

(1997) 07 MP CK 0020

In the Madhya Pradesh High Court

Case No : Criminal R. No. 385 of 1994 (I)

Laxman Das Pranchand

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 31-07-1997

Acts Referred:

Income Tax Act, 1961 — Section 194A, 276B

Citation : (1998) 1 MPJR 249

Hon'ble Judges : N.K. Jain, J

Bench : Single Bench

Advocate : S.C. Bagadia, for the Appellant; P.K. Saxena, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Jain, J.

This order shall govern disposal of Criminal Revisions No. 385/94 and 386/94.

These revisions are directed against framing of charges u/s. 276-B r/w. sec 194-A of the Income Tax Act. 1961 (for short, "the Act").

Applicant No. 1 is a partnership firm while applicants No. 2 to 6 are its partners. The applicant firm is an assessee under the Act. Income Tax Officer. B-Ward, Bhopal, has filed two separate complaints for the assessment years 1976-77 and 1977-78 against the accused-applicants alleging commission of offence u/s. 276-B/194-A of the Act. It is alleged that the applicants have failed to deduct tax at source as required u/s. 194-A. In response to the summons issued by the Court the accused-applicants have put in their appearance. Three witnesses were examined by the Court below as evidence before charge. On consideration of the evidence and after hearing both the parties the Court vide order impugned has framed charge against the applicants as aforesaid.

I have heard Shri S.C. Bagadia, learned Sr. Counsel appearing with Shri R.S. Chhabra for the applicants and Shri P.K. Saxena, learned Sr. counsel appearing

with Shri P.K. Jain for resp. - Department.

The applicants have impugned the order of the trial Court on the following four grounds:-

- (1) That no prior notice was given to the accused- applicants before filing prosecution against them;
- (2) That no criminal prosecution could be initiated against the applicant firm and its partners unless a person is designated as "Principal Officer" of the firm;
- (3) That it is neither alleged nor stated in evidence that omission to deduct tax at source was "without reasonable cause or excuse; and
- (4) That the Forms 15-A submitted by the accused- applicants are not shown to be false.

Taking the first point first, I find that admittedly no show-cause notice was served on the accused-applicants before filing the complaint against them in the Court below. However, the question remains whether such a notice was a condition precedent for launching prosecution.

Shri Bagadia learned counsel for applicants contended that the department in the instant case had an authority to levy tax on the amount of interest and recover the same either from the payer (the applicants) or the payee, and had also an authority to levy penalty. It has also an authority to commence the prosecution sec. 279 (2) of the Act provides for compounding of the offences either before or after initiation of criminal proceedings. Under the circumstances, the counsel submitted, principles of natural justice and fair play had required that the accused-applicants ought to have been noticed and heard for the purpose whether it was a fit case to compound. Reliance is placed on decisions of High Courts of Shree Singhvi Brothers and Others Vs. Union of India (UOI) and Others, and 124 CTR 201, respectively. In all these case it has been held that where other alternatives were available to the Department and remedy of launching prosecution was optional, it was essential that the accused be afforded an opportunity of being heard before filing prosecution.

The High Court of Madras has, however, taken a contrary view in 149 ITR 690 and has held that Income Tax Act does not contemplate issuing any show-cause notice before initiation of prosecution and as such it was not just to say that there was breach of principles of natural justice or that such prosecution was invalid in law.

Shri Saxena on the other hand, supports the act of prosecution and contends that view taken by High Court of Madras is in accordance with law.

I have bestowed my anxious consideration to rival contentions. In my view, the view expressed by High Courts of Rajasthan, Karnataka and Calcutta in the aforesaid decisions cannot be said to lay down the correct law.

I take this view because, undisputedly Income Tax Act does not provide that before instituting a criminal proceeding under the Act, the accused has to be given a notice in order to afford him an opportunity to compound the offence. Under the circumstance. I am afraid, the Court cannot insist upon issuance of prior notice as a condition precedent for criminal prosecution. Such an interpretation is not permissible. "Casus Omisus" is well settled rule of interpretation. Certain matters have to be left to the wisdom of legislature. A matter which should have been but has not been provided for in a statute, cannot be supplied by Courts. Even defect in phrasing dose not permit addition.

The Hon"ble Supreme Court in P.K. Unni Vs. Nirmala Industries and others [OVERRULED], has quoted with approval the (billowing observation of the Privy Council in the case of Crawford V. Spooner (1846 (6) Moor P.C. 1, 8, 9):

We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and by construction, make up deficiencies which are left there.

In Seaford Estate V. Asher (1942) 2 All E.R. 155, Lord Denning observed: "A Judge must not alter the material of which the Act is woven but he can and should iron out the creases". There are no creases to be ironed out. Legislative intent is clear.

Sec. 279 (2) of the I.T. Act provides that:

(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.

It is thus clear that composition of offence under Chapter XXII of the Act is permissible "either before or after the institution of proceedings". It is obviously for the offender to take steps towards composition and not for the authorities to ask him whether he is intending to compound and save himself from prosecution. This can be done even after the proceedings in Court. That being so, it would be improper to invalidate the proceedings for want of notice before institution of proceedings. Firstly, there is no condition of notice in the Act. Secondly, occasion to compound is not frustrated even after proceeding. The law must, therefore, sustain the validity of prosecution even when there was no prior notice. The aforesaid three decisions of various High Courts do not seem to have been called upon to consider the question from this angle. If the said decisions are followed to void the proceedings that it would make the word "after" in Sec. 279(2), superfluous. The law does not and cannot sanction such a course Expression "after" employed in Sec. 279 (2) neither considered nor decided, such decision is not binding as precedent Omprakash Vs. Ramcharan,

If the applicants had really intended to compound, they would have filed application in the trial Court in terms of Sec. 279(2). They are still free to make such an application to the concerning authorities. Needless to say, the authority on such application, can consider the question whether prosecution should be pursued or whether the case deserved to be compounded.

I may also mention that the applicants did not question the validity of taking cognizance on the first appearance as was possible in view of decision in K.M. Mathew Vs. State of Kerala and another, and participated without demur in evidence before charge. The challenge was made only at the stage of framing of charge. The belated objection is not sustainable in law even otherwise.

I, therefore, hold that it was not necessary to give notice to the accused-applicants before institution of proceedings.

Coming to the next point, it will be useful here to read Sec. 278-B, which is as follows:-

278-B (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.

Explanation - For the purpose of this section. -

(a) "company" means a body corporate, and includes ?

(i) a firm; and

(ii).....

(b) "director", in relation to?

(i) a firm, means a partner in the firm;

(ii).....

It will be thus seen that not only a firm but its partners can also be prosecuted for the offence under the Act. It is, however, open to any such partner to prove that the offence was committed without his knowledge or that he had exercised due diligence to prevent commission of such offence.

It is true that under clause (35) (b) of Sec. 2 of the Act, it is open for the assessing officer to serve a notice on a person treating him as principal officer of

a firm. But absence of such designation will again not vitiate the prosecution of the firm or its partners.

As regards remaining two grounds No. 3 and 4 noted above, I am of the opinion that it is premature to consider the same at this stage of framing of charge. Their effect, if any after evidence, may be considered by the trial Court at appropriate stage. At present I express no opinion on merits.

Agreeing, therefore, with the decision of High Court of Madras and position of law particularly in view of the expression "before and after" in Sec. 279 (2) of the Act and disagreeing with respect, with the view taken by other High Courts as cited above. I sustain the order of the trial Court and dismiss these revision petitions.

Retain this order in Cr. Rev. No. 385/94 and a copy be filed in Cr. Rev. No. 386/94.