

C. Sampath Kumar and Others Vs. Enforcement Officer

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SooperKanoon Citation : sooperkanoon.com/780893

Court : Chennai

Decided On : Aug-01-1997

Reported in : [1999]95CompCas602(Mad); 1999(105)ELT563(Mad)

Judge : T. Jayarama Chouta , J.

Acts : [Foreign Exchange Regulation Act, 1973](#) - Sections 40, 40(3), 56 and 56(1)

Appeal No. : Crl. O.P. Nos. 5468 and 5629 of 1996 and Crl. M.P. Nos. 2511 and 2578 of 1996

Appellant : C. Sampath Kumar and Others

Respondent : Enforcement Officer

Advocate for Def. : T. Gopalan, Adv.

Advocate for Pet/Ap. : N. Jothi, Adv.

Judgement :

T. Jayarama Chouta, J.

1. In these two criminal original petitions, filed under section 482 of the Code of Criminal Procedure, the petitioners have prayed for a direction to the respondent to withhold further proceedings in C.C. No. 60 of 1996 and C.C. No. 61 of 1996 on the files of the Additional Chief Metropolitan Magistrate (E.O.I), Egmore, and the

Additional Chief Metropolitan Magistrate (E.O. II), Egmore, Madras.

2. The necessary facts for the purpose of disposal of these two cases are these : The respondent preferred a complaint against the petitioners under section 56(1)(ii) of the [Foreign Exchange Regulation Act, 1973](#) (hereinafter shortly referred to as 'the Act'). According to the respondent, the petitioners have committed an offence in respect of section 40(3) of the Act, the violation of the same is punishable under section 56(1)(ii) of the Act. The said proceedings have been questioned in these petitions on a number of grounds. One of the grounds raised by the petitioners is that on the very reading of the provisions of the Act, sections 40(3) and 56(1)(ii) of the Act, the criminal cases filed against the petitioners are not maintainable.

3. According to the petitioners, a reading of the above provision only illustrates that the person summoned shall attend and shall state the truth upon the subject and produce the documents. The reading of the above sub-section, nowhere whispers for a prosecution under section 56(1)(ii) of the Act. Further, section 40(3) of the Act does not state what will be the consequences if a person does not attend except stating that he shall attend and he should attend as per the summons and give a statement or produce the documents. Sub-section (ii) of section 56(1) speaks about the punishment only. Further, the reading of section 56(1)(ii) of the Act measures the offence in terms and extent of the value of money involved in the contravention. This section deals with higher punishment and lesser punishment based upon pecuniary involvement and does not refer to any contravention or non-compliance with section 40(3) of the Act. The petitioners have further stated that they have invoked their constitutional remedies by filing a writ petition on receipt of the first summons and on the disposal of the said writ petition, they preferred writ appeals before this court and after the dismissal of the writ appeals, they have approached the Supreme Court under article 133 of the Constitution of India by filing special leave petition which are pending consideration before the said court. Under those circumstances, the respondent is not justified in lodging a complaint for non-compliance with the provisions of section 40(3) of the Act. The initiation of the said proceedings will have an implication that the rights of the petitioners are protected till the finality has been established, since the right of appeal is a vested

right to be exercised upon every adverse order apart from being a substantive right to enter the superior court which is made available to a person.

4. On behalf of the respondent, counter has been filed denying all the allegations contained in the affidavits of the petitioners except those which are specifically admitted by the respondent.

5. He has submitted that in respect of an investigation under the Act, the petitioners were issued the summons directing them to comply with the directions given in those summons and in the said summons, it has been specifically mentioned that non-compliance with these summons is an offence punishable under sections 50 and 56 of the said Act. It is further submitted that summons were issued on February 12, 1996, for the appearance of the petitioners on February 16, 1996, but they have failed to appear on that date. Their residences were searched on February 19, 1996, and certain documents were seized, even during the course of the search, they were not available. Hence, summons were issued again to the petitioners on February 19, 1996, for their appearance on February 19, 1996, at 3.00 p.m. Since the petitioners did not appear, one more summons for their appearance was also served under rule 3(c) of the Rules. In spite of appearing before the respondent, the petitioners filed writ petitions and also anticipatory bail applications before this court. In spite of a number of summons being issued to the petitioners, since they did not respond to the said summons and failed to appear in spite of various summons, complaints under section 56 of the Act were filed for non-compliance with summons before the competent courts. Finally, the petitioners appeared before the respondent and gave their statements.

6. The respondent has further stated that incriminating documents were seized and taken over under section 33(2) of the Act from the Income-tax, Department and the seizure of foreign exchange were all the materials available with the Department at the time of requisition of summoning the said petitioners who with a view to defeat the very purpose and scope of the Act failed to comply with the direction under summons and thereby contravened section 40(3) read with section 56(1)(ii) of the Act. It is the specific case of the respondent that by failing to comply

with the summons, the petitioners have failed to comply with the directions of the Enforcement Officer and hence the prosecution case was laid.

7. Section 56 of the Act is a punishment section and other section found in the Act deals with offences/powers of officers and, therefore, for contravention of the provisions of the Act, the main section 56 of the Act is attracted. The non-compliance with summons is a non-compliance with a direction/order/rule/condition under section 40 of the Act and in any event, the same is not to be measured vis-a-vis monetary/pecuniary extent in so far as section 56 of the Act is concerned. The contravention under the Act are given under various sections/provisions of the Foreign Exchange Regulation Act and as such, the punishment has not been stipulated in each and every section of the [Foreign Exchange Regulation Act, 1973](#). For punishment under the Foreign Exchange Regulation Act of any of the provisions of the Act, one has to look into section 56 only, except those sections, which are clearly excluded under section 56 of the Act. It is not correct for the petitioners to contend that for invoking section 56, there should be a monetary contravention and the petitioners cannot interpret the section to suit their convenience and the non-compliance is a contravention within the meaning of the Act and the punishment section is section 56 of the Act. The very fact that a number of summons were issued would only go to show the defiant attitude of the petitioners towards the summons and the same cannot be used to their advantage at the cost of the investigation which was suffering.

8. It is further stated that pursuing legal remedies in a court of law as stated by the petitioners are self-serving factors, subject to proof, to be reckoned on evidence, in trial and as such, the same cannot be urged as a criteria/ground to support the stand of the petitioners before this court by invoking the inherent jurisdiction of the court under section 482 of the Code of Criminal Procedure. The respondent has further stated that the inherent power of the court is exercisable only in the rarest of rare cases and the same may not be exercised in this case involving such issues as the complaints are before the Economic Offences Court and involve taking evidence/trial before the said court. On these grounds, the respondent has prayed this court to dismiss the criminal original petitions.

9. Heard Mr. N. Jothi, learned counsel on behalf of the petitioners and Mr. V. T. Gopalan, learned senior counsel appearing on behalf of Mr. K. Kumar (FERA), for the respondent. They raised a number of contentions and cited a number of decisions in support of their contentions. I have carefully considered those contentions and the relevant decisions which have been cited before me.

10. The first contention raised by learned counsel for the petitioners was that when the petitioners are pursuing their legal remedies in the competent court of law, the respondent was not justified in lodging a complaint for an offence under section 40(3) of the Act punishable under section 56(1)(ii) of the Act. Elaborating this contention, learned counsel submitted that special leave petitions challenging the issue of summons under section 40 of the Act are pending before the Supreme Court and, hence, the respondent is not justified in filing the above complaint. In support of his contention, he has placed reliance on the decision in *Garikapati Veeraya v. Subbiah Choudhry*, : [1957]1SCR488 , in which paragraph 23 reads as as follows (page 553) :

'From the decisions cited above the following principles, clearly emerge :

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.'

11. However, learned counsel, Mr. V. T. Gopalan, countering the said contention submitted before me that mere pendency of the matter, unless there being an order of stay or an appropriate order from the competent court will not prohibit the party from proceeding with the legal remedy which is available to it. He has cited a decision of the Supreme Court in *N. Rathinasabapathy v. K. S. Palaniappa Kandar* : 1995 CriLJ3622 , and placed reliance on the following passage found at page 206 :

'There is no doubt that the operation of the injunction was limited to three weeks. It is nobody's case that it was extended thereafter. The appellants showed respect to the order of the court by stopping the construction as soon as the injunction order was received. After the expiry of three weeks when they did not receive any order continuing the injunction they proceeded with the construction. As such it is difficult to understand how it can be said that the appellants had shown disrespect to the order passed by the court. On the contrary, they showed respect by not proceeding with the construction as soon as the injunction order was received and they continued with the construction only after its period expired.'

12. Since there is no order of stay from the Supreme Court in the so called special leave petitions, I see no force in the contention for learned counsel for the petitioner and accordingly, this contention is negatived.

13. The next contention of learned counsel for the petitioner is that non-compliance with section 40(3) of the Act is not an offence under section 56 of the Act and hence, the respondent was not justified in filing the said complaints and the courts were not justified in entertaining the said complaints and issuing summons to the petitioners. Now, let me consider this contention of learned counsel for the petitioner. It would be appropriate here to examine both the provisions of sections 40 and 56 of the Act. Section 40 of the Act reads as follows :

'40. Power to summon persons to give evidence and produce documents. - (1) Any Gazetted 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) A summons to produce documents may be for the production of certain specified documents or for the production of all documents of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by authorised 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.

(4) Every such investigation or proceeding as aforesaid shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code, 1860 (45 of 1860).'

14. Similarly, section 56 of the Act is to the following effect :

'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 sub-section (1) of section 18 (section 18A) clause (a) of sub-section (1) of section 19, sub-section (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.'

The rest of the provision is not necessary for our purpose.

Learned counsel submitted that not attending either in person or by authorised agent in pursuance of a summon issued by a Gazetted Officer of Enforcement is not an offence under section 56 of the Act since section 56 of the Act speaks about the offence in terms of the extent of the value of money involved in the contravention. Since section 40(3) of the Act does not mention about any monetary value, the courts were not justified in taking cognizance of the offence and issuing summons to the petitioners. In this connection, learned counsel for the petitioner relied upon a decision of the Kerala High Court in *Itty v. Assistant Director* [1992] 58 EDT 172 and placed reliance on the following passage at paragraph 6 :

'According to Webster's Dictionary, 'contravention' is : 'the act of contravening, violating or transgressing, violation, opposition'. In Random House Dictionary of the English Language, College Edition, 'contravention' means :

'an act of contravening, action counter to something, violation.

In Black's Law Dictionary, the word 'contravention' is explained as :

'When a person has been summoned to appear by a competent authority, it means that he has been directed/ordered to appear before him.' Summons has to be obeyed but disobedience is not contravention which is a matter coming under section 174 of the Indian Penal Code. In my view, it is a legal fallacy to say that the failure to obey the summons as per section 40(1) of the Act is a contravention of the provisions of the Act, rule direction or order. This is also clear from the fact that section 56 of the Act mentions about offences with particular reference to amount or value involved in them. It may not be possible to say that the offences

committed by the petitioner could be computed in terms of value or amount, to attract section 56 of the Act. In terms section 56 could not apply to a case coming under section 40 of the Act. Indeed, if it is held otherwise, there is no doubt that the consequences would be serious. It will be possible for over zealous officers to institute ill-motivated and vindictive prosecutions to harass innocent persons.'

15. Mr. V. T. Gopalan, in this connection invited my attention to an unreported decision of this court in M. P. Jain v. Assistant Director (Crl. O.P. No. 312 of 1992), which was rendered at the admission stage. In the said decision, the learned single judge of this court in paragraphs 9 and 10 held thus :

'A survey of the provisions, as extracted above, does indicate the power of any Gazetted Officer of the Enforcement Directorate 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 the FERA and the person so summoned shall be bound to attend either in person or by authorised agent, unless exception under section 132 of the Code of Civil Procedure, 1908, shall be applicable to any requisition for personal appearance.

In the case on hand, there is no pale of controversy as to the various summons having been issued by a Gazetted Officer of the Enforcement Directorate. The terms and tenor of the summons so issued do indicate the purpose for which they had been issued. It is also clear from the materials disclosed by the complaint that the petitioner-accused did not at all comply with the summons either by producing all the documents required to be produced or by making his personal appearance before the Enforcement Directorate as required to be done in the summons issued. For committing refraction or violation of the salient provisions adumbrated under sub-section (3) of section 40 of the FERA, no criteria have been prescribed and the mere fact of non-compliance with the summons issued itself constitutes simpliciter an offence punishable under section 56(1)(ii) of the FERA. In such state of affairs, to say that the allegations in the complaint, on their face value, make out absolutely no case or the complaint does not disclose the essential ingredients of an offence under the FERA cannot at all be countenanced.'

16. Placing reliance on the said decision, learned counsel submitted that this court has to follow the decision of this court ignoring the decision of the Kerala High Court. According to the learned senior counsel, the decision of the Kerala High Court is not binding on this court and it may have only persuasive value and the decision rendered by this court is binding on this court. However, learned counsel for the petitioners pointed out that this decision was rendered by this court not at the time of disposal of the matter but at the admission stage without issuing notice to the other side and hence, it is not binding on the other learned judges. To substantiate this contention, he invited my attention to a decision of this court regarding the binding force in *Abdul Malick v. Collector of Dharmapuri* : (1968)1MLJ9 and quoted the following passage for reference (page 13) :

'Whatever may be the value of a judgment rendered without hearing arguments in full when parties are present, judgment rendered without notice or in the absence of the contesting party will not be entitled to any weight as a precedent. In cases when petitions are dismissed at the admission stage, the respondent is not present and has no opportunity to put forth his case. Admittedly, whatever observations may be made they will not bind the respondent and the judgment cannot be a precedent, because it is a judgment rendered on hearing only one side. It will be a judgment per incuriam. It may be that the member of the Board was not aware of this position of law. But the fact that he has relied on the observations in the two decisions, which have no force as precedents is an error apparent on the face of the record. The only decision rendered after hearing both sides which was quoted before the Board was the one in *Panjathi Sambandam v. A. V. Nataraja Mudaliar* (W.P. No. 1848 of 1966), and the Board ought to have followed that decision.'

17. Mr. Jothi, learned counsel, further invited my attention to the definition of 'offence' which is found in section 3(38) of the General Clauses Act, 1897, which reads thus :

'Offence' shall mean any act or, omission made punishable by any law for the time being in force'.

18. He has invited my attention to a decision of the Allahabad High Court in *Raj Narain Singh v. Atmaram Govind*, : AIR1954 All319 , and, at page 334, this is what the court has observed :

'Bearing these considerations in mind, I am driven to the conclusion that taking the article as a whole, the context indicates that the word 'offence' as used in the article contemplates a criminal offence and not all types of offences. In any case, for an 'offence' there has to be an act or omission made punishable by any law for the time being in force.'

19. Learned counsel also further pointed out that if there is any ambiguity in considering the sections, such ambiguity should be resolved in favour of the person who would be liable to the penalty. He placed reliance on the decision of the Supreme Court in *Isher Das v. State of Punjab*, : 1972 CriLJ874 , learned counsel cited the following passage at page 1299 :

'Assuming that there was reasonable doubt or ambiguity, the principle to be applied in construing a penal Act is that such doubt or ambiguity should be resolved in favour of the person who would be liable to the penalty (see Maxwell on the Interpretation of Statutes, page 239, 12th edition)'

20. The next decision on which reliance has been placed by learned counsel is a decision in *Nasiruddin v. State Transport Appellate Tribunal* : [1976]1SCR505 . This is what the Supreme Court has observed :

'(i) If the precise words used are plain and unambiguous, they are bound to be construed in their ordinary sense. The mere fact that the results of a statute may be unjust does not entitle a court to refuse to give it effect. If there are two different interpretations of the words in an Act, the court will adopt that which is just, reasonable and sensible rather than that which is none of those things.'

21. In *A. R. Antulay v. R. S. Nayah*, : 1984 CriLJ647 , the Supreme Court observed in paragraph 18 as follows (page 729) :

'It is a well-established canon of construction that the court should read the section as it is and cannot rewrite it to suit its convenience; nor does any canon of

construction permit the court to read the section in such manner as to render it to some extent otiose. Section 8(1) says that the Special judge shall take cognizance of an offence and shall not take it on commitment of the accused. The Legislature provided for both the positive and the negative. It positively conferred power on the Special judge to take cognizance of offences and it negatively removed any concept of commitment. It is not possible, therefore, to read section 8(1) as canvassed on behalf of the appellant that cognizance can only be taken upon a police report and any other view will render the safeguard under section 5-A illusory.'

22. Mr. V. T. Gopalan, learned senior counsel appearing for the respondent submitted that the FERA being a self-contained Act, one need not go to any other Act and the non-compliance with section 40(3) of the Act is punishable under section 56 of the same Act. According to him, section 40 of the Act is a pivotal provision and if the said section is not complied with by the person, the investigation will be cut at the initial stage and the entire provisions of the Act will fall down. He has further submitted that in view of the scope and object of the said section 40 of the Act, a contravention of any direction or order as contemplated under the said section is punishable under section 56(1)(ii) of the said Act. In this connection, he has invited my attention to a decision of the Supreme Court in *Central Bureau of Investigation v. State of Rajasthan* : 1996 CriLJ3480 .

23. On the other hand, learned counsel for the petitioner submitted that the FERA is not a self-contained code. There are no provisions in the Act for issuing notice, for provision to apply for grant of bail, mode of according evidence and hence, it cannot be said that it is a self-contained Act. He placed reliance on a decision of the Andhra Pradesh High Court *N. S. R. Krishna Prasad v. Directorate of Enforcement* L. B. K. Market [1992] CLJ 1888 to show that while recording the statement of a person, the authority can follow the procedure laid down under section 164 of the Code of Criminal Procedure which means the Act is not a self contained Act. He has also invited my attention to a decision of the Delhi High Court in *Deepak Mahajan v. Director of Enforcement* [1992] 75 Comp Cas 514 and cited the following passage (pages 542, 545) :

'There is no provision made in the Customs Act laying down the procedure which may be followed for obtaining the order of the Magistrate for detaining such an arrested person in any of the custody. The customs officers and enforcement officers have advisedly not been given that power under section 104 of the Customs Act or under section 35 of the FERA as they are not to investigate into commission of offence triable by a Magistrate, though they have been given a limited power of the Officer-in-charge of a police station to grant bail or not to grant bail and nothing more. The arrest and detention by them is only for the purpose of holding an effective inquiry under the Customs Act or the FERA.'

24. He also took me to paragraphs 50, 55 127(1) and 131 of the decision reported in Directorate of Enforcement v. Deepak Mahajan, : 1994 CriLJ2269 to show that the Act is not a self-contained code.

25. Learned counsel invited my attention to the definition of 'foreign exchange' which is found in section 2(h) of the Act, which reads as follows :

"foreign exchange' means foreign currency and includes -

(i) all deposits, credits and balances payable in any foreign currency, and any drafts, traveller's cheques, letters of credit and bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency;

(ii) any instrument payable, at the option of the drawee or holder thereof or any other party thereto, either in Indian currency or in foreign currency or partly in one and partly in the other.'

26. Mr. V. T. Gopalan, learned senior counsel submitted that non-compliance with the provision under section 40(3) of the Act will be an offence under section 56(1)(ii) of the Act and hence, the respondent was justified in filing the complaints and the court in entertaining the said complaints. He further submitted that in the decision of the Kerala High Court, cited on behalf of the petitioner, the court has not considered the provision of section 56(1)(ii) of the Act and, hence, the said decision could be distinguished. According to the learned senior counsel, the decision of the Madras High Court, even though rendered at the stage of

admission, fully covers the present case. He submitted that 'in any other case' found in section 56(1)(ii) of the Act should have reference to matters under the provisions of section 40 of the Act and other provisions of the Act. He submitted that if Any person contravenes any of the provisions of this Act, or of any rule, direction or order made thereunder, he shall be liable for punishment.

27. Let me now examine the rival contentions. Section 40 of the Act speaks about the power of any Gazetted Officer of Enforcement to summon persons to give evidence and produce documents. The said section does not say what will happen if a person does not comply with the said direction. Section 56 of the Act speaks about offences and prosecutions. It says 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 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 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 and with fine.

28. From this provision, it is clear that it speaks about offences with particular reference to the amount or value in them. It may not be possible to say that the offences committed by, the present petitioners could be computed in terms of value or amount to attract section 56(1)(i) of the Act. Now, let me consider whether the act committed by the petitioners will come within the purview of section 56(1)(ii) of the Act as argued by the learned senior counsel on behalf of the respondent.

Section 56(1)(ii) of the Act reads 'in any other case, with imprisonment for a term which may extend to three years or with fine or with both'. According to me, 'in any other case' found in section 56(1)(ii) of the Act should be read in consonance with the provision of section 56(1)(i) of the Act. When section 56(1)(i) speaks about the offence, the amount or value involved in which exceeds Rs. 1 lakh, we have to read in section 56(1)(ii) of the Act in any other case as a case where the offence the amount or value involved does not exceed Rs. 1 lakh. Hence, in both these provisions, the offence is computed in terms of the value or amount. Therefore,

according to me, the entire section 56 of the Act is identified and substantiated only in terms of the extent and value of the money involved in the offence. It will be difficult to accept the argument of the learned senior counsel on behalf of the respondent that 'in any other case' means cases which fall within the purview of the Act irrespective of the extent or value of the money and section 40(3) of the Act is one such offence which will come within the purview of section 56(1)(ii) of the Act. I am in full agreement with the decision of the Kerala High Court in *Itty v. Assistant Director* : 1994ECR516(Kerala) . Since the judgment cited by learned senior counsel for the respondent is a judgment rendered at the admission stage without issuing notice to the either side, the said decision has no binding force as held by the decision in *Abdul Malick v. Collector of Dharmapuri* : (1968)1MLJ9 . Hence, I am of the opinion that the contravention of the provisions of section 40 of the Act is not an offence which will falls within the purview of section 56 of the Act.

29. Accordingly, for the reasons stated above, I allow these criminal original petitions and quash the proceedings pending in C.C. Nos. 60 of 1996 and 61 of 1996 on the file of the Additional Chief Metropolitan Magistrate (E. O.I.), Egmore, and Additional Chief Metropolitan Magistrate (E.O. II), Egmore, Madras-8.