

(2015) 12 DEL CK 0194
In the Delhi High Court
Case No : Criminal M.C. 2467/2015

Pradip Burman

APPELLANT

Vs

Income Tax Office

RESPONDENT

Date of Decision : 02-12-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 258
Income Tax Act, 1961 — Section 131(1A), 139(1), 142, 148, 271(1)(c)

Citation : (2016) 236 TAXMAN 606

Hon'ble Judges : Suresh Kait, J.

Bench : Single Bench

Advocate : S. Ganesh, Senior Advocate and Sudhir K. Makkar, Advocate, for the Appellant; Rahul Chaudhary Advocate Standing Counsel and Ruchir Bhatia, Junior Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Suresh Kait, J.

CrI. M.C. 2467/2015

1. The present petition has been directed against the order dated 19.02.2015, whereby the application of the petitioner was dismissed by the learned Additional Chief Metropolitan Magistrate (ACMM) (Central), Tis Hazari Courts, Delhi.
2. Vide the aforesaid application, the petitioner sought staying of the criminal proceedings against him on the ground that against the Assessment Order ("AO"), the petitioner had already filed an appeal, which is pending for adjudication.
3. Mr. Ganesh, learned senior counsel appearing on behalf of the petitioner argued that the complaint case filed by the respondent/Income Tax Department is liable to be quashed on the ground that at the time of filing of the criminal complaint, the petitioner had attained the age of 70 years, thus, no prosecution can be initiated against him.

4. In support of the aforementioned submission, learned senior counsel has heavily relied upon the case bearing Criminal Revision Petition No. 36/2011, titled as "Arun Kumar Bhatia & Anr Vs. Vijay Kumar & Ors.", decided by this Court on 02.11.2011. In the said case, the petitioner had taken the ground that he was above the age of 70 years on the date of filing the complaint and as per Circular dated 07.02.1991 issued by the Central Board of Direct Taxes, no prosecution can be initiated against a person who is above the age of 70 years.

5. Learned senior counsel further argued that case against the petitioner is that he concealed his income and did not file income tax accordingly. The said complaint was filed on the allegation that the petitioner had filed his original return of income in the prescribed form duly signed and verified by him for Assessment Year ("AY") 2007-08 on 31.07.2007 vide receipt No. 000105, declaring income of Rs. 75,31,769/-, in which his account with HSBC (P) Bank, Zurich, was not disclosed by him. The information that petitioner is having foreign bank account with the aforesaid Bank was received by the Investigation Wing of the Income Tax Department, Government of India. On coming to know about the said information with the Indian Government, vide letter dated 30.08.2011 addressed to the Director General of Investigation, Income Tax Department, New Delhi, the petitioner stated that he had an account outside India, which is as per FEMA Regulations, through his AR Abhay K. Aggarwal. To verify the details of the said foreign bank account in the name of the petitioner and the source of the deposits, summon under Section 131(1A) of the Income Tax Act, 1961 ("IT Act") dated 02.09.2011 was issued to the petitioner. Having knowledge qua start of the inquiries with regard to the source of funds deposited by the petitioner in the aforesaid foreign bank account, the petitioner admitted the same vide letter dated 03.10.2011, wherein he firstly stated that the information with the Department is unauthentic/unreliable and then agreed to deposit income tax on account of the balance exists in the foreign bank account in his name. Copy of the same is annexed as Annexure-I to the complaint filed by the petitioner. Vide letter dated 07.10.2011, the petitioner again offered to deposit income tax on the undisclosed deposits made by him in the foreign bank account, copy of the letter is annexed as Annexure-J.

6. The petitioner vide letter dated 14.10.2011 admitted that the amount lying in the foreign bank were about US\$40,000 and US\$32,12,000 in the Financial Year ("FY") 2005-06 and 2006-07, relevant to AY 2006-07 and 2007-08. Copy of the same is annexed as Annexure-K.

7. Learned senior counsel further submitted that since the petitioner has challenged the AO in the appeal and the same is pending for adjudication, therefore, the petitioner cannot be prosecuted in the criminal complaint filed by the Department.

8. To strengthen his submissions, learned senior counsel has relied upon the case of Commissioner of Income Tax, Mumbai, Vs. Bhupen Champal Lal Dalal & Anr., in SLP (Crl.) No. 2430 of 2000 decided on 27.02.2001 by the Supreme Court,

wherein observed as under:--

"The prosecution in criminal law and proceedings arising under the Act are undoubtedly independent proceedings and, therefore, there is no impediment in law for the criminal proceedings to proceed even during the pendency of the proceedings under the Act. However, a wholesome rule will have to be adopted in matters of this nature where courts have taken the view that when the conclusions arrived at by the appellate authorities have a relevance and bearing upon the conclusions to be reached in the case necessarily one authority will have to await the outcome of the other authority.

XXXX XXXX XXXX

In the present case, there is no claim of quashing of the proceedings. When ultimately the result to come out of the proceedings before the appellate authorities have a definite bearing on the cases alleged against the respondents, we find that the High Court is justified in granting the interim order it did and we do not think that such an interim order calls for interference at our hands. The learned counsel on either side relied on several decisions, but in the view we have taken it is unnecessary to refer to those decisions."

9. On the other hand, Mr. Rahul Chaudhary, learned senior standing counsel appearing on behalf of the respondent Department submitted that the petitioner has not approached this Court with clean hands and has tried to mislead this Court by stating that Instruction No. 5051/1991 dated 07.02.1991 mandates that no prosecution could be initiated against a person who is above the age of 70 years, conveniently leaving out the expression "at the time of commission of offence". He submitted that the said instruction does not mandate that no prosecution can be initiated against a person who has attained the age of 70 years, however, specifies as under:--

"4. Prosecution need not normally be initiated against persons who have attained the age of 70 years at the time of commission of offence."

Thus, the words "need not normally" used in para 4 of the instructions clearly show that the instructions do not provide for absolute bar on initiation of prosecution against persons who have attained the age of 70 (at the time of commission of offence). Further submitted, the instructions are in the nature of broad guidelines which should be kept in mind while initiating proceedings and provide for greater stress in initiation of prosecution proceedings in case of offences involving tax frauds, fabrication of evidence and major defaults.

10. Learned counsel further submitted that admittedly, date of birth of the petitioner is 02.11.1942. As on 28.07.2006 and 31.07.2007, i.e., the date of filing of original income tax return for the AY 2006-07 and 2007-08 respectively, which are the dates of commission of offence under Section 276 C (willful attempt to evade tax etc.) and 277 (false statement in verification etc.) of the Act, the petitioner had attained the age of 63 years and 64 years respectively.

Therefore, reliance placed on Instruction No. 5051/1991, dated 07.02.1991 is misplaced as it is not applicable to the facts of the present case for the reason the petitioner had not attained the age of 70 years at the time of commission of offence as provided.

11. Learned counsel submitted that in reply to the application filed by the petitioner, the Department stated that at the time of filing of Complaint No. 70/04, the petitioner had not filed any appeal in respect of the AO, subject matter of said complaint, however, the same had been filed as an afterthought with a view to thwart the criminal proceedings pending against him. It was further stated that even the appeal has been filed only to a limited extent of addition in respect of the said complaint qua the exchange rate of foreign currency. Even pendency of appeal is no ground for stay of the proceedings if the same has no bearing on the complaint.

12. I have heard the learned counsel for the parties.

13. It is pertinent to mention here that the aforesaid petition of Arun Kumar Bhatia and Anr. (supra) was allowed on the statement made by learned senior standing counsel for the Income Tax Department, who fairly conceded that as per Circular dated 07.02.1991, no prosecution can be initiated against a person who is above the age of 70 years.

14. Since the aforesaid order dated 02.11.2011 was passed by this Court only, therefore, it can authoritatively be said that the said order was not passed on merits, however, based on the precise statement made by the learned counsel for the Department. The fact remains that Instruction No. 5051/1991 dated 07.02.1991 states as under:--

"4. Prosecution need not normally be initiated against persons who have attained the age of 70 years at the time of commission of offence."

15. Admittedly, at the time of commission of alleged offence, the petitioner was not reached to the age of 70 years, however, the complaint in question was filed against him when he attained the age of 70 years. Thus, in my considered opinion, since case of Arun Bhatia (supra) was decided on the basis of the Circular dated 07.02.1991 and not on merits, therefore, benefit of the same cannot be given to the present petitioner.

16. In the impugned order, the learned Trial Court has recorded that both the complaints have been filed under Sections 276C(1) , 276D & 277 IT Act. The grounds of appeal and statements of facts clearly establish that there was no ground in either of the appeal in respect of the offence U/s. 276D IT Act. The appeal had been filed challenging the AO and consequential outcome of imposition of penalty U/s. 271(1)(c) IT Act. Thus, at any count, the outcome of the appeal filed on behalf of the petitioner will have no bearing on the present complaint at least in respect of offence U/s. 276D IT Act. Moreover, no prayer for quashing of the proceedings was made by the petitioner in the application.

17. The learned Trial Court further recorded that in Sasi Enterprises Vs. Assistant Commissioner of Income Tax, , while quoting the judgment in B. Premanand and Others Vs. Mohan Koikal and Others, , the Supreme Court clearly held in para 30 that pendency of appellate proceedings has no bearing in initiation of prosecution under the Income Tax Act. The relevant portion is extracted as under for ready reference.

"30 If it was the intention of the legislature to hold up the prosecution proceedings till the assessment proceedings are complete by way of appeal or otherwise the same would have been provided in Section 276CC itself. Therefore, the contention of the learned Senior Counsel for the appellant that no prosecution could be initiated till the culmination of assessment proceedings, especially in a case where the appellant had not be filed the return as per Section 139(1) of the Act or following the notices issued under Section 142 or Section 148 does not arise."

18. Accordingly, it can be safely stated that proceedings once initiated in a warrant trial case, there is no provision under the Code of Criminal Procedure, 1973, except U/s. 258 Cr.P.C., where the proceedings of the case can be stayed by the Magistrate suo moto or upon the application filed on behalf of the accused, however, Section 258 Cr.P.C. relates only to summons trial cases. Moreover, the application filed by the petitioner did not mention under which provision of Act it is filed. Thus, the learned Trial Court has rightly dismissed the application filed by the petitioner.

19. From the above noted facts, it is crystal clear that the petitioner had admitted to have bank accounts outside India only after the investigation by the Income Tax Department. The said foreign account was the undisclosed account and the deposits therein relates to his undisclosed income and the same needs to be examined.

20. Therefore, I am of the considered opinion that there is no illegality, infirmity or perversity in the order dated 19.02.2015 passed by the learned Trial Court. Thus, finding no merit in the instant petition, the same is hereby dismissed.

Crl. M.A. No. 8543/2015

With the dismissal of the petition itself, the instant application has become infructuous. The same is dismissed accordingly.