

(1987) 03 KL CK 0059

In the High Court Of Kerala

Case No : Criminal Miscellaneous Cases No's. 1115 and 1116 of 1986

G. Viswanathan

APPELLANT

Vs

Income Tax Officer, A-Ward, Parameswar Nagar

RESPONDENT

Date of Decision : 30-03-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Income Tax Act, 1961 — Section 276C

Citation : (1987) 65 CTR 184 : (1987) 167 ITR 103 : (1987) 35 TAXMAN 66

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Judgement

S. Padmanabhan, J.—The petitioner and the respondent in both the cases are the same. The respondent-income tax Officer is the complainant in C.C. Nos. 16 and 161 of 1986 on the file of the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam, and the petitioner, a cashew exporter, is the sole accused in both. Both the petitions are u/s 482 of the Code of Criminal Procedure to quash the respective complaints. The only question for consideration is whether the allegations in the complaint constitute the offence.

2. Assessment of Income Tax for the years 1977-78 and 1978-79 were completed and the Income Tax outstanding and payable were respectively Rs. 7,28,354 and 6,38,796. The properties of the petitioner including two air-conditioned theatres were attached for the arrears after issue of notice under rule 2 or Schedule II by the Tax Recovery Officer after the certificate has been received by him from the Income Tax Officer for recovery of the arrears. In violation of the prohibition contained in rule 16 of Schedule II and the provision that transactions thereafter will be void, the petitioner executed two gift deeds in 1983 regarding the only two unencumbered items of immovable properties in his name in favour of his two children, both of whom were minors then. The objections based on these two documents were rejected.

3. By this time, one of the sons became major. The major son by himself and the

minor son through his grandfather (father-in-law of the petitioner) filed O.S. No. 26 of 1984 before the Sub-court, Quilon, for a declaration that even though the documents of title are in the name of the petitioner, they are the real owners, the properties having been purchased with the funds supplied by the grandfather for their benefit. The Income Tax Recovery Officer applied to get himself impleaded in that suit but the application was opposed by the plaintiffs and it was dismissed. C.R.P. No. 2577 of 1986 against that order is pending before this court. Defendants in that case are said to be the Central Government represented by the Chief Secretary to the State Government and the State Government represented by the Government Pleader. The case of the respondent is that the properties belong to the petitioner himself having been acquired in his name in 1973 with funds accounted by him in his Income Tax accounts as his business income and that the gift deeds and the suit are only attempts by the petitioner to evade Income Tax.

4. Attachment of the properties was under rule 48, Schedule II. Rule 51 says that the attachment shall relate back to, and take effect from, the date on which the notice to pay the arrears under rule 2 was served on the defaulter. Section 276C of the Income Tax Act reads:

276C. 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.

(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest 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 with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine.

Explanation. - For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person -

(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or

(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or

(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or

(iv) causes any other circumstances to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.

5. The complaint was filed with the requisite sanction for an offence punishable u/s 276C(2). The contention is that even if all the allegations in the complaint are taken as correct, they will only amount to an attempt to "avoid" payment of Income Tax which is not made punishable and what is made punishable is only "evading" payment of any tax as distinguished from "avoiding" payment of the same which is not punishable. I do not think that there is any merit in this contention. At this stage, we are concerned only with the question whether the allegations in the complaint, if taken as correct, will constitute an offence punishable u/s 276C(2) of the Income Tax Act or not. Whether the offence was actually committed or not is not a matter for consideration in a proceeding u/s 482 to quash the complaint. That is a matter for evidence during the trial by the Magistrate.

6. Learned counsel for the petitioner relied on the Explanation to section 276C which enumerates four situations as "wilful attempt to evade tax, penalty or interest". The argument was that the only situation among the four which could be applied to this case is the last one, namely, causing any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under the Act or the payment thereof. Since the assessments for the relevant periods were completed and finalised after submission of returns and since what remains is only realisation of tax, the contention was that there cannot be any question of further evasion and what could be involved is only avoidance which is not penal.

7. It is true that there is a distinction between avoiding tax which is not made penal and evasion of tax which is made punishable. A person may go to a solicitor and ask him how to keep out of an Act - how to do something which does not bring him within the scope of it. The solicitor may advise him how to act within the limits allowed by law by finding out the loopholes to avoid tax or pay the minimum only. In a sense that may also be tax evasion but actually it is avoiding tax burden within the limits of law even if mala fides is involved sometimes. There is nothing illegal in it. They incur no legal penalties and strictly speaking no moral censure also, having considered the lines drawn by the Legislature for imposition of taxes. They only make it their business to walk outside of them. But the law will not tolerate such an evasion of the Act if it amounts to a positive fraud on the Act, such an evasion having no legal foundation. If such evasion is in conscious violation of the penal provisions, the penalty is definitely attracted.

8. Sub-sections (1) and (2) of section 276C deal with two different situations.

Sub-section (1) deals with evasion of tax, penalty or interest chargeable or imposable under the Act. Therefore, evidently, what is contemplated is evasion before charging or imposing tax, penalty or interest. That may include wilful suppression in the returns before assessment and completion. But sub-section (2) deals with evading the payment of tax, penalty or interest under the Act. The words chargeable or imposable are not there. What sub-section (2) says is without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable..... Therefore, evidently, sub-section (2) takes in cases of tax evasion after charging or imposition. Evasion after completion of assessment also comes within the operation of the sub-section. We are concerned in these cases with such alleged evasion.

9. What the Explanation to section 276C deals with is "wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or payment thereof" contemplated by sub-section (1) and not "payment of any tax, penalty or interest under this Act as contemplated in sub-section (2)". Therefore, the Explanation concerns only sub-section (1) and not sub-section (2). Further the Explanation is only inclusive and not exhaustive. Item (iv) of the Explanation also makes this position clear. Sub-section (2) is so clear that at any rate it takes in the cases of evasion of tax, penalty or interest after assessments were made. Avoidance of tax is avoidance of tax liability under some manner as distinguished from evasion of tax whether before or after charging or imposition. It is not illegal as distinguished from penal evasion. Section 276C(2) deals with evasion after quantification. It becomes applicable only after income is assessed and the assessee attempts to evade payment.

10. The necessary allegations are there in the complaints in the two cases and if the allegations are taken as correct, they disclose the alleged offence u/s 276C(2) also. The petitioner will have to stand trial before the magistrate and he cannot have the short cut method of avoiding it by resort to the inherent powers of this court.

11. Both the criminal miscellaneous cases are dismissed.