(2011) 07 MAD CK 0275

In the Madras High Court

Case No : Criminal A. No. 759 of 2010 and MP. No. 1 of 2010

Costa and Co. APPELLANT

Vs

State and Others RESPONDENT

Date of Decision : 26-07-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 11, 305, 305(2)
Income Tax Act, 1961 — Section 276B, 276U
Insecticides Act, 1968 — Section 29
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 141(1)
Penal Code, 1860 (IPC) — Section 11, 120B, 420, 467, 471
Prevention of Corruption Act, 1947 — Section 5(1), 5(2)

Citation : (2012) MLJ(Cri) 746

Hon'ble Judges : T. Mathivanan, J

Bench : Single Bench

Advocate : Ganesh, for the Appellant; N. Chandrasekaran, Special Public Prosecutor for CBI, for the Respondent

Final Decision : Dismissed

Judgement

T. Mathivanan, J.—Challenge is made in this memorandum of criminal revision petition to the order dated 8.7.2010 in C.C. No. 5 of 2000 on the file of the Learned Principal Special Judge for CBI Cases, Chennai turning down the relief sought for that the charges against the petitioner company have been abated as the Director of the company one Mr. Roque Francisco Ioda Costa Azardo had died on 10.05.2010 based on the doctrine of "actio personalis moritur cum persona". The crux of the facts for the disposal of this revision petition is as under;

1.1. The respondent police has laid a final report after the completion of the investigation based on the first information report in Cr. No. RC60(A)/90 dated 10.12.1990 against this petitioner company and two others alleging that they have committed an offence punishable under Sections 120B, 420 of IPC and u/s 5(2) read with 5(1)(d) of Prevention of Corruption Act 1947. The Principal Special Judge for CBI Cases has taken cognisance of the offences and taken the case on his file in C.C. No. 5 of 2000.

1.2. The petitioner being a company has been arraigned in the above case as 3rd accused. The trial in the above said case has already been commenced and it appears that the case is in the stage of part heard. When the matter stood thus, the petitioner has come out with a memorandum in SR. No. 3908 of 2010 stating that one Mr. Roque Francisco Ioda Costa Azardo who was the Director and responsible person for the day today affairs of the company during the crucial period viz., 1986-89 in which certain illegalities were alleged to have occurred had died on 10.5.2010 and therefore, the entire criminal proceedings as against the company were abated on the death of Mr. Roque Francisco Ioda Costa Azardo, based on the doctrine of "actio personalis moritur cum persona",

1.3. A death certificate to that effect was also tagged along with the memorandum. After hearing both sides the Learned Principal Special Judge for CBI Cases has rejected the memorandum on 8.7.2010, on the ground that the company has been arraigned as A3, in the above said case and that, it''s Directors have not been arraigned as the accused and hence, on the death of the Director of the Company the charge would not abate as against the company and on the other hand the company would defend the case by appointing its another representative as contemplated u/s 305 of Cr.P.C.

2. Heard Mr. Ganesh, the learned counsel for the petitioner and Mr. N. Chandrasekaran, Learned Special Public Prosecutor for CBI Cases, Chennai.

3. Mr. Ganesh, learned counsel appearing for the petitioner has reiterated his earlier stand that on the death of the Director, the criminal proceedings against the company would automatically be abated and therefore, the order of the Learned Principal Special Judge, for CBI Cases, Chennai, was erroneous and founded on wrong principles of law.

4. On the other hand Mr. N. Chandrasekaran, learned special public prosecutor for CBI Cases has vehemently resisted the arguments advanced on behalf of the petitioner and submitted that the company itself was having its own legal entity and of course it was a person and having been arraigned as an accused in the above said case among two accused, it could not be heard to say that the charges leveled against the company (A3) were abated on the death of Mr. Roque Francisco Ioda Costa Azardo, who was the Director of the Company. He would submit further that it was not the case of the petitioner that the company had become defunct on the demise of the erstwhile Director of the Company. The company had been running and functioning and therefore, it could very well defend the case by authorising the present Director.

5. Mr. Ganesh, the learned counsel for the petitioner in support of his contention has sought the assistance of Section 305 of Cr.P.C. and Section 11 of IPC.

6. Section 305 of the Code of Criminal Procedure enacts as follows:

Section 305-Procedure when corporation or registered society is an accused.

(1) In this Section, "corporation" means incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

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

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

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.

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

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

7. It is manifest from the averments of the memorandum that the former Director of the Company Mr. Roque Francisco Ioda Costa Azardo, had passed away on 5.10.2010. Since the company itself is an accused for the above said case as contemplated under sub-section 2 of Section 305 of Cr.P.C. the company may appoint a representative for the purpose of defending the case as the petitioner who stands as the 3rd accused, is functioning effectively till today. It is also significant to note here that as rightly argued by Mr. N. Chandrasekaran, learned special public prosecutor, the company has not yet become defunct.

8. The learned counsel for the petitioner would submit that since the Director of the petitioner company had passed away, the company could not be prosecuted as contemplated u/s 11 of IPC. Under these circumstances it has become imperative on the part of this Court to refer Section 11 of Cr.P.C.

9. Section 11 of IPC defines the phrase "person". As contemplated u/s 11 of IPC, the term "person" includes any company or association or body of persons whether incorporated or not.

10. Mr. Ganesh, learned counsel for the petitioner has also placed reliance upon the decision in A.K Khosla and Others v. T.S. Venkatesan and Others 1992 Crl. L.J. 1448 in support of his case. In this case the learned single judge of Calcutta High Court has held on the, language of Section 11 of Indian Penal Code that the offences involving mens rea and/or involving compulsory punishment of imprisonment the company cannot be prosecuted in respect of such offences.

11. In paragraph No. 9, the learned judge has observed that;

I may take up the last contention of Mr. Roy Chowdhury first for consideration. The offences alleged in the complaint under Sections 420, 467, 471 and 477A of the Indian Penal Code, as also the offence u/s 120B of the Indian Penal Code, are all offences having mens rea as one of the essential ingredients thereof. The accused committing the offences must have a guilty mind and as such a juristic person such as a body corporate cannot be prosecuted for the said offences.

12. In paragraph No. 10, the learned judge has observed that;

Another test was applied in respect of the prosecution of the body corporate in Adding Machines India (P) Ltd. v. State (1987) 1 CHN 359 : LNIND 1987 Cal 84. It was held that in respect of offence where the sentence prescribed is mandatory imprisonment and the Court has no discretion to impose any other punishment, such as fine, a company cannot be prosecuted in respect of such an offence.

13. Mr. Ganesh, the learned counsel for the petitioner has also made reference to the decision in Mopany Investment Pvt. Ltd. v. Amelendu Chatterjee and Another Crimes (HC) 1 (1992) 626. In this case it was alleged that the petitioners company had failed to deduct the income tax from the amount of interest credited to the payee, as required u/s 194-A(1) of the Act and failed to pay the tax to the credit of the Central Government. The failure on the part of the company tantamount to punishment of compulsory imprisonment as contemplated u/s 276-B(ii) of the Income Tax Act. In this connection a question was arisen as to whether the company being a juristic person can be subjected to imprisonment on conviction? On this core question it was held by the Calcutta High Court that the continuation of the instant proceedings against the company amounts to an abuse of the process of the Court. Then another question was arisen as to whether, the directors of the company can be proceeded with? This question was answered in the negative form, saying that when the company, principal offender cannot be proceeded with and convicted u/s 276-U (ii), the persons who are vicariously liable cannot be proceeded against and convicted in the instant proceeding.

14. In Jai Shree Agro Industries Ltd. And Others v. State of Haryana Crimes (HC) 4 (2007) 512, the scope and application of Section 29 of the Insecticides Act, 1968 and Section 305 of Cr.P.C, 1973 have been explained by the Learned single Judge of Punjab & Haryana High Court. In this case the petitioners company was a manufacturing company of Butachlor (weedicide) and it was found misbranded

by an analyst. Therefore, a petition was filed by the petitioners being its Director to quash the criminal proceedings. It was held that the Director being in charge of and responsible to company for conduct of its business could not avoid liability merely because that company had nominated another person to represent the company for trial.

15. On the other hand Mr. N. Chnadrasekaran, learned Special Public Prosecutor would submit that the relief sought for by the petitioner company is not tenable and the company Costa & Co. is the actual accused No. 3 as arraigned in the charge sheet and Mr. Roque Francisco Ioda Costa Azardo, was only representing the company and his death would not amount to abating of the charges against the company. He has also submitted further that the trial Court has correctly held the legal position envisaged u/s 305 of Cr.P.C that the company i.e., Costa & Co. has only been arraigned as accused No. 3 and its Directors were not arraigned as accused. However, Mr. Roque Francisco Ioda Costa Azardo was found to carry out the day to day affairs of the company and as such he was made to represent the company in the Court proceedings and his death would not absolve the company of the charges framed against the accused persons by the trial Court.

16. In support of his contention, the learned special public prosecutor has placed reliance upon the decision in Iridium India Telecom Ltd. Vs. Motorola Incorporated and Others, In this case at paragraph No. 55 the Apex Court has held that; "55. We are of the considered opinion that there is much substance in the submissions of Mr. Jethmalani that virtually in all jurisdictions across the world governed by the rule of law, the companies and corporate houses can no linger claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary mens rea for the commission of criminal offences. The legal position in England and the United States has now crystallized to leave no manner of doubt that a corporation would be liable for crimes of intent."

17. In paragraph No. 63, the Apex Court has held as follows;

63. From the above it becomes evident that a corporation is| virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is attributed to corporations on the principle of "alter ego" of the company.

18. The learned special public prosecutor has also referred another decision in S.V. Muzumdar and Others Vs. Gujarat State Fertilizer Co. Ltd. and Another, In this case the appellants have questioned the correctness of the judgment

rendered by a single Judge of the Gujarat High Court refusing to accept the prayer by the appellants to quash the proceedings initiated on the basis of a complaint filed by the respondents alleging commission of offence in terms of Section 138 of the Negotiable Instruments Act, 1881 and other connected offences. On hearing the appeal, the Apex Court has held that;

Section 141 of Negotiable Instruments Act would be attracted if the offence u/s 138 has been committed by company. Section 141 covers three types of persons viz.,

(1) The company who committed the offence.

(2) Everyone who was in charge of and was responsible for the business of the company.

(3) Any other person who is a director or a manager or a secretary or officer of the company with whose connivance or due to whose neglect the company has committed the offence.

19. It is also held that;

Whether or not the evidence to be led would establish the accusations is a matter for trial. It needs no reiteration that proviso to sub-section (1) of Section 141 enable the accused to prove his innocene by discharging the burden which lies on him.

20. On coming to the instant case on hand it is not in dispute that the former Director of the company Mr. Roque Francisco Ioda Costa Azardo had passed away on 5.10.2010. But the contention that on account of the death of its former Director the charges levelled against the petitioner company have become automatically abated is not able to be countenanced and is not tenable.

21. Virtually, the trial Court is in the half way and it was brought to the notice of this Court that some of the witnesses were examined on behalf of the prosecution and some more witnesses are yet to be examined. Only under this circumstance, the petitioner company has come out with a memorandum which was dismissed by the trial Court.

22. This Court has carefully considered the submission made on behalf of the both sides and is of considered view that as rightly observed by the Apex Court in Iridium India Telecom Ltd. v. Motorola Incorporated and Others (supra) "the companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary mens rea for the commission of criminal offences."

23. Since the trial is in progress, the criminal liability of the company has to be established by the prosecuting agency and this in not the high time to consider the arguments advanced on behalf of the revision petitioner. Having regard to the observations made above, this Court finds that the order passed by the trial Court does not require any interference.

