IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :20.07.2020

PRONOUNCED ON :31.07.2020

CORAM:

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CRL.O.P.No.18577 of 2014
M.P.No.1 of 2014

S.A.Khan
Ex-partner
M/s.Printwraps
No.832, 35th Street,
Kotturpuram,
Chennai-600 080. ... petitioner

Vs.

Union of India rep.by
The Assistant Commissioner of
Central Excise, Prosecution Unit,
Chennai-34.
... Respondent

Prayer : Criminal Original Petition filed under Section 482 of Cr.P.C., to call for the records in E.O.C.C.No.166 of 1997 pending on the file of the Additional Chief Metropolitan Magistrate EO1, Egmore.

For Petitioner : M/s.V.K.Sathiamurthy

For Respondent : Mr.N.P.Kumar
Special Public Prosecutor

O R D E R

This petition is filed to call for the records and quash E.O.C.C.No.166 of 1997 pending on the file of the Additional Chief Metropolitan Magistrate EO1, Egmore.

2. The case of the prosecution is that the respondent/The Assistant Commissioner of Central Excise, Prosecution Unit, Chennai-34, filed a complaint before the Additional Chief Metropolitan Magistrate for Economical Offences, Egmore, Madurai-600 008 against M/s.Printwraps, Chennai and Mr.S.Subash, Managing Partner of M/s.Printwraps and Mr.S.A.Khan, Ex-partner

of M/s.Printwraps, who were arrayed as A1 to A3. The first accused/Company is manufacturing articles of packing goods, falling under Chapter 3929 of Central Excise Tariff Act, 1985 and the factory is situated at No.5, SIDCO Industrial Estate, Gummidipoondi. Based on the intelligence gathered against the accused who were persistently and deliberately violating the provisions of Central Excise Act, the Officers belonging to the Central Excise Department visited the office premises and the factory, the second accused was present in the office. The third accused, who is in-charge of the factory, was available there. During the search of residential premises of the second accused, the Accountant Mr.J.Ganesh of the first accused company was questioned and, lot of self incriminating documents were found and seized. Further, from the residence of the third accused, 1738 kgs of non-duty paid printed polyester philaminated rolls valued at Rs.2,52,010/- were found. Further, it was found that the accused were using second set of invoices, indicating removal of excusable goods to the tune of Rs.21,23,113.40/-, without payment of duty. Thereafter, as per Central Excise Act, show cause notice was issued, adjudication proceedings were initiated, wherein, the accused persons evading duty was confirmed. In this regard, Commissioner of Central Excise passed an order in Original No.43/95 dated 22.02.1995, wherein, in lieu of confiscation, fine was imposed against the first, second and third accused. Added to it, criminal prosecution was launched by the Central Excise Department, wherein the company had been arrayed as A1 and the Managing Director, Mr.Subash arrayed as A2 and Ex-partner of Mr.S.A.Khan arrayed as A3.

3. The contention of the petitioner is that as per Section 9AA of the Central Excise Act, it is mandatory requirement to implead the company/firm as an accused. There cannot be any prosecution against the accused without arraying the Company/Firm as an accused. Further, as per Section 305(3), it is made clear that the method of selecting a person is unique right vested with the Company/Firm and the said power cannot be stretched further to say that the Court has the power to direct any person, whom it considers to be a representative of the company/firm. Further, it is submitted that in this case, no person represents the said firm. The second accused on the date of commission of the alleged offence was responsible for the conduct of the business of the firm. It is submitted that if the Company/Firm has been made as an accused, there is no bar in further proceedings and no proceeding shall go on without any one representing the company/Firm, despite the Company/Firm made as accused. In this case, charges were framed. It is further submitted that if the first accused Company/Firm is not represented by the Director or the partner of the company, the case cannot proceed further, and the entire proceedings will be nullity in the eye of law. For maintaining a prosecution under

the Central Excise Act, arraying the Company/Firm as an accused is imperative. In the absence of any person to represent the Company/Firm, the petitioner cannot be prosecuted as the partner of Print Wraps.

4. Further, it is submitted that during the pendency of this petition, the second accused, who was described as Managing Partner of first accused, passed away. Pursuant to the death of Subash/second accused, the respondent herein preferred a miscellaneous petition in M.P.No.2270 of 2000 in C.C.No.166 of 1997, before the Trial Court seeking an order to direct the petitioner herein/A3 to represent the first accused Firm, since there was no other person to represent the firm, after the demise of Subash/A2. The said petition was resisted by the petitioner herein on the ground that he had already retired from the partnership firm and hence, he was not competent to represent the second respondent firm. However, as per Section 305 of Criminal Procedure Code, the Corporation (herein the firm) may appoint a representative for the purpose of enquiry or trial and that such power available to the Company/Firm, but cannot be used by the prosecution to force anybody, to represent the firm. The Trial Court, on 24.08.2001, dismissed the petition filed by the respondent herein, against which, the respondent preferred a Revision before the learned Principal Sessions Judge, Chennai in Crl.R.C.No.147 of 2002. The learned Principal Sessions Judge allowed the Revision by order dated 23.07.2003, setting aside the order of the trial Judge dated 24.08.2001. Against which, the petitioner filed Crl.R.C.No.1256 of 2003 before this Court. This Court, by order dated 29.09.2011, elaborately discussed the case, considered Section 305(3) Cr.P.C., and given a finding that

> "the power conferred on the Court is to decide whether a person who appears as a representative of the company/firm is or is not a representative of the company or firm. The said power cannot be stretched further to say that the Court has power to direct any person, which it considers to be a representative of the company, to appear on behalf of the company".

5. Moreover, the petitioner/A3 retired in the year 1994, the prosecution, in this case, was launched in the year 1997. As such, the petitioner cannot be compelled to represent A1 firm. Thereby, this Court confirmed the order passed by the Trial Court.

6. Further, it is submitted that the respondent herein filed another petition in Crl.M.P.No.2158/2011 to implead one Saradha wife of Subbash/A2, who was another partner of the firm, to represent A1 firm. The trial Court rejected the impleading petition, by order dated 20.06.2013, held that there is no impediment to proceed further as per Section 305(3) Cr.P.C.

Hence, the learned counsel for the petitioner submitted that without arraying the company as an accused, the petitioner cannot be prosecuted. In support of his contention, he had relied upon the decision of the Hon'ble Apex Court in the case of ANEETA HADA vs. GODFATHER TRAVELS & TOURS (P) LTD. Reported in (2012)5SCC661 and S.BALASUBRAMANIAN vs. THE STATE OF TAMIL NADU reported in 2013-2-L.W.(Crl).289.

7. The learned Special Public Prosecutor appearing for the respondent/complainant submitted that the petition filed by the petitioner is to be dismissed in limine, because the petitioner herein is one of the partner in the first accused company. Further, submitted that the contention of the petitioner, is not sustainable. On perusal of the complaint, it is seen that the Company/Firm is arrayed as A1 and A2/Subbash, who was the Managing Partner of the first accused firm, represented A1, till his death. After the death of A2, the respondent filed a petition before the Trial Court, directing the petitioner herein/A3 to represent the company. The Trial Court dismissed the petition and thereafter, the respondent preferred a Revision petition before the learned Principal Sessions Judge, Chennai, the same was set aside, against which, the petitioner preferred a Revision before this Court in Crl.R.C.No.1256 of 2009. This Court, by order dated 29.09.2011, confirmed the order of the trial Court, for the reason that the petitioner retired from the firm in the year 1994 and cannot be compelled to represent the first accused firm. Thereafter, the respondent filed another petition to bring the proposed party/Saradha, who is a partner of A1 firm and wife of Subbash, to represent the first accused firm. However, the Trial Court, on a wrong notion, dismissed the petition. The observation made by the High Court was on a different pretext. Further, he submitted that the petitioner himself produced partnership deed dated 24.10.1988. From the partnership deed, it is seen that Mr.Subbash(A2-died), Mr.S.A.Khan(A3) and Ms.Saradha Subbash (Proposed party) were partners of M/s.Print Wraps(A1 Company). It is also seen that the petitioner had retired from the partnership firm on 06.10.1994 and after his retirement from the partnership firm, the remaining partners namely Subbash/A2 and his wife Ms.Saradha Subbash continued as partners of A1 Company. Now, the business of the first accused Firm is conducted by Saradha Subbash, existing partner. In view of the petitioner refusing to represent the A1 firm, the respondent filed a petition to bring Ms.Saradha Subbash as proposed party to represent the firm. It is for Ms.Saradha Subbash either to appear or to nominate a representative for A1 Firm. But the impleading petition was dismissed, on a wrong notion. Thereafter, the petitioner, by filing one petition or other petition, successfully stalled the proceedings in E.O.C.C.No.166 of 1997. For the past 13 years, there is no representation for A1 Firm. Therefore, he prayed for dismissal of this petition and

suitable orders to be issued.

8. Considering the rival submissions and on perusal of the materials, it is seen from the complaint, M/s.Print Wraps is shown as A1. The petitioner contention is that he cannot be prosecuted, is not a sustainable ground. A1 firm had been represented by A2, who was the Managing partner, till his death. After his death, the entire confusion arouse. Though this petitioner is no way affected by summoning Ms.Saradha Subhas to be a representative for M/s.Print Wraps firm/A1, the petitioner opposed the petition in Crl.M.P.No.2158/2011 and the trial Court dismissed the same by order dated 20.06.2013. This Court, by order dated 29.09.2011 in CRL.R.C.No.1256/2003 observed that there is no impediment in proceeding further in the trial under Section 305(3) Cr.P.C.

9. As per Section 63 of Cr.P.C., how summons to be served on corporate bodies and societies are stated. On service of summons under Section 63 of Cr.P.C, the company/Firm will nominate the representative to represent the firm. No doubt, it is for the company/Firm to decide who is to represent them in the proceedings. The right of choosing the representative rests solely with the company. Section 305 Sub-clause(ii) authorize the company/Firm to appoint its own representative for the purpose of enquiry or trial and such appointment need not be under the seal of the corporation.

10. In this case, after the demise of A2, who was the Managing Partner of A1 firm, the summons must be sent to A1 firm for representing them. It is admitted that Ms.Saradha Subbash, the partner of M/s.Print Wraps is presently conducting the business and affairs of the firm.

11. For better understanding, Section 63 and 305 of Cr.P.C are extracted below:

> Section 63 of Cr.P.C.- Service of summons on corporate bodies and societies.- Service of a summons on a corporation may be effected by serving it on the secretary, local manager or other principal officer of the Corporation, or by letter sent by registered post, addressed to the Chief Officer of the Corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.
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> Section 305 of Cr.P.C-Procedure when corporation or registered society is an accused-(i) In this section, "corporation" means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860(21 of 1860)

(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.

4. Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.

5.Where a statement in writing purporting to be signed by the managing director of the Corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs of the Corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6). If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court".

12. Thus, from the reading of Section 63 and 305 of Cr.P.C, it is seen that after the summons are served in the manner prescribed under Section 63 of Cr.P.C, the Corporation may appoint a representative as per Section 305 of Cr.P.C., for the purpose of inquiry or trial. Thus, it is evident that when the accused is a corporate body, it is not for the Court to decide who shall represent corporate body. The Court can issue the summon in the manner prescribed under Section 63 of Cr.P.C, and the representative could be appointed by the Corporate Body for the purpose of representing the firm during trial.

13. Thus, considering the facts and circumstances of the case, this Court directs the Trial Court to issue summons as per Section 63 of Cr.P.C to A1 firm to the present Principal Officer Ms.Saradha Subbash and thereafter, proceeds under Section 305 of Cr.P.C. If it is found that there is any deceit and evasion in receiving and complying the summons, the trial Court is directed

to take coercive steps in this regard. Further, taking into consideration that the trial is kept pending from the year 1997, the trial Court is directed to complete the trial, preferably within a period of six months from the date of lifting of lockdown and commencement of normal functioning of the Court below.

14. In view of the above observations, the Criminal Original Petition stands dismissed. Consequently, connected miscellaneous petition is also closed.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

ssb

To
1.The Additional Chief Metropolitan Magistrate EO1, Egmore.

2.The Assistant Commissioner of
Central Excise, Prosecution Unit,
Union of India, Chennai-34.

+1 cc to M/s.V.K.Sathiamurthy Advocate sr25686

CRL.O.P.No.18577 of 2014

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