(1983) 07 MAD CK 0032

In the Madras High Court

Case No : Criminal R.C. No. 167 of 1980 and Criminal M.P. No. 2572 of 1983

M.R. Pratap APPELLANT

Vs

V.M. Muthuramalingam, Income Tax Officer, Central Circle-III, Madras RESPONDENT

Date of Decision : 20-07-1983

Acts Referred:
Income Tax Act, 1961 — Section 192(1), 2(31), 2(35), 276B, 277

Citation : (1984) 39 CTR 43 : (1984) 16 TAXMAN 286

Hon'ble Judges : Natarajan, J

Bench : Single Bench

Advocate : N.C. Raghavachari, for the Appellant; Sam V. Chelliah, for the Respondent

Judgement

Natarajan, J.

1. The criminal revision is directed against the order of the Chief Metropolitan Magistrate, Madras, in M.P. No. 3269 of 1979 in C.C. No. 2652

of 1974, on the file of his court, refusing to discharge the 2nd accused without trial. The criminal miscellaneous petition has been filed to quash the

proceedings in C.C. No. 2652 of 1974, in so far as the 2nd accused is concerned.

2. The revision case and the miscellaneous petition have come to be filed in the following circumstances. The Income Tax Officer, Madras, filed a

complaint against M/s. Rayala Corporation Pvt. Ltd. (accused No. 1) and its managing director, Sri M. R. Pratap (accused No. 2) for non-

payment within the prescribed time of Income Tax deducted from the salaries of the employees of the company. The case was taken against the

two accused under s. 276B read with s. 200 of the I.T. Act, 1961 (hereinafter referred as ""the Act""), and rule 30 of the I.T. Rules, 1962 (hereinafter referred to as ""the Rules""), and process was issued to the accused.

3. After receipt of process, the two accused filed Clr. M.P. No. 25 of 1976 on the file of this court and prayed for quashing of the proceedings

against them. Various contentions were raised by then such as that only total non-payment of tax deductions and not delayed payment of tax will

fall under s. 276B of the Act, that for delayed payment of tax, the Department can only levy penalty and cannot resort to prosecution and that, in

any event, the second accused, viz., the managing director, cannot be held guilty of the offence complained of, because he is not the principle

officer of the company or the person responsible for praying Income Tax. The petition was heard by me and by order dated June 29, 1979, I

rejected the contentions and dismissed the petition.

4. In so far as the last contention is concerned, I held as follows :

Thus it may be seen that if the employer is a company, the company as well as the principal officer thereof have to be treated as ''person

responsible for payment''s. In section 2(35), the term ''principal officer'' has been defined. The definition takes within its fold not only (a) a

secretary, treasurer, or manager or agent of the authority, company, association or body, but also (b) any person connected with the management

or administration of the company ...... upon whom the Income Tax Officer has served a notice of his intention of treating him as the principal officer

thereof. A combined reading of section 204 and section 2(35)(b) will, therefore, go to show that a director or managing director will also fall within

the definition of ''principal officer'' provided the Income Tax Officer has served a notice of his intention of treating him a such. If, therefore, the

second petitioner had been issued a notice as contemplated in section 2(35)(b) and treated as the ''principal officer'', then notwithstanding the fact

that is the managing director, he can be treated as the ''principal officer''. Similarly, notwithstanding the fact that he is not actually the person making

deductions of Income Tax from the salaries paid to the employees, he will still constitute a person responsible for paying. In that view of the matter,

the 2nd contention of the petitioners has also fail. It is not the petitioners'' case that the 2nd petitioner has not been issued notice by the Income Tax

Officer and treated as the principal officer of the company. The situation may, however, be different if such a notice had not been given to the 2nd petitioner. But that is a matter to be gone into by the trial court, because it involves taking of evidence.

5. Consequent on the dismissal of Crl. M.P. No. 25 of 1976, the case was taken up for trail by the Chief Metropolitan Magistrate, Madras. The

2nd accused filed a petition in M.P. No. 3269 of 1979, praying for his discharge from the proceedings on the ground that the ITO has not served

on him a notice under s. 2(35)(b) of the Act to intimate that the Department would be treating the second accused as the principal officer of the

company.

6. The Chief Metropolitan Magistrate dismissed the petition holding that the Income Tax Department had been treating the managing director as

the principal officer of the company and, secondly, in M. R. Pratap v. V. M. Muthukrishnan [1977] 47 Comp Cas 815 (Mad), it has been held

that a managing director is liable to be treated as the principal officer of a company and punished under s. 277 of the Act for filing an incorrect

return of income.

7. Mr. N. C. Raghavachari, learned counsel for the petitioner (2nd accused), contends that the Chief Metropolitan Magistrate has failed to take

note of the pronouncement of this court in the earlier petition, Cr. M.P. No. 25 of 1976, that a managing director or director of a company can be

held to be a principal officer of the company only if the ITO has served a notice of his intention to treat the managing director or director as

principal officer of the company. In this case, according to the counsel, it is not only the contention of the petitioner, but the admitted stand of the

complaint also that the ITO has not issued any notice to the petitioner informing him of his intention to treat the petitioner as the principal officer of

the company. His further argument is that the decision in M. R. Pratap v. V. M. Muthukrishnan [1977] 47 Comp Cas 815 (Mad), will have no

application to the facts of this case, because s. 276B and s. 277 of the Act stand on different footings. Arguing contra, the learned counsel for the

Income Tax Department states that the petitioner will undoubtedly constitute the principal officer of the company in view of his position as

managing director and, therefore, he can also be proceeded with under s. 276B for delayed payment of the tax collection. His further contention is

that the ratio in M. R. Pratap v. V. M. Muthukrishnan can well be applied to this case also.

8. The short question for consideration is, whether the petitioner in his capacity as managing director is liable for prosecution under s. 276B of the

Act. The said section section reads as follows :

276B. If a person, without reasonable cause or excuse, fails to deduct or after deducting, fails to pay the tax as required by or under the

provisions of sub-section (9) of section 80E or Chapter XVII-B, he shall punishable.-

(i) in a case where the amount of tax which he has failed to deduct or pay 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"".

On a reading of the section, it may be seen that stringent punishment is provided for any person contravening the section. If the tax amount in

respect of which default in payment has occurred exceeds one hundred thousand rupees, the punishment can extent up to seven years'' rigorous

imprisonment besides fine, but, in any case, the sentence of imprisonment should not be less than six months. If the amount in respect of which

default has occurred is less than one hundred thousand rupees, the punishment may extend up to three years'' rigorous imprisonment and fine, and,

in any event, it shall be for a minimum period of three months.

9. Coming now to the interpretation of s. 276B, the section does not refer to the director or the principal officer, etc. It merely refers to a person.

The word ""person"" has been defined in s. 2(31) as follows :

2. (31) ''person'' includes -

(i) an individual, (ii) a Hindu undivided family, (iii) a company, (iv) a firm, (v) an association of persons or a body of individuals, whether

incorporated or not, (vi) a local authority, and (vii) every artificial juridical person, not falling within any of the preceding sub-clauses.

10. The definition contained in s. 2(31) is not helpful for deciding the controversy on hand, because it only refers to the various categories of

assessees who can be treated as a person within the meaning of the Act. Then we may look at s. 2(35), which defines ''principal officer''. The

definition is to the following effect -

2. (35) ''principal officer'' used with reference to a local authority or a company or any other public body or any association of persons or any

body of individuals means -

(a)the secretary, treasurer, manager or agent of the authority, company, association or body, or

(b) any person connected with the management or administration of the local authority, company, association or body upon whom the Income Tax

Officer has served a notice of his intention of treating him as the principal officer thereto.

11. Under sub-section (a), the secretary, treasurer, manager or agent will automatically constitute a ""principal officer"". In their absence, it is open to

the ITO to treat any one else as a ""principal officer"" of the company, provided he gives a notice to the person concerned of his intention of treating

him as the principal officer of the company. To enable the ITO to do so, sub-clause (b) has been enacted. The resultant position would, therefore,

be that if any one who is connected with the company is not the secretary, treasurer, manager or agent, then he cannot be treated as the principal

officer company unless the ITO has served a notice as envisaged under s. 2(35)(b) of the Act. It is in the light of these provisions, we have to

consider the claim of the petitioner that he is not the principal officer and, as such, he cannot be prosecuted for an offence under s. 276B. Then we

come to s. 192, which provides for deduction of tax at source. Sub-s. (1) of s. 192 reads as follows :

192.(1) Any person responsible for paying any income chargeable under the head ''Salaries'' shall, at the time of payment, deduct Income Tax on

the amount payable at the average rate of income tax computed on the basis of the rates in force for the financial year in which the payment is

made, on the estimated income of the assessee under this head for that financial year.

There is reference here also to a person responsible for paying any income chargeable under the head ""Salaries"". But, there in no reference to a

director or a managing director. Therefore, it follows that the managing director of a company, like the petitioner, cannot be held liable under s.

276B unless the ITO has served a notice on him under s. 2(35)(b) and informed him of his intention to treat him as the principal officer of the

company.

12. In the instant case, it is admitted by the Department that no such notice as contemplated under s. 2(35)(b) has been served on the petitioner.

Hence, the petitioner''s contention that he cannot be proceeded with for the delayed payment of the tax amount by the company is a well-founded

one. On the first occasion itself, when Cr. M.P. No. 25 of 1976 was disposed of, it was pointed out by me in the order that if the managing

director had been issued a notice as contemplated in s. 2(35)(b) and treated as the principal officer, then irrespective of the fact that he is not the

secretary, treasurer, manager or agent, or ""the person"" actually making deduction of the Income Tax on the salaries paid to the employees, he will

still constitute a person responsible for paying the deducted tax amounts to the Department. However, the quashing of the proceedings against the

managing director was not ordered at that time, because it was not known whether the ITO had issued notice to the managing director informing

him that he would be treated as the principal officer of the company. It was on account of that the following observation was made :

It is not the petitioner''s case that the 2nd petitioner has not been issued notice by the Income Tax Officer and treated as the principal officer of the

company. The situation may, however, be different if such a notice had not been given to the 2nd petitioner. But that is a matter to be gone into by

the trial court because it involves taking of evidence.

The petitioner has now come forward with this petition saying that the Department has not served any notice on him under s. 2(35)(b) and this fact

is not disputed by the Department itself. In such circumstances, the contention of the petitioner has to be accepted.

13. So far as the decision in M. R. Pratap v. V. M. Muthukrishnan [1977] 47 Comp Case 815 (Mad), is concerned, the ratio laid down therein

will not have application to the facts of the facts of this case. Section 277 deals with filing of a false statement in any verification made under the

Act or the Rules, etc. The section lays down that if a person makes a statement in any verification under the Act or the Rules or delivers an account or statement, which is false, then he should be punished with imprisonment up to seven years'' rigorous imprisonment and fine where there is

evasion of tax of over one hundred thousand rupees or with sentence up to three years'' rigorous imprisonment and fine if the evasion of tax is less

than that amount. The word ""person"" used in that section will have reference to the actual person making the statement in the verification or

delivering an account or statement, which is false. If a managing director had made a false statement in a verification or delivered a false account or

statement, then he would undoubtedly be liable under s. 277 of the Act. However, the liability is not on account of his status as managing director,

but on account of his criminal act in having signed a false statement or delivering of a false account of his criminal act in having signed a false

statement or delivering of a false account or statement. But in so far as an offence under s. 276B is concerned, it would be only the company and

the principal office of the company who will be liable for the failure to deduct Income Tax from the salaries of the employees or failure to pay the

tax after deduction of the amount from the salaries of the employees. The learned Chief Metropolitan Magistrate is, therefore, not right in taking the

view that the petitioner can be treated as the principal officer of the company, even if notice has not been served on him under s. 2(35)(b) and

called upon to defend the charge levelled against him by the Income Tax Department. The revision as well as the criminal miscellaneous petition,

therefore, deserve to succeed and will accordingly stand allowed. As a consequence thereof, the proceedings in C.C. No. 2652 of 1974 on the

file of the Chief Metropolitan Magistrate, Madras, will stand quashed as against the petitioner herein (second accused).

