, the facts giving rise to this case, needs to be taken notice of. 3. The case seems to be offshoot of fodder scam cases, which, under the direction of the Patna High Court as well as under the direction of Hon'ble Supreme Court, had been lodged against the number of accused persons including the father of this petitioner namely Dr. K.M.Prasad, wherein allegations had been made in almost all the cases that the accused persons in conspiracy with each other did withdraw the money from the different Treasuries in crores on the basis of fake allotment letters and fictitious supply orders. Against Dr. K.M.Prasad 14 cases were lodged, whereas against Kamlesh Kumar, S/o Dr. K.M.Prasad, 8 cases were lodged. During investigation of those cases, it could be revealed that Dr. K.M.Prasad has acquired huge immovable and movable properties in his name as well as in the name of his sons and daughters including the petitioner being the son of Dr. K.M.Prasad. Further, it had been found that Dr. K.M.Prasad had received foreign exchange remittances by way of foreign exchange instruments amounting to 3,15,000/ US Dollar and 1000/ Pounds during the year 199192 and those transactions were not genuine gift, rather it were in violation of the provision of Foreign Exchange Regulation Act, 1973 (in short FERA). During investigation, it also transpired that the petitioner had received 75,000/ US Doillars through foreign exchange remittances.

4. On such allegation, a complaint case bearing No. C III85/2002, was lodged against Dr. K.M.Prasad and his daughters and sons including this petitioner for contravention of provision of Section 9 (1)(1)(a) and 9 (1)(b)(i), read with Section 64 (2) of the Foreign Exchange Regulation Act, 1973. On filing of the complaint, cognizance of the offence punishable under Section 56 of the FERA Act, read with Sections 49(3) and 49(4) of the Foreign Exchange Management Act, 1999, was taken against the accused persons including this petitioner. Thereupon, warrant of arrest was issued against the petitioner.

5. Earlier the entire criminal proceedings of the said case was challenged before this Court in W.P.(Cr.) No. 85 of 2003, which was dismissed on 19/07/2012.

6. According to the petitioner, since nonbailable warrant of arrest has been issued taking the offences to be nonbailable, necessity arose to file this application for declaration as to whether offences under the FERA are bailable or nonbailable? That is how the matter has come up before this Court.

7. Mr. Anil Kumar, learned senior counsel appearing for the petitioner submits that the object of FERA, 1973, is to consolidate and amend the law regulating certain

payments dealing in foreign exchange and security transaction indirectly affecting the foreign exchange and the import and export of currency for the conservation of the foreign exchange resources of the Country and the proper utilization thereof in the interest of the economic development of the Country and, thereby, the main object of the legislature is to have proper regulation of the foreign exchange. Though the provision is there also for prosecution but that appears to be a secondary object of the legislature and, as such, the offences in terms of the provisions as contained in Section 62 of FERA Act, has been made noncognizable though punishment for some of the offences in terms of the provisions contained in Section 56 of the Act, extend to seven years but the Act is silent as to whether offence would be bailable or nonbailable? In absence of such provision being there under the said Act, one would be guided by first schedule of the Code indicating therein that most of the offences with certain exceptions under the Indian Penal Code kept in the category of non cognizable, have been shown to be bailable. However, PartII, which relates to the offences other than the IPC does classify that the offence punishable for more than seven years would be cognizable and nonbailable. But, so far provision of FERA is concerned, the offences have been made non cognizable, but the act is silent as to whether it is bailable or nonbailable.

8. Same issue did crop up before the Hon'ble Supreme Court in a case of Om Prakash & Others versus Union of India & Others [(2011) 14 SCC 1] as to whether offences under the Custom Act, 1962 and Central Excise Act, 1944, being noncognizable, are bailable or nonbailable? Their Lordships, after having regard to certain provisions of Central Excise Act, 1944, relating to the power to arrest as contained in Section 13; provisions relating to searches and arreest; disposal of persons arrested; procedure to be followed by the Officer Incharge; inquiry how to be made by the Central Excise Officer as contained in Sections 18, 19, 20 and 21 of the Central Excise Act, 1944 and also the provisions contained in Sections 41 and 155 of the Code of Criminal Procedure, were pleased to hold that the punishment though has been prescribed under the Excise Act up to seven years but those have been intended by the legislature to be bailable. On similar analogy, Their Lordships have also held the offences under the Custom Act to be bailable. While holding so, one of the considerations was there that the legislature have

made offence under both the Acts, noncognizable.

9. Similar is the situation here as has been stated above that some of the offences under Section 56 of the FERA are punishable for seven years but in terms of Section 62 it is noncognizable and, thereby, on the same analogy the offence under the FERA can be held to be bailable.

10. As against this, Mr. A.K.Das, learned counsel appearing for the Enforcement Directorate submits that it is true that the offences under the FERA in terms of the provisions as contained in Section 62 of the Act, is noncognizable, but provision of it does not indicate whether it would bailable or nonbailable. In absence of such provision being there, the issue would be governed by the provisions of the Code of Criminial Procedure. Section 2 (A) defines 'bailable offence', which offence as per said Section, is shown in the First Schedule as bailable or which is made bailable by any other law for the time being in force whereas 'nonbailable' offence means any other offence. The Second Part of the Schedule I is with respect to the offences other than IPC, being cognizable or noncognizable; bailable or non bailable. One of the categories of second part of Schedule I does stipulate that if the offence is punishable with imprisonment for three years and upwards but not morethan seven years, it would be cognizable and non bailable and, thereby, even if the offences under the Act, have been declared as noncognizable it, in terms of Second Part of the Schedule, would be non bailable. Further, it was submitted that the decision rendered in the case of Om Prakash & Others (supra), would not be applicable in this case as the provisions either under the Central Excise Act, 1944 or Custom Act, 1962, are not in paramateria of the provision as is there under the FERA, rather the provisions relating to arrest, powers of the police or the authority are quite different and, thereby, the decision rendered in the case of Om Prakash & Others (Supra), would not be applicable. 11. Thus, the contention, which has been made on behalf of the petitioner in reference to the provisions as contained in Section 62 of the FERA, declaring the offences under the FERA being noncognizable, be taken to be bailable keeping in view the main objective of the Act, never putting emphasis on the prosecution, rather emphasis is over the regulation of the Foreigh Exchange and, thereby, the offence being held to be bailable keeping in view that in a similar situation, the offences under the Central

Excise Act and the Custom Act, have been declared to be bailable by the Hon'ble Supreme Court in a case of Om Prakash & Others) (Supra).

12. On the other hand, submissions are there that the decision, referred to above, is not applicable as the provisions, on the basis of which the offences under those Acts have been held to be bailable, are not similar.

13. In that event, one before coming to any conclusion, needs to take relevant provisions of the Central Excise Act, 1944 and also the provisions under the FERA Act. Relevant provisions would be Section 9(a), 13, 18, 19, 20 and 21 of the Central Excise Act, which are hereinunder: 9(A) Certain offences to be noncognizable. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), offences under section 9 shall be deemed to be noncognizable within the meaning of that Code. (2) Any offence under this Chapter may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Central Excise on payment, by the person accused of the offence to the Central Government, of [such compounding amount and in such manner of compounding] as may be prescribed. Provided that nothing contained in this subsection shall apply to (a) a person who has been allowed to compound once in respect of any of the offences under the provisions of clause (a), (b), (bb), (bbb), (bbbb) or (c) of subsection (1) of Section 9; (b) a person who has been accused of committing an offence under this ACt which is also an offence under the Narcotic Drugs and Psyichotropic Substances Act, 1985 (61 of 1985); (c) a person who has been allowed to compound once in respect of any offence under this Chapter for goods of value exceeding repees one crore; (d) a person who has been convicted by the court under this Act on or after the 30th day of December, 2005. 13. Power to arrest. - Any Central Excise Officer not below the rank of Inspector of Central Excise may, with the prior approval of the Commissioner of Central Excise, arrest any person whom he has reason to believe to be liable to punishment under this Act or the rules made thereunder. 18. Searches and arrests how to be made. - All searches made under this Act or any rules made thereunder and all arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898 (5 of 1898), relating respectively to searches and arrests made under that Code. 19.

Disposal of persons arrested. - Every person arrested under this Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise Officer within a reasonable distance, to the officerincharge of the nearest police station. 20. Procedure to be followed by officerincharge of police station.- The officerincharge of a police station to whom any person is forwarded under section 19 shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate. 21. Inquiry how to be made by Central Excise Officers against arrested persons forwarded to them under section 19. - (1) When any person is forwarded under section 19 to a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to inquire into the charge against him. (2) For this purpose the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officerincharge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case : Provided that - (a) if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate; (b) if it appears to the Central Excise Officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise Officer may direct, to appear, if and when so required before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior.

14. Thus, I do find that Section 9(A) of the Central Excise Act, 1944 does prescribe for compounding of the offence, whereas Section 20 does prescribe about the procedure to be followed by the Officerincharge of the Police Station, wherein it has been stipulated that the Officerincharge of the police station to whom any person is forwarded under Section 19 shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate. 15 In that event, Their Lordships, after having regard of those provisions and also the provisions of the Code of Criminal Procedure

such as Section 2(a) speaking about the bailable offence, 2(c) defining a cognizable offence; 2(l) defining noncognizable offence and also the provisions of Section 155 of the Code of Criminal Procedure, were pleased to hold the offences under the Excise Act being bailable after observing as follows:

28. Having considered the various provisions of the Central Excise Act, 1944 and the Code of Criminal Procedure, which have been made applicable to the 1944 Act, we are of the view that the offences under the 1944 Act cannot be equated with offences under the Indian Penal Code which have been made non cognizable and nonbailable. In fact, in the Code itself exceptions have been carved out in respect of serious offences directed against the security of the country, which though noncognizable have been made nonbailable. 29. However, Subsection (2) of Section (A makes provision for compounding of all offences under Chapter II. Significantly, Chapter II of the 1944 Act deals with levy and collection of duty and offences under the said Act have been specified in Section 9, which provides that whoever commits any of the offences set out in Section 9, would be punishable in the manner indicated under Subsection

91) itself. What is even more significant is that Section 20 of the 1944 Act, which has been extracted hereinabove, provides that the OfficerinCharge of a police station to whom any person is forwarded under Section 19, shall (emphasis supplied) either admit him to bail to appear before the Magistrate having jurisdiction, or on his failure to provide bail, forward him in custody to such Magistrate. The said provision clearly indicates that offences under the Central Excise Act, as set out in Section 9 of the Act, are bailable, since the Officerin Charge of a police station has been mandated to grant bail to the person arrested and brought before him in terms of Section 19 of the Act. The decisions which have been cited by Mr. Parasaran deal mainly with powers of arrest under the Customs Act. The only cited decision which deals with the provisions of the Central Excise Act is the decision of the Division Bench of the Punjab & Haryana High Court in the case of Sunil Gupta Vs. Union of India. In the said case also, the emphasis is on search and arrest and the learned Judges in paragraph 22 of the judgment specifically indicated that the basic issue before the Bench was whether arrest without warrant was barred under the provisions of the 1944 Act and the

Courts had not occasion to look into the aspect as to whether the offences under the said Act were bailable or not.

30. In the circumstances, we are inclined to agree with Mr. Rohatgi that in view of the provisions of Sections 9 and 9 A read with Section 20 of the 1944 Act, offences under the Central Excise Act, 1944, besides being noncognizable, are also bailable, though not on the logic that all noncognizable offences are bailable, but in view of the aforesaid provisions of the 1944 /act, which indicate the offences under the said Act are bailable in nature.

16. Now, it is to be considered whether similar provisions are there under the Foreign Exchange Regulation Act, 1973, so as to come to the conclusion that the offences under the said Act, are bailable.

17. In this regard, one may take notice of the provisions as contained in Sections 35, 45, 56 and 62 of the said Act, which reads as follows:

35. Power to arrest

(1) If any officer of Enforcement authorised in this behalf by the Central Government, by general or special order, has reason to believe that any person in India or within the Indian customs waters has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested under subsection

(1) shall, without unnecessary delay, be taken to a magistrate.

(3) Where any officer of Enforcement has arrested any person under subsection (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officerincharge of a police station has, and is subject to, under the 1[Code of Criminal Procedure, 1973 (2 of 1974)]. 45 Power of police officer and other officers to enter, search, etc.

(1) Notwithstanding anything contained in the 1 [Code of Criminal Procedure, 1973 (2 of 1974), any police officer not below the rank of a Deputy Superintendent] of

Police, or any other officer of the Central Government or a State Government authorised by the Central Government in this behalf may enter any public place and search and arrest without warrant any person found therein who is reasonably suspected or having committed or of committing or of being about to commit a contravention of the provisions of subsection

(1) of section

8. Explanation.For the purposes of this subsection, the expression "public place" includes any public conveyance, any hotel, any shop or any other place intended for use by, or accessible to the public.

(2) Where any person is arrested under subsection

(1) by an officer other than a police officer, such officer shall, without unnecessary delay, take or send the person arrested before a magistrate having jurisdiction in the case or before the officerin charge of a police station. (3). The provisions of the 2[Code of Criminal Procedure, 1973 (2 of 1974)] shall, subject to the provisions of this section, apply, so far as may be, in relation to any entry, search or arrest, made under this section. (4). The provisions of this section shall have effect notwithstanding anything inconsistent, therewith contained in any other provision of this Act.

56. Offences and prosecutions.-

(1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes any of the provisions of this Act [other than section 13, clause (a) of subsection

(1) of 1[section 18, section 18A], clause (a) of subsection

(1) of section 19, subsection

(2) of section 44 and sections 57 and 58], or of any rule, direction or order made thereunder he shall, upon conviction by a court, be punishable,- (i) in the case of an offence the amount or value involved in which exceeds one lakh of rupees, 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; (ii) in any other case, with imprisonment for a term which may extend to three years or with fine or with both.

(2) If any person convicted of an offence under this Act [not being an offence under section 13 or clause (a) or subsection

(1) of 1[section 18 or section 18A] or clause (a) of subsection

(1) of section 19 or subsection

(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 subsection

(1) of 1[section 18 or section 18A] or clause (a) of subsection

(1) of section 19 or subsection

(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.

(3) Where a person having been convicted of an offence under this Act, [not being an offence under section 13 or clause (a) of subsection

(1) of 2[section 18 or section 18A] or clause (a) of sub section

(1) of section 19 or subsection

(2) of section 44 or section 57 or section 58], is again convicted of offence under this Act [not being an offence under section 13 or clause (a) of subsection

(1) of 1[section 18 or section 18A] or clause (a) of subsection

(1) of section 19 or subsection

(2) of section 44 or section 57 or section 58], the court by which such person is convicted may, in addition to any sentence which may be imposed on him under this section, by order, direct that that person shall not carry on such business as the court may specify, being a business which is likely to facilitate the commission of such offence for such period not exceeding three years, as may be specified by the court in the order.

(4) For the purposes of subsections

(1) and (2), the following shall not be considered as adequate and special reasons for awarding a sentence of imprisonment for a term of less than six months, namely:- (i)the fact that the accused has been convicted for the first time of an offence under this Act; (ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods in relation to such proceedings have been ordered to be confiscated or any other penal action has been taken against him for the same offence; (iii)the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party in the commission of the offence; (iv) the age of the accused.

(5) For the purposes of subsections

(1) and (2), the fact that an offence under this Act has caused no substantial harm to the general public or to any individual shall be an adequate and special reason for awarding a sentence of imprisonment for a term of less than six months.

(6) Nothing in 3[the proviso to section 188 of the Code of Criminal Procedure, 1973 (2 of 1974)] shall apply to any offence punishable under this section.

62. Certain offences to be noncognizable.Subject to the provisions of section 45 and notwithstanding anything contained in the 1[Code of Criminal Procedure, 1973 (2 of 1974)], an offence punishable under section 56 shall be deemed to be non cognizable within the meaning of that Code.

18. Thus, I do find that under the Act, no such provision is there like that of Sections 19 and 20 of the Central Excise Act, which do stipulate that when a

person is arrested under the Excise Act, he shall be forwarded to nearest Central Excise Officer if available within the reasonable distance or to Officerincharge of the nearest police station, who on being forwarded, may either admit him to bail to appear before the Magistrate having jurisdiction or in default of bail forward him in custody to such Magistrate. Whereas under FERA the power in terms of Section 45 of the FERA though has been given to police officer and other officer to make search and arrest when warrant but no provision is there that if arrest is affected by the officer other than the police officer, he is required to forward the accused to the officerincharge either for him to admit him on bail or to produce before the Magistrate, rather the provision as contained in Section 35 relating to the arrest, does stipulate that enforcement officer if has reason to believe that one has committed offence punishable under the Act, he may arrest such person and may inform him of the ground for such arrest and the said officer in terms of Subsection (3) of Section 35 will have same power as that of the officerincharge of the police station. That apart, no such provision is there which does speak about the compounding of the offence as is there under the Central Excise Act and Custom Act.

19. Under the circumstances, the offences under the Foreign Exchange Regulation Act, 1973 punishment of which extend to a period of seven years, cannot be taken to be bailable, rather in terms of the provision as referred to above and also in view of the Second part of Schedule I to Cr.P.C are held as nonbailable.

19. Accordingly, the question framed is answered.

20. Thus, this application stands disposed of. (R.R.Prasad, J) Mukund/cp.3