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**(1990) 03 DEL CK 0054**

**In the Delhi High Court**

**Case No :** Criminal Miscellaneous (Main) Appeal No. 1253 of 1988

Commercial Aviaiton and Travel Co. Inc.

APPELLANT

Vs

N. Kumar and Another

RESPONDENT

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**Date of Decision :** 02-03-1990

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 482

**Citation :** (1990) 41 DLT 347 : (1990) 1 ILR Delhi 375 : (1991) 54 TAXMAN 26

**Hon'ble Judges :** S. Duggal, J

**Bench :** Single Bench

**Advocate :** D.R. Sethi, Raman Sawhney, Sat Pal, P.K. Behl and B.T. Singh, for the Appellant;

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**Judgement**

Santosh Duggal, J.

(1) By this petition filed u/s 482 Criminal Procedure Code . the petitioners pray for quashing of their prosecution for offences under sections 276C(1). 277 read with section 278-B of the Income Tax Act, 1961 (for short "the Act") initiated on a criminal complaint having been filed by the Income Tax Officer, Central Circle Xiv, New Delhi respondent herein).

(2) Petitioner No. I is a partnership firm constituted by petitioners No. 2 to 4 and one other, namely, Smt. V. Panna Lal and as per allegations in the complaint, all of them were in charge and responsible to the firm petitioner No. 1 for the conduct of its business during the period relevant to this case, namely, assessment year 1983-84. The allegation is that in the return filed for the aforesaid assessment year on 28th September 1983, a declaration showing a total loss of Rs. 1,08,167 was filed in the practiced proforma, signed and verified by H. 1. Malhotra, petitioner No. 2 herein, as one of the partners. During the assessment proceedings for the abovementioned period, the scrutiny of the books of accounts of the firm revealed an entry in the sum of Rs. 3,46,480 inserted within two days, namely, 25th January 1982 and 1st February 1982 in the books of account of the Bombay office of the firm, which entry was made

against 31st January 1982. The investigation further revealed that in the books of accounts of the Delhi office of this firm corresponding entries were made in the cash book on 31st January, 1982 introducing the said amount of Rs. 3,46,480 under various heads, such as loan account, commission receivable account, refunds receivable account and Cat Bir tickets account, obviously with an intention to accommodate the Bombay office to insert the aforesaid entries in between the aforesaid two days.

(3) On being called upon to explain these entries, the plea put forward was that these amounts reflected cash received from the various heads as shown therein as well as loan from Mrs. N. R. Malhotra and payment of tickets from Bangalore. The matter was investigated further by the Income Tax Officer, who also recorded statement of one of the partners of the firm, namely, H. I. Malhotra under whose signatures and verification the return had been filed, and in this statement recorded on oath on 21st November 1985, he admitted that the said entries were made under wrong and different heads. He is alleged to have further admitted that he might have taken this amount and returned to the firm when required. An implication has been drawn by the Department from this admission to the effect that the accused firm had introduced unaccounted cash under various heads by inserting false entries in the books of account. It was further added that similar discrepancies were noted in the books of account of the accused for the period relevant to assessment year 1982-83 and the assessment for this assessment year had been re-opened and a notice u/s 148 of the Act had been served on the accused.

(4) It was thus alleged in the criminal complaint that the accused willfully attempted to evade tax, penalty or interest chargeable or imposable under the provisions of the Act and also willfully caused other circumstances to exist, which had the effect of enabling them to evade tax, penalty or interest chargeable or imposable under the Act or the payment thereof and thereby appear to have committed an offence u/s 276-C(1) of the Act. The income that has been assessed by the Income Tax Officer by order dated 31st March 1986 is Rs. 4,17,735. The allegation further is that the statement in the verification to the return of income submitted by the accused was thus false and so were the accounts/statements delivered along with the said return and were known and believed by them to be false or not believed to be true and as such offence punishable u/s 277 of the Act was also committed, and that the guilt of the accused for the aforesaid offence was evidenced both by oral and documentary evidence for which list of witnesses was annexed. Prosecution was accordingly sought for the aforesaid offence, by filing a complaint before the Chief Metropolitan Magistrate, Delhi.

(5) After order of summoning was passed and the accused put in appearance; an application was moved seeking dismissal of the complaint on the ground that on an appeal being filed against the assessment order, the Commissioner of Income Tax (Appeals) by order dated 5th January 1988 set aside the said order

expressing difference with the finding of the Income Tax Officer to the effect that the accused had an income of Rs. 3,46,480 from undisclosed sources. The plea was that the criminal complaint pending then in the court of the Additional Chief Metropolitan Magistrate, was based specifically on the said finding of the Income Tax Officer, and that since that order has been set aside; nothing survived for prosecution of these persons and thus the complaint was liable to be quashed and proceedings against them dropped.

(6) This application was opposed by the Department though the factum of the order having been passed by the Commissioner of Income Tax (Appeals) was not denied but it was added that by the said order, the Commissioner of Income Tax (Appeals) had only remanded the case for re-assessment and that there was no bar to the continuance of the criminal prosecution under the provisions of the Act.

(7) The learned Additional Chief Metropolitan Magistrate dismissed the application of the accused by order dated 8th August 1988 by relying upon the Supreme Court judgment in the case of P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, , where it was held that mere pendency of re-assessment proceedings was not a bar to the criminal prosecution of the assessed under various provisions of the Act. Reliance was also placed on a judgment of this Court in the case of Dharma Pratishtan and Others Vs. B. Mandal and Another, , where also on an appeal filed by the assessed, de novo assessment was ordered and while the appeal against the said order of the Commissioner of Income Tax (Appeals) was pending before the Income Tax Appellate Tribunal, re-assessment had been carried out determining the income at a sum lesser than that found on original assessment, and it was held on the facts of the case that the order of re-assessment would not effect the proceedings in the criminal complaint, filed against the assessed for his prosecution for the offence under the various heads.

(8) The application was dismissed on the view that the present case was similarly placed as referred to above, and that because the Income Tax Officer had found certain entries which were made fictitiously in order to accommodate another office of the same accused and a partner of the assessed firm had appeared and admitted that the entries were wrong: the criminal complaint was based on a material which would not be affected by the assessment order being set aside or the case remanded, for the purpose of giving fresh opportunity to the accused to satisfy the Income Tax assessing authority about those entries or for being afforded opportunity to explain the discrepancies.

(9) The present petition seeks an order of the High Court under its inherent power for quashing of these criminal proceedings on the plea that it would be an abuse of the process of the court if the Income Tax authorities were allowed to proceed with the criminal complaint, even after the original assessment order has been set aside and the matter remitted back to the Income Tax Officer for fresh decision after giving opportunity to the accused persons to explain these entries and that ends of justice require that such a proceeding ought not to

continue.

(10) At the time of hearing Mr. D. R. Sethi, appearing for the petitioner, argued that so far as the present case was concerned, the only basis was the finding in the Income Tax assessment order that the discrepancies in the entries were unexplained and that the inference which could be drawn was that these had been inserted to explain income from undisclosed sources, and that the entries were false. He contended that on the appeal being filed the appellate authority, namely, the Commissioner of Income Tax (Appeals), had found it to be a fit case where Explanation furnished by the assessed was examined, and while setting aside the finding of the Income Tax Officer had remanded the case, back with direction that the assessed be heard and afforded an opportunity to Submit Explanation for these entries or the discrepancies detected by the Income Tax Officer and then a fresh-finding recorded. The learned counsel contended that there was nothing, which survived for criminal prosecution, and as such the continuance thereof was an abuse of the process of the court. He placed reliance in the first instance on a judgment of the Supreme Court in the case of *Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar*, and also on two judgments of this Court. These being; (1) the case of *W. I. Kohli & another v. The Commissioner of Income Tax and another*, 1985 (1) C L R 313, which was a case of prosecution for offences under sections 277 and 278 of the Act and it was held that when the assessment order was set aside and fresh assessment ordered by the Income Tax Tribunal there was no prima facie case of criminal liability and the complaint was held liable to be quashed; on the view that at that stage when the Income Tax assessment had yet to be completed for the relevant year and the case having been remanded for fresh determination, no inference of concealment could be made out and without there being an assessment it could not be assumed, much less prima facie held, that a criminal liability for concealment is made out, and (2) in the case of *Dr. R.P. Gupta Vs. Inspecting Assistant Commissioner of Income Tax (Assessment), Range XIV, New Delhi*, and another, which was also a case of re-assessment having been ordered and the original assessment order having been set aside, holding that the Department was left with no material at that stage on the basis of which it could prosecute the petitioner therein and the complaint had to be quashed.

(11) Mr. Sethi also placed strong reliance on a judgment of the Calcutta High Court in the case of *Dr. Murari Mohan Mukherjee v. Kanai Lal De* (1988) 38 ITR 237, where a criminal complaint filed by the Department for prosecution u/s 277 of the Act was held liable to be quashed for the reason that the original assessment order was modified by the appellate order passed by the Commissioner of Income Tax (Appeals) and it became non-existing, and as such no cognizance could be taken by the Chief Metropolitan Magistrate for the offence on the complaint drawn on the basis of the finding of the Income Tax Officer at the time of original assessment. The learned counsel canvassed the plea strongly that in the present case there was no material independent of the finding of the Income Tax Officer while passing the assessment order on the

Income Tax return for the assessment year 1983-84. which was in turn based on the view that the entries in the account books were not correct and that this order had been set aside with a finding that full opportunity had not been given to the assessed to explain the discrepancies, and holding it to be a fit case to remand it back to the Income Tax Officer for considering the Explanation furnished by the assessed and passing a fresh assessment order. He Therefore, argued that for the present there was no material left, to sustain the allegation in the criminal complaint and that the same was liable to be quashed.

(12) The learned counsel also quoted from a judgment of Karnataka High Court, reported as *Balaji Oil Traders and Others Vs. Income Tax Officer, Central Circle-V, Bangalore*, where it was held that when the order of the subordinate authority was set aside and re-assessment ordered; the prosecution in the criminal court would amount to prosecuting on uncertain facts and that in such a case the criminal complaint was liable to be quashed.

(13) Mr. Satpal, appearing for the respondent countered these arguments by relying heavily on the Supreme Court judgment in the case of *P. Jayappan (supra)* (1) where it was held that the re-assessment proceedings would not act as a bar to the continuance of the criminal proceedings for the offence u/s 276-C or section 277 of the Act. and the institution of the criminal complaint in the circumstances did not amount to an abuse of the process of the Court. The learned counsel pointed out that the argument was repelled by the Supreme Court as urged in that case that since the assessment order had been set aside and the case remanded for fresh examination, there was no basis left for prosecution of the assessed or for continuance of the proceedings in the criminal complaint filed after the finalisation of the first assessment.

(14) THE-LEARNED counsel contended that this question was no longer rest *Integra*, so far as this Court was concerned after the recent judgments; firstly in the case of *Dharma Pratishtan (supra)* and thereafter in the case of *M/s. Rinkoo Steels and others v. Shri K. P. Ganguli, Income Tax Officer and State (Delhi Admn.)*, 1989(2) D L 136, and also in view of the earlier judgment in the case of *Umesh Kumar Modi Vs. K.S. Sahni, Income Tax Officer, Central Circle X, New Delhi*, and another, Mr. Satpal further argued that the Supreme Court has laid down clearly that re-assessment proceedings would not effect the proceedings in the criminal case. and that these could go on independently of the orders passed by the Income Tax authorities, and there was no case for the petitioners to plead that. the proceedings were liable to be quashed by virtue of the re-assessment ordered or the case being remanded by the Commissioner of Income Tax (appeals) in this case.

(15) I have carefully gone through the various judgments on which the learned counsel have placed reliance while canvassing their respective contentions. I find that although this proposition cannot be countenanced as a general rule that wherever the assessment order is set aside or re-assessment ordered; the criminal proceedings launched after first assessment order were liable to be

quashed, but converse can also not be the view of the courts mechanically that re-assessment proceedings would be in no way taken into consideration in respect to the criminal proceedings, once the complaint had been filed. To my mind each case would determine on its own facts. For instance, in the case before the Supreme Court of P. Jayappan (supra), there was an independent material which had been found during the search conducted in the premises of the petitioner resulting in seizure of several documents and books of account which revealed suppression of certain material as also existence of several bank accounts, fixed deposits and investments in the name of the family members of the assessed and also number of bank accounts which had not been disclosed in the statement of Income Tax returns and it was in that context obviously that it was held that there being independent material which the prosecution in the criminal complaint case could rely upon, besides the assessment returns, the mere pendency of the re-assessment proceedings would be of no consequence. Same was the position in the case before this Court re : Dharma Pratishtan (supra) as well as M/s. Rinkoo Steels (supra) where also the prosecution was based on independent material discovered by the Income Tax authorities during searches or seizure or scrutiny of records. Although, it has been held by this Court, on a resume of the entire case law, while deciding the case of M/s. Rinkoo Steels (supra) that proceedings in the criminal complaint cannot be held liable to be dropped merely because assessment has been set aside, re-assessment ordered or undertaken but that, as already observed was, on the view that there was material independent of the assessment returns, collected during searches and seizure and which evidence the Court had yet to appreciate and that it was not a case where prima facie it could be held that there was no material for the criminal complaint to proceed on the allegations of willful attempt to evade tax.

(16) On a conspectus of the case law. I am of my considered view that although in face of judgment of the Supreme Court in the case of P. Jayappan (supra) it may not be open to the petitioners, who are accused in the criminal complaint, to fall back on the earlier judgments of this Court in the case of W. 1. Kohli (supra) and Dr. R I. Gupta (supra), but observations of the Supreme Court quoted above in the case of P. Jayappan have nevertheless to be kept in view, and whereas the plea for quashing of the criminal complaint or dropping of the proceedings therein, for the only reason that the assessment order had been set aside and re-assessment ordered on remand is not maintainable, and to that extent the present petition is liable to be dismissed but on the fact situation emerging from re-assessment being ordered, and rests primarily upon whether entries noticed during assessment proceedings stand explained or not; it is felt to be a fit case, where option be left to the petitioners, to approach the concerned criminal court with a prayer for stay of the proceedings in case re-assessment has not yet been finalised because of the view expressed by the Supreme Court in the case of P. Jayappan (supra) to the following effect :

"IN appropriate cases the criminal court may adjourn or postpone the hearing of a criminal case in exercise of its discretionary power under s. 309 of the Cr. P. C.

if the disposal of any proceeding under the I. T. Act which has a bearing on the proceedings before it is imminent so that it may take into consideration also the order to be passed therein."

(17) I Therefore while dismissing the petition, as a case for quashing of the criminal complaint is not made out because of reference to the statement made by one of the partners of the accused firm, namely. H. L. Malhotra, during assessment proceedings, but in case re-assessment proceedings after remand have not yet been finalised, it is left open to the accused persons (petitioners herein) to approach the criminal court. with an appropriate prayer for adjournment or postponement of the hearing To the criminal complaint, in exercise of its discretionary powers till the re-assessment proceedings have been completed, and a fresh order passed by the Income Tax Officer because the present seems to be such a case where the order that is passed on re-assessment, might have a bearing on the prosecution case in the criminal complaint. It shall be however within the discretion of the trial court to pass an appropriate order on any such application being moved, after notice to the Department, so as to have factual position before it as to whether an re-assessment order was imminent because the accused cannot expect a sine die adjournment of the proceedings but only if the order after re-assessment in terms of remand order is expected soon, then in that situation the court may take this into consideration, and pass suitable order. of adjournment awaiting such an order The trial court shall, while disposing of such an application, bear in mind following observations of the Supreme Court in the case of P. Jayappan (supra) :

"EVEN here the discretion should be exercised judicially and in such a way as not to frustrate the object of the criminal proceedings. There is no rigid rule which makes it necessary for a criminal court to adjourn or postpone the hearing of a case before it indefinitely or for an unduly long period only because some proceeding which may have some bearing on it is pending elsewhere"

(18) The petition is dismissed with the above observations. Parties are left to bear their own cost.

TRIAL court records be sent back for further action in the matter. The petitioners to appear before the court of the Addl. Chief Metropolitan Magistrate on 23-3-90.