

Hira Lal vs The State Through The Sales Tax Officer, ... on 16 August, 1955

Equivalent citations: AIR1956ALL142, AIR 1956 ALLAHABAD 142

ORDER

James, J.

1. This Revision raises important questions regarding the criminal liability of persons who fail to pay sales tax due from them within the time allowed.

2. The facts are briefly these. There is a firm at Hathras entitled Ram Chand Cotton Spinning and Weaving Mills which is owned by several persons. It was assessed to a large amount as sales tax. It failed to pay the amount within the time allowed for doing so and even extensions of time yielded no result. Thereupon one of the partners of the firm, Hira Lal Burman by name, was prosecuted for an offence under Section 14 (b), U. P. Sales Tax Act (Act 15 of 1948).

He was convicted and sentenced by the trial Magistrate to a fine of Rs. 500/- and to a further fine of Rs. 10/- per day for the period the breach continued. His appeal before the Sessions Judge failed, whereupon he has come up in Revision to this Court.

3. In challenging the correctness of his conviction his learned counsel has urged a number of points. He contends first of all that the applicant is merely a sleeping partner of the firm and not the managing partner, hence he cannot be held criminally liable for non-payment of the sales tax. On fact this defence is negated by the evidence of the Sales Tax Officer who made the assessment on the firm, for he declares that it was within his knowledge that the applicant managed the affairs of the firm and that he (the applicant) interviewed him many times in connection with the assessment of the tax.

Besides, even if I were to assume for the sake of argument that the applicant was not directly managing the affairs of the firm I find no justification for the view that he as a non managing partner is not liable to prosecution. Under Section 3 of the Act every dealer must pay sales tax provided certain specified conditions are fulfilled, while under Section 2(c) a "dealer" means any person or association of persons carrying on the business of buying or selling and supplying goods, and includes every firm.

Section 14 (b) of the Act fixes a criminal liability on 'any person who fails to pay the tax. Every partner of a firm is jointly and severally responsible for the dues of the firm. When a business is carried on by a partnership every partner, whether he takes active interest in the day to day affairs of the partnership, or is what is popularly called a sleeping partner is a "dealer" within the meaning of Section 2 (e), and if after service of the notice of demand he fails to make the payment he thereby makes himself liable under Section 14 (b).

Consequently the applicant cannot escape liability under that penal clause even if he were to be deemed a sleeping partner.

4. It is next argued that the notice of demand of the tax was not duly served on him. On this point we have the testimony of a peon of the Sales Tax Officer, who shows that he took the forms and assessment order to the applicant and produced them before Lira, and that after perusing them the applicant asked him to deliver them at his office, whereupon he made them over to the firm's office manager or agent. This procedure was in full accord with Rule 77 framed by the Government under the Act regarding the modes of service, and no exception can be taken to it.

5. Again, it is contended -- and this is the contention of which the applicant's learned counsel wishes to lay great stress -- that since in its capacity as the dealer it was the firm which was liable to pay the tax and since it failed to do so the firm and not an individual partner can be held liable under Section 14 (b), and support for this view is attempted to be derived from the decision of Subba Rao, J. of the Madras High Court in -- 'Public Prosecutor v. K. Jacob Nadar', AIR 1951 Mad 886 (1) (A), and from certain observations of 'S. D. Singh's commentary on "The Law of Sales Tax in U. P."

The facts of the Madras case require to be stated. There the firm which was assessed to sales tax had two partners, Jacob and Mylappan; Jacob ceased to be a partner in December 1947; the firm owed sales tax for the year 1946-47; the assessment on it was made after Jacob's resignation; the notice demanding the tax was served solely on Mylappan; the amount was not paid within the required time whereupon the Sales Tax authorities prosecuted Jacob alone.

In upholding Jacob's acquittal His Lordships-pointed out that a firm is a person, that for purposes-of assessment the firm is treated as one entity and that in default of payment the firm alone is liable to be prosecuted. He ruled that since Jacob had ceased to be a partner and since no notice had been served, upon him he could not be prosecuted in his personal capacity and consequently was not liable.

6. Following the Madras decision the learned author of the commentary referred to above has observed:

'Since the assessment stands against the firm, it is that firm which is liable for the payment of tax and the firm itself should be prosecuted, if it makes a default, and not any individual partner thereof, unless the assessment was made and a notice of demand issued in their names individually'.

7. In my opinion, the Madras case is clearly distinguishable, for, unlike the present applicant, Jacob was neither a partner of the firm when the sales tax was assessed on it nor was any notice of demand served on him and it may be pointed out that Suba-Rao, J. himself appears to have been of the opinion-that Jacob's prosecution would have been valid under certain conditions, for we find his Lordship observing at the end of para. 4 of the Report:

Though Jacob may be made liable if the proper procedure had been followed as a partner of the firm -- on that question I do not express my final opinion".

8. Relying on certain observations in the Madras judgment the applicant's learned counsel has contended that a prosecution cannot be valid unless the firm is prosecuted. An attempt at analysing this contention is called for. A firm means the persons who have entered into partnership with one another taken collectively. Partnership is the relation, between persons who have agreed to share the profits of a business. The name of the firm is only a compendious description of the partners in reference to the common interest which they possess in certain concern. When the firm is arrayed as a defendant, all the partners, should be deemed to be in the array of the defendants in their capacity as partners: -- "Purshottam Lal Jaitly v. W. T. Henleys Telegraph Works Ltd.', AIR 1933 All 523 (B).

Raghubar Dayal J, in--'State v. Basdeo', AIR1951 All 44 (C), held at p.61 that though for various purposes a firm has been given a personality it has not been recognised as juristic person, while Lindley in his work on "Partnership" observes that although the partners may be prosecuted in respect of criminal offences, the fact that they are partners has little, if any, effect on their position from a criminal point of view.

9. Now, what does the prosecution of a firm imply? It can scarcely be disputed that it means the joint prosecution of all its partners. Learned counsel's argument therefore amounts to this: for a valid prosecution either all the partners of the firm should be prosecuted or none at all the authorities responsible for the prosecution cannot pick and choose from among the partners . I am unable to find any authority lending support to such a proposition, and if it be true that this is the proposition laid down by the Madras High Court in 'K. Jacob Nadar's case (A)' and by the learned author of the commentary mentioned above I must express my respectful dissent.

Take the simple case X and Y assaulting A and causing him hurt. I am not aware of any provision of law by which A is bound to file his complaint under S 323, I. P. C. against both X and Y, It ought to be impossible to dispute that there would be no legal bar to his instituting it against only one of them.

On the strength of this analogy I am unable to see how in the instant case the complaint of the Sales Tax authorities if made against all the partners would have been competent but has been rendered invalid by making the applicant alone the accused. I am fortified in this view by the ruling of Desai J. in Basdeo's case (C)' mentioned above, where at p. 56 of the Report he held:

"There is no law that when an offence is committed by a firm either all or none of the partners must be prosecuted."

I therefore repel the applicant's contention in this regard. Indeed, here again I should like to lay emphasis on the expression "any person" occurring in Section 14, for it reveals that the intention of the Legislature was to fix a criminal liability on all or any of the partners who failed to pay the firm's sales tax in due time.

10. The matter may be viewed from another angle. The liability for the payment of the tax is by virtue of Section 3 of the Act cast on every "dealer". It is the "dealer" who has to make the payment within the time specified in the notice vide Section 8. Section 2(c) makes it clear that a "dealer" means "any person or association of persons carrying on the business..." and consequently 'every person' carrying on the business individually or along with others is liable under Section 14.

11. Some discussion has also centered round the observation in the Madras judgment that Jacob could not be prosecuted in his personal capacity'. With profound respect to Subba Rao, J. I am unable to appreciate how the 'capacity of an accused person can affect the validity of his prosecution or conviction. As I understand the provisions of the Code of Criminal Procedure, the question of capacity in a case like the present can arise only if a partner is convicted and sentenced to fine & the problem arises as to whether the amount of the fine is to be realised from his personal property or from the assets of the firm, of which he is a partner, I cannot conceive of any other circumstance in which his capacity can be a relevant matter in criminal proceedings.

12. The question of 'mens rea' has also been raised, and it is argued that in the absence of proof of a guilty intention the applicant cannot be convicted. Such a question was raised before Malik, J. in --'Harish Chandra v. Emperor', AIR 1945 All 90 (D), and here I might remark that although his Lordship had before him a case of liability of a master for the acts of his servant the principle he enunciated is of general application. After an exhaustive examination of English and Indian authorities he observed:

"It is a general principle of criminal law that there must be some blameworthy condition of mind or 'mens rea' there may be negligence, malice, guilty knowledge or the like. . . . though it is in the power of the Legislature, if it so pleases, to enact that a man may be convicted and punished, although there was no blame-worthy condition of mind. But this exception, would have to be made out convincingly from the language of the statute, as it cannot lightly be presumed that the Legislature intended that A should be punished for the fault of B", and his Lordship went on to point out that it was necessary to see whether or not the required exception had been made by the statute either expressly or by necessary implication. Their Lordships of the Judicial Committee in "Srinivas Mall v. Emperor", AIR 1947 P. C. 135 (E) quoted with approval the following view expressed by the Lord Chief Justice of England in -- 'Brand v. Wood', (1946) 110 J. P. 317 (F):

"It is in my opinion of the utmost importance for the protection of the liberty of the subject that the Court should always bear in mind that, unless the statute, either clearly or by necessary implication, rules out 'mens rea' as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law

unless he has got a guilty mind."

The decision was followed by a Division Bench of this Court in -- 'Mohammad Ahmad v. Emperor' 1950 All W. R. 208 (G).

13. The law being thus found ambiguously settled we have to see whether the statute, governing the case before me has expressly or by necessary implication ruled out 'mens rea' as a constituent part of an offence under Section 14(b), Sales Tax Act. I am firmly of opinion that it has been ruled out. Section 14 prescribes six classes of offences numbered as (a) to (f). Out of these (a), (d) and (e) include the words "wilfully" or "fraudulently". The offence under (b), the offence of which the applicant has been found guilty is however innocent of any such adverb.

Had Clause (b) commenced with any such qualifying word as "wilfully" or "intentionally" or "knowingly" or "dishonestly" the existence of "mens rea" on the part of the accused would have been absolutely necessary. Since such adverbs have been omitted, & no doubt omitted deliberately from clause (b), whereas they are included in clauses (a) (d) and (e), it follows by necessary implication that the Legislature intended the offence of nonpayment of sales tax to be independent of the accused person's state of mind. I therefore hold that 'mens rea' is not a constituent part of an offence under Section 14(b) of the Act.

14. The result of the above discussion may be summarised. The applicant is not a sleeping partner of the firm. Even if he be assumed to be such a partner he is still liable. The notice of demand was duly served on him. The view that either all or none of the partners should be prosecuted is unwarranted, and it is perfectly legal to prosecute either all of them or any one or more of them. The capacity in which the person concerned is prosecuted is irrelevant. The offence under Section 14(b) of the Act is independent of 'mens rea'. In these circumstances the applicant must be held to have been rightly convicted for that offence.

15. His learned counsel has finally argued that the sentence of recurring fine passed on him is illegal. This fine has been imposed by virtue of the following provision in Section 14:

"..... . and where the breach is a continuing breach to a further fine which may extend to fifty rupees for every day after the first during which the breach continues."

Now, this provision is similar to one in Section 307, U. P. Municipalities Act, which is in these words:

"... ..and in case of a continuing breach, to a further fine which may extend to five rupees for every day after the date of the first conviction during which the offender is proved to have persisted in the offence".

The effect of this provision was considered by this Court in -- 'Amir Hasan Khan v. Emperor', AIR 1918 All 266 (H), decided in 1918 by Piggott, J. There the accused person was convicted of an offence under Section 307, Municipalities Act and fined,

and the Magistrate had further sentenced him to a recurring fine in the event of non-compliance with the order of the Municipal Board. In ruling this part of the Magistrate's order as illegal his Lordship gave the following reasons:

"The liability to a daily fine in the event of a continuing breach has been imposed by the Legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order.

The liability will require to be enforced, as often as the Municipal Board may consider necessary by institution of a second prosecution, in which the question for consideration will be, how many days have elapsed from the date of the first conviction, under the same section during which the offender is proved to have persisted in the offence, and secondly, the appropriate amount of the daily fine to be imposed under the circumstances of the case, subject to prescribed maximum of Rs. 5 per diem".

His Lordship's decision has been followed by this Court in all subsequent cases. The view of the Calcutta High Court is also the same but for a different reason, for a Division Bench of that Court held in -- 'Ram Krishna Biswas v. Mohendra Nath', 27 Cal 565 (I) decided in 1900 that an order for payment of a daily fine is illegal inasmuch as it is an adjudication in respect of an offence which has not been committed when such order is passed. The recurring fine imposed on the present applicant is therefore illegal and must be set aside.

16. In the result his conviction under Section 14(b), U. P. Sales Tax Act and the fine of Rs. 500/- thereunder is upheld. But the order imposing a fine of Rs. 10/- per day on him so long as the breach Continues is set aside. With this modification this Revision is dismissed. The applicant should pay up his fine of Rs. 500/- without delay.

17. Leave to appeal to the Supreme Court is refused.