
(2015) 07 BOM CK 0144

In the Bombay High Court

Case No : Criminal Application No. 93 of 2008

Wairagade Engineering Corporation

APPELLANT

Vs

Hiren Aluminum Ltd. and Others

RESPONDENT

Date of Decision : 16-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 120-B, 415

Citation : (2016) ALLMR(Cri) 502

Hon'ble Judges : A.B. Chaudhari, J

Bench : Single Bench

Advocate : Pradeep Marpakwar, for the Appellant; N.A. Padhye, Advocates for the Respondent

Final Decision : Disposed off

Judgement

A.B. Chaudhari, J—Being aggrieved by the judgment and order dated 23-10-2007 passed by the Ad-hoc Additional Sessions Judge, Nagpur in Criminal Revision No. 921/2006 by which the order dated 10-7-2006 passed by J.M.F.C., Nagpur in Criminal Case No. 1433/2006 issuing process against the respondent-company incorporated under the Companies Act was quashed and set aside, the instant application was filed.

2. Learned counsel for the applicant submitted that the learned revisional Court relied on a decision of the learned Single Judge of this Court in the case of Natural Sugar and Allied Industries Ltd. and Another Vs. Razzak and Others, (2006) CriLJ 3680 : (2006) 4 MhLj 771 and passed the impugned order holding that there could not be order of issuance of process against the company incorporated under the Companies Act in accordance with the said decision in which reference was also made to the earlier Supreme Court decision. He then submitted that there is a Constitution Bench judgment in the case of Standard Chartered Bank and Others etc. Vs. Directorate of Enforcement and Others etc., AIR 2005 SC 2622 : (2005) 3 BC 119 : (2005) 125 CompCas 513 : (2005) 4

CompLJ 464 : (2005) 3 CTC 39 : (2005) 195 CTR 465 : (2005) 100 ECC 457 : (2005) 275 ITR 81 : (2005) 5 JT 267 : (2005) 4 SCC 530 : (2005) 60 SCL 217 : (2005) 1 SCR 49 Supp : (2005) AIRSCW 2829 : (2005) 4 Supreme 290 which was noticed by the learned Single Judge but was not properly applied and therefore, according to him, the impugned order is liable to be quashed and set aside. He pressed into service the judgement in the case of Iridium India Telecom Ltd. Vs. Motorola Incorporated and Others, AIR 2011 SC 20 : (2010) 160 CompCas 147 : (2010) 11 JT 492 : (2011) 1 RCR(Criminal) 235 : (2011) 1 SCC 74 : (2011) 106 SCL 28 : (2010) 10 UJ 5258 : (2010) AIRSCW 6738 in which the Constitution Bench judgment of Standard Chartered Bank (supra) was considered and it was then held that the corporate companies can no longer claim immunity from criminal prosecution.

3. Shri Padhye, learned counsel for respondent No. 1 submitted that the impugned order is based on legal position and no fault, therefore, can be found with the impugned order.

4. Upon perusal of the impugned order and on hearing learned counsel for rival parties, I find that the decision of the learned Single Judge of this court shows that company could not be prosecuted in view of its juridical person status as such.

5. Shri Padhye, learned counsel then argued that the company being a juridical person cannot have the intention to deceive anybody and mens rea that is a pre-requisite for any criminal offence, which the company cannot have. He therefore, prayed for dismissal of the criminal application.

6. I have perused the judgment in the case of Standard Chartered Bank (supra) delivered by the Constitution Bench of the Hon'ble Supreme Court. I have also perused the judgment in the case of Iridium India Telecom Ltd. (supra). The Constitution Bench judgment in the case of Standard Chartered Bank is considered by the Supreme Court while delivering the judgment in Iridium India Telecom Ltd. The Apex Court also considered the legal position existing in the USA as well as in England in that behalf. Finally, the Supreme Court found that in the case of Standard Chartered Bank the company cannot claim any immunity from the criminal prosecution. Therefore, in the case of Iridium India Telecom Ltd., the Supreme Court accepted the legal position that a company though being a juridical person cannot claim immunity from criminal prosecution. It would be useful to quote the following paragraphs from the judgment in the case of Iridium India Telecom Ltd. (supra).

50. The limits within which the jurisdiction under Section 482 can be exercised was again precisely stated in Divine Retreat Centre Vs. State of Kerala as follows : (SCC p. 557, para 27)

"27. In our view, there is nothing like unlimited arbitrary jurisdiction conferred on the High Court under Section 482 of the Code. The power has to be exercised sparingly, carefully and with caution only where such exercise is justified by the

tests laid down in the section itself. It is well settled that Section 482 does not confer any new power on the High Court but only saves the inherent power which the Court possessed before the enactment of the Code. There are three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice."

51. In *M.N. Ojha vs. Alok Kumar Srivastav* this Court was dealing with a situation where the SDJM had issued process mechanically and without any application of mind. Furthermore, the High court had dismissed a petition for quashing the order of the SDJM by a cryptic and non-speaking order. In such circumstances, this Court observed : (SCC pp. 686-88, para 25 & 27-30)

"25. Had the learned SDJM applied his mind to the facts and circumstances and sequence of events and as well as the documents filed by the complainant himself along with the complaint, surely he would have dismissed the complaint. He would have realised that the complaint was only a counterblast of the FIR lodged by the Bank against the complainant and others with regard to the same transaction.

* * *

27. The case on hand is a classic illustration of non-application of mind by the learned Magistrate. The learned Magistrate did not scrutinise even the contents of the complaint, leave aside the material documents available on record. The learned Magistrate truly was a silent spectator at the time of recording of preliminary evidence before summoning the appellants.

28. The High Court committed a manifest error in disposing of the petition filed by the appellants under Section 482 of the Code without even advertng to the basic facts which were placed before it for its consideration.

29. It is true that the Court in exercise of its jurisdiction under Section 482 of the code of Criminal Procedure cannot go into the truth or otherwise of the allegations and appreciate the evidence if any available on record. Normally, the High Court would not intervene in the criminal proceedings at the preliminary stage/when the investigation/enquiry is pending.

30. Interference by the High Court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure can only be where a clear case for such interference is made out. Frequent and uncalled for interference even at the preliminary stage by the High court may result in causing obstruction in the progress of the inquiry in a criminal case which may not be in the public interest. But at the same time the High Court cannot refuse to exercise its jurisdiction if the interest of justice so required where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding. In such cases refusal to

exercise the jurisdiction may equally result in injustice more particularly in cases where the complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint."

52. Keeping in view the aforesaid principles, we may now examine as to whether the High Court has adopted the correct approach while exercising its inherent power under Section 482 CrPC. The High Court notices in extenso the facts as narrated above. Thereafter the High Court notices the submissions made on behalf of the parties. It was observed by the High Court that a company/corporation will not have the mens rea for commission of the offence under Section 415 IPC. The High Court relied on the observations made by this Court in Kalpanath Rai Vs. State and distinguished the judgment in M.V. Javali Vs. Mahajan Borewell & Co. It is held that a company being a juridical person cannot have the intention to deceive, which is the necessary mens rea for the offence of cheating. According to the High Court, although a company can be a victim of deception, it cannot be the perpetrator of deception. It can only be a natural person who is capable of having mens rea to commit the offence. According to the High Court, the same reasoning would also apply in respect of the offence of conspiracy which involves a guilty mind to do an illegal thing.

53. The judgments relied upon by the complainant are distinguished by the High court, as they pertain to special provisions contained in different statutes such as the Income Tax Act, the Essential Commodities Act, the Food Adulteration Act and the TADA Act. It is noticed that in Kalpanath Rai Vs. State this Court was concerned with the provisions of TADA Act. The High court was further of the opinion that the Penal Code does not contain any provision similar to the aforesaid Acts. Since the offence of cheating under Section 415 and the offence of conspiracy under Section 120-B can only be committed by a natural person, the word "whoever" cannot include in its sweep a juridical person like a company.

54. The High Court notices the judgment of the Calcutta High Court in A.K. Khosla Vs. T.S. Venkatesan wherein it was held that there are two tests in respect of prosecution of a corporate body i.e. first being the test of mens rea and the other being the mandatory sentence of imprisonment. However, no opinion has been expressed thereupon by the High Court. In view of the aforesaid conclusions, the High Court has held that the complaint would not be maintainable against the respondent.

55. We are of the considered opinion that there is much substance in the submission of Mr. Jethmalani that virtually in all jurisdictions across the world governed by the rule of law, 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. The legal position in England and United States has now crystallised to leave no manner of doubt that a corporation would be liable for crimes of intent.

56. In the year 1909, the United States Supreme Court in New York Central &

Hudson River Railroad Co. Vs. United States stated the principle thus : (L Ed p. 622)

"It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offences, of which rebating under the federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not so, many offences might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.

* * *

We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that inter-State commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."

57. The aforesaid sentiment is reiterated in 19 American Jurisprudence 2d, Para 1434 in the following words:

"Lord Holt is reported to have said (Anonymous, 12 Mod 559, 88 Eng Reprint, 1164) that a corporation is not indictable, but the particular members of it are". On the strength of this statement it was said by the early writers that a corporation is not indictable at common law, and this view was taken by the courts in some of the earlier cases. The broad general rule is now well established, however, that a corporation may be criminally liable. This rule applies as well to acts of misfeasance as to those of nonfeasance, and it is immaterial that the Act constituting the offence was ultra vires. It has been held that a de facto corporation may be held criminally liable.

As in case of torts the general rule prevails that a corporation may be criminally liable for the acts of an officer or agent, assumed to be done by him when exercising authorised powers, and without proof that his act was expressly authorised or approved by the corporation. A specific prohibition made by the

corporation to its agents against violation of the law is no defence. The rule has been laid down, however, that corporations are liable, civilly or criminally, only for the acts of their agents who are authorised to act for them in the particular matter out of which the unlawful conduct with which they are charged grows or in the business to which it relates."

58. Again in 19 Corpus Juris Secundum, Para 1363 it has been observed as under:

"A corporation may be criminally liable for crimes which involve a specific element of intent as well for those which do not, and, although some crimes require such a personal, malicious intent, that a corporation is considered incapable of committing them, nevertheless, under the proper circumstances the criminal intent of its agent may be imputed to it so as to render it liable, the requisites of such imputation being essentially the same as those required to impute malice to corporations in civil actions."

59. The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the "alter ego" of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation.

7. The discussion about position in India was then discussed by the Supreme Court in paragraph Nos. 64 and 65 as held by the Constitution Bench in the case of Standard Chartered Bank (supra) and finally it was held thus:

66. These observations leave no manner of doubt that a company/corporation cannot escape liability for a criminal offence merely because the punishment prescribed is that of imprisonment and fine. We are of the considered opinion that in view of the aforesaid judgment of this court, the conclusion reached by the High Court that the respondent could not have the necessary mens rea is clearly erroneous.

In view of the dicta laid down by the Apex court, following result is inevitable. Hence, the order.

ORDER

(i) Rule is made absolute in terms of prayer clause (1).

(ii) The proceedings of Criminal Case No. 1433/2006 (M/s. Wairagade Engineering Corporation Vs. M/s. Hiren Aluminum Ltd.) shall stand restored on the file of Judicial Magistrate First Class, Nagpur. Learned Judicial Magistrate First Class, Nagpur to proceed according to law.

(iii) Complainant to appear before the trial Court on 17-8-2015 and take further steps as per the directions of the trial Court.

Criminal application stands disposed of in above terms with no order as to costs.