(2009) 03 DEL CK 0204

In the Delhi High Court

Case No : Criminal M.C. No. 2921 of 2004

Income Tax Officer APPELLANT

Vs

Globe Walker RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 188, 220(1), 221(1), 221(2), 258
General Clauses Act, 1897 — Section 26
Income Tax Act, 1961 — Section 116, 269UA, 271(1), 273A, 275A

Citation : (2009) 183 TAXMAN 167

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Sanjeev Rajpal, for the Appellant; Arvind Chaudhary, for the Respondent

Judgement

Mool Chand Garg, J.—The complaint filed by the petitioner against the respondents including one Manoj Burman was dismissed by the Addl. Chief Metropolitan Magistrate on 3-11-1998 after the evidence was recorded and statement of the accused persons u/s 313, Cr. P.C. was also recorded but on the point that the complaint filed was bad inasmuch as the authorization provided u/s 279 of the Income Tax Act was taken from CIT either before 29-3-1990 or before that date itself and, therefore, the complaint filed was not tenable in law.

2. A second complaint was thereafter filed by the petitioner under the same provision that is u/s 276C, 277 and 278 of the Income Tax Act for the assessment year 1987-88 after obtaining fresh sanction. The ACMM dismissed the complaint by misreading the provision of Section 300, Cr. P.C. and discharged the accused persons vide order dated 15-9-2001. The observation made by the Magistrate are as under:

1. This is an application u/s 300, Cr. P.C. moved by accused for their discharge from the proceeding. Accused persons are facing allegations of offence

punishable u/s 276C, 277 read with Section 278 of the Income Tax Act pertaining to the assessment year 1987-88, accused No. 1 being firm and other accused being its partners. The application has been moved on the ground that earlier complaint No. 159/95 was filed by the complainant against the accused persons on very allegations, which formed the basis of present complaint. In those proceedings accused Manoj Burman who is also an accused in the present proceeding was discharged vide order dated 7-6-1995 on the ground that accusation against him were groundless. Rest of the accused were acquitted in the case on 3-11-1998 wherein it was held by my Ld. Predecessor that authorization to prosecute the accused persons was not valid.

2. Arguments were heard on behalf of both the parties. On behalf of the complainant, reliance have been placed on 1995 Criminal Law Journal 192 and it has been argued that since accused persons were acquitted on technical ground, authorization to prosecute having been held invalid and hence a fresh complaint was maintainable. I have gone through the case reported as Abdul Reman v. State of Kerala 1995 Cri LJ 192 but I find the facts in that case totally different and distinct from the fact in the case. In the case being relied upon on behalf of the complainant it is only an order of discharge was passed by Sessions Court and it was found that complaint has been made by an Excise Inspector who had no jurisdiction to make the complaint but in the present case accused Manoj Burman was discharged from the allegations vide order dated 7-6-1995 on the ground that accusation against him were groundless and other accused were acquitted of allegations after trial and evidence led by parties vide judgment dated 3-11-1998. Since the accused persons have already faced a trial by a court of competent jurisdiction for the offences for which the present complaint has been filed and has been acquitted of the offences and acquittal still remaining in force, they cannot be tried for the same allegations that is of the offence punishable under sections 276C, 277 read with Section 278 of the Income Tax Act. In view of provisions of Section 300, Cr.P.C. the complaint filed is not maintainable and same is dismissed. All the accused are discharged in the case.

3. The order of the Magistrate was then challenged before the Sessions Court. The Sessions Court went tangent and gave a different finding by holding that:

13. In the instant case, the Department has not preferred any appeal against the earlier judgment of acquittal and the proceedings in Complaint Case No. 157/95 was never held null and void. Therefore it cannot be said that the fresh complaint in Complaint Case No. 86/99 is permissible again on the same set of facts between the same parties. In view of the above I find that there is no illegality or infirmity in the order of the Id. ACMM, Delhi in the impugned order. Consequently the following order is passed.

Order

The petition stands dismissed.

Send back the TCR along with the copy of this order.

4. This order has been passed on 3-7-2004. Aggrieved by the aforesaid order the petitioner preferred this petition u/s 482, Cr.P.C. read with Article 227 of the Constitution of India. It has been pointed out that a bare reading of Section 300, Cr.P.C. goes to show that observations made by the Addl. Chief Metropolitan Magistrate in his order dated 15-9-2001 and the order of the Addl. Sessions Judge dated 3-7-2004 is untenable in law. Section 300, Cr.P.C. is reproduced hereunder:

300. Person once convicted or acquitted not to be tried for same offence--

(1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Sub-section (1) of Section 221, or for which he might have been convicted under Sub-section (2) thereof.

(2) A person acquitted or convicted of any offence afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charges have been made against him at the former trial under Sub-section (1) of Section 220.

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offences if the consequences had not happened, or were not known to the court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged u/s 258 shall not be tried again for the same offence except with the consent of the court, by which he was discharged or of any other court to which the first-mentioned court is subordinate.

(6) Nothing in this section shall affect the provisions of Section 26 of the General Clauses Act, 1897 (10 of 1897) or of Section 188 of this Code.

5. A bare reading of the aforesaid provision goes to show that if a complaint is dismissed and the accused is discharged it does not amount to an acquittal for the purpose of this section. It is also stated that u/s 279 of the Income Tax Act which reads as under:

279. Prosecution to be at instance of Chief Commissioner or Commissioner.--

(1) A person shall not be proceeded against for an offence u/s 275A, Section 275B, Section 276, Section 276A, Section 276B, Section 276BB, Section 276C,

Section 276CC, Section 276D, Section 277, Section 277A or Section 278 except with the previous sanction of the Commissioner or Commissioner (Appeals) or the appropriate authority:

Provided that the Chief Commissioner or, as the case may be, Director General may issue such instructions or directions to the aforesaid income- tax authorities as he may deem fit for institution of proceedings under this sub-section.

Explanation.--For the purposes of this section, ''appropriate authority'' shall have the same meaning as in clause (c) of Section 269UA.

(1A) A person shall not be proceeded against for an offence u/s 276C or Section 277 in relation to the assessment for an assessment year in respect of which the penalty imposed or imposable on him under clause (iii) of Sub-section (1) of Section 271 has been reduced or waived by an order u/s 273A.

(2) Any offence under this Chapter may, either before or after the institution of proceedings, be compounded by the Chief Commissioner or a Director General.

(3) Where any proceeding has been taken against any person under Sub-section (1), any statement made or account or other document produced by such person before any of the Income Tax authorities specified in Clauses (a) to (g) of Section 116 shall not be inadmissible as evidence for the purpose of such proceedings merely on the ground that such statement was made or such account or other document was produced in the belief that the penalty imposable would be reduced or waived. u/s 273A or that the offence in respect of which such proceeding was taken would be compounded.

Explanation.--For the removal of doubts, it is hereby declared that the power of the Board to issue orders, instructions or directions under this Act shall include and shall be deemed always to have included the power to issue instructions or directions (including instructions or directions to obtain the previous approval of the Board) to other Income Tax authorities, for the proper composition of offences under this section.

6. It is, thus, submitted that the prosecution of the petitioners earlier without a proper sanction would not have been proceeded for the offences alleged and, thereafter, the initial proceedings taken by the petitioners was bad in law. It is submitted that since no limitation is prescribed for the prosecution of the offences alleged against the respondents filing of the second complaint in these circumstances after obtaining proper sanction is not barred and, therefore, the order of the ACMM and the Addl. Sessions Judge are unsustainable.

7. Nothing contrary has been pointed out by the respondents who accept the position that the first complaint was dismissed by the ACMM only because sanction was not proper though there was a mention of recording of the evidence as well as statement u/s 313, Cr. P.C. of the accused persons and, therefore, he submits that it was a proper trial.

8. It may be observed here that one of the accused was discharged vide order dated 7-6-1995 and the petitioner submits that they have no grievance against him and they will not prosecute Manoj Burman in the second complaint.

9. Be that as it may having gone through the order of the ACMM dated 3-11-1998 it cannot be said that the said judgment is on merits of the case. Accordingly I hold that the order of the Magistrate dated 15-9-2001 and 3-4-2004 cannot be sustained. Accordingly the complaint is sent back to the Trial Court for proceeding further in the matter except with an observation that accused Manoj Burman will not be tried again as he has been discharged much earlier. The petition is disposed of with these observations. Parties may appear before the Trial Court on 21-4-2009.

10. Insofar as accused No. 4 is concerned, namely Vijay Burman, he will be exempted through counsel. Trial Court record, if summoned, be sent back.

