

(1983) 10 BOM CK 0034

In the Bombay High Court

Case No : Criminal Application No. 187 of 1981

Garda Chemicals Pvt. Ltd. and three others

APPELLANT

Vs

Shri R. Parthasarthy, Assistant Collector, Central Excise,
Kalyan and another

RESPONDENT

Date of Decision : 15-10-1983

Acts Referred:

Central Excise Rules, 1944 — Rule 173G(1), 173Q(1), 221, 225, 9(1)
Central Excises and Salt Act, 1944 — Section 9, 9(1), 9C(1)

Citation : (1984) 2 ECC 384 : (1984) 15 ELT 18 : (1984) 147 ITR 412(1)

Hon'ble Judges : A.D. Tated, J

Bench : Single Bench

Judgement

1. This petition u/s 482 of Criminal Procedure Code and Article 227 of the Constitution of India has been filed for quashing the proceeding of the Criminal Case No. 218 of 1980 pending in the Court of the Judicial Magistrate, F. C. Kalyan and also for setting aside the order of issue of summonses against the petitioners.

2. The Petitioner No. 1 is the private limited company incorporated under the Companies Act, 1956 - having its office at 48, Hill Road, Bandra, Bombay-400050. The business of the first petitioner (hereinafter referred to as the Company) is to manufacture dyes, dye-intermediate and pesticide-intermediates. The Company has its factory in the M.I.D.C. area - Dombivali, District Thane (hereinafter referred to as the company's factory). The second petitioner is the Managing Director of the first petitioner and is in overall charge of the first petitioner. The third petitioner was its Administrative Officer and the 4th petitioner was its Works Manager at the relevant time. The second Respondent who is accused No. 4 was its Excise Assistant and was attending the duties in respect of excise. The first Respondent who is the Assistant Collector of Central Excise, Kalyan Division I on 6-2-1980 filed a complaint against the petitioners Nos. 1 to 4 and the second Respondent in the Court of the Judicial Magistrate, First Class, Kalyan for the offence u/s 9(b), (bb), (bbb) and (c) of the

Central Excises and Salt Act, 1944 on the allegations that the petitioners and the Respondent No. 2 who are the accused in that case had taken credit of Rs. 25,000/- as basic excise duty and Rs. 5,000/- as auxiliary duty, total Rs. 30,000/- on 4-2-1976 in the PLA (personal ledger account) maintained by them and removed excisable goods on which they were liable to pay basic excise duty Rs. 24,343.96 and auxiliary duty Rs. 4,019.81. The accused No. 4 who took the credit in Personal Ledger Account on 4-2-1976 without there being a corresponding deposit, deposited the amount on 25-2-1976 with the State Bank of India, Dombivali and the date 25-2-1976 appearing on the challan was changed to 4-2-1976 in order to show that the payment was made on 4-2-1976 and copy of the challan with the changed date was sent to the Custom Office at Pune. The accused No. 4 had taken credit of Rs. 30,000/- in the personal ledger account on 4-2-1976 on the advice dated 3rd February 1976 received by him from the head office and the said advice was given by the head office without crediting the said amount with the bank. Thus the complainant alleged that the accused in contravention of the provisions of the Central Excise Rules, without payment of the central excise duty removed the goods and thereby committed an offence punishable u/s 9(b), (bb), (bbb) and (c) of the Central Excises and Salt Act, 1944.

3. The learned Judicial Magistrate, First Class, Kalyan issued process to the petitioners and the Respondent No. 2 for the said offence.

4. Feeling aggrieved by the issue of process by the learned Judicial Magistrate, First Class, Kalyan the petitioners Nos. 1 to 3 and 5 who are original accused Nos. 1 to 3 and 5 have filed this petition for setting aside the order of the learned Judicial Magistrate issuing process against them and quashing the proceedings of the criminal case.

5. The learned Counsel for the petitioners contends that the facts alleged in the complaint do not make out any offence against the petitioners Nos. 2 to 4. Regarding the petitioner No. 1 i.e. company, the learned Counsel stated that he would not press for setting aside the process issued against him. He pressed the petition for the petitioners Nos. 2 to 4 only. The learned Counsel for the petitioners submitted that the Respondent No. 1 served show-cause notice dated 28th January, 1978 for contravention of the provisions of Rule 173-G(1) read with Rule 9(1) and 173-Q(1)(a) and (d) of the Central Excise Rules, 1944 on the petitioners No. 1. No such notice was served on the petitioners Nos. 2 to 4. According to the learned Counsel for the petitioners, in the complaint no acts of commission or omission have been alleged against the petitioners Nos. 2 to 4 and therefore, no offence is disclosed against them. According to him, these petitioners could not be held guilty for the alleged offence only on the ground that at the relevant time they were in the employment of the petitioner No. 1 and held some administrative posts. The learned Counsel for the Respondent No. 1, on the other hand contends that averments in para 3 of the complaint and other averments in the complaint were sufficient to disclose their liability for the

offences alleged in this case.

6. Before proceeding to consider whether the averments made in the complaint are sufficient to disclose the alleged offence against the petitioners it is necessary to notice the law on the point. Their Lordships of the Supreme Court in *Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others*, stated the law thus :

"Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside :

(1) Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like."

The Supreme Court in the recent decision in *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, has considered the powers of the High Court u/s 462 of the Criminal Procedure Code in the matter of quashing the criminal proceeding. At page 69 of the report. Their Lordships stated the law thus :

"It may be noticed that Section 482 of the present Code is the ad verbatim copy of Section 561-A of the old Code. This provision confers a separate and independent power on the High Court alone to pass orders ex debito justified in cases where grave and substantial injustice has been done or where the process of the Court has been seriously abused. It is not merely a revisional power meant to be exercised against the orders passed by subordinate Courts used to quash the proceedings or expunge uncalled for remarks against witnesses or other persons or subordinate Courts. Thus, the scope, ambit and range of Section 561-A (which is now Section 482) is quite different from the powers conferred by the present Code under the provisions of Section 397. It may be that in some cases there may be overlapping but such cases would be few and far between. It is well settled that the inherent powers u/s 482 of the present Code can be exercised only when no other remedy is available to the litigant and not where a specific remedy is provided by the statute. Further, the power being an extraordinary one, it has to be exercised sparingly. If these considerations are kept in mind, there will be no inconsistency between Sections 482 and 397(2) of the present Code."

Their Lordships of the Supreme Court at page 70 of the report stated the law thus;

"It is, therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations in the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers u/s 482 of the present Code."

It was a case under the Prevention of Food Adulteration Act. The Food Inspector, Municipal Corporation of Delhi obtained a sample of the toffees manufactured by M/s. Upper Ganges Sugar Mills and those toffees were found to be adulterated. Therefore, the Manager of the Company M/s. Upper Ganges Sugar Mills and the directors of the company were prosecuted. The Manager of the Company was the Respondent No. 1 and the Directors were the Respondents Nos. 2 to 5. The Metropolitan Magistrate before whom the complaint was filed issued process against all the accused. The petition was filed in the Delhi High Court for quashing the proceeding taken against the Respondents Nos. 1 to 5. The Delhi High Court after examining the averments in the plaint found that the facts mentioned therein did not constitute any offence against the petitioners before them and, therefore, they quashed the criminal proceeding against these petitioners. The Municipal Corporation of Delhi took appeal to the Supreme Court against the decision of the Delhi High Court and Their Lordships of the Supreme Court after stating the law for quashing criminal proceeding u/s 482 of the Criminal Procedure Code, allowed the appeal only to the extent of the quashing of the proceeding against the Manager (Respondent No. 1) and maintained the order of the Delhi High Court quashing the proceeding against the Directors.

7. Turning to the allegations in the complaint against the petitioners in this case, Para 3 of the complaint reads thus :

"The accused No. 2 is the managing director, accused Nos. 3 and 4 are the Administrative Officer and Excise Assistant, respectively and accused No. 5 is the Works Manager of M/s. Garda Chemicals Pvt. Ltd. and they are also liable for payment of all duties charged and to all penalties and confiscation incurred etc. in respect of the trade and/or business carried on by M/s. Garda Chemicals Pvt. Ltd. under the said Act and the Rules framed thereunder. Any contravention of the provisions of Central Excises and Salt Act, 1944, and/or the rules, framed thereunder by accused Nos. 2 to 5 are also liable to be punished."

It is not disputed that the accused No. 2 is the Managing Director and is in overall charge of the Company. The learned Counsel for the petitioners contends that besides the averments referred to above there were no allegations of any commission or omission on the part of the petitioner No. 2 and therefore, he could not be charged for the offence u/s 9 of the Central Excises and Salt Act,

1944. The relevant provisions of Section 9(1) read as follows :

"9. Offences and Penalties. - (1) Whoever commits any of the following offences, namely :-

(a) * * * *

(b) evades the payment of any duty payable under this Act;

(bb) removes any excisable goods in contravention of any of the provisions of this Act or any rule made thereunder or in any way concerns himself with such removal.

(bbb) acquires possession of, or in any way concerns himself in transporting, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or any rule made thereunder, and

(c) fails to supply any information which he is required by rules made under this Act to supply, (unless which shall be upon him that the information supplied him is true) supplies false information;"

It is not disputed before me that the excisable goods were removed without payment of excise duty during the period 4-2-1976 to 25-2-1976. It is also not disputed that in the personal ledger account maintained by the accused No. 4 the credit of Rs. 30,000/- was taken on 4-2-1976 without depositing the corresponding amount with the Bank. The said credit was taken by the accused No. 4 on the advice he had received from the head office on 3-2-1976. It is the case of the petitioners that the accused No. 4 took one credit of Rs. 30,000/- on the basis of the advice from the head office dated 3rd February, 1976 and he took the second credit on the basis of Challan dated 28th January, 1976 which he had received on 4-2-1976. The credit on the basis of the payment under the challan dated 28th January, 1976 was already taken. It is submitted that the accused No. 4 lost sight of this fact and he took another credit on the basis of the challan dated 28th January, 1976 on 4-2-1976. Thus according to the petitioners, there was some misunderstanding on the part of the accused No. 4 and as such the credit for Rs. 30,000/- was taken on 4-2-1976 without there being corresponding deposit with the Bank. In my opinion, it is not necessary to consider in this proceeding whether the accused No. 4 had taken the credit in question on 4-2-1976 on account of the misunderstanding on his part or on account of the wrong advice from the head office. The accused No. 1 is the Company and the Company has to act through its Officers. In the matter of responsibility of the corporate body for making declaration and obtaining licence the provisions have been made in Rule 221 of the Central Excises and Salt Act, 1944. Rule 221 reads as follows :

"Responsibility of a corporate body for making declaration and obtaining licence. - (1) Where any trade or business in respect of which declaration is required to be made by these Rules, is carried on by a corporation, the declaration shall be

under the seal of the corporation and signed by the chairman or some director of the corporation or by its secretary or other principal officer.

(2) Any person signing a declaration, and also corporation, under whose seal the declaration is made, shall be liable for the payment of all duties, charged and to all penalties and confiscations incurred in respect of the trade or business to which the declaration relates.

(3) A declaration in respect of a trade or business carried on by a corporation shall be treated as being under the seal of the corporation if it is signed by some person authorised in that behalf by the corporation under its seal."

Rule 225 reads as follows :

"Producer or manufacturer liable for removal of goods by any person. - If any excisable goods are, in contravention of any condition prescribed in these Rules, removed by (any person) from the place where they are produced, manufactured or warehoused, the producer, manufacturer or the licensee or keeper of the warehouse shall be held responsible for such removal, and shall be liable to be dealt with according to the provisions of the Act or the Rules as if he had removed the goods himself."

The accused No. 2 is the Managing Director and he is in charge of the affairs of the Company. The show-cause notice dated 28th January, 1978 issued by the Assistant Collector, Central Excise Customs (Prev.) Headquarters, Pune to the Company was replied to by the petitioner No. 2 as the Managing Director of the Company. As managing Director of the Company he was liable to pay the excise duty for and on behalf of the Company before removal of the excisable goods. Taking into consideration such position of the accused No. 2 vis-a-vis the Company it cannot be said that he is not at all concerned with the payments of the excise duty and also for the removal of the excisable goods from the warehouse of the Company. The learned Counsel for the petitioners in support of his contention that the petitioners were not responsible for the contravention of the provisions of the Central Excises and Salt Act, 1944 and the Rules framed thereunder, relied on the decision of the Calcutta High Court in *Kedar Nath Goenka and others v. Superintendent of Central Excise and others* 1979 C L J 421 = 1978 E.L.T. (J 538) (Cal.). In that case five petitioners and the opposite party No. 3 who were directors of M/s. Premier Irrigation Equipment (Private) Ltd. were prosecuted for the offence under Sections 9(1) and 9C(1) of the Central Excises and Salt Act, 1944. They were sought to be implicated for the commission of the offence u/s 9 of the Act, inasmuch as they were held to be responsible to the company for the conduct of the business of the company at the relevant time when the offence was committed. It was contended on behalf of the petitioners that there should have been specific averment in the petition or complaint to the effect that the Directors who were implicated by virtue of their office were personally responsible for the acts of commission or omission, for which they have been sought to be held liable u/s 9 of the Act. It was pointed

out that besides what was stated in para 10 there was not a single sentence anywhere in the petition or complaint which sought to implicate the petitioners or the opposite party No. 3. The para 10 of the complaint reads as follows :

"That the accused persons have committed an offence punishable u/s 9 of the Central Excises and Salt Act, 1944 inasmuch as they were responsible to the company for the conduct of business of the company at the relevant time when the offences were committed."

There was no averment that the petitioners and the opposite party No. 3 or any of them was guilty for commission or omission which would tantamount to an offence u/s 9(1), sub-clause (b) or (bb) of the Act. After reproducing the provisions of Section 9(1)(b) of the Act Their Lordships of the Calcutta High Court observed as follows :

"On reading of the aforesaid paragraph it is apparent that the petitioners and the opposite party No. 3 were sought to be made liable by virtue of an assumption that they were responsible to the company for the conduct of its business at the relevant time when the offences were committed. There is no averment that the petitioners and the opposite party No. 3 or any of them were guilty of any specific act of omission or commission which would tantamount to an offence u/s 9(1) sub-clause (b) or (bb) of the Act."

The learned Counsel for the petitioners submitted that the decision of the Calcutta High Court was fully applicable to the facts of the present case and therefore, the process issued against the petitioners Nos. 2 to 4 was liable to be quashed. I am unable to agree with the learned Counsel for the petitioners in respect of the case against the petitioner No. 2. The petitioner No. 2 is the Managing Director and is in overall charge of the Company. It is alleged in the complaint that he was liable for the payment of all duties charged and to all penalties in respect of trade and/or business carried on by M/s. Garda Chemicals Private Ltd. under the Central Excises and Salt Act and the Rules framed thereunder. The credit dated 4th February, 1976 for Rs. 30,000/- was taken in the personal ledger account by the accused No. 4 at the advice of the head office and at the end of the month an incorrect statement along with the challan on which the date was altered from 25-2-1976 to 4-2-1976, was sent to the Central Excise office. The goods from the factory were removed as per the orders received from the head office. The petitioner No. 2 was in overall charge of the head office and as such it cannot be said that he had no concern with the removal of the excisable goods from the factory without payment of the excise duty. This was not the case in the decision of the Calcutta High Court relied on by the learned Counsel for the petitioners. The report of the said decision does not indicate that any of the petitioners in that case was the Managing Director and in overall charge of the business of the Company and therefore, that case is distinguishable on facts so far as the petitioner No. 2 is concerned. Consequently, it cannot be said that the allegations made in the complaint prima facie do not disclose any offence against him and the learned Judicial Magistrate was wrong

in issuing process against him.

8. It takes me to the case against the petitioners Nos. 3 to 4. The petitioner No. 3 was the Administrative Officer and the petitioner No. 4 was the Works Manager of the Company. There are no averments in the complaint as to how they are concerned with the payment of the excise duty and the removal of the goods from the premises of the Company. From the mere fact that the petitioner No. 3 was the administrative officer and the petitioner No. 4 was the Works Manager they cannot be held to be concerned with the payment of excise duty and the removal of the goods. Consequently, I find that on the averments and allegations appearing in the complaint there was no case for issuing process against them.

9. In the result, the petition succeeds only to the extent of the petitioners Nos. 3 and 4. The process issued against the petitioners Nos. 3 and 4 by the learned Judicial Magistrate, First Class is quashed. The petition fails in respect of the petitioners Nos. 1 and 2.

10. At this stage the learned Counsel for the petitioners applies for leave to appeal to the Supreme Court on behalf of the second petitioner under Article 134 of the Constitution of India. It is rejected.

11. At the request of the learned Counsel for the petitioners the stay of the proceedings in the trial Court shall continue for a month.