

**PROSECUTION OF A PARTNER WITHOUT IMPLEADING THE FIRM
AS A CO-ACCUSED**

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In the recent Judgment in Criminal Revision No.434 of 1995 decided on 11.02.2004 and reported in Gopal Chandra Paul Vs State of Assam, (2004) 3 GLR 64, 2004 (2) GLT 39 it has been held that the conviction and sentence of a partner of a firm in the absence of a complaint against the firm is wholly illegal and bad in law. Two other cases namely Hanuman Prasad Lohia Vs State of Assam 1973 ALR 169 decided on 19.06.1973 and State of Assam Vs Paban Kumar Agarwalla (1990) 2 GLR 345 decided on 06.02.1990 were also referred to in support of the above holding. In view of certain development in law since 19.06.1973 when 1973 ALR 169 was decided and even recently the holdings in these Judgments need to be examined further. This essay attempts such an examination.

1. FACTS

Sri Gopal Chandra Paul and one Sanjay Paul were prosecuted for an offence under section 7/16 of the Prevention of Food Adulteration Act 1954 (PFA Act hereinafter) showing them respectively as a partner and the proprietor of a firm named M/S Sanjay Paul. The trial Court convicted and sentenced both the accused. Sanjay Paul was acquitted in appeal. The remaining accused Gopal Chandra Paul succeeded in freeing himself in the Revision on the sole ground that since the firm M/s Sanjay Paul has not been shown as an accused he alone being a partner of the firm cannot in law be prosecuted and convicted.

In Hanuman Prasad Lohia (Supra) Hanuman Prasad was convicted as a partner of the firm, M/s Nagarmal Nandkishore without the firm being made an accused. Relying on A.I.R 1971 Mad 40 the Criminal Revision was decided in favour of Hanuman Prasad Lohia.

Unlike Gopal Chandra Paul (Supra) and Hanuman Peasad Lohia (Supra), Paban Kumar Agarwalla (Supra) is a judgment in a Criminal Appeal by the State against an acquittal of the two accused there on the ground that the firm was not impleaded as an accused. The

materials in the case show that the two accused there were a proprietor of a proprietorial firm and the vendor. The shop is named and styled as M/s Sajan Kumar Paban Kumar which misled the trial court. The Judgment could have been rested on the materials and the law that Hanuman Prasad Lohia (Supra) is not applicable. But in para 11 of the Judgment at page 349 of the Law Report the interpretation of Section 17 of the PFA Act that found favour with the court in the cases of Hanuman Prasad Lohia (Supra) and Gopal Chandra Paul (Supra) was clearly emphasized.

2. THE LAW

The criminal law is of modern origin and the most modern concept within criminal law is the concept of corporate criminal liability. In India following this concept many modern statutes contain provisions for prosecution of Companies which include firms. To name a few, Section 10 of the Essential Commodities Act 1955, Section 34 of the Drugs and Cosmetic Act 1940, Section 278 B of the Income Tax Act 1961, Section 38 of the Narcotic Drugs and Psychotropic Substance Act 1985, Section 141 of the Negotiable Instruments Act 1981 and Section 149 of the Electricity Act, 2003 contain provisions similar to the provisions of Section 17 of the PFA Act which reads thus (only material portions quoted) :-

“17 offences by Companies- (1)where an offence under this Act has been committed by a Company -

(a) (i) the person, if any, 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 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
:.....

(2)

(3).....

(4) Notwithstanding anything contained in the foregoing sub-sections, 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 not being a person nominated under sub-section (2), 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 purpose of this Section

- (a) "Company" means any body corporate and includes a firm or other association of individuals
- (b) "Director" in relation to a firm means a partner in the firm; and
- (c) "manager" in relation to a company in relation to a company engaged in hotel industry, includes the person in charge of the catering department of any hotel run by it".

Section 10 of the Essential Commodities Act 1955 contains two sub-sections. Sub-section (1) reads thus :- "(1) if the person contravening an Order made under Section 3 is a Company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the Company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly :"

The proviso (not quoted) immediately following is the same as in Section 17 of the PFA Act with the minor difference that in stead of the word "offence" in proviso of Section 17 of the PFA Act the word "contravention" has been used and the word "committed" has been replaced by the word "took place".

Sub-section (2) of Section 10 of the Essential Commodities Act 1955 is a replica of the sub-section (4) of Section 17 of the PFA Act quoted above with the consequential changes such as the group of words in sub-section (4) of Section 17 of the PFA Act "the foregoing sub-section" becomes "sub-section (1)" and the group of words "not being a person nominated under sub-section (2)" were deleted in sub-section (2) of Section 10 of the Essential Commodities Act 1955. Secondly the Sub-clause (c) in the Explanation to Section 17 of the PFA Act has been

deleted from the Explanation to Section 10 of the Essential Commodities Act 1955.

It may be stated here that only by the Amending Act 34 of 1976 effective from 01.04.1976 Section 17 of the PFA Act has been expanded into four sub-sections and three definitions in the Explanation. In the original PFA Act effective from 01.06.1955 the format and phraseology of section 17 is with the minor changes consequent on difference in the subject matter of the statute is replicated in all other statutes providing for corporate criminal prosecution as in section 17 of the PFA Act.

An analysis of this provision for corporate criminal prosecution like the provision of section 17 of the PFA Act in various statutes yields the following result. In a prosecution against a company the real accused is the company and there are two other accused created through the legal fiction enacted by such provisions. Thus including the Company there may be three persons arrayed as accused in such a prosecution. The Company, the person in charge and the officer of the company described in sub-section (4) of Section 17 and in sub-section (2) of all other Statutes can all be prosecuted. But the provision seems to be silent as to whether all three of them should be prosecuted jointly, severally or individually. Therefore the need for proper analysis and interpretation of such a provision arises. Unfortunately neither in Hanuman Prasad Lohia (Supra) nor in Gopal Chandra Paul (Supra) any submission on behalf of the respondent has been recorded. In Paban Kumar Agarwalla (Supra) this point did not really arise for decision, therefore the public prosecutor simply argued that Hanuman Prasad Lohia ((Supra) was misapplied by the trial Court.

3. THE INTERPRETATION OF THE LAW

At the outset it is necessary to state that the different statutes providing for corporate criminal prosecution are not statutes in pari materia as the subject matter of the various legislations are varied. Evenso, the principle of interpretation that statutes in pari materia should be construed similarly has been extended to provisions in pari materia contained in different statutes which themselves may not be in pari materia. Most recent example of this principle is the unanimous decision of the Three Judge Bench of the Supreme Court dated 28.04.2004 in Kusum Ingots & Alloys Ltd. Vs Union of India and Another (2004) 6 SCC 254 where despite the fact that the Code of Civil Procedure and the constitution of India not being statutes in pari-materia and the further fact that “in view of section 141 of the Code of Civil Procedure of

provisions thereof would not apply to Writ proceedings, the phraseology used in Section 20(c) of the Code of Civil Procedure and Clause (2) of Article 226 being in pari materia, the decisions of this Court rendered on interpretation of Section 20(c) CPC shall apply to the writ proceedings also”.

Section 17 of the PFA Act has several aspects. Although the Supreme Court had to consider the provisions of this section in nine cases as far as reported cases go over a period of time ending with Nalin Thakur and others Vs State of Maharashtra 2004(1) FAC 68 decided on the 29th of January 2004 the particular aspect of Section 17 of the PFA Act on which the decision of Gopal Chandra Paul ((Supra) rests did not fall for consideration in any of those nine cases. However there are two decisions of the Supreme Court on Section 10 of the Essential Commodities Act 1955 and one on section 141 of the Negotiable Instruments Act 1881- both are provisions in pari materia with section 17 of the PFA Act – where this particular aspect of the provisions fell for consideration. These three cases are

- (1) Sheoratan Agarwal and another Vs State of Madhya Pradesh AIR 1984 S.C. 1824: (1984)4 SCC 352 decided on 12.09.1984.
- (2) Anil Hada Vs Indian Acrylic Ltd. A.I.R. 2000 S.C. 145 decided on 26.11.1999.
- (3) State of Punjab Vs Kasturi Lal and others A.I.R. 2004 S.C. 4087 decided on 28.07.2004

Cases at (1) & (3) deal with section 10 of the Essential Commodities Act 1955 and the case at (2) deal with Section 141 of the Negotiable Instruments Act 1881.

In Sheoratan (Supra) two accused persons namely Sheoratan Agarwal and Raghunandanlal Chaturvedi were respectively the Managing Director and Production Manager of M/s 5-S Ltd. a public limited company. They were prosecuted for contravention of the provisions of certain control orders issued under Section 3 of the Essential Commodities Act 1955 without making the Company an accused in the complaint. On this ground the two accused reached the High Court via Section 397/482 of the Code of Criminal Procedure. Having suffered a rebuff there Sheoratan and Raghunandanlal arrived in the Supreme Court by obtaining Special Leave to appeal under Article 136 of the Constitution of India and the point urged was that without the company as an accused in the complaint the Managing Director and the Production Manager could not be prosecuted in law.

The Supreme Court analysed a previous decision of the Court namely State of Madras Vs C.V. Parekh A.I.R 1971 SC 447, analysed Section 10 of the Essential Commodities Act 1955 and spoke thus on the matter :

“ The section appears to our mind to be plain enough. If the contravention of the Order made under Section 3 is by a company, the persons who may be held guilty and punished are (1) the company itself, (2) every person who..... conduct of the business of the company whom for short we shall describe as the person-in-charge of the company, and (3) any director, manager offence has been committed, whom for short we shall describe as an officer of the company. Any one or more or all of them may be prosecuted and punished. The Company alone may be prosecuted. The person-in-charge only may be prosecuted. The conniving officer may individually be prosecuted. One, some or all may be prosecuted. There is no statutory compulsion that the person-in-charge or an officer of the company may not be prosecuted unless he be ranged along side the company itself.”

It was also further pointed out by the Supreme Court that *“what was sought to be emphasized was that there should be a finding that the contravention was by the company before the accused could be convicted and not that the company itself should have been prosecuted along with the accused.” (Underlining supplied)*

There cannot be a clearer statement of the law under section 10 of the Essential Commodities Act 1955 on the question of maintainability of the prosecution against other specified persons without the company as the accused ranged alongside them.

In Kasturi Lal (Supra) Kasturi Lal and other Directors of the company M/s Sangrur Vanaspati Mills Ltd. and Prem Mohan Tiwari its Production Manager were prosecuted without making the company an accused in the case.

In para 9 of the Judgement can be read the law quoted above from Sheoratan (Supra). In para 8 the Supreme Court concluded thus :-

“The above position was highlighted in Sheoratan Agarwal and another Vs State of Madhya Pradesh (1984 4 SCC 352)

In Anil Hada (Supra), a case under the Negotiable Instruments Act 1881 the same question arose in relation to Section 141 thereof. The phraseology of the section is same as in Section 10 of the Essential Commodities Act 1955 as also of Section 17 of the PFA Act with minor differences consequential upon difference in the subject matter of the statute. In that case the Company M/s Rama Fibres Ltd. was an accused alongside the Directors of the company Anil Hada and 10 others. But the company could not be proceeded against because of pendency of winding up proceedings in Court. Anil Hada applied to the Magistrate to drop the proceedings against himself as well on the ground that in the absence of the company as the accused he cannot be prosecuted. He failed in the trial Court as well as in the High Court and reached the Supreme Court via Article 136 of the Constitution. The supreme Court considered A.I.R. 1971 S.C. 447 as well as Sheoratan (Supra), analysed Section 141 as was done in Sheoratan, held the provision of Section 10 of the Essential Commodities Act 1955 to be very much analogous to Section 141 of the Negotiable Instruments Act and concluded thus :- “We, therefore, hold that even if the prosecution proceedings against the company were not taken or could not be continued, it is no bar to proceed against the other person falling within the purview of Sub-section (1) and (2) of section 141 of the Act.

It may be mentioned that in Anil Hada (Supra) an argument based on UP Pollution Control Board Vs M/s Modi Distillery A.I.R. 1988 S.C. 1128 was rejected by holding that the observations in that judgment on which the argument was sought to be founded “are obiter and that apart, the law on the point was specifically discussed and dealt with in Sheoratan Agarwal, (AIR 1984 SC 1824) (Supra) with which we are in respectful agreement”.

Incidentally in M/s Modi Distillery (Supra) same point fell for consideration in relation to Section 47 of the Water (Prevention and Control of Pollution) Act 1974 which is identical to Section 141 of the Negotiable Instruments Act 1881.

Considered in the light of law enunciated in the above cases by the Supreme Court in relation to Section 10 of the Essential

Commodities Act 1955 and Section 141 of the Negotiable Instruments Act 1881 which are provisions in pari materia with the provisions of section 17 of the PFA Act there can be no doubt that Hanuman Prasad Lohia (Supra), Paban Kumar Agarwala (Supra) and Gopal Chandra Paul (Supra) do not lay down correct law.

4. A RECENT DEVELOPMENT

The matter may be considered from another angle. On 09.09.2004 the Judgment in Criminal Revision No. 593 of 1995 as yet unreported- M/s Brooke Bond Lipton India Ltd. Vs The State of Assam was delivered by a Division Bench of the High Court. It was held in the Judgment that a Company cannot be prosecuted under the PFA Act because the Company being a juristic person cannot be sent to jail. Hanuman Prasad Lohia, Paban Kumar Agarwalla and Gopal Chandra Paul (Supra) say that without the company as an accused alongside they cannot be prosecuted. The resultant judicial conundrum in effect destroys the entire edifice, of the provisions for company prosecution in several statutes dealing with social welfare, economy, environment and health of the community, built over the years by the Parliament by reducing these provisions to a dead letter.

5. THE CONCLUSION

In conclusion one can only hope that a Full Bench will in due course of time consider and resolve the conundrum indicated above.