REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.1406 OF 2009**

VIJAY MALLYA ...APPELLANT

**VERSUS**

ENFORCEMENT DIRECTORATE,
MIN. OF FINANCE ...RESPONDENT

**J U D G M E N T**

**ADARSH KUMAR GOEL, J.**

1. This appeal has been preferred against judgment and order dated 21st May, 2007 of the High Court of Delhi at New Delhi in Criminal Revision Petition No.554 of 2001.

2. Brief facts necessary for decision of this appeal are that the appellant was summoned by the Chief Enforcement Officer, Enforcement Directorate, under Section 40 of the Foreign Exchange Regulation Act, 1973 ("the Act") with his passport and correspondence

relating to a transaction with Flavio Briatore of M/s. Benetton Formula Ltd., London, to which the appellant, as Chairman of United Breweries Ltd., was a party. Allegation against the appellant was that he entered into an agreement dated 1st December, 1995 with the earlier mentioned English Company for advertisement of 'Kingfisher' brand name on racing cars during Formula-I World Championships for the years 1996, 1997 and 1998 providing for fee payable. Requisite permission of the Reserve Bank of India was not taken which was in violation of provisions of Sections 47(1) & (2), 9(1)(c) and 8(1) of the Act. Approval was later sought from Finance Ministry for payment on 19th June, 1996, which was rejected on 4th February, 1999. Since the appellant failed to appear in response to summons issued more than once, a complaint dated 8th March, 2000 under Section 56 of the Act was filed before the Additional Chief Metropolitan Magistrate, New Delhi. The trial court after considering the material on record summoned the appellant and

framed charge against him under Section 56 of the Act.

3. The appellant challenged the order of the Magistrate dated 9th August, 2001 in above Criminal Complaint No.16/1 of 2000 and also sought quashing of proceedings in the said complaint before the High Court by filing Criminal Revision Petition No.554 of 2001 on the ground that willful default of the appellant could not have been inferred and that there was non-application of mind in the issuance of summons as well as in framing the charge which was in violation of procedure laid down under Section 219 of the Criminal Procedure Code. The charge related to failure of the appellant to appear on four occasions, i.e., 27th September, 1999, 8th November,1999, 26th November, 1999 and 3rd January, 2000. In respect of first date, it was submitted that the trial court itself accepted that the service of summons was after the time for appearance indicated in the summons. In respect of second and third dates, the appellant had responded and informed about his

inability to appear and for the last date, summons was not as per procedure, i.e., by registered post. It was submitted

that composite charge was against Section 219 of the Criminal Procedure Code.

4. The High Court rejected the contentions by holding that framing of composite charge could not be treated to have caused prejudice so as to vitiate the proceedings. It was further observed that default of the appellant in relation to summons dated 15th September, 1999 for attendance on 27th September, 1999 could not be taken into account and to that extent the charge was liable to be deleted but with regard to the defaults in relation to summons dated 7th October, 1989, 8th November, 2009 and 21st December, 1999, the proceedings were not liable to be interfered with as the appellant could contest the matter before the trial court itself in the first instance.

5. We have heard Shri F.S. Nariman, learned senior counsel for the appellant and Shri K. Radhakrishnan,

learned senior counsel for the respondent.

6. When the matter came up for hearing before this Court earlier, a statement was made on behalf of the appellant that the appellant expressed regret for not responding to the summons on which learned senior counsel for the respondent took time to ascertain whether the complaint could be withdrawn. Thereafter, it was stated that withdrawal of the complaint may have impact on other matters and for that reason withdrawal was not possible. However, the question whether the non compliance was deliberate was required to be examined. Learned senior counsel for the appellant submitted that the default was not deliberate, intentional or willful which may be punishable under Section 56 of the Act and the appellant had sent reply and sought a fresh date on two occasions.

7. It was further submitted that subsequent events which were not gone into by the High Court may also be seen. The complaint was filed on 8th March, 2000.

During pendency of the complaint, the Act (FERA) was repealed on 1st June, 2000. Still, show cause notice dated 13th March, 2001 was issued to which reply was given and the adjudicating officer vide order dated 10th January, 2002 dropped the proceedings on merits. The Appellate Board dismissed the Revision Petition filed by the Department on 16th March, 2004. Against the said order, Criminal Appeal No.515 of 2004 was pending in the High Court.

8. It was submitted that having regard to repeal of the Act and exoneration of the appellant by the departmental authorities (even though an appeal was pending in the High Court), this Court in the circumstances of the case ought to quash proceedings, following law laid down in ***Dy. Chief Controller of Import and Export*** vs. ***Roshan Lal Agarwal***[1] *as follows* **:**

> *"13. In view of the findings recorded by us, the learned Magistrate has to proceed with the trial of the accused-respondents. Shri Ashok Desai, learned Senior Counsel has, however, submitted that the Imports and Exports (Control) Act, 1947 has since been repealed and in the departmental proceedings taken under the aforesaid Act,*

[1] (2003) 4 SCC 139

> *the Central Government has passed orders in favour of the respondents and, therefore, their trial before the criminal court at this stage would be an exercise in futility. He has placed before us copies of the orders passed by the Additional Director General of Foreign Trade on 16-8-1993 and also by the Appellate Committee Cell, Ministry of Commerce, Government of India on 13-3-1997 by which the appeals preferred by the respondents were allowed by the Appellate Committee and the accused-respondents were exonerated. Having regard to the material existing against the respondents and the reasons and findings given in the aforesaid orders, we are of the opinion that no useful purpose would be served by the trial of the accused-respondents in the criminal court at this stage. The proceedings of the criminal cases instituted against the accused-respondents on the basis of the complaints filed by the Deputy Chief Controller of Imports and Exports are, therefore, quashed".*

Alternatively, explanation of the appellant for non appearance may be looked into on merits instead of the same being left to the trial court.

9. Before we consider the submissions made, the provisions of Section 40 and 56 of the Act may be noticed which are as follows :

> "***Section 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 summon 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 (45of 1860).*

***Section 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 sub-section(1) of (Section 18, Section 18A), clause (a) of sub-section (1) of Section 19, sub-section(2) of Section 44 and Section 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."*

10. In ***Enforcement Directorate*** vs. ***M. Samba Siva Rao***[2], it was observed :

*"3. xxxxxxxx*

*The Foreign Exchange Regulation Act, 1973 was enacted by Parliament, basically for the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interest of economic development of the country. The Act having been enacted in the interest of national economy, the provisions thereof should be construed so as to make it workable and the interpretation given should be purposive and the provisions should receive a fair construction without doing any violence to the language employed by the legislature. The provisions of Section 40 itself, which confers power on the officer of the Enforcement Directorate, to summon any person whose attendance he considers necessary during the course of any investigation, makes it binding as provided under sub-section (3) of Section 40, and the investigation or the proceeding in the course of which such summons are issued have been deemed to be a judicial proceeding by virtue of sub-section (4) of Section 40. These principles should be borne in mind, while interpreting the provisions of Section 40 and its effect, if a person violates or disobeys the directions issued under Section 40."*

[2] (2000) 5 SCC 431

11. The above observations clearly show that a complaint is maintainable if there is default in not carrying out summons lawfully issued. The averments in the complaint show that the summons dated 21st December, 1999 were refused by the appellant and earlier summons were not carried out deliberately. The averments in paras 3 and 4 of the complaint are as follows :

> *"3. That the complainant issued a summons dated 21.12.1999 under Section 40 of FERA, 1973 in connection with the impending investigations for the appearance of the accused on 3.1.2000 but the same have been returned back by the postal authorities with the remarks "refused".*
>
> *It is submitted that the accused has deliberately avoided his appearance before the Investigating Officer and on account of his non co-operative attitude the investigation has come to a standstill.*
>
> *4. It is respectfully submitted that the accused has been intentionally avoiding his appearance before the Enforcement Directorate knowing fully well that non compliance of the directions made under Section 40 of the Act renders the person liable for prosecution in a Court of law under Section 56 of the Act which is a non-bailable offence. It is further submitted that by virtue of Section 40(3) of the Act, the accused was bound to appear before the Officers of the Enforcement Directorate in the best interest of investigation. Section 40(3) is reproduced below for kind perusal and ready reference to this Hon'ble Court :*
>
> *"Section 40(3) :*

> *(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."*
>
> *It is respectfully submitted that non compliance of any rule, directions or law is punishable under Section 56 of the Act. The accused willfully failed to appear before the Enforcement Directorate at the given venue, time and dates mentioned in the respective summons and has thus, contravened the provisions of Section 56 of the Act."*

12. As regards summons dated 8th November, 1999, learned senior counsel for the appellant has referred to the explanation offered by the appellant. Letter dated 22nd November, 1999 is as follows :

> *"As you will appreciate, I am the Chairman of several public Companies both in India as well as in the USA and, therefore, my schedule is finalized several months in advance. During the fiscal year end period, the problem only gets compounded.*
>
> *I would, therefore, request you to excuse me from the personal appearance on November 26, 1999 as I will be out of India.*
>
> *I am willing to fix a mutually convenient date to appear before you."*

13. From the tenor of the letter, it appears that it was not a case of mere seeking accommodation by the appellant but requiring date to be fixed by his convenience. Such stand by a person facing

allegation of serious nature could hardly be appreciated. Obviously, the enormous money power makes him believe that the State should adjust its affairs to suit his commercial convenience.

14. In our opinion, the appeal is required to be dismissed for more than one reason. The fact that the adjudicating officer chose to drop the proceedings against the appellant herein does not absolve the appellant of the criminal liability incurred by him by virtue of the operation of Section 40 read with Section 56 of the Act. The offence under Section 56 read with Section 40 of the Act is an independent offence. If the factual allegations contained in the charge are to be proved eventually at the trial of the criminal case, the appellant is still liable for the punishment notwithstanding the fact that the presence of the appellant was required by the adjudicating officer in connection with an enquiry into certain alleged violations of the various provisions of the Act, but at a subsequent stage the adjudicating officer opined that there was either insufficient or no material to proceed

against the appellant for the alleged violations of the Act, is immaterial. The observations made by this Court in ***Roshanlal Agarwal*** (supra), in our opinion, must be confined to the facts of that case because this Court recorded such a conclusion *"having regard to the material existing against the respondent and the reasons and findings given in the aforesaid orders....."*. The said case cannot be read as laying down a general statement of law that the prosecution of the accused, who is alleged to be guilty of an offence of not responding to the summons issued by a lawful authority for the purpose of either an inquiry or investigation into another substantive offence, would not be justified. Exonerating such an accused, who successfully evades the process of law and thereby commits an independent offence on the ground that he is found to be not guilty of the substantive offence would be destructive of law and order, apart from being against public interest. Such an exposition of law would only encourage unscrupulous elements in the society to defy the authority conferred upon the

public servants to enforce the law with impunity. It is also possible, in certain cases that the time gained by such evasive tactics adopted by a person summoned itself would result in the destruction of the material which might otherwise constitute valuable evidence for establishing the commission of a substantive offence by such a recalcitrant accused.

15. Secondly, an appeal against the conclusion of the adjudicating officer that the proceedings against the appellant herein for the alleged violation of the various provisions of the FERA Act are required to be dropped has not even attained finality. Admittedly, such an order of the adjudicating officer confirmed by the statutory appellate authority is pending consideration in an appeal before the High Court. Though, in our opinion, the result of such an appeal is immaterial for determining the culpability of the appellant for the alleged violation of Section 40 read with Section 56, we must record that the submission made on behalf of the appellant in this regard itself is inherently untenable.

16. For all the abovementioned reasons, we do not see any merit in the appeal. We are also of the opinion that the entire approach adopted by the appellant is a sheer abuse of the process of law. Any other view of the matter would only go to once again establishing the notorious truth stated by Anatole France that – *"the law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread".*

17. The appeal is dismissed with exemplary costs quantified at rupees ten lakhs to be paid to the Supreme Court Legal Service Authority.



.....J.
[ J. CHELAMESWAR ]

.....J.
[ ADARSH KUMAR GOEL ]

NEW DELHI
JULY 13, 2015

**ITEM NO.1A-For Judgment COURT NO.4 SECTION II**

**S U P R E M E C O U R T O F I N D I A**
**RECORD OF PROCEEDINGS**

**Criminal Appeal No(s). 1406/2009**

**VIJAY MALLYA** **Appellant(s)**

**VERSUS**

**ENFORCEMENT DIRECTORATE,**
**MIN.OF FINANCE.** **Respondent(s)**

**Date : 13/07/2015 This appeal was called on for pronouncement of JUDGMENT today.**

**For Appellant(s)**
**M/s. Khaitan & Co.**

**For Respondent(s)** **Mr. Surender Kumar Gupta, Adv.**
**Mr. B.K. Prasad, Adv.**
**Mr. B. V. Balaram Das,Adv.**

**Hon'ble Mr. Justice Adarsh Kumar Goel pronounced the judgment of the Bench comprising Hon'ble Mr. Justice J. Chelameswar and His Lordship.**

**The appeal is dismissed in terms of the signed Reportable judgment with exemplary costs quantified at rupees ten lakhs to be paid to the Supreme Court Legal Service Authority.**

**(VINOD KR.JHA)** **(RENUKA SADANA)**
**COURT MASTER** **COURT MASTER**

**(Signed Reportable judgment is placed on the file)**