

(2003) 02 BOM CK 0005

In the Bombay High Court

Case No : Criminal Application No. 286 of 1997 4 February 2003

Homi Phiroze Ranina

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 04-02-2003

Acts Referred:

Income Tax Act, 1961 — Section 278B

Citation : (2003) 3 MhLj 34 : (2003) 131 TAXMAN 100

Hon'ble Judges : A.S. Aguiar, J

Bench : Division Bench

Advocate : H.V. Mehta and R.Y. Mirza, for the Appellant;

Judgement

The applicants seek quashing of the order-dated 30-11-1996 passed by the learned Additional Chief M.M., 47th Court, Bandra in case Nos. 248-S to 251-S of 1993 and pray for their discharge in the said cases.

2. The brief facts of the case are : a complaint came to be filed by the Income Tax Officer, TDS VI, Bombay, against the present applicants/accused as well as M/s. Unique Oil India Ltd. of which the applicants/accused are Directors as well as against Shri L.K. Khosla, Chairman and Managing Director of accused No. 1 Company as well as Gayatri Khosla another Director and one Yogesh Khosla the whole-time Director of accused No. 1 Company before the Additional Chief Metropolitan Magistrate, 47th Court, charging them u/s 276B read with 278B of the Income Tax Act, 1961. Summons were issued to all the accused persons including the present applicants. On receipt of summons the applicants herein (accused Nos. 4, 5, 6 and 7) filed applications, for discharge before the M.M. Court on 31-10-1996. By his order dated 30-11-1996 the Magistrate rejected the discharge applications filed by the applicants/accused Nos. 4, 5, 6 and 7.

3. The present application is for setting aside the said order which the applicants claim is passed on insufficient material. It is specifically contended that the lower court has not taken into consideration the requirements of section 194C, sections

204 and 2(35) of Income Tax Act. It is contended that the present applicants/accused are admittedly not the principal officers of the accused No. 1 company and, therefore, not responsible for the failure on the part of the Company to deposit with the Central Government the taxes deducted at source by the Company from four contractors namely (i) M/s. Allied Consulting Engineers (P) Ltd., (ii) M/s. Shrinivas Plates and Structural (P) Ltd., (iii) M/s. Excellite Insulators (P) Ltd. and (iv) M/s. Kanaiya Construction Company. Though the company had deducted the tax payable by the said contractors while making payment to the Contractors the Company failed and neglected to remit the tax deducted to the Treasury within the stipulated time. Admittedly, there is delay in remitting the tax deducted to the Central Government. As required u/s 194C, the tax had to be credited to the Central Government by 7-5-1989. However, the same was paid to the credit of the Central Government only on 30-5-1989. The tax deducted had to be credited to the Central Government within one week from the last date of the month in which deduction is made.

4. It is the contention of the applicants/accused that they are not the principal officers of the said Company Accused No. 1. They are only the non-executive Directors of the Company Accused No. 2. L.K. Khosla is the Chairman and Managing Director and Accused No. 8 Yogesh Khosla is whole-time Director of the said Company and hence, the liability for deducting Income Tax and crediting to the Central Government is that of Accused Nos. 2, 8 and the Company, Accused No. 1. It is also contended that no notice was given by the Commissioner of Income Tax to the applicant/accused prior to his granting sanction to prosecute the accused u/s 279(1) of the Act. Principles of natural justice require that the notice ought to have been given to the applicants by the Commissioner before according sanction.

5. The aforesaid submissions were made by the applicants before the learned Magistrate at the time of hearing their application for discharge. However, the learned Magistrate rejected the said contention by a speaking order. The learned Advocate, Mr. Ranina for the applicants/accused has submitted that the applicants being non-executive Directors are not concerned with the day-to-day affairs of the Company which are looked after by the Managing Director and whole-time Director. Admittedly no administrative responsibilities were shouldered by the applicants. Furthermore, applicant Nos. 1 and 3 are also practising Advocates and, therefore, they cannot by law act as full-time Directors. They could only act as non-executive Directors not exercising any administrative powers or performing any administration duties.

6. Reliance is placed on sections 194C(1), 2(35), 204 and 279 of Income Tax Act which cast liability on the company and its principal officers for making payment of the amounts deducted to the credit of the Central Government. Section 194C(1) makes the company/accused No. 1 responsible for making payment of amount deducted from the contractors and crediting it to the Central Government. Section 204(iii) states that persons responsible for crediting the

said amount are the Company itself and the Principal Officer of the said Company. In order to attract the liability of the applicants for making the payment to the Central Government it was essential for the respondents to show that the applicants were the Principal Officers of the said Company. Reliance is placed on section 2(35) of the Income Tax Act which states who is the Principal Officer and makes it obligatory on the part of the assessing officer to serve notice on the said Officer of the Company of his intention to treat him as the Principal Officer of the Company.

7. It is submitted that in the present case no notice as such was served upon the applicants by the assessing officer disclosing his intention of treating the applicants/Directors as Principal Officers of said Company.

8. It is further contended that in the complaint filed by the Commissioner it was not enough for the complainant merely to state that the accused/directors are in charge and responsible for the day-to-day management of the Company. What is required is that there must be an averment showing the nature of the post and its duties and it must be indicated in the complaint, how the Director is in charge of and responsible for the conduct of business of the Company. In the case of *M.A. Unneerikutty and Others Vs. Deputy Commissioner of Income Tax (Assessment)*, Kerala High Court observed as follows :

... By virtue of section 2(35) of the Act, partners do not come within the definition of principal officer unless the Income Tax Officer had served notice of his intention to treat them or any one of them as the principal officer of the firm connected with the management or administration. It seems necessary that the complainant must allege and show by some acceptable materials that the partners concerned were in charge of and responsible for the conduct of the business of the firm to make them also vicariously responsible along with it. A mere allegation to that effect will not. be sufficient. There should be credible materials to show their active involvement in the conduct and management of the business of the firm. Short of stating that they were in charge of and responsible for the conduct of the business of the firm nothing had been mentioned in the complaints either about their role or as to the extent of their liability, which should not have been left to be inferred. At any rate the allegations seem too be insufficient to make them liable for the impugned act for which perhaps the firm and the principal officer, if any, alone would be liable. (p. 609)

9. The learned Magistrate in rejecting the application for discharge has observed that unless and until the prosecution has been given an opportunity to lead evidence, it cannot be determined at the stage prior to the framing of the charge as to whether accused 4 to 7 applicants herein were not in charge of the conduct of the business of the company, and accordingly, held that the authority referred to by the applicants viz. *Shital N. Shah and others Vs. Income Tax Officer*, cannot be relied upon. In the said case the Madras High Court observed :

... if the payer is a company, the company itself including the principal officer thereof will be the "person responsible for paying. . . . (p. 379)

Section 2(35) specifies that the Principal Officer with reference to a Company would be any person on whom the Income Tax Officer has served a notice of his intention of treating him as Principal Officer. Admittedly no such notice was served upon the applicants. Despite the said observations of the Madras High Court in the case of Shital N. Shah (supra) the learned Metropolitan Magistrate has held that unless opportunity to the prosecution is given to lead evidence to substantiate or to prove that the accused Nos. 4 to 7 were in charge and responsible for the conduct of the business of the accused No. 1 Company, this defence cannot be taken by the accused at this stage but the accused can raise this point at the time of framing of charge.

10. It must be fairly stated that at the time of hearing of the said application for discharge, the attention of the court was not drawn to the case of M. A. Unneerikutty (supra), Kerala High Court clearly states that it is necessary that complainant must lead and show some acceptable materials that the partners were in charge of and responsible for the conduct of the business of firm. to make them also vicariously responsible along with it. A mere allegation to that effect will not be sufficient. There should be credible material to show their active involvement in the conduct and management of the business of the firm.

11. The complaint filed by the Commissioner states that accused Nos. 2 to 9 at the material time were in charge of and responsible to accused No. 1 for the conduct of its business and, therefore, legally liable u/s 194C(1) read with section 204 of the said Act to deduct Income Tax and to pay the tax so deducted to the credit of the Central Government within one week from the last date of the month in which the deduction is made. Apart from the averment that accused/applicants were in charge of and responsible to the Company for the conduct of its business there is no material whatsoever which prima facie shows that the applicants/accused were in fact in charge of the affairs of the Company and responsible for the conduct of its business and day-to-day affairs.

12. Unless the complaint disclosed a prima facie case against the applicants/accused of their liability and obligation as Principal Officers in the day-to-day affairs of the Company as Directors of the Company u/s 278B, the applicants cannot be prosecuted for the offences committed by the Company. In the absence of any material in the complaint itself prima facie disclosing responsibility of the accused for the running of the day-to-day affairs of the Company process could not have been issued against them. The applicants cannot be made to undergo the ordeal of a trial unless it could be prima facie showed that they are legally liable for the failure of the Company in paying the amount deducted to the credit of the Company. Otherwise, it would be a travesty of justice to prosecute them and ask them to prove that the offence is committed without their knowledge. The Supreme Court in the case of Sham Sunder and Others Vs. State of Haryana, held as follows :

... It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub-section (1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof, no partner could be convicted.... (p. 1984)

13. In the light of the above discussion the application will have to be allowed. The impugned order dated 30-11-1996 is set aside.

The applicants stand discharged in case Nos. 248-S to 251-S of 1993.