

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Cr1.M.C.1055/2001

% Date of Decision: 11.11.2009.

EXPORT CREDIT GUARANTEE CORPORATION OF
INDIA LIMITED (ECGC) Petitioner

! Through: Mr. Bharat Sangal, Mr. R.R.
Kumar, Ms. Mrinalini Oinam,
advs.

Versus

\$ M/S SAWHNEY EXPORTS HOUSE Respondent

^ Through: Mr. T.S. Sawhney, A.R.

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

MOOL CHAND GARG, J(*Oral*)

1. The short point involved in this matter is as to whether the petitioner would have been made as an accused and could have been summoned because the allegation made by the complainant reveals that the circular in question which has caused an obstacle in receiving loan/other credit facilities from the bankers was issued *malafidely*. Thus, it is an allegation of mens rea even though on a *prima facie* reading of the order passed by the trial Judge it is

apparent that there is some fault which has been committed on behalf of the petitioner but legal question which is raised is that the company could not have been made as an accused. Reference has been made by the petitioner to the judgments in Sunilakhya Chowdhury Vs. H.M. Jadwet and Anr. AIR 1968 Calcutta 266 and Kalpnaath Rai Vs. State (Through CBI) (1997) 8 SCC 732.

2. In the case of *Sunilakhya Chowdhury (Supra)* it has been stated as under:

The next three points raised by the learned Advocate-General are material and go to the root of the case. There is much force behind the same Mr. Dutt contended that a company cannot in any event be held to have committed an offence under section 500 I.P.C because the most essential ingredient of the said offence is mens rea. A company is a juristic entity or an artificial person and a director is not a company. Accordingly there is no offence by the limited company, namely, The Metropolitan Printing and Publishing House (P) Ltd., whereof the accused petitioner was formerly a director, and as such it cannot be prosecuted of the offence as alleged or at all. A reference in this connection may be made to the relevant provisions of the Companies Act (Act I of 1956), as amended by Act LXV of 1960. In various penal provisions thereunder namely, under sections 162, 168 and 220(3) the legislature in its wisdom has used the expression 'the company and every officer of the company who is in default'. An officer who is in default' has been defined in section 5 of the said Act as an officer of the company who is knowingly guilty of the default, noncompliance, failure, refusal or contravention mentioned in the relative provisions. Therefore, there is no difficulty in convicting a company as enjoined under the said provisions of that Act But the position becomes difficult in the case of an offence under section 500 I.P.C., which is an offence requiring a blame-worthy mind and is not a statutory offence requiring no 'Mens Rea'. The

offence of defamation consists of three essential ingredients, namely, (1) making or publishing any imputation concerning my person (2) Such imputations must have been made by words either spoken or intended to be read or by signs or by visible representations and (3) the said imputation must have been made with the intention to harm or with knowledge or having reason to believe that it will harm the reputation of the person concerned. Therefore, the intention to cause harm is the most essential "sine qua non" of an offence under section 499 I.P.C. It is further to be noted that in this case the press belonged to the company at Calcutta and it had merely done the job of printing in the ordinary course of day-to-day business. The learned Advocate-General has referred to two cases in this connection. In the first place he has referred to the case of Anath Bandhu vs. Corporation of Calcutta, AIR 1952 Cal 759. Mr. Justice K C Chunder has held therein that if there is anything in the definition or context of a particular section in the statute which will prevent the application of the section to a limited company, certainly a limited company cannot be proceeded against. There are heaps of sections in which it will be physically impossible by a limited company to commit the offences. Then again a limited company cannot generally be tried when 'mens rea' is essential. Again it cannot be tried where the only punishment of the offence is imprisonment because it is not possible to send a limited company to prison by way of a sentence. Under the General Clauses Act as also the Bengal General Clauses Act, the expression person includes a limited liability company in the second place he has referred to the cases of Bisheswar Nath Mehrotra v. state, 60 Cal WN 305 : (AIR 1956 Cal 137), wherein Mr. Justice Debabrata Mukherjee has discussed as to whether a company can be prosecuted and the maintainability of such a prosecution and also of the prosecution against the directors of the company. His Lordship has held ultimately that the director or all the directors do not constitute a company. The company is a legal entity which can be prosecuted if it is alleged that it is guilty of acts which make it punishable under the Indian Boilers Act, 1923. I agree, therefore, with the learned Advocate-General that a company cannot be held to have committed an offence under section 500 I.P.C.

3. In the case of *Kalpna Rai (Supra)* also reference has been made to the following observations made by the Apex Court:

“56. For all the above reasons we hold that mens rea is an essential ingredient for the offence envisaged in Section [3\(4\)](#) of TADA.

57. On the above understanding of the legal position we may say at this stage that there is no question of A-12 - company to have had the mens rea even if any terrorist was allowed to occupy the rooms in Hotel Hans Plaza. The company is not a natural person. We are aware that in many recent penal statutes, companies or corporations are deemed to be offenders on the strength of the acts committed by persons responsible for the management or affairs of such company or corporations e.g. Essential Commodities Act, Prevention of Food Adulteration Act etc. But there is no such provision in TADA which makes the company liable for the acts of its officers. Hence, there is no scope whatsoever to prosecute a company for the offence under Section [3\(4\)](#) of TADA. The corollary is that the conviction passed against A-12 is liable to be set aside.”

4. Learned counsel for the petitioner has relied upon another judgment in the case of *Zee Telefilms Limited Vs. M/s Sahara India Commercial Corporation Ltd. & Anr. (2001) Cal LT 262 (HC)*. This judgment has taken clue from the other judgments cited by the petitioner and which reiterates that companies cannot be prosecuted for criminal offence where mens rea is involved. Reference can be made to para 13 of the judgment, which is as follows:

“13. Of course two further decisions of the apex Court were cited on behalf of the Opposite Parties as to under what circumstances a criminal prosecution can be quashed or process issued at the initial stage can be interfered with in exercise of inherent power of this Court under section 482 Cr. PC. In these circumstances of the case so far as the petitioner company is concerned I have absolutely no hesitation in my

mind that if the company was incapable of committing an offence of which mens rea or a particular state of mind or intention is the essential ingredient of such offence, the process issued against the petitioner must be quashed though the case instituted against others may be maintainable and proceeded with in respect of which I am not called upon to express any opinion."

5. On the other hand the respondent/complainant submits that the position of law is settled vide judgment delivered by the Supreme Court in the case of Standard Chartered Bank & Ors. Vs. Directorate of Enforcement & Ors. (2005) 4 SCC 530. In that case, the very issue as to whether a company can be prosecuted criminally has been discussed while dealing with corporate criminal liability. The Apex Court has been pleased to make the following observations:

8. Inasmuch as all criminal and quasi-criminal offences are creatures of statute, the amenability of the corporation to prosecution necessarily depends upon the terminology employed in the statute. In the case of strict liability, the terminology employed by the legislature is such as to reveal an intent that guilt shall not be predicated upon the automatic breach of the statute but on the establishment of the *actus reus*. subject to the defence of due diligence. The law is primarily based on the terms of the statutes. In the case of absolute liability where the legislature by the clearest intendment establishes an offence where liability arises instantly upon the breach of the statutory prohibition, no particular state of mind is a prerequisite to guilt. Corporations and individual persons stand on the same footing in the face of such a statutory offence. It is a case of automatic primary responsibility. It is only in a case requiring *mens rea*, a question arises whether a corporation could be attributed with requisite *mens rea* to prove the guilt. But as we are not concerned with this question in these proceedings, we do not express any opinion on that issue.

9. In series of offences punishable under various statutes, sentence of imprisonment and fine are prescribed as the punishment. In some of these enactments, for certain offences a minimum period of imprisonment is

prescribed as punishment. Under Section 56(1)(i) of the FERA Act, in respect of certain offences, if the amount or value involved therein exceeds one lakh of rupees, the punishment prescribed is imprisonment for a term which shall not be less than six months, but which may extend to seven years and with fine. In any other case, the punishment prescribed is imprisonment for a term which may extend to three years or with fine or with both.

10. Going by the provisions in Section 56 of the FERA Act, if the view expressed in Velliappa Textiles is accepted as correct law, the company could be prosecuted for an offence involving rupees one lakh or less and be punished as the option is given to the court to impose a sentence of imprisonment or fine, whereas in the case of an offence involving an amount or value exceeding rupees one lakh, the court is not given a discretion to impose imprisonment or fine and therefore, the company cannot be prosecuted as the custodial sentence cannot be imposed on it.

11. The legal difficulty arising out of the above situation was noticed by the Law Commission and in its 41st Report, the Law Commission suggested amendment to Section [62](#) of the Indian Penal Code by adding the following lines :

"In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only."

This recommendation got no response from the Parliament and again in its 47th Report, the Law Commission in paragraph 8(3) made the following recommendation :

"In many of the Acts relating to economic offences, imprisonment is mandatory. Where the convicted person is a corporation, this provision becomes unworkable, and it is desirable to provide that in such cases, it shall be competent to the court to impose a fine. This difficulty can arise under the Penal Code also, but it is likely to arise more frequently in the case of economic laws. We, therefore, recommend that the following provision should be inserted in the Penal Code as, say, Section [62](#):

(1) In every case in which the offence is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine only.

(2) In every case in which the offence is punishable with imprisonment and any other punishment not being fine,

and the offender is a corporation, it shall be competent to the court to sentence such offender to fine.

(3) In this section, "corporation" means an incorporated company or other body corporate, and includes a firm and other association of individuals."

But the Bill prepared on the basis of the recommendations of the Law Commission lapsed and it did not become law. However few of these recommendations were accepted by the Parliament and by suitable amendment some of the provisions in the taxation statutes were amended.

12. The question whether a company could be prosecuted for an offence for which mandatory sentence of imprisonment is provided continued to agitate the minds of the courts and jurists and the law continued to be the old law despite the recommendations of the Law Commission and the difficulties were expressed by the superior courts in many decisions.

13. The question under consideration is that where an accused is found guilty and the punishment to be imposed is imprisonment and fine, whether the court has got the discretion to impose the sentence of fine alone. Senior counsel Shri Jethmalani contended that if a corporate body is found guilty of the offence committed, the court, though bound to impose the sentence prescribed under law, has the discretion to impose the sentence of imprisonment or fine as in the case of a company or corporate body the sentence of imprisonment cannot be imposed on it and as the law never compels to do anything which is impossible, the court has to follow the alternative and impose the sentence of fine. The counsel also hastened to add that this discretion could be exercised only in respect of juristic persons and not in respect of natural persons. It was contended that by doing so, the court does not alter the provisions of the law by interpretation, but only carry out the mandate of the legislature. Senior counsel appearing for other appellants, on the other hand, contended that the Parliament enacted laws knowing fully well that the company cannot be subjected to custodial sentence and therefore the legislative intention is not to prosecute the companies or corporate bodies and when the sentence prescribed cannot be imposed, the very prosecution itself is futile and meaningless and thus the majority decision in Velliappa Textiles has correctly laid down the law. The counsel on either side drew our attention to various decisions on the point.
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32. We hold that there is no immunity to the

companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment (*sic* and fine). We overrule the views expressed by the majority in *Velliappa Textiles(supra)* on this point and answer the reference accordingly. Various other contentions have been urged in all appeals, including this appeal, they be posted for hearing before an appropriate Bench.

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37. The argument advanced on behalf of the company and corporate bodies that as the minimum prescribed punishment of imprisonment cannot be imposed on juristic person like company or corporation, Section 56 of the Act cannot be invoked against the company or corporation cannot be accepted. It is to be noted that there are other provisions in the Act, where on conviction of companies or corporations, adverse consequences flow against the offending companies and corporations such as under Section 69 of blacklisting them and under Section 50 penalising them. The prosecution of the companies and corporations under Section 56 of the Act and imposing on them the punishment of fine which is possible to be imposed, therefore, is not ruled out. Section 56 of the Act provides for imposition of minimum prescribed sentence of imprisonment wherever possible and also fine. Such a construction of the provisions of Section 56 of the Act to make it workable cannot be said to be a construction impermissible only because the statute under construction is a penal statute. Section 56 cannot be so construed as to make it ineffective against companies and corporations. Merely because there is no specific mention in the section that in the event of breach committed by the companies and corporations, the punishment can only be in the nature of fine is no ground to read into the provision a fatal lacuna. The provision which is clearly applicable equally to natural and juristic persons, if construed reasonably in the manner indicated above, would be found workable and capable of fulfilling the object of the Act.

6. The respondent also makes reference to the following paragraphs of the aforesaid judgment which form part of dissenting view taken by the other two judges:

“63. There appears to be a difference of opinion amongst the learned counsel assailing the correctness of the majority view in *Velliappa* as to whether the task of the Court in the case on hand is one of statutory interpretation. Some counsel have argued that it is open to the court to read the words “imprisonment and fine” as “imprisonment or fine”. In our view, such a construction is impermissible. First, it virtually amounts to rewriting of

the section. The court would be reading the section as applicable to different situations with different meanings. If the offender is a corporate entity, then only fine is imposable; if the offender is a natural person, he shall be visited with both the mandatory term of imprisonment and fine. The exercise would then become one of putting a fluctuating or varying interpretation on the statute depending upon the circumstances. That is not permissible for the court, either on principle, or on precedent. While it may be permissible for the court to read the word “and” as “or”, or vice versa, whatever the interpretation, it must be uniformly applied to all situations. If the conjunction “and” is read disjunctively as “or”, then the intention of Parliament would definitely be defeated as the mandatory term of imprisonment would not be available even in the case of a natural person. We have not been shown any authority for the proposition that it is open to the court to put an interpretation on a statute which could vary with the factual matrix.

73. A final argument, more in *terrorem* than based on reason, put forward was that, if the majority view in *Velliappa*¹ is upheld, it would be impossible to prosecute a number of offenders in several statutes where strict liability has been imposed by the statute. If that be so, so be it. As already pointed out, the judicial function is limited to finding solutions within specified parameters. Anything more than that would be “judicial heroics” and “naked usurpation of legislative function”.

76. We see nothing special in the Indian context which requires us to take a different view. In all these jurisdictions, the view that prevailed was that, where a statute imposes mandatory imprisonment plus fine, such a provision would not enable the punishment of a corporate offender. If the legislatures of these countries stepped in to resolve the problem by appropriate legislative enactments giving option to the courts to impose fine in lieu of imprisonment in the case of a corporate offender, we see nothing special in the Indian context as to why such a course cannot be adopted. Merely because the situation confronts the courts in a number of statutes, the court need not feel deterred in construing the statute in accordance with reason.

77. The argument that the Criminal Procedure Code, 1973 recognises different stages of cognizance, prosecution, conviction and punishment and that it is open to the court to stop short of actual imposition of punishment, is opposed to the law laid down by this Court in a series of cases. In *State of Maharashtra v. Syndicate Transport Co. (P) Ltd*, *Edmund N. Schuster v. Asstt. Collector of Customs* and *Kartick Chandra Mallik v. Rani Harsha Mukhi Dasi* it has been held that once the court after trial in accordance with the prescribed procedure comes to a finding of guilt and convicts an offender, the court is bound to sentence the offender with the punishment prescribed in law. In other words, sentence must inexorably follow conviction, as night follows the day. The

argument that it is open to the court to abandon its duty midway without imposition of punishment of the offender, is one without merit.

70. The maxim '*lex non cogit ad impossibilia*', like all maxims, only tells us that law does not contemplate something which cannot be done. The maxim applies, in so far as persuading the Court to hold that it is impossible to send a company to prison. The maxim by itself does not empower the Court to break up the section into convenient parts and apply them selectively. Nor does the maxim '*Impotentia excusat legem*' apply here for the same reason. Au contraire, the application of these two maxims could equally persuade the Court to ignore the language of the statutory provision in the case of a juristic person, there being no warrant for the dissecting of the section and treating only one part as capable of implementation when the mandate of the section is to impose the whole of the prescribed punishment.

79. For all these reasons, we are of the opinion that the majority view of this Court in **Velliappa** is correct and does not require any reconsideration by this Bench. All the matters comprised in this group be placed before appropriate Benches for disposal in accordance with law."

7. It may be observed here that insofar as the case of Asstt. Commissioner Vs. Villiappa Textiles Ltd., (2003) 11 SCC 405 is concerned, the controversy involved in that matter was as to whether the company can be prosecuted where mandatory sentence is imprisonment, which is not the case in hand. The petitioner is being prosecuted under Section 500 IPC where the punishment prescribed is simple imprisonment for a term which may extend to 2 years or a fine or both. So, it is not a case where mandatory sentence of imprisonment is required. As such, taking into consideration the judgment of the Hon'ble Supreme Court delivered in the case of Standard Chartered Bank (Supra) in can be

inferred that a company can be certainly prosecuted.

8. As far as the question of mens rea, it will be for the Court to see as to whether there was a mens rea on the part of the company or not while issuing the circulars because the circulars have been issued by and on behalf of the company. It does not matter that the circular is signed by the Chairman or a Managing Director or a Director or other employee of the company. These questions can be examined and defence of the company can also be examined during the course of evidence which may be recorded even at the stage of pre-charge and no harm is going to be caused to the petitioner unless and until the Court is satisfied that it can proceed or charges can be framed.

9. Thus, the petition as filed by the petitioner is dismissed only on the point that in view of the judgment delivered in *Standard Chartered Bank (supra)* it cannot be said that company cannot be prosecuted.

10. Parties to appear before the trial Court on 04.12.2009.

11. LCR be sent back along with a copy of this order.

12. Dasti to both the parties.

MOOL CHAND GARG,J

NOVEMBER 11, 2009

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