2020 INSC 634

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 715 OF 2020
(ARISING OUT OF SLP (CRIMINAL) NO. 578 OF 2020)

HINDUSTAN UNILEVER LIMITED .....APPELLANT(S)

VERSUS

THE STATE OF MADHYA PRADESH .....RESPONDENT(S)

W I T H

CRIMINAL APPEAL NO. 716 OF 2020
(ARISING OUT OF SLP (CRIMINAL) NO. 806 OF 2020)

J U D G M E N T

HEMANT GUPTA, J.

1. The challenge in the present appeals is to an order passed by the High Court of Madhya Pradesh, Jabalpur on 9.1.2020 whereby the revision filed by Shri Nirmal Sen, appellant/Nominated Officer

(Incharge) of the Hindustan Unilever Limited[1], was allowed, however the matter was remitted back to the trial court to revisit the evidence adduced by both the parties, so far it relates to the appellants, Nirmal Sen and the Company. The operative part of the order reads thus:

> "8. If the company-Hindustan Lever Limited is acquitted of the charges, the said benefit will also directly go to the applicant. In view whereof, this Court finds a glaring and patent defect in the judgment of the trial Court as well as in the judgment of the appellate Court, thus, this Court, in these premises, finds it fit to interfere in the judgment of the trial Court in exercise of the revisional jurisdiction under Section 401(1) of Cr.P.C., hence, this Court is inclined to set aside the conviction and sentence passed against the applicant being a nominated person of the company and remitted back the matter to the trial Court for passing fresh judgment considering the company-Hindustan Lever Limited that had already been arrayed as an accused along with the applicant.
>
> 9. In view of aforesaid discussions, this revision is allowed. The impugned conviction and sentence passed against the applicant is hereby set aside and the matter is remitted back to the trial Court to revisit the evidence adduced by both the parties and also revisit its judgment dated 16/06/2015, so far as it relates with the applicant and company-Hindustan Lever Limited thereafter again pass a separate judgment after providing opportunity of hearing to the applicant as well as the company-Hindustan Lever Limited without getting prejudice with the discussions made by the appellate Court and this Court."

2. Brief facts leading to the present appeals are that a complaint

1 Hereinafter referred to as "Company".

was filed by Shri H.D. Dubey, Inspector, Food and Health, on the basis of a sample taken on 7.2.1989 in respect of Dalda Vanaspati Khajoor Brand Ghee manufactured by the Company, in terms of the provisions of The Prevention of Food Adulteration Act, 1954[2]. The sample of Vanaspati Ghee was taken from the godown of Lipton India Limited which was found to be adulterated as the melting point was found to be 41.8 degree centigrade which is higher than the normal range i.e. as against 31-41 degree centigrade. Initially, the complaint was filed against the Directors of the Company as well as that of Lipton India Limited. However, the said proceedings came to be decided by this Court in a judgment reported as ***R. Banerjee & Ors.*** v. ***H.D. Dubey & Ors.***[3] wherein it was held as under:

> "12. In the result, the appeals are allowed. The order of the learned Magistrate as well as the impugned order of the High Court are set aside. The matters are remanded to the learned trial Magistrate with a direction to inquire into the question whether the nomination forms nominating H. Dayani and Dr Nirmal Sen were received and acknowledged by the Local (Health) Authority competent to receive and acknowledge the same. This question will be considered as a preliminary question and the learned magistrate will record a finding thereon. If he comes to the conclusion that the nomination forms had been acknowledged by the competent Local (Health) Authority he shall drop the proceedings against the Directors of the company, other than the company and the nominated persons. If on the other hand he comes to the conclusion that the prescribed forms had been acknowledged by a person

2 For short, the '1954 Act'
3 (1992) 2 SCC 552

> other than the competent Local (Health) Authority he will proceed against all the persons who are shown as the accused in the complaint i.e. all the Directors including the nominated person and the company. The appeals are allowed accordingly."

3. In terms of the directions of this Court, it appears that the learned trial court passed an order on 6.7.1993 absolving the Directors of the Company and the prosecution was ordered to continue against the appellant Nirmal Sen. The said order is not on record but it appears that no proceedings were continued against the Company inasmuch as it has four accused, namely, Lipton India Limited, Mohd. Saleem, Harish Dayani and Nirmal Sen were arrayed as accused.

4. The Act was then repealed and the Food Safety and Standards Act, 2006[4] came into force on 23.8.2006.

5. The learned trial court vide judgment dated 16.6.2015 convicted the appellant/Nominated Officer under various provisions of the 1954 Act. The learned trial court held as under:

> "58. That on the basis of the above complete evidence analysis, it is certified that on the day of the incident, the accused Dr. Nirmal Sen was a nominee of Hindustan Limited Company and the goods of the said company were given to the palm plantation oil vanaspati from Godown Rathore Clearing and Forwarding Agency, Panagar, Jabalpur, Mohd. Salim. Sale of Vanaspati by Hindustan Liver Limited to the complainant food inspector H.D. Dubey went to purchase there. At the time when the said product was sold, the adulteration was came in light, and according to rule 32(f) of the Act,

4 For short, the '2006 Act'

> the details were not even duly marked, which comes under the category of false impression in print of the packet or pouch.
>
> xx xx xx
>
> 60. Therefore, the accused Dr. Nirmal Sen was found to be guilty under Section 2(1G)(K) r/w Section 32(F)/7(i)/16(A)(i) and Section 2(ia)(m) r/w 7(i)/16(1)/(a)(i) of Food Adulteration Act, 1954 and Food Adulteration and Prevention Act under Section 14 r/w Rule 2(A) r/w Section 7(v)/16(1C).”

6. A complete reading of the order passed by the trial court does not lead to an inference that the Company was represented at any stage during the course of trial. It is to be noted that in the aforementioned judgment, there was no order passed by the learned trial court to convict the appellant-Company of any offence. The appellant Nirmal Sen contested the proceedings and was convicted by the trial court.

7. In an appeal against the said judgment, the learned Additional Sessions Judge held that the prosecution was found to be maintainable against Rathore Clearing and Forwarding Agency and the Company but the same was not mentioned in the impugned judgment and order. The Court held as under:

> “31. ….As per order dated 6.7.1993, the Hindustan Lever Limited also has been held accused, but erroneously, it could not have been mentioned in the impugned judgment and order. As per law, any company is a legal personality and it cannot be undergo imprisonment sentence. The appellant Nirmal Sen being the nominee for the offence of the aforesaid

> company, has been punished. In such situation, the appellant does not seem to be entitled for get any benefit only on the mere technical grounds."

8. The learned counsel for the appellant placed reliance on the judgment of this Court reported as ***Nemi Chand*** v. ***State of Rajasthan***[5] before the learned Additional Sessions Judge, in support of the argument that pursuant to the repeal of the Act, only punishment of fine has been contemplated under the 2006 Act. Thus, since the provisions of the 2006 Act are beneficial to the accused, the accused is entitled to such benefits provided by the 2006 Act. It was found that the decision in ***Nemi Chand*** has been passed in exercise of the jurisdiction conferred on the constitutional courts, but the First Appellate Court does not have any such specific constitutional power. The Court rejected the applicability of the 2006 Act as the punishments imposed under the repealed Act have been saved by Section 97 of the 2006 Act. The Court held as under:

> "39. There is no doubt in it that as a result of amendment made by the post facto laws, if the sentence given for any offence is lessened or rejected then the accused is entitled to get benefit of it under Article 20 of the Constitution of India. But is also mentionable that the accused has been prosecuted and sentenced under the "Act" of 1954 in the matter under consideration and in place of it, the Food Safety and Standard Act, 2006 has been implemented since 24.08.2006. By section 97 (1) of this new Act, the Act of 1954 has been repealed but it also has been provided that action could be kept continued under the

5 (2018) 17 SCC 448

> repealed Act and any such penalty, confiscation or punishment could be charged like it that as if this Act be not passed.
>
> 40. Thus, with regard to the offence occurred before the date of implementation of the new Act, the provisions of the "Act" of 1954 have applicability and it cannot be held the punishment has been lessened by amending in the offence under Section 16 of the old Act by the new Act. It seems from the records that the case has remained pending for several years before the Ld. Trial Court but several Stays submitted by the accused persons are also responsible for this delay and on this ground, they are not entitled for any sympathy. Keeping in view to the gravity of the offence, the sentence awarded to the appellant Nirmal Sen by the Ld. Subordinate Court in the case seems in accordance with law and of appropriate and no need to interfere in it does not seem."

9. With the aforesaid discussion, the learned Additional Sessions Judge affirmed the conviction of the appellant/Nominated Officer but the conviction of the accused Harish Dayani and Mohd. Saleem was set aside and they were acquitted.

10. The High Court in its order noticed that if the Company is acquitted of the charges, the said benefit will also directly go to the appellant/Nominated Officer. A glaring and patent defect in the judgment of the trial court as well as in the judgment of the appellate court was observed by the High Court. Thus, the conviction and sentence passed against the appellant, being a nominated person of the Company, was set aside and the matter was remitted back to the trial Court for passing fresh judgment.

11. Before this Court, two-fold arguments were raised by the learned counsels for the appellants. Dr. Abhishek Manu Singhvi, learned senior counsel appearing on behalf of the appellant/Nominated Officer argued that the appellant was charged for the violation of Section 2(ia)(m) read with Section 7(i) of the Act. Such violation attracted a sentence of not less than six months and up to 3 years and a fine of Rs.1,000/- under Section 16(1)(a)(i), whereas under the 2006 Act, the punishment of such adulteration which is related to only higher melting point is fine of Rs.5 lakhs and Rs.1 lakh under Sections 3(1)(zx) and 3(1)(i) respectively. The reliance is placed upon judgments of this Court in ***T. Barai*** v. ***Henry Ah Hoe & Anr.***[6], ***Nemi Chand*** and ***Trilok Chand*** v. ***State of Himachal Pradesh***[7].

12. Mr. Siddharth Luthra, learned senior counsel for the appellant-Company raised an argument that the Company was not convicted by the trial court. Therefore, the High Court in revision could not have passed an order of retrial, more so when the Company was not given any notice of being heard. Since there was no order of conviction by the trial court, as also no opportunity of hearing was given, such order is in contravention of sub-section (2) of Section 401 of the Code of Criminal Procedure,

---

6 (1983) 1 SCC 177

7 Criminal Appeal No. 1831 of 2010 decided on 1.10.2019

1973[8]. Section 401 (2) of the Code reads thus:

> "401(2). No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence."

13. We do not find any merit in the arguments raised by Dr. Singhvi with respect to the punishment provided under the 2006 Act. The judgment of this Court in ***T. Barai*** is consequent to amendment in the Act when Section 16A was inserted by the Parliament. Similarly, the judgment in ***Nemi Chand*** was a judgment arising out of the amendment in the Act only. The benefit of amendments in the Act, has been rightly granted to the accused in an appeal arising out of the proceedings under the Act. But in the present case, the Act has been repealed by Section 97 of the 2006 Act, however, the punishments imposed under the Act have been protected. Section 97 of the 2006 Act, which came into force on 5.8.2011, is as follows:

> "97. Repeal and savings.—(1) With effect from such date* as the Central Government may appoint in this behalf, the enactment and orders specified in the Second Schedule shall stand repealed:
>
> Provided that such repeal shall not affect:—
>
> (i) the previous operations of the enactment and orders under repeal or anything duly done or suffered thereunder; or
>
> (ii) any right, privilege, obligation or liability acquired,

8 For short, the 'Code'

accrued or incurred under any of the enactment or orders under repeal; or

(iii) any penalty, forfeiture or punishment incurred in respect of any offences committed against the enactment and orders under repeal; or

(iv) any investigation or remedy in respect of any such penalty, forfeiture or punishment,

and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed:

(2) If there is any other law for the time being in force in any State, corresponding to this Act, the same shall upon the commencement of this Act, stand repealed and in such case, the provisions of Section 6 of the General Clauses Act, 1897 (10 of 1897) shall apply as if such provisions of the State law had been repealed.

(3) Notwithstanding the repeal of the aforesaid enactment and orders, the licences issued under any such enactment or order, which are in force on the date of commencement of this Act, shall continue to be in force till the date of their expiry for all purposes, as if they had been issued under the provisions of this Act or the rules or regulations made thereunder.

(4) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act or orders after the expiry of a period of three years from the date of the commencement of this Act." *(Emphasis Supplied)*

14. Section 6 of the General Clauses Act, 1897 provides the effect of repeal as under:

"Where this Act or any Central Act or Regulation made after the commencement of this act repeals any

> enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.....
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act or Regulation had not been passed."

15. In terms of Section 6 of the General Clauses Act, 1897, unless different intention appears, the repeal of a statute does not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act or Regulation had not been passed. But in the 2006 Act, the repeal and saving clause contained in Section 97 (1)(iii) and (iv) specifically provides that repeal of the Act shall not affect any investigation or remedy in respect of any such penalty, forfeiture or punishment and the punishment may be imposed, "*as if the 2006 Act had not been passed".* The question as to whether penalty or prosecution can continue or be initiated under the repealed provisions has been examined by this Court in ***State of Punjab*** v.

Mohar Singh[9]*,* wherein this Court examined Section 6 of the General Clauses Act which is on lines of Section 38(2) of the Interpretation Act of England. It was held as under:

> "6. Under the law of England, as it stood prior to the Interpretation Act of 1889, the effect of repealing a statute was said to be to obliterate it as completely from the records of Parliament as if it had never been passed, except for the purpose of those actions, which were commenced, prosecuted and concluded while it was an existing law [Vide *Craies on Statute Law*, 5th edn, p. 323] . A repeal therefore without any saving clause would destroy any proceeding whether not yet begun or whether pending at the time of the enactment of the Repealing Act and not already prosecuted to a final judgment so as to create a vested right [Vide *Crawford on Statutory Construction*, p. 599-600w] . To obviate such results a practice came into existence in England to insert a saving clause in the repealing statute with a view to preserve rights and liabilities already accrued or incurred under the repealed enactment. Later on, to dispense with the necessity of having to insert a saving clause on each occasion, Section 38(2) was inserted in the Interpretation Act of 1889 which provides that a repeal, unless the contrary intention appears, does not affect the previous operation of the repealed enactment or anything duly done or suffered under it and any investigation, legal proceeding or remedy may be instituted, continued or enforced in respect of any right, liability and penalty under the repealed Act as if the Repealing Act had not been passed. Section 6 of the General Clauses Act, as is well known, is on the same lines as Section 38(2) of the Interpretation Act of England.
>
> 9. The offence committed by the respondent consisted in filing a false claim. The claim was filed in accordance with the provision of Section 4 of the Ordinance and under Section 7 of the Ordinance, any false information in regard to a claim was a punishable offence. The High Court is certainly right in holding that Section 11 of the

9 AIR 1955 SC 84

Act does not make the claim filed under the Ordinance a claim under the Act so as to attract the operation of Section 7. Section 11 of the Act is in the following terms:

> "The East Punjab Refugees (Registration of Land Claims) Ordinance 7 of 1948 is hereby repealed and any rules made, notifications issued, anything done, any action taken in exercise of the powers conferred by or under the said Ordinance shall be deemed to have been made, issued, done or taken in exercise of the powers conferred by, or under this Act as if this Act had come into force on 3rd day of March, 1948".

.....The truth or falsity of the claim has to be investigated in the usual way and if it is found that the information given by the claimant is false, he can certainly be punished in the manner laid down in Sections 7 and 8 of the Act. If we are to hold that the penal provisions contained in the Act cannot be attracted in case of a claim filed under the Ordinance, the results will be anomalous and even if on the strength of a false claim a refugee has succeeded in getting an allotment in his favour, such allotment could not be cancelled under Section 8 of the Act. We think that the provisions of Sections 47 and 8 make it apparent that it was not the intention of the Legislature that the rights and liabilities in respect of claims filed under the Ordinance shall be extinguished on the passing of the Act, and this is sufficient for holding that the present case would attract the operation of Section 6 of the General Clauses Act. It may be pointed out that Section 11 of the Act is somewhat clumsily worded and it does not make use of expressions which are generally used in saving clauses appended to repealing statutes; but as has been said above the point for our consideration is whether the Act evinces an intention which is inconsistent with the continuance of rights and liabilities accrued or incurred under the Ordinance and in our opinion this question has to be answered in the negative."

16. In another judgment reported as ***Tiwari Kanhaiyalal & Ors.*** v. ***Commissioner of Income Tax, Delhi***[10], the assessments were completed under the Income Tax Act, 1922 after the Income Tax Act, 1961 came into force. There was search on the premises of the assessee. The revised returns were filed after the Income Tax Act, 1961 came into force. The penalty proceedings were initiated and it was levied under the 1961 Act. Later, the complaints were filed alleging commission of the offences under Section 277 of 1961 Act. Another set of complaints were filed under the Income Tax Act, 1922. This Court held that the complaints under the 1922 Act remains unaffected. It was held as under:

> "7. It is advisable to discuss and dispose of a new point which arose during the hearing of these appeals. Sub-section (1) of Section 297 of the 1961 Act repealed the 1922 Act including Section 52. In sub-section (2) no saving seems to have been provided for the launching of the prosecution under the repealed Section 52 of the 1922 Act. It does not seem correct to take recourse to clause (h) of Section 297(2) to make the offences come under Section 277 of the 1961 Act as was endeavoured to be done by the respondent in the first 12 complaint petitions. But then from no clause under sub-section (2) a different intention appears in this regard from what has been said in Section 6 of the General Clauses Act. On the facts alleged the criminal liability incurred under Section 52 of the 1922 Act remains unaffected under clause (c) of Section 6 of the General Clauses Act…."

17. Thus, in view of Section 97 of the 2006 Act, as also under Section 6 of the General Clauses Act, 1897, the proceedings would

10 (1975) 4 SCC 101

continue under the Act. No benefit can be taken under the 2006 Act as the prosecution and punishment under the Act is protected.

18. The judgment of this Court in ***Trilok Chand*** is the only judgment which has given benefit of the 2006 Act and the sentence was imposed by imposing a fine of Rs.5,000/-. The attention of the Court was not drawn to Section 97 of the 2006 Act, which protects the punishments given under the repealed Act. Therefore, the order in ***Trilok Chand*** is on its own facts.

19. However, we find merit in the argument of Mr. Luthra that the order of remand by the High Court to the trial court against the Company cannot be sustained for the reason that such an order was passed without giving an opportunity of hearing, as contemplated under Section 401(2) of the Code. The question thus now narrows down as to whether the course adopted by the High Court to remand the matter to the trial court after more than 30 years to cure the defect which goes to the root of the trial, though permissible in law, is justified.

20. A three-Judge Bench of this Court in ***Aneeta Hada*** v. ***Godfather Travels & Tours Private Limited***[11] considered the question of conviction of the Directors in the absence of the Company in proceedings under Section 138 of the Negotiable Instruments Act, 1881[12] as also in the proceedings under Information Technology

11 (2012) 5 SCC 661
12 For short, the 'NI Act'

Act, 2000. This Court held that Section 141 of the NI Act dealing with offences by companies contemplates that 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. This Court, considering the said provision, held as under:

> "38. From the aforesaid pronouncements, the principle that can be culled out is that it is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term "deemed" has to be read in its context and further, the fullest logical purpose and import are to be understood. It is because in modern legislation, the term "deemed" has been used for manifold purposes. The object of the legislature has to be kept in mind.
>
> xx xx xx
>
> 56. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons, whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned counsel for the respondents have vehemently urged that the use of the term "as well as" in the section is of immense significance and, in its

tentacle, it brings in the company as well as the Director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the Directors or other officers is tenable even if the company is not arraigned as an accused. The words "as well as" have to be understood in the context.

xx xx xx

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.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. ……."

21. Section 17 of the Act reads as under:

"**17. Offences by companies**—(1) Where an offence under this Act has been committed by a company—

(*a*) (*i*) the person, if any, who has been nominated under sub-section (2) to be in charge of, and responsible to, the company for the conduct of the business of the company (hereinafter in this section referred to as the person responsible), or

(*ii*) where no person has been so nominated, 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; *and*

(b) 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 and that he exercised all due diligence to prevent the commission of such offence.

(2) **** *****"

22. Clause (a) of Sub-Section (1) of Section 17 of the Act makes the person nominated to be in charge of and responsible to the company for the conduct of business and the company shall be guilty of the offences under clause (b) of Sub-Section (1) of Section 17 of the Act. Therefore, there is no material distinction between Section 141 of the NI Act and Section 17 of the Act which makes the Company as well as the Nominated Person to be held guilty of the offences and/or liable to be proceeded and punished accordingly. Clauses (a) and (b) are not in the alternative but conjoint. Therefore, in the absence of the Company, the Nominated Person cannot be convicted or vice versa. Since the Company was not convicted by the trial court, we find that the finding of the High Court to revisit the judgment will be unfair to

the appellant/Nominated Person who has been facing trial for more than last 30 years. Therefore, the order of remand to the trial court to fill up the lacuna is not a fair option exercised by the High Court as the failure of the trial court to convict the Company renders the entire conviction of the Nominated Person as unsustainable.

23. In view of the above, the appeals are allowed and the order passed by the High Court is set aside. Resultantly the complaint is dismissed.

.....J.
(L. NAGESWARA RAO)

.....J.
(HEMANT GUPTA)

.....J.
(AJAY RASTOGI)

NEW DELHI;
NOVEMBER 5, 2020.