

Girdharilal Gupta & Anr vs D. N. Mehta, Collector Of Customs & Anr on 18 August, 1970

Equivalent citations: 1971 AIR 28, 1971 SCR (3) 748

Author: S.M. Sikri

Bench: S.M. Sikri, I.D. Dua

PETITIONER:
GIRDHARILAL GUPTA & ANR.

Vs.

RESPONDENT:
D. N. MEHTA, COLLECTOR OF CUSTOMS & ANR.

DATE OF JUDGMENT:
18/08/1970

BENCH:
SIKRI, S.M.
BENCH:
SIKRI, S.M.
DUA, I.D.

CITATION:
1971 AIR 28 1971 SCR (3) 748
1970 SCC (2) 530

ACT:

Foreign Exchange Regulation Act 7 of 1947-Indian currency sought to be sent out of India in contravention of s. 8(2) of Act-Officer making search of accused's premises does not necessarily need to be corroborated-Account slips found in search and tallying with account books are good evidence-Firm held guilty of contravention of Act-Partner incharge of business of firm is guilty under s. 23C(1) of Act unless he can prove that the contravention of the Act by the firm took place without his knowledge and he had exercised diligence to prevent the contravention-Review, justification for-Reduction of sentence in case of vicarious liability, considerations for.

HEADNOTE:

An air parcel declared by the consigner to contain rasogollas and other edibles was found to contain Rs. 51,000

worth of Indian currency notes. The parcel was booked to be sent from Calcutta to Hong Kong. The consignor's name as given on the parcel was found to be false and on investigation the suspicion of the customs authorities fell on the appellants two of whom were partners in a firm, the third being an employee of the firm. The office of the firm was searched. Certain incriminating documents including account slips and cash books of the firm were seized. In a complaint filed by the Assistant Collector of Customs against the appellants and their firm it was alleged that sending out money in Indian currency was prohibited by s. 8(2) of the Foreign Exchange Regulation 7 of 1947 and any attempt to do the same was punishable under s. 23B of the Act. The trial court acquitted the appellants but the High Court in appeal convicted them under s. 23(1A). By special leave appeals were filed in this Court. Judgment was delivered on August 18, 1970. Thereafter review petition No. 37 of 1970, was filed. A further judgment in respect of the contention raised therein as to the interpretation of s. 23C(i) was delivered on February 18, 1971.

HELD : (i) The proposition that if an investigating officer conducts a search his evidence cannot be relied on unless it is corroborated is a novel one with no principle or authority to support it. It all depends on the facts of each case. In the present case there was the corroborative evidence of P.W. 8 who signed the search document and also the entries themselves in the account books and their tallying with the slips. [755 G]

(ii) There was no substance in the argument that the account slips could not be taken into consideration because they were not evidence. These were part of the things discovered during search and if the entries therein were carried into the account books there was no reason why they could not be looked at [755 H]

(iii) In the context of s. 23C(1) a person 'in-charge' must mean that the person should be in over all control of the day to day business of the company or firm. The inference follows from the wording of s. 23C(2). It mentions director who may be a party to the policy being followed by

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a company and yet not be in charge of the business of the company. Further it mentions manager who usually is in charge of the business not in over all charge. Similarly the other officers may be in charge of only some part of the business. [758 G-759 A]

State v. S. P. Bhadani, A.I.R. 1959 Pat. 9, R. K. Khandelwal v. State [1964] 62 A.L.J. 625 and Public Prosecutor v. R. K. Karuppian, A.I.R. 1958 Mad. 183, referred to.

In the present case the appellant G had himself stated that he alone looked after the affairs of the firm. This meant that he was in-charge within the meaning of the section though there may be a manager working under him [760 C-D]

When a partner in charge of a business proceeds abroad it does not mean that he ceased to be in charge, unless there is evidence that he gave up charge in favour of another person. Therefore it must be held that the appellant was in charge of the business of the firm within the meaning of s. 23C(1). [760 E-F].

In view of the fact that G was abroad at the time of contravention it was possible that the contravention took place without his knowledge or lack of diligence. He was being vicariously punished. In such a case a sentence of imprisonment may not be imposed but a sentence of fine only would meet the ends of justice. [760 G]

(iv) As regards appellant P the prosecution had been unable to prove by any reliable evidence that he took any active part in the conduct of the business of the firm. He must therefore be given the benefit of doubt and acquitted. [757 A]

(v) The case was fit for review because at the time of arguments the attention of the court was not drawn specifically to sub-s. 23C(2) and the light it throws on the interpretation of sub-s.(1). [761 A]

JUDGMENT:

CRIMINAL, APPELLATE JURISDICTION: Criminal Appeal Nos. 211 & 212 of 1969 and Review Petition No. 37 of 1970. Appeals by Special leave from the judgment of the Calcutta 7 High Court dated August 18, 1969 in Criminal Appeal No. 183 of 1961.

C. K. Daphtary and S. K. Dholakia, for the petitioner. V. A. Seyid Muhammad and S. P. Nayar for the respondents. The Judgment of the Court on August 18, 1970 was delivered by Sikri, J. These appeals, by special leave, are directed against the judgment of the High Court at Calcutta whereby the High Court (A. K. Das and K. K. Mitra, JJ.) set aside the order of acquittal and convicted the appellants before us under s. 23(1A) of the Foreign Exchange Regulation Act (VII of 1947)-hereinafter referred to as the Act. The appellant Girdharilal Gupta, and the appellant Puranmull Jain, were sentenced to rigorous imprisonment for six months each and to pay a fine of Rs. 2,000/- each, in default, to rigorous imprisonment for a further period of three months each. The appellant, Bhagwandeo Tewari was sentenced to rigorous imprisonment for three months and to pay a fine of Rs. 1,000/-, in default, to rigorous imprisonment for two months. The firm was sentenced to pay a fine of Rs. 2,000/-. It does not appear that any special leave was obtained on behalf of the firm.

In order to appreciate the contentions made before us it is necessary to state the relevant facts. On October 25, 1958, Customs Preventive Officer B. Roy examined a parcel (wooden case) which purported to contain Rasogolla, Achar, papar and dried vegetable, booked for Hongkong, to be taken by the Swiss Air of which the Indian Airlines Corporation was the cargo handling agent. The articles had been declared to be worth Rs. 20/- but the freight which had been paid came to Rs.

127.73 nP. This excited the suspicion of the Customs Preventive Officer, B. Roy, and on opening the parcel and breaking down the case, five hundred ten currency notes of the denomination of hundred rupees each, valuing Rs. 51,000/-, were found. The name of the consignor was Ramghawan Singh at Karnani Mansion, Park Street, Calcutta, but on enquiry no trace could be found of this Ramghawan Singh at Karnani Mansion. In the course of further investigation suspicion fell, on M/s. Agarwala Trading Corporation of which the appellants Girdharilal Gupta and Fumanmall Jain were the partners and the appellant Bhagwandeo Tewari was an employee. On January 22, 1959, the office of the firm at 191, Mahatma Gandhi Road and the alleged residence of the partners at 11-B Jatindra Mohan Avenue was searched. The appellant, Bhagwandeo Tewari, on being identified by the Traffic Assistant of the Indian Airlines Corporation, Ambar Nath Sen, P.W. 4, and one loader of Thai Airways, S. K. Battu, P.W. 26, was arrested. Certain incriminating documents, including account slips and cash books of the firm were seized.

On June 3, 1959, a complaint was lodged at the instance of the Assistant Collector of Customs, Calcutta. After stating the above facts it was alleged, in the complaint that sending out money in Indian currency was prohibited under s. 8(2) of the Act and any attempt to do the same was punishable under s. 23B of the, Act.

At the trial a number of witnesses were examined. B. Roy, Customs Preventive Officer, gave evidence regarding the discovery of Rs. 51,000/- in Indian currency notes, apart from Rasogollas, pickles, etc. on October 25, 1958. No cross-examination was directed to show that this did not happen on October 25, 1958.

S. A. D. Moira, Traffic Assistant of the Indian Airlines Corporation, P.W. 2, who checks freight and does other transshipment work in course of his duties at Dum Dum airport, deposed that he received the relevant documents on October 25, 1958, from Calcutta office. H.-, said that the documents were in the handwriting of N. Sen of the Freight Section of the Calcutta Office. Armed with the letter of authority, he took the parcel to the Customs Officer and P.W. 1, B. Roy, asked him to open the parcel and currency notes of the value of Rs. 51,000/-, along, with other things were discovered.

R. R. Mukherjee, Traffic Officer of the Indian Airlines Corporation, P.W. 3, is another witness to the recovery of the currency notes. P.W. 4, Ambare Nath Sen, was the Traffic Assistant in the Indian Airlines Corporation, who had typed out the consignment note in respect of this parcel after seeing the shipping bill (Ext. 1). He identified the appellant, Bhagwandeo Tewari, as the, person who had handed over the shipping bill to him and the letter of authority, Ext. 11 He said that he calculated the freight and received the freight, from this appellant. He further said that this appellant signed the consignment notes in Hindi in his presence and he remembered having seen this appellant writing a postcard on the adjoining table while he was preparing the consignment notes. He further stated that his immediate superior officer, P. K. Chatterjee, was also present at the time this consignment was being booked. Apparently this is not the first time that this appellant had gone to the Indian Airlines Corporation because P.W. 4 says that seven days ahead of October 24, 1958, this appellant had called on him with another shipment although that consignment was booked by P. K. Chatterji. Some days after October 25, 1958, this witness P.W. 4 was taken by the Customs Officer to

some place to find the man who is alleged to have booked the Parcel. Two or three months thereafter he was again taken by the Customs Officers to another place in Burrabazar area, which was the place of Agarwal Trading Corporation, and he said that he Pointed out the appellant, Bhagwandeo Tiwari, as the one who had taken the Parcel to him on October 24, 1958. He was cross-examined in order to show that he could not remember customers. He admitted that it was not always possible for him to remember all the men who came in contact with him in the course of his work, but 'he said that he had told C. R. Basu who was investigating the case that the person who brought the parcel was an oldish man and lean one, and had also described his nose. He further admitted that at the place he identified appellant Bhagwandeo Tiwari, he was the only oldish man there. He 4-Ll 100SupCI/71 said that he did not think that he committed a mistake unless the man he identified had a double in the shape- of a twin brother and the like. He further admitted that he had been trying to recollect the appearance of the man to reconstruct in his mind the outline of his appearance as far as he could.

The evidence of P.W. 4 impresses us and there is no reason why we should not place reliance on his evidence. P. K. Chatterjee, P.W. 5, speaks of the earlier visit of the appellant Bhagwandeo Tiwari as the person who called on him with the shipping bill on October 17, 1958. C. R. Basu, P.W. 6, Officer of the Customs who investigated the case, said that after making enquiries he applied for the issue of search warrant to search the premises No. 191, Mahatma Gandhi Road. He also applied for a search warrant to search the premises of the partners of the firm at 11-B, Jatindra Mohan Avenue. He did not himself search 11-B, Jatindra Mohan Avenue, but went to execute the search warrant at 191, Mahatma Gandhi Road, where on the identification of P.W.4 he arrested the appellant Bhagwandeo Tiwari. He then conducted the search of the premises in the presence of the witnesses and took into possession one Rokar, one khata bahi, one nakal bahi, the attendance register and three account slips which he marked 8, 9 and 10 (Ext. 9 and 9/1 and 9/2 respectively). We may reproduce his evidence regarding the discovery of these account slips because a great deal of argument has been addressed to us on the recovery of these slips. He stated "The three slips, about which I have spoken just now, are in the same condition to-day as I found them on the day when they were seized. The witnesses to the search I conducted are Radheshyam Gupta and Lalit Kumar Chandu Lal Parekh. Here is the search list over my signature and the signature of the witnesses. (Ext. 10)."

In his cross-examination he stated "You are right that Exhibits 9, 9/1 and 9/2 are included in Serial No. 38 of the search list. Ext. 10".

The search list does not mention the slips separately but only mentions loose sheets in 'a sealed parcel. It has been urged that there is no evidence to show when the seal was opened. It is suggested that these slips have been fabricated and planted. No such question was put to the witnesses and we are unable 'to presume that the investigating officer would go about fabricating account slips in order to rope in the appellants.

The prosecution produced two witnesses who had signed the recovery list. The evidence of Radheshyam Gupta, P.W. 7, must be discarded because although he was examined before the Chief Presidency Magistrate he was not made available for cross-examination. The learned counsel, Mr. Bhattacharya, suggested that if this witness had been produced for cross-examination he would have deposed against the prosecution. We are unable to draw any such presumption. The other witness

was Lalit C. L. Parekh, P.W.

8. He had signed the search list but on cross-examination he stated that "Basu had taken slips of paper from the 'Agal Bagal' of the guddy, by which I mean from underneath the Takia on the bed". He further said that "bits of paper Basu found from a wooden case as well." He further stated as follows "You are right that Basu placed all these bits of papers at one and the same place. How many pieces ? I cannot say. I did not count. By guess I can say that the number of bits of paper would run to 50 or 60. I signed all the pieces of paper which were found so. "

The learned counsel fastens on the last line and says that these slips do not bear the signature of Lalit C. L. Parekh, and therefore it is clear that these have been fabricated later. We are unable to sustain this contention. The witness had signed a number of documents including the search list and he may well have thought that he had signed every piece of paper which was seized. No such question was put to the investigating officer. P.W. 11, N. R. Paul, who was the assistant attached to the Appraising Department of the Calcutta Customs deposed regarding the preparation of the shipping bill. It appears that the shipping bill bore the words "Thai Airways Co." and these words were scored out and "Swiss Air" written in hand. He could not say who corrected the entry but nothing turns on this because it may be that the original idea was to send the parcel by Thai Airways but later on for some reasons it was not possible to send that parcel through this airways. The prosecution led evidence to show that as a matter of fact appellant Bhagwandeo Tiwari had approached some body in Thai Airways but we need not dwell on, this part of the case.

The prosecution also produced Shridhar Chatterjee, hand- writing expert, who examined the signature reading as "Ram Chandra" writing in Hindi and in pencil in the two way bills, Ext. 3 and 4, and the specimen writing, He was of the opinion that the writer of the specimen writing was the writer of the signature "Ram Chandra" appearing in the airway bill. We may mention that Bhagwandeo Tiwari is alleged to have signed as "Ram Chandra". The expert also gave the opinion that the type-written papers, Exts. 11 and IX had been typed on the same machine. Exhibit 9/2, 'one of the seized account slips, is a very important document. The official translation is printed in the records and reads:

"Translation of EXT.9/2 dated 24-10-58..... 2/8/-4 cases-Godown A/C 1 -
..... /8/- 3 "opened below and goods brought.

In Cash (Paper Torn) cases bound (Pettis)(?)/4/- Case I' (Illegible) /2/-
Illegible (Paper torn) Cases (Pettis)(Illegible) 2 R.B. -/151- for coming and going to
I.A.C. Rs.223/8/. 4/51-

127/73-HongkongShanghai (torn & illegible)"

The High Court had to translate it again and the last line was translated into "Hongkong Lagaya" in, place of "Hongkong Shanghai".

In the account books of M/s. Agarwala Trading Corporation (Exts. 21 and 21/1) under the entries dated October 24, 1958, on which date the booking is alleged by the prosecution to have been done, on entry appears as follows:

"Rs. 415/- Through Bhagwan Deo /8/- Colli (Janka) 115/-Rickshaw fare 2/ 14/-Cart Charge Rs. 1/8/- Through Ghanshyam & Pandey /4/- Bus fair 1/4/- Bus fair 1/4-Bus Tarm"

It will be noticed that the same items appear in Ext. 9(2). The breakup in Ex. 9(2) is slightly different but in the account book the four annas and two annas entries have been added to Rs. 2/8/to make Rs. 2/14/- as cart charge.

Again the entries in Ext. 9/1 are as follows "/1/- But hire for going home.

1/4/- Caine from home to Thai (?) Taxi /12/- Riksha-hire from Thai /1/- Coolie

-/4/- Thai Office Colie _____ 2/6/-

Rs. 147/10/- In Cash"

The corresponding entry in the account books are as follows "Rs. 2/6/- (Bus fare /1/Taxi fare Rs. 1/4/- Rickshaw Rs. /12/-

Cooli 151-"

It is true that the entry of Rs. 127/73 which exists in Ext. 9/2 has not been carried over into the account books but perhaps that would have been even too much for an accountant to do. He never dreamt that these entries, of Rs. 4/5/- and Rs. 2/6/- in the account books would be seized upon by the prosecution to complete the case against the appellants. Be that as it may, the entries in the account books demolish the case of defence that these slips were fabricated and that they had nothing to do with the firm. Ex. 9/2, on the other hand, clearly shows that somebody had gone to the I.A.C. office and paid /15/-for going and coming to the I.A.C. office and paid the incidental charges. Mr. Bhattacharya, who followed Mr. Chagla for the appellants, contends that a serious question of law is involved, the question being that if an investigating officer conducts a search his evidence cannot be relied on unless it is corroborated. It is a novel proposition and he has not been able to cite any authority or principle in support of it. It all depends on the facts in each, case. At any rate here we have the corroborative evidence of P.W. 8, who signed the search document and also the entries themselves in the account books and their tallying with the slips.

It was urged on behalf of the defence counsel that these slips could not be taken into consideration at all because they are not evidence. We are unable to appreciate why they are not evidence. These

are part of the things discovered during search and if the entries therein are carried into the account books there is no reason why these things could not be looked at. The learned counsel has taken us through the judgments of the Chief Presidency Magistrate and the High Court. We are in agreement with the conclusions arrived at by the High Court. We have ourselves gone into the evidence as the High Court had reversed the order of acquittal and in one or two places made minor mistakes.

Mr. Chagla, while arguing on behalf of the partners, said that there was evidence that one, partner was not in Calcutta on the 24th or 25th October, 1958, as he was in Japan. But even if we take this fact into consideration, which fact was not brought to the notice of the Chief Presidency Magistrate or the High Court, it does not help him at all. Entries were made in the account books and it was the firm's money which was spent and he being an active partner is clearly liable under s. 23C(1) of the Act which reads :

"23C(1) If the person committing a contravention is a company, every person who, at the time the contravention 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 contravention and shall be liable to be proceeded against and punished accordingly;

Provided that nothing contained in this sub- section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention."

This sub-section deems the appellant Girdhari Lal Gupta guilty. The question is : Has he proved that the contravention took place without his knowledge and he exercised due diligence to prevent such contravention ? What he said in his statement under s. 342, Cr-P.C., was that he alone looks after the affairs of the firm. There is also no evidence to show that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention. The entries were there in his account books and the only thing that, he had to say about these entries in his account books is that they pertain to the routine work of the firm. Under the circumstances we are unable to exonerate him of the charge.

As far as the other partner, Puramnall Jain, is concerned' he stated that he does not look after the affairs of the firm and further that he stays all along at Sriganganagar in Rajasthan and does not stay in Calcutta. The prosecution has not led any reliable evidence to prove that he took any active part in the conduct of the business of the firm. In these circumstances we are inclined to give him the benefit of doubt and acquit him.

In the result the appeal of Puranmall Jain is allowed and he is acquitted of the charge. Ms bail bond shall stand cancelled. The appeals of Girdhari Lal and Bhagwandeo Tewari are dismissed.

[After the above judgment was delivered Review Petition No. 37 of 1970 was filed. The judgment of the Court thereon was delivered on February 18, 1971 by] Sikri, C.J. We disposed of Criminal Appeals Nos. 211 and 212 of 1959 by our judgment dated August 18, 1970, whereby the appeals of Girdharilal Gupta, and Bhagwandeo Tewari against. their convictions were dismissed. Girdharilal

Gupta put in this review petition stating that the counsel had omitted to bring to our notice the provisions of s. 23C(2) of the Foreign Exchange Regulation Act, 1947-hereinafter referred to as the Act-which has a vital bearing on the case. The judgment in Criminal Appeal No. 211 of 1959 has, therefore, been re-opened. We may mention that Bhagwandeo Tiwari has not filed a review petition against his conviction, upheld by this Court.

Mr. Daphtary contends that on the facts, as found by us, the appellant, Girdhari Lal Gupta, does not come within the purview of s. 23C(1) or s. 23C(2) of the Act. Sections 23C(1) and 23C(2) read as follows "23C. (1) If the person committing a contravention is a company, every person who, at the time the contravention 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 contravention and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this subsection shall render any such person liable to punishment if he proves that the contravention took place, without his knowledge or that he exercised all due diligence to prevent such contravention. 23C. (2) Notwithstanding anything contained in sub-section (1), where a contravention under this Act has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.-For the purposes of this section,-

(a) " company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

Mr. Daphtary contends that there is no evidence to show that the appellant was in charge of the conduct of the business of the firm at the relevant time and therefore, s. 23C(1) does not apply. He further says that as the appellant was abroad, the contravention took place without his knowledge. We may mention, however, that the defence that he was abroad at the relevant time was not taken in the courts below. At the time of the last hearing learned counsel produced the passport of the appellant before us from which it appears that he was abroad at that time and came back a few days after the alleged contravention.

Mr. Daphtary further contends that s. 23C(2.) also does not apply because there is no evidence that the contravention took place with the consent or connivance of, or was attributable to any neglect on the part of, the appellant. He referred to us a number of authorities of the High Courts in India which have interpreted similar provisions and we shall refer to them later.

It seems to us quite clear that s. 23C(1) is a highly penal section as it makes a person who was in-charge and responsible to the company for the conduct of its business vicariously liable, for an offence committed by the company. Therefore, in accordance with well-settled principles this section should be construed strictly.

What then does the expression "a person in-charge and responsible for the conduct of the affairs of a company mean" ? It will be noticed that the word 'company' includes a firm or other association and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person 'in-charge' must mean that the person should be in over all control of the day to day business of the company or firm. This inference follows from the wording of s. 23C(2). It mentions director, who may be a party to the policy being followed by a company and yet not be in-charge of the business of the company. Further it mentions manager, who usually is in charge of the business but not in over-all-charge. Similarly the other officers may be in charge of only some part of business.

In *State v. S. P. Bhadani*(1), Kanhaiya Singh, J., in construing a similar provision of the Employees Provident Fund Act (1952). Section 14A-held that the first sub-section would be confined only to officers in the immediate charge of the management of the company. Later he observed that "it is, therefore, manifest that all the officers of the company not in direct charge of the management of the business are immune from the liability for the offence, unless they have contributed to its commission by consent, connivance or neglect."

In *R. K. Khandelwal v. State* (2 D. S. Mathur, J., in construing s. 27 of the Drugs Act, 1940, a provision similar to the one we are concerned with, observed :

"There can in directors who merely lay down the policy and are not concerned with the day to day working of the Company. Consequently, the mere fact that the accused person is a partner or director of the Company, shall not make him criminally liable for the offences committed by the Company unless the other ingredients are established which make him criminally liable."

In *The Public Prosecutor v. R. Karuppian*(3), Somasundaram J., while dealing with a case arising under the Prevention of Food Adulteration Act, 1954 (s. 17(1)) observed that the Secretary of the Co-operative Milk Society, on the facts of the case, could not be held to be a person in charge of the Society. On the facts of that case the business of selling milk was done by the clerk of the Society and the Secretary was only an honorary Secretary and was not coming to the Society daily.

The only evidence led by the prosecution on this part of the case was of one Sohan Lal Gupta who is a broker. He stated in examination-in-chief :

"Who exactly the proprietors of the said firm are, I cannot say. But I can say this much that whenever I had been there I was referred to Girdharilal Gupta (accused No. 2) and Puranmal Jain (accused No. 3) as the Maliks of the firm. I see accused No. 2 Girdharilal Gupta in court (identified him). I know that Bhagwandeo Tewari

(accused No. 4) is the Cashier of that firm. I see him here in court (identifies accused No. 4).

(1) A.I.R. [1959] Pat.9. (2) [1964] 62 A.L.J. 625. (3) A.I.R. [1958] Mad. 183.

.Im15 I know of another employee of the firm the manager, Jagdish Prasad. I know another employee of the firm the accountant, Shyamlal."

The appellant in 'his statement under S. 342, Cr.P.C. stated thus "You ask me, Sir, if I have to say anything about the evidence led in this case to the effect that I happen, to be a partner of accused No. 1 firm. To that, Sir, my answer is that I am. " The evidence to that end is correct. I shall only add that I alone look after the affairs of _this firm." Mr. Daphtary says that on this evidence it cannot be held that the appellant was in-charge of the conduct of the business. We are unable to agree with him on this point. The appellant has himself stated that he alone, looked after the affairs of the firm. This means that the is in charge of the business of the firm within the meaning of the section though there may be a Manager working under him. The question then arises whether the appellant was in charge of the conduct of the business of the firm at the time the contravention was committed. He was not physically present, in Calcutta at the time of the commission of the offence and the prosecution evidence shows that one Jagdish Prasad. was the manager of the firm. It is true that the onus of proving that the appellant was in charge of the conduct of the business of the company at the time the contravention took place lies on the Prosecution, but when a partner in charge of a business proceeds abroad it does not mean that he ceases to be charge, unless there is evidence that he gave up charge in favour of another person' Therefore, we must hold that the appellant was in charge of the business of the firm within the meaning of sec. 23C(1). But while imposing sentence a Court might take notice of the fact that a person is being vicariously punished for an offence and if he shows that it is possible that the contravention of the Act took place without his knowledge or neglect a sentence of imprisonment may not be imposed. In this case he was abroad at the time of contravention and it is possible that the contravention took place without his knowledge or because of lack of diligence. It seems to us that on the facts of this case a sentence of fine of Rs. 2,000/- will meet the ends of justice.

The learned counsel for the respondent State urges that this is not a case fit for review because it is only a case of mistaken judgment. But we are unable to agree with this submission because at the time of the arguments our attention was not drawn., specifically to sub-s. 23C(2) and the light it throws on the interpretation of sub-s. (1). In the result the review petition is partly allowed and the judgment of this Court in Criminal Appeal No. 211 of 1969 modified to the extent that the sentence of six months' rigorous. imprisonment imposed on Girdharilal is set aside. The sentence-, of fine of Rs. 2,000/- shall, however, stand.

G.C.

Ordered accordingly.