

CASE NO.:
Appeal (civil) 1748 of 1999

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

RESPONDENT:
Directorate of Enforcement & Ors., etc.

DATE OF JUDGMENT: 05/05/2005

BENCH:
N. Santosh Hegde & B.N. Srikrishna

JUDGMENT:
J U D G M E N T

With

Civil Appeal Nos. 1749/99, 1750/99, 1751 & 1944/99,
S.L.P.(Crl.) Nos. 2599/03, 4995/03 and 1940/04,
Criminal Appeal Nos. 847/04 and 848/04 and
Writ Petition (Crl.) No. 165/04

Srikrishna, J.

We have had the benefit of reading the opinions expressed by our esteemed and learned brothers Balakrishnan, Dharmadhikari and Arun Kumar, JJ. With great respect, we are unable to persuade myself to the views expressed therein.

Brother Balakrishnan, J., has indicated in his judgment the circumstances under which the reference has been made to this larger Bench to reconsider the correctness of the view expressed by the majority in Assistant Commissioner, Assessment \026II, Bangalore & Ors. vs. Velliappa Textiles Ltd. & Anr.

Velliappa was concerned with prosecution for an offence under Sections 276C, 277 and 278 read with Section 278B of the Income Tax Act, 1961. Each of the punishing sections provides that a person found guilty shall be punishable with a mandatory term of imprisonment and fine. The majority in Velliappa took the view that since an artificial person like a company could not be physically punished to a term of imprisonment, such a section, which makes it mandatory to impose a minimum term of imprisonment, cannot apply to the case of an artificial person.

The majority judgment in Velliappa indicates that the situation is not one of an interpretational exercise, but one that calls for rectification of an irretrievable error in drafting of the concerned statute. It has noticed the two Reports of the Law Commission of India of 1941 and 1947 pointing out the impossibility of implementing such a provision without transgressing the well established bounds of judicial functions and taking on the role of legislature. It was also pointed out that the situation is neither novel, nor unique. Such situation has been faced in several other jurisdictions wherein it was recognised that the only solution to such a problem is by legislative action. Instances from the jurisdictions in Australia, France, Canada, Netherland and Belgium were referred to. There was also reference made to the fact that the Indian Parliament was cognizant of the problem and had proposed the IPC (Amendment) Bill, 1972, Clause 72(a), which specifically was intended to take care of a situation where the offender is a company and the offence is mandatorily punishable with imprisonment in which case the option was given to the Court to sentence such a corporate offender to fine only. Reference was also made in Velliappa to the fact that the said

Amendment Bill had lapsed.

It is unnecessary to make detailed reference to the arguments presented to the Court in Velliappa and the view expressed thereupon, as they are reflected in the judgment itself. We would, therefore, deal with some of the additional arguments presented before us to persuade us to hold that Velliappa was wrongly decided.

LEGISLATIVE INTENT

One of the functions of the Court is to ascertain the true intention of the Parliament in enacting the statute and, as far as permissible on the language of the statute, to interpret the statute to advance such legislative intent. If this be the test, there is no doubt that Parliament has accepted the view taken in the majority in Velliappa as correct. Velliappa interpreted the situation arising out of a prosecution under Sections 276C, 277, 278 read with Section 278B of the Income Tax Act, 1961 and the judgment was delivered on 16th September, 2003. Section 278B was promptly amended by Parliament by insertion of sub-section (3) by the Finance (No. 2) Act, 2004 w.e.f. 1.10.2004. The inserted sub-section (3) reads as under:

"278B (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."

Similar amendment was made in Wealth Tax Act, 1957 also by insertion of sub-section (3) in Section 35 HA by the same Finance (No. 2) Act, 2004. In the face of these Parliamentary amendments, it would be futile to look for some presumed intention of Parliament on a theoretical basis. When Parliament has taken note of a situation and resolved the difficulty by a suitable amendment in legislation, the Court must hold that its decision has correctly interpreted the law and accords with the Parliamentary intent in enacting the law as it stood prior to the enactment. (See, Bhimaji Shanker Kulkarni v. Dundappa Vithappa Udupudi and another).

Thus, if the interpretative function of the Court be to find out the true intention of Parliament, then such intention has been manifested the amendments adopting the manner of resolving the difficulty indicated by Velliappa.

JUDICIAL FUNCTION

A number of arguments were addressed by learned counsel as to what is the true function of the Court in interpreting a statute. We would prefer to tread the conventional path that the maxim 'judicis est just dicere, non dare' best expounds the role of the court. It is to interpret the law, not to make it. The Court cannot act as a sympathetic caddie who nudges the ball into the hole because the putt missed the hole. Even a caddie cannot do so without inviting censure and more. If the legislation falls short of the mark, the Court could do nothing more than to declare it to be thus, giving its reasons, so that the legislature may take notice and promptly remedy the situation. This is precisely what has happened in the present case.

We are unable to subscribe to the view that by 'judicial heroics' it is open to the Court to remedy an irretrievable legislative error by resort to the theory of presumed intention of the legislature. It was contended that the Court should adopt a purposive construction of statutes. The dicta of Denning L.J. in Seaford Court Estates Ltd. vs. Asher were pressed into service for emulation. The view of Denning L.J., that 'judicial heroics' were

warranted to cope with the difficulties arising in statutory interpretation, was severely criticized by the House of Lords in *Magor & St. Mellons R.D. C. v. Newport Corporation*. Lord Simonds said, "the duty of the Court is to interpret the word that the legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited." "It appears to me", said Lord Simonds, "to be a naked usurpation of legislative function under the thin disguise of interpretation". Lord Morton observed: "these heroics are out of place". Lord Tucker said, "Your Lordships would be acting in a legislative rather than a judicial capacity if the view put forward by Denning, L.J., were to prevail." This disapproval of Denning L.J.'s approach was cited with approval by this Court in *Punjab Land Development and Reclamation Corporation Ltd. vs. Presiding Officer, Labour Court*.

The argument of purposive interpretation, therefore, does not appeal when the statute in plain terms says something.

INTERPRETATIVE EXERCISE

There appears to be a difference of opinion amongst the learned counsel assailing the correctness of majority view in *Valliappa* as to whether the task of the Court in the case on hand is one of statutory interpretation. Some counsel have argued that it is open to the Court to read the words "imprisonment and fine" as "imprisonment or fine". In our view, such a construction is impermissible. First, it virtually amounts to rewriting of the section. The Court would be reading the section as applicable to different situations with different meanings. If the offender is a corporate entity, then only fine is imposable; if the offender is a natural person, he shall be visited with both the mandatory term of imprisonment and fine. The exercise would then become one of putting a fluctuating or varying interpretation on the statute depending upon the circumstances. That is not permissible for the Court, either on principle, or on precedent. While it may be permissible for the court to read the word 'and' as 'or', or vice versa, whatever the interpretation, it must be uniformly applied to all situations. If the conjunction 'and' is read disjunctively as "or", then the intention of Parliament would definitely be defeated as the mandatory term of imprisonment would not be available even in the case of a natural person. We have not been shown any authority for the proposition that it is open to the Court to put an interpretation on a statute which could vary with the factual matrix.

Secondly, when a statute says the Court shall impose a term of 'imprisonment and a fine', there is no option left in the Court to say that under certain circumstances it would not impose the mandatory term of imprisonment. It is trite principle that punishment must follow the conviction.

In *State of Maharashtra vs. Jugamander Lal* this Court observed: (at p.5)

"By saying that a person convicted of the offence shall be sentenced to imprisonment of not less than one year the Legislature has made it clear that its command is to award a sentence of imprisonment in every case of conviction."

[See also in this connection: *Gul Mahmud Shah vs. Emperor* ; *Jayaram Vithoba and another vs. The State of Bombay* ; *Jagmohan Singh vs. State of U.P.* and *Modi Industries Ltd. Vs. B.C. Goel*]

Thirdly, if on the words used by the legislature it is impossible to effectuate the intention of the legislation, namely, to punish a company to imprisonment, it is not possible to read the section in any other manner to impose any other punishment on the offender. "We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there", said the Judicial Committee in *Crawford vs. Spooner*. In other words, the language of Acts of Parliament and more especially of the modern Acts, must neither be extended beyond its natural and proper limits, in order to supply omissions

or defects, nor strained to meet the justice of an individual case.

"If", said Lord Brougham in *Gwynne vs. Burnell*, "we depart from the plain and obvious meaning on account of such views (as those pressed in arguments on 43 Geo, 3, C.99), we do not in truth construe the Act, but alter it. We add words to it, or vary the words in which its provisions are couched. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreting it. This becomes peculiarly improper in dealing with a modern statute, because the extreme conciseness of the ancient statutes was the only ground for the sort of legislative interpretation frequently put upon their words by the judges. The prolixity of modern statutes, so very remarkable of late, affords no grounds to justify such a sort of interpretation."

The interpretation suggested by the learned counsel arguing against the majority view taken in *Velliappa*, which has appealed to our learned brothers Balakrishnan, Dharmadhikari and Arun Kumar, JJ., would result in the Court carrying out a legislative exercise thinly disguised as a judicial act.

The argument of Mr. Jethmalani that Section 11 of IPC defines the word 'person' to include a company, and because of Section 7 it is an inexorable definition which must permeate and lend colour to construction of all sections, is an argument of *petitio principii* and really begs the question. Irrespective of a declaration in the statute that it shall be applied 'unless there is anything repugnant in the clause to the context', such an interpretation must necessarily be implied as forming part of all statutes. [See in this connection, *Commissioner of Sales Tax vs. Union Medical Agency ; Kartick Chandra vs. Harsha M. Dasi ; Edmund N. Schuster vs. Assistant Collector of Customs, New Delhi ; State of Maharashtra vs. Syndicate Transport ; and Knightsbridge Estates Trust Ltd. Vs. Byrne and others*] The definition of any word in a statute must necessarily depend on the context in which the word is used in the statute. If the statute says that the 'person' committing the offence shall be mandatorily sent to prison, this principle would suggest that such a section would not apply to a juristic person.

The maxim '*lex non cogit ad impossibilia*', like all maxims, only tells us that law does not contemplate something which cannot be done. The maxim applies, in so far as persuading the Court to hold that it is impossible to send a company to prison. The maxim by itself does not empower the Court to break up the section into convenient parts and apply them selectively. Nor does the maxim '*Impotentia excusat legem*' apply here for the same reason. Au contraire, the application of these two maxims could equally persuade the Court to ignore the language of the statutory provision in the case of a juristic person, there being no warrant for the dissecting of the section and treating only one part as capable of implementation when the mandate of the section is to impose the whole of the prescribed punishment.

In the written submissions on behalf of *Iridium India Telecom Ltd.* - (the petitioner in Special Leave Petition (Criminal) No. 4995 of 2003), a fallacious mathematical syllogism is put forward in support. The argument is that the statute mandates ('A + B'); if A is impossible, then A=0. Then, the statutory mandate would be only (Zero + B), which is really equal to 'B' (presumably 'A' = imprisonment and 'B' = fine). There is no warrant for the assumption that the value of 'A' reduces to zero merely because it is impossible in case of a corporate offender. It could very well be that 'A' is indeterminate. In that case, the mathematical logic would break down (Indeterminate + B) = Indeterminate, which is exactly what has been held by *Velliappa*, namely, that the statute would become unworkable in the case of a juristic person. Ergo, it cannot apply to a juristic person for all the reasons adumbrated by the majority in *Velliappa*.

The maxim '*ut res magis valeat quam pereat*' is pressed into service to contend that the duty of the Court is to construe the enactment in such a way is to implement rather than defeat the legislative purpose. In our view, this maxim can be pressed into service only if it is permissible to extract another

reasonable meaning from the plain words used in the statute. There is a further difficulty in accepting this principle as applicable to the case on hand. This principle might enable the Court to resolve the difficulty in construing a statute so that an interpretation is put on the statute which will carry forward the intention of the statute. However, it is to be remembered that the interpretation put on the statute must be of determinative import in all cases. This maxim cannot enable the Court to put a variant construction on the statute, which would vary with the circumstances of different cases. For example, if this maxim is applied to construe a section such as Section 56(1)(i) of the Foreign Exchange Regulation Act, 1973, it is not permissible for the Court to hold that the Section would mean one thing in the case of an offender, who is a natural person and something else in the case of an offender, who is a juristic person. Such a situation can only be brought about by Parliamentary legislation of the nature cited earlier. The mandate of the legislature can be interpreted so as to advance the purpose of the legislation. Whatever interpretation is given must be applicable equally in all situations. Neither this maxim, nor any other maxim, enables a Court to interpret a statute in different ways under different fact situations.

ARGUMENT OF CONSEQUENCE

A final argument, more in terrorem than based on reason, put forward was that, if the majority view in Velliappa is upheld, it would be impossible to prosecute a number of offenders in several statutes where strict liability has been imposed by the statute. If that be so, so be it. As already pointed out, the judicial function is limited to finding solutions within specified parameters. Anything more than that would be 'judicial heroics' and 'naked usurpation of legislative function'.

JURISPRUDENTIAL PRINCIPLE

Kenny in "The Outlines of Criminal Law" observes as under: "Moreover a corporation is devoid not only of mind, but also of body; and therefore incapable of the usual criminal punishments. "Can you hang its common seal?" asked an advocate in James KK's days (8St.Tr.1138)."
"Thus the fact that a corporation cannot be hanged or imprisoned sets a limit to the range of its criminal liability. A corporation can only be prosecuted, as such, for offences which can be punished by a fine."

Para 57 of the judgment in Velliappa specifically notices that corporate criminal liability cannot be imposed without making corresponding legislative changes such as the imposition of fine in lieu of imprisonment. That such requisite legislative changes were introduced in Australia, France (Penal Code of 1992), Netherlands (the Economic Offences Act, 1950 and Article 51 of the Criminal Code) and Belgium (in 1934 Cour de Cassation) is already referred to in Velliappa.

We see nothing special in the Indian context which requires us to take a different view. In all these jurisdictions, the view that prevailed was that, where a statute imposes mandatory imprisonment plus fine, such a provision would not enable the punishment of a corporate offender. If the legislatures of these countries stepped in to resolve the problem by appropriate legislative enactments giving option to the Courts to impose fine in lieu of imprisonment in the case of a corporate offender, we see nothing special in the Indian context as to why such a course cannot be adopted. Merely because the situation confronts the Courts in a number of statutes, the Court need not feel deterred in construing the statute in accordance with reason.

The argument that the Criminal Procedure Code, 1973 recognises different stages of cognizance, prosecution, conviction and punishment and that it is open to the Court to stop short of actual imposition of punishment, is opposed to the law laid down by this Court in a series of cases. In State of Maharashtra vs. Syndicate Transport (supra); Edmund N. Schuster vs. Assistant Collector of Customs, New Delhi (supra) and Kartick Chandra

vs. Harsha M. Dasi (supra) it has been held that once the court after trial in accordance with the prescribed procedure comes to a finding of guilt and convicts an offender, the court is bound to sentence the offender with the punishment prescribed in law. In other words, sentence must inexorably follow conviction, as night follows the day. The argument that it is open to the court to abandon its duty midway without imposition of punishment of the offender, is one without merit.

The reliance on Section 48A of the Monopolies and Restricted Trade Practices Act, 1969, which was inserted by the 1984 amendment, is of no consequence. The section merely says "any person or body corporate' or which "does or omits to do what is mentioned in the Act shall be punishable with 2 years imprisonment and also with fine which may exceed to Rs.10000/-." We do not think that reliance on this section in any way advances the contention canvassed by the counsel in favour of overruling the view taken by the majority in Velliappa. It is obvious that notwithstanding such an amendment made in 1984, a body corporate cannot be visited with imprisonment for any term. This section, therefore, is of the same nature as the ones which were the subject matters in the fiscal statutes like Income Tax Act and Wealth Tax Act or Foreign Exchange Regulation Act. That the Parliament is alive to the situation and has remedied the difficulty with alacrity is really indicative of its recognition of the correctness of the majority view taken in Velliappa.

For all these reasons, we are of the opinion that the majority view of this Court in Velliappa is correct and does not require any reconsideration by this Bench. All the matters comprised in this group be placed before appropriate Benches for disposal in accordance with law.