

Arjun Amla Vs. Enforcement Directorate

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Court : Delhi

Decided On : Mar-13-2009

Reported in : [2009]91SCL267(Delhi)

Judge : Mool Chand Garg, J.

Acts : [Foreign Exchange Management Act, 1999](#) - Sections 8(1), 8(2), 8(3), 8(4), 9(1), 9(1)(I), 18(2), 18(3), 49(3), 51, 56 and 68; Customs Act - Sections 108; Foreign Exchange Management Act, 1973 - Sections 8(1) and 8(2), 18(2) and 18(3); Code of Criminal Procedure (CrPC) - Sections 319

Appeal No. : Crl. Rev. P. 246/2007

Appellant : Arjun Amla

Respondent : Enforcement Directorate

Advocate for Def. : A.K. Vali, Adv.

Advocate for Pet/Ap. : R.K. Handoo, Adv

Judgement :

Mool Chand Garg, J.

1. In this case the petitioner is aggrieved from an order passed by the Learned ACMM dated 05.03.2007 passed in CC No. 763/01 which is a complaint filed by

the respondent against Esam Trading Company Limited and three others i.e. Abhishek Verma, Sandeep Puri and M.A. Khan on the basis of the allegations made by the complainant that those persons had violated provisions of Section 8(1), 8(2), 8(3), 8(4), 9(1)(a), 9(1)(l)(i), 18(2), 18(3) read with Sub-section (3) of Section 49 of [Foreign Exchange Management Act, 1999](#).

2. The name of the present petitioner was not added as an accused in the complaint though his name appeared in paragraph 23 & 35 of the complaint where some allegations are made against the petitioner in helping Abhishek Verma in procuring some foreign exchange on a premium. However, the fact remains that he was not implicated as an accused.

3. Learned Counsel appearing for the Enforcement Directorate submits that in fact a notice was issued to the petitioner calling upon him to show cause as to why he should not be prosecuted. After taking his reply on record the Enforcement Directorate was satisfied that it was not a case where he should also be prosecuted along with other accused persons and that is how his name was not added as an accused in the complaint but inadvertently certain references were there qua him in the complaint probably which was prepared before the receipt of the reply to the show cause notice issued to the petitioner. It is also fairly conceded by the learned Counsel appearing for the Enforcement Directorate that the petitioner was also exonerated in the adjudicatory proceeding as no penalty has been imposed upon him for having violated any of the provisions of the [Foreign Exchange Management Act, 1999](#).

4. The petitioner has filed this petition aggrieved from an order passed by the ACMM summoning him under Section 319 Cr.P.C. while framing charges against the persons who were named in the complaint despite the Departmental decision not to prosecute him and to exonerate him in the adjudicatory proceedings. It is also submitted by the petitioners that one of the accused, namely, Shri Sandeep Puri who was named in the complaint and against whom adjudicatory proceedings resulted in his exoneration filed a petition in this Court by way of a criminal revision against the order of the ACMM which was registered as CrI.REV.P. No. 326/07 and where a Learned Single Judge of this Court has taken a view that:

6. It cannot be seriously disputed by learned Counsel for the respondent that the present case would fall within the fourth category of cases as referred to above in Sunil Gulati's case (*supra*) inasmuch as the accused persons were exonerated by the competent authority/tribunal in the adjudication proceedings. If such exoneration in the departmental adjudication on a 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 the criminal proceedings. However, the position would be different if the exoneration in the adjudication proceedings were on merits and the allegations were found not to be substantiated with the concerned persons being found innocent of the same and in such eventuality, the criminal prosecution cannot be permitted to continue. The obvious reason for the same is that the criminal complaint is filed by the departmental authorities alleging violation or contravention of the provisions of the said Acts while simultaneously in the adjudication proceedings, there is a categorical and unambiguous finding that there is no such contravention of the provisions of the said Act. Thus, it was held that 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 in the departmental proceedings, it has been found that *ex facie* there was no such violation. The yardstick fixed was that the charges in the departmental proceedings as well as the criminal complaint must be of identical nature and the exoneration of the concerned persons in the departmental proceedings is on merits holding that there is no contravention of the provisions of the said Act.

7. There is no real dispute that the adjudication proceedings in the present case are not based on technical grounds or by giving benefit of doubt or that the merits have not been examined. The natural consequences, thus, is that the charges cannot be framed and the criminal prosecution cannot be permitted to continue against the petitioners once the adjudication proceedings on merits have been found in favour of the petitioners. Learned Counsel for the respondent, in fact, has been more than fair in accepting the said conclusion.

8. The petitions are accordingly allowed and the impugned orders framing charges are quashed and the petitioners are discharged.

5. It has been submitted by the petitioner that the aforesaid pronouncement by this Court squarely applies to the case of the petitioner also. In this regard he also referred to an earlier judgment delivered in the case of Anil Mahajan and Anr. v. UOI and Anr. in Crl.REV.P. No. 160/2007 decided on 05.02.2008 as well as the judgment of Sunil Gulati v. R.K. Vohra in Crl.M.C. No. 2173/2004 and Crl.M.C. 991/2004 decided on 20.12.2006 delivered by another Single Judge of this Court wherein also it was held:

14. However, what is relevant for us is the discussion in the judgment on one of the arguments which was raised by counsel for the appellant Bank. The contention was that criminal proceedings under Section 56 of the FERA Act could not be initiated before holding adjudication proceedings in terms of Section 51 of the FERA and if only satisfied, proceed with the prosecution under Section 56 of the said Act. This argument was on the premise that first there have to be findings in the adjudication proceedings about the violation of the provisions of FERA and imposition of penalty and only in the light of those findings in the adjudication for penalty that the Directorate of Enforcement could decide as to whether to impose or not to impose any further punishment under Section 56 of the Act and thus launch prosecution or not. This argument was countered on behalf of Union of India by arguing that adjudication and prosecution are two separate and distinct proceedings with distinct purposes and there was no bar either in FERA or in any other law to an adjudication and prosecution being launched simultaneously in respect of an alleged contravention of FERA. It was argued that for the violation of those provisions both civil and criminal action could be taken under the law criminal action was not wait till the outcome of the adjudication proceedings as even when penalty was imposed in the adjudication proceedings criminal action was still warranted in view of the provisions Section 56 of the FERA which commences with the words 'without prejudice to any award of penalty by the Adjudicating Officer under this Act.

15. The Court accepted the argument of the Government and held that a complaint under Section 56 of the FERA can never be said to be pre-mature if it is initiated before the award of the penalty under Section 51 of the Act and such proceedings being independent proceedings can be initiated during the pendency

of adjudication proceedings under Section 51 of the FERA. Reading of the judgment, thus, in the manner indicated above, would clearly show that what is decided by the Supreme Court is that since two proceedings are independent,' even when the adjudication proceedings are not over, the department was competent to launch criminal proceedings as well, alleging violation on the part of the accused person.

16. However, in the present case, we are not concerned with this question. A fine distinction of the issue involved in the case before the Supreme Court and before us in the present case has to be borne in mind. No doubt, as per the aforesaid judgment of the Supreme Court, adjudication proceedings as well as criminal proceedings can be initiated simultaneously. In fact, for initiating criminal proceedings one does not have to wait for the outcome of adjudication proceedings. Therefore, filing of the criminal proceedings by the department against the petitioner in the instant case cannot be termed as bad in law. However, the question with which we are concerned is the impact of the findings which is recorded on the culmination of adjudication proceedings, on criminal adjudication. To put it in simple words, the issue is, if in the adjudication proceedings the petitioner is exonerated, whether on that basis the petitioner can state that criminal proceedings should also be dropped. Case of the petitioner is that since it is held by the adjudicating authority itself that the petitioner has not committed any violation of FERA provisions, same authority cannot be allowed to continue the criminal proceedings.

6. After making the aforesaid observations, the learned Single Judge drew the following conclusions:

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 resjudicata 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 that 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 in so far 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/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 of 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.

7. Since in that case the exoneration was not on merits, the Court observed:

29. It is clear from the above that in the departmental proceedings, the petitioner is not exonerated on merits and it would still be open to the criminal court as to whether the statement of Sunil Gulati under Section 108 of the Customs Act should be believed or not. Therefore the impugned order of the learned trial court is valid and proper, though the discussion on the issue namely relevance of adjudication proceedings on the criminal cases may not be fully correct which is stated by the learned trial court in the earlier part of the order. Since the conclusion of the learned trial court in the impugned order is otherwise proper and meets the legal test, this petition is devoid of merits and is dismissed.

8. Relying upon the judgment in Sandeep Puri's case and the judgment as referred to above, it has been submitted by the petitioner that while the respondents are well within their rights to have civil as well as criminal proceedings in a given case but where the exoneration of the incumbent in adjudicatory proceedings is on merits there is no question of prosecuting him on criminal side. This position has been further clarified in Sandeep Puri's case in the peculiar facts of that case and, thus, the present case where the petitioner has already been exonerated of the penalty proceedings and the Department himself had decided not to prosecute the petitioner the order passed by the ACMM dated 05.03.2007 deserves to be set aside.

9. It is fairly conceded by the learned Counsel for the respondent that in this case at the time when the complaint was filed against the other accused persons when a reference was also available against the petitioner in the said complaint, neither a reply to the show cause notice was given to him for initiating the criminal proceedings nor adjudication proceedings for levying the penalty has finally been decided. However, before the order under Section 319 Cr.P.C. was passed and after the complaint was filed the show cause notice given to the petitioner under Section 61(2) was recalled and adjudicatory proceedings also came to an end against him wherein a decision was taken that no penalty is to be levied against the petitioner.

10. The petitioner has also referred to adjudication order which is available at page 92 of the paper book. This order goes to show that with respect to the alleged

contravention of the offences for which the complaint has been filed in this case against the other accused persons, the Department has taken a view that no case is made out against the present petitioner. Relevant observations made in this regard appears in para 62 of the said order which is reproduced here under:

62. As regards the proceedings against Sh. Sandeep Puri against whom the charges of Sections 8(1) and 8(2) and Sections 18(2) & 18(3) of the FERA, 1973 were invoked in terms of Section 68 of the Act, the said proceedings are dropped as the charges were not proved as discussed hereinabove. Similarly, the proceedings against Sh. Arjun Amla for contravention of Section 8(1) of the FERA, 1973 are also dropped since the charge was not proved as per the discussions in the preceding paragraphs.

63. The penalties imposed as above should be deposited in the office of the Deputy Director, Enforcement Directorate, Delhi Zonal office, 10-A, Jam Nagar House, Akbar Road, New Delhi in the form of Demand Draft to be drawn in favour of the pay and Accounts officer, Department of Revenue, New Delhi, within 45 days of the receipt of this order.

11. The learned Counsel for the respondents submits that the earlier notice which is also known as opportunity notice with respect to the question as to whether criminal proceedings should be initiated against the petitioner or not was given much earlier i.e. on 03.05.2002 which document is also available at page 73-87 and was issued on 03.05.2002. This notice was replied to by the petitioner vide his reply dated 13.05.2001 which is at page 88 and based upon the aforesaid the Department passed the order dated 10.05.2005.

12. Since no complaint was filed till 31.05.2002 which was the last date till when complaint could be filed, this goes to show that the Department decided not to prosecute him. This decision is also available on the paper book. Since the petitioner was not present before the learned ACMM when the impugned order was passed it was not possible for him to bring all these facts to the notice of the learned ACMM even though Shri Sandeep Puri another co-accused who was arrayed as an accused brought to the notice of learned ACMM the judgment delivered by this Court in the case of Anil Mahajan and Shri Sunil Gulati but the

ACMM did not agree with that proposition. However this judgment in Sandeep Puri's case (supra) as mentioned in paragraph 4 of this judgment has been delivered subsequent to the order passed by the ACMM under Section 319 Cr.P.C.

13. Now the question for consideration before this Court is as to whether the petitioner could be still prosecuted on the basis of the order passed by the ACMM under Section 319 Cr.P.C. despite a decision taken by the respondents not to prosecute the petitioner and his exoneration in the Departmental proceedings.

14. The submission of the Learned Counsel for the petitioner are:

i) As per the complaint he was not an accused

ii) He has been added as a party under 319 Cr.P.C. even though no such case was made out

iii) Adjudication proceedings which have taken place exonerates him from the charge

iv) In the earlier judgments it was held that once adjudication proceedings exonerates the persons similarly situated then criminal proceedings could not go on. The ACMM took a different view but her view in the case of Sandeep Puri has been upset by this High Court in a revision filed against the order framing of charge.

v) At the time when the order was passed petitioner was not before the Court and, therefore, could not make his submissions but now that a judgment has been given in Sandeep Puri's case subsequent to the order passing of the charge and it is not a case where even situation warrants passing of order under Section 319 Cr.P.C and further because the respondents themselves decided not to initiate the proceedings with criminal side against the petitioner after receiving his reply it is a fit case where proceedings should go on. There was no notice under 61(2) for the purpose of the prosecution of the petitioner in respect of the offences for which an order under 319 Cr.P.C has been passed.

15. In view of the aforesaid and in view of the judgment delivered by Learned Judge of this Court in Sandeep Puri's case subsequent to the passing of the aforesaid order where her order framing of the charges was questioned also on the ground that once the petitioner Sandeep Puri was exonerated of an adjudicatory proceedings, no purpose would have been served to prosecute him any further. This is also the position in this case.

16. Even though Hon'ble Supreme Court in Standard Chartered Bank (supra) also followed in Sunil Gulati's case has laid down that the two proceedings i.e. civil and criminal can be taken together but in the present case when the Department itself decided not to take any proceedings against the petitioner for his criminal prosecution and in view of the legal position as enunciated by this Court in the judgment delivered in the case of Sandeep Puri, Anil Mahajan and Sunil Gulati and there being no contrary view put forward by the respondents who are not even seriously opposing this petition as they neither moved an application under Section 319 Cr.P.C. nor have any occasion to support such review before the learned ACMM or to oppose the same. The order dated 05.03.2007 passed by the ACMM summoning the petitioner cannot be sustained.

17. In view of the aforesaid, this Court is convinced that no purpose will be served to permit prosecution of the petitioner as the entire process will be an abuse of the process of the Court. More so when there would be no occasion to hold him guilty in the facts of this case. Thus, the petition is allowed and the order dated 05.03.2007 passed against the petitioner under Section 319 Cr.P.C. is set aside. His bail bond, if any, are discharged.