
(1995) 09 CAL CK 0023
In the Calcutta High Court
Case No : Criminal Revision No. 1287 of 1994

J. Tewari

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 03-09-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 204, 245, 245(2)
Income Tax Act, 1961 — Section 194A, 2, 276B, 278B, 278E

Citation : (1995) 2 CALLT 467 : (1997) 89 CompCas 415 : (1997) 225 ITR 858 :
(1996) 86 TAXMAN 151

Hon'ble Judges : Satya Narayan Chakrabarty, J

Bench : Single Bench

Advocate : Biswanath Sanyal and Keya Banerjee, for the Appellant; B.R. Ghosal and Amit Talukdar, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Chakrabarty, J.—Criminal Revision No. 1287 of 1994 is directed against an order dated March 21, 1994, passed by a Metropolitan Magistrate in Case No. C/992/30 u/s 276B, and 276B read with Section 278B on the Income Tax Act, 1961, whereby the learned magistrate directed that the case be proceeded against the secretary-accused, petitioner No. 2 only, as the case did not lie against accused No. 1-company, a juristic person.

2. The Deputy Commissioner of Income Tax, Special Range 15, Calcutta, filed a petition of complaint against (1) Chem Crown India Limited and (2) J. Tewari, the secretary of the company, in which it was alleged that the company filed its return of income on July 31, 1987, for the assessment year 1987-88 and while scrutinising the details filed by the company along with the return it was observed from a perusal of annexure "XVI" of the tax audit report dated July 28, 1987, that a tax of Rs. 85,045 was deducted u/s 194A of the Income Tax Act, 1961, from the interest paid to the loan creditor, viz., IND Mark Services (P.) Ltd., on March 31, 1987, but the tax so deducted appears not to have been

deposited to the Central Government account within the statutory prescribed time, i.e., within March 31, 1987, as provided u/s 200 of the Income Tax Act, 1961, read with Rule 30 of the Income Tax Rules, 1962.

3. It is, therefore, alleged that the company accused No. 1 having failed to pay the tax deducted to the credit of the Central Government, it committed an offence punishable u/s 276B of the Income Tax Act, 1961, and accused No. 2 being in charge of and responsible for the conduct of the business of the company during the material time had committed an offence punishable u/s 276B read with Section 278B of the Income Tax Act, 1961, and he has also been treated as principal officer of the company by issuing notice on him. Before the lower court, the learned advocate for the complainant conceded that as the principal offender company being a juristic person cannot be subjected to imprisonment, accused No. 2 cannot also be held liable vicariously. The learned magistrate, however, on a perusal of the petition of complaint held, in agreement with the arguments advanced by the learned advocates for both sides relying upon the decisions reported in [1989] Cri LR Cal 171 ; [1992] 1 CHN 299 and [1980] 1 CHN 326, that as the substantive sentence of imprisonment cannot be imposed on the accused-company, being a juristic person, it will be an abuse of the process of the court, if such proceeding is continued against the company and accordingly he found that the case does not lie against accused No. 1. As regards accused No. 2, the learned magistrate seeing that the accused was treated as "principal officer", and proper notice u/s 2(35)(b) of the Income Tax Act being served upon him, held that the proceeding was maintainable against accused No. 2.

4. Learned counsel for the petitioner relying upon a single Bench decision of this court by A. K. Chatterjee J., in *Shyam Lal Dey Housing Industries (Pvt) Ltd. v. Sidheswar Bhusan Puttenda* [1992] 2 CHN 434, a Division Bench decision in *Prakash Chand Jain v. State of West Bengal* [1991] 2 CHN 48, *State of Madras Vs. C.V. Parekh and Another*, , tried to argue that the accused No. 2 being made liable vicariously and the principal accused No. 1 company being discharged by the magistrate, the question of liability of accused No. 2 as the person in charge of the company does not arise and he cannot be prosecuted. He further submitted that the unreported decision by the Division Bench comprising Mr. Justice A.K. Chatterjee and Mr. Justice S.N. Chakrabarty in *Kanoi Udyog* rendered on September 28, 1994, has no binding effect as it is a judgment sub silentio inasmuch as the Division Bench did not consider and discuss the previous single Bench decision in *Shyam Lal Dey Housing Industries (Pvt.) Ltd. v. Sidheswar Bhusan Puttenda* [1992] 2 CRN 434 and the aforesaid decisions. Learned counsel on behalf of the State, on the other hand, submitted that all these decisions were considered by the Division Bench and these decisions do not absolve accused No. 2 of his liability, as argued. He further submitted that the accused company was not acquitted by the magistrate on the merits and accordingly it cannot be argued by the other side that as the company has been acquitted, no responsibility can be imposed on accused No. 2-secretary. He further submitted

that the single Bench decision in *Shyam Lal Dey Housing Industries (Pvt) Ltd. v. Sidheswar Bhusan Puttenda* [1992] 2 CHN 434, has no value after the Division Bench decision in *Kanoi Udyog*. Basing on AIR 1984 SC 620, [1994] 100 Cri. LJ 628 and the unreported decision of the Division Bench, he submitted that the accused No. 2-secretary is also independently liable,

5. I have considered the submissions of learned counsel for both the sides and also the rulings referred to as well as the relevant provisions of the Income Tax Act. The alleged offence is punishable with compulsory imprisonment and fine. In this case, the assessee-company (accused No. 1) cannot be sent to prison in view of the peculiar penal provision and the learned magistrate discharged it saying that it will be an abuse of the process of the court if the proceedings against the company are continued, but that does not mean that the company cannot commit an offence. The company was not acquitted on the merits after evidence but it was discharged u/s 245(2) of the Criminal Procedure Code, before evidence and there is an allegation that the contravention was by the company. Accordingly, it cannot be said at this stage that the company did not commit the alleged offence by contravening the provisions of Section 276B of the Income Tax Act, the language of which does not involve any mens rea as far as the company is concerned. We have, however, pointed out in the unreported decision in *Kanoi Udyog* that the rule of evidence embodied in Section 278E of the Act regarding presumption of culpability on the part of the accused does not differentiate between a natural person and a juristic person and the court will presume the existence of the culpable state of mind unless the accused proves to the contrary. It has been clearly stated by the Supreme Court in the decision reported in 1984 SC 620, that it cannot be said that if it is alleged that the person contravening the provision is a company, the prosecution of the person in charge or an officer of the company is precluded, unless the company itself is prosecuted. The only condition precedent for such prosecution is that there should be a finding that the contravention was by the company and it is not necessary that the person in charge or the officer of the company should also be arraigned with the company and prosecuted. The Supreme Court thus amplified the matter while clearing the misunderstanding in the submission made before it on behalf of the petitioner at the time of construction of the analogous provisions of Section 10 of the Essential Commodities Act. The unreported Division Bench decision of this court to which I am a party, certainly superseded the single Bench decision by Justice A. K. Chatterjee. As far as the Division Bench decision reported in *Prakash Chand Jain v. State of West Bengal* [1991] 2 CHN 48 is concerned, it relates to an infringement of the provision of the Prevention of Food Adulteration Act and has no application to the facts of the present case and thus it cannot be argued on behalf of the petitioner that the commission of offence by the company not being proved, the commission of offence by its employee, viz., the secretary also fails in view of the clear decision of the apex court in AIR 1984 SC 620.

6. The definition of the word "person" in Section 2(31) of the Income Tax Act,

1961, includes a company, but it does not exclude the "principal officer" which has been defined u/s 2(35) of the Income Tax Act as meaning the secretary or any person connected with the management or administration of the company upon whom the Income Tax Officer has served notice of his intention of treating him as the principal officer thereof. Here the secretary has been notified by the Income Tax Officer of his intention to be treated as a principal officer of the company. The word "person" in Section 276B of the Income Tax Act, includes the principal officer and he is also independently and primarily liable. In this case from the interest paid to the loan creditor, the tax was deducted u/s 194A of the Income Tax Act, but the same was not paid to the credit of the Central Government u/s 200 of the Act, by the company secretary through whose instrumentality the company acted and the word "person" referred to in this section includes the principal officer of the company, i.e., the secretary, besides the company being also responsible for paying as laid down in Section 204. It has also been held by the apex court in [1994] CrL. LJ 628 that by the introduction of Section 278B of the Income Tax Act with effect from October 1, 1975, it has been enacted that where an offence under this Act has been committed by the 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.

7. It is, therefore, clear that everybody mentioned in this section including the company shall be liable for the offence committed by the company, and proceeded against.

8. This revision accordingly fails. The interim order of stay of proceedings of the court below granted on July 6, 1994, is vacated. The learned court below will dispose of the proceedings before it as early as possible.