
(2005) 02 KL CK 0005

In the High Court Of Kerala

Case No : Criminal Revision Petition No. 200 of 1995 22 February 2005

Edayanal Constructions

APPELLANT

Vs

ITO

RESPONDENT

Date of Decision : 22-02-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401, 482

Income Tax Act, 1961 — Section 139, 14, 142, 143, 154

Penal Code, 1860 (IPC) — Section 120B, 193, 196, 276C, 278E

Citation : (2006) 153 TAXMAN 65

Hon'ble Judges : M. Sasidharan Nambiar, J

Bench : Division Bench

Advocate : C. Kochunny Nair, Dale P. Kurien and Sunny Mathew, for the Petitioner Smt. Raziya, P.K.R. Menon George K. George,, for the appearing parties;

Judgement

By the Court

1. Revision petitioners were accused in C.C. 179/88 on the file of Additional Chief Judicial Magistrate (Economic Offences), Ernakulam. They were convicted and sentenced to undergo rigorous imprisonment for three months and a fine of Rs. 7,500 and in default rigorous imprisonment for one month each for each of the offences under sections 276C(1)(ii) and 277(ii) of Income Tax Act. Petitioners challenged the conviction and sentence before Sessions Court, Ernakulam in CrI. A. 105/92. The learned Additional Sessions Judge confirmed the conviction and sentence and dismissed the appeal, which is challenged in the revision.

2. First respondent is the Income Tax Officer, the Complainant in the case.

3. First petitioner is a partnership firm and the second petitioner is its Managing Partner. They submitted a return of income for assessment for the year 1984-85. It was verified and signed by the Managing Partner, second petitioner. Along with the return, profit and loss account and balance sheet were also filed. The income from the contract business declared in the return was Rs. 1,22,460. The Income

Tax Officer verified the return as well as the books of account. The accounts of the firm had shown credits in the name of C.V. Jacob, P.C. David, T.V. Devassia, P.T. Varghese, N.A. George and Saramma Varghese. The Income Tax Officer on verification found that Rs. 1,65,000 so shown is not genuine credit and therefore, treated it as income from other sources liable for Income Tax. Holding that petitioners concealed the said income which is liable for payment of an Income Tax of Rs. 28,800 directed the petitioners to pay the Income Tax for the same. Proceedings were also initiated u/s 271(1)(c) of the Income Tax Act. A penalty of Rs. 1,30,000 was levied u/s 271(1)(c) and a complaint was lodged before the learned Magistrate for the offences under sections 276C(1)(ii) and 277(ii) of the Income Tax Act. Petitioners pleaded not guilty. Prosecution examined eight witnesses and marked Exts. P1 to P17. On the side of the petitioners Exts. D1 to D5 were marked. By that time under Ext. D5 order the order levying of penalty u/s 271(1)(c) of the Income Tax Act was cancelled by CIT (Appeals). The learned Magistrate on the evidence found that petitioners submitted false return and Rs. 1,65,000 shown as credits were not genuine credits and therefore, petitioners committed offences both under sections 276C(1)(ii) and 277(ii) of Income Tax Act, They were convicted and sentenced accordingly. Petitioner challenged it in CrI.A.105/92. Learned Additional Sessions Judge after analysing and reappraising the evidence confirmed the finding that petitioners concealed the income and though the order levying penalty was set aside by the Appellate Authority, that is not a bar for prosecuting petitioners for the offences and confirmed the conviction and sentence. Subsequent to the filing of the revision, the Income Tax Appellate Tribunal, Cochin Bench disposed the appeal filed by the first respondent challenging Ext.D5 order cancelling penalty imposed u/s 271(1)(c). As per order dated 28-2-2001, the Income Tax Appellate Tribunal accepted the explanation offered by the petitioners cancellation of the penalty imposed u/s 271(1)(c) by the Appellate Authority was upheld.

4. Revision petitioners contended that the basis for prosecution is the original order of assessment where under it was found that petitioners concealed the income to the extent of Rs. 1,65,000 which was claimed as cash credits and as the order levying penalty u/s 271(1)(c) was cancelled by the Appellate Authority which was further affirmed by the Income Tax Appellate Tribunal holding that the explanation offered by the petitioners is satisfactory, prosecution will not lie and the courts below should have acquitted petitioners on that ground. It was contended that petitioners had furnished all evidence regarding the credits both in the course of assessment proceedings and in the course of appellate proceedings and therefore, there was no concealment of income and in any event there was no submission of any false return or statements and therefore, the conviction is to be set aside.

5. Heard Advocate Sri Kochunni Nair appearing for the revision petitioners and Advocate Sri Ravindranatha Menon, Senior Central Government Standing counsel for taxes.

6. Advocate Sri Kochunni Nair relied on the decision of the Apex court in K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, and the decision of the Punjab and Haryana High Court in Sudarshan Jain Vs. Assistant Commissioner of Income Tax, and also the decision of this court in Premier Breweries Ltd. v. Dy. CIT 1994 KLJ 143 and argued that by the cancellation of the penalty imposed u/s 271(1)(c) of the Income Tax Act, the very foundation of the prosecution has been taken away and therefore, petitioners are to be acquitted as there is no concealment of income or filing of any false returns or statements. Consequently it was argued by the learned counsel that even if prosecution would lie in spite of the order of cancellation of penalty imposed, all the prosecution witnesses supported the petitioners and therefore, there is no evidence to prove either of the offences and therefore on that ground also conviction is to be set aside. Finally, it was argued relying on the decision in CIT v. Anwar Ali (1977) 76 ITR 696 that in any event there is no culpable mens rea and the amended section 278E of the Income Tax Act which came into force only with effect from 10-9-1986 will not apply to the case of an Income Tax return submitted on 31-12-1984 and therefore, on the evidence also courts below should have acquitted the petitioners.

7. Advocate Sri Raveendranatha Menon, argued that the prosecution was initiated only on 27-11-1998 much after the introduction of section 278E and therefore, the burden to prove absence of mens rea is on the petitioners and they did not adduce any evidence and on the evidence courts below could only find that there was mens rea. Learned counsel argued that as the amendment is to a procedural law as declared by the Supreme Court in Nani Gopal Mitra Vs. The State of Bihar, , in Balumal Jamnadas Batra Vs. State of Maharashtra, , the procedural law has to be applied as it stood on the date when prosecution has been launched. Learned counsel also argued that decision in K.C. Builder"s case (supra) and other cases would apply only to a case where the entire assessment order was set aside and as the assessment order as it originally stood was not set aside prosecution will not be effected by the cancellation of penalty by the Appellate Authority or the Appellate Tribunal. It was also argued that in any event decision may effect only offence u/s 276C of the Act and will not effect the prosecution u/s 277(ii) of the Income Tax Act as it has nothing to do with the cancellation of the order and therefore, conviction is perfectly correct. The learned counsel also argued that the burden to be discharged by petitioners u/s 278E is beyond reasonable doubt and not preponderance of probabilities relying on the decisions in Commissioner of Income Tax Vs. United Commercial and Industrial Co. (P.) Ltd., , in Shankar Industries Vs. Commissioner of Income Tax, Central, and in Commissioner of Income Tax Vs. Drilcos (India) Pvt. Ltd., .

8. Chapter IV of the Income Tax Act deals with computation of total income. Section 14 provides the Heads of income. Under the said section, all income for the purposes of charge of Income Tax and computation of total income are classified under the heads of income namely, "A" Salaries, "C" Income from house property, " D" Profits and gains of business or profession, "E" Capital

gains, and "F" Income from other sources ("B" Interest of security was omitted by Finance Act, 1988). Section 56 deals with income from other sources. Under sub-section (1) of section 56, income of every kind which is not to be excluded from the total income under the Act shall be chargeable to Income Tax under the head "Income from other sources". If it is not chargeable to Income Tax under any of the heads in section 14. Section 68 deals with cash credits. That section provides where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not in the opinion of the assessing officer, satisfactory, the sum so credited may be charged to Income Tax as the income of the assessee of that previous year. Chapter XIV deals with Procedure for assessment. u/s 139, every person being a company shall furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed. Section 143 deals with assessment under sub-section (1) of section 143, where a return has been made u/s 139, or in response to a notice under sub-section (1) of section 142(i) if any tax or interest is found due on the basis of return after adjustment of any tax deducted at source, any advance tax paid, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest, an intimation shall be sent to the assessee specifying the sum so payable and such intimation shall be deemed to be a notice of demand issued u/s 156 of the Income Tax Act. Under sub-section (2) of section 143, where a return has been furnished u/s 139, or in response to a notice under sub-section (1) of section 142, the assessing officer has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, shall serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him to produce or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim. Under sub-section (3) the assessing officer after hearing such evidence and taking into such particulars as the assessee may produce, shall allow or, reject the claim or claims specified in such notice by an order in writing and make assessment determining the total income or loss and determine the sum payable by the assessee on the basis of such assessment.

9. Revision petitioners submitted the return disclosing the income for the assessment year 1984-85 on 31-12-1984. The declared income was Rs. 1,22,460. The assessing officer found the accounts of the assessee defective and rejected the book result and estimated the net income from contract business at 12 per cent of the receipt. It was Rs. 1,45,000 as against the declared income of Rs. 1,22,460. The assessing officer also found that petitioners had shown cash credits of Rs. 15,000 each in the name of C.V. Jacob and P.C. David and Rs. 50,000 each in the name of T.V. Devassy and N.A. George and Rs. 10,000 in the name of P.T. Varghese, and Rs. 25,000 in the name of Saranna Varghese the total being Rs. 1,65,000. The assessing officer not satisfied with the production

of the creditors disbelieved their version and assessed Rs. 1,65,000, the total of the credits shown, as the income of the petitioners from other sources and levied a penalty of Rs. 1,30,000 u/s 271(1)(c) on the ground that there was concealment of income. Petitioners challenged that assessment and levy before the CIT (Appeals). Under Ext. D5 order the addition of Rs. 1,65,000 as the income from other sources was confirmed stating that the explanation offered by the creditors were unsatisfactory. But holding that mere rejection of the explanation and the confirmation letters about the credit would not justify imposition of penalty u/s 271(1)(c) for concealment of income it was cancelled on the ground that the explanation offered by the assessee was bona fide and whatever could available was furnished. First respondent challenged that order before the Income Tax Appellate Tribunal. As per the order produced by the revision petitioners under Crl. Appl. 1017/05, with a prayer to receive it as additional evidence Income Tax Appellate Tribunal confirmed the order cancelling the penalty levied u/s 271(1)(c).

10. Petitioners were prosecuted for the offence under sections 276C(1)(ii) and 277(ii) of the Income Tax Act. Section 276C(1)(ii) reads:

"Wilful attempt to evade tax, etc.(1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable,

(i) in a case where the amount sought to be evaded exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine."

Section 277(ii) reads:

"(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine."

Section 276C would be attracted if a person wilfully attempts in any manner to evade any tax, penalty or interest chargeable or imposable under the Act. So also to attract u/s 277 a person shall make a statement in any verification under the Act or the Rules or delivers an account or statement and such statement must be false. Additionally the person must have either knowledge or belief that the statement was false or must not have a belief that the statement was true. As rightly pointed out by the learned counsel appearing for the revision petitioners, the basic ingredient of both the offences is the same. Section 277 would attract only if the statement in the verification or in the account is either false to the knowledge of the person or he believes to be false or does not believe to be true. But in any event the statement must be false. u/s 276, the person must wilfully attempt in any manner to evade any tax penalty or interest

chargeable or imposable under the Act. The concealment of income is common to both. When it is the result of a wilful attempt to evade tax, offence u/s 276C is attracted. When it is by making a false statement of account the offence u/s 277 is attracted. To appreciate the nature of the offences, it is necessary to appreciate section 271 also. Section 271 deals with failure to furnish returns, comply with notices, concealment of income. Sub-section (1) of section 271 provides that if the assessing officer in the course of any proceedings is satisfied that any person

(b) Has failed to comply with a notice under sub-section (1) of section 142 or

(c) Sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142 or has concealed or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty a sum of Rs. 10,000 in the case of failure as contemplated under clause (b) and a sum which shall not be less than but which shall not exceed three times the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income under clause (c). Therefore, the penalty provided u/s 271(1)(c) is not only for concealment of the particulars of the income but also for furnishing inaccurate particulars of such income. Section 271(1)(c) reads:

"Failure to furnish returns, comply with notices, Concealment of income, etc.(1) If the assessing officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty."

11. The assessing officer was not satisfied with the explanation offered by the petitioners with regard to the cash credit to the tune of Rs. 1,65,000. It was therefore, taken as income from other source liable for tax. Tax was imposed under Ext. P16 order. It was on the basis that petitioners concealed the particulars of income to the tune of Rs. 1,65,000 and also furnished inaccurate particulars of such income in the return submitted for the assessment year 1984-85, under Ext. P16 order, the assessing officer directed to proceed against the petitioners as provided u/s 271(1)(c) of the Income Tax Act. It is on that basis a penalty of Rs. 1,30,000 was levied u/s 271(1)(c). Under Ext.D5 order, though the assessment order was confirmed, the levy of penalty was cancelled. Though first respondent challenged that order before the Income Tax Appellate Tribunal under order dated 28-2-200 1, Ext. D5 order was confirmed. The order of the Income Tax Appellate Tribunal, produced by the petitioners in the revision which came into existence subsequent to the disposal of the appeal is necessary for proper decision in the revision. In the interest of justice it is received as additional evidence and marked Ext. D6. Ext.D6 confirms Ext, D5 order holding that mere confirmation of the addition of income is not sufficient to infer that the assessee concealed the particulars of his income, to attract the penalty u/s

271(1)(c) and explanation offered by the assessee is quite reasonable and is not an absurd one. The Appellate Tribunal also found that the assessing officer rejected the explanation of the creditors who gave confirmation letters and also confirmed the credits at the time of their examination and the assessee's explanation was "plausible explanation which cannot be treated as mere fanciful at least with regard to penalty proceedings". It was for that reason the cancellation of the penalty levied u/s 271(1)(c) was upheld.

12. The question is what is the effect of the cancellation of an order imposed u/s 271(1)(c) of the Income Tax Act in a prosecution for the offence under sections 276C and 277 of Income Tax Act. The Apex court in K.C. Builder's case considered this aspect. The earlier decisions including the one in G.L. Didwania and Another Vs. Income Tax Officer and Another, , where the Apex court held that the entire prosecution cannot be sustained in view of the cancellation of the levy of penalty u/s 271(1)(c) of the Act were considered. In Didwania's case, the assessing authority had held that the assessee had intentionally concealed his income derived from Company "Y" which belonged to him and prosecution was initiated against him. The assessee filed an appeal against the assessment order and the Tribunal set aside the assessment holding that there was no material to hold that "Y" Company belonged to the assessee. The assessee thereafter filed a petition before the Magistrate to drop the criminal proceedings. When it was dismissed, he challenged it before the High Court. When it was dismissed, assessee approached the High Court under section 482 to quash the criminal proceedings which was dismissed.

It was taken before the Apex court in an appeal. The Supreme Court held that the whole question was whether appellant made a false statement regarding income which according to assessing authority had escaped assessment and so far as this issue was concerned, the finding of the Appellate Tribunal was conclusive and hence, the prosecution cannot be sustained. The Supreme Court quashed the criminal proceedings in that case. This decision was followed in K. C Builder's case (supra). In that case, the petition filed by the assessee to drop the criminal proceedings was dismissed by the Magistrate and though assessee challenged that order in a revision filed before the High Court u/s 401 of Cr. P.C. that was also dismissed which was taken up before the Supreme Court. Considering the question the Supreme Court held :

"... The penalties levied u/s 271(1)(c) were cancelled by the respondent by giving effect to the Income Tax Appellate Tribunal, in I.T.A. Nos. 3129-3132. It is settled law that levy of penalties and prosecution u/s 276C are simultaneous. Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution u/s 276C is automatic.

In our opinion, the appellants cannot be made to suffer and face the rigorous of criminal trial when the same cannot be sustained in the eyes of law because the entire prosecution in view of a conclusive finding of the Income Tax Tribunal that there is no concealment of income becomes devoid of jurisdiction and u/s 254 of

the Act, a finding of the Appellate Tribunal supersedes the order of the assessing officer u/s 143(3) more so when the assessing officer cancelled the penalty levied.

In our view, once the finding of concealment and subsequent levy of penalties u/s 271(1)(c) of the Act has been struck down by the Tribunal, the assessing officer has no other alternative except to correct his order u/s 154 of the Act as per the directions of the Tribunal. As already noticed, the subject-matter of the complaint before this court is concealment of income arrived at on the basis of the finding of the assessing officer. If the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eyes of law and, therefore, the prosecution cannot be proceeded with by the complainant and further proceedings will be legal and without jurisdiction. The Assistant Commissioner of Income Tax cannot proceed with the prosecution even after the order of concealment has been set aside by the Tribunal. When the Tribunal has set aside the levy of penalty, the criminal proceedings against the appellants cannot survive for further consideration. In our view, the High Court has taken the view that the charges have been framed and the matter is in the stage of further cross-examination and, therefore, the prosecution may proceed with the trial. In our opinion, the view taken by the learned Magistrate and, the High Court is fallacious. In our view, if the trial is allowed to proceed further after the order of the Tribunal and the consequent cancellation of penalty, it will be an idle and empty formality, to require the appellants to have the order of the Tribunal exhibited as a defence document inasmuch as the passing of the order as aforementioned is unsustainable and unquestionable." (p. 573)

The argument of Advocate Sri Ravindranatha Menon is that the said principle is not applicable to a case where the assessment order is not set aside and only penalty is set aside and in any case it would only effect the prosecution u/s 276C(1) and not u/s 277. The argument of the learned counsel is that the offence u/s 276C is in respect of an attempt to evade tax by concealing the income and it may not survive once the order of assessment is aside and the offence u/s 277 relates to a submission of a statement or delivery of an account or statement which is false and it relates before the date of assessment and therefore, the order cancelling the penalty u/s 271(1)(c) has no effect. I cannot agree with the submission, Even though in K.C Builder's case (supra) the offence u/s 271(1)(c) was specifically mentioned while quashing the prosecution initiated therein and it was only mentioned that quashing of prosecution u/s 276C is automatic as rightly pointed out by Advocate Sri Kochunni Nair the judgment itself shows that prosecution was for the offences under sections 276C(2) and 278B of the Income Tax Act and sections 120B 193 196 and 420 of IPC. The charge against the assessee in G.L. Didwania's case was not concealment of income alone but also for making a false statement as provided u/s 277 which was also quashed on the same principle which was followed in K.C. Builder "s case (supra). A learned single Judge of this court in Premier Breweries Ltd. v. Dy. CIT 1994 K.L.J 143 (as his Lordship then was) had occasion to consider a similar

case. That was a case initiated before the Additional Chief Judicial Magistrate on a complaint filed by the Deputy Commissioner of Income Tax. The offences alleged were sections 276C 277 and 278B of Income Tax Act. In that case, the assessee filed petition to quash proceedings u/s 482 of Cr.P.C. As in this case the allegation was that assessee submitted a false return claiming revenue expenditure to the tune of Rs. 9,98,200. The claim was found to be without any basis. The said amount was therefore, taken as income and penalty u/s 271(1) (c) was also imposed. Criminal prosecution was also initiated before the learned Magistrate. While so assessee challenged the levy of penalty before the Income Tax Appellate Tribunal and the Tribunal quashed the order imposing penalty. As in this case Income Tax authorities contended that the assessment has become final by treating the aforesaid claim as baseless and therefore, notwithstanding the order of the Tribunal cancelling the penalty by an independent proceeding, prosecution will stand. Relying on identical case decided by *Kanshi Ram Wadhwa v. ITO* (1984) 145 ITR 1091 where a similar prosecution proceedings were quashed holding that there is no reasonable prospect of a criminal case ending in conviction, as the basis for the criminal prosecution is taken away by the cancellation of the order levying penalty, this court quashed the proceedings. The position is identical in this case.

13. Though in the assessment order Rs. 1,65,000 was treated as income from other sources of the revision petitioners, the Appellate Authority as well as the Income Tax Appellate Tribunal in unambiguous terms found that the explanation of the assessee for not showing Rs. 1,65,000 as the income and instead showing it as cash credits was for a plausible explanation and in any event it cannot be treated as a mere fanciful explanation. It is on that basis the order levying tax was cancelled which was affirmed by both the Appellate Authority and the Income Tax Appellate Tribunal. Consequent to the said finding the petitioners are entitled to contend that they did not make a false statement or delivered a false statement or account as contemplated u/s 277 of the Income Tax Act. When the order cancelling of the levy of penalty is applicable to proceeding u/s 276 as expressly held in *K.C. Builder's* case, the principle will definitely apply to a prosecution u/s 277 also. Both the offences have a common foundation. When that foundation is removed under Exts. D5 and D6 Orders, the prosecution will not stand. Therefore, it can only be held that in view of the order of cancellation of levy of penalty under Ext. D5 order of the Appellate Authority and Ext. D6 order of the Income Tax Appellate Tribunal, no prosecution will lie either u/s 276C or 277(ii) of Income Tax Act.

14. In view of my earlier finding, it is not necessary to consider the other aspects argued by the counsel.

15. The Criminal Revision Petition is therefore, allowed. The conviction and sentence passed by the learned Additional Chief Judicial Magistrate and confirmed by the Additional Sessions Judge is set aside. Petitioners are acquitted of the offences charged. Bail bonds executed by them will stand cancelled. They

are set at liberty.