

M/S. Rai Bahadur Seth Shreeram Durgaprasad

Vs

Director of Enforcement

Criminal Appeal No. 627 of 1986

(A. P. Sen, V. B. Eradi JJ)

01.05.1987

JUDGMENT

SEN, J. -

1. The short question involved in this appeal by special leave directed against the judgment and order of the High Court of Bombay dated March 7, 1986 is whether the word 'whoever' in sub-section (1) of Section 23 of the Foreign Exchange Regulation Act, 1947 before its amendment by Act 39 of 1957 denoted only a natural person and association of persons, such as a firm, would not fall within the connotation of the word 'whoever'. By the judgment, a learned Single Judge of the High Court allowed the appeal of the Director of Enforcement under Section 54 of the Act and set aside the order of the Foreign Exchange Regulation Appellate Board, Bombay dated January 30, 1981 and restored the order of the Director of Enforcement dated August 17, 1978 holding the appellants guilty of contravention of Section 12(2) of the Act read with the notification issued by the Government of India in the Ministry of Finance, New Delhi dated April 22, 1952 and levying a penalty of Rs. 15,00,000. By its order the Foreign Exchange Regulation Appellate Board held that there could be no levy of penalty on the appellants-firm for failure to repatriate foreign exchange on shipments of manganese ore made prior to September 20, 1957 i.e. prior to the amendment of Section 23(1) of the Act and the introduction of Section 23-C by the Amendment Act and accordingly reduced the amount of penalty to Rs. 3,10,000. As a result of the decision of the High Court, the order of the Director of Enforcement levying a penalty of Rs. 15,00,000 on the appellants has been restored.

2. The facts giving rise to the appeal are as follows. Messrs Rai Bahadur Seth Shreeram Durgaprasad were a partnership firm engaged in the business of winning, extracting and getting manganese ore from their manganese mines at Tumsar on a very large scale. During the period from 1952 to 1958, the partnership firm made 52 shipments of manganese ore to various foreign countries and earned huge amount of foreign exchange. It however failed to repatriate the full value in foreign exchange against the aforesaid 52 shipments and thereby contravened Section 12(2) of the Act. The Director of Enforcement accordingly initiated adjudication proceedings against the appellants under Section 23(1) as amended for contravention of Section 12(2) as well as Section 4(1) of the Act. The appellants stated before the Director of Enforcement that they did not contest the charge under Section 12(2) of the Act but questioned the liability of the firm on the ground that the amended Section 23(1) as well as Section 23-C introduced by the Amendment Act came into force on September 20, 1957 and were therefore inapplicable to the export shipments from the year 1952 onwards till that date : and if at all, the firm could only be held liable under the amended Section 23(1) read with Section 23-C as from that date. It was contended that the word 'whoever' in sub-section (1) of Section 23 of the Act before its amendment denoted only a natural person and

association of persons, such as a firm, would not fall within the connotation of the word 'whoever'. The Director of Enforcement by his order dated August 17, 1978 repelled the contention and held that the firm and its partners had deliberately under-invoiced shipments at the time of export and also diverted the undeclared proceeds to their accounts with foreign banks with an intention not to repatriate the sale proceeds in the prescribed manner within the prescribed period in respect of each shipment. He dealt with the evidence in detail with reference to the books of account and came to the conclusion that both Durgaprasad Saraf and Umashanker Aggarwal were in charge of, and responsible for, the conduct of the business of the partnership firm during the relevant period. Neither of them produced any evidence to show that the contravention in question had taken place without their knowledge or that they had exercised due diligence to prevent such contravention. They were accordingly made liable for contravention of Section 12(2) of the Act for failure to repatriate the foreign exchange earned on the aforesaid 52 shipments and were imposed a penalty of Rs. 15,00,000 on the partnership firm. The Foreign Exchange Regulation Appellate Board however disagreed with the Director of Enforcement and accepted the contention of the appellants and accordingly reduced the amount of penalty to Rs. 3,10,000.

3. Shri Asoke Sen, learned counsel appearing for the appellants with his usual fairness frankly concedes that Article 20(1) of the Constitution would not in terms apply but, he contends, the principles embodied therein would still govern. He has confined his submissions to only one point, namely, that the word 'whoever' in sub-section (1) of Section 23 before its amendment by Act 39 of 1957 connoted only a natural person i.e. those who actually contravened the provisions of Section 12(1) of the Act by failure to repatriate full value of foreign exchange earned on exports and would not take in corporate liability and therefore association of persons, such as a firm, would not fall within the connotation of the word 'whoever'. The learned counsel further contends that by the Amendment Act, new Section 23(1) was substituted and Section 23-C introduced w.e.f. September 20, 1957 and the effect of these provisions was that after that date, adjudication proceedings or criminal proceedings could be taken in respect of a contravention mentioned in Section 23(1) while before the amendment only criminal proceedings before a court could be instituted to punish the offender. We are afraid, the contention cannot prevail. It is not correct to say that the amended Section 23(1) of the Act does not apply to contraventions which took place before the Amendment Act came into force. Shri Madhusudan Rao, learned counsel appearing for the respondents rightly contends that on a combined reading of Sections 23(1) and 12(2), the only possible construction is that the word 'whoever' includes a person and therefore initiation of adjudication proceedings against the partnership firm was permissible. He draws sustenance from the provision contained in sub-section (4) of Section 23 which clearly contemplates prosecution of a company or other body corporate. As regards the applicability of the amended Section 23(1) read with Section 23-C with regard to initiation of adjudication proceedings in respect of contraventions which took place before the Amendment Act came into force, he rightly contends that the matter is concluded by the decision of this Court in *Union of India v. Sukumar Pyne* ((1966) 2 SCR 34 : AIR 1966 SC 1206 : 1966 Cri LJ 946).

4. In order to appreciate the contentions raised, it is necessary to set out the statutory provisions insofar as relevant.

4.(1) Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall sell or lend to, or exchange with, any person not being an authorised dealer, any foreign exchange.

12.(2) Where any export of goods has been made to which a notification under sub-

section (1) applies, no person entitled to sell, or procure the sale of, the said goods shall, except with the permission of the Reserve Bank, do or refrain from doing any act with intent to secure that -

(a) the sale of goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade, or

(b) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any be allowed by the Reserve Bank, or is delayed to such extent as aforesaid :

Provided that no proceedings in respect of any contravention of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full amount as aforesaid has not been made in the prescribed manner.

5. Section 23(1) prior to its amendment and the original sub-section (3) now renumbered as Section 23(4) are as follows :

23(1) Whoever contravenes any of the provisions of this Act or of any rule, direction or order made thereunder shall be punishable with imprisonment for a term which may extend to two years or with fine or with both, and any court trying any such contravention may, if it thinks fit and in addition to any sentence which it may impose for such contravention, direct that any currency, security, gold or silver, or goods or other property in respect of which the contravention has taken place shall be confiscated.

23(4) If the person committing an offence punishable under this section is a company or other body corporate, every director, manager, secretary or other officer thereof shall, unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent its commission, be deemed to be guilty of such offence.

6. Sub-section (1) of Section 23-C is as follows :

23-C. Offences by companies. - (1) If the person committing a contravention 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 the 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.

7. It is clear from these provisions that the word 'whoever' in sub-section (1) of Section 23 of the Act before its amendment was comprehensive enough to include an association of persons, such as a firm, and did not connote a natural person alone. There is no reason why the word 'whoever' in the section should not receive its plain and natural meaning. According to the Shorter Oxford English

Dictionary, vol. 2, p. 2543, 'whoever' means 'any one who, any who'. The meaning given in Webster Comprehensive Dictionary, International edn., vol. 2 at p. 1437 is 'any one without exception, any person who'. In our judgment, the word 'whoever' in the unamended Section 23(1) must be read in juxtaposition with Section 12(2) and must mean any person who commits a contravention of that section without exception. That must be the legal connotation of the word 'whoever' and it necessarily takes in corporate liability and includes any association of persons such as a partnership firm. That construction of ours is borne out by the plain language of sub-section (4) of Section 23 inserted by Act 34 of 1950. It provides that if the person committing an offence punishable under sub-section (1) of Section 23 is a company or other body corporate, every director, manager, secretary or other officer thereof shall, unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent its commission, be deemed to be guilty of such offence. The Act therefore clearly contemplated that adjudication proceedings under sub-section (1) of Section 23 prior to its amendment could be initiated not only against the person who actually commits contravention but also casts vicarious liability on an association of persons such as a partnership firm or an artificial or a legal entity like a company. It is therefore idle to contend that the appellants were not liable to pay penalty for failure to repatriate foreign exchange on 52 shipments of manganese ore effected through the years 1952 to 1958. Upon that view, the learned Single Judge was right in setting aside the order of the Foreign Exchange Regulation Appellate Board and restoring that of the Director of Enforcement levying a penalty of Rs. 15,00,000 on the appellants for failure to repatriate foreign exchange in contravention of Section 12(2) of the Act.

8. The contention of the learned counsel that recourse could not be had to the amended Section 23(1) read with Section 23-C of the Act in respect of the contravention of Section 12(2) for failure on the part of the appellants to repatriate foreign exchange on shipments of manganese ore made prior to September 20, 1957, and there could be no initiation of adjudication proceedings under the amended Section 23(1) read with Section 23-C or levy of penalty on the appellants must also fail for another reason. In *Sukumar Pyne case* ((1966) 2 SCR 34 : AIR 1966 SC 1206 : 1966 Cri LJ 946), the Court reversed the decision of the Calcutta High Court in *Sukumar Pyne v. Union of India* (AIR 1962 Cal 590) striking down Section 23(1)(a) as being violative of Article 14 of the Constitution. Regarding the point, namely, whether Section 23(1)(a) having been substituted by Amendment Act 39 of 1957 would have retrospective operation in respect of the alleged offence which took place in 1954, the High Court came to the conclusion that the petitioner had a vested right to be tried by an ordinary court of the land with such rights of appeal as were open to all and although Section 23(1)(a) was procedural, where a vested right was affected, *prima facie*, it was not a question of procedure. Therefore, the High Court came to the conclusion that the provision as to adjudication by the Director of Enforcement could not have any retrospective operation. It was held that 'the impairment of a right by putting a new restriction thereupon is not a matter of procedure only'. It impairs a substantive right and an enactment that does so is not retrospective unless it says so expressly or by necessary intendment. The court reversed the High Court and held that effect of these provisions was that after the amendment of 1957, adjudication or criminal proceedings could be taken up in respect of a contravention mentioned in Section 23(1) while before the amendment only criminal proceedings before a court could be instituted to punish the offender. In repelling the contention advanced by Shri N. C. Chatterjee that the new amendments did not apply to contravention which took place before the Act came into force, the Court observed :

In our opinion, there is force in the contention of the learned Solicitor General. As observed by this Court in *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh* (1953 SCR 1188 : AIR 1953 SC 394 : 1953 Cri LJ 1480), a person accused of the commission of an offence has no vested right to be tried by a particular court of a

particular procedure except insofar as there is any constitutional abjection by way of discrimination or the violation of any other fundamental right is involved. It is well recognised that "no person has a vested right in any course of procedure" (vide Maxwell 11th Edition, p. 216), and we see no reason why this ordinary rule should not prevail in the present case. There is no principle underlying Article 20 of the Constitution which makes a right to any course of procedure a vested right.

These principles are clearly attracted to the facts and circumstances of the present case and therefore the initiation of adjudication proceedings for failure to repatriate foreign exchange on shipments of manganese ore prior to September 20, 1957, the date when the Amendment Act came into force, was permissible.

9. The appeal must therefore fail and is dismissed with costs.

</html