
(1995) 03 MAD CK 0143
In the Madras High Court
Case No : Criminal Appeal No. 877 of 1984

Income Tax Officer

APPELLANT

Vs

Dharamchand Surana

RESPONDENT

Date of Decision : 10-03-1995

Acts Referred:

Income Tax Act, 1961 — Section 273(A), 276C, 276C(1)
Penal Code, 1860 (IPC) — Section 420, 511

Citation : (1995) 216 ITR 678

Hon'ble Judges : Rengasamy, J

Bench : Single Bench

Advocate : Ramaswamy, for the Appellant; S.A. Rajan, for the Respondent

Judgement

Rengasamy, J.—This appeal is against the order of acquittal passed by the learned Additional Chief Metropolitan Magistrate (E.O.I.), Madras-8, in E.O.C.C. No. 705 of 1983 for the offences under sections 193 and 420 read with section 511, Indian Penal Code, 1860, and section 276C of the Income Tax Act, 1961.

2. The respondent was carrying on business in jewellery and he was also an assessee to Income Tax. On September 16, 1976, P.W.-1, Inspector of Income Tax and other officials of the same department conducted a search in his residential premises No. 13/14, Kalmandapam Road, Madras, and seized certain records including exhibits P-2 to P-7 series which are separate sheets and exhibit P-8 account book relating to 1976-77 transactions. The records revealed that exhibit P-8 was prepared to conceal the real income for the purpose of evading Income Tax. A statement, exhibit P-18, was recorded from this respondent. Subsequently, the respondent gave exhibit P-19 statement also, in the office, admitting the suppression of income in the account book. Hence, he was prosecuted for fabrication of a document intentionally for the purpose of evading tax which acts are punishable under sections 193 and 420 read with section 511, Indian Penal Code, and section 276C, Income Tax Act, 1961 (hereinafter referred to as "the Act").

3. The learned Additional Chief Metropolitan Magistrate (E.O.I.) has found that though two documents were in the possession of the accused, concealing the real income, the requirements of the provisions of law to constitute the offences mentioned above have not been satisfied and, therefore, he could not be punished. As the accused was acquitted by the learned Additional Chief Metropolitan Magistrate, the State has come forward with this appeal.

4. Learned counsel for the Income Tax Department, Mr. K. Ramaswamy, would submit that this is a case in which the accused himself admitted the seizure of the documents from his residential premises and the documents showing the omission of all the sales and income deliberately and in spite of that, the lower court has found that the accused-respondent had not attempted to commit the offence as though the records prove only the stage of preparation for the offence for which he could not be convicted and this view of the learned Additional Chief Metropolitan Magistrate is incorrect in the light of the express provisions, namely, section 193, Indian Penal Code, and section 276C of the Act and, therefore, the order of the court below is liable to be set aside.

5. As mentioned above, the respondent has admitted the search conducted by the Income Tax officials on September 16, 1976, at 9.00 a.m., and the seizure of the records exhibits P-2 to P-9. Exhibits P-2 to P-7, sheets, now stitched in the form of a book, relate to the sales turnover from February 28, 1976, to September 15, 1976, to the tune of Rs. 3,61,210.96. The records also reveal that the purchases by the appellant were for Rs. 3,63,236.72, but the account book, exhibit P-8 prepared by the appellant discloses only sales to the tune of Rs. 57,301.85 and the purchases were only for Rs. 43,557.30. Exhibit P-8 contains the seal of the Commercial Tax Office in pages 150, 59 and 74. P.W.-5, the Deputy Commercial Tax Officer also would identify the book, exhibit P-8 as the account book produced before him by the respondent for showing the turnover of sales for the purpose of levying sales tax. Therefore, exhibit P-8 book is the regular account book prepared by the respondent for his sales and only from this account book, the income of the respondent also had to be worked out. But, as mentioned above, exhibit P-8 does not contain all the sales turnover because exhibits P-2 to P-7 prove that the actual turnover of sales was Rs. 3,61,210.96. In exhibits P-2 to P-7 sheets, certain sales are indicated with "X" mark and these "X" marks indicated transactions, omitted to be mentioned in the account book, exhibit P-8. In exhibit P-18, which is a statement of the respondent recorded u/s 132 of the Act while conducting the search, the respondent has admitted that the entries in these sheets having "X" marks are payments outside the regular books of account and the account book, exhibit P-8 does not reflect the regular transactions. Exhibit P-19 is the statement recorded from the respondent on November 29, 1976, in the office after administering the oath and here also he has admitted that he had concealed the income, but the concealed income was already declared under the Voluntary Disclosure Scheme. Anyhow the fact remains that though exhibits P-2 to P-7 prove the real turnover to the tune of Rs. 3,61,210.96, in exhibit P-8 account book he had shown only

the sales for Rs. 57,301.85.

6. The learned Additional Chief Metropolitan Magistrate also in his order would hold that the respondent had maintained two accounts, one the real transaction and another the account concealing the real income. It is because of this conduct of the respondent, that the Income Tax Department has filed this case against him. Another aspect to be mentioned is that the respondent did not file the return of income for 1976-77 till November 9, 1981, in spite of the notices sent by the Department. The return for 1976-77 should have been submitted by the respondent before the end of June 30, 1977. As the accused did not submit returns for 1976-77 and also for 1977-78, notices, exhibits P-20 and P-21 were issued directing to produce the books of account. The respondent sent a reply through his consultant under exhibit P-22 that the accounts were not finalised and, therefore, he required some more time to file the return. Thereafter, again notice was issued under exhibits P-23 and P-24, in October, 1974, for which again he sent a reply exhibit P-25 requesting time as the accounts were not finalised. Once again, the Department sent the notices, exhibits P-26 and P-27, in August, 1981, and only thereafter, he filed the return, exhibit P-30, in November, 1981, showing the estimated income at Rs. 15,000. When certain defects were pointed out, he subsequently filed a fresh return under exhibit P-33 showing the income at Rs. 12,220. Subsequently, for 1977-78 also, he filed the return, exhibit P-36, and, thereafter the fresh return, exhibit P-40, on March 16, 1982.

7. Learned counsel for the Income Tax Department, Mr. Ramaswamy, would submit that in addition to the fact that the respondent prepared a fabricated account exhibit P-8 and when the same was seized by the Income Tax Department, he did not file the return also for more than four years. This conduct itself indicates that as his attempt to evade the Income Tax by filing exhibit P-8 account was foiled by the seizure of the record, he did not file the return in time and from the documents seized from the respondent and also from his conduct, the attempt to cheat the Department by evading the tax and also the fabrication of the document is established and, therefore, the offences alleged against the respondent are proved in this case.

8. On a perusal of the order passed by the learned Additional Chief Metropolitan Magistrate, he has taken the view that as the respondent had submitted the Income Tax return, exhibits P-33 and P-40, though belatedly, giving the correct income, he has not evaded the tax by concealing his income and though he fabricated the document exhibit P-8 the same was not used by him for concealing the income and that there is nothing to show that exhibit P-8 was created for the purpose of producing before the Income Tax authority and, therefore, the offences have not been made out against the respondent.

9. Now, let us proceed to consider the three sets of offences alleged against the respondent, namely, creation of false evidence, cheating and attempt to evade tax.

10. The first offence u/s 192, Indian Penal Code, can be easily answered from the evidence available in this case. Section 192 of the Indian Penal Code, deals with the commission of the offence of fabricating false evidence and section 193 is the punishment section. Section 192 of the Indian Penal Code, read as follows:

"192. Fabricating false evidence. - Whoever causes any circumstance to exist or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence"."

11. The section makes it very clear that even if one makes any false entry in any book or makes any document containing a false statement with the intention of using it in a judicial proceeding, that constitutes an offence. So, it is not necessary that the document should have been used in the judicial proceedings to attract the punishment under the section, but if the document was created with the intention of using it as evidence in the judicial proceedings, the offence is committed. In this case, exhibit P-8 is admittedly the fabricated account as it does not contain the real sales and it shows only the suppressed income. Therefore, this is a fabricated document. Then, the only question to be considered is whether the respondent had intended to use the document in the judicial proceedings. The learned Additional Chief Metropolitan Magistrate would observe that as exhibit P-8 contains the seal of the Commercial Tax Officer, P.W.-5, this was created only for the purpose of the sales tax account and there is nothing to indicate from this document that this was intended to be used before the Income Tax Officers and, therefore, no offence u/s 193, Indian Penal Code, is made out against the respondent. As rightly contended by learned counsel Mr. K. Ramaswamy, when an account has been prepared of the sales of the articles manufactured by him, the sale transactions cannot vary for sales tax purposes and Income Tax purposes though the taxes may vary. The sale transactions shown to the commercial tax authorities, cannot be different from those shown to the Income Tax Department. Therefore, basically the turnover of the sales must be the same both to the Commercial Tax Officer and the Income Tax Officer. When exhibit P-8 was fabricated suppressing the real sales and the same also was produced before the Deputy Commercial Tax Officer, P.W.-5, the same turnover of sales must be for the Income Tax Department also, to work out the total income as there cannot be any difference in the actual sales turnover for the relevant year. Hence, it has to be taken that exhibit P-8 was intended for the Income Tax Department also. As the assessment proceedings under the Income Tax Department is a judicial proceeding and when the respondent is proved to have created exhibit P-8, a fabricated document for the purpose of using it before the Income Tax Officers to conceal the real income for the

purpose of evading the tax, certainly section 193, Indian Penal Code, is attracted and the accused has completed the offence, even though subsequently he had filed the return exhibits P-36 and P-40, showing the real income. This view is supported by the Supreme Court in Kamla Prasad Singh Vs. Hari Nath Singh and Another, . The Supreme Court observes (at page 21):

".... The offence was complete the moment the false record was made with the said intention and it was not necessary for the completion of this offence that the record should be used in a judicial proceeding so as to cause an erroneous opinion to be formed touching on a point material to the result of such proceeding."

12. In Mahabir Prasad Saraogi Vs. State of Bihar and Another, , the Patna High Court also observes (headnote):

"The offence u/s 193, Indian Penal Code, of fabricating false evidence for the purpose of being used in any stage of a judicial proceeding is complete as soon as the fabrication is complete. Even if the judicial proceeding in which the fabricated document may be intended to be used may not have commenced, the offence is complete as soon as the document is fabricated, as section 193, Indian Penal Code, does not require the actual user of the document."

13. Section 193, Indian Penal Code, does not contemplate the user of the document in the judicial proceedings, but preparation of a document for the purpose of using it in the judicial proceeding itself is the offence. When the respondent had prepared exhibit P-8 and also produced the same before the Commercial Tax Officer, he would not prepare another account containing the real turnover for the purpose of producing before the Income Tax Department, because the variance between such an account and exhibit P-8 would expose the suppression of the real sales turnover which he had done before the commercial tax authorities, for which he would be punished. Therefore, the fabrication of exhibit P-8 itself is the offence u/s 193, Indian Penal Code, which the lower court has failed to understand.

14. Coming to the other offences, namely, attempt to evade the tax contemplated u/s 276C of the Act and the attempt of the respondent to cheat the Income Tax Department, punishable u/s 420, read with section 511, Indian Penal Code, it was contended by Mr. S.A. Rajan, learned counsel appearing for the respondent, that when it has been admitted by P.W.-4 himself that in the return filed subsequently under exhibit P-36, the entire income shown in exhibits P-2 to P-7 is accounted, there is no question of any attempt to evade tax on the part of the respondent and, therefore, the accused cannot be convicted of these offences. The lower court also, only on this assumption, has found that the accused is not guilty of this offence. Mr. K. Ramaswamy, learned counsel for the appellant, would submit that simply because, subsequently, the return was submitted by the appellant in the year 1981, giving full details of the income, that would not cover up the conduct of the appellant as the concealment of

income is proved from exhibit P-8 seized from his house and, therefore, the filing of the return subsequently is not voluntary disclosure and but for the seizure of exhibits P-2 to P-8, the respondent would not have disclosed his real income and, therefore, when the existence of exhibit P-8, namely, a fabricated document for the income, is proved, the attempt to conceal the income and the attempt to cheat the Department are proved. Learned counsel, Mr. Ramaswamy, relies on a decision in *Hakam Singh and Others Vs. Commissioner of Income Tax*, wherein the Allahabad High Court has held that when a return was filed under the constraint of exposure to adverse action by the Income Tax Department after the seizure of the records, the return will not be voluntary within the meaning of section 273A and as the assessee had to file the return under compelling circumstances, otherwise, he would be dealt with under the penal provisions of the Act, it was a constrained action. When the records relating to the real income of the assessee were seized in a raid, naturally the assessee cannot give a false income and, therefore, the return submitted by the assessee subsequently cannot be considered to be a voluntary return as observed above. In *Jaswant Rai v. CBDT* [1982] 133 ITR 19, the Delhi High Court has held that where the assessee has concealed his income, any subsequent act of voluntary disclosure would not affect the imposition of penalty for concealment. This court also in *G.S.R. Krishnamurthi Vs. M. Govindaswamy, Income Tax Officer*, has observed that the tax sought to be evaded on the concealed income by suppression of materials is capable of being determined on the evidence to be adduced. Therefore, simply for the reason that the respondent filed the return in the year 1981 for the taxable period 1976-77, the conduct of the respondent during the taxable period cannot become that of an honest assessee and that he never intended to attempt to conceal the income.

15. Learned counsel for the respondent, Mr. S.A. Rajan, would contend that even if it is taken that exhibit P-8 document was created in the year 1976 for the purpose of using it in the Income Tax proceedings, the fabricator of this document had opportunity to withhold this document in time, before producing the same before the Income Tax authorities, due to change of mind to be an honest assessee and unless the respondent had done some thing positively to complete the offence, but it had not taken place on account of some other causes, the respondent cannot be convicted u/s 420 read with section 511, Indian Penal Code, and section 276C, Income Tax Act. Learned counsel, Mr. S.A. Rajan, cited a few decisions which are not relevant to the point in issue. However, I am referring to those decisions also. Learned counsel refers to a decision in *M. Kalyanasundaram and Another Vs. M. Karunanidhi*, relating to a news item about the institution of a suit by the then Chief Minister of Tamil Nadu, Mr. M. Karunanidhi. The then Chief Minister filed a suit against the appellant therein for defamatory publications in a Tamil journal "Janasakthi" and the appellant again published a news item about the institution of the suit in the High Court against him by the Chief Minister along with a cartoon. It was said to be a criminal contempt against the court and the Supreme Court has observed that it

was only a mild ridicule on the respondent, the then Chief Minister, but it was not a contempt of court. The next decision relied upon by him is Jatindra Nath Sahu Vs. Emperor, . In that case, a police officer, who received the message of a missing person was alleged to have omitted to record certain things. After the first message of missing of the person, the police officer was informed again about the presence of bloodstains in a particular place which the police officer had omitted to record. He was prosecuted u/s 193, Indian Penal Code, for illegal omission of the evidence. The Calcutta High Court, in that case, has held that the police officer was not bound to record the statement verbatim and the omission in recording will not amount to an offence u/s 193, Indian Penal Code. The third decision relied upon by learned counsel for the respondent is Umrao Lal Vs. State, . This decision deals with the inconsistent statements of a person and when such a statement would become perjury.

16. All the above decisions cited by learned counsel for the respondent have no relevancy to the point in controversy and, therefore, these decisions do not require consideration for the applicability to this case, as we are concerned with the question whether the fabrication of exhibit P-8 would amount to an attempt to evade tax.

17. From the decisions referred to by Mr. K. Ramaswamy, learned counsel for the appellant, the filing of the Income Tax return subsequently after the raid and seizure of the documents cannot be considered to be the voluntary disclosure of income. The very important conduct of the respondent is that though he was bound to submit the return of his income for the assessment year 1976-77 before June 30, 1977, he did not file the return within time in spite of notices from the Department and, therefore, it shows his hesitation to file the Income Tax return as he was not having the correct account. Somehow, he was not prosecuted for not filing the return within time. Therefore, his conduct in evading to file the return for four years is a circumstance indicating that he was relying on exhibit P-8 which is a fabricated document, for the purpose of filing his return and as the same was seized from him, he could not file the return in the manner in which he wanted to do. Learned counsel for the Department, Mr. K. Ramaswamy, cited before me two decisions to support his argument that the preparation of exhibit P-8 and the delay in filing the return are proof of the attempt on the part of the assessee to evade tax. He referred to a decision in Sudhir Kumar Mukherjee v. State of West Bengal [1975] LW(Crl.) 28. The facts of that case are that one Sudhir Kumar Mukherjee was employed in Gluconate Ltd., Calcutta, and one Sham Lal Shaw was the supplier of limestones to the said firm every day, for the manufacture of the products of the firm. Every day the supplier Sham Lal Shaw used to bring the limestones for which Sudhir Kumar used to prepare a challan, send it to P.W.-2, Goswami, who used to initial it and send it back to Sudhir Kumar, who would hand over the challan to the supplier, Sham Lal Shaw for receiving the price of the raw materials supplied by him, from the counter. Sudhir Kumar was expected to verify the raw materials before he prepared the challan, as though the supplier had brought the raw materials, viz.,

limestones, as usual and P.W.-2 himself went down to verify the stock but found that no raw material was received on that day. When questioned, Sudhir Kumar replied that the raw material received had been used up. However, the supplier Shaw, who was sent for, said that he did not supply limestone on that day. It appears that after the initials made by P.W.-2 in the challan, Sudhir Kumar had to affix a stamp on the challan and sign it for giving it to the supplier Sham Lal Shaw. It was argued in that case on behalf of the appellant, Sudhir Kumar, that as the challan was not signed by P.W.-2 himself and Sudhir Kumar also had not handed over the challan to the supplier for receiving the cash, it was only in the stage of preparation and it was not an attempt on his part to cheat and, therefore, the offence was not made out. But the Supreme Court has observed that it is not necessary for the offence u/s 511, Indian Penal Code, that the transaction commenced must end in the crime or offence if not interrupted and a person commits the offence of attempt to commit a particular offence when he intends to commit that particular offence and he having made preparations and with the intention to commit the offence, does an act towards its commission and such act need not be the penultimate act towards the commission of the offence. In that case, the Supreme Court has held that though the amount was not paid to the supplier and the stamps were not affixed by the appellant, still it was an attempt on his part to commit the offence. In *State of Maharashtra Vs. Mohd. Yakub and Others*, , the attempt to commit an offence is clearly defined. The prosecution in that case alleged that the accused therein attempted to smuggle silver from the country and for that purpose, the accused transported silver in a truck to the coast and it was intercepted and the silver was seized. The Supreme Court, observing the conduct of the accused, held that he had reached close to the seashore and had started unloading the silver there near a creek from where the sound of the engine of a sea-craft was also heard and, therefore, it was beyond the stage of preparation as most of the steps in the course of export by sea had been taken and the only step that remained to be taken towards the export of the silver was to load it on the sea-craft for leaving the territorial waters of India. But for the intervention of the officers of law, the export of the silver would have been completed. The Supreme Court observes (at page 1114):

"What constitutes an "attempt" is a mixed question of law and fact, depending largely on the circumstances of the particular case. "Attempt" defies a precise and exact definition. Broadly speaking all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step in order to be "criminal" need not be the penultimate act towards the commission of the offence. It is sufficient if such act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence

A person commits the offence of "attempt to commit a particular offence when: (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence".

18. Bearing these principles laid down by the Supreme Court, in mind, if we look into the conduct of the respondent, he not only prepared the account book, which is a fabricated document concealing the real income but also produced this document before the commercial tax authorities to record that what were furnished under exhibit P-8 were the only and real sales during the relevant year in his business. Therefore, this conduct of producing the record before one wing of the authorities goes a long way to establish that he intended to use this document for Income Tax purposes also and as this document was seized, he did not file the return for more than four years even after the lapse of the time given for filing the return for 1976-77 and 1977-78. As held by the Supreme Court, the act need not be the penultimate act towards the commission of the offence but the production of the account before the commercial tax authorities is the venture of the respondent in the course of committing the offence.

19. Section 276C deals with the attempt to evade tax which was chargeable or imposable indicating that it need not be relating to the tax that was paid already. For the return to be submitted in June, 1977, the fabricated document, exhibit P-8, was created. Therefore, the creation of this document and also using it before the commercial tax authorities, namely, one wing of the tax authorities, prove that the respondent has started the process of committing the offence though the same was not completed. Therefore, certainly it is an attempt u/s 420, Indian Penal Code, read with section 511, Indian Penal Code, and also section 276C of the Income Tax Act. The court below has not considered these aspects in the offence and, therefore, has wrongly held that no offence was made out against the respondent. For the reasons stated above, the order of acquittal passed by the lower court has to be set aside.

20. Coming to the question of the sentence, as the disparity between exhibits P-8 and P-2 to P-7 is vast showing a difference of more than Rs. 2 lakhs, the punishment shall be u/s 276C(1)(i) of the Act. For the offence u/s 193, Indian Penal Code, a sentence of six months rigorous imprisonment and a fine of Rs. 1,000, that for the offence u/s 420 read with section 511, Indian Penal Code, a sentence of six months rigorous imprisonment and a fine of Rs. 250 and for the offence u/s 276C(1)(i) of the Income Tax Act, a sentence of six months rigorous imprisonment and a fine of Rs. 500 will be adequate punishment for the respondent.

21. In the result, setting aside the order of acquittal passed by the court below, the respondent is found guilty of the offences under sections 193 and 420 read with section 511, Indian Penal Code, and u/s 276C(1)(i) of the Income Tax Act

and he is convicted and sentenced in the manner stated above and sentences to run concurrently. The appeal is allowed.

22. This matter having been posted this day for being mentioned, made the following order:

On the representation of learned counsel for the accused, Mr. S.A. Rajan, the last lines above in the judgment were added to the effect that if the accused is entitled to the benefits of the Government orders passed by the Government, that would be considered by the jail authorities. Now, learned counsel, Mr. S.A. Rajan, fairly concedes that the orders of the Government of Tamil Nadu remitting the sentence is not applicable in this case, as the matter falls under the Income Tax Act, under the jurisdiction of the Central Government. Therefore, the last two lines in the judgment will not have any effect and they can be deleted. In the result, after the line, "the appeal is allowed" in paragraph 17, the subsequent lines are deleted.

23. The matter having come up for being mentioned today (10-3-1995), the court made the following order:

In this matter, the order was passed on February 28, 1995, imposing the penalty. But by oversight the default sentence is not mentioned in the order. Therefore, the default sentence is that the respondent shall undergo simple imprisonment for one month for the first offence and one week for each of the other offences, respectively.

B