The Assistant Commissioner, ... vs M/S. Velliappa Textiles Ltd. & Anr on 16 September, 2003

Equivalent citations: AIR 2004 SUPREME COURT 86, 2003 AIR SCW 5647, 2003 AIR - KANT. H. C. R. 2878, 2003 TAX. L. R. 1054, 2004 (1) COM LJ 21 SC, 2004 SCC(CRI) 1214, (2004) 1 COMLJ 21, (2003) 11 ALLINDCAS 496 (SC), (2003) 263 ITR 550, 2003 (4) LRI 24, 2003 (11) ALLINDCAS 496, 2003 (5) SLT 509, 2003 (7) SCALE 530, 2003 (8) ACE 443, 2003 (11) SCC 405, (2003) 4 RECCRIR 695, (2003) 10 INDLD 183, (2003) 157 ELT 369, (2004) 1 MADLW(CRI) 447, (2004) 27 OCR 43, (2003) 4 CURCRIR 50, (2003) 177 TAXATION 354, (2003) 132 TAXMAN 165, (2003) 56 CORLA 221, (2003) 7 SUPREME 227, (2003) 7 SCALE 530, (2004) 1 ALLCRILR 541, (2003) 4 CRIMES 267, (2003) 184 CURTAXREP 193

Author: B. N. Srikrishna

Bench: B. N. Srikrishna

```
           CASE NO.:
Appeal (crl.)  142 of 1994

PETITIONER:
The Assistant Commissioner, Assessment-II,  Bangalore & Ors.

RESPONDENT:
M/s. Velliappa Textiles Ltd. & Anr.

DATE OF JUDGMENT: 16/09/2003

BENCH:
B. N. Srikrishna.

JUDGMENT:
```

JUDGMENT SRIKRISHNA, J.

I have had the benefit of perusing the erudite judgment of learned brother Mathur, J. I, however, find myself unable to agree with one aspect of the judgment and the resultant outcome.

The facts have been succinctly stated in the judgment of brother Mathur, J. Hence it is not necessary to elaborate them, except to recapitulate them very briefly. The first respondent is a limited company which, along with its Managing Director, was sought to be prosecuted under Sections 276C, 277 and 278 read with Section 278B of the Income Tax Act (hereinafter referred to as 'the

Act'). The respondents challenged the prosecution by a petition under Section 482 of the Criminal Procedure Code and urged the following grounds in support:

> (1) That the sanction of the Commissioner of Income Tax granted under Section 279 of the Act is vitiated for failure to observe the principles of natural justice inasmuch as no opportunity of hearing was given to the respondents before the sanction was given.
>
> (2) The first respondent is a company, a juristic person, and therefore, incapable of being punished with a sentence of imprisonment, which is mandatory under the provisions of Sections 276C and 277. Hence, the prosecution under these Sections against a juristic person like a company is not maintainable, even if by reason of Section 278B some other persons connected with it and responsible for running the business of the company can be held liable for the offence.

As far as the first contention is concerned, I respectfully agree with the view taken in the judgment of brother Mathur, J and the reasons given in support. It is only with regard to the second contention, that I am unable to agree with the views expressed in the judgment.

It is a basic principle of criminal jurisprudence that a penal statute is to be construed strictly. If the act alleged against the accused does not fall within the parameters of the offence described in the statute the accused cannot be held liable. There is no scope for intendment based on the general purpose or object of law. If the Legislature has left a lacuna, it is not open to the Court to paper it over on some presumed intention of the Legislature. The doctrine of casus omissus, expressed in felicitous language in CST Vs. Parson Tools and Plants (1975) 4 SCC 22, is:

> "If the legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the court is not competent to supply the omission by engraving on it or introducing in it, under the guise of interpretation, by analogy or implication, something what it thinks to be a general principle of justice and equity. To do so "would be entrenching upon the preserves of legislature", (At p 65 in Prem Nath L Ganesh v. Prem Nath,L. Ram Nath, AIR 1963 Punj 62, Per Tek Chand,J.). The primary function of a court of law being jus dicere and not jus dare."

(Emphasis supplied) The maxim "Judicis est jus dicere, non dare" pithily expounds the duty of the Court. It is to decide what the law is and apply it; not to make it.

The question of criminal liability of a juristic person has troubled Legislatures and Judges for long. Though, initially, it was supposed that a Corporation could not be held liable criminally for offences where mens rea was requisite, the current judicial thinking appears to be that the mens rea of the person in-charge of the affairs of the Corporation, the alter ego, is liable to be extrapolated to the Corporation, enabling even an artificial person to be prosecuted for such an offence. I am fully in agreement with the view expressed on this aspect of the matter in the judgment of brother Mathur,

J. What troubles me is the question whether a Corporation can be prosecuted for an offence even when the punishment is a mandatory sentence of imprisonment.

That in India the situation has not been free from doubt is evident from two reports of the Law Commission of India which recommended specific amendments in order to get over this difficulty. The Law Commission of India in its 41st report at paragraph 24.7 recommended as under: -

> "24.7 – As it is impossible to imprison a corporation practically the only punishment which can be imposed on it for committing an offence is fine. If the penal law under which a corporation is to be prosecuted does not provide for a sentence of fine, there will be a difficulty. As aptly put by a learned writer, -
>
> "Where the only punishment which the court can impose is death, penal servitude, imprisonment or whipping, or a punishment which is otherwise inappropriate to a body corporate, such as a declaration that the offender is a rogue and a vagabond, the court will not stultify itself by embarking on a trial in which, if the verdict of guilt is returned no effective order by way of sentence can be made".

In order to get over this difficulty we recommend that a provision should be made in the Indian Penal Code e.g. as section 62 in Chapter III relating to punishments, on 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".

Again, the Law Commission of India in its 47th report vide paragraph 8.3 recommended as under: -

> "8.3 – 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."

The Law Commission's recommendations focussed on the fact that the law as it exists renders it impossible for a court of law to convict a Corporation where the statute mandates a minimum term of imprisonment plus fine. It would not be open to the court of law to hold that a Corporation would be found guilty and sentenced only to a fine for that would be re-writing the statute and exercising a discretion not vested in the court by the statute. It is precisely for this reason that the Law Commission recommended that where the offence is punishable with imprisonment, or with imprisonment and fine, and the offender is a corporation, the Court should be empowered to sentence such an offender to fine only. These recommendations have not been acted upon, though several other recommendations made by the 47th Report of the Law Commission have been accepted and implemented by Parliament vide the Taxation Laws (Amendment) Act, 1975. Hence, the state of law as noticed by the Law Commission continues.

A number of judgments of High Courts as well as one judgment of this Court were cited at the bar which render the situation more complex and perhaps necessitated reference of the matter to a larger Bench. This Court speaking through a Bench of two learned Judges in M.V. Javali Vs. Mahajan Borewell & Company & Ors. (1997) 8 SCC 72 made the following observations vide paragraphs 6 and 8:

> "6 – From a plain reading of the above section it is manifest that if an offence under the Act is committed by a company the persons who are liable to be proceeded against and punished are: (i) the company, (which includes a firm); (ii) every person, who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business; and (iii) any director (who in relation to a firm means a partner), manager, secretary or other officer of the company with whose consent or connivance or because of neglect attributable to whom the offence has been committed. The words "as well as the company" appearing in the section also make it unmistakably clear that the company alone can be prosecuted and punished even if the persons mentioned in categories (ii) and
>
> (iii), who are for all intents and purposes vicariously liable for the offence, are not arraigned, for it is the company which is primarily guilty of the offence.

xxx xxx xxx xxx

8. Keeping in view the recommendations of the Law Commission and the above principles of interpretation of statutes we are of the opinion that the only harmonious construction that can be given to Section 276-B is that the mandatory sentence of imprisonment and fine is to be imposed where it can be imposed, namely on persons coming under categories (ii) and (iii) above, but where it cannot be imposed, namely on a company, fine will be the only punishment. We hasten to add, two other alternative interpretations could also be given : (i) that a company cannot be prosecuted (as held in the impugned judgment); or (ii) that a company may be prosecuted and convicted but

not punished, but these interpretations will be dehors Section 278-B or wholly inconsistent with its plain language."

Though, Javali (supra) refers to the recommendations of 47th report of the Law Commission of India dated 28.2.1972 in support of its view, I find it difficult to agree with its reasoning. The report of the Law Commission indicates a lacuna in the law and suggests a possible remedy by amending the law. Since the function of the court of law is jus dicere and not jus dare, the court of law cannot read the recommendations of the Law Commission as justifying an interpretation of the Section in tune with them, even when the words of the Section are plain and unambiguous. Though Javali (supra) also refers to the general principles of interpretation of statutes, the rule of interpretation of criminal statutes is altogether a different cup of tea. It is not open to the court to add something to or read something in the statute on the basis of some supposed intendment of the statute. It is not the function of this Court to supply the casus omissus, if there be one. As long as the presumption of innocence of the accused prevails in this country, the benefit of any lacuna or casus omissus must be given to the accused. The job of plugging the loopholes must strictly be left to the legislature and not assumed by the court.

The judgment of the Karnataka High Court under appeal relies on its earlier judgment in P.V.Pai Vs. R.L. Rinawma ILR (1993) KAR 709. To similar effect are the views of the Calcutta High Court in Kusum Products Ltd. Vs. S.K.Sinha, ITO,Central Circle-X,Calcutta (1980) 126 ITR 804, Modi Industries Ltd. Vs. B.C. Goel (1983) 144 ITR 496.

The judgment of the Full Bench of the Delhi High Court in Municipal Corporation of Delhi Vs. J.B. Bottling Company (1975) Crl.L.J. 1148 followed by the judgment of the Full Bench of the Allahabad High Court in Oswal Vanaspati & Allied Industries Vs. State of U.P. (1993) 1 CLJ 172 take the view that where a statute imposes a minimum sentence of imprisonment plus fine, since the court cannot imprison a juristic person like company, it has the option of imposing fine only. With great respect, I am unable to subscribe to this view. Where the legislature has granted discretion to the court in the matter of sentencing, it is open to the court to use its discretion. Where, however, the legislature, for reasons of policy, has done away with this discretion, it is not open to the court to impose only a part of the sentence prescribed by the legislature, for that would amount re-writing the provisions of the statute.

Prior to the substitution of Section 276C, 277 and 278 by the Taxation Laws (Amendment) Act, 1975 with effect from 1.10.1975 in the present form, there was no minimum sentence of imprisonment provided for. The intention of the legislature in imposing a minimum term of imprisonment for offences punishable thereunder was to do away with the Court's discretion of only imposing of a fine and make the punishment more stringent.

The Law Commission in its 47th Report recommended (Chapter 18, pg. 157) that the punishment under sections 276B, 276C, 276E, 277 and 278 should be increased. It further recommended, "there should be a provision for minimum imprisonment and minimum fine'. These recommendations were implemented vide the Taxation Laws (Amendment) Act, 1975. In fact, at the time of introduction of the amendment bill, the Finance Minister Shri C. Subramaniam stated:

> "To those who make a lot of money through infringement of laws, monetary penalties do not really serve as deterrents. The provisions relating to prosecutions for tax offences are, therefore, proposed to be tightened up. The Select Committee has further recommended that in order to make the provisions relating to prosecution more effective, the discretion vested in courts to award monetary punishment as an alternative to rigorous imprisonment or to reduce the term fo imprisonment below the prescribed minimum should be taken away. I welcome these changes and commend them to the house."

Hence, it is apparent that the legislative mandate is to prohibit the Courts from deviating from the minimum mandatory punishment prescribed by the statute. If, in spite of the amendment, the situation is seen as before, then I fail to see the purpose of the amendments made by the Taxation Laws (Amendment) Act, 1975.

I am of the view that the Court should be slow in interpreting a penal statute in a manner which would amount to virtual re-writing of the statute to prejudice to the accused.

As Loreburn,J. observed in Bristol Guardians Vs. Bristol Waterworks Company (1914) AC 379, 388:

> "After all, it is not our function to repair the blunders that are to be found in legislation. They must be corrected by the legislature."

A court cannot breach a casus omissus and no canon of construction permits the court to supply a lacuna in a statute; nor can courts of law fill up the lacuna in an ill-drafted and hasty legislation. This was echoed by the Full Bench of the Calcutta High Court in Tarak Chandra Vs. Ratanlal [AIR (1957) Cal. 257 thus:

> "It is true that one must not expect in a statute the completeness and elaboration of a deed, and where the minimum required to make a particular meaning which is obviously intended is found, effect must be given to such meaning. But courts cannot dispense with even the minimum. Even where such minimum is absent, courts must declare the deficiency and let it have its effect rather than strain themselves to make it good. Thereby, not only will the courts prevent themselves from taking up the functions of the legislature but the legislature may also profit because it may take care to avoid such deficiencies in future."

Whether the omission is intentional or inadvertent is no concern of the court.

The observations in Tolaram Relumal & Anr. Vs. The State of Bombay [AIR (1954) SC 496] , Bijaya Kumar Agarwala Vs. State of Orissa (1996) 5 SCC 1, Sanjay Dutt Vs. State through CBI, Bombay(II) (1994) 5 SCC 410, Niranjan Singh Karam Singh Punjabi,Advocate Vs. Jitendra Bhimraj Bijjaya & Ors. (1990) 4 SCC 76 make it clear that while interpreting a penal statute, if more than one view is possible, the court is obliged to lean in favour of the construction which exempts a citizen from penalty than the one which imposes the penalty. The observations of Lord Esher, MR in

formulating, "the settled rule of construction of penal Sections", that "if there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction . If there are two reasonable constructions, we must give the more lenient one." (See Tuck & Sons Vs. Priester (1887) 19 QBD 629 and London & Norm Eastern Railway Vs. Berriman (1946) 1 ALL ER 255.

In State of Maharashtra Vs. Jugmander Lal [AIR (1966) SC 940] this court held that the expression, "shall be punishable for imprisonment and also for fine" means that the court is bound to award a sentence comprising both imprisonment and fine and the word "punishable" does not mean anything different from "shall be punished", punishment being obligatory in either case. The judgment of the Bombay High court in State of Maharashtra Vs. Syndicate Transport Company Pvt. Ltd. [AIR (1964) Bom. 195] also supports this view.

The view taken by me also finds support from the Australian jurisdiction. Faced with the same situation, the legislature in Australia enacted Part 2.5 of the Commonwealth Criminal Code Act, 1995 to specifically provide: "a body corporate may be found guilty of any offence, including one punishable by imprisonment." This provision has to be read with Section 4B(3) of the Crimes Act, 1914 which provides : "where a body corporate is convicted of an offence against a law of the Commonwealth, the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to 5 times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence." This was a case of the legislature stepping in to supply the casus omissus. The legislature in Australia has expressly empowered the court to exercise a discretion to impose only fine even where a mandatory term of imprisonment is prescribed, if the accused is a Corporation.

Contrasting the situation in India, against he background of the two reports of the Law Commission referred to, with the situation in Australia, drives home the point. I am of this view that this Court cannot, in the garb of construction of the penal provisions of Section 276 (C), 277 and 278, impose a punishment of fine in a situation which calls for no punishment by a virtual re- writing of the statute.

The argument that the term "person" has been defined in Section 2 (31) of the Act, so as to include a company, does not impress me. All definitions in the Act apply "unless the context otherwise requires". For reasons which I have indicated, the context does indicate to the contrary, while reading of the word "person" in the concerned Sections.

The judgment of the U. S. Supreme Court in United States Vs. Union Supply Company 54 Lawyers Ed. 87 (215 U.S.50) referred to in the judgment of brother Mathur, J seems to support the view that "the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean, on that account, to let the defendant escape." Apart from this, I see no other reasoning contained therein. With respect, I am unable to agree with the view taken in the judgment in United States Vs. Union Supply Company (supra). The situation in India was considered by two Law Commissions whose recommendations I have referred to earlier. I have already discussed that import.

For the aforesaid reasons, I am of the view that the first respondent company cannot be prosecuted for offences under Sections 276C, 277 and 278 read with Section 278 since each one of these Sections requires the imposition of a mandatory term of imprisonment coupled with a fine and leaves no choice to the Court to impose only a fine.

The following observations of Stable, J. in R. Vs. I.C. R. Haulage, Ltd. (1944) 1 All. E.R. 691 made in similar situation are of relevance:-

> "Where the only punishment which the court can impose is death, for this purpose the basis of this exception is being that the court will not stultify itself by embarking on a trial in which, if the verdict of guilt is returned, no effective order by way of sentence can be made."

Hence, in my judgment, the High Court was justified in quashing the prosecution as far as the first respondent is concerned. I would therefore, dismiss the appeal as far as the first respondent is concerned and allow the appeal with regard to the prosecution against the second respondent.