
(1997) 01 RAJ CK 0038

In the Rajasthan High Court

Case No : Civil Writ Petition No's. 6288 of 1992 and 393 of 1993

Mehta Vegetables P. Ltd.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 09-01-1997

Acts Referred:

Constitution of India, 1950 — Article 14
Income Tax Act, 1961 — Section 269SS, 269T

Citation : (1998) 234 ITR 425

Hon'ble Judges : M.G. Mukherjee, C.J.; Bhagwati Prasad, J

Bench : Division Bench

Advocate : Vineet Kothari and Anjay Kothari, for the Appellant; D.S. Sishodia and Sandeep Bhandawat, for the Respondent

Judgement

Bhagwati Prasad, J.—These two writ petitions involve identical questions and, therefore, they are being decided by this common judgment.

2. The petitioners are aggrieved by the penalty imposed on them in terms of Sections 269SS and 269T of the Income Tax Act, 1961. Against the assessment orders, the petitioners have preferred regular appeals and in those appeals stay was not granted to the petitioners by the appellate authority. The petitioners came up before this court after rejection of such applications on the grounds that the penalty which was sought to be stayed, is illegal and Sections 269SS and 269T of the Income Tax Act, 1961, are ultra vires the Constitution and, therefore, no demand could have been issued against the petitioners.

3. The basic argument of learned counsel for the petitioners for challenging the vires of Sections 269SS and 269T of the Income Tax Act (hereinafter referred to as "the Act"), is based on a judgment of the Madras High Court in the matter of Kumari A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation, . According to learned counsel for the petitioners, Section 269SS of the Act makes the "borrower" of a sum more than Rs. 20,000 now and Rs. 10,000 earlier, an offender. Learned counsel has placed reliance on

the reasoning given in the aforesaid Madras High Court decision whereby the learned single judge of that court has held that there is no difference between a "borrower" and a "lender" as far as culpability is concerned and since the lender has been left out of the purview of Section 269SS and the borrower alone has been covered within the ambit of said section of the Act, the inclusion of the borrower alone is not rational. The learned single judge of the Madras High Court held that a transaction of loan cannot exist without a lender and a borrower, They form an integral part of a single transaction of loan. Once the transaction of loan incorporated "borrower" and "lender", leaving a lender without a penalty the said provision is discriminatory and, therefore, the learned single judge of the Madras High Court was of the view that the section is hit by the rigour of Article 14 of the Constitution.

4. Learned counsel for the petitioners urged that the impugned orders are bad, being violative of Article 14 of the Constitution of India. When "lender" is left out and only "borrower" is punished then the provisions are per se discriminatory. If the "borrower" can show wrong entries then the "lender" can also invest his undisclosed income. In this fashion both are liable to be punished but Sections 269SS and 269T of the Act merely holds the "borrower" liable.

5. Another argument of learned counsel for the petitioners is that the act of the respondents has the effect of putting the petitioner in multiple jeopardy. His income u/s 68 of the Act is enhanced by adding the entries of such transaction. After this, under Sections 271D and 271E of the Act, penalty is imposed as the petitioner is held guilty of transaction under Sections 269SS and 269T, respectively. Multiple penalisation for the same offence is hit by the principles of double jeopardy. It is further argued that the penalties have been imposed on protective basis. It has been offered that if the petitioner agrees for addition of such income u/s 68 of the Income Tax Act then the penalties can be waived. That kind of order cannot sustain the penalty.

6. Another contention of learned counsel for the petitioners is that the statute has not been made retrospective. One of the assessments in question is of the year 1989-90, the relevant year being 1988-89. As per Board Circular No. 551 (see [1990] 183 ITR 7) dated January 23, 1990, the provisions of Sections 271D and 271E of the Income Tax Act are applicable for transactions entered into after April 1, 1989, and in terms of Circular No. 522 (see [1988] 173 ITR 44), dated August 18, 1988, Sections 269SS and 269T will also apply after April 1, 1989. Thus, these provisions could not be made applicable for the assessment year 1989-90.

7. It is further argued that there was no mens rea and the punishment was very harsh, more particularly when due to business losses the business has been closed and the entire assets of the firm have been sold out. The breach can be said to be a technical or venial breach.

8. The decision of the Madras High Court which declared Section 269SS of the

Act as violative of Article 14 of the Constitution, was delivered on April 21, 1992. A Division Bench of the same High Court in a judgment delivered in the case of K.R.M.V. Ponnuswamy Nadar Sons (Firm) and Others Vs. Union of India and Others, , decided on September 11, 1989, has considered the same question and while adjudging the vires of Section 269SS of the Act, upheld the constitutional validity of this section. A Division Bench of the Madras High Court having upheld the constitutional validity of Section 269SS of the Act, it was not open to the learned single judge of the same court to have considered the question all over again and strike down the section, In this regard we draw strength from a Supreme Court pronouncement in the case of D.K. Yadav Vs. J.M.A. Industries Ltd., wherein it has been held that once an authoritative law is laid down after considering all the relevant provisions and the previous precedents, it is no longer open to recanvass the same on new grounds or reasons that may be put forth in its support unless the court deemed appropriate to refer it to a larger Bench in the larger public interest to advance the cause of justice. Every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent. It does not lose its authority "merely" because it was badly argued, inadequately considered and fallaciously reasoned. In this view of the matter, learned counsel for the appellant cannot draw benefit from the judgment of the learned single judge of the Madras High Court in Kumari A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation,

9. Learned counsel for the respondents have drawn our attention to a news item, reported in Commissioner of Income Tax Vs. Shivsagar Estates (Aop), wherein it has been reported that Supreme Court on July 26, 1993, has stayed the operation of the judgment of the Madras High Court in Kumari A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation, upon which reliance has been placed by learned counsel for the writ petitioner. Learned counsel for the respondent-Department has placed reliance on a case decided by the Gujarat High Court in SUKHDEV RATHI Vs. UNION OF INDIA AND ANOTHER, and urged that not only the Madras High Court but a Division Bench of the Gujarat High Court also upheld the constitutional validity of Section 269SS of the Act. The Division Bench of the Gujarat High Court in the aforesaid case has held that though it is true that a transaction of loan or deposit involves two persons--a borrower and a lender--and both can be said to be similarly situated so far as the transaction of borrowing or deposit is concerned, when it comes to evasion of tax, it cannot be said that they are similarly situated. A borrower by adopting the device of giving a false explanation or making false entries or by obtaining confirmatory letters is found evading payment of tax. Therefore, a borrower and lender cannot be presumed to be similarly situated as far as imposition of penalty is concerned. The Division Bench of the Gujarat High Court thus, also upheld the constitutional validity of Section 269SS of the Act. On the strength of the aforesaid decision it has been urged on behalf of the respondent-Department that the writ petition is meritless.

10. We have considered the rival submissions. The foundation on which Kumari

A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation, proceeds is that-like should be treated alike. The learned single judge of the Madras High Court has held that when "lender" and "borrower" stand on the same footing in a transaction of loan then they should be treated similarly. The observation of the learned single judge of the Madras High Court further is that to some extent the borrower stands on a worse footing, This finding of the learned single judge is not justified. The borrower has the opportunity of misusing the loan so taken by showing his income against an entry of loan, therefore, he has an opportunity of evading tax. Learned counsel for the petitioners has tried to press that when the "borrower" can manipulate the entries, the "lender" can also convert his number two income into number one. There is no denial that anyone who has money can advance it but in advancing it he makes it open and the moment he declares income it becomes open and he becomes liable to be taxed. Thus, one who wants to keep the money under a veil cannot take any advantage of evading tax by advancing such money. However, a "borrower" by a fictitious entry can always say that the money does not belong to him and is a loan. Therefore, the equation set up by the learned single judge of the Madras High Court in Kumari A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation, is not made out that easily. A Division Bench of the Gujarat High Court has considered the question in detail and has come to a conclusion that the classification made by the Legislature is based on intelligible differentia and cannot be said to be discriminatory or in any manner, violative of Article 14 of the Constitution. The classification has a rational nexus, sought to be achieved by the provisions of the Act. Sufficient safeguards have been provided therein. The arbitrariness alleged is not germane from the provisions as an assessee can always show a reasonable cause before any penalty is imposed u/s 269SS and, therefore, it is not an unbridled and unchecked power. We are in agreement with the view taken by the Division Bench of the Madras as also of the Gujarat High Courts and do not find any unconstitutionality in the provisions of Section 269SS and, on the same parity, the validity of Section 269T is also upheld.

11. The question raised by learned counsel for the petitioners regarding mens rea is a subject-matter which the Departmental authorities have to consider. The absence of mens rea is a question which does not touch the constitutional validity of the sections and similarly hardship can also be said to be a feature which cannot be gone into while judging the question of constitutional validity of a provision impugned. There may be statutory offences bereft of mens rea as well. These are questions which the Departmental authorities have to consider and their presence or absence does not make any legislative enactment either invalid or valid. As regard the penalty being on protective basis, it can be said that there are various provisions in the Income Tax Act where offences have been made compoundable and in this way compounding has been offered and negotiated. Therefore, this also is an aspect which the Departmental authorities have to consider.

12. Another aspect raised by learned counsel for the petitioners is that the penalty cannot be retrospective. This also is an aspect which has to be gone into by the Departmental authorities, in the proceedings pending before them and while this court is entertaining only on the question of validity of the sections aforesaid, these questions are not adjudicated upon and are left to be decided by the Departmental authorities.

13. The argument of double jeopardy has been urged by counsel for the petitioners without appreciating the import of the doctrine. Various provisions of the Income Tax Act make the different stages of a transaction punishable. Section 68 of the Income Tax Act covers the case of evasion of tax by levying tax. Sections 271D and 271E make the borrowing and repayment without cheque punishable as the repayment and borrowing are not considered genuine. The genuineness is the basic ingredient. This being absent it is not one default--with every step a different offence is committed and that brings the act of the petitioners out of the double jeopardy jargon. In any case, no such case is made out from the facts. Each penalty is prescribed for a different kind of violation.

14. The law laid down by the Madras High Court and the Gujarat High Court in upholding the constitutional validity of Section 269SS of the Act appears to be sound and the view taken by the learned single judge of the Madras High Court in Kumari A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation, seems to us as being unreasonable, being a judgment passed in utter disregard of the principles of judicial propriety because the learned single judge of the Madras High Court while deciding Kumari A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation, had before him a Division Bench judgment of that very court and he was bound by the ratio of that case. We are in agreement with the law laid down by the aforesaid two decisions of the Madras High Court and the Gujarat High Court in K.R.M.V. Ponnuswamy Nadar Sons (Firm) and Others Vs. Union of India and Others, and in SUKHDEV RATHI Vs. UNION OF INDIA AND ANOTHER, and consider that there is no arbitrariness or discrimination in the provisions of Section 269SS of the Act and, on the same parity we uphold the constitutional validity of Section 269T of the Act because that is only the reverse of borrowing and there is no difference because that also deals with the manipulative devices of the borrower.

15. In view of the aforesaid discussion, both the writ applications fail and are dismissed as being without merit.