

(2007) 09 GUJ CK 0007
In the Gujarat High Court

Case No : Special Criminal Application No's. 1273 and 1274 of 1992

H.T. Power Structure P. Ltd. and Others	APPELLANT
Vs	
R.P. Sharma and Another	RESPONDENT

Date of Decision : 21-09-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Income Tax Act, 1961 — Section 143(3), 271(1), 276(1), 276C(1), 277
Penal Code, 1860 (IPC) — Section 109, 114, 177, 193, 196

Citation : (2008) 218 CTR 170 : (2008) 299 ITR 363

Hon'ble Judges : M.R. Shah, J

Bench : Single Bench

Advocate : J.P. Shah, for the Appellant; Manish R. Bhatt and B.B. Naik, for the Respondent

Judgement

M.R. Shah, J.—As common question of law and facts arise in these petitions, they are being disposed of by this common judgment and order.

2. Special Criminal Application No. 1273 of 1992 is filed by the petitioners, original accused, for an appropriate order quashing and setting aside the proceedings launched by the Income Tax Department by way of Criminal Case No. 251/92 pending in the court of learned Chief Judicial Magistrate, Ahmedabad, and also to quash and set aside the order passed by the learned Addl. Chief Metropolitan Magistrate dated March 27, 1992, in issuing the summons upon the petitioners in the said criminal case.

3. Special Criminal Application No. 1274 of 1992 has been filed by the petitioners, original accused, for an appropriate order quashing and setting aside the proceedings launched by the Income Tax Department by way of Criminal Case No. 252/92 pending in the court of learned Chief Judicial Magistrate, Ahmedabad. It is also further prayed to quash and set aside the order of the Addl. Chief Metropolitan Magistrate dated March 27, 1992, in issuing the summons upon the petitioners in the said criminal case.

4. Criminal Case No. 252/92 has been filed by the Assistant Commissioner of Income Tax, Company Circle 7(2), Ahmedabad against the petitioners, original accused, for the offence punishable under Sections 177, 193, 196 and 199 of the IPC read with Sections 34, 109 and/or 114 of the IPC for the assessment year 1985-86.

5 Criminal Case No. 251/92 is also filed by the very Assistant Commissioner of Income Tax against the petitioners, accused persons, for the offence under Sections 276(1) and 277 of the Income Tax Act, 1961, read with Section 278B of the Income Tax Act for the assessment year 1985-86.

6. A few facts which are necessary for the determination of the aforesaid two criminal cases as emerges from the record in a nutshell are that petitioner No. 1 is a private limited company manufacturing transmission line towers and selling them to electricity board and railways. Petitioners Nos. 2 to 6 are the directors of the said company. On June 28, 1984, the petitioner-company filed an Income Tax return showing loss of Rs. 2,19,169 inclusive therewith audited profit and loss account and balance-sheet for the assessment year 1984-85. The Assessing Officer passed an order dated March 30, 1985 u/s 143(3) of the Income Tax Act, 1961, stating "depreciation of Rs. 2,19,169 and investment allowance of Rs. 91,198 is allowed to be carried forward." The above assessment order accepting the method of charging the retention money held back by the clients to be debited to the profit and loss account was passed on March 30, 1985. On May 1, 1985, the petitioner-company filed return for the assessment year 1985-86 showing loss of Rs. 13,01,641 with a similar note like earlier years in the notes forming part of accounts and debited to the profit and loss account the amount of retention money. It is the case of the petitioners that by the time, the said assessment was taken up, in the next year's account ending on May 30, 1985, for the assessment year 1986-87, the petitioner-company changed the method of accounting by deciding not to debit the retention money and, therefore, during the assessment proceedings of the assessment year 1985-86, the petitioner-company addressed a letter dated February 22, 1988, requesting the Assessing Officer to add back to the income the claim of retention money. The Assessing Officer passed an assessment order dated March 25, 1988, for the assessment year 1985-86 adding back Rs. 1,70,360 as prayed for by the petitioner-company yet computing the loss of Rs. 9,80,398 and also ordered initiation of penalty u/s 271(1)(c) of the Income Tax Act. The petitioner company went in appeal to the Commissioner of Income Tax (Appeals) against this assessment order for the assessment year 1985-86. The Assessing Officer passed an order giving effect to the order of the Commissioner of Income Tax (Appeals) revising the total loss to Rs. 10,63,045. The present applications are against the prosecution of the company and its directors for concealing the above income by Rs. 1,70,360 for the assessment year 1985-86. It appears that thereafter, the Assessing Officer issued show-cause notice u/s 271(1)(c) of the Income Tax Act dated September 6, 1988. The petitioners replied to the same. However, the Income tax Officer by order dated March 30, 1989, rejected the above and other contentions and

imposed the penalty of Rs. 1 lakh. The petitioner-company went in appeal to the Commissioner of Income Tax (Appeals) against the above penalty order. The Commissioner of Income Tax (Appeals) dismissed the appeal. The petitioner-company preferred an appeal to the Income tax Appellate Tribunal being I.T.A. No. 4778/91. When the aforesaid appeal was pending, the Income tax Department instituted a Criminal Case No. 251/92 for the offence u/s 276C(1) and 277 read with Section 278B of the Income Tax Act and Criminal Case No. 252/92 for the offence under Sections 177, 193, 196 and 199 read with Sections 34, 109 and/or 114 of the IPC. The learned Addl. Chief Metropolitan Magistrate passed an order issuing the summons upon the petitioners and non-bailable warrants were also issued against petitioners Nos. 2 to 6 being the directors of the petitioner-company. Being aggrieved by the above two criminal proceedings and the orders passed by the learned Addl. Chief Metropolitan Magistrate issuing the summons upon the petitioners, the petitioners have preferred the present petitions under Articles 226 and 227 of the Constitution of India.

7. Shri J.P. Shah, learned senior advocate appearing on behalf of the respective petitioners, has submitted that pending the present proceedings before this court, the Tribunal has already allowed the appeal of the petitioner-company by its judgment and order dated February 10, 1993, which is reported in H.T. Power Structures P. Ltd. v. Asst. CIT [1993] 45 ITD 571 . Under the circumstances and relying upon the two decisions of the hon''ble Supreme Court in case of K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, and in the case of Virtual Soft Systems Ltd. Vs. Commissioner of Income Tax, Delhi-I, , it is requested to allow the present applications and to quash and set aside the aforesaid criminal proceedings. The learned advocate appearing on behalf of the respective petitioners has submitted that as observed by the hon''ble Supreme Court in the case of K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, , the finding of the Appellate Tribunal is conclusive and prosecution cannot be sustained since the penalty after having been cancelled, no offence survives under the Income Tax Act and thus, quashing of prosecution is automatic. It is further submitted by the hon''ble Supreme Court that 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 could not be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction. He has also relied upon the further observation of the hon''ble Supreme Court in the aforesaid decision to the effect that as there was absence of dishonest and fraudulent intention, the question of committing the offence u/s 420 of the IPC does not arise. It is further submitted that as observed by the hon''ble Supreme Court when the matter has been adjudicated and settled by the Tribunal need not be dragged into the criminal courts unless and until the act of the appellants could have been described as culpable.

8. Under the circumstance and in view of the subsequent development that the order of penalty has been quashed and set aside by the Tribunal, it is requested to allow the present applications and to quash and set aside the criminal

complaints as well as the orders passed by the learned Metropolitan Magistrate in issuing the summons in the said complaint.

9. Shri B.B. Naik, learned advocate appearing on behalf of the Department, has not disputed that the order of penalty has been set aside by the Tribunal. He is also not in a position to distinguish the decision of the hon''ble Supreme Court relied upon by the petitioners. He is also not in a position to dispute that once the order of penalty has been set aside by the Tribunal, the prosecution cannot be sustained.

10. Under the circumstances and considering the fact that the Appellate Tribunal has allowed the appeal of the petitioner-company and has quashed and set aside the order of penalty, as held by the hon''ble Supreme Court in the case of K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, , once the order of penalty has been cancelled by the Tribunal, the finding of the Appellate Tribunal is conclusive and the prosecution cannot be sustained and is to be quashed.

11. For the reasons stated above and considering the judgment of the hon''ble Supreme Court in the case of K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, and Virtual Soft Systems Ltd. Vs. Commissioner of Income Tax, Delhi-I, , the impugned complaint being Criminal Case Nos. 251/92 and 252/92 as well as the order passed by the learned Addl. Chief Metropolitan Magistrate dated March 27, 1992, in issuing the summons upon the petitioners in the said criminal cases are hereby quashed and set aside. Rule made absolute in each of the petition.