RAI BAHADUR SETH SHREERAM DURGAPRASAD

v.

DIRECTOR OF ENFORCEMENT

MAY 1, 1987

[A.P. SEN AND V. BALAKRISHNA ERADI, JJ.]

Foreign Exchange Regulation Act, 1947—Section 23 (1)—'Whoever'—Interpretation of—Comprehensive enough to include an association of persons such as a firm—Does not connote a natural person alone.

The Director of Enforcement initiated adjudication proceedings against the appellants—a partnership firm, under Section 23(1), as amended, for failure to repatriate the full value in foreign exchange earned by it against export shipments of manganese ore made during 1952-1958, and thereby contravening Section 12(2), as well as Section 4(1) of the Foreign Exchange Regulation Act, 1947. The appellants did not contest the charge under Section 12(2) of the Act but questioned the liability of the firm on the ground that the amended Section 23(1) as well as Section 23C introduced by the Amendment Act came into force on September 20, 1957 and were, therefore, inapplicable to the export shipments from the year 1952 onwards till that date and if at all, the firm could only be held liable under the amended Section 23(1) read with Section 23C as from that date. It was contended that the word 'whoever' in sub-section (1) of Section 23 of the Act before its amendment denoted only a natural person, and association of persons, such as a firm, would not fall within the connotation of the word 'whoever'. The Director of Enforcement held that the firm and its partners had deliberately underinvoiced shipments at the time of export and also diverted the undeclared proceeds to their accounts with foreign banks with an intention not to repatriate the sale proceeds in the prescribed manner within the prescribed period in respect of each shipment. He also held that the two persons incharge of, and responsible for, the conduct of the business of the partnership firm during the relevant period did not produce any evidence to show that the contravention in question had taken place without their knowledge or that they had exercised due diligence to prevent such contravention, and they were accordingly made liable for contravention of Section 12(2) of the Act for failure to repatriate the foreign exchange earned on the shipments and a penalty was imposed on the partnership firm.

A The Foreign Exchange Regulation Appellate Board, however, disagreed with the Director of Enforcement, accepted the contention of the appellants and accordingly reduced the amount of penalty.

The High Court allowed the appeal of the Director of Enforcement and restored the original order of the Director of Enforcement.

B

In appeal to this Court it was submitted on behalf of the appellants that though Article 20(1) of the Constitution would not in terms apply, the principles embodied therein would still govern and that the word 'whoever' in sub-section (1) of Section 23 before its amendment by Act XXXIX of 1957 connoted only a natural person i.e. those who C actually contravened the provisions of Section 12(1) of the Act by failure to repatriate full value of foreign exchange earned or exports and would not take in corporate liability and, therefore, association of persons, such as a firm, would not fall within the connotation of the word 'whoever', that by the Amendment Act, a new Section 23(1) was substituted and Section 23C was introducted and the effect of these D provisions was that after September 20, 1987 adjudication proceedings or criminal proceedings could be taken in respect of a contravention mentioned in Section 23(1), while before the amendment only criminal proceedings before a court could be instituted to punish the offender.

On behalf of the respondents it was contended that on a combined E reading of Section 23(1) and 12(2), the only possible construction was that the word 'whoever' includes a person and, therefore, initiation of adjudication proceedings against the partnership firm was permissible and sub-section (4) of Section 23 clearly contemplates prosecution of a company or other body corporate.

F Dismissing the appeal, this Court,

HELD: 1. It is clear from Sections 4(1), 12(2), 23(1), 23(4) and 23C that the word 'whoever' in sub-section (1) of Section 23 of the Act before its amendment was comprehensive enough to include an association of persons, such as a firm, and did not connote a natural person G alone. The word 'whoever' in the unamended Section 23(1) must be read in juxtaposition with Secton 12(2) and must mean any person who commits a contravention of that Section without exception. That must be the legal connotation of the word 'whoever' and it necessarily takes in corporate liability and includes any association of persons such as a partnership firm. Such a construction is borne out by the plain H language of sub-section (4) of Section 23 inserted by the Act XXXIV of

1950 which provides that if the person committing an offence punishable under sub-section (1) of Section 23 is a *company or other body corporate,* every director, manager, secretary or other officer thereof, unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent its commission, be deemed to be guilty of such offence. The Act, therefore, clearly contemplated that adjudication proceedings under sub-section (1) of Section 23 prior to its amendment could be initiated not only against the person who actually commits contravention but also casts vicarious liability on an association of persons such as a partnership firm or an artificial or a legal entity like a company. [143FH; 144A-C]

The High Court was right in setting aside the order of the Foreign Exchange Regulation Appellate Board and restoring that of the Director of Enforcement levying a penalty of Rs.15,00,000 on the appellants for failure to repatriate foreign exchange in contravention of Section 12(2) of the Act. The initiation of adjudication proceedings for failure to repatriate foreign exchange on shipments of manganese ore prior to September 20, 1957, the date when the Amendment Act came into force, was permissible. [144D; F]

Union of India v. *Sukumar Pyne,* [1966] 2 SCR 34, **referred to.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 627 of 1986.

From the Judgment and Order dated 7.3.1986 of the Bombay High Court in Crl. Appeal No. 119 of 1981.

Ashok Sen, Kapil Sibbal, A.K. Sanghi and R.L. Sanghi for the Appellants.

M.S. Rao, A.S. Rao and C.V. Subba Rao for the Respondents.

The Judgment of the Court was delivered by

SEN, J. The short question involved in this appeal by special leave directed against the judgment and order of the High Court of Bombay dated March 7, 1986 is whether the word 'whoever' in sub-s. (1) of s. 23 of the Foreign Exchange Regulation Act, 1947 before its amendment by Act XXXIX of 1957 denoted only a natural person and association of persons, such as a firm, would not fall within the connotation of the word 'whoever'. By the judgment, a learned Single Judge

A of the High Court allowed the appeal of the Director of Enforcement under s. 54 of the Act and set aside the order of the Foreign Exchange Regulation Appellate Board, Bombay dated January 30, 1981 and restored the order of the Director of Enforcement dated August 17, 1978 holding the appellants guilty of contravention of s. 12(2) of the Act read with the notification issued by the Government of India in the B Ministry of Finance, New Delhi dated April 22, 1952 and levying a penalty of Rs.15,00,000. By its order the Foreign Exchange Regulation Appellate Board held that there could be no levy of penalty on the appellants-firm for failure to repatriate foreign exchange on shipments of manganese ore made prior to September 20, 1957 i.e. prior to the amendment of s. 23(1) of the Act and the introduction of s. 23C by the C Amendment Act and accordingly reduced the amount of penalty to Rs.3,10,000. As a result of the decision of the High Court, the order of the Director of Enforcement levying a penalty of Rs.15,00,000 on the appellants has been restored.

The facts giving rise to the appeal are as follows. Messrs Rai D Bahadur Seth Shreeram Durgaprasad were a partnership firm engaged in the business of winning, extracting and getting manganese ore from their manganese mines at Tumsar on a very large scale. During the period from 1952 to 1958, the partnership firm made 52 shipments of manganese ore to various foreign countries and earned huge amount of foreign exchange. It however failed to repatriate the full value in E foreign exchange against the aforesaid 52 shipments and thereby contravened s. 12(2) of the Act. The Director of Enforcement accordingly initiated adjudication proceedings against the appellants under s. 23(1) as amended for contravention of s. 12(2) as well as s. 4(1) of the Act. The appellants stated before the Director of Enforcement that they did not contest the charge under s. 12(2) of the Act but questioned the F liability of the firm on the ground that the amended s. 23(1) as well as s. 23C introduced by the Amendment Act came into force on September 20, 1957 and were therefore inapplicable to the export shipments from the year 1952 onwards till that date; and if at all, the firm could only be held liable under the amended s. 23(1) read with s. 23C as from that date. It was contended that the word 'whoever' in sub-s. (1) of G s. 23 of the Act before its amendment denoted only a natural person and association of persons, such as a firm, would not fall within the connotation of the word 'whoever'. The Director of Enforcement by his order dated August 17, 1978 repelled the contention and held that the firm and its partners had deliberately underinvoiced shipments at the time of export and also diverted the undeclared proceeds to their H accounts with foreign banks with an intention not to repatriate the sale

proceeds in the prescribed manner within the prescribed period in respect of each shipment. He dealt with the evidence in detail with reference to the books of account and came to the conclusion that both Durgaprasad Saraf and Umashanker Aggarwal were incharge of, and responsible for, the conduct of the business of the partnership firm during the relevant period. Neither of them produced any evidence to show that the contravention in question had taken place without their knowledge or that they had exercised due diligence to prevent such contravention. They were accordingly made liable for contravention of s. 12(2) of the Act for failure to repatriate the foreign exchange earned on the aforesaid 52 shipments and were imposed a penalty of Rs.15,00,000 on the partnership firm. The Foreign Exchange Regulation Appellate Board however disagreed with the Director of Enforcement and accepted the contention of the appellants and accordingly reduced the amount of penalty to Rs.3,10,000.

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

A s. 23(1) read with s. 23C with regard to initiation of adjudication proceedings in respect of contraventions which took place before the Amendment Act came into force, he rightly contends that the matter is concluded by the decision of this Court in *Union of India* v. *Sukumar Pyne*, [1966] 2 SCR 34.

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

> "4. (1) Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall ..... sell or lend to, or exchange
C with, any person not being an authorised dealer, any foreign exchange.
>
> 12.2. Where any export of goods has been made to which a notification under sub-section (1) applies, no person entitled to sell, or procure the sale of, the said goods shall,
D except with the permission of the Reserve Bank, do or refrain from doing any act with intent to secure that—
>
> (a) the sale of goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade, or
>
E
>
> (b) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any as may be allowed by the Reserve Bank, or is delayed to such extent as
F aforesaid:
>
> Provided that no proceedings in respect of any contravention of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full amount as aforesaid has not been
G made in the prescribed manner."

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

> "23. (1) Whoever contravenes any of the provisions of
H this Act or of any rule, direction or order made thereunder

shall be punishable with imprisonment for a term which may extend to two years or with fine or with both, and any Court trying any such contravention may, if it thinks fit and in addition to any sentence which it may impose for such contravention, direct that any currency, security, gold or silver, or goods or other property in respect of which the contravention has taken place shall be confiscated. A B

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

Sub-s.(1) of s. 23C is as follows:

"23C. Offences by companies—(1) If the person committing a contravention is a company, every person who, at the time the contravention was committed, was incharge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: D E

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

It is clear from these provisions that the word 'whoever' in sub-s. (1) of s. 23 of the Act before its amendment was comprehensive enough to include an association of persons, such as a firm, and did not connote a natural person alone. There is no reason why the word 'whoever' in the section should not receive its plain and natural meaning. According to the Shorter Oxford English Dictionary, vol. 2, p. 2543, 'whoever' means' 'any one who, any who'. The meaning given in Webster Comprehensive Dictionary, International edn., vol. 2 at p. 1437 is 'any one without exception 'any person who'. In our judgment, the word 'whoever' in the unamended s. 23(1) must be read in juxtaposition with s. 12(2) and must mean any person who commits a G H

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

E The contention of the learned counsel that recourse could not be had to the amended s. 23(1) read with s. 23C of the Act in respect of the contravention of s. 12(2) for failure on the part of the appellants to repatriate foreign exchange on shipments of manganese ore made prior to September 20, 1957, and there could be no initiation of adjudication proceedings under the amended s. 23(1) read with s. 23C or levy F of penalty on the appellants must also fail for another reason. In *Sukumar Pyne's* case the Court reversed the decision of the Calcutta High Court in *Sukumar Pyne* v. *Union of India & Ors.*, AIR (1962) Cal. 590 striking down s. 23(1)(a) as being violative of Art. 14 of the Constitution. Regarding the point, namely, whether s. 23(1)(a) having been substituted by Amendment Act XXXIX of 1957 would have G retrospective operation in respect of the alleged offence which took place in 1954, the High Court came to the conclusion that the petitioner had a vested right to be tried by an ordinary court of the land with such rights of appeal as were open to all and although s. 23(1)(a) was procedural, where a vested right was affected, *prima facie,* it was not a question of procedure. Therefore, the High Court H came to the conclusion that the provision as to adjudication by the

Director of Enforcement could not have any retrospective operation. It was held that 'the impairment of a right by putting a new restriction thereupon is not a matter of procedure only'. It impairs a substantive right and an enactment that does so is not retrospective unless it says so expressly or by necessary intendment. The Court reversed the High Court and held that effect of these provisions was that after the amendment of 1957, adjudication or criminal proceedings could be taken up in respect of a contravention mentioned in s. 23(1) while before the amendment only criminal proceedings before a Court could be instituted to punish the offender. In repelling the contention advanced by Shri N.C. Chatterjee that the new amendments did not apply to contraventions which took place before the Act came into force, the Court observed:

> "In our opinion, there is force in the contention of the learned Solicitor-General. As observed by this Court in *Rao Shiv Bahadur Singh* v. *The State of Vindhya Pradesh*, [1953] SCR 1188, a person accused of the commission of an offence has no vested right to be tried by a particular court or a particular procedure except in so far as there is any constitutional objection by way of discrimination or the violation of any other fundamental right is involved. It is well recognised that "no person has a vested right in any course of procedure "(vide Maxwell 11th Edition, p. 216), and we see no reason why this ordinary rule should not prevail in the present case. There is no principle underlying Art. 20 of the Constitution which makes a right to any course of procedure a vested right."

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

The appeal must therefore fail and is dismissed with costs.

N.P.V. Appeal dismissed.