
(1999) 04 MAD CK 0068
In the Madras High Court
Case No : Criminal Appeal No. 765 of 1989

Ganga Bai

APPELLANT

Vs

Inspector Civil Supply C.I.D., North Unit, Madras

RESPONDENT

Date of Decision : 29-04-1999

Acts Referred:

Constitution of India, 1950 — Article 136
Essential Commodities Act, 1955 — Section 10, 3, 7(1)
Tamil Nadu Scheduled Commodities (Regulation of Distribution by Card System) Order, 1982 — Clause 6(2)(3)
Water (Prevention and Control of Pollution) Act, 1974 — Section 20, 25(1), 26, 44, 47

Citation : (1999) CriLJ 3560 : (1999) 2 CTC 385 : (1999) 2 LW(Cri) 540

Hon'ble Judges : V.S. Sirpurkar, J;P. Thangavel, J;A. Raman, J

Bench : Full Bench

Advocate : Mr. S. Gopinath, for Mr.K. Sellathurai, for the Appellant; Mr. Syed Fasiuddin, Additional Public Prosecutor, for the Respondent

Judgement

Judgement pronounced by V.S. Sirpurkar, J.—The question, which has been referred to us for decision, appears in the referring order as

follows:

That two rulings by Benches consisting of equal number of Judges when cannot be reconciled and the consequences of non- prosecution are

detrimental to the public interest, how to reconcile and ward off the evil consequences of non-prosecution on public justice system.

This question has arisen in a criminal appeal which has been filed by accused Ganga Bai who has been convicted by the Special Judge for offences

under Clause 6 (2) (3) of the Tamil Nadu Scheduled Commodities (Regulation of Distribution by Card System) Order, 1982, (herein after called

as "the order") read with section 7(1)(a)(ii) of the Essential Commodities Act, 1955 and has been sentenced to undergo rigorous imprisonment for

three months as also to pay fine of Rs.500 and in default to undergo rigorous imprisonment for a further period of three months. The said accused was charged along with two other accused persons, who, however, were acquitted by the trial Court. It was the case of the prosecution before the trial Court that the appellant Ganga Bai was working as the Chief Billing Clerk in a Fair Price Shop allotted to a Co-operative Society as an authorised dealer situated at Thiru-ViKa Street, Otteri, Chennai, while the two other accused were working as weighing man and labourer. It was alleged against them that with common intention to make illegal gain, they prepared bogus bills for Palmoil which was supplied to the family card holders for the month of August, 1997. According to the prosecution, the palmoil was sold to the people who did not hold the card and thus the accused persons had committed the offences. As many as eight witnesses were examined in support of the prosecution and ultimately the trial Court had convicted only the appellant Ganga Bai, who used to write the Cash Memos/Bills, while the other two accused persons were acquitted who were merely the weighman and the labourer respectively. The learned single Judge, who heard the appeal, has observed in his order that contrary views have been taken in the two Supreme Court judgments, they being Sheoratan Agarwal and another v. State of Madhya Pradesh, 1984 S.C.C. (Cri) 620 and U.P. Pollution Control Board v. Messrs. Modi Distillery and others, 1987 S.C.C. 632. Unfortunately, there is nothing in the reference order to indicate as to why the said rulings were referred and what was the exact contention of the parties before the learned single Judge. However, with the help of the learned Counsel appearing on behalf of the accused as also the Additional Public Prosecutor, we went through the records. It was the contention of the appellant's counsel before the learned single Judge and also before us that the conviction against the appellant could not be sustained as the offence was committed by the co-operative society and not by the individual and, therefore, unless the said co-operative society or the persons responsible to run the said co-operative society was added as the accused, there could be no prosecution maintainable against the present appellant who was merely a servant of the said society. It seems that reliance was placed by the appellant on Section 10 of the Essential Commodities Act and more particularly on the reported rulings referred to by the learned single judge in his reference

order.

2. It was also suggested that the present appellant was not an authorised dealer and as such could not be proceeded against under the provisions

of the Essential Commodities Act. It was suggested that sub-clause (2) as also sub-clause (3) of Clause 6 of the Order spelt out an offence

committed only by the authorised dealer and the appellant not being an authorised dealer at all, could not be charged for the breach of Clause 6 (2)

and (3) of the Order. Clause 6 (2) and (3) of the Order are as under:

(2) The authorised dealer with whom the family card is registered shall on production of such card by the holder, make necessary entries in the

card and supply the scheduled commodities not exceeding the quantities for which he is eligible.

(3) The authorised dealer shall not supply the scheduled commodities against any family card not registered with him or to non-card holder.

According to the learned counsel, the provisions of sub-clauses (2) and (3) of Clause 6 of the Order operate only vis-a-vis the authorised dealer

and, therefore, the appellant, who was not an authorised dealer, could not be convicted for the breach of those provisions, independently of the

authorised dealer.

3. On the other hand, the learned Additional Public Prosecutor pointed out that there was no necessity of the authorised dealer being made an

accused, though in the facts of the present case even the authorised dealer could have been made as a party accused because of Clause 14 of the

Order suggests that every authorised dealer shall be held responsible for all the acts of commission and omission of his partners, agents, servants

and other persons who are allowed to work in the shop. However, he also contended that there would be no question of the present appellant

getting any advantage of the authorised dealer viz., the co-operative society in this case not being a party as an accused to this case as the offence

could be alleged independently against the appellant.

4. The question that could fall for consideration in this appeal, therefore, was as to whether the appellant who was merely a servant of the

authorised dealer could be said to have caused a breach of Clause 6(2) and (3) of the Order read with Section 7(1)(a)(ii) of the Essential

Commodities Act and further the non-prosecution of the authorised dealer by

itself was fatal to the prosecution against the appellant who was merely a servant.

5. In support of the contentions referred to earlier, it seems that the two aforementioned decisions came to be cited before the learned single

Judge. There was no scope in the appeal to go beyond these questions. It was an admitted position that the authorised dealer viz., the Society in

whose favour the authorisation for the Fair Price Shop was granted was not proceeded against and was not joined as an accused. So also, it was

an admitted position that the present appellant was working as a servant in that Fair Price Shop. Again, there was no allegation by the prosecution

and no charge that the concerned offence was committed by the authorised dealer. Perhaps, the only argument which was raised before the

learned single Judge was that a non- prosecution of authorised dealer was fatal to the prosecution against the appellant and the ""said non-

prosecution was against the public interest"" causing ""evil consequences on public justice system"" and for this purpose, it was suggested on the basis

of two rulings that the principles evolved in the two aforementioned rulings were contradictory to each other. It seems, the learned Judge,

therefore, has proceeded to refer the question to a larger Bench accepting that the two aforementioned rulings cannot be reconciled. It seems that

the learned single Judge has also accepted the argument that the consequences of the non- prosecution ""of authorised dealer"" are ""evil vis-a-vis the

public justice system.

6. On a careful consideration of the two aforementioned judgments, we are of the clear view that firstly there is nothing which is reconcilable in

those judgments. Secondly, in our opinion, these two judgments are practically irrelevant for the controversy involved in the appeal.

7. In Sheoratan Agarwal's case, 1984 SCC (CrI) 620 which was under the Essential Commodities Act like the present prosecution, Section 10

fell for consideration. The facts suggest that the two petitioners, who were Managing Director and the Production Manager of a Company, had

challenged their prosecution for alleged violation of the provisions of the Madhya Pradesh Pulses, Edible Oil Seeds and Edible Oil Dealers

Licensing Order, 1977 and Clause 3 of the Madhya Pradesh Essential Commodities (Price Exhibition and Price Control) Order, 1977 read with

Sections 3 and 7 of the Essential Commodities Act by way of a revision u/s 397 read with Section 482 of the Code of Criminal Procedure before

the High Court of Madhya Pradesh. The High Court dismissed the said revision petition and, therefore, the two appeal before the Apex Court.

Reliance was placed were filed on behalf of the two accused persons on the Supreme Court ruling in State of Madras Vs. C.V. Parekh and

Another, and it was argued that where there was an allegation that the Company had violated the orders made under the Essential Commodities

Act, the prosecution of the directors, the officers and servants of the company or other person is precluded unless the company itself was

prosecuted. Considering the language of Section 10 of the Essential Commodities Act, it was pointed out by the Apex Court that if the

contravention of the order made u/s 3 of the Essential Commodities Act is by a company which includes a firm or other association of individuals

(like a society in the present case), the persons who may be held guilty and punished were (1) the company itself, (2) every person who, at the

time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the Company, and

(3) any director, manager, secretary and or other officer of the company with whose consent or connivance or because of neglect attributable to

whom the offences had been committed. The Apex Court then holds,

Any one or more or all of them may be prosecuted and punished. The company alone may be prosecuted. The person-in- charge only may be

prosecuted. The conniving officer may individually be prosecuted. One, some or all may be prosecuted. There is no statutory compulsion that the

person-in-charge or an officer of the company may not be prosecuted unless he be ranged alongside the company itself. Section 10 indicates the

persons who may be prosecuted where the contravention is made by the company. It does not lay down any condition that the person-in- charge

or an officer of the company may not be separately prosecuted if the company itself is not prosecuted. Each or any of them may be separately

prosecuted or along with the company. Section 10 lists the person who may be held guilty and punished when it is a company that contravenes an

order made u/s 3 of the Essential Commodities Act. Naturally, before the person-in-charge or an officer of the company is held guilty in that

capacity it must be established that there has been a contravention of the order by the Company. That should be axiomatic and that is all that the

Court laid down in *State of Madras Vs. C.V. Parekh and Another*, as a careful reading of that case will show and not that the person-in-charge or

an officer of the company must be arraigned simultaneously along with the company if he is to be found guilty and punished." (Italics supplied).

The Apex Court further observed that there has to be a finding that the contravention was made by a company before the accused could be

convicted and not that the company itself should have been prosecuted along with the accused. It is on that basis that the petition of the petitioners

was dismissed. Now, really speaking, this case will be completely inapplicable to the present case because there is no suggestion and there has

been no allegation that the contravention is by the Society. A careful reading of the charge would suggest that all the accused, they being Bill Clerk,

Packer and Daily wages worker joined together and sold palmolein to the non-card holders by preparing bogus bills and thereby contravened

clause 6 (2) and (3) of the Order, 1982 with the common intention of making illegal profit and they made themselves liable to be punished u/s 7(1)

(a)(ii) of the Essential Commodities Act. The case of *Sheoratan Agarwal*, therefore, is completely inapplicable to the present facts. It cannot be

again forgotten that the contention of the accused that they alone could not be prosecuted was not accepted in this case.

8. The second case addressed to by the learned single Judge is *U.P. Pollution Control Board v. Messrs. Modi Distillery and others*, 1987 SCC

632. This was a case under Water (Prevention and Control of Pollution) Act, 1974 and more particularly u/s 47 thereof. The allegation against the

distillery was that the industrial unit called Messrs. Modi Distillery which was the unit of Messrs. Modi Industries Limited had discharged its highly

noxious and polluted trade effluents into the Kali River and had caused continuous pollution on the said stream without the consent of the Board

which was bound to be obtained u/s 26. It was alleged that the company had failed to submit an application for the consent of the Board in the

prescribed form in terms of Sections 25(1), 26 of the Act. Instead of the company, the said industrial unit viz., Messrs. Modi Distillery had made

an application to the Board for the "No Objection Certificate" for the consent to discharge its trade effluents into the stream. The said application

was scrutinised by the Board and was found to be incomplete. The Board, therefore, informed the said industrial unit with regard to the discrepancies and the particulars which were wanting. However, there is no response from the respondents nor did they rectify the discrepancies pointed out. Therefore, the Pollution Control Board refused to grant the consent prayed for in the public interest since the application itself was incomplete in many respects and also because the Unit did not have proper arrangements for treatment of its highly polluted trade effluents. The Board had also thereafter issued a notice u/s 20 of the Act directing the company to furnish certain information regarding the particulars and names of the Managing Director. Directors and other persons responsible for the conduct of the company. However, even that information was not supplied by the company inspite of the two subsequent letters by the Board. It was on this basis that the Board, lodged the complaint against the respondents u/s 44 of the Act. The Board had arrayed eleven persons as accused, but instead of launching a prosecution against the main company viz., Messrs. Modi Industrial Limited, only its industrial unit Messrs. Modi Distillery came to be joined as the accused. The other accused were the Chairman. Vice-Chairman, Managing Director and members of the Board of Directors of Messrs. Modi Industries Limited i.e., the company owning the industrial unit. This complaint was straight away challenged before the Allahabad High Court by way of a petition u/s 482 of the Code of Criminal Procedure read with Section 397 of the Code. The High Court quashed the said complaint on the ground that no vicarious liability could be saddled on the Chairman, Vice-Chairman, Managing Director and other Members of the Board of Directors of the Company u/s 47 of the Act unless there was a prosecution of the company viz., Modi Industries Limited. It was held that the complaint suffers from the serious legal infirmity and to allow the proceedings to continue would amount to an abuse of the process of the Court. This judgment was challenged by the U.P. Pollution Control Board by way of a petition under Article 136 of the Constitution of India before the Supreme Court. The Apex Court framed a question as to whether the Chairman, Vice-Chairman, Managing Director and members of the Board if Directors were liable to be proceeded against u/s 47 of the Act in the absence of a prosecution of the Company owning the said industrial unit. After considering the language

of Section 47 which is akin to Section 10 of the Essential Commodities Act, it went on to explain the Section. In the same manner as in the case of

Sheoratan Agarwal, 1984 SCC (CrI) 620 it held that where an offence has been committed by a Company, every person who, at the time of the

commission of the offence would be liable to be proceeded against. It also explained the proviso and held that proviso to Section 47 engrafts an

exception in the case of every such person if he were to prove that the offence has been committed without his knowledge or that he exercised all

due diligence to prevent the commission of such offence. It held that the said proviso shifted the burden on the delinquent officer or servant of the

company responsible for the commission of the offence to prove that he did not know of the offence or connived in it or that he had exercised all

due diligence to prevent the commission of such offence. It again reiterated that where an offence was committed by a company and it is proved

that the offence was committed with the consent or connivance of, or, is attributable to any neglect on the part of, any director, manager, secretary

or other officer of the company, such person shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and

punished accordingly. The Apex Court in paragraph 6 decried the fact that the company was not joined as the accused and it was only the

industrial unit of that company which was proceeded against in the complaint. However, it took adequate note of the fact that the accused had

failed to supply the proper information to the Board in spite of repeated requests. The Apex Court also observed that the defect could be easily

removed by adding the company as a party. There is one statement, which was heavily relied on, on behalf of the accused:

Although as a pure proposition of law in the abstract the learned single Judge's view that there can be no vicarious liability of the Chairman, Vice-

Chairman, Managing Director and members of the Board of Directors under sub-section (1) or (2) of Section 47 of the Act unless there was a

prosecution against Messrs. Modi Industries Limited, the company owning the industrial unit can be termed as correct, the objection raised by the

petitioners before the High Court ought to have been viewed not in isolation but in the conspectus of facts and events and not in vacuum.

Probably, it was argued on this basis, the present accused persons could not be prosecuted unless the Company itself was made as an accused

and again probably it was because of these observations that the learned single Judge has observed that law laid down in U.P. Pollution Control

Board's case, 1987 SCC 632 is contrary or contradictory to the one which was laid down in Sheoratan Agarwal's case, 1984 SCC 620. It will

be interesting to note here that the Apex Court in the above case went on to set aside the judgment of the High Court also on the ground that the

allegations in the complaint could be also read as independently directed towards the Chairman, Vice-Chairman, Managing Director and the other

members of the Board of Directors. Ultimately, the judgment was set aside and the matter was sent back for fresh trial.

9. From all the angles, we fail to see as to how this case helps the accused or as to how it could be seen as contradictory or irreconcilable with the

law laid down in Sheoratan Agarwal's case, 1984 SCC 620. In both the cases, the Apex Court has very clearly brought out a position that the

office-bearer of the company, which may also include its servant, could not be vicariously proceeded in the absence of the company itself. The

thrust in both the judgments is on the vicarious liability of the servants and if the facts in both the cases are to be seen, it would be seen that the act

of contravention was not attributed to the servants alone, like in the present case, where, the act of selling the palm oil is effected personally and is

alleged to have been committed personally by the three accused including the present appellant. At any rate, in Sheoratan Agarwal's case, 1984

SCC 620 the Supreme Court has clarified the position in an extremely clear manner as pointed out in the earlier paragraphs. In both the cases, the

Supreme Court has held that where there is an allegation against the Company for having committed the contravention and where vicariously

criminal liability is being alleged against the Officers, then the concerned company should be joined as a party-accused as a precondition thereof.

We do not find anything contradictory inter se in these two cases.

10. On this backdrop, when we see the facts in the present case, it is clear that there is no allegation whatsoever to the effect that it is the offence

committed by the Society. In fact, the allegation is absolutely individual allegation attributed to each of the accused personally. In that view of the

matter, there would be no question of applicability of Section 10 of the Essential Commodities Act at all in this case and as we have indicated

earlier, the only question that could be decided is whether the contravention of Clause 6(2) (3) of the Order can also be made by any person other

than the authorised dealer. Once the applicability of Section 10 is ruled out, there is no question even to consider the so-called irreconcilability

between the two judgments of the Apex Court. According to us, the two judgments cannot be said to be irreconcilable at all. Therefore, there will

be no question of answering the reference in that behalf. We have already pointed out the real question which could fall for consideration.

However, it would not be for us to consider that question and that would have to be essentially done by the learned single Judge who may deal

with the appeal. The question referred to also deals with the non- prosecution of the authorised dealer (though the authorised dealer is not referred

to in the question). We have already pointed out that there was no allegation against the authorised dealer which in this case is a Society. It does

not seem to be a case where this was a design on the part of the whole Society in whose name, the authorisation to run the shop stood. The

allegations seem to be directed against the accused persons personally. If the prosecution case itself is in such a narrow conspectus, then there

would be no question of the prosecution of the authorised dealer (in this case the Society) and any evil consequences thereof. We have already

pointed out that even the Apex Court has not held that a mere non-prosecution of the company u/s 10 does not necessarily result in the other

accused persons going scot-free. The Supreme Court has laid down an essential condition that there has to be an allegation against the company

that the offence was committed by the company and if the offence is vicariously directed against the servant or the office-bearer of the company,

where the company itself has committed the offence, then alone, the said servants of the office-bearers could not be prosecuted. Such a situation is

clearly not available in the facts of the present case and, therefore, the non-prosecution of the Society or as the case may be authorised dealer in

this case has got nothing to do, much less to gauge even the effect of the accused going scot-free for that technical reason. It is only where there is

an allegation that the authorised dealer (in this case the Society) itself has committed the offence, then its office- bearers or servants cannot be

prosecuted, unless the authorised dealer itself or himself is prosecuted. The apprehension expressed by the learned single Judge is, therefore, not

warranted at least on the facts of the present case. Thus, there would be no question of the present appellant getting the benefit of the non-

prosecution of the co-operative society which is the authorised dealer in the present case.

11. The learned counsel appearing on behalf of the accused then invited our attention to a few judgments which dealt with the prosecutions under

the very same Order, 1982. First judgment is reported in T.N. Civil Supplies Corporation, etc. v. State, etc., 1996 (2) L.W. 495. We are afraid,

the judgment is not at all applicable as the facts are completely inapplicable. In the aforementioned judgment, the learned single Judge of this Court

was considering judge of this Court was considering the question of criminal liability of the authorised dealer for the acts of salesman who were

also found guilty along with him. It was held by the Court that with the aid of Section 10 of the Essential Commodities Act, the liability could not be

fixed against the authorised dealer unless the authorised dealer could be shown to have the knowledge regarding the criminal activities of the other

servants like salesmen, etc., The judgment has no application. Similar is the case with the second ruling in M. Karuppannan v. State by Inspector

of Police, 1988 L.W. (Crl.) 485. Even here, the question of the criminal liability of the President of the Society has been discussed and it is held

that since the President had no knowledge regarding the criminal activities of the persons who were on the spot, the President could not be held

liable. Similar is the case with the third ruling in Tamil Nadu Civil Supplies Corporation Ltd., Tirunelveli v. Inspector of Police, Civil Supplies,

C.I.D., Tirunelveli, 1993 L.W. 601. There also, a learned single Judge of this Court has held that under Clause 14 (1) (a) of the Order, the

authorised dealer cannot be straightaway held liable for the criminal activities of the servants or the salesman, etc., unless it could be shown that he

had any knowledge about the same. All these cases are not applicable to the present controversy which would be limited to the question as to

whether the present appellant, who is only a servant and not an authorised agent could be prosecuted and held liable for the offences of breach of

clause 6 (2) and (3) of the Order. It would be for the learned single Judge to answer this question. However, we clarify that the accused cannot

straight-away claim any benefit merely because the authorised agent in this case has not been prosecuted along with the accused.

12. For all these reasons, we hold that there is no irreconcilability between the two judgments in Sheoratan Aganval's case, 1984 SCC 620 and U.P. Pollution Control Board's case, 1987 SCC 632 referred to, that these judgments would be totally inapplicable to the facts of the present appeal and that the accused cannot claim any benefit on account of the non-prosecution of the authorised agent in this case. In view of the above, we return the reference and direct the matter to be kept before the learned single Judge for being disposed of.