

(1996) 11 PAT CK 0022
In the Patna High Court
Case No : C.W.J.C. No. 1955 of 1993

Narsingh Ram Ashok Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 13-11-1996

Acts Referred:

Income Tax Act, 1961 — Section 269SS, 271D

Citation : (1999) 153 CTR 502 : (1998) 234 ITR 414 : (1997) 2 PLJR 498 :
(1998) 98 TAXMAN 173

Hon'ble Judges : D.P. Wadhwa, C.J;M.Y. Eqbal, J

Bench : Division Bench

Advocate : S.B. Gadodia, for the Appellant; Debi Prasad and K.K. Jhunjhunwala,
for the Respondent

Judgement

1. In this petition under Articles 226 and 227 of the Constitution, there is challenge to the constitutional validity of Sections 269SS and 271D of the Income Tax Act, 1961 (for short "the Act"). These two Sections may be set out as under :

"269SS. Mode of taking or accepting certain loans and deposits.--No person shall, after the 30th day of June, 1984, take or accept from any other person (hereafter in this section referred to as the depositor), any loan or deposit otherwise than by an account-payee cheque or account payee bank draft if,--

(a) the amount of such loan or deposit or the aggregate amount of such loan and deposit ; or

(b) on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid ; or

(c) the amount or the aggregate amount referred to in Clause (a) together with the amount or the aggregate amount referred to in Clause (b), is twenty

thousand rupees or more :

Provided that the provisions of this section shall not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by,--

- (a) Government ;
- (b) any banking company, post office savings bank or co-operative bank ;
- (c) any corporation established by a Central, State or Provincial Act ;
- (d) any Government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956) ;
- (e) such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette :

Provided further that the provisions of this section shall not apply to any loan or deposit where the person from whom the loan or deposit is taken or accepted and the person by whom the loan or deposit is taken or accepted are both having agricultural income and neither of them has any income chargeable to tax under this Act.

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

- (i) "banking company" means a company to which the Banking Regulation Act, 1949 (10 of 1949), applies and includes any bank or banking institution referred to in Section 51 of that Act ;
- (ii) "co-operative "bank" shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949) ;
- (iii) "loan or deposit" means loan or deposit of money.

271D. Penalty for failure to comply with the provisions of Section 269SS.--(1) If a person takes or accepts any loan or deposit in contravention of the provisions of Section 269SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted.

(2) Any penalty imposable under Sub-section (1) shall be imposed by the Deputy Commissioner."

2. We may, however, note that prior to the Direct Tax Laws (Amendment) Act, 1987, which came into force with effect from April 1, 1989, the amount of such loan or deposit was rupees ten thousand or more. Section 269SS itself was inserted by the Finance Act, 1984. By the same amending Act, 1987, Section 271D was inserted and at the same time Section 276DD which provided for punishment for failure to comply with the provision of Section 269SS was omitted,

3. It is not that the petitioner has come to this court at the earliest opportunity

but only after the matter had gone up to the Income Tax Appellate Tribunal and the Appellate Tribunal holding that the penalty u/s 271D was correctly imposed for contravention of Section 269SS of the Act. The penalty amount is Rs. 22,000 and odd. The assessment year is 1990-91. The petitioner did not seek reference to this court on any question of law arising out of the order of the Appellate Tribunal but came to this court questioning the very constitutional validity of the aforesaid two provisions. We, therefore, limited the argument to the constitutional validity of Section 269SS and Section 271D of the Act.

4. Mr. Gadodia, learned counsel for the petitioner, submitted that if Section 269SS is held to be ultra vires Section 271D will also go along with it and conversely if Section 269SS is held to be valid then the question of validity of Section 271D would not arise except that reasonableness of the penalty would have to be gone into. To this last limb of the argument, we expressed our inability to do so inasmuch as on that ground the petitioner could have asked for reference u/s 256 of the Act. Mr. Gadodia then submitted that in any transaction when two persons are involved both should be treated alike. To stress his point, he gave instances of giving and taking of bribe between an individual and a public servant, payment of salami/pagri by a tenant to the landlord and receiving of the same by the landlord. It was submitted that in both these cases the giver and taker of bribe or the salami/pagri was punishable under law. Thus, according to Mr. Gadodia, in the present case, when the person giving the loan has been let off the borrower could not be held to be guilty. According to him, there was no rational or intelligible differentia in treating the lender and the borrower differently. Where the borrower has been held to be guilty and liable to penalty irrespective of the fact if the loans are genuine or not, Mr. Gadodia said that if that is the object in inserting Section 269SS to curb the menace of black money then both lender or the borrower should have been treated alike and liable to penalty. In support of his submission, Mr. Gadodia referred to a single judge decision of the Madras High Court in the case of Kumari A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation, . In this case the learned single judge held the provisions of Section 269SS of the Act to be unconstitutional as violative of Article 14 of the Constitution. The learned judge was of the view that the transaction of loan was a single transaction and that it was the giving of money by the lender as well as the taking of money by the borrower and that the two ingredients were to be necessarily present in the transaction of loan. Though under the provisions of Section 269SS of the Act the borrower was put under obligation to take a loan by an account payee cheque or account payee bank draft, if it was for an amount of Rs. 10,000 or more and if he violates the said provision he would be made liable for the penalty, but no such obligation was cast on the lender, who was an integral part of the loan transaction. The learned judge then noted that that the differentia looked all the more hostile, harsh and discriminatory when we take into account the "normal circumstance that the borrower would be at the mercy of the lender". He said, ordinarily, the borrower could not dictate terms to the lender as to in what

manner he should advance the loan amount to him. While so, leaving the lender out of the purview of Section 269SS and placing the borrower alone within the ambit of the same would amount to a classification which was not a rational one and that it was not based on any intelligible differentia which distinguished those that were grouped together from others, viz., lenders. The learned judge was further of the view that the differentia did not have a rational relation to the object sought to be achieved by the provision. The object of Section 269SS was to curb the circulation of black money and put an effective check upon it. With due respect to the learned judge, we are unable to subscribe to the view and the reasoning adopted by him. Earlier to this judgment of the learned single judge in Kumari A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation, , a Division Bench of the Madras High Court in the case of K.R.M.V. Ponnuswamy Nadar Sons (Firm) and Others Vs. Union of India and Others, , had held Section 269SS to be intra vires the Constitution. This judgment was noted by the learned single judge in Kumari A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation, , but he then said that the point which had been taken before him, viz., that Section 269SS was violative of Article 14 was not taken in the case of K.R.M.V. Ponnuswamy Nadar Sons (Firm) and Others Vs. Union of India and Others, . Thus, he held that the ruling rendered in K.R.M.V. Ponnuswamy Nadar Sons (Firm) and Others Vs. Union of India and Others, , would not be a bar for consideration of the contention then put forward before him. With utmost respect to the learned single judge, a subsequent Bench of the same High Court could not have taken a different view on the mere ground that a particular point had not been urged before the earlier Bench to take a different view. If the subsequent Bench differed from the view taken by the earlier Bench, the matter could have been referred to a larger Bench. We need not, however, dilate on this aspect of the matter any further. We draw strength from the Bench decision of the Madras High Court in K.R.M.V. Ponnuswamy Nadar Sons (Firm) and Others Vs. Union of India and Others, , holding Section 269SS to be constitutional.

5. A Division Bench of the Gujarat High Court in SUKHDEV RATHI Vs. UNION OF INDIA AND ANOTHER, , differed from the view of the Madras High Court in Kumari A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation, and referred to the Bench decision of the same High Court in K.R.M.V. Ponnuswamy Nadar Sons (Firm) and Others Vs. Union of India and Others, . The Gujarat High Court also repelled the argument that Section 269SS of the Act was violative of Articles 14 and 19(1)(g) of the Constitution. The Gujarat High Court held that though it was true that a transaction of loan or deposit involved two persons--a borrower and a lender--and both could be said to be similarly situated so far as the transaction of borrowing or deposit was concerned but when it came to evasion of tax, it could not be said that they were similarly situated. We may at this stage also refer to the Explanatory Notes on the provisions relating to direct taxes in the Finance Act, 1984, with reference to Section 269SS which was inserted in the principal Act by the Finance Act, 1984.

It is as follows (see Hyderabad Vanaspati Limited Vs. Income Tax Officer, Central Circle, Hyderabad and Another, :

"(xxiv) Prohibition against taking or accepting certain loans and deposits in cash.

32.1 Unaccounted cash found in the course of searches carried out by the Income Tax Department is often explained by taxpayers as representing loans taken from or deposits made by various persons. Unaccounted income is also brought into the books of account in the form of such loans and deposits, and taxpayers are also able to get confirmatory letters from such persons in support of their explanation.

32.2 With a view to countering this device, which enables taxpayers to explain away unaccounted cash or unaccounted deposits, the Finance Act has inserted a new Section 269SS in the Income Tax Act debarring persons from taking or accepting, after 30th June, 1984, from any other person any loan or deposit otherwise than by an account payee cheque or account payee bank draft if the amount of such loan or deposit or the aggregate amount of such loan and deposit is Rs. 10,000 or more. This prohibition will also apply in cases where on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), and the amount or the aggregate amount remaining unpaid is Rs. 10,000 or more. The prohibition will also apply in cases where the amount of such loan or deposit, together with the aggregate amount remaining unpaid on the date on which such loan or deposit is proposed to be taken is Rs. 10,000 or more.

32.3 The prohibition will, however, not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by, the following, namely :--

- (a) Government ;
- (b) any banking company, post office savings bank or any cooperative bank ;
- (c) any corporation established by a Central, State or Provincial Act ;
- (d) any Government company as defined in Section 617 of the Companies Act, 1956 ;
- (e) such other institution, association or body or class of institutions, associations or bodies which the Central Government, may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette.

32.4 For the purposes of the provision, the expression "banking company" shall have the meaning assigned to it in Clause (a) of the Explanation to Section 40A(8) of the Income Tax Act and the expression "co-operative bank" shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949. The expression loan or deposit" for the purposes of this provision, would mean loan or deposit of money.

32.5 Fears have been expressed in certain quarters that the provision will adversely affect the rural sector and farmers who bring produce to mandies for sale. The prohibition contained in Section 269SS is confined to loans and deposits only and does not extend to purchase/sale transactions.

32.6 Section 276DD inserted in the Income Tax Act by the Finance Act, provides that if a person, without reasonable cause or excuse, takes or accepts any loan or deposit in contravention of the aforesaid provisions, he shall be punishable with imprisonment for a term which may extend to two years and shall also be liable to a fine equal to the amount of such loan or deposit.

32.7 The provisions take effect from 1st April, 1984, but as stated above, the prohibition contained therein will apply only in relation to any loan or deposit taken or accepted after 30th June, 1984."

6. We do not think the petitioner is right in his submission that the provision of Section 269SS of the Act is in any way unconstitutional. The object aforementioned which led to the insertion of this section in the Act would justify the provision to be constitutionally valid. The examples of landlord and tenant involving payment and receipt of salami/pagri and that between an individual and a public servant of giving and taking of bribe cannot have any application to judge the constitutional validity of Section 269SS of the Act. Under the provisions of the Act, the Assessing Officer is concerned with the return of income of the assessee before him. Section 269SS of the Act requires that when there is any transaction of loan or deposit in the books of the assessee that shall be evidenced by an account payee cheque or an account payee bank draft. It was to curb the rampant circulation of black money that such a provision has been introduced in the Act. We fail to understand, as to how the assessee can complain that when he needs any money by way of loan or deposit for the conduct of his business, Section 269SS of the Act requires that he should receive the amount only through an account payee cheque or an account payee bank draft. Why should he be concerned that the person, who gives loan or makes deposit should equally be punished if he does not make the payment or deposit by means of an account payee cheque or an account payee bank draft. It is the assessee, who is to keep his house in order. After all he is the one who seeks relief under the provisions of the Act that the amount so shown in his books of account as loan or deposit is not liable to tax. This provision does rather help the assessee otherwise it is possible that the Assessing Officer may treat the loan or deposit in the books of the assessee as his income from undisclosed sources unless the assessee is able to show sufficient proof about the genuineness of the loan or deposit. We should, however, be not understood as saying that if the deposit or loan is shown to have been received by means of an account payee cheque or an account payee bank draft the Assessing Officer would invariably hold the genuineness of the deposit or loan. The provision of Section 269SS of the Act takes into account only one aspect of the matter. We find the provision is quite rational and it achieves the object of curbing circulation of black money.

The provision is not discriminatory or arbitrary. The challenge to its constitutional validity must, therefore, be repelled. We are in respectful agreement with the views expressed by the Madras High Court in the case of K.R.M.V. Ponnuswamy Nadar Sons (Firm) and Others Vs. Union of India and Others, and the Gujarat High Court in the case of SUKHDEV RATHI Vs. UNION OF INDIA AND ANOTHER, . Accordingly, this writ application fails and is dismissed. We, however, leave the parties to bear their own costs.