

(1982) 11 GAU CK 0012
In the Gauhati High Court
Case No : Criminal Revision No. 200 of 1979

Dr. Chandra Mohan Goswami

APPELLANT

Vs

State of Assam and Another

RESPONDENT

Date of Decision : 16-11-1982

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401, 482
General Clauses Act, 1897 — Section 26
Income Tax Act, 1961 — Section 271(1), 277, 279(1)
Penal Code, 1860 (IPC) — Section 177, 193, 196, 228

Citation : (1983) 35 CTR 28 : (1984) 145 ITR 582

Hon'ble Judges : K.N. Saikia, J

Bench : Single Bench

Advocate : D.N. Barua, for the Appellant; D.K. Talukdar, for the Respondent

Judgement

K.N. Saikia, J.—In this criminal revision under Sections 401 and 482, Or. PC, the petitioner prays for setting aside the order dated July 18, 1979, of the Judicial Magistrate, Gauhati, in Case No. 309/C/73 rejecting his prayer for stay of the proceeding pending assessment made by the ITO.

2. The ITO, B-Ward, Gauhati, instituted the above complaint case u/s 277 of the I.T. Act read with Sections 177, 193 and 196 of the IPC on the allegation, inter alia, that the petitioner willingly and deliberately concealed his actual income earned as medical fees from various Central Govt. employees and from private practice to evade tax.

3. In the complaint case the petitioner appeared before the court and pleaded not guilty. It is stated in this petition that against the relevant assessment of 1970-71 made by the ITO, B-Ward, Gauhati, the petitioner preferred an appeal before the AAC, Gauhati, Range-1, who by his order dated November 21, 1974, partly allowed the appeal giving some relief to the petitioner, and on further appeal the Income Tax Appellate Tribunal by its order dated May 5, 1977, has allowed the appeal and has set aside the assessment order holding that the

assessee is entitled to an opportunity before an assessment could be made ; that the information gathered by the ITO was not tendered to the assessee for verification ; and that the assessee had denied that he had received the fees from the postal employees ; and, therefore, the assessee was entitled to an opportunity to substantiate his case. The Tribunal has sent down the matter to the ITO for making fresh assessment after giving opportunity to the assessee.

4. The IAC, Gauhati Range, has since informed the petitioner by his letter dated March 1, 1978, that the penalty proceedings u/s 271(1)(c) of the I.T. Act in respect of that assessment has also been dropped. Thereafter, the petitioner filed a petition before the Judicial Magistrate praying that he be discharged in the said Criminal Case No. 309/C/73 ; but his prayer was rejected. His revision therefrom was also rejected by this court. The petitioner thereafter filed another application before the learned Magistrate who by his order dated July 18, 1979, rejected that application also. Hence this petition.

5. Mr. D.N. Barua, learned counsel for the petitioner, submits that the assessment having been set aside, there will be abuse of the process of the court if the complaint case is allowed to continue until reassessment is made. Mr. G.K. Talukdar, for the complainant, submits that the offence having been committed by the assessee, the complaint case must proceed.

6. Section 277 of the I.T. Act, 1961, deals with false statement in a declaration and provides that if a person makes a statement in any verification under that Act or under any rule made thereunder, or delivers an account or statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable as prescribed under that section.

7. Section 279 of the I.T. Act provides that prosecution has to be at the instance of the Commissioner, Sub-section (1A) of Section 279 provides that a person shall not be proceeded against for an offence u/s 277 in relation to the assessment for an assessment year in respect of which the penalty imposable upon him under Clause (iii) of Sub-section (1) of Section 271 has been reduced or waived by an order u/s 273A.

8. Section 271 deals with penalty for failure to furnish the returns of total income under Sub-section (1) of Section 139.

9. On a perusal of this petition and the complaint petition it is clear that it is a case of submission of false returns, and not false documents and under the circumstances when the I.T. authorities themselves have set aside the assessment with the observation that the information gathered by the Department were behind the back of the petitioner without giving him an opportunity to explain, and the penalty proceeding was also dropped, there may be no criminal prosecution of the petitioner in respect of the same matter either until reassessment. The assessee, when given an opportunity as ordered, may be in a position to explain his return and income.

10. The criminal case is also Under Sections 177, 193 and 196 of the Penal Code.

11. Section 177 of the Penal Code deals with furnishing false information and, inter alia, provides :

"Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both :

or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

12. This section deals with giving false information which one knows or has reason to believe to be false. Knowledge of falsity is necessary to constitute an offence under this section (Jagan Nath v. Rex AIR 1950 Ajm 19). As was held in P.D. Patel v. Emperor [1933] 1 ITR 363:

"...anyone through inadvertence, mistake or misunderstanding may make an inaccurate return of his assessable income, and if, when the error is pointed out, the assessee is willing to pay Income Tax upon his real assessable income, normally there will be an end of the matter. But where.....assessable income is deliberately kept out of the return..... and so far from being ready and willing to put matters right, the assessee has persisted in maintaining what he must know to be a false defence to the charges that are preferred against him, the offence, if proved, must be regarded as a serious one, bearing in mind the deleterious effect that it may have, unless other persons are deterred from acting in like manner, upon the position of the general body of taxpayers."

13. In the same case it has been held that Section 22(2) (now Section 139(2)) of the I.T. Act is mandatory, and a person who has not been served with a notice under that section is not legally bound to furnish any information about his income to the ITO and a person who furnishes any false information to the ITO, without having been served with such a notice, will not be guilty of an offence u/s 177, IPC.

14. In the instant case, the assessment having been set aside and the penalty proceeding dropped, the assessee being required to be given an opportunity to explain the information, the very foundation of the complaint case has been removed. Such a prosecution may be taken if after the opportunity is afforded to the assessee, his explanation is unacceptable.

15. Falsity of the return submitted being the alleged offence in this case, in view of Section 26 of the General Clauses Act, there is also no bar to the trial or conviction of the offender under both the enactments, namely, the I.T. Act and

the Penal Code, but there is only a bar to the punishment of the offender, twice for the same offence. In T.S. Baliah Vs. T.S. Rengachari, the argument that in view of Section 26 of the General Clauses Act the appellant could be prosecuted either u/s 52 of the Indian I.T. Act, 1922 (Section 277 of the 1961 Act) or u/s 177 of the Penal Code was rejected holding that Section 26 of the General Clauses Act provides that "where an act or omission constitutes an offence under two enactments the offender may be prosecuted and punished under either or both the enactments but shall not be liable to be punished twice for the same offence."

16. The Department itself has found that information was gathered behind the back of the petitioner, and that the petitioner was not given a reasonable opportunity to explain them ; and it has ordered fresh assessment after giving him an opportunity. Therefore, the petitioner cannot be held liable under this section until the fresh assessment is made after giving the assessee a reasonable opportunity to explain.

17. u/s 193 of the Penal Code :

"Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine....."

18. There is no doubt that u/s 136 of the I.T. Act, 1961, any proceeding under that Act before an I.T. authority shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purposes of Section 196 of the Penal Code. The proceeding before the ITO is deemed to be a judicial proceeding as was held in S. Sannana Chetty and Sons and Others Vs. Third Income Tax Officer, , and that a criminal court can take cognizance of an offence of making false statements in a proceeding before the ITO u/s 37 on a complaint in writing by the ITO as was ruled in Lalji Haridas Vs. State of Maharashtra and Another, . In Balwant Singh and Another Vs. L.C. Bharupal, Income Tax Officer, New Delhi and Another, , it was held that though the proceedings before the ITO u/s 26A of the Indian I.T. Act, 1922, were judicial proceedings in a court and Section 195(1)(b) of the Cr. PC, 1898, applied the ITO could not be treated as a revenue court and neither Section 476 nor Section 479A of the Code applied and that it was not incumbent on the ITO to follow the procedure laid down in either of those two sections before he could validly file a complaint for offences Under Sections 193 and 196 of the Penal Code where forged documents were produced and false statements were made on oath in a proceeding.

19. Section 196 of the IPC deals with the following :

"Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated shall be punished in the same manner as if he gave or fabricated false evidence."

20. On a perusal of the order of the I.T. authorities there arises no doubt that it is incumbent to give the petitioner an opportunity to explain his information. It is a matter of submission of allegedly false returns and not of false documents ; and as the I.T. authorities have set aside the assessment and directed that the petitioner be given an opportunity to explain those informations, those cannot be treated as false at this stage. The petitioner may furnish information or pay the tax due when an opportunity is given to him.

21. Under the above circumstances of the case, this petition is allowed and the criminal proceeding in Case No. 309 C/1973 of the Court of the Judicial Magistrate, Gauhati, is quashed. It will be open to the ITO to institute fresh proceeding if after an opportunity is given to the petitioner there remains a case of false information or false return or otherwise,

22. The petition is allowed and the rule made absolute.