



2024:DHC:1464



* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 15.01.2024

Pronounced on: 26.02.2024

+ **CRL.M.C. 3732/2011**

ABHISHEK VERMA

..... Petitioner

Through: Mr.Maninder Singh, Sr. Adv.
with Mr.Dinhar Takiar,
Ms.Aerita Vats, Ms.Simran
Chawdhary, Mr.Yash Singh,
Advs.

versus

ENFORCEMENT DIRECTORATE

..... Respondent

Through: Mr.Rajat Nair, SPP with
Mr.Imon Bhattacharya, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. This petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 (in short, 'CrPC') praying for the following relief:

“(a) Quash the order on charge and charge dated 16.06.2007 and 03.08.2007 respectively passed by the LD. ACMM in the matter of Enforcement v. M/s ESAM India Limited in CC.NO 91/1/2002 to the extent that the petitioner is not representing M/s ESAM India Ltd.”

2. The petitioner is aggrieved of the order dated 16.06.2007 passed by the learned Additional Chief Metropolitan Magistrate, New Delhi (hereinafter referred to as 'ACMM') passed in CC No. 91/1/2002 titled ***Enforcement v. M/s Esam India Ltd. etc.***, insofar as it holds as



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under:

"I hereby hold that prima facie the accused no. 1 Esam India Limited through the accused no. 2 Abhishek Verma who was the Chairman of the Accused no.1 Company had contravened the provisions of Section for the alleged violations u/s. 8 (3), 8(4) and Section 68 of FERA for which a charge u/s. 56 of FERA is required to be framed."

3. The petitioner is also aggrieved of the Impugned Order dated 03.08.2007, whereby the following charge has been framed:

"I, Sh. Ajay Kumar Kuhar, ACMM, New Delhi do hereby charge you accused M/s. Eassm India Ltd. (Now changed as AltaVista (India) Ltd.) through its Chairman Abhishek Verma and Abhishek Verman, Chairman of M/s. Essam India Ltd. (now changed as altavista (India) ltd. as under:-

That in the year 1997 by acquiring foreign exchange to the tune of US dollar 3,40,000/- you, a company person other than an authorized dealer or money changer for the particular purpose of importing computer system from M/s. European Capital Ltd. Sharja UAE and by failing to import the said goods of value of representing the foreign exchange so acquired without any permission of RBI you M/s. Essam India Ltd. thereby committed offences under section 8(3) read with 8(4) of FERA 1973 punishable u/s 56 of FERA, and you Abhishek Verma Chairman of M/s. Essam India Ltd. Thereby committed offences under section 8(3) read with 8(4) of FERA 1973 and also read with section 68 of FERA 1973 punishable u/s 56 of FERA, 1973 within my cognizance.

I hereby direct that you be tried of the above said offence by this court."

(emphasis supplied)

4. The limited challenge of the petitioner to the Impugned Order and charge is that the Company, that is, M/s Esam India Limited,



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being in Liquidation and a Provisional Liquidator having been appointed for it, only the Provisional Liquidator can represent the Company in the proceedings pending before the learned ACMM and not the petitioner herein.

Petitioner's Submissions

5. The learned senior counsel for the petitioner submits that the petitioner had resigned from the Company in the year 1993, that is, much before the alleged transaction that took place in 1997.

6. He submits that, in any event, for the said Company, by an Order dated 14.05.1999 passed in Company Petition No. 215/1998, a Provisional Liquidator has been appointed. He submits that, therefore, charges against the Company cannot be framed through the petitioner herein as the petitioner no longer has the authority to represent the Company in the trial as is required under Section 305 CrPC. He submits that as far as separate charges against the petitioner in his individual capacity are concerned, without admitting them, the petitioner does not challenge the same at this stage and is ready to face the trial on the same.

Respondent's Submissions

7. On the other hand, the learned counsel for the respondent submits that the learned ACMM, in the Order dated 16.06.2007, has given detailed reasons for not accepting the plea of the petitioner that he had resigned from the Company in the year 1993 or that he did not have the control over the affairs of the said Company at the time of the



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alleged transaction and thereafter. He submits that, therefore, charge under Section 68 of Foreign Exchange Regulations Act, 1973 (hereinafter referred to as 'Act') has been rightly framed against the petitioner herein. In support, he places reliance on the judgment of the Supreme Court in ***Shailendra Swarup v. Deputy Director, Enforcement Directorate*** (2020) 16 SCC 561.

8. He further submits that as the petitioner represented the Company and was at the helm of its affairs when the alleged transaction took place, charges against the said Company have been rightly framed through the petitioner.

Analysis

9. I have considered the submissions made by the learned counsels for the parties.

10. Section 68 of the Act reads as under:

“68. Offences by companies.- (1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or



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order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation. For the purposes of this section.---

(i) "company" means any body corporate and includes a firm or other association of individuals: and

(ii) "director", in relation to a firm, means a partner in the firm."

(emphasis supplied)

11. A reading of Sub-Section (1) of Section 68 of the Act would show that where the offence is alleged to have been committed by a Company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of business of the company 'as well as the company', shall be deemed to be guilty of the contravention/offence under the Act and shall be liable to be proceeded against and punished accordingly. Proviso to sub-Section (1) of Section 68 of the Act casts a burden on such person to prove that the contravention took place without his knowledge or that he had exercised all due diligence to prevent such contravention, to escape the liability and punishment for the offence committed by the company.

12. Sub-Section (2) of Section 68 of the Act further states that where the contravention of any of the provisions of the Act or of any Rule, Direction or Order made thereunder has been committed by a



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company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer 'shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly'.

13. In **Shailendra Swarup** (Supra), the Supreme Court while considering the provision of Section 68 of the Act, held as under:

“45. Section 68 of the FERA, 1973 deals with “Offences by companies”. Section 68(1) provides that:

“... every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be deemed to be guilty of the contravention....”

Section 68(1) creates a legal fiction i.e. “shall be deemed to be guilty”. The legal fiction triggers on fulfilment of conditions as contained in the section. The words “every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business” has to be given some meaning and purpose. The provision cannot be read to mean that whosoever was a Director of a company at the relevant time when contravention took place, shall be deemed to be guilty of the contravention. Had the legislature intended that all the Directors irrespective of their role and responsibilities shall be deemed to be guilty of contravention, the section could have been worded in different manner. When a person is proceeded with for committing an offence and is to be punished, necessary ingredients of the offence as required by Section 68 should be present.



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46. We may notice that Section 141 of the Negotiable Instruments Act, which was inserted in the Negotiable Instruments Act by amendment in the year 1988 contains the same conditions for a person to be proceeded with and punished for offence as contained in Section 68 of the FERA, 1973. Section 141(1) of the Negotiable Instruments Act uses the same expression “every person, who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence”. Section 68 of the FERA, 1973 as well as Section 141 of the Negotiable Instruments Act deals with the offences by the companies in the same manner. The ratio of the judgments of this Court on Section 141 of the Negotiable Instruments Act as noted above are also clearly relevant while interpreting Section 68 of the FERA Act. We, thus, hold that for proceeding against a Director of a company for contravention of provisions of FERA, 1973, the necessary ingredient for proceeding shall be that at the time offence was committed, the Director was in charge of and was responsible to the company for the conduct of the business of the company. The liability to be proceeded with for offence under Section 68 of the FERA, 1973 depends on the role one plays in the affairs of the company and not on mere designation or status. This Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*, (2005) 8 SCC 89 : 2005 SCC (Cri) 1975] while elaborating the ambit and scope of Section 141 of the Negotiable Instruments Act has already laid down above in para 10 of the judgment as extracted above.

47. It is true that with regard to any offence punishable under Section 138 of the Negotiable Instruments Act with respect to offences by companies, a complaint in writing has to be filed as required by Section 142 of



the Negotiable Instruments Act. A complaint as contemplated for offence under Section 138 needs to necessarily contain all allegations constituting offence. In FERA, 1973 for imposing a penalty under Section 50, the adjudicating officer is required to hold an enquiry after giving the person a reasonable opportunity for making a representation in the matter. Even though, FERA, 1973 does not contemplate filing of a written complaint but in proceedings as contemplated by Section 51, the person, who has to be proceeded with has to be informed of the contravention for which penalty proceedings are initiated. The expression “after giving that person a reasonable opportunity for making a representation in the matter” as occurring in Section 51 itself contemplate due communication of the allegations of contravention and unless allegations contains complete ingredients of offence within the meaning of Section 68, it cannot be said that a reasonable opportunity for making a representation in the matter has been given to the person, who is to be proceeded with.

48. *The learned ASG is right in his submission that FERA, 1973 does not contemplate any complaint but the scheme of the Act indicate that a person, who is to be proceeded with has to be made aware of the necessary allegations, which may constitute an offence on his part. This Court in N. Rangachari [N. Rangachari v. BSNL, (2007) 5 SCC 108 : (2007) 2 SCC (Cri) 460] has observed that a person in the commercial world having a transaction with company is entitled to presume that the Directors of the company are in charge of the affairs of the company. The presumption of a person in the commercial world is a rebuttable presumption and when adjudicating authority proceeds to impose a penalty for a contravention of FERA, 1973, essential ingredients constituting an offence under the FERA read with Section 68*



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has to be communicated to the person proceeded with to enable him to make effective representation in the matter.”

14. As noted hereinabove, the petitioner at this stage, does not dispute the invocation of Section 68 of the Act against him. The learned senior counsel for the petitioner has submitted that the petitioner shall face the trial on the allegation on basis of which Section 68 of the Act has been invoked against the petitioner. This Court, therefore, need not detain itself on this issue.

15. The only issue before this Court is whether the charge against the Company can be framed through the petitioner. In this regard, Section 305 CrPC would be relevant and is reproduced hereinbelow:

“305. Procedure when corporation or registered society is an accused.—(1) In this section, “corporation” means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in



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sub-section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.

(emphasis supplied)

16. A reading of the above would show that where the accused person is a company, it may appoint a representative for the purpose of the trial, and where such representative appears, any requirement of the CrPC that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to such representative. Sub-Section (4) of Section 305 CrPC states that where the representative of a company does not appear, any such requirement as is referred to in sub-Section (3) of Section 305 CrPC shall not apply.

17. In the present case, there is no authorization of the petitioner to represent the Company in the trial. In fact, the Company is in liquidation and a Provisional Liquidator already stands appointed for the Company.

18. In terms of Section 457 of the Companies Act, 1956 (as was



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then applicable), it is only the Provisional Liquidator or person authorized by the Provisional Liquidator, who could represent the Company in the trial. The petitioner, therefore, cannot be said to be representing the Company. It is another thing to say that he would face the trial in his individual capacity as an accused, but another thing to say that he would also face the trial as a representative of the Company.

19. Though the above issue was flagged before the learned Trial Court, as is reflected in the Orders dated 08.04.2002, 13.05.2002 and 28.10.2002, the learned Trial Court proceeded to frame the charge against the Company taking the petitioner herein to be representing the Company. The same cannot, therefore, be sustained.

Conclusion & Directions

20. In my view, therefore, the learned Trial Court has clearly erred in framing the charge against the Company through the petitioner. The charge against the Company has to be through the Provisional Liquidator appointed for the Company. The impugned order dated 03.08.2007 shall stand modified to this limited extent. It is clarified that the charges framed against the petitioner in his individual capacity have not been interfered with by this Court.

21. The petition is disposed of in the above terms.

NAVIN CHAWLA, J

FEBRUARY 26, 2024/ns/RP/am

Click here to check corrigendum, if any