(2012) 02 JH CK 0059

In the Jharkhand High Court

Case No : Criminal Miscellaneous No. 1502 of 2000 (R)

M/s D.N. Singh Construction Co., Chitra Deoghar and Others APPELLANT

Vs

The State of Bihar and Another RESPONDENT

Date of Decision : 29-02-2012

Acts Referred:

Income Tax Act, 1961 — Section 271(1)(c), 271C, 276C, 277, 278B
Negotiable Instruments Act, 1881 (NI) — Section 141, 2

Citation : (2012) 2 JCR 502 : (2012) 2 JLJR 218

Hon'ble Judges : Prashant Kumar, J

Bench : Single Bench

Advocate : Anubha Rawat Choudhary, Warda Khan, K.P. Choudhary, for the Appellant; Deepak Roshan, Amit Kumar, Rupa Kumari, for the Respondent

Final Decision : Dismissed

Judgement

Prashant Kumar, J.—This application has been filed for quashing of entire proceeding pending in connection with complaint case no. 25 of 1993 u/s 276C and Section 277 of the Income Tax Act, 1961 pending in the Special Court, Economic Offences, Dhanbad. It is alleged that petitioner no. 2 being partner of petitioner no. 1, a firm namely D.N. Singh Construction Company, Chitra Deoghar, filed return showing total income of petitioner no. 1 Rs. 1,62,9907- for the assessment year 1989-90. It is further alleged that on completion of assessment it was found that actual income of firm was Rs. 2,55,878/-. It is alleged that accordingly a penalty proceeding u/s 271(1)(c) of the Income Tax Act has been initiated against accused. It is also alleged that petitioner no. 2 wilfully made a false statement in the verification portion of the return concealing the true particulars of income. Accordingly, present complaint petition filed against petitioner no. 1 and its all partners (petitioner nos. 2 to 5) u/s 276C and 277 of the Income Tax Act, 1961. It further appears that said complaint received in the Special Court, Economic Offences, Dhanbad, on 15.3.1993, on that day itself cognizance of offences under Sections 276C and 277 of Income Tax Act, 1961 was taken against petitioners.

2. White assailing the criminal proceeding initiated against petitioners Mrs. Anubha Rawat Choudhary, learned counsel for the petitioners, submits that in the instant case difference of income shown in the return and income assessed by assessing authority is less than Rs. 15,000/-, thus, as per circular of Govt. of India prosecution of petitioners under Sections 276C and ''277 of Income Tax Act is not tenable. In support of aforesaid submission she relied upon a unreported judgment of Hon''ble Patna High Court in Cr. Misc. No. 6400 of 1993 dated 18.8.1998. It is further submitted that from perusal of assessment order it is clear that Income Tax authority had not initiated any proceeding u/s 271(1)(c) of the Income Tax Act. It is submitted that Hon''ble Supreme Court in K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, had held that in the absence of any proceeding u/s 271(1)(c) of Income Tax Act prosecution u/s 276C of Income Tax Act will automatically be liable to quashed. It is submitted that as in the instant case, no proceeding u/s 271(1)(c) of Income Tax Act initiated, thus question of prosecuting petitioners u/s 276C does not arise. Learned counsel lastly submits that according to Section 278B of Income Tax Act, the person, who is in-charge of company for the conduct of its business, shall be liable to be prosecuted. It is submitted that it has been held by their Lordships of Supreme Court in National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, that it is imperative for the complainant to make necessary averment in the complaint petition as to how and in what manner the accused persons are responsible for the conduct of the business of company. Mrs. Choudhary submits that merely by saying in the complaint petition that all accused persons are responsible for the conduct of the business of company is not sufficient to prosecute them. She submits that in the complaint petition it is specifically mentioned that petitioner no. 2 signed the return, thus, at the time the offence committed he was incharge and responsible for the conduct of business of the company, therefore, prosecution of petitioner nos. 3, 4 and 5 cannot be sustained in view of Section 278B of the Income Tax Act.

3. Sri Deepak Roshan appearing for the opposite party no. 2 submits that from Annexure-1 (return filed by petitioners) it is clear that petitioners shown income of firm Rs. 1,62,990/-, whereas Assessing Authority assessed its income Rs. 2,31,567/-. Thus, difference between income shown in the return and income assessed by assessing authority is more than Rs. 25,000/-. Thus, the circular issued by Government of India has no application in the facts of this case, consequently, judgment of the Patna High Court has no application in this case. Sri Roshan further submits that in the complaint petition, as well as in the sanction order, it is clearly mentioned that penalty proceeding u/s 271(1)(c) has already been initiated. Thus, non-mentioning of the same in the assessment order has no consequence. It is submitted that it is not mandatory for the assessing authority to write in the assessment order that proceeding u/s 271(1)(c) has been initiated. Sri Roshan further submits that in paragraph no. 2 of complaint petition, complainant stated that all partners are equally responsible for every act and transaction of the business of the said firm, therefore

requirement as contained u/s 278B of the Income Tax Act has been complied, thus, there is no impediment in prosecution of petitioner nos. 3, 4 and 5.

4. Having heard the submissions, I have gone through the record of case. From perusal of return (Annexure-1) I find that petitioners shown income of petitioner no. 1 Rs. 1,62,990/-. However, Annexure-5, reveals that Income Tax Authority assessed income of petitioner-firm Rs. 2,31,567/-. Thus difference in between income shown in the return and income assessed by Income Tax Authority is more than Rs. 25,000/-. The Hon''ble Patna High Court in aforesaid decision (Cr, Misc. No. 6400 of 1993) had considered the circular of the Government of India, where it is stated that no prosecution should be launched under Sections 276C and 277 of the Income Tax Act if income sought to be evaded is less than Rs. 25,000/-. In this case, as stated hereinabove, income sought to be evaded is more than Rs. 25,000/-, therefore, aforesaid circular of Government of India and judgment of Hon''ble Patna High Court has no application in this case.

5. Now coming to the second submission it is worth mentioning that in paragraph no. 6 of the complaint petition it is stated that penalty proceeding u/s 271(1)(c) of the Income Tax Act has already been initiated against petitioners. Aforesaid statement reiterated in the sanction order, which is attached with complaint petition. There is nothing in the Income Tax Act which makes it imperative. that the assessing authority should state in the assessment order that a proceeding u/s 271(1)(c) of the Income Tax Act has already been initiated. Thus, submission of learned counsel for the petitioners that since in the assessment order it is not stated that proceeding u/s 271(1)(c) has been initiated, therefore, it will be presumed that no such proceeding initiated, thus, petitioners could not be prosecuted under Sections 277 and 271C (sic--276C ?) of Income Tax Act does not inspire confidence. In my view, aforesaid judgment of Hon''ble Supreme Court in K.C. Builders and Others (supra) has no application in the facts of this case.

6. Before appreciating the 3rd contention raised by Mrs. Choudhary I think it appropriate to quote Section 278B of the Income Tax 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 proceed against and punished accordingly.

(3) [Where an offence under this Act has been committed by a person, being a company, and the punishment for such offence is imprisonment and fine, then, without prejudice to the provisions contained in sub-section (1) or sub-section (2), such company shall be punished with fine and every person referred to in sub-section (1), or the director, manager, secretary or other officer of the company referred to in sub-section (2), shall be liable to be proceeded against and punished in accordance with the provisions of this Act.]

Explanation.--For the purposes of this section,--

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

(i) a firm; and

(ii) an association of persons or a body of individuals whether incorporated or not; and

(b) director", in relation to--

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

(ii) any association of persons or a body of individuals, means any member controlling the affairs thereof.

From bare perusal explanation attached to aforesaid section, it is clear that a company includes a firm. It is not in dispute that petitioner no. 1 is a firm. According to Section 278B(1), only such persons are liable to be prosecuted for any offence committed under Income Tax Act, who are in-charge and responsible to the company for the conduct of its business'', unless it is shown that offence has been committed with the consent or connivance of other partners and officers of the firm. Hon''ble Supreme Court in National Small Industries Corporation Ltd. case (supra) while dealing with Section 141 of the Negotiable Instruments Act, which is similar to Section 278B of Income Tax Act had held that merely by stating in the complaint petition that accused persons were in-charge and were responsible to the company for the conduct of its business is not sufficient for prosecuting them. It is necessary for the complainant to make averment that how and in what manner all accused persons are guilty of consent and connivance and responsible under sub-section 2 of Section 141 of the Act.

7. In the instant case, except petitioner no. 2, there is vague allegation against petitioner nos. 3, 4 and 5 that they are partners, therefore equally responsible for every act and transactions of the business of the said firm. There is no averment in complaint that petitioner No. 1 conceal real income of the firm with their consent. Thus in my view, aforesaid averment is not sufficient to prosecute petitioner nos. 3, 4 and 5 because as per aforesaid judgment of Their Lordships

of Supreme Court, complainant is require to make necessary averment as to how petitioner nos. 3, 4 and 5 were responsible under sub-section 2 of Section 278B of Income Tax Act. Thus, I find substance in the submission of Mrs. Choudhary that prosecution of petitioner nos. 3, 4 and 5 is not tenable as per provision of Section 278B of Income Tax Act.

8. So far petitioner nos. 1 and 2 are concerned, it appears that petitioner no. 1 is a firm, whereas petitioner no. 2 namely Dhirendra Nand Singh is a partner, who filed return in question and put his signature on its verification portion, thus, he was in-charge and responsible for the conduct of the business of firm at the time of commission of offence. Therefore, I am of the view that petitioner no. 1 and 2 were rightly prosecuted in this case. In the result, I allow the application filed by petitioner nos. 3, 4 and 5. Criminal proceeding initiated against petitioner nos. 3, 4, 5 namely Manoranjan Bhokta, Smt. Rita Sheikhar and Binod Kumar Rai in connection with Complaint Case No. 25 of 1993 is hereby quashed. However, I find no merit in the application filed by petitioner nos. 1 & 2, therefore application filed on their behalf is hereby dismissed. It is made clear that any findings given in this case against petitioner nos. 1 and 2 will not prejudice them during the trial.