
(1998) 11 PAT CK 0045

In the Patna High Court

Case No : Criminal Miscellaneous No's. 7421, 7422 and 7423 of 1986

Quality and Others

APPELLANT

Vs

Income Tax Officer and Another

RESPONDENT

Date of Decision : 26-11-1998

Acts Referred:

Income Tax Act, 1961 — Section 276C, 277, 278B

Citation : (1999) 98 CompCas 66 : (1999) 239 ITR 290 : (1999) 1 PLJR 550 : (1999) 107 TAXMAN 409

Hon'ble Judges : Pramod Kumar Sarin, J

Bench : Single Bench

Advocate : K.N. Jain, R.K. Agrawal, R. Usha and R.K. Bhargav, for the Appellant; S.K. Sharan, for the Respondent

Judgement

P.K. Sarin, J.—These three cases have been filed by the same petitioners against the same opposite parties. As a common question of law arises, the three applications have been heard together and are being disposed of by this common judgment,

2. It appears that a complaint (annexure-2) in each of the cases was filed by the Income Tax Officer, Ward "B", Special Investigation Circle, Patna, against the petitioners making allegations that they have tried to evade Income Tax by filing returns showing false and low income. It was alleged that a raid was conducted at the premises of the petitioners and some account books were seized, which revealed that the turnover of the petitioners' business was much larger than shown in the Income Tax return. Accordingly, proceedings were initiated and then the petitioners were issued notice to file fresh returns u/s 148 of the Income Tax Act. Ultimately, the assessment order was passed assessing the petitioners at a higher income than shown in the earlier Income Tax return. The assessment order was upheld up to the appellate stage. The complaint had been filed against the petitioners for committing offences punishable under Sections 276C and 277 of the Income Tax Act and Section 420 of the Indian Penal Code.

An application was filed on behalf of the petitioners before the learned trial court for discharging them on the ground that petitioner No. 1 is a firm and it cannot be punished with sentence of imprisonment as provided under the Income Tax Act under those sections. It was further asserted that as the firm cannot be prosecuted and sentenced, petitioners Nos. 2 and 3 who are partners of petitioner No. 1-firm would also be not liable to be prosecuted and punished. The learned trial court rejected the said application with the observation that there is sufficient ground for framing of charge, as the complainant's evidence before the charge has already been recorded, Feeling aggrieved the petitioners have filed the present applications u/s 482 of the Code of Criminal Procedure for quashing the entire criminal proceedings including the cognizance order dated March 29, 1984, and the order dated July 23, 1986, rejecting the petition of the petitioners for discharge. The criminal proceedings against the petitioners in Cases Nos. 332(M) of 1984, Tr. No. 241 of 1986, 331(M) of 1984, Tr. No. 240 of 1986 and 330(M) of 1984, Tr. No. 238 of 1986 were pending in the Special Court (Economic Offences), Muzaffar-pur. Learned counsel for the petitioners has stated that the cases are now pending in the court of the Special Judge (Economic Offences), Patna.

3. It has been contended by learned counsel for the petitioners that Case No. 332(M) of 1984, Tr. No. 241 of 1986 is in respect of offence committed on July 30, 1974, He has referred to the date of occurrence as given in the complaint (annexure-2). It is contended that the present Section 276C of the Income Tax Act (hereinafter referred to as "the Act") was substituted in place of original Section 276C by the Taxation Laws (Amendment) Act, 1975, with effect from October 1, 1975, and it is pointed out that Section 276C as it stood on the date of offence of the case in 1974 related to the offence in respect of failure to furnish return of income, while the present Section 276C substituted with effect from October 1, 1975 is in respect of an offence regarding wilful attempt to evade tax, etc.

4. I find the said contention to carry force, The relevant part of the earlier Section 276C was as follows :

276C. Failure to furnish returns of income.--If a person wilfully fails to furnish in due time the return of income which he is required to furnish under Sub-section (1) of Section 139 or by notice given under Sub-section (2) of Section 139 or Section 148, he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine equal to a sum calculated at a rate which shall not be less than four rupees or more than ten rupees for every day during which the default continues, or with both"

5. The present Section 276C, which was substituted with effect from October 1, 1975, runs as follows :

"276C. (1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall, without

prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable,--

(i) in a case where the amount sought to be evaded 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.

(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine,

Explanation.--For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case, where any person-

(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement ; or

(ii) makes or causes to be made any false entry or statement in such books of account or other documents ; or

(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents ; or

(iv) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof."

6. Thus, it is evident that the offence punishable u/s 276C before October 1, 1975, was on failure to file return, while the offence punishable under the present Section 276C, which became effective since October 1, 1975, is in respect of wilful attempt to evade tax, etc. The complaint has been filed in the year 1984. A person could not be convicted under the present Section 276C of the Act in respect of an offence committed before October 1, 1975. If an act is not an offence earlier but is made an offence subsequently, the subsequent creation of liability for such act would only be an offence after the date when the offence has been created by the statute. I agree with the contention of learned counsel for the petitioners that the petitioners could not be prosecuted for the offence u/s 276C in respect of an act done on July 30, 1974.

7. However, such circumstance exists only in respect of Complaint Case No. 332(M) of 1984 and in the remaining two cases the date of offence is after October 1, 1975. Therefore, the complaint could be maintainable in those two

cases for punishment of offence u/s 276C, if the ingredients of the offence are made out.

8. The next contention of learned counsel for the petitioners is that the other offence, which the petitioners were said to have committed, is alleged to be punishable u/s 277 of the Act, which relates to the false verification made in the statement of return filed earlier or for submitting false account. It is contended that petitioner No. 1 is a partnership firm and it cannot be sentenced with imprisonment. It is pointed out that the sentences provided for the offences under Sections 276C and 277 of the Act are sentences of imprisonment with fine.

9. I agree with the contention that petitioner No. 1 being a partnership firm cannot be punished in its name, Liability, if any, would be only of its partners. The Act has made specific provision in respect of offences by companies, which include partnership firms as well. u/s 278B it has been provided that where an offence under the 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. By the proviso to such provision it has been provided that nothing contained therein shall render any such person liable to such 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. In the complaint there is a bald statement that petitioners Nos. 2 and 3 are partners of petitioner No. 1 and each of them is in charge of the conduct of the business of the firm and responsible for the day-to-day business. It has been contended by learned counsel for the petitioners that merely such bald statement would not be sufficient, as the law requires that it should be specifically averred in what manner the particular person was responsible and was conducting the business of the company.

10. Learned counsel for the petitioners has placed reliance on a decision of the apex court in the case of *Sham Sunder v. State of Haryana* [1990] 67 Comp Cas 1, wherein the provision of Section 10 of the Essential Commodities Act, which was *pari materia* with the provision of Section 278B of the Act was considered. The apex court held that it is true that under the Indian Partnership Act a "firm" or "partnership" is not a legal entity but is merely an association of persons to carry on business and is only a collective name of the partners carrying on business in partnership. It was further observed that each partner is a representative of the other partners and each partner is an agent as well as a principal, However, it was observed for the purposes of criminal liability that the penal provision must be strictly construed and there is no vicarious liability in the criminal law unless the statute takes it also within its fold. It was held that Section 10 of the Essential Commodities Act does not provide for such liability and does not make all the partners liable for the offence whether they do business or not. Then the apex court made the observations that there may be a

situation whether some of the partners may not be even knowing what was going on day-to-day in the firm and there may be ladies and minors, who were admitted to the benefits of the partnership and they might not be knowing anything about the business. It was observed that (page 4) :

"It would be a travesty of justice to prosecute all the partners and ask them to prove under the proviso to Sub-section (1) that the offence was committed without their knowledge. It is significant to note that the obligation of the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in Sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was, during the relevant time, in charge of the business. In the absence of any such proof, no partner could be convicted . . ."

11. Following the dictum of the apex court, the Madras High Court in the case of Smt. Thangalakshmi Vs. Income Tax Officer, , while considering the provision of Section 278B of the Act held that there must be specific averments in the complaint to the effect that the partner of the firm at the time the offence was committed was in charge of, and was responsible for, the conduct of the business of the firm and particulars regarding conduct of business and responsibility should be stated in the complaint, in order to make him liable for the offence and in its absence no partner could be convicted. It was observed that the complaint is bound to provide indication, though not evidence, as to in what manner a particular partner of the firm was in charge of and responsible for the conduct of business and mere reproduction of the words of the section is not enough. In that case the court quashed the proceedings in respect of one of the accused in the absence of specific averments regarding specific overt acts alleged against him.

12. Learned counsel for the petitioners has placed reliance on a decision of the Punjab and Haryana High Court in the case of MEHAR CHAND OM PARKASH AND OTHERS Vs. Income Tax OFFICER AND ANOTHER., , In the said case it has been held that where a firm is prosecuted for filing an erroneous return, a partner against whom there is no specific allegation, cannot be held liable. Relying on this observation it has been contended that none of the petitioners can be held liable without any specific allegation for filing erroneous or false return. The said decision supports the petitioners' contention.

13. Learned counsel for the petitioners has next placed reliance on a decision of the Delhi High Court in the case of Parameet Singh Sawney Vs. Dinesh Verma and Another, , wherein it has been observed that mere reproduction of the expression in Section 278B in the complaint does not meet a requirement of law and the complaint is bound to provide indication, though not evidence, as to in what manner a particular partner of the firm is supposed to be in charge of and responsible for the conduct of the business.

14. Considering the principles laid down in the case law cited above, I am of the opinion that petitioners Nos. 2 and 3 could not have been proceeded against in the absence of any averment in the complaint as to in what manner each of them was responsible to the company or responsible for the conduct of the business of the company. The evidence adduced by the complainant before charge also does not show as to what is the specific role of each of the partners or in what manner they were responsible to the company for the conduct of the business of the company or who was in charge of the business when the offence was committed. In the absence of such averments the learned trial court ought not to have taken cognizance and ought not to have proceeded against petitioners Nos. 2 and 3. Petitioners Nos. 2 and 3 could not be prosecuted merely because they happened to be partners of the partnership firm, unless it is alleged by specific averment as to in what manner they were responsible for the conduct of the business of the partnership firm. There is no averment in the complaint as to who had signed the verification of the statements contained in the return filed earlier or who had delivered an account of statement, which he knew or believed to be false. It is not clear from the complaint as well as from the evidence before charge as to who had signed the verification in the return. In the absence of such averment petitioners Nos. 2 and 3 could not be proceeded against for the offence u/s 277 of the Act. It may be pointed out that petitioner No. 1 is the partnership firm and it could not by itself sign the verification. The firm must act through some person and such person might sign the verification.

15. Petitioner No, 1 is the firm and it could not be punished with sentence of imprisonment. It has been held in the case of *Dunlop India Ltd. and Others Vs. Arun Chandra Sinha, Assistant Commissioner of Income Tax and Others*, , that proceedings u/s 277 of the Income Tax Act cannot be initiated against a company because imprisonment is a compulsory punishment for an offence under that section and a company cannot be sent to prison nor is it open to a court to impose a sentence of fine and not award any imprisonment if the court finds the company guilty under that section. I agree with the said principles laid down in the said case. I hold that the prosecution against petitioner No. 1 for the offences under Sections 276C and 277 could only be a futile exercise when no punishment of imprisonment as provided under the said sections could be imposed on petitioner No. 1, which is not even a legal entity.

16. Considering the entire facts and circumstances of the case and in view of the discussions made above, in my opinion, taking cognizance against the petitioners and passing the impugned order rejecting the application for discharge of the petitioners and the entire Criminal proceedings pending against the petitioners on the basis of the complaint filed by the Income Tax Officer are illegal and it will be an abuse of the process of the court, if further proceedings are allowed to continue in the case. No useful purpose would be served if the prosecution continues. It appears to be a fit case for exercise of the power of the court u/s 482 of the Code of Criminal Procedure to quash the entire criminal proceedings including the order taking cognizance and the order rejecting the petition for dis

charge.

17. Accordingly, the criminal proceedings in Cases Nos. 332(M) of 1984, Tr. No. 241 of 1986, 331(M) of 1984, Tr. No. 240 of 1986 and 350(M) of 1984, Tr. No. 238 of 1986 of the Muzaffarpur court, now pending in the Court of the Special Judge (Economic Offences), Patna, are quashed including the order taking cognizance and the order rejecting the petition for discharge.