

Girdhari lal gupta

Vs

D. H. Mehta and Another

Criminal Appeal No. 211 of 1969

18.02.1971

JUDGMENT

SIKRI, C.J. -

1. We disposed of Criminal Appeals Nos. 211 and 212 of 1959 by our judgment, dated August 18, 1970, whereby the appeals of Girdhari 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 Section 23-C(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 Tewari has not filed a review petition against his conviction, upheld by this Court.

2. Mr. Daphtary contends that on the facts, as found by us, the appellant, Girdharilal Gupta, does not come within the purview of Section 23-C(1) or Section 23-C(2) of the Act. Sections 23-C(1) and 23-C(2) reads as follows :

"23-C. (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.

23-C. (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.

3. 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, Section 23-C(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.

4. Mr. Daphtary further contends that Section 23-C(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.

5. It seems to us quite clear that Section 23-C(1) is a highly penal section as it makes 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.

6. 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 Section 23-C(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.

7. In *State v. S. P. Bhadani*, (AIR 1959 Pat 9 : 1958 BLJR 436 : 1959 Cr LJ 68 : (1959) 1 Lab LJ 157.) Kanhaiya Singh, J., in construing a similar provision of the Employees Provident Fund Act (1952), Section 14-A - 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."

8. In *R. K. Khandelwal v. State*, ((1964) 62 ALJ 625.) D. S. Mathur, J., in construing Section 27 of the Drugs Act, 1940, a provision similar to the one we are concerned with, observed :

"There can be 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 offence committed by the Company unless the other ingredients are established which make him criminally liable."

9. In *The Public Prosecutor v. R. Karuppian*, (AIR 1958 Mad 183 : (1958) 1 Mad LJ 20 : 71 Mad LW 78 : 1958 Cr LJ 527.) Somasundaram, J., while dealing with a case arising under the Prevention

of Food Adulteration Act, 1954 [(Section 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.

10. The only evidence led by the prosecution on this part of the case was of one Sohan Lal Gupta who is a broker. We 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). I know of another employee of the firm : the manager, Jagdish Prasad. I know another employee of the firm : the accountant, Shaymlal."

11. The appellant in his statement under Section 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."

12. 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 to the firm. This means that he is in-charge of the business of the firm within the meaning of the section though there may be a manager working under him.

13. 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 on 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 in-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 Section 23-C(1).

14. 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.

15. 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-section 23-C(2) and the light

it throws on the interpretation of sub-section (1).

16. 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.

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