rsk

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.597 OF 2011
WITH
CRIMINAL REVISION APPLICATION NO.595 OF 2011
WITH
CRIMINAL REVISION APPLICATION NO.598 OF 2011

1. M/s. Shah Rameshchandra Nihalchand & Co.
2. Sushilkumar Kapoorchand Jain
3. Rameshkumar Kapoorchand Jain
4. Manojkumar Kapoorchand Jain

Having address at 13, Memon Wada Road, Mumbai 400 003. … Applicants

Versus

1. S. Bose Commissioner of Tax-13
Room NO.416, 4th Floor, Aayakar Bhavan,
M.K. Road,
Mumbai 400 020.

2. The State of Maharashtra … Respondents

Mr. Girish Kulkarni, Senior Advocate i/b Mr. M. G. Shukla, for Applicants in all Applications.

None for Respondent No.1.

Mr. A. R. Metkari, APP, for Respondent-State.

CORAM : Jitendra Jain, J.

RESERVED ON : 17 JULY 2025
PRONOUNCED ON 18 JULY 2025

Judgment :-

1. The facts and the legal issues involved in these three Applications are identical and therefore, are disposed of by common order, by consent of the parties, by taking Criminal Revision Application No.597 of 2011 as a lead matter.

2. The present Application is filed challenging the order dated 18 November 2011 passed by the learned Sessions Judge whereby the order of learned Chief Metropolitan Magistrate rejecting Respondent No.1's Application under Section 319 of the Criminal Procedure Code (Cr. P. C.) was set aside.

3. On 5 March 2012, none appeared for the Respondent-Commissioner of Income Tax. On 19 March 2012, also none appeared for the Commissioner of Income Tax-Respondent. On 2 April 2012, this Court noted the above absence of appearances on behalf of the Commissioner of Income Tax and passed the following order:

> *"1. These three revision Applications show seriousness with which the Income Tax Department deals with the cases pending in which interim orders were passed on 30th January, 2012. Interim orders were continued on 5th March, 2012 as none appeared for the Union of India. Again on 19th March, 2012, none appeared for Union of India. Interim orders were continued. Today none appears for the Union of India. Issue fresh notice to the Respondent indicating that the matter would be disposed of admission stage on 16th April, 2012 irrespective whether Respondent appears on not.*
>
> *2. Learned counsel for the Applicant to file entire compilation of record from the trial Court. Stand over to 16.04.2012."*

4. On 11 June 2012, again, none appeared for the Respondent-Income Tax Department. This Court, therefore admitted the matter and granted interim stay and the hearing was expedited. On 19 July 2012, Mr. Inamdar appeared for Respondent No.1-Commissioner of Income Tax.

5. The matter was listed for final hearing on 17 July 2025 and was called out in the morning session. However, since none appeared for Respondent No.1 and to give one more opportunity, the matter was kept back and called out in the afternoon session. In the afternoon session also, none appeared for Respondent-Commissioner of Income Tax.

6. In the light of the above, since consistently there is no appearance on behalf of Respondent No.1 and the Revision Application is of the year 2011, I have no choice, but to proceed with the final hearing.

BRIEF FACTS :-

7. The Applicant No.1 is a partnership firm and Applicant Nos.2 to 4 are the partners of the said firm.

8. On 17 March, 1982 search proceedings were initiated by the Customs and Income Tax Authorities at the business premises of the firm, wherein, the deceased Kapoorchand Jain, father of Applicant Nos.2 to 4 was also residing. Certain gold and silver along with the books of accounts were seized.

9. Respondent No.1 filed three complaints against the firm-accused no.1 and Mr. Kapporchand Jain-accused no.2 for the Assessment Year 1981-1982, 1982-1983 and 1983-1984 alleging offence committed under Section 276C and

277 of the Income Tax Act. While the complaint was pending, Mr. Kapoorchand Jain, accused no.2 in the original complaint died.

10. Respondent No.1 made an Application for making Applicant Nos. 2 to 4 as representatives of accused No.1-Firm. This action was contested by Applicant Nos.2 to 4 on the ground that no sanction was obtained of the Commissioner of Income Tax for adding Applicant Nos.2 to 4 as representatives of accused No.1.

11. On 31 August 1996, the learned Metropolitan Magistrate passed an order on the aforesaid Application and observed that since Applicant Nos.2 to 4 were not brought on record as "accused" but they were sought to be brought on record in order to represent the firm, sanction was not required and therefore the Application made by Respondent No.1 to make Applicant Nos.2 to 4 as representative of accused No.1-firm was allowed. I have not been shown any material to indicate that this order was further challenged before the higher forum and therefore, I proceed on the footing that this order has become final.

12. On 11 March 2008, Respondent No.1 made an Application under Section 319 of the Cr.P.C. before the learned Metropolitan Magistrate praying for impleading Applicant Nos.2 to 4 as "accused" along with accused No.1 firm in the trial. Applicant Nos. 2 to 4 filed their reply and opposed the Application under Section 319 of Cr.P.C.

13. The Metropolitan Magistrate, *vide* order dated 21

January 2009, dismissed the Application under Section 319 of Cr.P.C. primarily on the ground that no sanction of Commissioner of Income Tax has been obtained against Applicant Nos.2 to 4 for proceeding as an accused. Learned Magistrate also observed that when the complaint was filed deceased Kapoorchand Jain was treated as a partner in-charge of day-to-day affairs of Respondent No.1-firm.

14. The aforesaid order of the learned Metropolitan Magistrate dismissing the Application of Respondent No.1-CIT under Section 319 of Cr.P.C. was challenged by Respondent No.1 before the learned Sessions Court by filing Criminal Revision Application. The learned Sessions Judge by his order dated 18 November, 2011 set aside the Metropolitan Magistrate's order and allowed the Application filed by Respondent no.1 under Section 319 of Cr.P.C. to treat Applicant Nos.2 to 4 as accused.

15. It is on the above backdrop that the present criminal revision Application is filed challenging the order of the learned Sessions Judge.

16. I have heard learned Senior Advocate Mr. Girish Kulkarni and A. R. Metkari, learned APP for the Respondent-State. For the reasons stated hereinafter, I am of the view that the present criminal revision Application is required to be allowed for the following reasons:

i) In the order of learned Metropolitan Magistrate dated 31 August 1996, Respondent No.1 specifically stated that Applicant Nos.2 to 4 are brought on record not as an

"accused" but they were sought to be brought on record in order to represent the firm and therefore sanction was not required. This contention of Respondent No.1 was accepted by the learned Metropolitan Magistrate. The Respondent No.1-Income Tax Department, was aware that accused No.1 is a firm and they were also aware that a firm consist of more than one partner and inspite of the same, only the deceased was made as accused No.2 and not Applicant Nos.2 to 4 before this Court. In the proceedings of 31 August 1996, Respondent No.1 have accepted that Applicant Nos. 2 to 4 are brought on record not as "accused", but only as representatives of the firm. In my view, therefore, today Respondent No.1 cannot make an Application under Section 319 of the Cr.P.C. and contend that Applicant Nos.2 to 4 be added as an "accused". The order dated 31 August 1996 has become final and therefore Respondent No.1 is not justified in making Applicant Nos.2 to 4 as accused by adopting route of Section 319 of the Cr.P.C.

17. The order dated 31 August 1996, categorically gives a finding by accepting the submission of Respondent No.1 that no sanction was required for bringing on record Applicant Nos. 2 to 4. Today, by an Application under Section 319 of Cr. P. C. Respondent No.1 seeks to make Applicant Nos. 2 to 4 as "accused" without there being any sanction. I have not been shown any material that the sanction was obtained as required under Section 279 of the Income Tax Act.

18. Section 279 of the Income Tax Act provides that, a

person shall not be proceeded against for offence specified therein except with previous sanction of the authorities viz., Principal Commissioner or Commissioner or Joint Commissioner (Appeal) or Commissioner (Appeal) or the appropriate authority. In the absence of any sanction as required under Section 279 of the Income Tax Act, the Application under Section 319 of Cr.P.C. to make Applicant Nos. 2 to 4 as accused is without jurisdiction. Therefore, even on this count Application made under Section 319 of Cr.P.C. is required to be rejected. The Supreme Court in the case of ***Surinderjit Singh Mand & Anr. State of Punjab & Anr.***[1] has held that even for the purpose of Section 319 of the Cr.P.C., mandatory sanction required by Section 197 of the Cr. P.C. or by a special statue has to be complied with.

19. The basis of Application under Section 319 of Cr.P.C. is evidence recorded of Mr. A. P. Shrivastava who was posted as Assistant Director of Income Tax in 1982 at Mumbai. In the said evidence it is the case of Respondent No.1 that they came to know that there were four partners of the firm having share in the range of 20-25% and one minor partner having share of 5 %. In the evidence, it is also recorded that accused No.1-firm had filed Form No.12 for continuation of registration as a firm in which each of the partner had signed. Form No.12 was already filed with the Income Tax Department in the year 1981-1982 itself and the Income Tax Department was aware that accused No.1 is a firm having

---

1 (2016) 8 SCC 722

four partners. This is not something which surfaced for the first time in the evidence recorded by the learned Metropolitan Magistrate, but this was something within the knowledge of the Income Tax Department much prior to the date of search and filing the complaint. Inspite of the same, the original complaint was filed against the firm as accused No.1 and Shri Kapoorchand Jain-accused No.2 who passed away pending the completion of the trial. Therefore, today, it is not permissible for Respondent No.1 to make an Application under Section 319 of Cr.P.C. on the basis that for the first time they came to know that Applicant Nos.2 to 4 were partners of accused No.1 and therefore, they are entitled to make an Application under Section 319 of Cr.P.C. Therefore even on this count Application under Section 319 of Cr. P. C. could not have been allowed by the learned Sessions Judge.

20. Sub-section (1) of Section 319 of the Cr.P.C. reads as under :-

> **319 : Power to proceed against other persons appearing to be guilty of offence.**—(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed."

21. The Supreme Court in the case of ***Shankar Vs. State of Uttar Pradesh & Ors.***[2] has analyses the power under Section 319 of the Cr. P.C.. The relevant observations are as under :-

---

[2] 2024 SCC OnLine SC 730

> "94…….. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution. if unrebutted, may lead to conviction of the persons sought to be added as the accused in the case.
>
> 95. ……Under Section 319 CrPC, though the test of *prima facie* case is the same, the degree of satisfaction that is required is much stricter...
>
> 105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and ……. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.
>
> 106. Thus, we hold that though only a *prima facie* case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than *prima facie* case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrP.C.……"

22. Section 319 of Cr.P.C. provides that where in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

23. In the instant case before me, the evidence which is

relied upon on the basis of which an Application under Section 319 is made by Respondent No.1 is the evidence of Mr. A. P. Shrivastava, Assistant Director of Income Tax dated 16 August 2007 and 25 July 2007.

24. Insofar as the evidence of 25 July 2007 is concerned it only reiterates how the search was conducted, what was seized and how the panchnamas were drawn. Insofar as the evidence of 16 August 2007 is concerned, it only records that the accused No.1 is a firm consisting of four partners and the firm had filed Form-12 for continuation of registration and such form is signed by each partner. It also states that assessment order was passed by the Income Tax Officer after filing a Form-12. It further narrates the income assessed and penalty proceedings having initiated.

25. In my view, based on the evidence on the basis of which the Application under Section 319 is made, it cannot be concluded that the said evidence inculcates Applicant Nos.2 to 4 for having committed an offence. Furthermore, has observed above, the statement and submission of Respondent No.1 accepted and recorded in the Magistrate's order dated 31 August 1996 itself states that Applicant No.2 to 4 are brought on record not as an "accused" but has representative of Respondent No.1-Firm. Therefore, in my view, the ingredients required for allowing the Application under Section 319 is not satisfied and, therefore, even on this ground, the impugned order dated 18 November 2011 passed by the Sessions Judge is required to be quashed and set aside.

26. Section 319 of the Cr.P.C. cannot be read in isolation. In the facts of the present case it will have to be read along with Section 278B of the Income Tax Act. Section 278B deals with offences by Companies and Explanation to Section 278B defines "company" to mean a firm; and "director" in relation to a firm to mean a partner in the firm.

27. Section 278B of the Income Tax Act reads as under :-

"278B. 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 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.

(3) Where an offence under this Act has been committed by a person, being a company, and the punishment for such offence is imprisonment and fine, then, without prejudice to the provisions contained in sub-section (1) or sub-section (2), such company shall be punished with fine and every person, referred to in sub-section (1), or the director, manager,

secretary or other officer of the company referred to in sub-section (2), shall be liable to be proceeded against and punished in accordance with the provisions of this Act.

Explanation. - For the purposes of this section,-

(a) "company" means a body corporate, and includes-

(i) a firm; and

(ii) an association of persons or a body of individuals whether incorporated or not; and

(b) "director", in relation to-

(i) a firm, means a partner in the firm;

(ii) any association of persons or a body of individuals, means any member controlling the affairs thereof."

28. Sub-section (1) of Section 278B read with the definitions of "company" and "director" in the Explanation thereto would mean that where an offence under the Income Tax Act has been committed by a firm, every partner who at the time the offence was committed was responsible to the firm for the conduct of the business shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

29. Sub-section (2) of Section 278B further provides, in the context of the firm read with Explanation, to mean that where an offence is committed by a firm with the consent or connivance or is attributable to any neglect on the part of partner then, such partner shall be deemed to be guilty of that offence and shall be punished accordingly.

30. In my view, on a conjoint and harmonious reading of Section 278B of the Income Tax Act and Section 319 of the Cr.P.C., the provisions of Section 319 will be triggered only if in the course of enquiry or trial of an offence it appears from the evidence that the other partners who were not impleaded

as accused in the original complaint were in charge of and responsible to the firm for the conduct of the business of the firm or the offence has been committed with the consent or connivance or is attributable to any neglect on the part of the partner then only the application made under Section 319 can be allowed for trying the other partners for the offence which appears to have been committed.

31. In the instant case, as observed by me above, from the evidence of Mr. Srivastava, nowhere it can be remotely inferred that Applicant nos. 2 to 4 were in-charge of or that were responsible to the firm for the conduct of the business or that the offence has been committed with the consent or connivance or negligence attributable to any of the partner who have made this application before me.

32. Therefore, in my view and based on a conjoint reading of Section 319 of the Cr.P.C. and Section 278 B of the Income Tax Act, in the absence of even *prima facie* satisfaction of the conditions required for fulfilment of Section 278 B of the Income Tax Act, learned Session Judge erred in allowing the application under Section 319 of the Cr.P.C. filed by the respondent no.1 and thereby directing impleadment of applicant nos.2 to 4 as" accused".

33. The Supreme Court in the case of ***State of Karnataka vs. Pratap Chand and Ors.***[3] was concerned with the provisions of Sections 18, 18 A and 34 of the Drugs and Cosmetics Act 1940, which is *pari materia* to Section 278B of the Income

[3] (1981) 128 ITR 573

Tax Act. The Supreme Court observed that a partner is liable to be convicted for an offence committed by the firm if he was in charge of and responsible to the firm for the conduct of the business of the firm or if it is proved that the offence was committed with the consent or connivance or was attributable to any neglect on the part of the partner. A person "in-charge" must mean that person should be in overall control of the day to day business of the firm. Similar view has also been expressed by the Kerala High Court in the case of ***M. A. Unneerikutty & Ors. Vs. Deputy Commissioner of Income-Tax (Assessment)***[4].

34. In my view, both the above decisions would squarely apply to the facts of the present case before me and therefore, the learned Session Judge erred in setting aside the order passed by the learned Magistrate.

35. For all the above reasons, the Criminal Revision Application Nos.597 of 2011, 595 of 2011 and 598 of 2011 is allowed in terms of prayer clause (b) which reads as under :-

Criminal Revision Application Nos.597 of 2011

> "b) That pending the hearing and final disposal of the present Criminal Revision Application, this Hon'ble Court may be pleased to call for record and proceedings of C. C. No.196/S/2003 from the file of the learned Metropolitan Magistrate, 3rd Esplanade, Mumbai and after going through the same be pleased to set aside order dated 18th November 2011 passed by the Hon'ble

[4] (1996) 218 ITR 606

Sessions Court in Criminal Revision Application No.722 of 2009."

Criminal Revision Application Nos.595 of 2011

"b) That pending the hearing and final disposal of the present Criminal Revision Application, this Hon'ble Court may be pleased to call for record and proceedings of C. C. No.197/S/2003 from the file of the learned Metropolitan Magistrate, 3rd Esplanade, Mumbai and after going through the same be pleased to set aside order dated 18th November 2011 passed by the Hon'ble Sessions Court in Criminal Revision Application No.722 of 2009."

Criminal Revision Application Nos.598 of 2011

"b) That pending the hearing and final disposal of the present Criminal Revision Application, this Hon'ble Court may be pleased to call for record and proceedings of C. C. No.195/S/2003 from the file of the learned Metropolitan Magistrate, 3rd Esplanade, Mumbai and after going through the same be pleased to set aside order dated 18th November 2011 passed by the Hon'ble Sessions Court in Criminal Revision Application No.722 of 2009."

(Jitendra Jain, J)