

Mr. Raj Sahai vs The State Of West Bengal & Anr on 2 February, 2024

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 100 of 2020

Mr. Raj Sahai

Vs

The State of West Bengal & Anr.

For the Petitioner : Mr. Sabyasachi Banerjee,
Mr. Nigam Ashish Chakraborty,
Mr. Agniva Banerjee.

For the State/Opposite Parties : Mr. Sanjay Bardhan,
Ms. Rita Dutta.

Hearing concluded on : 16.01.2024

Judgment on : 02.02.2024

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Shampa Dutt (Paul), J.:

1. The present revisional application has been preferred praying for quashing of the prosecution Report being No. 02/19-20 dated 26.04.2019 arising out of S.L. 49/2018-19 dated 31.01.2018 of Baguiati Excise Circle, Bidhannagar, under Sections 10/12/16/18(1) of the Bengal Excise Act, 1909 read with rule 118 of West Bengal (Foreign Liquor) Rules, 1998 and punishable under Sections 46A(c)(e)/52 of The Bengal Excise Act, 1909, and the proceedings corresponding to Complaint Case

No. 1986 of 2018 and orders connected thereto, presently pending adjudication before the Court of the Learned Chief Judicial Magistrate at Barasat.

2. FACTS:-

The petitioner's case is that he is a retired Army Officer and has set up a Private Limited Company under the name and style "Duomo Distribution Private Limited" (hereinafter referred to as "the said company") in the year 2017 under the relevant provisions of The Companies Act, 2013 for the purpose of importing new brands of foreign liquor from Europe in the Indian Market. The present petitioner was appointed as one of the directors of the said company since its inception in 2017. The said company is appointed as the sole importer and marketing company in India for globally renowned liquor brands owned by leading manufacturers of international repute namely one Polini Group Italia SRL, Italy (hereinafter referred to as "Polini").

3. Copies of the Import Export Code issued by the Government of India, Ministry of Commerce and Industry, Department of Commerce dated 12.02.2018 and a license under the Food Safety and Standards Act, 2006 dated 08.03.2018 indicating the aforesaid factum of sole importer and marketing company for globally renowned liquor brands owned by leading manufacturers of Polini are annexed to the revisional application as Annexure "P-1".

4. The petitioner was appointed as an executive director of the said company and was exclusively engaged for the marketing of the products being imported by the said company.

5. The prosecution story in a nutshell is that a raiding team of the Bidhannagar Excise Department, on 31.10.2018, in between 11.30 hours to 15.20 hours, conducted a raid at the marketing office of the said company situated at AC - 120, Prafulla Kanan, Krishnapur, Police Station - Baguiati, Kolkata - 700101 wherefrom allegedly 292 bottles of foreign liquor (O.S.) of different brands, total quantity - 218.1 liters were allegedly seized and accordingly a forwarding report dated 01.11.2018 annexing the said seizure list dated 31.10.2018 was forwarded before the Court of the Learned Chief Judicial Magistrate at Barasat. The purport of the said seizure list was that the seized bottles of foreign liquor were unregistered and non duty paid. It is the further contention of the prosecution that such articles finds its way in the clandestine market and involves interstate ramification and erosion in augmentation of Government revenue. Accordingly, it results in a heinous offence/business which is a direct threat to the Government exchequer, causing huge loss to the Government revenue.

6. The petitioner states that the petitioner was apprehended by the investigating agency on the same day i.e. 31.10.2018 and produced before the Court on 01.11.2018. On the prayer of the petitioner for bail, the Learned Trial Court was pleased to enlarge this petitioner on bail therein imposing certain conditions which were further relaxed by the Learned Court vide order dated 13.12.2018.

7. After completion of the investigation, the investigating agency submitted the prosecution report being prosecution report no. 02/19-20 dated 26.04.2019 under Sections 10/12/16/18(1) of The Bengal Excise Act, 1909 read with rule 118 of the west Bengal (Foreign Liquor) Rules, 1998

punishable under Sections 46A(c)(e)/52 of The Bengal Excise Act, 1909 against the petitioner herein and another.

8. It is stated by the petitioner that the samples/foreign liquor seized in the instant case were not meant for sale. That vide declaration dated 01.08.2018 issued by „Polini to the said company, it is clearly mentioned that the bottles in question under invoice no. 4357 dated 01.08.2018 were meant only for marketing and sales promotion purposes and were not for the purpose of sale. An invoice dated 27.10.2018 clearly indicates that stickers bearing tag "NOT FOR SALE" which were supposed to be affixed on the bottles in question were ordered. However before the same could have affixed, the bottles were seized on 31.10.2018.

9. The petitioner's case is that as per Regulation 118 of Foreign Liquor Rules, any foreign liquor which is not meant for sale, is not required to be registered.

10. As per rule 149 and 196 of the said Rules, excise is applicable to products where MRP is mentioned, however, in this instant case none of the bottles had any MRP on it as it was not for sale. The fees for issuance of a pass and the excise duty that is payable on any commodity for consumption can only be calculated on the MRP (maximum retail price) of such foreign liquor (Appendix F and Appendix K of the said Rules), and in the absence of such retail price, there is no mechanism for the calculation of any duty.

11. The petitioner further states that the investigation in the instant case has been carried out in a biased manner, without proper administration of law and hence the report filed at the end of such investigation is bad in fact and in law.

12. The petitioner submits that it is a clear proposition of law that in case of criminal law there is no concept of vicarious liability until and unless the company being a juristic entity which can sue and be sued in its own capacity as per the law, is made a party. The Hon'ble Apex Court has laid down this principle of law that a director or a principle officer of a company cannot be made liable until and unless the company itself is a party to the proceedings and the specific role of such director or a principle officer of the company should be expressed and/or explained in order to make that person vicariously liable for the offences. The provision of Section 46B of the Bengal Excise Act, 1909 categorically speaks about offences committed by companies. The prosecution has not impleaded the company in this instant case which has imported the Liquors which were not for sale, and has only implicated the director and an employee of the company for which, the initiation of proceedings and its continuation is bad in law.

13. Written notes of argument stating the case of the petitioner, has been filed.

14. Learned Special Prosecutor appearing on behalf of the West Bengal Excise Department has placed the relevant case records including a reply to the petitioner's written notes of argument.

15. FINDINGS:-

The case of the prosecution as per the case diary placed before the Court on 17.02.2020, is that the petitioner, was arrested from the spot, for unlawful transport, storage and possession on 31.10.2018, in between 11.30hrs. to 15.20hrs. A case was started by the Officer-in-Charge of Excise, Baguiati Circle, Bidhannagar Excise District under Seizure List No. O.C.(E)/BG/S.L. No. 49/2018-19 dated 31.10.2018 at a house at AC-120, Prafulla Kanan, Krishnapur, P.S.-Baguiati, Kolkata-700101 leading to recovery of 22 (twenty two) different brands of non-duty paid Overseas foreign Liquor (Total 292 bottles or 218.1 Lts). Raj Sahai, S/o Lt Brij Behari Sahai, the petitioner herein & Chhote Prasad, S/o Lt Bhagban Prasad were arrested from the spot for unlawful transport, storage, possession of unregistered & non-duty paid Foreign Liquor in contravention of Sections 10, 12, 16, 18(1) of the B.E. Act 1909 read with Rule 118 of W.B. Excise (F.L) Rules 1998 and thereby committed an offence punishable under u/s 46A(c), (e) & Sec 52 of the said Act as amended. The said house from where the bottled spirit & wine were recovered was claimed to be the marketing office of a company as stated by Mr. Sahai. On demand Raj Sahai and Chhote Prasad failed to produce any valid document in support of such possession. The unlawful intoxicants was seized on the spot observing all required formalities.

16. The premises as noted is a house at AC-120, Prafulla Kanan, Krishnapur, P.S. Baguiati, Kolkata-700101, from which the seized articles being 292 bottles of non-duty paid Overseas Foreign Liquor was recovered and the accused/petitioner was arrested.

17. The petitioner's defense is that these were samples and as such no duty was payable. It is further submitted along with supporting documents that the exporter had also given the Declaration as to the said articles being samples.

18. It is also the case of the prosecution that the house/place of storage is not authorized/approved by the competent authority under the Bengal Excise Act, 1909 (as amended).

19. It appears from a copy of a Transport pass dated 11.09.2018, issued in favour of the petitioner's Company (Duomo Distribution Pvt. Ltd.) that the name & address of the Consignee is „Bevco Warehouse at Kashipur, WBSCCL warehouse, Kolkata (North) and Consigner is Central Warehouse Corporation 2, Taratala Road, Kolkata - 700088.

20. The petitioner's defense is that as the said seized articles were not for sale, the same was stored in their company office. Documents have been filed showing that the said articles (free samples) along with other duty paid articles were brought in through the Indian Customs EDI system - Imports at 15/1, Strand Road, Custom House, Kolkata- 1 and the importer is the petitioner's Company Duomo Distribution Private Ltd.

21. The articles were received from Polini Group, Italia. The documents are dated 05.09.2018 and the 'samples not for sale' are duly marked in the said invoices. The raid and arrest in this case was made on 31.10.2018 as seen from the forwarding report to the Court.

22. The memo of arrest dated 31.10.2018, shows the place of arrest as:-

□Duomo Distribution Pvt. Ltd., at AC - 120, Prafulla Kanan, Krishnapur, P.S. Baguiati, Kolkata - 700101.

23. The case of the prosecution is that the pass required to be applied for by the petitioner for such import has not been done as per the State Act and thus the violation under the Act.

24. The State has alleged violation under Section 18(1) of the Bengal Excise Act, 1908 (as amended) as the seized articles did not contain any label with MRP and without valid transport pass.

25. The petitioner has relied upon Section 4(1)(b) of the Central Excise Act, 1964, which is reproduced here:-

□4. Valuation of excisable goods for purposes of charging of duty of excise (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

a) In a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

b) In any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

[Explanation : for the removal of doubts, it is hereby declared that the price-cum duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, following directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.]

26. The petitioner herein has filed documents of the custom office to show valid import of the articles specifically marked "Samples Not for Sale".

27. Duty as required has been paid to the Custom Authorities.

28. The petitioner has now submitted that if required they are ready and willing to pay the duty as per the West Bengal Excise Act, 1909 (as amended). But the State submits that there being no such provision under the Amended Act, the petitioner is liable to be prosecuted. Section 65 of the Act provides for compounding of offences & release of confiscated property (other than Sections 46A, 46AA) under the Act. The petitioner has been charged under Section 46A of the Act.

29. From the materials on record, it appears that the petitioner and another accused Chhote Prasad have been made accuseds in this case, but the Company, Duomo Distribution Pvt. Ltd. AC-120

Prafulla Kanan, Krishnapur Baguiati has not been made an accused. The petitioner admittedly is a director of the said Company, and it is from the company premises that the accused was arrested and the articles seized.

30. The Supreme Court in Dayle De' Souza Vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr., in SLP (Crl.) No. 3913 of 2020, on October 29, 2021, held:-

¶25. This position was again clarified and reiterated by this Court in Himanshu v. B. Shivamurthy and Another., (2019) 3 SCC 797. The relevant portion of the judgment reads thus:

¶6. The judgment of the High Court has been questioned on two grounds. The learned counsel appearing on behalf of the appellant submits that firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint is misconceived. The learned counsel submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand and the failure of payment within the prescribed period. In absence of compliance with the requirements of Section 138, it is asserted, the direction of the High Court that the company could be impleaded/arraigned at this stage is erroneous.

7. The first submission on behalf of the appellant is no longer res integra. A decision of a three-Judge Bench of this Court in Aneeta Hada v. Godfather Travels & Tours (P) Ltd. governs the area of dispute. The issue which fell for consideration was whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being arraigned as an accused.

The three-Judge Bench held thus: (SCC p. 688, para 58) "58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company"

appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted."

27. In terms of the ratio above, a company being a juristic person cannot be imprisoned, but it can be subjected to a fine, which in itself is a punishment. Every punishment has adverse consequences, and therefore, prosecution of the company is mandatory. The exception would possibly be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar. However, such exceptions are of no relevance in the present case. Thus, the present prosecution must fail for this reason as well.

30. At the same time, initiation of prosecution has adverse and harsh consequences for the persons named as accused. In *Directorate of Revenue and Another v. Mohammed Nisar Holia*, 2008 (2) SCC 370, this Court explicitly recognises the right to not to be disturbed without sufficient grounds as one of the underlying mandates of Article 21 of the Constitution. Thus, the requirement and need to balance the law enforcement power and protection of citizens from injustice and harassment must be maintained. Earlier in *M/s. Hindustan Steel Ltd. v. State of Orrisa*, 1969 (2) SCC 627, this Court threw light on the aspect of invocation of penalty provisions in a mechanical manner by authorities to observe:

□8. Under the Act penalty may be imposed for failure to register as a dealer -- Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasicriminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out. Almost every statute confer operational power to enforce and penalise, which power is to be exercised consistently from case to case, but adapted to facts of an individual case¹⁹. The passage from *Hindustan Steel Ltd. (supra)* highlights the rule that the discretion that vests with the prosecuting agencies is paired with the duty to be thoughtful in cases of technical, venial breaches and genuine and honest belief, and be firmly unforgiving in cases of deceitful and mendacious conduct. Sometimes legal provisions are worded in great detail to give an expansive reach given the variables and complexities involved, and also to avoid omission and check subterfuges. However, legal meaning of the provision is not determined in abstract, but only when applied to the relevant facts of the case. Therefore, it is necessary that the discretion conferred on the authorities is applied fairly and judiciously avoiding specious, unanticipated or unreasonable

results. The intent, objective and purpose of the enactment should guide the exercise of discretion, as the presumption is that the makers did not anticipate anomalous or unworkable consequences. The intention should not be to target and penalise an unintentional defaulter who is in essence law-abiding.

31. There are a number of decisions of this Court in which, with reference to the importance of the summoning order, it has been emphasised that the initiation of prosecution and summoning of an accused to stand trial has serious consequences. They extend from monetary loss to humiliation and disrepute in society, sacrifice of time and effort to prepare defence and anxiety of uncertain times. Criminal law should not be set into motion as a matter of course or without adequate and necessary investigation of facts on mere suspicion, or when the violation of law is doubtful. It is the duty and responsibility of the public officer to proceed responsibly and ascertain the true and correct facts. Execution of law without appropriate acquaintance with legal provisions and comprehensive sense of their application may result in an innocent being prosecuted.

31. In the present case:-

a) The company has not been made an accused.

b) The petitioner a director of the company has been made an accused.

c) The place of seizure and the seized articles on which the case has been initiated, is the registered office of the company. The petitioner has also been arrested from the office of the company.

32. Therefore, in the absence of the company being arraigned as an accused, a complaint against the petitioner is not maintainable *Dayle De' Souza Vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr., (Supra)*.

33. This is in clear violation of Section 46B of the Bengal Excise Act, 1909.

34. Section 46B of the Bengal Excise Act, 1909, lays down:-

46B. Offences by companies.-(1) Where any offence punishable under this Act is committed by a Company, the Company and every Director, Manager, Secretary or agent of the Company, unless such Director, Manager, Secretary or agent proves that the offence was committed without his knowledge or consent, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(2) Notwithstanding anything contained in sub-

section (1), where an offence punishable under this Act has been committed by a Company and it is proved that the offence has been committed with the consent or connivance of or is attributable to

any neglect on the part of any other officer or person concerned in the management of the affairs of the Company, such other officer or person 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 a body corporate and includes a firm or other association of individuals; and

b) "Director, in relation to a firm", means a partner of the firm.

35. Admittedly the company has not been made as an accused.

36. Thus the proceedings in this case being not in accordance with law is an abuse of the process of law.

37. CRR 100 of 2020 is thus allowed and accordingly disposed of.

38. The proceedings in Complaint Case No. 1986 of 2018, arising out of S.L. 49/2018-19 dated 31.01.2018 of Baguiati Excise Circle, Bidhannagar, under Sections 10/12/16/18(1) of the Bengal Excise Act, 1909 read with rule 118 of West Bengal (Foreign Liquor) Rules, 1998 and punishable under Sections 46A(c)(e)/52 of The Bengal Excise Act, 1909 including the prosecution Report No. 02/19-20 dated 26.04.2019 therein is hereby quashed.

39. All connected applications, if any, stand disposed of.

40. Interim order, if any, stands vacated.

41. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

42. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)