Radheshyam Kejriwal vs State Of West Bengal & Anr on 18 February, 2011

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Bench: Harjit Singh Bedi, Chandramauli Kr. Prasad

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1097 OF 2003

RADHESHYAM KEJRIWAL ..... APPELLANT

VERSUS

STATE OF WEST BENGAL & ANR. ..... RESPONDENTS

J U D G M E N T

CHANDRAMAULI KR. PRASAD, J.

1. We have gone through the draft judgment prepared by our noble and learned Brother Sathasivam, J. and we find ourselves unable to subscribe to the view taken by him.

2. Shorn of unnecessary details facts giving rise to the present appeal are that on 22nd May, 1992

various premises in occupation of the appellant Radheshyam Kejriwal besides other persons were searched by the officers of the Enforcement Directorate. The appellant was arrested on 3rd May, 1992 by the officers of the Enforcement Directorate in exercise of the power under Section 35 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the `Act') and enlarged on bail on the same day. Further the appellant was summoned by the officers of the Enforcement Directorate to give evidence in exercise of the power under Section 40 of the Act and in the light thereof his statement was recorded on various dates, viz.

22nd May, 1992, 10th March, 1993, 16th March, 1993, 17th March, 1993 and 22nd March, 1993. On the basis of materials collected during search and from the statement of the appellant it appeared to the Enforcement Directorate that the appellant, a person resident in India, without any general or specific exemption from Reserve Bank of India made payments amounting to Rs.24,75,000/- to one Piyush Kumar Barodia in March/April, 1992 as consideration for or in association with the receipt of payment of U.S. $ 75,000 at the rate of Rs.33/-

per U.S. Dollar by the appellant's nominee abroad in Yugoslavia. It further appeared to the Enforcement Directorate that transaction involved conversion of Indian currency into foreign currency at rates of exchange other than the rates for the time being authorised by the Reserve Bank of India. In the opinion of the Enforcement Directorate the act of the appellant in making the aforesaid payment of Rs.24,75,000/- in Indian currency for foreign currency at the rate of Rs.33/- per US Dollar against the official rate of Dollar i.e. Rs.30/- per Dollar (approximately), contravened the provision of Section 8(2) of the Act. Further the Said payment having been made without any general or special exemption from Reserve Bank of India, the appellant had contravened the provisions of Section 9(1)(f)(i) of the Act and accordingly rendered himself liable to imposition of penalty under Section 50 of the Act. Enforcement Directorate was further of the opinion that by abetting in contravening the provisions of Sections 9(1)(f)(i) and 8(2) of the Act read with the provisions of the Section 64(2) of the Act the appellant has rendered himself liable for penalty under Section 50 of the Act.

3. Accordingly, a show cause notice dated 7th May, 1993 was issued by the Special Director of the Directorate of Enforcement calling upon the appellant to show cause as to why adjudication proceeding as contemplated under Section 51 of the Act be not held against him for the contraventions pointed above. Show cause notice dated 7th May, 1993 referred to above led to institution of proceeding under Section 51 of the Act (hereinafter referred to as the `adjudication proceedings'). The adjudication officer came to the conclusion that the allegation made against the appellant of contravention of the provisions of Section 8, 9(1)(f)(i) and Section 8(2) read with Section 64(2) of the Act cannot be sustained. While doing so the Special Director observed as follows:

> The payment alleged to have been made by Shri Radheshyam Kejriwal amounting to Rs.24,75,000/- has to be examined in the context of Section 9(1)(f)(i) and Section 8(2) r/w Section 64(2) of Foreign Exchange Regulation Act, 1973. The important ingredients for sustaining the conviction under the above provisions would require the proof of payment having been made to the credit of any person @ exchange other

than the rate which has been authorized by the Reserve Bank of India. In the case before me, it has not been proved beyond reasonable doubt whether a sum of Rs.24,75,000/-

has actually been paid or not. There is no documentary evidence except the statement of Shri Piyush Kumar Barodia and the retracted statement of Shri Radheshyam confirming the fact that Rs.24,75,000/- was exchanged @ of Rs.33/- per dollar. Therefore, it is very relevant to take the above facts and circumstances into consideration before coming to a conclusion as to the correctness of the statements given by S/Shri Radheshyam Kejriwal and Piyush Kumar Barodia. The documentary evidence available and the statements of the other co-accused will definitely throw further light in the matter.

After considering all the above facts, I find that the only evidence available against Shri Radheshyam Kejriwal is the fact that his telephone number and name are mentioned in the documents seized from Shri Piyush Kumar Barodia and the fact that some transactions have been noted against his name which do not match the sum of Rs.24,75,000/- which was alleged to have been transferred. Secondly, there is no evidence to show that he was indulging in any foreign exchange transaction to transfer money abroad. In conclusion, the benefit of doubt will have to be given to Shri Radheshyam Kejriwal in the absence of any further evidence and also the fact that both Raju Poddar and Babubhai Umaidmal have denied having taken part in any such transaction. Significantly, on enquiry, it was found that Shri Sirish Kumar Barodia, brother of Shri Piyush Kumar Barodia staying at Bombay, was not available for the past year during which these transactions took place. Shri Piyush Kumar Barodia is absconding, therefore, his case is being decided on merits. However, since the charges against Shri Radheshyam Kejriwal for contravening the provisions of Section 9(1)(f)(i) and Section 8(2) read with Section 64(2) of the Foreign Exchange Regulation Act, 1973 cannot sustained, the charges against Shri Piyush Kumar Barodia can also not be sustained. Therefore, the charges against S/Shri Raju Poddar, Sirish Kumar Barodia and Babubhai Umaidmal Jain @ Babubhai Bhansali, are not sustainable for contravening the provisions of Section 9(1)(f)(i) and 8(2) read with Section 64(2) of the Foreign Exchange Regulation Act, 1973.

In view of the foregoing, the proceedings initiated against S/Shri Piyush Kumar Barodia, Radheshyam Kejriwal, Raju Poddar, Sirish Kumar Barodia and Babubhai Umaidmal Jain and Babubhai Bhansali, vide the impugned Memorandum, are hereby dropped."

It is common ground that the Enforcement Directorate has not challenged this order and it has attained finality.

4. It is relevant to state that any person contravening the provisions of Sections 8 and 9 of the Act besides other provisions is also liable to be prosecuted under Section 56

of the Act without prejudice to any award of penalty by the adjudicating officer under Section 51 of the Act. However, before launching such prosecution for contravening such provisions of the Act which prohibits the doing of an act without permission, the proviso to Section 61(2) of the Act mandates giving an opportunity to the person concerned to show that he had such permission. Accordingly, by notice dated 29th December, 1994 the appellant was given an opportunity to show permission granted by the Reserve Bank of India. Appellant replied to that but did not produce any permission.

5. The Enforcement Directorate on the same allegation which was the subject matter of adjudication proceeding laid complaint against the appellant for prosecution under Section 56 of the Act before the Metropolitan Magistrate. After the issuance of process and exoneration in the adjudication proceeding appellant filed application for dropping the proceedings, inter alia, contending that on the same allegation the adjudication proceedings having been dropped and the appellant exonerated, his continued prosecution is an abuse of the process of the Court. The Metropolitan Magistrate by order dated 2nd September, 1997 rejected his prayer. Aggrieved by the same appellant preferred criminal revision application and reiterated the same submission but it did not find favour with the Calcutta High Court and by the impugned order dated 10th August, 2001, it rejected the revision application. While doing so it observed as follows:

"Therefore, the contention of Mr. Ghosh is unacceptable that in the adjudication proceedings being held by the department concerned the allegations against the petitioner having not been found established the prosecution against him before a Court of law cannot have any legs to stand upon, since the same departmental authority which held the enquiry against him and found no materials for establishing his guilt cannot be expected to lodge the prosecution on the self-same allegations against that person before a Court and cannot be expected to take a different stand on the self-same materials as available against him on the record. As we have noted above, the Enforcement Officer who has investigated into the case is a different agency from that of the adjudicating officer and, what is more important, it cannot be taken for granted that the Court will take the same view on the materials on record which have prompted the departmental authority to find the allegations not substantiated. As it has been already pointed out, the procedure according to which the trial of such an accused by the Court it held has some special features and the two testing processes are so divergent that there is ample scope for the two parallel authorities to hold even diametrically opposite views so far as the question of proof of the charge against the accused is concerned. The most of decisions relied upon by Mr. Ghosh and discussed above in respect of his above contention cannot be attracted to our present case for the simple reason that none of those judicial pronouncements are relating to a case under the Foreign Exchange Regulation Act the provisions of which cannot be equated with those of the Income Tax Act or Customs Act."

6. Being aggrieved, the appellant is before us with the leave of the Court.

7. Mr. Amarendra Sharan, Senior Counsel appearing on behalf of the appellant submits that standard of proof required to bring home the charge in a criminal case is much higher than the adjudication proceeding and once the appellant has been exonerated in the adjudication proceeding, his prosecution is an abuse of the process of Court. Mr. P.P. Malhotra, Additional Solicitor General, however, contends that from the scheme of the Act as reflected from Sections 50, 51, 56 of the Act, the plea put forth by the appellant is unsustainable.

8. The submissions made necessitate examination of the scheme of the Act. Section 50 of the Act which is relevant for the purpose reads as follows:

> 50. Penalty.-- 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 and clause (a) of sub-section (1) of Section 19 or of any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government in either case hereinafter referred to as the adjudicating officer.

The aforesaid provision provides for mandatory penalty and fixes the outer limit of such penalty on any person contravening the provisions of the Act which is to be adjudged by the Director of Enforcement or any other officer of the Enforcement not below the rank of an Assistant Director empowered by the Central Government. The procedure and the power to adjudicate penalty have been provided under Section 51 of the Act, which reads as follows:

> 51. Power to adjudicate.-- For the purpose of adjudicating under section 50 whether any person has committed a contravention of any of the provisions of this Act other than those referred to in that section or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section.

9. From a plain reading of Section 51 of the Act it is evident that for adjudging the penalty under Section 51 of the Act for contravention of the provisions of the Act or any rule, direction or order made thereunder the adjudicating officer is to be satisfied that the person has committed the contravention after holding an inquiry in the prescribed manner and after giving the person concerned a reasonable opportunity of making representation. Thus besides the procedural requirement the sine qua non for imposition of penalty under Section 51 of the Act is that the adjudicating officer has to record its satisfaction that the person concerned has committed the

contravention of any of the provisions of the Act or of any rule, direction or order made thereunder.

10. As would be evident from the preamble of the Act, it was enacted for the conservation of foreign exchange resources of the Country and the proper utilization thereof in the economic development of the Country. It is relevant here to mention that the Forty Seventh Report of the Law Commission of India on the Trial and Punishment of Social and Economic Offences quoted the following portion from the Report of the Study Team on Leakage of Foreign Exchange through Invoice Manipulation:

> "...like the Customs Act, there should be a provision that for an offence in the Foreign Exchange Regulation Act, both adjudication by the Director of Enforcement and conviction by a Court of law are possible. The two should not be alternatives as at present. We would also suggest that in more and more cases, prosecution should also be launched apart from adjudication so as to have a deterrent effect."

Bearing in mind aforesaid the Legislature in order to ensure that no economic loss is caused by the contravention provided for an appropriate penalty under Section 51 of the Act and to prevent the tendency to violate is curbed by inserting Section 56 of the Act providing for imposing appropriate punishment after due prosecution, relevant portion whereof reads as follows:

> "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 18 A, 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,-
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> xxx xxx xxx xxx
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> 11. With deepest respect we are entirely in agreement with the conclusion of our learned Brother Sathasivam, J. that the proceedings under Section 51 and 56 of the Act are independent of each other and the finding in an adjudication proceeding under Section 51 of the Act is not binding in the proceeding for prosecution under Section 56 of the Act and both can go hand in hand. Further, the prosecution can be launched even before conclusion of adjudication proceeding under Section 51 of the Act. In fact, it has explicitly been said by this Court in the case of Standard Chartered Bank and others vs. Directorate of Enforcement and others (2006) 4 SCC 278 which is as follows :
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> "24.There is nothing in the Act to indicate that a finding in an adjudication is binding on the court in a prosecution under Section 56 of the Act. There is no indication that the prosecution depends upon the result of the adjudication. We have already held that on the scheme of the Act, the two proceedings are independent. The finding in one is not conclusive in the other. In the context of the objects sought to be achieved by the Act, the elements relied on by the learned Senior Counsel, would not justify a

> finding that a prosecution can be launched only after the completion of an adjudication under Section 51 of the Act."

12. However, in a case like the present one in which the penalty proceeding under Section 51 of the Act and the prosecution under Section 56 of the Act though launched together but the penalty proceeding culminated earlier exonerating the person, the question would arise as to whether continuance of the prosecution would be permissible or not. In other words, the question with which we are concerned is the impact of the findings which are recorded on the culmination of adjudication proceeding on criminal proceeding and in case in the adjudication proceeding person concerned is exonerated can he ask for dropping of the criminal proceeding on that ground alone. Mr. Malhotra submits that finding in the adjudication proceeding cannot either operate as estoppel or res judicata in case of prosecution under Section 56 of the Act and in this connection, he has drawn our attention to a Constitution Bench judgment of this Court in the case of the Assistant Collector of Customs, Bombay and another vs. L.R. Melwani and another AIR 1970 SC 962, wherein in paragraph 8, it has been held as follows :

> "8. We shall now take up the contention that the finding of the Collector of Customs referred to earlier operated as an issue estoppel in the present prosecution. The issue estoppel rule is but a facet of the doctrine of autre fois acquit."
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> xxxx xxxx xxxx xxxx But before an accused can call into aid the above rule, he must establish that in a previous lawful trial before a competent court, he has secured a verdict of acquittal which verdict is binding on his prosecutor. In the instant case for the reasons already mentioned, we are unable to hold that the proceeding before the Collector of Customs is a criminal trial. From this it follows that the decision of the Collector does not amount to a verdict of acquittal in favour of accused Nos. 1and 2."

We do not find any substance in the submission of Mr. Malhotra and the decision relied on has no bearing in the facts and circumstances of the case.

13. In L.R. Melwani's case (supra), the accused persons resisted their prosecution on the ground that the Collector of Customs having given the benefit of doubt, in view of the guarantee granted under Article 20 (2) of the Constitution for the same offence they can not be tried more than once. It was also contended that that person once convicted or acquitted can not be tried for same offence again in view of the safeguard provided under Section 403 of Code of Criminal Procedure, 1898, which corresponds to Section 300 of the Code of Criminal Procedure, 1973. In order to get benefit of Section 300 of the Code of Criminal Procedure, 1973, it is necessary for an accused person to establish that not only he had been tried by a Court of competent jurisdiction for an offence but convicted or acquitted of that offence and the said conviction or acquittal is in force. In the aforesaid background the question which fell for consideration before this Court was as to whether the proceeding before the Collector of Customs is a criminal trial by a court of competent jurisdiction for trial of offence. On analysis of the various authorities of this Court, the Constitution Bench came to the conclusion that the Collector of Customs was not a Court of competent jurisdiction for criminal trial. This would be evident from the following passage from the said judgment :-

> "..... Hence the question is whether that prosecution is barred under Article 20 (2) of the Constitution which says that no person shall be prosecuted and punished for the same offence more than once. This Article has no direct bearing on the question at issue. Evidently those accused persons want to spell out from this Article the rule of autre fois acquit embodied in S.403, Criminal Procedure Code. Assuming we can do that, still it is not possible to hold that a proceeding before the Collector of Customs is a prosecution for an offence. In order to get the benefit of Section 403, Criminal Procedure Code or Article 20 (2), it is necessary for an accused person to establish that he had been tried by a "Court of competent jurisdiction" for an offence and he is convicted or acquitted of that offence and the said conviction or acquittal is in force....."

14. In the present case, it is not the case of the appellant that they were tried by the Enforcement Directorate and therefore further trial by the criminal court is not permissible but their contention is that in the face of the finding in the adjudication proceeding, their continued prosecution is an abuse of the process of the court. In view of what we have observed above, the contention of Mr. Malhotra is without merit and the decision relied on in no way supports his contention.

15. Mr. Malhotra, then contends that finding of the Enforcement Directorate in the adjudication proceedings is not binding or relevant in the criminal court where the appellant is facing the trial. In support of the contention, reliance has been placed on a full Bench decision of the Lahore High Court in the case of B.N. Kashyap vs. Emperor AIR (32) 1945 Lahore 23 and our attention has been drawn to the following passage:

> "There is no reason in my judgment as to why the decision of the civil Court particularly in an action in personam should be allowed to have that sanctity. There appears to be no sound reason for that view. To hold that when a party has been able to satisfy a civil court as to the justice of his claim and has in the result succeeded in obtaining a decree which is final and binding upon the parties, it would not be open to criminal Courts to go behind the findings of the civil Court is to place the latter without any valid reason in a much higher position than what it actually occupies in the system of administration in this country and to make it master not only of cases which it is called upon to adjudicate but also of cases which it is not called upon to determine and over which it has really no control. The fact is that the issues in the two cases although based on the same facts (and strictly speaking even parties in the two proceedings) are not identical and there appears to be no sufficient reason for delaying the proceedings in the criminal Court, which unhampered by the civil Court, is fully competent to decide the questions that arise before it for its decision and where in the nature of things there must be a speedy disposal."

We do not find any substance in this submission of Mr. Malhotra also. We may observe that standard of proof in a criminal case is much higher than that of the adjudication proceeding. The Enforcement Directorate has not been able to prove its case in the adjudication proceeding and the appellant has been exonerated on the same allegation. The appellant is facing trial in the criminal

case. Therefore, in our opinion, the determination of facts in the adjudication proceeding cannot be said to be irrelevant in the criminal case. In the case of B.N. Kashyap (Supra), the full Bench had not considered as to the effect of a finding of fact in a civil case over the criminal cases and that will be evident from the following passage from the said judgment :

> "I must, however, say that in answering the question, I have only referred to civil cases where the actions are in personam and not those where the proceedings or actions are in rem. Whether a finding of fact arrived at in such proceedings or actions would be relevant in criminal cases, it is unnecessary for me to decide in this case. When that question arises for determination, the provisions of Section 41, Evidence Act, will have to be carefully examined."

This Court had the occasion to consider this question in the case of K.G. Premshanker v. Inspector of Police (2002) 8 SCC 87, wherein it has been held as follows :-

> "30. What emerges from the aforesaid discussion is -- (1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of res judicata may apply; (3) in a criminal case, Section 300 CrPC makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein."

Hence, we reject this submission of Mr. Malhotra.

16. Mr. Malhotra submits that finding recorded in the adjudication proceeding is not binding on the criminal proceeding as both the cases have to be decided on the basis of the evidence therein. Reliance has been placed on a decision of this Court in the case of Iqbal Singh Marwah v.

Meenakshi Marwah (2005) 4 SCC 370, relevant portion whereof reads as follows :-

> "32. Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein...."

We do not have the slightest hesitation in accepting the broad submission of Mr. Malhotra that finding in an adjudication proceeding is not binding in the proceeding for criminal prosecution. A person held liable to pay penalty in adjudication proceeding can not necessarily be held guilty in criminal trial. Adjudication proceedings are decided on the basis of preponderance of evidence of a little higher degree whereas in a criminal case entire burden to prove beyond all reasonable doubt lies on the prosecution. In the case of Iqbal Singh Marwah (supra) relied on by Mr. Malhotra, the question which fell for consideration was as to whether bar under Section 195 (1) (b) (i) and (ii) operates for taking cognizance when a complaint is filed alleging that will filed by the accused in a probate case is forged and while holding that the bar would not operate if the will is forged before its filing in the court, hence the aforesaid observation of this court has no bearing in the facts and circumstances of this case.

17. It is trite that standard of proof required in criminal proceedings is higher than that required before adjudicating authority and in case accused is exonerated before the adjudicating authority whether his prosecution on same set of facts can be allowed or not is the precise question which falls for determination in this case. There are authorities of this Court in relation to the Income-tax Act in this regard. The first in the series is the judgment of this Court in the case of Uttam Chand and others vs. Income Tax Officer, Central Circle, Amritsar (1982) 2 SCC 543 in which registration of firm was cancelled on the ground that it was not genuine and prosecution initiated for filing false return. However, in appeal, the Income Tax Appellate Tribunal reversed the finding and held the firm to be genuine. Relying on that, this court quashed the prosecution inter alia observing as follows :

> "1. Heard counsel, special leave granted In view of the finding recorded by the Income Tax Appellate Tribunal that it was clear on the appraisal of the entire material on the record and Shrimati Janak Rani was a partner of the assessee firm and that the firm was a genuine firm, we do not see how the assessee can be prosecuted for filing false returns. We, accordingly, allow this appeal and quash the prosecution.
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> 2. There will be no order as to costs."

In the case of G.L. Didwania and Another vs. Income Tax Officer and Another 1995 Supp (2) SCC 724, on setting aside the order of the assessing authority which led to the prosecution of the assessee by the Income-Tax Appellate Tribunal, this Court held the prosecution not permissible and while doing so observed as follows :

> "4. In the instant case, the crux of the matter is attracted and whether the prosecution can be sustained in view of the order passed by the tribunal. As noted above, the assessing authority held that the appellant-assessee made a false statement in respect of income of M/s. Young India and Transport Company and that finding has been set aside by the Income Tax Appellate Tribunal. If that is the position then we are unable to see as to how criminal proceedings can be sustained."

Similar view has been taken by this Court in the case of K.C. Builders and Another vs. Assistant Commissioner of Income Tax (2004) 2 SCC 731, in which it has been held as follows:

> "26. In our view, once the finding of concealment and subsequent levy of penalties under Section 271(1)(c) of the Act has been struck down by the Tribunal, the assessing officer has no other alternative except to correct his order under Section 154 of the Act as per the directions of the Tribunal. As already noticed, the subject-matter of the complaint before this Court is concealment of income arrived at on the basis of the finding of the assessing officer. If the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eye of the law and, therefore, the prosecution cannot be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction. The Assistant Commissioner of Income Tax cannot proceed with the prosecution even after the order of concealment has been set aside by the Tribunal. When the Tribunal has set aside the levy of penalty, the criminal proceedings against the appellants cannot survive for further consideration. In our view, the High Court has taken the view that the charges have been framed and the matter is in the stage of further cross-examination and, therefore, the prosecution may proceed with the trial. In our opinion, the view taken by the learned Magistrate and the High Court is fallacious. In our view, if the trial is allowed to proceed further after the order of the Tribunal and the consequent cancellation of penalty, it will be an idle and empty formality to require the appellants to have the order of the Tribunal exhibited as a defence document inasmuch as the passing of the order as aforementioned is unsustainable and unquestionable."

18. Mr. Sharan contends that aforesaid principle shall apply with equal force in the prosecution under the Act as the basic principle which these judgments take note of to quash the prosecution is the higher standard of proof required in a criminal case than the adjudication proceeding and no reference at all has been made to the provisions of the Income-

tax Act to come to that conclusion. The decisions referred to above pertain to prosecution under the Income-tax Act and obviously had not adverted to any of the provisions of the Act, particularly Sections 50, 51 and 56 of the Act points out Mr. P.P. Malhotra, the Additional Solicitor General and therefore these decisions in his submission shall have no bearing on the facts of the present case.

19. We find substance in the submission of Mr. Sharan.

There may appear to be some conflict between the views in the case of Standard Charted Bank (supra) and L.R. Melwani (supra) holding that adjudication proceeding and criminal proceeding are two independent proceedings and both can go on simultaneously and finding in the adjudication proceeding is not binding on the criminal proceeding and the judgments of this Court in the case of Uttam Chand (supra), G.L. Didwania (supra) and K.C. Builders (supra) wherein this Court had taken a view that when there is categorical finding in the adjudication proceeding exonerating the person which is binding and conclusive, the prosecution cannot be allowed to stand. Judgments of this Court are not to be read as statute and when viewed from that angle there does not seem any

conflict between the two sets of decisions. It will not make any difference on principle that latter judgments pertain to cases under the Income Tax Act. The ratio which can be culled out from these decisions can broadly be stated as follows :-

(i) Adjudication proceeding and criminal prosecution can be launched simultaneously;

(ii)Decision in adjudication proceeding is not necessary before initiating criminal prosecution;

(iii)Adjudication proceeding and criminal proceeding are independent in nature to each other;

(iv)The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceeding by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20 (2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi)The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances can not be allowed to continue underlying principle being the higher standard of proof in criminal cases.

In our opinion, therefore, the yardstick would be to judge as to whether allegation in the adjudication proceeding as well as proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceeding, the trial of the person concerned shall be in abuse of the process of the court.

20. In the submission of Mr. Malhotra the matter stands squarely covered by the decision of this Court in the case of Standard Chartered Bank (supra) which submission has found favour with learned Brother Sathasivam, J. We deem it expedient to consider the ratio and background of the said case in little detail. In the said case alleging violation of some of the provisions of the Act the Enforcement Directorate issued notices to the Standard Chartered Bank and its officers as to why proceedings for imposition of penalty under Section 50 of the Act be not initiated against them. Further notices under Section 61 of the Act were also issued to them calling upon them to produce the necessary permission from the concerned authority for the transaction involved. The Standard

Chartered Bank and its officers filed writ petitions in the Bombay High Court challenging the constitutional validity of Sections 50, 51 and 68 of the Act. The Bombay High Court upheld the constitutional validity of the aforesaid provisions of the Act but at the same time observed that Section 68(1) of the Act shall not be applicable to adjudication proceeding and it is confined to prosecution under the Act. The Bank and its officers aggrieved by the judgment of the Bombay High Court upholding the constitutional validity of the impugned provisions of the Act and the Union of India dissatisfied with the observation of the Court whereby it restricted the application of Section 68(1) of the Act to only criminal prosecution filed separate appeals before the Supreme Court.

This Court upheld the decision of the Bombay High Court so far as the constitutional validity of the aforesaid provisions of the Act is concerned and accordingly dismissed the appeals filed by the Bank and its officers. However, this Court reversed the view of the Bombay High Court in regard to the applicability of Section 68(1) of the Act and held that it shall be applicable to both adjudication proceeding as well as proceeding for prosecution under the Act. In the case in hand we are not concerned with either of the issue.

21. Another contention which was raised in the aforesaid case was that criminal proceeding under Section 56 of the Act could not be initiated before culmination of adjudication proceeding under Section 51 of the Act. It was contended in the said case that there has to be finding in the adjudication proceeding about the violation of the provision of the Act and consequential imposition of a penalty and only thereafter in the light of those findings prosecution under Section 56 of the Act could be launched. It was resisted by the Union of India relying on the words "Without prejudice to any award of penalty by the Adjudicating Officer" in Section 56 of the Act and submission was made that criminal action cannot wait till outcome of the adjudication proceeding. In the context of the aforesaid argument this Court observed that proceedings under Section 51 and 56 of the Act are proceedings independent of each other and can be initiated simultaneously and finding in an adjudication proceeding is not binding on the Court in a proceeding for prosecution under Section 56 of the Act. The effect of finding of exoneration in the adjudication proceeding on criminal proceeding was not an issue and, therefore, the judgment under consideration cannot be said to have decided this question with which we are concerned in the present appeal.

22. A learned Single Judge of the Bombay High Court had the occasion to consider this question in a case under the Foreign Exchange Regulation Act in Criminal Application No. 1070 of 1999 (Hemendra M. Kothari vs. Shri W.S. Vaigankar, Assistant Director, Enforcement Directorate (FERA), Govt. of India and State of Maharashtra), decided on 25.04.2007 and on a review of large number of decisions of this Court and other courts it came to the following conclusion :-

> "21. It may be noted that in the present case the applicant was exonerated by the Dy. Director of Enforcement, who was adjudicating authority, in the adjudication proceedings. Admittedly that order was not challenged in appeal by the respondent and thus that order has become final. I have already noted the facts and findings of the adjudicating authority in detail. The adjudicating authority had clearly come to the conclusion that there was no material to hold the present applicant guilty for contravention of the provisions of FERA and he was completely exonerated. When in

> the departmental proceedings before the adjudicating authority, the department could not establish the charges, it is difficult to imagine how the department could prove the same charges before the criminal Court when the standard of proof may be much higher and stringent than the standard of proof required in departmental proceedings."

The Delhi High Court also considered this question arising out of a case under Foreign Exchange Regulation Act, in detail in the case of Sunil Gulati & Anr. V. R.K. Vohra 145 (2007) DLT 612, and held as follows :-

> "In case of converse situation namely where the accused persons are exonerated by the competent authorities/Tribunal in adjudication proceedings, one will have to see the reasons for such exoneration to determine whether these criminal proceedings should still continue. If the exoneration in departmental adjudication is on 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 criminal proceedings. If, on the other hand, the exoneration in the adjudication proceedings is on merits 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."

We respectfully endorse the view taken by the Bombay High Court in the case of Hemendra M. Kothari (supra) and Delhi High Court in Sunil Gulati (supra).

23. Bearing in mind the principles aforesaid we proceed to consider the case of the appellant. In the adjudication proceeding on merit the adjudicating authority has categorically held that "the charges against Shri Radheshyam Kejriwal for contravening the provisions of Section 9(1)(f)(i) and Section 8(2) read with Section 64(2) of the Foreign Exchange Regulation Act, 1973 cannot be sustained". In the face of the aforesaid finding by the Enforcement Directorate in adjudication proceeding that there is no contravention of any of the provisions of the Act, it would be unjust and an abuse of the process of the court to permit the Enforcement Directorate to continue with the criminal prosecution.

24. In the result the appeal is allowed, the impugned judgment of the learned Metropolitan Magistrate and the order affirming the same by the High Court are set aside and appellant's prosecution is quashed.

.....J [HARJIT SINGH BEDI] .....J [CHANDRAMAULI KR. PRASAD] NEW DELHI FEBRUARY 18, 2011.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1097 OF 2003

Radheshyam Kejriwal .... Appellant(s)

Versus

State of West Bengal & Anr. .... Respondent(s)

J U D G M E N T

P. Sathasivam, J.

1) This appeal is filed against the final judgment and order

dated 10.08.2001 passed by the High Court of Calcutta in C.R.R. No. 3593 of 1997 whereby the learned single Judge of the High Court dismissed the application filed by the appellant herein under Sections 401 and 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as `the Code') for quashing the criminal proceedings initiated against him vide Complaint Case No. 965 of 1995 under Section 56 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "the FERA") pending in the Court of 9th Metropolitan Magistrate, Calcutta.

2) BRIEF FACTS:

a) On 07.05.1993, a show cause notice bearing No. T-4/2-

C/93 was issued by the Special Director, Enforcement Directorate, FERA, Government of India, New Delhi to five persons including the appellant herein for holding inquiry under Section 51 of the FERA for the purpose of adjudicating the penalty under Section 50 for contravening the provisions of Sections 8(2) and 9(1)(f)(i) of the FERA which provides that no person shall make or receive any payment except with the special permission of the Reserve Bank of India. A search was conducted in the premises of one Shri Piyush Kumar Barodia at Calcutta wherefrom certain documents were found including the telephone diary. Apart from certain incriminating documents found against some other persons, some entries resembling to the name of the appellant herein were also found. After interrogating several persons, the Department came to the conclusion that Piyush Kumar Barodia was engaged in the transaction of providing dollars abroad by receiving the money in Indian currency in India. He used to send money through his younger brother placed at Bombay, who in turn, used to give the same to one Shri Babu Bhai Umaidmal Jain @ Bhansali and Bhansali used to send the money to one Shri Anil Bhai at London and the Anil Bhai used to deliver equivalent amount of foreign exchange to the agents of such intending persons abroad.

(b) On 09.12.1994, the Enforcement Directorate, before receiving the reply from the appellant herein, in response to the notice dated 07.05.1993, issued another show cause notice under Section 61 of the FERA for taking cognizance of the offences committed on account of the contravention of the provisions of the FERA. On 07.09.1995, without waiting for the reply of the appellant in response to the two notices, one under Section 51 for adjudication of penalty proceedings and other under Section 61 for taking cognizance of the offence, a complaint was filed by the Department under Section 56 of the FERA alleging violation of provisions contained in Sections 8(2) and 9(1)(f)(i) of the FERA. The Special Director, Enforcement Directorate, FERA, New Delhi after going through the entire record and the evidences, vide order dated 18.11.1996, acquitted the appellant by holding that no penalty could be imposed as there is no proper evidence to connect the appellant with the contravention of any of the provisions of the FERA and accordingly directed to drop the proceedings and discharged the notices.

(c) Though no triable issue remained after the final adjudication by the Special Director, Enforcement Directorate, the criminal proceedings were not dropped by the Department.

On 27.03.1997, the appellant filed an application before the Metropolitan Magistrate, Calcutta for dropping the proceedings. Vide order dated 02.09.1997, the Metropolitan Magistrate rejected the

said application and held that there is no bar to proceed with the criminal case as the proceeding before the FERA Board is separate.

(d) Being aggrieved by the said order, on 04.12.1997, the appellant filed an application under Sections 401 and 482 of the Code before the High Court of Calcutta for quashing of the criminal proceedings. The High Court, by the impugned order dated 10.08.2001, rejected the prayer for quashing of the criminal proceedings. Against the said order, the appellant has filed this appeal by way of special leave before this Court.

3) Heard Mr. Amarendra Sharan, learned senior counsel for the appellant and Mr. P.P. Malhotra, learned ASG for the respondents.

4) The main question that arises for consideration in this appeal is whether the Enforcement Directorate (ED) FERA can prosecute the appellant in a proceeding under Section 56 of the FERA when on the self-same facts and cause of action, the respondent-adjudicating authority dropped the charges framed under Section 50 of the FERA.

5) Since I have briefly stated the factual details in the earlier paragraphs, there is no need to traverse the same once again.

However, it is not in dispute that the residential premises of the appellant, a business man was searched by the office of the Enforcement Directorate on 22.05.1992 and certain documents were seized. Based on the same, on 07.05.1993, a show cause notice was served against him by the Enforcement Directorate directing him to show cause as to why adjudication proceedings as contemplated under Section 51 of the FERA should not be proceeded against him for contravening the provisions of Sections 8(2) and 9(1)(f)(i) of the FERA. The appellant submitted his reply to the show cause notice. Thereafter, adjudication proceedings in respect of the show cause notice dated 07.05.1993 was instituted before the Special Director, Enforcement Directorate, FERA, New Delhi.

After considering the submissions of both sides, Special Director passed an order dated 18.11.1996 holding that the Enforcement Directorate had failed to make out a prima facie case in support of charges of violation of Sections 8(2) and 9(1)(f)(i) of the FERA and directed that the aforementioned Departmental proceedings be dropped. It is relevant to point out that in the meantime i.e. on 26.07.1995, the respondents filed a complaint against the appellant in the Court of Chief Metropolitan Magistrate, Calcutta on the same cause of action which was taken cognizance by the Magistrate. According to the appellant, inasmuch as the same issues having already been adjudicated by the authority concerned, the Magistrate ought to have dropped the complaint and the continuation of the proceedings would result in abuse of the process of the Court. Aggrieved by the order of the Magistrate in not dropping the proceedings and continuing the same, the appellant preferred revision before the High Court being CRR No. 3593 of 1997. By the impugned order, the High Court accepting the stand of the Department refused to quash the criminal proceedings and dismissed the revision.

6) In order to appreciate the claim of the appellant, it is useful to refer the relevant provisions of FERA which are applicable to the issue raised. They are:

> "Penalty
>
> 50. 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 and clause (a) of sub-section (1) of section 19] or of any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government (in either case hereinafter referred to as the adjudicating officer). Power to adjudicate
>
> 51. For the purpose of adjudging under section 50 whether any person has committed a contravention of any of the provisions of this Act (other than those referred to in that section) or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section.
>
> Offences and Prosecutions
>
> 56. (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 judgement, 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."

7) Mr. Amarendra Sharan, learned senior counsel for the appellant, after taking through the above provisions as well as the order dated 18.11.1996 of the Special Director, Enforcement Directorate,

dropping the departmental proceedings submitted that in view of the said conclusion and of the fact that the Department had not challenged the same by way of further appeal, there cannot be criminal prosecution for the same cause of action under Section 56(1) of FERA.

8) I have gone through the order of the Special Director dated 18.11.1996. I have already pointed out that pursuant to the search and seizure, after issuance of show cause notice and opportunity of hearing, the Special Director, Enforcement Directorate passed the above order. After considering all the materials and finding that no incriminating documents relating to foreign exchange transactions and further finding that the charges against the appellant for contravening the provisions of Sections 8 (2) and 9(1)(f)(i) read with Section 64 (2) of FERA cannot be sustained, the Special Director dropped the proceedings initiated against the appellants and others.

Admittedly, the Department had not challenged the said conclusion by way of an appeal to the Foreign Exchange Regulation Appellate Board as per Section 52 of the FERA. It is the claim of the appellant that since there is a categorical finding by the Special Director exonerating the appellant from all charges leveled against him, the Department is not permitted to initiate criminal proceedings under Section 56 of the FERA. It is the stand of the appellant that in view of the language used in sub-section (1) of Section 56, namely, "without prejudice to any award or penalty by the adjudicating officer under this Act....", and in the light of the categorical conclusion by the Special Director dropping all the charges, the Enforcement Department is estopped from initiating prosecution.

9) In support of the above claim, learned senior counsel for the appellant relied on the following decisions:-

1) G.L. Didwania and Another vs. Income Tax officer and Another, 1995 Supp (2) SCC 724;

2) K.C. Builders and Another vs. Assistant Commissioner of Income-Tax, (2004) 2 SCC 731;

3) P.S. Rajya vs. State of Bihar, (1996) 9 SCC 1 and

4) Uttam Chand and Others vs. Income Tax Officer, Central Circle, Amritsar, (1982) 2 SCC 543.

10) The first decision, being G.L. Didwania (supra) arose under the Income Tax Act. The appellant therein was an assessee and for the assessment year 1960-61, he filed his return of income showing his income as Rs. 26,224/- in the prescribed form and the verification was signed by him on

25.08.1961 and the return was filed on 08.09.1961. The appellant showed his business income from firms in Delhi and Bombay. The assessment was made on 31.10.1961 by the officer concerned taking the income to be of Rs. 35,699/-.

There was another firm, M/s Young India and Transport Company in which the minor children of the appellant and his two employees were partners. In the assessment proceeding, the assessing authority reached the conclusion that it was not a genuine firm and the instrument of partnership was invalid and inoperative. Therefore, the proceedings under Sections 147 and 148 of the Income Tax Act were initiated against the appellant and his assessment was reopened. In pursuance of the notice under Section 148, the appellant filed his return showing his income as Rs. 29,500/-. By an order dated 17.03.1969, the Income Tax Officer assessed the income of the appellant as Rs. 52,634/- and this figure was arrived at by adding the income of M/s Young India and Transport Company and for the same assessment year as though it was the income of the appellant. The appellant made a statement in the verification to the return filed on 02.12.1971 and delivered an account/statement which according to the assessing authority was false or the assessee knew or believed to be false. On the basis of this assessment, the prosecution was launched and the complaint by the authorised authority was filed on 09.09.1977. Meanwhile, the appellant-assessee filed an appeal before the Income Tax Appellate Tribunal and the Tribunal by its order dated 24.02.1977 allowed the appeal and held that there was no substantial material to hold that the appellant was the owner of the entire business. The Appellate Tribunal also observed that the assessing authority arrived at wrong conclusion from the facts on record and held that the business run in the name of M/s Young India and Transport Company belonged to the assessee and accordingly the appellate authority deleted the addition of Rs. 23,134/-

from the total income of the assessee. After the Appellate Tribunal passed the order, allowing the appeal in favour of the appellant, the assessee filed a petition before the Magistrate to drop the criminal proceedings. The Magistrate by his order dated 02.09.1979 dismissed the said application and held that the prosecution has got a right to lead evidence in support of his complaint and the court can come to the conclusion whether or not any criminal offence is made out. The Magistrate also observed that the order of the Tribunal can be taken only as evidence. Aggrieved by the same, the appellant-

assessee filed an application under Section 482 of the Code before the High Court and the High Court dismissed the same in limine which was challenged before this Court. The question before this Court was whether the prosecution can be sustained in view of the order passed by the Tribunal. In the factual scenario, this Court held as under:

> "4. ... . As noted above, the assessing authority held that the appellant-assessee made a false statement in respect of income of M/s Young India and Transport Company and that finding has been set aside by the Income Tax Appellate Tribunal. If that is the position then we are unable to see as to how criminal proceedings can be sustained."

The ratio laid down in the decision is that in view of conclusion of the Income Tax Appellate Tribunal, the Department is not permitted to continue the criminal proceeding which was pending before the Magistrate and the finding of the Appellate Tribunal is a conclusive one. Based on such conclusion, this Court quashed the criminal proceeding and allowed the appeal of the assessee.

11) The second decision being K.C.Builders (supra) also arose under the Income Tax Act. Here again, relying on the earlier decision in G.L. Didwania (supra), this Court held as under:

> "31. It is a well-established principle that the matter which has been adjudicated and settled by the Tribunal need not be dragged into the criminal courts unless and until the act of the appellants could have been described as culpable."

12) The third decision being P.S. Rajya (supra), relates to power of the Court under Section 482 of the Code in respect of quashing of complaint/FIR. In this decision, it was held that if the issue in the criminal proceeding is identical to the departmental proceeding which could not be established, the Department is not permitted to pursue the same charge in the criminal proceeding.

13) The last decision relied on by the counsel is Uttam Chand (supra). This decision also arose under the Income Tax Act. Without adverting to any statutory provisions and the earlier decisions, confining to the facts of this case, noting the finding recorded by the Income Tax Appellate Tribunal that one Smt. Janak Rani was a partner of the assessee firm and that the firm was a genuine firm, this Court quashed the criminal proceeding initiated against her for filing false returns.

14) The first two decisions admittedly arose from the Income Tax Act. It is not demonstrated before us that whether identical provisions, namely, Sections 50, 51 and 56 of the FERA are available in the Income Tax Act. Even otherwise, in the light of the language used in Section 56(1) of the FERA, there cannot be any bar irrespective of the decision under Section 50, which I will elaborate in the succeeding paragraphs. The third decision relied on by the appellant relates to power of the Court under Section 482 of the Code for quashing the complaint/FIR and the last decision relied on has to be confined to the facts of that case since no other material was available. In other words, there is no ratio for being considered for other cases.

15) Now, let me consider the stand of the Department as projected by Mr. P.P. Malhotra, learned ASG. After taking through Sections 50, 51 and 56 of the FERA, Mr. Malhotra submitted that both the proceedings, namely, the departmental adjudication and imposition of penalty as covered by Sections 50 and 51 and the prosecution covered by Section 56 of the Act can go hand in hand and there is no bar from simultaneous operation of these two systems. He also submitted that all the decisions relied on by the learned counsel for the appellant have no bearing on the issue in the case on hand since no one has dealt with the provisions of FERA, more particularly, Sections 50, 51 and 56. In support of his claim, he relied on the following decisions:- 1) Standard Chartered Bank and Others vs. Directorate of Enforcement and Others, (2006) 4 SCC 278; 2) K.G. Premshanker vs. Inspector of Police and Another, (2002) 8 SCC 87; 3) Assistant Collector of Customs vs. L.R. Malwani, 1969 (2) SCR 438; 4) Iqbal Singh Marwah and Another vs. Meenakshi Marwah and Another, (2005) 4 SCC 370 and 5) B.N. Kashyap vs. Emperor, AIR (32) 1945 Lahore 23 Full Bench.

16) The first decision i.e. Standard Chartered Bank (supra), is a three-Judge Bench decision and arose on the very same provisions, namely, Sections 50, 51 and 56 of the FERA.

Since, at the outset, Mr. Amarendra Sharan has pointed out that the question in that decision was not the one relating to the issue being considered in the case on hand, let me first note down the facts and points determined by the three-Judge Bench. On receipt of notices under the FERA for showing cause why adjudication proceedings for imposition of penalty under Sections 50 and 51 be not initiated against the appellant Bank and some of its officers and further notices under Section 61 of the FERA giving an opportunity to the appellant Bank and its officers of showing that they had the necessary permission from the authority concerned for the transaction involved, the appellant Bank filed Writ Petition No. 1972 of 1994, seeking a declaration that the relevant sections of the FERA are unconstitutional, being violative of Articles 14 and 21 of the Constitution of India and for writ of prohibition restraining the authorities under the FERA from proceeding with the proposed adjudication and the proposed prosecution, in terms of the Act. In another writ petition which was filed by the officers of the Bank as CWP No. 2377 of 1996 challenging the individual notices, the High Court of Bombay rejected the challenge to the constitutional validity of Sections 50, 51, 56 and 68 of the FERA, but clarified that Section 68(1) of FERA was not applicable to an adjudication proceeding and that it was confined to a prosecution for penal offences under the Act.

Being aggrieved, the appellant-Bank and its officers as well as the Union of India have filed Civil Appeals before this Court.

Initially, those appeals came up before a Bench of two learned Judges which referred the same to a bench of three Judges by order dated 20.04.2004. The three-Judge Bench doubted the correctness of a decision relied on by the Bank and its officers in Asstt. Commr. vs. Velliappa Textiles Ltd. (2003) 11 SCC 405 which was a judgment of a Bench of three Judges and by order dated 16-7-2004 [ANZ Grindlays Bank Ltd. Vs. Directorate of Enforcement, (2004) 6 SCC 531] referred the question to a Constitution Bench. The Constitution Bench, by judgment dated 5-5-2005 (Standard Chartered Bank vs. Directorate of Enforcement (2005) 4 SCC 530) overruled the decision in Asstt. Commr. vs. Velliappa Textiles Ltd.

(supra) and sent these appeals for being heard on merits by a Division Bench. The question that was decided was whether in a case where an offence was punishable with a mandatory sentence of imprisonment, a company incorporated under the Companies Act, can be prosecuted, as the sentence of imprisonment cannot be imposed on the company. The majority in the Constitution Bench, held that there could be no objection to a company being prosecuted for penal offences under the FERA and the fact that a sentence of imprisonment and fine has to be imposed and no imprisonment can be imposed on a company or an incorporated body, would not make Section 56 of the FERA inapplicable and that a company did not enjoy any immunity from prosecution in respect of offences for which a mandatory punishment of imprisonment is prescribed. In the light of the said decision of the Constitution Bench, the controversy before the three-Judge Bench has narrowed down and proceeded on the basis that the appellant-Banks are liable to be prosecuted for offences under the FERA. Since the Bench elaborately considered the scope and applicability of Sections 50, 51, and 56 of the FERA with which I am concerned, I extract the entire discussion and the ultimate conclusion.

"20. The learned Senior Counsel for the appellants in Civil Appeal No. 1750 of 1999, in addition to adopting the arguments of the learned Senior Counsel already adverted to, also contended that on the scheme of the Act, it was incumbent on the Directorate of Enforcement to first adjudicate in terms of Section 51 of FERA and only if satisfied, proceed with the prosecution under Section 56 of the Act. According to counsel, under the scheme of FERA, the adjudication proceedings must first be commenced and only after they are completed, the Directorate of Enforcement can, in the light of the findings in the adjudication for penalty, decide to initiate a prosecution and seek to impose or not to impose a further punishment under Section 56 of the Act. It is submitted that the adjudication proceedings would give an idea to the authorities under the Act as to the gravity of the violation and the opportunity to decide whether the contravention deserved also a punishment by way of prosecution. They would decide whether the penalty imposed under Section 50 of the Act is adequate or not. If in the adjudication proceedings it is found that the alleged offender has not infringed any of the provisions of the Act, there will be no occasion for the Directorate of Enforcement to prosecute the person concerned. It would then be incongruous and unreasonable for the Directorate of Enforcement to prosecute a person for violating FERA, when in the adjudication proceedings against him, it had been found that the person had not violated any of the provisions of FERA. It was in this context that the scheme of FERA should be understood as indicating that there should first be an adjudication and thereafter, if the Directorate of Enforcement feels that the penalty is inadequate, to consider the launching of a prosecution.

21. The learned Additional Solicitor General contended that under FERA, adjudication and prosecution are two separate and distinct procedures with distinct purposes. There was no bar either in FERA or in any other law, to an adjudication and prosecution being launched in respect of an alleged contravention of FERA. Counsel submitted that the law has permitted it by providing two separate modes for dealing with the person who contravenes the law in relation to foreign exchange. While the primary purpose of imposing of the penalty is in the interests of revenue and the preservation of foreign exchange, the primary purpose of prosecution is to serve as a strong deterrent to persons or companies contravening the provisions of the Act and to send a message to society at large. Counsel pointed out that Section 56 of FERA which deals with offences and prosecutions, commences with the words "without prejudice to any award of penalty by the adjudicating officer under this Act". A person contravening any of the provisions shall upon conviction by a court will be punished, even if a penalty has been imposed on him. There was no warrant for reading the words "without prejudice to" as restricting the right of the authorities under the Act to proceed with the adjudication first and to commence the prosecution only at its conclusion. Counsel also emphasised that the two proceedings are independently dealt with. Counsel pointed out that even in respect of FERA of 1947 in Shanti Prasad Jain v. Director of Enforcement this Court had upheld a special procedure under the statute holding that it was not violative of Article 14 of the Constitution. It is submitted that the purpose of the Act is to bring the accused to

book, more so in case of a serious offence and it could not have been the intention of the legislature to await a long time for an adjudication to be completed by way of an appeal and a second appeal and then only to commence the prosecution.

22. The Act was enacted, as indicated by its preamble, for the conservation of foreign exchange resources of the country and the proper utilisation thereof in the economic development of the country. When interpreting such a law, in the absence of any provision in that regard in the Act itself, we see no reason to restrict the scope of any of the provisions of the Act, especially in the context of the presence of the "without prejudice" clause in Section 56 of the Act dealing with offences and prosecutions. We find substance in the contention of the learned Additional Solicitor General that the Act subserves a twin purpose. One, to ensure that no economic loss is caused by the alleged contravention by the imposition of an appropriate penalty after an adjudication under Section 51 of the Act and two, to ensure that the tendency to violate is curbed by imposing an appropriate punishment after a due prosecution in terms of Section 56 of the Act. The contention that as a matter of construction--since the provisions could not be attacked as violative of the rights under Part III of the Constitution--we should interpret the provisions of the Act and hold that an adjudication has to precede a prosecution cannot be accepted as we see nothing in the provisions of the Act justifying such a construction. On the scheme of the Act, the two proceedings are seen to be independent and the launching of the one or the other or both is seen to be controlled by the respective provisions themselves. In the context of the inclusion of this Act in the Ninth Schedule, the reliance placed on the decision in Rayala Corpn. (P) Ltd. v. Director of Enforcement cannot enable this Court to deem the provisions as arbitrary and to read them down or understand them in the manner suggested by the learned Senior Counsel. The very purpose of the Act and the very object of inclusion of the Act in the Ninth Schedule justifies an interpretation of the provisions as they stand on the basis that there is nothing arbitrary or unreasonable in the provisions and in the scheme as enacted. We may also notice that Section 23-D of the Foreign Exchange Regulation Act, 1947 which was considered in Rayala Corpn. (P) Ltd. had a proviso, which indicated that the adjudication for the imposition of penalty should precede the making of a complaint in writing to the court concerned for prosecuting the offender. The absence of a similar proviso to Section 56 or to Section 51 of the present Act, is also a clear indication that the legislature intended to treat the two proceedings as independent of each other. Obviously, the legislature must be taken to have been conscious of the interpretation placed on the corresponding provisions by this Court in the decisions above referred to when the 1973 Act was enacted and it was also included in the Ninth Schedule to ward off any challenge on the ground that it would be violative of Article 14 of the Constitution, unless understood or read in a particular fashion.

23. The learned Senior Counsel appearing for the appellant in criminal appeal arising out of SLP (Crl.) No. 5892 of 2004 in which the Full Bench decision of the Calcutta High Court is challenged, supported the arguments raised by the learned Senior

Counsel in Civil Appeal No. 1750 of 1999. The Full Bench of the Calcutta High Court in the judgment under appeal has, on a consideration of the relevant aspects, answered the reference made to it by holding that a complaint under Section 56 of FERA can never be said to be premature if it is instituted before the awarding of penalty under Section 50 of the Act and such criminal proceeding being an independent proceeding, can be initiated during the pendency of an adjudication proceeding under Section 51 of FERA, 1973. Therein, the Full Bench has referred to the decision of the Madras High Court in A.S.G. Jothimani Nadar v. Dy. Director, Enforcement Directorate and that of the Andhra Pradesh High Court in Anilkumar Aggarwal v. K.C. Basu which also take the same view as the one taken by the Full Bench in the judgment under challenge. The Court has also derived support for its view from the decisions of this Court in Asstt. Collector of Customs v. L.R. Melwani and in P. Jayappan v. S.K. Perumal. We see no reason not to approve the answer given by the Full Bench to the question referred to it for decision. On the whole, we are satisfied that there is no justification in accepting the argument that unless an adjudication proceeding under Section 51 of the Act is completed, a prosecution under Section 56 of FERA cannot be initiated. Both proceedings can simultaneously be launched and can simultaneously be pursued.

24. Counsel submitted that the devising of a special machinery for adjudication, the limiting of the "without prejudice" clause in Section 56 to any award of penalty and not the initiation of proceedings under Section 51 of the Act, the making of a contravention of any of the provisions of this Act as the key to both proceedings, would all indicate that an adjudication should precede a prosecution under Section 56 of the Act. There is nothing in the Act to indicate that a finding in an adjudication is binding on the court in a prosecution under Section 56 of the Act. There is no indication that the prosecution depends upon the result of the adjudication. We have already held that on the scheme of the Act, the two proceedings are independent. The finding in one is not conclusive in the other. In the context of the objects sought to be achieved by the Act, the elements relied on by the learned Senior Counsel, would not justify a finding that a prosecution can be launched only after the completion of an adjudication under Section 51 of the Act. The decision in K.C. Builders v. CIT is clearly distinguishable. The Court proceeded as if under the Income Tax Act, the prosecution is dependent on the imposition of penalty. That was a case where the prosecution was based on a finding of concealment of income and the imposition of penalty. When the Tribunal held that there was no concealment, and the order levying penalty was cancelled, according to this Court, the very foundation for the prosecution itself disappeared. This Court held that it is settled law that levy of penalties and prosecution under Section 276-C of the Income Tax Act are simultaneous and hence, once the penalties are cancelled on the ground that there was concealment, the quashing of the prosecution under Section 276-C of the Income Tax Act was automatic. We have held already that on the scheme of FERA, the adjudication and the prosecution are distinct and separate. Hence, the ratio of the above decision is not applicable. That apart, there is merit in the submission of the

learned Additional Solicitor General that the correctness of the view taken in K.C. Builders may require reconsideration as the reasoning appears to run counter to the one adopted by the Constitution Bench in Asstt. Collector of Customs v. L.R. Melwani and in other decisions not referred to therein. For the purpose of these cases, we do not think it necessary to pursue this aspect further. Suffice it to say, that the ratio of that decision has no application here."

17) The next decision heavily relied on by the Department is K.G. Premshanker (supra) which is also a three-Judge Bench decision. In this case, this Court has considered the effect of the decision of the civil court on the criminal proceedings and initiation of civil and criminal proceedings against the same person belonging to the same cause. The following discussion and conclusion are relevant:

"30. What emerges from the aforesaid discussion is -- (1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of res judicata may apply; (3) in a criminal case, Section 300 CrPC makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein.

31. Further, the judgment, order or decree passed in a previous civil proceeding, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act then in each case, the court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein.

32. In the present case, the decision rendered by the Constitution Bench in M.S. Sheriff case would be binding, wherein it has been specifically held that no hard-and-fast rule can be laid down and that possibility of conflicting decision in civil and criminal courts is not a relevant consideration. The law envisages "such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for limited purpose such as sentence or damages".

33. Hence, the observation made by this Court in V.M. Shah case1 that the finding recorded by the criminal court stands superseded by the finding recorded by the civil court is not correct enunciation of law. Further, the general observations made in Karam Chand case are in context of the facts of the case stated above. The Court was not required to consider the earlier decision of the Constitution Bench in M.S. Sheriff case as well as Sections 40 to 43 of the Evidence Act.

34. In the present case, after remand by the High Court, civil proceedings as well as criminal proceedings are required to be decided on the evidence, which may be brought on record by the

parties."

18) In L.R. Malwani (supra), which is also a Constitution Bench decision, though various questions of law posed before the Bench, I am concerned with question Nos. 1 and 2 which reads thus:

> "(i) Whether the prosecution from which these Criminal Revision Petitions arose is barred under Article 20(2) of the Constitution as against accused Nos. 1 and 2 in that case by reason of the decision of the Collector of Customs in the proceedings under the Sea Customs Act ?
>
> (ii) Whether under any circumstance the finding of the Collector of Customs that the 1st and 2nd accused are not proved to be guilty operated as an issue estoppel in the criminal case against those accused ?"

In those appeals, the case of the prosecution was that the accused persons and some other unknown persons had entered into a conspiracy at Bombay and other places in the beginning of October, 1959 or thereabout for the purpose of smuggling foreign goods into India and in pursuance of that conspiracy they had smuggled several items of foreign goods in the years 1959 and 1960. In that connection, an enquiry was held by the Customs authorities. In the course of the enquiry, some of the goods said to have been smuggled were seized.

After the close of the enquiry those goods were ordered to be confiscated. In addition, penalty was imposed on some of the accused. Thereafter, on February 19, 1965, the Assistant Collector of Customs, Bombay after obtaining the required sanction of the Government filed a complaint against five persons including the appellants in Criminal Appeal No. 35 of 1967 (accused Nos. 1 and 2 in the case) under Section 120-B, I.P.C. read with Clauses (37), (75), (76) and (81) of Section 167 of the Sea Customs Act, 1878 (Act VIII of 1878) as well as under Section 5 of the Imports and Exports (Control) Act, 1947. Before the commencement of the enquiry in that complaint, the 1st accused filed the application mentioned above on August 3, 1965. In the enquiry held by the Collector of Customs, he gave the benefit of doubt to accused Nos. 1 and 2. This is what he stated therein:

> "As regards M/s. Larmel Enterprises (of which accused No. 1 is the proprietor and accused No. 2 is the Manager) although it is apparent that they have directly assisted the importers in their illegal activities and are morally guilty. Since there is no conclusive evidence against them to hold them as persons concerned in the act of unauthorised importation, they escape on a benefit of doubt."

Despite the above finding, the Assistant Collector in his complaint sought to prosecute these accused persons. The Constitution Bench has considered the contention that "the finding of the Collector of Customs referred to earlier operated as an issue estoppeld in the present prosecution". The following conclusion of the Constitution Bench is relevant:

> "9. The rule laid down in that decision was adopted by this Court in Pritam Singh v. State of Punjab, AIR 1956 SC 415 and again in N.R. Ghose alias Nikhil Ranjan Ghose

> v. State of West Bengal, (1960) 2 SCR 58. But before an accused can call into aid the above rule, he must establish that in a previous lawful trial before a competent court, he has secured a verdict of acquittal which verdict is binding on his prosecutor. In the instant case for the reasons already mentioned, we are unable to hold that the proceeding before the Collector of Customs is a criminal trial. From this, it follows that the decision of the Collector does not amount to a verdict of acquittal in favour of accused Nos. 1 and 2."

19) It is relevant to point that the above dictum of the Constitution Bench in L.R. Malwani (supra) was relied on by a three-Judge Bench in Standard Chartered Bank (supra).

20) In Iqbal Singh Marwah (supra), about the binding nature of the decision in criminal court in respect of the same issue, it was held:

> "32. Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein. While examining a similar contention in an appeal against an order directing filing of a complaint under Section 476 of the old Code, the following observations made by a Constitution Bench in M.S. Sheriff v. State of Madras give a complete answer to the problem posed: (AIR p. 399, paras 15-16) "15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard-and-fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.
>
> 16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

> This, however, is not a hard-and-fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under Section 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

21) In B.N. Kashyap (supra), the Full Bench of the Court while considering Sections 40 to 43 of the Evidence Act, 1872 has held that finding on certain facts by a civil Court in action in personam is not relevant before the Criminal Court when it is called upon to give a finding on the same facts. Similarly the finding on certain facts by the Criminal Court is not relevant before the civil Court when it is called upon to give a finding on the same facts.

22) The above decisions, particularly, the decision in Standard Chartered Bank (supra) which arose under the FERA and dealt with the scope of Sections 50, 51 and 56 which in turn relied on and followed in the decision of Constitution Bench in L.R. Malwani (supra) is directly on the point raised in this appeal. In fact, this Court, in para 21, in the Standard Chartered Bank (supra) considered the very scope of the words "without prejudice to any award of penalty by the adjudicating officer under this Act" as mentioned in Section 56 of the Act.

23) Considering the interpretation relating to Sections 50, 51 and 56 by various decisions, I am of the view that in a statute relating to economic offences, there is no reason to restrict the scope of any provisions of the Act. These provisions ensure that no economic loss is caused by the alleged contravention by the imposition of an appropriate penalty after adjudication under Section 51 of the Act and to ensure that the tendency to violate is guarded by imposing appropriate punishment after due transaction in terms of Section 56 of the Act. In fact, it is relevant to point out that Section 23D of the Foreign Exchange Regulation Act, 1947 had a proviso, which indicates that the adjudication for the imposition of penalty should precede making of complaint in writing to the court concerned for prosecuting the offender. The absence of a similar proviso to Section 51 or to Section 56 of the present 1973 Act is a clear indication that the Legislature intended to treat the two proceedings as independent of each other. There is nothing in the present Act to indicate that a finding in adjudication is binding on the Court in a prosecution under Section 56 of the Act or that the prosecution under Section 56 depends upon the result of adjudication under Section 51 of the Act. It is reiterated that the two proceedings are independent and irrespective of the outcome of the decision under Section 50, there cannot be any bar in initiating prosecution under Section 56. The scheme of the Act makes it clear that the adjudication by the concerned authorities and the prosecution are distinct and separate. No doubt, the conclusion of the adjudication, in the case on hand, the decision of the Special Director dated 18.11.1996, may be a point for the appellant and it is for him to put forth the same before the Magistrate.

Inasmuch as FERA contains certain provisions and features which cannot be equated with the provisions of Income Tax Act or the Customs Act and in the light of the mandate of Section 56 of the FERA, it is the duty of the Criminal Court to discharge its functions vest with it and give effect to the legislative intention, particularly, in the context of the scope and object of FERA which was enacted

for the economic development of the country and augmentation of revenue.

Though the Act has since been repealed and not available at present, those provisions cannot be lightly interpreted taking note of the object of the Act.

24) In view of the above analysis and discussion, I agree with the conclusion arrived at by the Metropolitan Magistrate, Calcutta as well as the decision of the High Court.

Consequently, the appeal fails and the same is dismissed.

.....J. (P. SATHASIVAM) NEW DELHI;

FEBRUARY 18, 2011.