

(2000) 07 CAL CK 0018
In the Calcutta High Court
Case No : C.R.R. No. 2429 of 1998

India Brush Works (P) Ltd.

APPELLANT

Vs

Biman Bhattacharjee

RESPONDENT

Date of Decision : 20-07-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 465
Income Tax Act, 1961 — Section 279(1)

Citation : (2001) 1 ILR (Cal) 249

Hon'ble Judges : Malay Kumar Basu, J

Bench : Single Bench

Advocate : T. Roy Chowdhury, for the Appellant; R.N. Mitra and Md. Nizamuddin, for the Respondent

Final Decision : Dismissed

Judgement

Malay Kumar Basu, J.—This is an application u/s 482 of the Code of Criminal Procedure filed by M/s. India Brush Works (P) Ltd. and two others against Sri Biman Bhattacharjee, Asstt. Commissioner of Income Tax, Companies Circle, for an order quashing the proceeding of the case being No. C 557 of 1991 under Sections 276 c and 277 of the Income Tax Act, 1961 of the Court of the Chief Metropolitan Magistrate Calcutta.

2. The case of the Petitioners briefly stated as follows:

The O.P. filed a petition of Complaint before the Court of Chief Metropolitan Magistrate Calcutta in 1991 under Sections 276c(i) and 277 read with Section 278B of the Income Tax Act, 1961 on the allegation that the accused No. 1 (present Petitioner No. (1), a Company, had submitted Tax Returns for the accounting year ending June 30, 1978 (assessment year 1979-80) which were found to be false. The other two Petitioners being Directors of the Company were arraigned as accused Nos. 3 and 4 in the complaint, though neither of them signed the verification. According to the Petitioners this complaint was not legally maintainable in view of the provisions of Section 279(1) of the Income Tax Act as

they stood at that point of time. At the time when the petition of complaint was filed i.e. March 28, 1991, the old Section 279(1) had been amended and the designated authorities were changed by the amended Act and prosecution could be lodged only by taking previous sanction granted by such newly designated persons under the amended section. But the said complaint was neither filed after obtaining such prior sanction, nor the prosecution was at the instance of the Commissioner (Appeals) or the Appropriate Authority within the meaning of clause C of Section 269 UA. The authorization as alleged by the complainant in the complaint could not be deemed to be the previous sanction within the meaning of the amended Section 279(1) of the Act which had come into force with effect from April 1, 1989. The further case of the Petitioner-accused is that the verification in the Return in question was not made by either the Petitioner No. 2 or Petitioner No. 3, but it was made by another director, named, Sudhir Kumar Dutta (who has been made accused No. 2 in the complaint in question) and unlike partners in a partnership firm the directors of a company are not co-owners and therefore, these Petitioners cannot be held liable for the entries in the Return submitted or verified by a different director.

3. Mr. Mitra, learned Advocate, appearing for the opposite party, contests the application and contends as follows. His first contention is that since the alleged offence relates to the filing of the Return of income tax for the financial year 1978-79 (Assessment year 1979-80), the lodging of any prosecution in that respect should be governed by the law of that time and since at that time the only condition that was to be observed while filing such a complaint was that the prosecution should be at the instance of the Chief Commissioner or Commissioner of Income Tax, no question of authorization, far less sanction to be given by the Income Tax authorities before filing of such a complaint could arise and thus from that point of view there has been absolutely no lapse on the part of the Income Tax Department inasmuch as, the impugned complaint was filed at the instance of the said authority (vide para. 1 of the complained Mr. Mitra's alternative contention is. that if the above view is not found tenable, then the procedural law prevalent at the time when the prosecution was actually launched, namely, March 28, 1991, will come to govern this filing and then also the authority would not be at fault in any way, since what has been filed by it along with complaint is nothing but sanction in reality and substance.

4. As against this, the contention of Mr. Roy Chowdhury the learned Counsel for the revisional applicant, has been that in the first place, the complaint cannot be said to be at the instance of the Commissioner of Income Tax or any other appropriate authority since not a single scrap of paper is forth coming to give support to the genuineness or correctness of such a claim. Only a simple averment in the complaint made to the effect that it is being filed at the instance of the Commissioner cannot be enough for this purpose. There must be papers like order-sheets etc. to show that the said authority itself mitigated the action and filed the prosecution or ordered it to be filed. Secondly, and more importantly, according to Mr. Roy Chowdhury, the aforesaid "authorization" can

never amount to "sanction" as contemplated under the provisions of the amended Section 279(1) of the Income Tax Act.

5. So far as the first contention of Mr. Mitra is concerned that the law prevalent at the time of filing of the Return in question i.e. financial year 1978-79 should be applied in respect of the filing of the present complaint, I am constrained to hold that the same is without any substance. The settled principle in this respect is that an amending statute which affects a substantive right is presumed to be prospective unless made retrospective either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such construction is textually impossible, is presumed to be retrospective so that even pending cases are governed by the amended law of procedure. Here, since the matter is procedural only and there is no question of any substantive right of the party being affected, the piece of legislation which was in vogue at the time when the prosecution was being lodged must be the governing law. The contention that the procedural law as prevalent in the year 1978-79 should be applied and accordingly there was no requirement of giving prior sanction for the prosecution and it would suffice if the prosecution was at the instance of the relevant authority has no legs to stand upon. Since the complaint was lodged on March 28, 1991, the provisions of Section 279(1) of the Income Tax Act, as they were on that date, should be applicable to the procedural aspect of the filing of the impugned complaint and consequently the sanction of the appropriate authority i.e. the Commissioner of Income Tax was required to be obtained prior to the filing of the complaint if the prosecution was not at the instance of the Commissioner (Appeals) or other appropriate authority.

6. Thus; this much of the legal position being settled that Section 279(1) of the Act as amended in 1988, will be applicable and accordingly the previous sanction of the appropriate authority of the income tax Department will be required for lodging of the complaint in question, the same being nor at the instance of the said authority, let us now see if such sanction was accorded by the authority before the complaint was filed.

7. On a careful perusal of the so called "authorization" order of the Commissioner of Income Tax, an annexure to the complaint in question it is found that it is a reasoned order of the Commissioner dwelling upon the justifiability for lodging a prosecution against the accused-Petitioners under certain provisions of the Income Tax Act. From the trend of reasoning it is very clear that the author of this order was very keen on establishing the necessity and justification for launching such a prosecution against the Petitioners and after recording its satisfaction in that behalf the Commissioner appears to have passed the order of authorization in the last paragraph of this written order sheet empowering the Assistant Commissioner of Income Tax to file the complaint before a Court of competent jurisdiction on his behalf.

8. Mr. Roy Chowdhury has repeatedly emphasized that this is mere authorization and cannot be equated with sanction, because the two are totally different

concepts and unless there is prior sanction accorded by the appropriate authority as required under the aforementioned provisions of Section 279(1) of the Act, the filing of the complaint will be without any legal validity since in the absence of such previous sanction, the Court cannot attain jurisdiction to entertain: any such complaint. But this contention of Mr. Roy Chowdhury cannot be accepted in view of the reason that the said order of the Income Tax Commissioner which is being loosely styled as "authorization order" appears to be in essence an order of sanction. Within the four corners of the Income Tax Act or its Rules or any other law there has been prescribed no particular form in which such "sanction" is to be accorded by the prescribed authority. The two-paged order passed by the Income Tax Commissioner above contains in its last few lines only the authorization part, but the rest of the order deals with the reasoning to find out the justifiability of taking legal action against the Petitioners and coming to the finding that such a prosecution was required to be initiated against them. For all practical purposes this Finding is nothing but a sanction for the prosecution. I am unable to be in agreement with Mr. Roy Chowdhury When he argues that this is out and out an "authorization" and it cannot serve the purpose of "sanction" within the meaning of the provisions of Section 279(1) of the Act. Since there is no prescribed form for according sanction for the purpose of launching prosecution against any particular party at fault, it cannot be said that the order on the strength of which the impugned complaint was filed by the O.P. before the Court of Magistrate against the Petitioners was in the nature of here authorization and could not be treated as an order sanction in the sense in which the term has been used under that section. Simply because the word sanction has nowhere been used or mentioned in this order by its maker, it cannot be concluded that it falls short of sanction on that score. Whether it serves the purpose of "sanction" is to be gathered from the actual words or expression used in that order and the meaning or sense which they convey or the effect which they create. It is needless to point out that in such a respect it is the substance and not the form which matters. It will be improper and wrong to say that this reasoned order of the competent authority of the Income Tax Department on the basis of which the present impugned proceeding was started should be given a narrow interpretation confining it within a compass called "authorization" falling short of "sanction" particularly when nothing has been spelt out under any law as to what should be the form of such "sanction" or in what words it should be couched or to whom it should be addressed, and the like.

9. This assumes greater significance when we consider the intention of the Legislature manifested in the mandatory provisions of Sections 465 of the Code of Criminal Procedure under which any error or irregularity in any sanction for the prosecution cannot be made a ground for reversing or altering an order Passed by any trial Court, unless the Court of revision is of the opinion that a failure of justice has occasioned thereby. The settled principle is now that a prosecution cannot be allowed to fail merely on the ground of any error of irregularity in the sanction for prosecution so long as there has been no failure of

justice. In the present case, as I have already pointed out, substantially and in essence a sanction for the present prosecution as required u/s 279(1) of the Income Tax Act has been accorded by the appropriate authority namely the Commissioner of Income Tax and there has been no flaw or shortcoming in that regard. But even if for the sake of argument it is assumed for a moment that there may have been some irregularity in such sanction even then that will not be allowed to pose a bar to the continuance of the prosecution in view of the salutary provisions of Section 465 of Code of Criminal Procedure, since in the face of such a purely technical irregularity, no miscarriage of Justice can be said to have occasioned.

10. Mr. Roy Chowdhury has, however, in support of this argument cited a good number of rulings. He has referred to two decisions of this Court (Single Bench) in the cases of Dilip Kumar Ghosh v. Dilip Kumar Jana 1995 C.C.L.R. (Cal.) 71 and Warranty Tea Ltd. (M/s.) and Anr. v. Deputy Commissioner of Income Tax 1994 C.C.L.R. (Cal.) 79 . In these two judgments, a Single Bench of this Court has held that authorization or approval for prosecution could not, by any means or manner, be deemed to be sanctioned for prosecution Within the meaning of Section 279 of the Income Tax Act and since there has been nothing on record to indicate that the previous sanction from the prescribed authority has been obtained for proceeding against the accused in terms of that section which is a precondition for launching prosecution thereunder, the prosecution of the accused Petitioners clearly appears to be incompetent. Mr. Roy Chowdhury has contended that these two decisions were pronounced by this Court in the cases In which the facts and circumstances were identical with (sic) those of the present case and that being so, this Court cannot escape arrival at the same conclusion. He has (sic) relied upon a ruling of the Apex Court in this connection in order to bring home the point that one co-ordinate Bench of the same High Court cannot take a view (sic) contrary to the decision given earlier by another Bench of that Court and that one is bound by that decision vide division Bench judgment reported in Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractors Co. and Others Vs. State of Andhra Pradesh and Others, Besides the abovementioned two Single Bench judgments of this Court, another Single Bench judgment of Patna High Court is also being relied upon by the Petitioners, namely, the judgment in Raj Kumar Sodera v. Chief Commissioner of Income Tax 1996 ITR 626. In this judgment also similar verdict has been given that sanction as reported under Sections 279 of the Income Tax Act having not been obtained, the prosecution of the Petitioner for offences under Sections 276(c) and 277 of the Act is liable to be quashed, since such sanction is the condition precedent for taking cognizance of the offence.

11. After having gone through the facts of all these three cases under reference and comparing them to the facts of our present case, I find that they cannot be said to be identical or even similar. In those cases, the Court after scrutinizing the order on the strength of which the prosecution had been allegedly launched against the Petitioners found that they were anything other than sanction orders.

In respect of the two reported cases of this High Court those orders were found to be merely orders of authorization and in respect of the case of Patna High Court the Learned Judge found that it was a mere show-cause notice given to the Assessee directing him to show-cause why a criminal prosecution should not be launched against him. But, in the instant case, as it has been shown above, the impugned order of the Commissioner of Income Tax is in reality an order assigning the reasons and justification for initiating prosecution against the Petitioners and taking the decision that it was a fit case where such an action should be taken against the Petitioners and on the basis of such finding the Assistant Commissioner was directed and empowered to lodge a complaint before a Court of competent jurisdiction. This is in reality nothing but sanction, whatever its form may be and whatever nomenclature or style anybody may like to bestow on it. It should be borne in mind that nowhere the Law has given any definition of the word "sanction". The dictionary meaning of the term when used as noun is "approval" or "encouragement given to an action" or "express permission". When it is used as verb it means "to authorize" or "to agree to" or "to make binding" (vide the Oxford Concise Dictionary). In the said order, the Income Tax Commissioner after noting down his satisfaction as to the existence of reasonable grounds for prosecuting the Petitioners has in exercise of the lawfully vested powers authorized and directed the Assistant Commissioner of Income Tax having jurisdiction over the concerned Assessee to file the petition of complaint before the competent court for taking cognizance against the company and its directors in question. What more is required for the purpose of giving sanction to the prosecution ? The use of the word "direct" side by side with "authorize" in the last paragraph of the order is extremely significant and meaningful. Directing the Assistant Commissioner to file the complaint in addition to authorizing him for that purpose makes it clear and explicit in very very certain terms that it was nothing but an order according sanction in terms of the requirement of Section 279(1) of the Act discussed above. Authorizing means empowering the officer, but directing him to lodge the prosecution so that the Court may take cognizance of the offence is another name of giving sanction. Thus the entire approach and angle of vision in which the interpretation of the Annex. "A" to the complaint has been advanced on behalf of the Petitioners suffer from a gross misconception and is totally unworthy of acceptance.

12. We have thus seen that the said order of the Income Tax authority is quite distinguishable from the orders of those authorities which were considered by their Lordships in the said cases under reference. In the case of *Dilip Kumar Ghosh v. Dilip Kumar Jana* (Supra) it was admitted position that there was nothing in the lower Court record to indicate that previous sanction had been obtained for prosecuting the accused by the appropriate authority. In the case of *Warranty Tea Ltd. (M/s.) and Anr. v. Deputy Commissioner of Income Tax* (Supra) also the position was the same there the authorisation order on the basis of which the prosecution was started against the accused/Petitioner could not be deemed to be the previous sanction within the meaning of the amended Section

279(1) of the Act which was the guiding procedural law at that point of time. In the third ruling relied upon by Mr. Roy Chowdhury, namely, *Ram Kumar v. State of Haryana* (Supra) also the facts and circumstances under which the verdict was given by the Apex Court were totally different. There the prosecution was lodged against the accused/ Petitioner who was a Member of the Armed Forces by the State after obtaining sanction u/s 132 of Code of Criminal Procedure but without taking prior sanction u/s 197 of the Code. The Hon'ble Division Bench of the Apex Court came to hold that the sanction under Sections 132 for prosecution of the accused was not a substitute for sanction for taking cognizance u/s 197 of the Code which was to be addressed to the Magistrate for the purpose of taking cognizance and hence the Court taking cognizance in the absence of such sanction u/s 197 acted without jurisdiction. But, in our instant case, as I have pointed out above, there is no such question of any absence of sanction as required under the Income Tax Act. Hence this decision also has no application to the present case.

13. The other point canvassed by Mr. Roy Chowdhury is that the Director of the Company, Shri Sudhir Kumar Dutta, who actually signed the verification could at the most be implicated in this case, but these Petitioner Nos. 2 and 3 having not been connected with the alleged offence, nothing having been specifically alleged against them in the complaint but some vague allegations of general nature having been averred against them, the complaint cannot be maintainable against these two Petitioners under the law. In support of this argument Mr. Roy Chowdhury refers to a Division Bench judgment of this Court reported in *Kedar Nath Goenka v. Superintendent, Central Excise* 1978 C.H.N. 789. But this connection does not hold much water in view of the reason that from the averments of the complaint, para. 3, it is found that the complaint has made an explicit statement that the accused Nos. 2 to 4 (accused Nos. 3 and 4 being the present Petitioners), all directors of the Company (accused No. 1) had been at the material time in charge of and were responsible to the company for the conduct of its business. As per the settled position of law, such averment in the complaint is sufficient for the purpose of implicating a director of the accused Company specifically. Mr. Mitra, learned Counsel for the Opposite Party has referred to in this connection a decision of Punjab and Haryana High Court in *Amritlai and Company and Ors. v. Income Tax Officer* 1994 I p. ITR 427 wherein it was held that a specific allegation to the effect that all the partners were in-charge of the conduct of the business of the firm was enough for the purpose of holding that the complaint was not liable to be quashed on the ground that the complaint could not be linked with the alleged offence. The decision which Mr. Roy Chowdhury refers to, namely, *Kedar Nath Goenka v. Superintendent, Central Excise* (supra). (Division Bench judgment), will not be applicable to the present case. Because in that case, the question arose that if in view of the provisions of Section 9(1) of the Central Excise and Salt Act, 1944, using the expression "whoever commits" all the directors of any particular company would not be automatically liable for any offence under the Act and it was held by their

Lordships in this case that it was clear from the expression "whoever commits" that a person was made personally responsible for an offence committed under the Act and the liability could not be extended to any other person merely by virtue of any office or position he held in a company or firm and in order to extend the liability for an offence committed under the said Act to an individual it was to be specifically averred in the petition that the particular person was personally guilty of an act of commission or omission which would be tantamount to an offence under the Act and since such an averment was wanting in the impugned complaint, their Lordships held that the petition of complaint did not make a prima facie case against the Petitioner in question u/s 9 of the said Act. But in the present case the requirement of law is unlike that of Section 9 of the Central Excise and Salt Act, 1944, discussed above. Here, as pointed out above, the fact that an allegation specifically has been made in the complaint to the effect that the Petitioners were in charge of and responsible for the conduct of the business of the company in question at the relevant time was enough for the purpose of implicating the Petitioners in view of the provisions of Section 278B of Income Tax Act. The details regarding the active role played by such directors in the affairs of the company or the extent of their liability are matters to be divulged at the time of trial in the shape of evidence and their absence in the complaint cannot be made a ground for quashing the entire proceeding. Section 278B(1) of the Act lays down that where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge 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 offence and shall be liable to be proceeded against and punished accordingly. The saving clause has been provided under its proviso to the effect that if during trial any such directors proves that the offence was committed without his Knowledge or that he exercised all due diligence to prevent the commission of such offence, then he shall not be liable to any punishment. So, this above contention of Mr. Roy Chowdhury is also not worth being acceded to.

14. Having regard to the foregoing discussion, I am constrained to held that the impugned complaint is not found to be suffering from any infirmity or draw back as pin pointed by Mr. Roy Chowdhury and the prosecution appears to have been initiated by the complaint after fulfilling the required preconditions. Accordingly, I do not find any fault with the legal maintainability of the complaint and the prayer for quashment of the prosecution appears to be totally unfounded and not worth being granted. In the result, the application fails and is dismissed. The learned Magistrate may proceed with the case in accordance with the law as expeditiously as possible.