

Before:—J. S. Sekhon, J.

THE INDIAN HUME PIPE CO. LTD., CHANDIGARH AND  
OTHERS,—Petitioners.

versus

THE ASSISTANT COLLECTOR, CENTRAL EXCISE,  
CHANDIGARH AND ANOTHER,—Respondents.

Criminal Misc. No. 11091-M of 1990.

11th October, 1991.

*Central Excise and Salt Act, 1944—Ss. 9 & 9-AA—Constitution of India, 1950—Art. 20—Evasion of Central Excise Duty—Company depicting lesser production than actual—Deflation of freight charges by preparing duplicate bills—Non-inclusion of handling charges in return—Deemed liability—S. 9AA dealing with such liability—Connivance of Managing Director has to be presumed ex-facie—S. 9AA, however, inserted on 27th December, 1985—Offence committed during period 1982 to 1987—Order of trial Court pertaining to incidents prior to 27th December, 1985 liable to be quashed.*

*Held*, that the provisions of sub-section (2) of Section 9AA of the Central Excise and Salt Act, 1944 make the Director, Manager, Secretary or other officers of the company liable if the offence has been committed with the consent or connivance of or due to the neglect on the part of such person. In the present case, the evasion of the central excise duty by depicting lesser production than the actual by preparing duplicate bills by deflating freight charges and by not including handling charges in the return being for the benefit of the company itself, the connivance of their Managing Director shall have to be presumed *ex-facie*. Thus on the basis of deemed liability, the Chairman or the Manager of the Company would be liable for their acts or omissions after 27th December, 1985 as under Art. 20 of the Constitution of India, a person can only commit an offence against the existence provisions of law. Thus, under these circumstances, the order of the trial Court pertaining to the incidents prior to 27th of December, 1985 shall have to be quashed with the direction that the trial Court shall frame charge *qua* the allegations pertaining to the period after 27th of December, 1985.

(Paras 11 & 12)

*PETITION under section 482 of the Code of Criminal Procedure, praying that :—*

- (i) That rule be issued;
- (ii) That the record and proceedings in the criminal complaint dated 28th February, 1989 be called for from the court of Additional Chief Judicial Magistrate, Chandigarh, and after examining the legality and validity of the same, the said proceedings be quashed.

(iii) *Pending the hearing and final disposal of this petition, further proceedings before the trial court in criminal case of 1989 pending before the learned Additional Chief Judicial Magistrate, Chandigarh, be stayed;*

(iv) *That such further and other relief as the facts and circumstances of the case require, be granted.*

H. L. Sibal, Senior Advocate, R. K. Handa & Miss Kiran Randhawa, Advocates with him, for the Petitioner.

H. S. Brar, Sr. Central Government Standing Counsel on 25th January, 1991, when the arguments were concluded, for the Respondents.

### JUDGMENT

*J. S. Sekhon, J.*

The petitioners through this petition filed under section 482 of the Code of Criminal Procedure, 1973 seek the quashment of the complaint Annexure P1 for offence under section 9 of the Central Excise and Salt Act, 1944 pending in the court of Chief Judicial Magistrate, Chandigarh.

(2) The brief resume of facts figuring in the complaint and the Annexures mentioned therein is that M/s Indian Hume Pipe Company Limited is situated in Industrial Area-I, Chandigarh. Shri Bahubali Gulabchand accused-petitioner is the Chairman and Managing Director of the Company while Shri A. K. Johri accused-petitioner is its Manager. The Company is engaged in the manufacture of R.C.C. Pipes and Collers falling under new Chapter sub-heading No. 6807-00 of the Central Excise Tariff Act, 1985. The duty of Central Excise on the manufacture of R.C.C. Pipes and Collers was payable under the Central Excise Rules. Accused No. 1, 2, and 3 are responsible for the conduct of this business of the firm and thus are responsible for the payment of central excise duty on its product. The duty is assessed on adveloram rate. The goods are mainly supplied to the Government Departments to whom the same are offered for inspection before despatch. The Auditors of the Central Excise Department observed that the Company has been evading central excise duty to the tune of over Rs. 4,09,482.08 paise from April, 1982 to January, 1987 as per details given in Annexures A to D, by suppressing their production, charging higher rates from buyers than those intimated to the Central Excise Department. claiming more deductions on account of freight

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than the actual and the open market rates and by not including the handling charges in the assessable value as detailed hereunder :—

- (a) "That the quantity of R.C.C. Pipes and Collers offered for inspection was much more than that shown in stock as per R.G.I. register. The inspection notes detailed in Annexure A are duly signed by the Inspecting Officer and copy thereof received by the accused. The accused No. 2 and 3 did not account for their production properly and the suppressed production was removed clandestinely because the goods are first entered into R.G.I. register after curing and then offered for inspection as confessed by the accused No. 3,—vide letter dated 9th February, 1987.
- (b) That the accused Nos. 2 and 3 had been raising two different bills for the same goods (consignee). The bills submitted to the Central Excise Department were of less value than those filed with the buyers thereby evading Central excise duty as per details given in Annexure B.
- (c) That the rates approved by the Controller of Stores, Punjab, Chandigarh were F.O.R. Destination and the freight was to be deducted therefrom to arrive at the assessable value under section 4 of the Central Excise Salt Act, 1944 for the purpose of assessing the duty. The accused Nos. 2 and 3 had been claiming deductions of freight from the assessable value at higher rates than those prevailing in the open market, as is seen from the quotations given by the transporter of such goods on 4th February, 1987.
- (d) That the accused Nos. 2 and 3, as per their agreement entered into with a transporter, had been claiming handling charges from the transporters but did not include that amount in the assessable value."

(3) Thus the complainant maintained that the accused had contravened the provisions of Rule 9(1), 52-A, 53, 173-F, 173-G read with Rule 226 of the Central Excise Rules, 1944 and evaded the payment of central excise duty to the tune of Rs. 4,09,482.08 paises during the period from April, 1982 to January, 1987.

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(4) In this petition for quashment of the proceedings in the above referred complaint, it is maintained that under Chapter XVII of the Code of Criminal Procedure, there has to be separate charge for separate offences and at the most, three offences of the same kind committed within one Calendar year may be tried together. But in the instant case, the incident of covering a span of five years has been made the subject matter of single complaint and thus this complaint is not maintainable as it suffers from this inherent legal infirmity. It is also averred that the Chairman and the local Manager of the Company would only be liable if specific overt acts are attributed to them or in the alternative, if there is evidence of their collusion or participation in the crime or by way of failure to do certain acts which the law enjoins upon the accused. Reliance in this regard has been placed on the observations of the Supreme Court in *Smt. Nagawwa v. Veeranna Shivalingappa Nonjalgi and others* (1). It is further averred that the Chairman of the Company at Bombay is over all incharge of the Company and had nothing to do with the alleged offences committed at Chandigarh while Mr. Jhori was not the Manager of the Chandigarh unit of the company during the relevant period as he took over on 1st of February, 1987. It is also maintained that petitioners No. 2 and 3 stand charged under section 9 of the Act as if they have personally participated in the commission of the offence under section 9 of the Act and the provisions of Section 9-AA having been inserted in the Act with effect from 27th of December, 1985,—*vide* Act No. 79 of 1985 would not apply to the petitioners to the alleged incidents which took place prior thereto and the prosecution pertaining to the incidents which took place after insertion of Section 9-AA, on the basis of deemed liability of the Company or its Directors, office-bearers, being incapable of bifurcation from the earlier incidents is not maintainable. It is also maintained that the Indian Hume Pipe Company is a Public Limited Company and had its registered office at Bombay and had fifty-one factories all over India and that the Administrative functions are spread on a tiered system with the management of such unit. The Head of the unit reports to the incharge of the circle and the incharge of the circle submits reports to the Chief Executive Engineer at Bombay. Thus the Board of Directors is only concerned with taking policy decisions and dealing with the Company. It is also maintained that the process of manufacturing of the pipes is complete when these come out of the curing tank and entered in the R.G.I. register and that

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(1) A.I.R. 1976 S.C. 1947.

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the department has wrongly inferred that the petitioners are manufacturing more goods than the one reflected in the R.G.I. register.

(5) In return filed by Shri Mewa Singh, Assistant Collector, Central Excise, Chandigarh, it is maintained that the department is well within its rights to demand central excise duty within a period of five years in all those cases where the party had suppressed production of goods manufactured by it or for any contravention of the provisions of the Central Excise Rules with regard to the payment of the central excise duty. Without any specific denial about Mr. Johri having been posted as Manager in the month of February, 1987 but on the other hand, it is maintained that the Chairman/Managing Director of the Company cannot escape from the responsibility of the evasion of the central excise duty as he is wholly responsible for the omissions and commissions of the management in the course of their appointment as Chairman/Managing Director of the Company. It was also maintained that in any case the liability of the Company, its Chairman-cum-Managing Director and the Manager after coming into force the provisions of Section 9-AA of the Act can be well bifurcated as the incidents resulting in the evasion of excise duty are of specific period. It is further maintained that the merits of the case would be a matter of detailed evidence and cannot be gone into at present stage.

(6) I have heard the learned counsel for the parties besides perusing the record.

(7) There is no dispute *qua* the legal position that the proceedings can be quashed under the provisions of Section 482 of the Code of Criminal Procedure if the allegations made in the complaint or the statements of the witnesses taken at their face value do not make out any case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused or where the allegations made in the complaint are patently absurd and inherently improbable. The Apex Court in *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and others* (supra) had laid down four considerations under which a complaint can be quashed or set-aside. These are:—

- (i) "Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same

taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

- (2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;
- (3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and
- (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like."

(8) The question then arises whether in the present case, all the above referred considerations are available. In this regard, it is note-worthy that the allegations in the complaint Annexure P1 are required to be read in the light of Annexures mentioned therein. The perusal of the notice Annexure P2 given by the Collector to the manufacturing company reveals that the quantity of R.C.C. Pipes and Collers offered for inspection to the buyers was much more than the stock as per entry in R.G.I. register. The details of the inspection report figure in Annexure-A. Keeping in view that only the finished goods are inspected by the buyers, it transpires that there is no force in the contention of Mr. Sibal, the learned Senior counsel for the petitioners that there was no substance in this allegation of the complainant. The other item of charge relates to the factum that the assessee had been raising two different bills for the same goods. The bills submitted to the Department were of less value than those filed with the buyers thereby evading central excise duty. The details of the bills figure in Annexure-B. The third item relates to the allegations that the assessee had been claiming deductions of high freight from the assessable value than those prevailing in the open market or the one approved by the Controller of Stores, Punjab, Chandigarh. The fourth item relates to the conduct of the assessee as per agreement entered into with the transporter for claiming handling charges from the transporter but did not include that amount in the

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assessable value. The above referred charges are of such a nature which will benefit the company as a whole and not the officer in-charge of the local unit. In other words, it can be well said that such like *modus operandi* in evading the payment of central excise duty by the company could not be presumably evolved without the connivance of the Chairman/Managing Director of the Company or a person in-charge and responsible to the company for running its business. Thus under the circumstances of this case, it cannot be said that the contents of the charge do not even apparently relate to the over all responsibility of the Chairman or the Managing Director of the Company.

(9) The question then arises whether the Chairman or the Managing Director of the Company shall be liable for the offences under sections 9(1)(b) and 9(1)(bb) and punishable under section 9(1)(i) of the Act. These provisions read as under :—

“S. 9 *Offences and penalties.*—(1) Whoever commits any of the following offences, namely : —

- (b) evades the payment of any duty payable under this Act;
- (bb) removes any excisable goods in contravention of any of the provisions of this Act or any rule made there-under or in any way concerns himself with such removal;

shall be punishable.—

- (i) in the case of an offence relating to any excisable goods, the duty leviable thereon under this Act exceeds one lakh of rupees, with imprisonment for a term which may extend to seven years and with fine :

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment shall not be for a term of less than six months.

(ii) x x x x x x x x x x x

(10) A bare glance through the above referred provisions leaves no doubt that Section 9 deals with the individual liability of the persons and not with their deemed liability. In order to make the company and its officials liable for evasion of central excise duty, Section 9-AA was inserted by the Legislature with effect from 27th of December, 1985. Section 9-AA reads as under :—

**"S. 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 dilligence 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."

(11) The perusal of the above referred Section leaves no doubt that where an offence under this Act has been committed by a company, every person who at the time the offence was committed was incharge of, and was responsible to, the company for the conduct of its business, as well as the company, shall be deemed to be

guilty of the offence. The Proviso appended to sub-section (1) would show that such a person shall not be liable to punishment 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. Consequently, the Chairman/Managing Director of the company can only escape the liability for the above referred acts or omissions if he proves that the acts are committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. On the other hand, the provisions of sub-section (2) of this Section make the Director, Manager, Secretary or other officers of the company liable if the offence has been committed with the consent or connivance of, or due to the neglect on the part of such person. As already discussed, the evasion of the central excise duty by depicting lesser production than the actual by preparing duplicate bills by deflating freight charges and by not including handling charges in the return being for the benefit of the company itself, the connivance of their Managing Director shall have to be presumed *ex facie*.

(12) However, the contention of Mr. Sibal is well founded that the provisions of Section 9-AA of the Act would be applicable to the misconduct with effect from 27th December, 1985, as under Article 20 of the Constitution of India, a person can only commit an offence against the existent provisions of law. To the similar effect is the definition of offence figuring in clause (n) of Section 2 of the Code of Criminal Procedure, 1973. On Section 3(38) of the General Clauses Act, 1897, the definition of offence is also to the same effect. Thus on the basis of deemed liability, the Chairman or the Manager of the Company would be liable for their acts or omissions after 27th of December, 1985. The perusal of Annexures A and B to the complaint leaves no doubt that the company had indulged in some incriminating acts specifically after 27th of December, 1985 also. Thus under these circumstances, the order of the trial Court pertaining to the incidents prior to 27th of December, 1985 shall have to be quashed with the direction that the trial Court shall frame afresh charge *qua* the allegations pertaining to the period after 27th of December, 1985.

(13) It is not disputed that Mr. A. K. Johri, respondent No. 3, Manager of the Company was posted in the Chandigarh unit on 1st February, 1987 whereas the allegations pertain to the period up to January, 1987. Thus Mr. Johri having not been posted in this

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unit during the relevant period and simply happens to be Manager of the company, cannot be said to be even *ex facie* liable for the above referred offences, even if the entire allegations are taken to be true. Thus the continuation of the criminal proceedings on the basis of the above referred complaint against Mr. A. K. Johri would certainly amount to abuse of the process of the Court.

(14) There is considerable force in the last contention of Mr. Sibal that the trial Court had failed to comply with the provisions of Chapter XVII of the Code of Criminal Procedure *qua* the framing of joint charge for the commission of offences during the span of five years from April, 1982 to January, 1987, as ordinarily, the provisions of Section 218 of the Code provide the framing of separate charge for distinct offences unless the accused otherwise in writing desires to club different charges in order to avoid prejudice to him. While Section 219 of the Code provides of the framing of joint charge for three offences of the same kind committed within a span of one year. The provisions of Section 220 of the Code further provide the framing of one joint charge and holding one trial in those cases where series of acts are so connected as to form the same transaction to make out more offences than one committed by the same person. But the complaint or the proceedings resulting therefrom cannot be quashed on this score alone especially when the provisions of Section 216 of the Code empowers the Court for altering or adding to any charge at any time before the judgment is pronounced subject to the qualification that each such added or altered charge shall be read and explained to the accused etc. The trial Court shall, however, keep in view the provisions of Chapter XVII of the Code while framing fresh charges against Bahubali Gulabchand accused.

(15) For the reasons recorded above, the complaint as well as further proceedings resulting therefrom are quashed in the case of Mr. A. K. Johri while in the case of the company and Bahubali Gulabchand, the complaint and the charge relating to the incidents to the period prior to the insertion of Section 9-AA of the Act i.e. prior to 27th of December, 1985 are quashed by partly accepting this petition. Bahubali Gulabchand petitioner, through his counsel, is directed to appear before the trial Court on 25th January, 1991.

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J.S.T.