

(2001) 06 MAD CK 0002

In the Madras High Court

Case No : Criminal O. P. No's. 14209 of 1998 and 11832 of 2000 and Criminal M. P. No's. 6219 of 1998, 3708 of 2000, 824 and 825 of 2001 22 June 2001

Nirmal and Navin (P) Ltd and Others

APPELLANT

Vs

D. Ravindran, Deputy Commissioner

RESPONDENT

Date of Decision : 22-06-2001

Acts Referred:

Citation : (2002) 173 CTR 177 : (2001) 253 ITR 19

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Division Bench

Advocate : Ramasamy K. Special Public Prosecutor, for the Revenue, for the Appellant;

Judgement

M. Karpagavinayagam, J.

Mainly contending that on the application filed by the petitioners/accused Nos. 7 to 10 before the Settlement Commission, the order of immunity

has been passed from penalty as well as prosecution, these applications have been filed u/s 482 of the Criminal Procedure Code, 1973, seeking to

quash the private complaint filed by the Deputy Commissioner of Income Tax, Special Range IX, Chennai, against ten accused including the

petitioners.

The first accused is the Express Newspapers Limited. Accused Nos. 2 to 6 are the directors and officers of Express Newspapers Limited. The

petitioners being arrayed as accused Nos. 7 to 10 are the cold storage companies carrying on business in West Bengal and their directors. The

petitioners/accused Nos. 7 to 10 are also trading in potato and were the agents of Express Newspapers Limited, the first accused, in its potato

trading business during the years 1984 to 1986.

The complainant, the Deputy Commissioner filed a private complaint on 20-3-1989, against accused Nos. 1 to 10 alleging that they committed the offences punishable under sections 120B, 34, 193, 196, 420, 511, 468 and 471 of the Indian Penal Code, 1860, and under sections 276C, 278B and 278 of the Income Tax Act, 1961.

The gravamen of the charge is that Express Newspapers Limited claimed a loss of Rs. 74.65 lakhs in the trading in potatoes and set it off against

its other income and thereby avoided payment of the legitimate tax and the tax sought to be evaded relating to the fictitious loss of Rs. 74.65 lakhs

is about Rs. 50.95 lakhs. It is further stated in the complaint that the petitioners/accused Nos. 7 to 10 created and fabricated records as though

potatoes were purchased from the suppliers and those potatoes were sold to specific dealers who gave pay orders in favour of the first accused. It

is further stated that during the enquiry, it was found that the petitioners/accused forged signatures of the alleged potato suppliers and forged

invoices of sales, etc., and, as such, the petitioners/accused Nos. 7 to 10 committed the offences of abetment u/s 278 read with section 276C and

section 277 of the Income Tax Act.

Even before filing of the said complaint, the petitioners/accused Nos. 7 and 8 filed applications before the Settlement Commission on 12-5-1988.

The said applications were admitted in June, 1988. Only thereafter, the complaint was filed on 20-3-1989. Ultimately, the Settlement Commission

passed an order on 30-5-1995 in, both the applications filed by A-7 and A-8 granting immunity from penalty and prosecution in respect of the

matters arising out of the settlement.

Based upon these orders, A-7 to A-9 filed an application in the year 1998 in Crl. O. P. No. 14209 of 1998 seeking for quashing. In the year

2000, A-10 filed a similar application raising the same ground in Crl. O. P. o. 11832 of 2000.

When these matters came up before this court the petitioners filed another application in Crl. M. P. No. 824 of 2001, requesting permission to

raise an additional ground stating that the order of the assessing authority was appealed before the appellate authority and the same was allowed

by the said authority and consequently all the accused are liable to be

exonerated from any liability.

However, the learned Special Public Prosecutor appearing for the respondent has now brought to the notice that the said order passed by the

appellate authority was subsequently recalled on 30-11-2000. Therefore, the said ground was not pressed.

Mr. B. Kumar, learned senior counsel appearing for the petitioners, while elaborating the point relating to the lack of maintainability in view of the

immunity granted by the Settlement Commission would make the following submissions :

The petitioners u/s 245C of the Income Tax Act, made applications to have the case settled and to grant immunity from penalty and prosecution.

Admittedly, these applications were filed and admitted prior to the filing of the private complaint in question. Under a proviso to section 245H(1),

immunity cannot be granted when the proceedings for prosecution for such offence had already initiated before the date of the receipt of the

application u/s 245C. In this case, the petitioners/accused Nos. 7 and 8 filed the applications on 12-5-1988, and the Settlement Commission

entertained the application filed by A-8 on 24-6-1988, and the application filed by A-7 on 14-7-1988, whereas the prosecution was filed by the

complainant only on 20-3-1989 and the same was entertained by the court on 4-4-1989. Therefore, the bar under the proviso to section 245H(1)

does not apply to the case of the petitioners. It is settled law that if there is an order of the Settlement Commission granting immunity u/s 245H(1),

the prosecution will have to be quashed. When the immunity is granted to A-7 and A-8 being the company, automatically A-9 would also get

immunity. Hence, the prosecution against all the petitioners are liable to be quashed.

The Settlement Commission constituted under the Income Tax Act deals with the filing of the application u/s 245C and has passed orders under

sections 245D(1) and 245D(4) and, ultimately, the order has been passed u/s 245H granting immunity. This order is final and conclusive u/s 245-I

of the Act. As against this final order passed by the Settlement Commission, no appeal has been filed. So this order is valid and binding upon the

department until it is set aside.

Even though the order passed by the Settlement Commission on the application

filed by Express Newspapers Limited in favour of the company

was set aside by the Supreme Court directing the company (A-1) to file an appeal against the order of the assessing authority before the appellate

authority the orders passed by the Settlement Commission in favour of the petitioners have not been challenged before the Supreme Court and, as

such, the judgment rendered by the Supreme Court in the S. L. P. filed by the Income Tax Commissioner against the said order passed by the

Settlement Commission in Commissioner of Income Tax, Madras Vs. M/s. Express Newspaper Ltd., , is not applicable to the petitioners.

Therefore, the immunity which has not been disturbed by the appellate authority has to be given effect to.

In reply to the above contentions, Mr. Ramasamy, K. the learned Special Public Prosecutor for Income Tax, appearing for the respondent, would

make the following submissions :

The impugned orders of the Settlement Commission granting immunity would not relate to the subject-matter of the complaint. The claim relating to

the dealings with Express Newspapers Limited in potatoes which is the subject-matter of the complaint has been withdrawn by the

petitioners/accused Nos. 7 and 8 as evident from the impugned orders. Therefore, the Settlement Commission has no jurisdiction to grant immunity

to the subject-matter of the present complaint.

Though as per the provision u/s 245-I the order of the Settlement Commission is final and conclusive, the immunity is not in respect of the

allegations made in the complaint, particularly when the statement of facts filed before the Settlement Commission alleging dealings in potatoes

which is the subject-matter of the complaint has been withdrawn, the alleged order of immunity cannot be construed to be the immunity granted in

respect of the present complaint.

The order of the Settlement Commission granting immunity in favour of A-1 in this case has been set aside by the Supreme Court in the decision in

CIT v. Express Newspapers Ltd. (supra), on the ground that the Settlement Commission has no jurisdiction to pass such an order as the same was

not a disclosure u/s 245C of the Act. The said decision would apply to this case also since the requirements of section 245C have not been

complied with in the order of the Settlement Commission which are in question.

Therefore, the order of immunity, even assuming that it would relate to the present complaint, would be a nullity.

I have given my thoughtful consideration to the respective contentions urged by counsel for the parties.

At the outset, I cannot but appreciate the neat presentation with thorough preparation by both Mr. B. Kumar, learned senior counsel appearing for the petitioners and Mr. Ramasamy K. the learned Special Public Prosecutor for Income Tax by filing complete typed set giving the authorities on the question both for and against to enable this court to have a grip of the facts as well as law and to understand the intricacies of the legal provisions touching upon the subject.

In brief, the submission of counsel for the petitioners is that there is no criminal liability in view of the immunity. The straight reply by counsel for the respondent is that the alleged immunity is not only a nullity but also would suffer from non-applicability to the subject-matter of complaint.

It is not in dispute that u/s 245H(1), the Settlement Commission can grant immunity from prosecution for any offence under the Income Tax Act or under the Indian Penal Code or under any other Central Act for the time being in force and also from the imposition of any penalty under this Act.

But, the bar provided under the proviso to section 245H(1) envisages that no such immunity can be granted by the Settlement Commission in cases where the proceedings for prosecution have been instituted before the date of receipt of the application u/s 245C.

As correctly indicated by learned senior counsel for the petitioners, the bar engrafted in this proviso would not be available in this case, in view of the fact that the petitioners filed the applications before the Settlement Commission on 12-5-1988, itself and only thereafter, the complaint was filed by the respondent in 20-3-1989. Furthermore, it is seen that the applications which were filed on 12-5-1988, by the petitioners/accused Nos.

7 and 8 were admitted by the Settlement Commission on 14-7-1988, and 24-6-1988, respectively. Thus, in this case, not only the institution but also the admission of the application has taken place earlier to the filing of the complaint. Hence, the bar under the proviso to section 245H(1), admittedly, does not apply to this case.

According to counsel for the respondent, though this bar is not a bar from

granting the immunity, the immunity in question would not be a bar either for launching prosecution or for the continuance of the said proceedings. It is specifically contended by counsel for the respondent that the immunity is not in relation to the subject-matter of the complaint, as the claim for the subject matter of the complaint has already been withdrawn by the petitioners, while making the arguments before the Settlement Commission.

In the light of the above submission, let us now see whether such a statement is correct in view of the relevant portions of the order of the Settlement Commission.

In this context, it has to be borne in mind, the private complaint in question is only in respect of the assessment year 1985-86, but the application in respect of the said year was not entertained by the Settlement Commission and the order has been passed only in the application filed by the petitioner (A-7) in respect of the assessment year 1986-87. In the said order, paragraph 4 would give the following : .

It will be seen from the above two statements that the applicant has now withdrawn its claim regarding the dealings with Express Newspapers

Ltd. in potatoes. During the course of the hearing, Shri S. N. Mandal categorically accepted that the offer contained in the SOF was not genuine

and was made only to help Express Newspapers Ltd., to justify its claim for loss in potato dealings. Accordingly, Shri S. N. Mandal requested that

the applicant may be permitted to withdraw the offer of Rs. 46.50 lakhs contained in the SOF and the total income of the two assessment years

determined without taking into account the amount of Rs. 46.50 lakhs.

It is true that an application had been filed by the petitioner (A-8) in respect of the assessment year 1985-86 and the same was entertained by the

Settlement Commission and in the said order also, the same observation has been made in paragraph 4 which is as follows :

It will be seen from the above two statements that the applicant has now withdrawn its claim regarding the dealings with Express Newspapers

Ltd. in potatoes. During the course of the hearing, Shri S. N. Mandal categorically accepted that the offer contained in the SOF was not genuine

and was made only to help Express Newspapers Ltd. to justify its claim for loss in potato dealings. Accordingly, Shri S. N. Mandal requested that

the applicant may be permitted to withdraw the offer of Rs. 35.75 lakhs contained in the SOF and the total income of the two assessment years

determined without taking into account the amount of Rs. 35.75 lakhs.

On the strength of these observations, it is contended by learned counsel for the respondent that the subject-matter of the complaint, namely, the

alleged dealings in potatoes with Express Newspapers Ltd. (A-1), had been withdrawn and, hence, the subject-matter of the complaint also goes

out of the application filed before the Settlement Commission.

On going through the complaint, it is noticed that there are allegations that the petitioners/accused Nos. 7 and 8 have created and fabricated

records as though potatoes were purchased from the suppliers, who denied on enquiry, that they fabricated agreements and cold storage receipts,

contract bills, books of account for the said bogus transactions as if those potatoes were sold to specific dealers who gave pay orders in favour of

accused No. 1, Express Newspapers Ltd., that the said dealers on enquiry have denied having given any pay orders in favour of accused No. 1,

Express Newspapers Ltd., and that the petitioners forged the signatures of the alleged potato suppliers and also forged invoices of sales, etc. It

was further admitted by the petitioners/accused Nos. 7 and 8 that they did all those to enable accused No. 1, Express Newspapers Ltd., to show

loss in its return of income and thus enabled accused No. 1, Express Newspapers Ltd., to conceal its real income and to evade the legitimate tax

due to the exchequer.

In the light of these allegations, we have to see whether the immunity granted by the Settlement Commission is in respect of the allegations made in

the complaint.

The relevant portions relating to the grant of immunity, as given in the Settlement Commission order are these :

Considering the co-operation extended by the applicant in the proceedings before us, immunity is granted from penalties and prosecution in

respect of the matters arising out of this settlement. The immunity from prosecution is subject to the applicant co-operating with the department in

any proceedings for assessment, penalty or prosecution in the case of Express Newspapers Ltd.

As noted above, as far as the petitioner (A-7) is concerned, there is no order of

immunity in respect of the assessment year 1985-86, as the same was not entertained. Admittedly, the present complaint is only in respect of the assessment year 1985-86. Therefore, this observation if at all, would apply to A-8 alone. But, the question that remains to be answered is whether immunity has been granted or could be granted in respect of the subject-matter of the complaint when the claim regarding the same had been withdrawn.

Further, the assessment order dated 12-5-1988, relating to A-8 would indicate that in view of the finding of the assessing officer that Express

Newspapers Ltd. did not have any dealings in potatoes through the petitioner and its claim to have incurred losses in such transactions was of a

bogus nature, the Settlement Commission asked the petitioner to furnish necessary evidence in support of the petitioners' claim to have had

dealings in potatoes as the agent of Express Newspapers Ltd. and instead of furnishing such evidence, counsel for the petitioner accepted that the

said transaction was not genuine and the same was made by the petitioner only to help Express Newspapers Ltd. to justify its claim for loss in

potato dealings.

The said finding of the assessing officer as referred to in the order of the Settlement Commission which was accepted to be correct by counsel for

the petitioner is exactly the subject-matter of the present complaint. Therefore, the immunity as granted by the Settlement Commission would not

be the subject matter of the complaint.

As a matter of fact, there are allegations in the complaint that the petitioners/accused Nos. 7 to 10 have abetted the offence under sections

276C(1) and 277 of the Income Tax Act committed by accused No. 1, Express Newspapers Ltd. In other words, it is stated in the complaint that

petitioners/accused Nos. 7 to 10 conspired, fabricated and forged records, fabricated false evidence with wilful intention to enable accused No. 1,

Express Newspapers Ltd., to attempt to evade tax u/s 276C(1) and by filing false returns of income and delivering false statements of accounts u/s

277 of the Income Tax Act, 1961.

In short, the petitioners/accused Nos. 7 to 10 are stated to have committed the offence of abetment u/s 278 of the Income Tax Act by enabling

accused No. 1, Express Newspapers Ltd., to commit the offence under sections

276C(1) and 277 of the Income Tax Act, 1961. At the most it

could be stated that the immunity granted in the impugned order of the Settlement Commission passed in the case of the petitioner (A-8) may relate

to other subject-matters or other offences committed separately by the petitioner (A-8), as it is stated that the cash of Rs. 35.75 lakhs introduced

in the books of account of the petitioner (A-8) on 10-5-1988, actually represented the amount misappropriated out of the loans taken from West

Bengal Transport Financial Corporation by various group concerns of the petitioner (A-8).

Under those circumstances, on the available materials, this court is unable to accept the contention that the immunity from prosecution has been

granted in respect of the allegation made in the complaint in question.

In view of the fact that the subject-matter of the complaint was not taken into consideration by the Settlement Commission for granting immunity, I

find force in the contention of learned counsel for the respondent that the Settlement Commission has no jurisdiction to grant immunity in respect of

the prosecution of the present case.

Let us now come to the question whether the decision taken by the Supreme Court in CIT v. Express Newspapers Ltd. (supra) would apply to

the case of the petitioners.

It is not debated that the main accused in this case, namely, A-1, filed a similar application u/s 245C before the Settlement Commission and the

same was allowed granting immunity to it both from penalty and prosecution in respect of the present case on 16-12-1988, in respect of the

assessment years 1985-86 to 1988-89. By order dated 31-5-1990, the Settlement Commission allowed the application filed by A-1. Against the

above order, the department filed a SLP before the Supreme Court. The Apex Court by the order dated 11-1-1994, allowed the application

preferred by the department, by setting aside the order of the Settlement Commission. The said order, as noted above, is reported in CIT v.

Express Newspapers Ltd. (supra). In the said order, the following findings have been given (headnote) :

(i) The respondent had merely offered a part of the losses claimed by it for the assessment years towards taxable income. In its application the

respondent had not disclosed any income not disclosed before the assessing

officer; nor did it disclose the manner in which such income was derived. The application was not in compliance with the first and foremost requirement of section 245C and ought, therefore, to have been rejected in limine.

(ii) This was a case where the Income Tax authorities had made extensive investigation and enquiries wherein they had collected voluminous material which, according to them, established concealment on the part of the respondent.

(iii) The Settlement Commission was also not right in holding that, in deciding whether the Commission should allow the application to be proceeded with u/s 245C, it would not look into the materials collected after the date of the filing of the application.

In this order, the Supreme Court specifically would hold that the application filed by accused No.1, Express Newspapers Ltd., before the Commission was not maintainable and could not have been allowed to be proceeded with, since the requirements of section 245C had not been complied with.

The main ingredient of section 245C is that there should be a disclosure of income before the Settlement Commission which was not earlier

disclosed before the assessing officer. If the assessing officer has already discovered it and either has gathered the material to establish the

particulars of such income or fraud fully or is at a stage of investigation where the material gathered by him is likely to establish the particulars of

such income or fraud, the assessee cannot be allowed to defeat the entire exercise of the Income Tax authorities just by approaching the

Settlement Commission. In such a case, it cannot be said that he is acting voluntarily or in good faith.

In this case, the survey was conducted earlier and it was found that a false return was filed. Only thereafter, the assessee approached the

Settlement Commission. This shows that the assessee approached the Settlement Commission with disclosure of income which had been already

discovered. On that reason, the Supreme Court categorically said that the very application itself before the Settlement Commission was not

maintainable and the Settlement Commission has no jurisdiction to deal with the said application and to pass an order. The relevant portion of the

judgment is as this (page 457) :

Thus, his application, not being in compliance with the first and foremost requirement of section 245C(I), was not maintainable thereunder. It

ought to have been rejected in limine. The Commission had no jurisdiction to entertain the said application. Secondly, this is a case where the

Income Tax authorities had made extensive investigation and enquiries wherein they had collected voluminous material, which, according to them

established the particulars of concealment of income on the part of the respondent-assessee.

The above observation, in all fours, would apply to the case of the petitioners also, since the disclosure of their income before the Settlement

Commission was only after the discovery of the same by the Income Tax authorities.

Under those circumstances, it cannot be said that there is no force in the submission made by counsel for the respondent that the very order by the

Settlement Commission itself is nullity.

Counsel for both the petitioners and the respondent cited so many other authorities which, in my view, may not be necessary to be referred to

here, as it would not serve any purpose.

Furthermore, the reading of the relevant portion relating to immunity granted by the Settlement Commission would make it obvious that it is

conditional order. According to counsel for the respondent, even assuming that the immunity would be relating to the subject-matter of the

complaint, the condition contemplated in the order of immunity has not been complied with and, as such, the order of immunity has no force at all.

On the other hand, it is contended by counsel for the petitioners that the payment of amount as ordered by the Settlement Commission while

granting immunity would be made by the petitioners only after due intimation and since no intimation has been received, it cannot be said that the

condition was not complied with.

In my opinion, all these materials cannot be agitated before this court at this stage. To put it briefly, on the available materials before this court, I am

not able to persuade myself to accept that the immunity in question would apply to the present complaint and even if such an immunity is in respect

of the present complaint, the Settlement Commission has no jurisdiction to grant

such an immunity, in view of the factual situation referred to above and in the light of the observation made by the Supreme Court indicated above. Ultimately, these questions can be decided by the Trial Court on the basis of the materials placed by both the parties before it during the course of trial uninfluenced in any way by the observations made above. With the above observations, the petitions for quashing are dismissed. Consequently, CrI. M. P. Nos. 6219 of 1998, 3708 of 2000 and 824 and 825 of 2001 are also dismissed.