
(1995) 02 PAT CK 0026

In the Patna High Court

Case No : Criminal Miscellaneous Nos. 113 and 1656 of 1994

Jamshedpur Engineering and Machine Manufacturing
Company Ltd. and Others

APPELLANT

Vs

Union of India (UOI) and Others
 Sardar Ravi Inder
Singh and Others Vs State of Bihar and Others

RESPONDENT

Date of Decision : 17-02-1995

Acts Referred:

Citation : (1995) 02 PAT CK 0026

Judgement

Nagendra Rai, J.—Both the applications arise out of the same matter and are being disposed of by this common judgment.

2. The petitioners in both cases have challenged the order dated February 1, 1994, passed in Complaint Case No. 1 of 1994 taking cognizance under Sections 276C and 277 of the Income Tax Act, 1961, against them.

3. The Union of India through the Deputy Commissioner of Income Tax, Special Range, Jamshedpur, filed a complaint petition before the Special Judicial Magistrate, Jamshedpur, alleging, inter alia, that the accused company is a private company and is an assessee within the meaning of Section 2(7) of the Income Tax Act, 1961. Two returns of loss were filed by the assessee-company first on December 28, 1989, disclosing total loss of Rs. 91,69,770 and the second revised return was filed on October 19, 1990, showing total loss at Rs. 10,77,040. The assessment was completed u/s 143(3) of the Act determining the total income at nil. Two additions, the first one of Rs. 74,850 on account of discrepancy in stock and the second one of Rs. 1,25,000 on account of disallowances of motor car expenses, were made. Before making these additions, sufficient opportunity was given to the assessee-company but it did not offer any satisfactory explanation in this regard, the order of assessment was upheld in the appeal by the Commissioner of Income Tax (Appeals), Jamshedpur, on November 7, 1991. The penalty proceeding was also initiated u/s 271(1)(c) of the Act and the same was also confirmed by the Commissioner of Income Tax (Appeals),

Jamshedpur. In view of the finding arrived at in the assessment order it is manifest that the accused company and its directors had wilfully and deliberately attempted to evade the tax liability by furnishing inaccurate particulars of Income Tax and making false verifications in the return. Thus, they committed the offence punishable under Sections 276C and 277 of the Act.

4. It was further alleged in the complaint petition that after grant of sanction u/s 279 of the Act by the Commissioner of Income Tax for prosecution of the aforesaid accused persons for the offence under the aforesaid sections on November 20, 1992, the complaint petition is being filed.

5. On the basis of the aforesaid complaint, as stated above cognizance has been taken under the aforesaid sections, which has been challenged in the present case.

6. It appears that the company has not filed the application for quashing. In Criminal Miscellaneous No. 1113 of 1994(R) one of the ex-directors, namely, Sardar Gurdev Singh, and in Criminal Miscellaneous No. 1656 of 1994(R) five ex-directors are petitioners.

7. Before advertng to the submission advanced at the Bar I would like to state some more facts which are borne out from the records of this case and with regard to which there is no dispute between the parties. The assessment order was challenged by the petitioners in appeal which was upheld. Thereafter, the petitioners preferred the appeal before the Income Tax Appellate Tribunal and the Appellate Tribunal remanded the matter with regard to addition on account of discrepancy in stock. The Tribunal also deleted the disallowance of Rs. 1,00,000 and allowed addition of only Rs. 25,000 on account of disallowance of motor car expenses. After remand the assessing authority upheld his earlier order with regard to addition on account of discrepancy in stock. The penalty proceeding was also initiated u/s 271(1)(c) of the Act by the assessing authority and penalty was imposed which was upheld in appeal. However, the Income Tax Appellate Tribunal has remanded the matter but there is nothing on the record to show as to what has happened to the penalty proceeding after remand by the Income Tax Appellate Tribunal.

8. Learned counsel for the petitioners has contended that as the order of the assessing authority has been modified by the Income Tax Appellate Tribunal in appeal with regard to addition on the one account and remanded with regard to addition on the other account, the prosecution on the basis of the assessment order is an abuse of the process of the court as the very foundation for lodging the prosecution has not been upheld by the superior authority under the Act. He has also contended that the prosecution of these petitioners is not permissible in law for the reason that there is no averment that when the offence was committed the petitioners were in charge of or responsible to the company for the conduct of its business and in the absence of the aforesaid averment in the complaint they cannot be prosecuted in view of the specific provisions contained

u/s 278B of the Income Tax Act.

9. Learned counsel appearing for the Department, on the other hand, contended that the complaint has been filed in view of the specific finding given by the Assessing Officer that the petitioners had wilfully attempted to evade the tax and also submitted false statements in verification and thus committed offence under Sections 276C and 277 of the Act. The modification of the order by the appellate authority is no ground to quash the prosecution. It is not the case of the petitioners that the finding arrived at by the assessing authority with regard to concealment of income has been set aside by the superior authority but, on the other hand, an addition on account of motor vehicle disallowance to the extent of Rs. 25,000 was added by the appellate authority also and the matter with regard to addition on account of discrepancy in stock was remanded only. He also contended that there is a clear averment in the complaint petition that the petitioners, who are directors, wilfully and deliberately attempted to evade the tax liability by furnishing inaccurate particulars and made a false verification in the return and as such they are liable for prosecution in this case.

10. To appreciate the rival contentions raised at the Bar it is apt to quote the relevant provision of the Act. Sections 276C and 277 of the Act run as follows :

"276C. (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.

277. If a person makes a statement in any verification under this Act or under any rule made thereunder, or delivers an account or statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable, --

(i) in a case where the amount of tax, which would have been evaded if the statement or account had been accepted as true, 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."

11. After reading of the aforesaid provision it is clear that wilful attempt to evade tax, penalty or interest is punishable u/s 276C and on false statement in any verification under this Act or under any rule made thereunder or if a person delivers an account or statement which is false and which he either knows or believes to be false, or does not believe to be true he commits an offence u/s 277 of the Act.

12. In this case the allegation is that the return filed did not contain the correct and true statements and according to the finding of the assessing authority the false statements were made in the return with the object of evading tax liability and thus a prima facie case under Sections 276C and 277 of the Act is made out.

13. The first question which is to be determined is as to whether when a complaint petition is filed for the offence under Sections 276C and 277 of the Act on the basis of the finding given by the assessing authority the prosecution of the petitioner should be quashed on the ground that subsequently the order of the assessing authority has been modified by the appellate court.

14. In the case of Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, a firm was granted registration by the Income Tax Officer. Later on, at the instance of one of the so-called partners, the Income Tax Officer proceeded to examine the genuineness of the firm and came to the conclusion that the firm was not genuine and, accordingly, cancelled the registration and passed the order of assessment. The assessee filed an appeal before the appellate authority and in the meantime the Income Tax Department filed a complaint against the assessee for the offence u/s 277 of the Act with regard to the relevant assessment year. The appeal was allowed and the order was passed in favour of the assessee and thereafter the assessee filed an application for quashing the prosecution. Dealing with the said matter, the apex court said that as the finding was given in favour of the assessee by the appellate court the assessee cannot be prosecuted for filing a false return and, accordingly, quashed the prosecution. The said case has no application in the present case as admittedly in this case the order was only modified by the appellate court, as stated above.

15. This apart, Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, was considered by the Supreme Court in P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, , wherein it was held that Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, is not an authority for the proposition that no proceeding can be initiated at all under Sections 276C and 277 of the Act as long as some proceeding under the Act in which there is a chance of success of the assessee is pending. A mere chance of expectation in proceedings pending in appeal or reference is not a ground for not instituting a criminal proceeding under Sections 276C and 277 of the Act. The aforesaid two

cases were again considered by the apex court in the case of K.T.M.S. Mohd. and another Vs. Union of India, , wherein the Supreme Court held as follows (at page 218) :

"It may not be out of place to refer to an observation of this court in Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, , wherein it was observed that the prosecution once initiated may be quashed in the light of a finding favourable to the assessee recorded by an authority under the Act subsequently in respect of the relevant assessment proceedings. But in P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, , it has been held that the decision in Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, , is not an authority for the proposition that no proceedings can be initiated at all u/s 276C and Section 277 as long as some proceeding under the Act in which there is a chance of success of the assessee is pending. Though, as held in P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, , a criminal court has to judge the case before it independently on the materials placed before it, there is no legal bar in giving due regard to the result of the proceedings under the Income Tax Act, 1961."

16. Thus, the criminal court while deciding the criminal proceeding with regard to the relevant assessment year has to take into consideration the result of the proceeding under the Income Tax Act and the resultant finding in the said proceeding has to be given due regard in deciding the criminal prosecution. But that does not mean that if an order of assessment, on the basis of which a complaint has been filed, has been modified by the superior authority or the matter is pending before the lower authority on remand and there is a chance of success in the proceeding pending under the Act the criminal prosecution with regard to the relevant assessment year should be quashed.

17. In the present case, as stated; above, the finding of the Assessing Officer has been upheld with regard to one item of addition of Income Tax with modification and it was remanded with regard to the other item of addition. Thus, the assessment order has been upheld in part. As such it prima facie shows that the assessee has attempted to evade the tax by filing a false return. Accordingly, I do not find myself able to accede to the submission advanced on behalf of the petitioners for quashing the prosecution.

18. To appreciate the second submission it is useful to note Section 278B of the Act, which runs as follows :

"278B(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his

knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in Sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

19. From a reading of the aforesaid section it is clear that apart from the company every person, who, at the time when the offence was committed, was in charge of and responsible for the conduct of the business shall be guilty of the offence. It is to be noticed that every director or person associated with the company will not be held liable for the offence. It is only the person who was entrusted with the business of the company and was responsible to the company for the conduct of its business who will be liable for the offence alleged.

20. Section 10 of the Essential Commodities Act is in pari materia with the aforesaid section. The said provision came up for consideration before the apex court in the case of Sham Sunder and Others Vs. State of Haryana, . In that case the question was regarding the prosecution of the partners of the firm and according to the Explanation in the Act in question as well as under the Essential Commodities Act, the company includes a firm also. Dealing with the aforesaid aspect their Lordships have held as follows in paragraphs 8 and 9 (at page 4 of 67 Comp Cas) :

"But we are concerned with a criminal liability under a penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not.

It is, therefore, necessary to add an emphatic note of caution in this regard. More often, it is common that some of the partners of a firm may not even be knowing of what is going on day-to-day in the firm. There may be partners, better known as sleeping partners, who are not required to take any part in the business of the firm. There may be ladies and minors who were admitted only for the benefits of partnership. They may not know anything about the business of the firm. It would be a travesty of justice to prosecute all the 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 of 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. We, therefore, reject the contention urged by counsel for the State."

21. In the case of *State of Karnataka Vs. Pratap Chand and Others*, , the apex court dealing with a similar provision under the Drugs and Cosmetics Act held that a partner is liable to be convicted for the offence if committed by the firm, if he was in charge of and responsible to the firm for the conduct of the business of the firm or it is proved that the offence has been committed with the consent or connivance of, or attributable to any neglect on the part of, the partner concerned.

22. From a bare reading of the provision of Section 278B of the Act it appears that only the person who is in charge of and responsible for the conduct of the business of the company at the relevant time will be liable to be proceeded against and punished. The proviso to Section 278B, Sub-section (1), will come into play only when it is found that the director was in charge of and responsible for the conduct of the business of the company at the relevant time. Before any person associated with the company or firm is prosecuted it has to be alleged specifically by the prosecution that he was in charge of and responsible for the conduct of the business of the company. Unless there is such allegation the person cannot be prosecuted for the simple reason that Section 278B does not provide that the directors of the company will be liable on the ground that they are directors, in other words, it does not fasten vicarious liability on all the directors. Only those directors who, at the relevant time, were in charge of and responsible to the conduct of the business of the company alone can be prosecuted

23. In the case of *Murari Lal and Others Vs. Income Tax Officer "A" Ward*, , a learned single judge of the Punjab and Haryana High Court dealing with the provisions of Section 278B of the Act held that in case an offence is committed by the firm the partner who was in charge of and responsible to the firm for the conduct of the business at the relevant time only will be prosecuted. A similar view has been expressed by the same High Court in the case of *Puran Devi Vs. Z.S. Klar, Income Tax Officer*, .

24. Thus, the law on the subject is well settled that in case of prosecution under the Act with regard to an offence alleged to have been committed by a firm or company there should be a specific averment in the complaint that the directors or the partners were in charge of and responsible to the conduct of the business of the firm or the company at the time of the alleged offence. In the absence of such an averment, their prosecution is not sustainable in law.

25. So far as the allegation in the present complaint is concerned, as stated above, apart from the company, six directors have been made accused in the case. Regarding the directors the only averment in the complaint is that they wilfully and deliberately attempted to evade tax liability by furnishing inaccurate

particulars of income and making a false verification in the return. There is no averment that any of these directors was in charge of, or responsible for the conduct of the business of the company at the relevant time. As such, on this ground, the prosecution of the directors for the offence under Sections 276C and 277 of the Act is not permissible in law and, accordingly, the same is quashed.

26. However, so far as prosecution of the company is concerned, the same will proceed and it will be open to the complainant to show during the course of the trial that any of the directors was in charge of and responsible for the conduct of the business of the company and in such a situation the court will exercise the power u/s 319 of the Code and will add them as accused.

27. In the result, both the applications are allowed.