
(2001) 06 MAD CK 0006

In the Madras High Court

Case No : Criminal O.P. No's. 3034 to 3040 of 1999 and Criminal M.P. No's. 6131, 1633, 1635, 1637, 1639, 1641 and 1643 of 1999 22 June 2001

Kothari and Sons and Others

APPELLANT

Vs

N. Subramanian

RESPONDENT

Date of Decision : 22-06-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Income Tax Act, 1961 — Section 278

Citation : (2001) 252 ITR 153

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Division Bench

Advocate : N. T. Vanamamalai for MIs. K. S. Rajagopalan, N. Quadir Hoseyn and S. Chandrasekaran for the Assessee Ramasamy K, for the Appellant;

Judgement

M. Karpagavinayagam, J.

Since the issues raised in all these applications are one and the same, a common order is being passed.

These applications have been filed by the companies directors and other employees seeking for quashing of the complaints filed against them by the

Income Tax Officer, Central Circle, Chennai, for the offences under sections 120B, 193, 196, 420, 511 and 34 of the Indian Penal Code, 1860

and sections 276C, 277 and 278 of the Income Tax Act, 1961, which were taken on file by the Trial Court in CC. Nos. 2181 to 2187 of 1982.

These complaints were filed on 20-10-1982. The crux of the allegations contained in the complaints in question are as follows :

The company premises and residential premises belonging to the Kothari Group were searched by the Income Tax officials in August, 1981.

Several documents were seized. Those documents disclosed that the various amounts from the account of the companies were withdrawn under the guise of pay and allowance to be paid to their employees and thereby, inflated the expenditure of the companies, which are arrayed as accused No. 1 in order to suppress the real income of the companies. The directors of the companies obtained false vouchers from their employees, the other accused, as though they were paid pay and allowance for a higher amount, whereas in reality they were paid only a paltry sum for signing such false vouchers. On the basis of those vouchers, the companies' account books also were fabricated, thereby the companies and their directors attempted to evade Income Tax leviable on the real income of the companies with active abetment and assistance of the other accused, namely, the employees who signed the false vouchers. Thus, all the accused persons committed the offences under sections 120B, 193, 196, 420, 511 and 34 of the Indian Penal Code, 1860 and sections 276C, 277 and 278 of the Income Tax Act, 1961.

The petitions for quashing have been filed raising the grounds as given below :

One of the petitioners, viz., Mrs. Indira D. Kothari, filed an application before the Settlement Commission which ultimately passed an order on 28-

1-1993, u/s 245D(4) holding that the employees were not fictitious persons and there is no evidence to show that no payment was made to them

and in the circumstances, the offer of additional items made by the directors is accepted. This finding of the Settlement Commission based on the

very same seized materials is contrary to the allegations in the complaint and it nullifies the complaint.

The Income Tax Appellate Tribunal on August 27-8-1993, set aside the earlier assessment orders of the authorities and restored the matter to the

assessing officer to make fresh assessment orders taking into account the order of the Settlement Commission dated 28-1-1993, wherein it was

held that the additional amount was treated as perquisite and, therefore, the said amount may be admissible as business expenditure. In view of the

above finding the whole complexion of the allegations in the complaint has undergone a change. Furthermore in view of the order of the Tribunal,

the fresh assessment was made by the Additional Commissioner in his order on 5-1-1996, by which 70 per cent offer before the Settlement

Commission was treated as excess remuneration paid to the directors, the non-genuine expenditure mentioned in the complaint has been treated as

genuine expenditure as the same can be considered as excess remuneration paid to the directors. Therefore, the reassessment order passed by the

Additional Commissioner of Income Tax by giving effect to the Settlement Commission's order dated 28-1-1993, and the Tribunal's order dated

27-8-1993, wipes away not only the earlier assessment order but also the allegations in the complaint.

In reply to the above grounds, the contentions urged by counsel for the respondent are as follows :

The allegations contained in the complaint would constitute the offence of wilful attempt to evade tax, conspiracy, fabrication of false evidence,

etc., when there are prima facie allegations which could be proved by the materials collected by the complainant, the complaint cannot be quashed.

The petitions filed by the companies before the Settlement Commission were rejected on 20-10-1993. The order passed by the Settlement

Commission relied on by the petitioners is in the case of one Mrs. Indira Kothari in her individual assessment. Therefore, the finding given in the

order relating to the individual assessment would not be applicable to the company against whom the complaints were filed. Moreover, the finding

given in those orders by the Settlement Commission will not have any bearing on the allegations contained in the complaint. Furthermore, even in

the individual assessment, no immunity has been granted in regard to the prosecution proceedings. The orders passed by the Settlement

Commission and the orders of the Tribunal will have no impact on the trial of the complaint, as the offences alleged in the complaint basing on the

seized materials are independent of assessment proceedings or the orders passed by the Settlement Commission and the Tribunal. Hence, the

petitions for quashing are liable to be dismissed.

Dealing with the above submissions, Mr. N. T. Vanamamalai, learned senior counsel appearing for the petitioners, and Mr. Ramasamy, learned

Special Public Prosecutor for the Income Tax Department, the respondent, have argued in detail and at length.

Mr. N. T. Vanamamalai, learned senior counsel for the petitioners, would cite the following authorities in support of his contentions :

- (1) T.G. Rajaram Income Tax Officer Vs. M.A. Jaffar, ;
- (2) S. Udayakumar, First ITO Vs. Abbas Ali and Co. and others, ;
- (3) Mohamed I. Unjawala and etc. etc. Vs. Assistant Commissioner of Income Tax, City Circle VI (1), Madras, ;
- (4) G.L. Didwania and Another Vs. Income Tax Officer and Another, ;
- (5) K.T.M.S. Mohd. and another Vs. Union of India, ;
- (6) Patna Guinea House and Others Vs. Commissioner of Income Tax and Another, ; and
- (7) Thanjai Murasu and Others Vs. Income Tax Officer, .

Per contra, the learned Special Public Prosecutor appearing for the respondent would cite the authorities given below :

- (1) Dharma Pratishtan and Others Vs. B. Mandal and Another, ;
- (2) Madras Vanaspati Ltd. and Others Vs. S. Subramanian, Income Tax Officer, ;
- (3) Income Tax Officer Vs. D. Manoharlal Kothari, ;
- (4) Hakam Singh and Others Vs. Commissioner of Income Tax, ; and
- (5) Commissioner of Income Tax, Madras Vs. M/s. Express Newspaper Ltd., .

Some of the observations made by various High Courts and the Supreme Court giving various guidelines as given in the judgments cited by learned

senior counsel for the petitioners could be summarised as below :

The complaint is said to be sustained against the petitioners on the ground that the petitioners made a false statement and prepared false vouchers.

When that view of the assessing authority has been set aside by the appellate authority, it would follow that the basis for the complaint vanishes.

The findings of the assessing authority which is the basis for the prosecution, have been set aside by the superior court at a later stage, resulting in

setting aside the resultant prosecution.

In view of the fact that in the order of the Appellate Tribunal, the conclusion reached by the assessing authority that the appellant wrongly and

falsely declared that the income of the Young India and Transport Company does not belong to him, has been set aside, the very basis of the

complaint is knocked out and therefore, in the interest of justice the proceedings are liable to be quashed.

The appellants cannot be held to be liable for punishment u/s 120B read with

section 277 of the Income Tax Act, as the very basis of the prosecution is completely nullified by the order of the Tribunal which fact can be given due regard in deciding the question of the criminal liability of the appellant.

Even though the findings of the Income Tax authority are not binding on the criminal court, due regard should be given to the order passed by the Income Tax appellate authority.

The finding of fact given by the Tribunal has to be respected by the criminal court unless the court takes the view that the Tribunal had erred in law

in arriving at the finding of fact. Otherwise, the conclusion on the question of fact arrived at by the Tribunal cannot be disturbed by the criminal

court, since the findings of the Income Tax Appellate Tribunal on the facts are final.

The criminal court has to give due regard to the result of any proceedings under the Income Tax Act having a bearing on the question in issue. In

appropriate cases, it may drop the proceedings in the light of the order passed under the Income Tax Act.

Let us now see the principles laid down on this issue by this court as well as the Supreme Court in the decisions cited by the learned Special Public

Prosecutor, appearing for the respondent :

The fact that the Tribunal has passed an order of remand in the assessment proceedings would not be a bar to the prosecution for offences under

the Income Tax Act. Mere expectancies should not stand in the way of the criminal court proceeding in the matter. The High Court cannot stop

any proceedings, against an assessee in a criminal court on mere expectancy.

Though the criminal court has to give due regard to the result of any proceedings under the Income Tax Act having a bearing on the question in

issue and in an appropriate case, it may drop the proceedings in the light of the order passed under the Act. It does not mean that the result of a

proceeding under the Act would be binding on the criminal court as the criminal court has to judge the case independently on the evidence given in

the court.

While exercising the discretion to drop the proceedings in the light of the order passed under the Income Tax Act, the Supreme Court sounded a

note of caution to the criminal courts that they have to keep in view that the object of the criminal proceedings is not frustrated and there is no rigid

rule which makes it necessary for a criminal court to adjourn or postpone or drop the proceedings.

The criminal complaint cannot be quashed only on the ground that in the Income Tax appeal before the Tribunal, which was based on the same

facts as are alleged in the criminal complaint, the penalty imposed had been quashed.

It is not in every case where the assessment order is set aside, that criminal prosecution has necessarily to be brought to a grinding halt.

Merely because the original assessment had been set aside and reassessment ordered, it could not be held that the satisfaction originally arrived at

by the officer for initiating the prosecution was taken away and the criminal proceedings should necessarily be cancelled.

In a quashing petition, this court has merely to find out whether the allegations made in the complaint bring out the ingredients of the penal

provisions shown therein. It is the trial court alone which is competent to go into the truth or falsity of the statements and decide which of the

conflicting versions made by the prosecution and the accused is true. That would be beyond the limited scope of these proceedings u/s 482 of the

Criminal Procedure Code.

Every order of the Income Tax Appellate Tribunal is not binding upon the criminal court. On a question of fact even if it was not disputed or the

Tribunal was not misdirected or misguided, such facts found by the Tribunal can be accepted by the criminal court. However, the criminal court

has to judge the case independently on the evidence and materials placed before the court.

In the light of the above guidelines given by this court as well as the Supreme Court referred to in the various decisions mentioned above, let us

now see the merits of the contentions urged by counsel for the parties.

The core of the submission made by learned senior counsel appearing for the petitioners is that the order passed by the Settlement Commission

and subsequent order by the Tribunal accepting the finding of the Settlement Commission and remanding the matter for reassessment and

consequent reassessment order cancelling the earlier assessment order would

necessarily nullify the complaint.

Arguing contra, the order of the Settlement Commission and other consequent orders were not passed in the application filed by the company and

as a matter of fact, the application filed by the companies were rejected by the Settlement Commission. Therefore, the orders relied upon by the

petitioners would not be of any help to them to hold that the complaint is invalid. Furthermore, according to counsel for the respondent, the order

passed by the Settlement Commission in the application filed by one of the petitioners on an individual assessment will not cause any bearing or

impact over the allegations made in the complaint which have to be appreciated by the trial court on an independent assessment.

As noted above, if a question of fact which has got a bearing on the allegations contained in the complaint has been decided by the Settlement

Commission or by the Tribunal or other authority under the Income Tax Act, the criminal court has to give due regard to the finding given by them.

But, the question that may arise for consideration is whether any finding of fact has been given by the authorities including the Tribunal will have

direct bearing or impact on the accusation made in the complaint.

There is no dispute to the fact that the complaints in question were filed on 20-10-1982. It is also not in dispute that the applications were filed by

the petitioners before the Settlement Commission only subsequent to the filing of the said complaints. It is seen from the records that the

applications filed on behalf of the companies which are arrayed as accused No. I in these complaints have been rejected on 20-10-1983. It cannot

also be debated that the order passed by the Settlement Commission dated 28-1-1993, which was relied upon by the petitioners was on the

application filed by one Indira D. Kothari, one of the petitioners in her individual capacity.

According to counsel for the respondent, an individual assessment made by the assessment officer which was later confirmed by the Tribunal

cannot be made use of in these quashing petitions, since these proceedings would relate to the criminal prosecution against the company and its

directors, not against the individual person. However, it is seen from the Tribunal's order that the orders were passed on the appeals filed by the

companies as well as the Income Tax Officer. The reassessment order dated

5-1-1996, also shows that the name of the assessee is the company.

It is seen from the records, as pointed out by learned Special Public Prosecutor appearing for the respondent, that the company filed a further

appeal before the Commissioner of Income Tax and by the order dated 11-1-1999, the Commissioner of Income Tax upheld the order of the

assessing officer dated 5-1-1996.

In the light of the above factors, it is to be seen whether the finding which has been given in the Settlement Commission's order or in the Tribunal's

order or in the subsequent order passed by the other authority has been given with reference to the allegations made in the complaint so as to have

any impact on the trial.

The following observations mentioned in the order of the Settlement Commission dated 28-1-1993 are said to be relied upon by counsel for the

petitioners to substantiate his plea that the finding has already been given :

On a perusal of the copies of the seized documents, we find that the employees, whose names were indicated therein, were not fictitious persons,

but were actually working with the group companies and there is no evidence to show that no payment was made to them as indicated in the seized

documents. In the circumstances, the offer of additional income made by the four lady directors is accepted. This income will be added under the

head "Income from other sources".

A perusal of the above observation and the complaint in question would not indicate any finding given which has got a bearing or impact to the

allegations made in the complaint. The so called finding as referred to above, would make it clear that the Settlement Commission has concluded

that the seized documents giving the details of the amounts given to the employees would not relate to the fictitious persons.

It is not the case of the prosecution that the vouchers have been falsely prepared in the name of fictitious persons. On the other hand, it is the case

of the complainant that full amounts contained in the vouchers for which the employees (A-8 to A-12) signed the said vouchers, have not been

paid to them but they were paid only a paltry sum for signing such false vouchers as indicated in the seized documents.

It is also the observation of the Settlement Commission that there is no evidence to show that no payment was made to the employees as indicated

in the seized documents. This also is not the case of the prosecution.

It is specifically alleged in the complaint that the amount which is only a paltry sum was given to those employees in order to obtain their signatures

in the false vouchers as if the entire amount mentioned in the said vouchers had been given to them. Under those circumstances, it cannot at all be

contended that the finding has been given in respect of the facts alleged in the complaint in question.

As a matter of fact, as pointed out by counsel for the respondent, the applications filed by the companies before the Settlement Commission were

rejected and only in the application filed by one of the petitioners in an individual capacity, on an independent assessment, the above observation

has been made without touching upon the actual allegations contained in the complaint.

The very observation contained in the order of the Settlement Commission that the seized documents would show that the employees were not

fictitious persons itself would show that the Settlement Commission has not applied its mind to the allegations contained in the complaint.

In this context, it is relevant to note that even in the said order relating to the individual assessment, there is no immunity granted from prosecution in

favour of the said petitioner. Thus, it is clear that the Settlement Commission neither entertained the application filed by the company nor granted

any immunity for the offences alleged in the complaint in favour of any of the petitioners.

Further, it is to be stated that the other orders such as the order passed by the Tribunal or the reassessment order or the subsequent order passed

by the Commissioner of Income Tax would never give any finding with reference to the specific allegations made in the complaint.

As indicated by this court as well as the Supreme Court, when there are allegations in the complaint constituting the prima facie case for wilful

attempt to evade tax and other offences, the complaint cannot be quashed. As noted above, the orders passed by the Tribunal and other

departmental authorities are not binding on the criminal court, especially when there is no finding of fact by them in respect of the allegations

contained in the complaint.

According to the prosecution, the offences mentioned in the complaint have to be

tried by the criminal court and the opportunity has to be given to the complainant to prove the same. As pointed out by learned counsel for the respondent, there may be assessment order or reassessment order on the basis of the subsequent development or on the basis of the request made by the petitioners by the authorities concerned. But, that would not absolve the accused persons from the offences which had already been committed. As indicated above, there is no finding by any authority which has got any bearing or impact caused to the facts alleged in the complaint.

In view of what is stated above, the petitions are liable to be dismissed and accordingly, the same are dismissed. Consequently, Crl. M. P. Nos. 1631, 1633, 1635, 1637, 1639, 1641 and 1643 of 1999 are closed.

However, it is made clear that the above observations have been made only for the purpose of disposal of these petitions in the context of answering the questions posed before this court. Therefore, the Trial Court may decide the case on the basis of the materials placed before it uninfluenced by any of the observations made above.