

S.A. Khan Vs Union of India

Court: Madras High Court

Date of Decision: Sept. 29, 2011

Acts Referred: Central Excise Rules, 1944 " Rule 173E, 173F, 49, 52A, 57A

Central Excises and Salt Act, 1944 " Section 11D, 9(1)

Criminal Procedure Code, 1973 (CrPC) " Section 305, 397

Hon'ble Judges: P.R. Shivakumar, J

Bench: Single Bench

Advocate: S.R. Rajagopal, for the Appellant; N.P. Kumar, Spl. Public Prosecutor for R1, No appearance R2 and R3, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

1. This criminal revision case has been preferred against the order of the learned Additional Principal Sessions Judge, Chennai dated 23.07.2003

made in Crl. R.C. No. 147 of 2002 reversing the order of the trial Judge, namely Additional Metropolitan Magistrate, E.O.I dated 24.08.2001

made in M.P. No. 2270 of 2000 in E.O.C.C. No. 166 of 1997.

2. The facts leading to the filing of the present criminal revision in brief, are as follows:

(i) M/s. Printwraps, the second respondent herein/first accused was a partnership firm in which S.Subash, the third respondent herein/second

accused and the petitioner in the present criminal revision/third accused were the partners. Union of India represented by Assistant Commissioner

of Central Excise, Chennai, the first respondent herein, preferred a criminal complaint on the file of the Additional Metropolitan Magistrate, E.O.I,

Egmore, Madras under Sections 9(1), 9(1)(b), 9(1)(bb), 11D of Central Excise Act, 1944 r/w. Rules 49, 173F, 52A, 173E, 57F(2), 57A of the

Central Excise Rules, 1944 for their prosecution and punishment for the offence of violation of the above said provisions of Central Excise Act and

Central Excise Rules.

(ii) Though the partnership firm, namely M/s. Printwraps, was sought to be prosecuted by virtue of Section 9-AA of the Central Excise Act, 1944.

57F(2), 57A of the Central Excise Rules, 1944, which equates a partnership firm with a company/corporation for the purpose of prosecution

under the Act. Respondent No. 3 and the revision petitioner herein were arraigned as accused Nos.2 and 3 respectively on the ground that they

were not only partners on the date of occurrence, but also were responsible for the conduct of the business of the second respondent firm. The

complaint was taken on file by the trial Court following the private complaint procedure and was numbered as C.C. No. 166 of 1997. Processes

were issued to the revision petitioner and Respondents 1 and 2 (Accused 1 and 2). But it is not known whether the service was effected on the

firm, namely the second respondent herein / first accused. The other two accused, namely revision petitioner and the Respondent No. 3 were

served with summons and they entered appearance to defend themselves.

(iii) During the pendency of the case, the third respondent, namely S. Subash, who was described as Managing Partner of the partnership firm,

passed away and pursuant to the death of the said Subash, the first respondent herein/complainant preferred a miscellaneous petition in M.P. No.

2270 of 2000 in C.C. No. 166 of 1997 on the file of the trial Court praying for an order that the revision petitioner herein/3rd accused shall

represent the first accused company (firm), as there was no other person to represent the firm and the above said Subash described as Managing

Partner had passed away. The said miscellaneous petition was resisted by Mr. S. A. Khan, the revision petitioner/3rd accused on the ground that

he had already retired from the partnership firm and hence, he was not competent to represent the second respondent firm. It was his further

contention that as per Section 305 of Criminal Procedure Code, the Corporation (here the Firm) may appoint a representative for the purpose of

inquiry or trial and that such a power available to the Company (the firm in this case) cannot be used by the prosecution to force upon anybody,

the duty to represent the corporation (firm).

(iv) The Additional Metropolitan Magistrate, E.O.I, after hearing both sides, accepted the above said contention of the revision petitioner

herein/3rd accused S. A. Khan and dismissed M.P. No. 2270 of 2000 by an order dated 24.08.2001. As against the said order passed by the

trial Judge, the first respondent herein/complainant preferred a revision before the learned Principal Sessions Judge, Chennai in CrI.R.C. No. 147

of 2002 u/s 397 Cr.P.C. The learned Principal Sessions Judge, Chennai, after hearing, allowed the revision by an order dated 23.07.2003, set

aside the order passed by the trial Judge dated 24.08.2001, allowed M.P. No. 2270 of 2000 and directed that the revision petitioner herein/3rd

accused S. A. Khan shall represent the second respondent herein /1st accused in the criminal proceedings initiated against it in C.C. No. 166 of

1997. Aggrieved by and challenging the same and also questioning the correctness and legality of the said order passed by the learned Principal

Sessions Judge, Chennai in Crl.R.C. No. 147 of 2002, the present revision petition has been filed by S. A. Khan, the third accused on various

grounds set out in the memorandum of criminal revision case.

3. The arguments advanced by Mr. S. R. Rajagopal, learned counsel for the petitioner and by Mr.N.P.Kumar, learned Special Public Prosecutor

for the first respondent were heard. The materials available on record were also perused.

4. The short point that arises for consideration in this criminal revision case is "whether the learned Principal Sessions Judge has reversed the order

of the learned trial Judge by an erroneous interpretation and misconstruction of the scope of Section 305 Cr.P.C and hence, the order of the

learned Principal Session Judge is liable to be interfered with by this Court in exercise of its revisional power?

5. Since the facts have already been narrated, it shall be unnecessary to again repeat. Suffice to state that the first respondent has launched

prosecution for the offences of violation of Sections 9(1), 9(1)(b), 9(1)(bb), 11D of Central Excise Act, 1944 and the Rules 49, 173F, 52A,

173E, 57F(2) and 57A of the Rules framed thereunder, as referred to in the narration of the facts indicated supra, against 2nd respondent /M/s.

Printwraps, which is a partnership firm, S.Subash/3rd respondent, who is no more, in his capacity as Managing Partner of the second respondent

firm and hence was accountable for the conduct of the business of the firm and S. A. Khan, the revision petitioner herein as an ex-partner, who

was also responsible for the conduct of the business of the firm at the time of commission of the alleged offences and they had been arraigned as

Accused Nos.1, 2 and 3 respectively. Admittedly S. Subash, Accused No. 2, after the filing of the complaint passed away and is no more. Hence,

the charge against him shall stand abated. So far as the revision petitioner is concerned, he is sought to be prosecuted for the alleged offence

committed by the firm, which is equated to a corporation by virtue of a specific provision, namely Section 9-AA of the Central Excise Act. For

better appreciation the section is reproduced as under:

9-AA.Offences by companies - (1) Where an offence under this Act has been committed by a company, 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 of the company, as well as the

company, shall be deemed to be guilty of the offence 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 any punishment provided in this Act, if he proves that the

offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence 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 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.

6. The revision petitioner is being prosecuted as one of the partners of the said firm on the date of alleged commission of the offence, taking part in

the conduct of the business and hence, responsible for the conduct of the business of the firm. He has no grievance against the prosecution

launched against him in his personal capacity arraigning him as Accused No. 3, in which case, he shall be having a right to contend that though he

was a partner of the firm as on the date of alleged commission of the offence, he was not the person responsible for the conduct of its business; or

that the alleged acts amounting to the alleged offences were committed without his knowledge or that he had exercised all due diligence to prevent

the commission of the offence. He is prepared to face the prosecution as third accused in the criminal case concerned in this revision, namely

E.O.C.C. No. 166 of 1997 on the file of Additional Metropolitan Magistrate, Egmore, Chennai. But it is his contention that he, having retired from

the partnership firm long before the launching of the prosecution, cannot be expected to represent the first accused firm and the prosecution cannot

compel him to represent the first accused firm solely on the ground that he was a partner of the firm as on the date of the alleged commission of

offence, while he has been arraigned as a co-accused (A3) and is being prosecuted on the same ground.

7. It is the further contention of the learned counsel for the petitioner that the right to appoint a representative to represent the company (firm) in a

criminal trial or inquiry is conferred on the company/firm u/s 305 of the Code of Criminal procedure and the prosecution cannot have anything to

say that the company should appoint a person to represent it in the inquiry or trial. It is the further contention of the learned counsel for the plaintiff

that the right given to the Company/firm under Sub-clause (2) of Section 305 Cr.P.C cannot be interpreted to mean a corresponding right available

to the prosecution to name a person to be the representative of the company or firm and compel him to represent the company/firm in the enquiry.

8. The above said contention raised by the learned counsel for the petitioner is clearly tenable and the same has to be countenanced. What sub-

section (2) of Section 305 Cr.P.C says is that where a Corporation (Firm in this case) is the accused person or one of the accused persons in an

inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the

Corporation(Firm in this case). The term used is ""may"" and not ""shall"" meaning that it is a right available to the Corporation/firm to appoint a

representative to defend it in a criminal trial or inquiry. If the Corporation or Firm does not come forward to appoint a representative, the same

doesn't mean that the prosecution can compel anybody to represent the Company (Firm). This shall be quite obvious if the entire Section 305

Cr.P.C is considered. For better appreciation the entire Section 305 Cr.P.C is reproduced hereunder:

305.Procedure when corporation or registered society is an accused - (1) in this section ""corporation"" means an incorporated company or other

body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

(2) Where a corporation is the accused persons or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose

of the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or

shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the

representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a

requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called)

having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has

been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved,

presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not

such representative, the question shall be determined by the Court.

9. According to Sub-clause (3) of Section 305 Cr.P.C., if a representative of a Corporation/Company (Firm) appears on behalf of the Company,

then a requirement of the Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused,

shall be construed as a requirement that the same shall be done in the presence of the representative or read, stated or explained to the

representative. It also proceeds to state that any requirement for the examination of the accused shall be construed as a requirement of examination

of such representative. Sub-section (3) contemplates voluntary appearance of a representative of the Company/Firm. It does not mean that

anybody can be compelled by the prosecution or the Court to represent the company/firm. Then a question will arise as to what shall happen to the

prosecution if nobody is appointed by the company/firm or nobody appears as a representative of the company/firm in the trial or inquiry in the

criminal case before the Court. The answer is found in Sub-clause (4) which reads as follows:

4. Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.

Therefore, it is abundantly clear that if process was properly served on the Corporation/Company/firm and the corporation/company (firm) does

not enter appearance through a representative, then the requirement that certain things are to be done in the presence of the accused, like framing

of charges and examination of witnesses in the presence of the accused shall not be applicable. Similarly, the requirement of examination of the

accused also shall not be applicable. The only circumstance under which the Court can decide whether a person is or is not a representative of the

Corporation/company/society/firm is when a person appears as representative of such body and a question arises as to whether such a person is

or is not such a representative. Then only the question shall be determined by the Court.

10. As per Sub-clause (3) of the Section 305 Cr.P.C, which reads as follows:

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or

shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the

representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a

requirement that the representative shall be examined.

The power conferred on the Court is to decide whether a person who appears as a representative of the company/firm is or is not a representative

of the company or firm. The said power cannot be stretched further to say that the Court has power to direct any person, which it considers to be

a representative of the company, to appear on behalf of the company.

11. The learned trial Judge, namely Additional Metropolitan Magistrate, E.O.I, Egmore has arrived at a correct conclusion on a proper

construction and proper interpretation of Section 305 Cr.P.C and the learned Principal Sessions Judge, on an erroneous application and wrong

interpretation of a provision of law, has arrived at a wrong conclusion that a person can be compelled to represent a Corporation/Company/Firm,

which is arraigned as an accused in an inquiry or trial before a criminal Court. On that score alone the order of the learned Principal Sessions Judge

is liable to be interfered with and set aside.

12. The impugned order of the learned Principal Sessions Judge is challenged on another ground also. It is the contention of the learned counsel for

the revision petitioner that the question whether S.A.Khan/3rd accused, who was a partner of M/s. Printwraps, the second respondent herein as

on the date of alleged commission of the offence, was responsible for the conduct of the business of the firm has to be decided after trial, but the

same has been answered in the affirmative by the learned Principal Sessions Judge and that the same amounts to a pre-determination of a question

which is to be relegated to be decided at the conclusion of trial. Though the petitioner was a partner of the second respondent firm on the date of

alleged commission of the offence, the prosecution has to prove that he was responsible to the company for the conduct of its business in order to

prove that he is also guilty of the offences. Even in such cases, namely when the prosecution proves that the petitioner was responsible to the

company for its conduct of business, a further defence is available to him to escape punishment by proving that the offence was committed without

his knowledge or that he had exercised all due diligence to prevent commission of such offence. The learned Principal Sessions Judge, disregarding

the said provision, simply carried away by the fact that the petitioner was a partner as on the date of the alleged commission of the offence; that he

could have had definite access to the records of the partnership firm before his retirement. The main issue, viz., ""whether the petitioner shall be

compelled to represent the second respondent / partnership firm?"" has been forgotten and the learned Principal Sessions Judge proceeded on the

assumption that there should be a person representing the company/partnership firm in a prosecution launched against it. In such process the

learned Principal Sessions Judge has forgotten the fact that the Revision petitioner is being prosecuted as a co-accused along with the firm on the

premise that he, as a partner at the time of the occurrence, was responsible for the conduct of the business of the firm on the date of alleged

commission of the offence; that a retired partner cannot represent the partnership firm after such retirement and that even in the worst case he

cannot be compelled to represent the partnership firm. Admittedly, the petitioner retired from the second respondent/partnership firm in 1994 itself

and in the complaint itself, while arraigning the petitioner as third accused, the complainant has described him as ex-partner of the second

respondent firm. Hence he cannot be compelled to represent the firm in the criminal prosecution. On that score also the impugned order of the

learned Principal Sessions Judge is liable to be set aside.

13. Therefore, this Court comes to the conclusion that the order passed by the learned Principal Sessions Judge reversing the well considered

order passed by the learned trial Judge, namely Additional Metropolitan Magistrate, E.O.I cannot be sustained in law. Accordingly, this Court sets

aside the impugned order of the learned Principal Sessions Judge, City Civil Court, Chennai dated 23.08.2003 made in CrI.R.C. No. 147 of 2002

in exercise of the revisional power of this Court u/s 397 Cr.P.C.

14. In the result, the present criminal revision petition is allowed and the order of the learned Principal Sessions Judge, City Civil Court, Chennai

dated 23.08.2003 made in CrI. R.C. No. 147/2002 is set aside. The order of the trial judge, namely Additional Chief Metropolitan Magistrate,

E.O.I., Egmore dated 24.08.2001 made in CrI.M.P. No. 2270 of 2000 in C.C. No. 166 of 1997 is restored and confirmed. CrI.M.P. No. 2270

of 2000 in C.C. No. 166 of 1997 on the file of the trial Court shall stand dismissed.