

CASE NO.:
Appeal (civil) 1748 of 1999

PETITIONER:
ANZ Grindlays Bank Limited & Ors., etc.

RESPONDENT:
Directorate of Enforcement & Ors., etc.

DATE OF JUDGMENT: 01//4\001@\006

BENCH:
May 5, 2005

JUDGMENT:
J U D G M E N T

Civil Appeal No.1749/1999, CA No.1750/ 1999, CA No.1751 & 1944 of 1999, SLP(Crl.)No.1940 of 2004, SLP(Crl) No.2599 of 2003, SLP (Crl)No. 4995 of 2003 with W.P.(Crl.)No.165 of 2004 and Appeal (Crl.) No.847 of 2004 and Appeal (Crl) No.848 of 2004.

ARUN KUMAR, J.

C.A.No.1748 of 1999

I have had the benefit of going through the judgment prepared by my learned brother K.G. Balakrishnan, J. I am entirely in agreement with the view expressed by my learned brother in the said judgment. However, in order to highlight certain aspects I have chosen to add the following:

The question for consideration in the appeal is:

"Whether a company or a corporation, being a juristic person, can be prosecuted for an offence for which mandatory punishment prescribed is imprisonment and fine"?

The controversy has arisen in the context of provisions of Section 56 of the Foreign Exchange Regulation Act 1973 (for short 'FERA'). The appellant Corporation was sought to be prosecuted under said provision for violation of the relevant provision of the Act. It was contended on behalf of the appellant that the appellant being a company cannot be subjected to criminal action under Section 56 of the FERA because the section prescribes a minimum sentence of imprisonment and fine and a company cannot be imprisoned. Section 56 is reproduced as under:

"56. Offences and prosecutions \026 (1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes any of the provisions of this Act (other than Section 13, clause (a) of sub-section (1) of section 18, Section 18A, clause (a) of sub-section (1) of Section 19, sub-section (2) of Section 44 and Sections 57 and 58, or of any rule, direction or order made thereunder, he shall, upon conviction by a court, be punishable,--

(i) In the case of an offence the amount or value involved in which exceeds one lakh of rupees, with imprisonment for a term which shall not be less than six months, but which may extend to seven years and with fine:

Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months;

(ii) in any other case, with imprisonment for a term which may extend to three years or with fine or with both.

(2)\005.
(3)\005.
(4)\005.
(5)\005
(6)\005"

The main argument advanced on behalf of the appellant in this behalf is that the statutes creating criminal liability have to be strictly construed. When a statute prescribes punishment of imprisonment and fine, it is not permissible for the court to award punishment of fine alone. A corporation being a juristic person cannot be awarded the punishment of imprisonment. The appellants contend that when a statutory provision cannot be complied with as per its strict language, the consequence should be that there can be no prosecution. There is no sense in prosecuting somebody when the punishment cannot be awarded as per the mandate of the statute. The present reference to a larger Bench for consideration of this question was made in view of a three-Judge Bench decision of this Court in *Assistant Commissioner, Assessment-II, Bangalore & Others vs. Velliappa Textiles Ltd.* And another [2003 (11) SCC 405]. In the said judgment two learned Judges who formed the majority, took the view favouring the proposition advanced by the appellants, that is, in such a situation a corporation cannot be prosecuted.

So far the principle regarding strict construction of penal statutes is concerned there can be no quarrel. However, we need not misapply the principle. This principle has developed only in the context of the provisions in statutes which lay down the elements of an offence and the persons who can be charged with it. If there is any ambiguity or doubt as to whether in a given case an offence is made out or not or about who can be an offender with respect to the given offence, the ambiguity is to be resolved in favour of the person charged. In Maxwell on 'The Interpretation of Statutes', 12th Edition, the rule is stated as under:

"Strict construction of words setting out the elements of an offence

If there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether the act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged. This is, in practice, by far the most important instance of the strict construction of penal statutes."

Various illustrations discussed in Maxwell in this connection deal only with cases where there was ambiguity or doubt regarding ingredients or elements of an offence as stated in a statute. Not a single instance has been brought to our notice about the above rule being applied in relation to sentencing part of penal statutes. Rather in sentencing courts have always enjoyed a certain amount of discretion. For instance, in spite of a statute prescribing punishment for an offence the courts have been empowered to grant probation to a person found guilty in certain cases.

We cannot ignore the fact that prosecution, conviction and sentencing are different stages in a criminal trial. The stage for sentencing is reached only after a verdict of guilt is pronounced after a full-fledged trial. See Sec.235 Code of Criminal Procedure. A reference to Section 56 of the Act itself demonstrates this aspect when the last words in opening part in sub-section (1) are:

"\005.upon conviction by a court, be punishable \005".

Thus the section itself refers to two stages, i.e. the stage up to conviction and thereafter the stage of punishment. From this it follows that conviction is not dependant on sentencing. Rather it is the other way round i.e. sentencing follows conviction.

The learned counsel appearing for the respondents have demonstrated the anomalous situation to which the proposition suggested on behalf of the appellants would give rise to. It was pointed out with reference to Section 56 of the FERA that for offences where the amount or value involved does not exceed Rs. one lakh, the punishment can be imprisonment or fine while when the amount or value involved exceeds Rs. One lakh, punishment by way of imprisonment and fine is mandatory. For offences under Section 56 where amount or value does not exceed Rs. One lakh, the argument based on impossibility of levy of punishment by way of imprisonment on a corporation does not survive because imprisonment in such a case is not mandatory. If we accept this argument of appellants result will be that for lesser offences Corporations can be prosecuted while for graver offences exceeding amount of Rs. One lakh the Corporations will escape liability. This could never be the object of the statute. Not only with reference to Section 56 of FERA, this anomaly can be demonstrated with reference to other statutes. For instance under the Employees Provident Fund Act, if the offence is committed second time imprisonment is mandatory. Corporations are often the offenders under the said Act. Second offence is taken more seriously and that is why punishment of imprisonment has been made mandatory. Could it be said that for first offence a Corporation can be prosecuted and punished while in case of second offence it goes scot free because imprisonment is a mandatory sentence in that case?

What follows from this is that for difficulty in sentencing we need not let the offenders escape prosecution. While laying down criminal liability the statute does not make any distinction between a natural person and Corporations. The Criminal Procedure Code dealing with trial of offences contains no provision for exemption of Corporations from prosecution if there is difficulty in sentencing them as per statute. How can we allow Corporations to escape liability on this specious plea? In such a situation the Latin maxim *Lex Non Cogit Ad Impossibilia* is attracted which means: law does not compel a man to do which he cannot possibly perform. Broom's "Legal Maxims" contains several illustrative cases in support of the maxim. This maxim has been referred with approval by this Court in *State of Rajasthan v. Shamsher Singh* (1985) suppl. SCC 416. In the background of above legal position let us consider Section 56 of the FERA. First we must find as to who can be the offender. The key words are: "if any person". The meaning of the word 'person' is to be gathered. This word has not been defined in the FERA. The definition of the word 'person' is available in Section 11 of the Indian Penal Code as well as in Section 3 (42) in the General Clauses Act. Both the definitions are similar and show that the word 'person' includes any company or association or body of persons whether incorporated or not. It follows that the word 'person' here will include corporation, company or association or body of persons whether incorporated or not. This makes it clear that a company or a corporation can be subjected to penal liability under Section 56 of the FERA. In fact, during the course of hearing none of the counsel appearing for appellants argued or suggested that Section 56 does not apply to corporations. Their entire argument to save the corporations from liability under Section 56 is based on the difficulty of levying mandatory punishment of imprisonment on corporations when the amount involved exceeds Rs. One lakh. As a matter of fact, it is not disputed that when the amount involved does not exceed Rs. One lakh, a corporation or a company can be prosecuted under Section 56.

The question which now arises is can the criminal liability created by the statute be made dependent on the sentencing part contained in the same statute. In my view the mandate of the provision is quite clear, that is, the corporations are liable to be prosecuted for offences under FERA as per Section 56 and allowing corporations to escape liability for prosecution on this specious plea based on difficulty in sentencing as per the Section, will be doing violence to the statute. As already noticed principles of strict interpretation of criminal statutes require that the substantive offences

created by the statute which does not exclude corporations, should be enforced strictly and anyone rendering itself liable for action under the said Section, be it a corporation or a natural person, should face prosecution, conviction and sentence. The charging provision contained in Section 56 lays down the ingredients of the offence in very clear and unambiguous terms. There is no scope for any doubt that corporations are subject to provision of Section 56 of FERA. The statutory mandate is loud and clear. Any interpretation which leads to results contrary to the statutory mandate will be in violation of the statute.

No difficulty arises when we come to the stage of sentencing after a finding of guilt if the amount involved does not exceed Rs. one lakh. This difficulty arises only in cases where amount involved exceeds Rs. One lakh. Here it may be worthwhile to mention that the original FERA of 1947 did not prescribe a mandatory punishment of imprisonment and fine and therefore, such a situation was never faced. The 1973 Act sought to make the penal provision more severe and, therefore, prescribed that in case of high valuation cases punishment by way of imprisonment and fine, both will be necessary. When the statutory intention was to make the graver offences punishable more severely, are we justified in holding that in such a situation the offender totally escapes liability? The law cannot be allowed to result in such absurdity. Such a view in my judgment will neither be just nor fair nor in accordance with the law. By a purely technical process of reasoning Corporations should not be allowed to go scot free. There are several statutes making corporations liable for conviction which prescribe punishment by way of imprisonment as well as fine. An interpretation as suggested on behalf of the appellant will result in corporations escaping liability in all cases. Here we may point out that Section 48 A of the Monopolies and Restrictive Trade Practices Act 1969 specifically makes corporations liable for prosecution while at the same time providing that in case of conviction they will be liable to imprisonment and also fine. In the face of this specific provision will corporations be allowed to escape liability on same reasoning as is being advanced here on behalf of appellants. In my view allowing corporations to escape prosecution for offences under Section 56 FERA for the only reason that corporations cannot be punished with imprisonment even though the punishment by way of fine which is also prescribed under the Section can be levied on them, will be defeating the statutory mandate regarding bringing to book offenders under the FERA. For the view I am taking I find support from the view expressed by the three-Judge Bench in the referring order in this case which is reported as ANZ Grindlays Bank Ltd. and Others vs. Directorate of Enforcement and Others [2004 (6) SCC 531] wherein it is observed:

"..Section 56 of the Act provides for different punishments for commission of different offences. It is true that in an offence of this nature a mandatory punishment has been provided for but offences falling under other part of the said section do not call for mandatory imprisonment. Section 56 of the Act covers both cases where an offender can be punished with imprisonment or fine and a mandatory provision of imprisonment and fine. In the event it is held that a case involving graver offence allegedly committed by a company and consequently, the persons who are in charge of the affairs of the company as also the other persons, cannot be proceeded against, only because the company cannot be sentenced to imprisonment, in our opinion, the same would not only lead to reverse discrimination but also go against the legislative intent. The intention of Parliament is to identify the offender and bring him to book."

"..upon taking recourse to the principle of purposive construction as has been held by a three-Judge Bench of this Court in Balram Kumawat v. Union of India an attempt should be made to make Section 56 of the Act workable. It is possible to read down the provisions of

Section 56 to the effect that when a company is tried for commission of an offence under the Act, a judgment of conviction may be passed against it, but having regard to the fact that it is a juristic person, no punishment of mandatory imprisonment can be imposed."

Another three-Judge Bench of this Court in a judgment in Balram Kumawat vs. Union of India 2003 (7) SCC 628, to which I was a party, observed in the context of principles of statutory interpretation:

"23. Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject-matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Criminal jurisprudence does not say so."

In *M.V. Jawali v. Mahajan Borewell & Co. and Others* [1977 (8) SCC 72] this Court was considering a similar situation as in the present case. Under Section 278 B of the Income Tax Act a company can be prosecuted and punished for offence committed under Section 276-B, sentence of imprisonment is required to be imposed under the provision of the statute and a company being a juristic person cannot be subjected to it. It was held that the apparent anomalous situation can be resolved only by a proper interpretation of the section. The Court observed:

"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."

For the above reasons I reject the argument on behalf of the appellants that Corporations cannot be prosecuted under Section 56 of the FERA for the reason that mandatory punishment of imprisonment cannot be imposed on Corporations. I would like to answer the reference accordingly resulting in the appeal being dismissed. The remaining matters be listed before an appropriate Bench for disposal.