

(1989) 06 KL CK 0001

In the High Court Of Kerala

Case No : Criminal Miscellaneous Case No. 423 of 1988

R. Bharathan

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 22-06-1989

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 195(1)
Income Tax Act, 1961 — Section 132, 276C, 276C(1), 277
Penal Code, 1860 (IPC) — Section 193, 196

Citation : (1989) 79 CTR 105 : (1989) 180 ITR 356

Hon'ble Judges : K. Sreedharan, J

Bench : Single Bench

Advocate : Dharmadhan and G. Krishnakumari, for the Appellant; K.K. Abdullah, for the Respondent

Judgement

K. Sreedharan, J.—The petitioner was an abkari contractor. For the assessment year 1983-84 (accounting year 1982-83) he was running arrack shops and toddy shops in Kazhakkootam Excise Range in Trivan-drum district. He filed a return of income on December 6, 1983, before the Income Tax Officer, D-Ward, Quilon, offering an income of Rs. 4,64,845. A search u/s 132 of the Income Tax Act, 1961, hereinafter referred to as "the Act", was conducted at the arrack depot of the accused at Kazhakkootam and at the residence of the accused on March 5, 1985. In the course of search, it is alleged that certain original books of accounts disclosing sale of arrack at different rates were found. According to the Income Tax authorities, the return of income filed by the petitioner on December 6, 1983, was incorrect and it was filed by fabricating and manipulating false accounts. On this allegation, a complaint, copy of which is marked in this case as annexure-5, was filed before the Additional Chief Judicial Magistrate's Court (Economic Offences), Ernakulam, for offences under Sections 276C(1) and 277(i) of the Act and Sections 193 196 and 415, IPC. That court registered the complaint as C. C. No. 34 of 1987 and issued summons to the petitioner.

2. The petitioner seeks to quash the proceedings before the court below on two grounds. First ground is as follows : The petitioner filed a return of income before the Income Tax Officer, D-Ward, Quilon, on December 6, 1983. That officer passed the assessment order on February 28, 1986. So the offences under Sections 193 and 196, IPC, if at all must be taken to have been committed by the petitioner before the court of the Income Tax Officer, D-Ward, Quilon. Only that officer or a superior officer to whom that officer was subordinate could have filed a complaint. The complaint, annexure-5, was filed by the Income Tax Officer, B-Ward, Trivandrum. That complaint is incompetent. The second ground urged is that the allegation regarding fabrication and manipulation of false accounts and other documents cannot stand in view of the decision of the Commissioner of Income Tax (Appeals) in the appeal filed by the petitioner and by virtue of the order passed by the Income Tax Appellate Tribunal, Cochin Bench, in I. T. A. No.320 of 1987. I shall proceed to deal with these grounds in detail.

3. Offences alleged against the petitioner are those under Sections 276C(1) and 277(i) of the Act and Sections 193, 196 and 415 of the Indian Penal Code. The petitioner filed a return of income for the assessment year 1983-84 on December 6, 1983, before the Income Tax Officer, D-Ward, Quilon. That officer passed a final order of assessment on February 28, 1986. So it is contended that the offences under Sections 193 and 196, IPC, if at all committed, must be taken to have been committed before the Income Tax Officer, D-Ward, Quilon. Section 136 of the Act provides that any proceeding before the Income Tax authorities shall be deemed to be a judicial proceeding for the purpose of Section 196, IPC, and that every Income Tax authority shall be deemed to be a civil court for the purposes of Section 195 of the Code of Criminal Procedure. So, if an offence u/s 193 or 196 of the IPC has been committed in respect of a proceeding before the Income Tax authority, that authority alone can file a complaint u/s 195 of the Code of Criminal Procedure. If that authority is not filing a complaint, then some other authority to which the first authority is subordinate can initiate proceedings. In the instant case, the alleged false return of income was filed before the Income Tax Officer, D-Ward, Quilon. So, the offences u/s 193 or 196, IPC, can be taken to have been committed before that officer or court. Annexure-5 complaint was not filed by that officer. It was filed by the Income Tax Officer, B-Ward, Trivandrum. Learned counsel representing the Revenue has no case that the Income Tax Officer, B-Ward, Trivandrum, is an officer superior to the Income Tax Officer, D-Ward, Quilon. In other words, the Income Tax Officer, D-Ward, Quilon, is not subordinate to the Income Tax Officer, B-Ward, Trivandrum. Therefore, as per Section 195(1)(b) of the Code of Criminal Procedure, the complainant is incompetent to file the complaint for prosecuting the petitioner for offences under Sections 193 and 196, IPC. This view is supported by the decision in *Income Tax Officer Vs. Kerala Oil Mills and Another*, .

4. Learned counsel representing the petitioner contends that the decision in *Income Tax Officer Vs. Kerala Oil Mills and Another*, is also an authority for the

proposition that the Income Tax Officer before whom the offences under Sections 193 or 196, IPC, are committed alone can file a complaint for offences u/s 277 of the Act. I find it difficult to accept this argument. In that decision, the maintainability of a complaint filed by an officer of the Income Tax Department as per the provisions of the Act for an offence u/s 277 of the Act was not considered by this court. Independent of the charge under Sections 193 or 196, IPC, a prosecution for violation of the provisions of the Act is maintainable. Offences under Sections 276C(1) and 277(i) of the Act are independent of Sections 193 or 196, IPC. The restriction for initiation of prosecution for an offence under the Act is that it cannot be initiated except with the previous sanction of the Commissioner of Income Tax. The complaint in this case is one filed at the instance of the Commissioner of Income Tax, Trivandrum, as per his proceedings No. 898/ADI/1987-88 dated January 18, 1988. The complaint, which is filed with the previous sanction of the Commissioner, is maintainable in so far as it relates to the offences under the Act.

5. From the above discussion, it follows that the complaint against the petitioner for offences under Sections 193 or 196, IPC, alone is unsustainable. The complaint in respect of other offences alleged therein is to be enquired into by the court below. Ground No. 1 raised by the petitioner is answered in this manner.

6. The petitioner challenged the order of assessment passed against him for the assessment year 1983-84 before the Income Tax Appellate Tribunal, Cochin Bench, in I. T. A. No. 320 of 1987. That appeal was disposed of by the Tribunal by an order dated September 9, 1988, observing :

"We are, therefore, left with the payments made to the excise authorities, police and politicians. Taking all these things into account, we are of the opinion that an addition of Rs. 5 lakhs should be made to the disclosed income as per the books. This is merely as a matter of estimate and not on the basis of any suppressed income in the books of account maintained by the assessee."

7. This order, according to learned counsel appearing for the petitioner, shows that the petitioner did not file any false return of income by fabricating or manipulating false accounts or other documents as alleged in the complaint.

8. Learned counsel representing the Revenue submits that the Tribunal, after rejecting the accounts, accepted the concession made by the petitioner's counsel, Sri C. Kochunni Nair, for adding Rs. 5 lakhs to the income disclosed as per the books. The Tribunal, in paragraph 16 of the order (annexure IX), observed:

"We will, therefore, treat it as an ordinary case and go first into the issue of reasons for rejection of the books of account. Shri Nair had fairly accepted before us that he would not press for acceptance of book results and a fair estimate may be made. Therefore, on concession from Shri Nair, we can treat it as a case where the proviso to Section 145 would be applicable."

9. Learned counsel appearing for the Revenue went on to submit that the order of the Tribunal, annexure-IX, brings out the fact that the books of account produced by the petitioner were rejected. I find much force in this argument. The accounts produced by the petitioner were not acted upon by the Tribunal. The Tribunal accepted the concession made by learned counsel representing the petitioner. So, it cannot be held that the decision rendered by the Tribunal has the effect of a finding that the accounts were not fabricated or that the petitioner had not manipulated false accounts. Nor has it the effect of stating that the accounts produced by the petitioner are correct.

10. The next argument advanced by learned counsel appearing for the petitioner is that the penalty imposed by the Income Tax Officer u/s 271(1)(c) of the Act has been cancelled by the Commissioner of Income Tax (Appeals), Trivandrum," by order dated October 31, 1988, and hence no prosecution for manipulation of accounts or for fabricating accounts be sustained. According to learned counsel appearing for the Revenue, the Commissioner of Income Tax (Appeals) interfered with the order imposing penalty solely relying on the Tribunal's order. When the Tribunal refused to accept the books of account produced by the petitioner as correct and genuine, the decision on the appeal will not, in any way, alter the situation.

11. The operative portion of the order of the Commissioner (Appeals) is :

"In the light of the nature of addition made as per the Tribunal's order, it is only a case of estimated addition and even this estimated addition is not based on any concealment or suppression of sale proceeds or any question of facts. In view of the foregoing, the charge of concealment of income does not survive. There is no case for levy of penalty u/s 271(1)(c) of the Act. The penalty order is cancelled accordingly."

12. From this it is evident that the Commissioner of Income Tax (Appeals) was basing his decision solely on the findings of the Tribunal. Therefore, learned counsel appearing for the Revenue is well within his province when it is argued that the order of the Tribunal or of the Commissioner (Appeals) has not entered a finding that the return of income filed by the petitioner was correct.

13. The question whether prosecution for offences punishable under Sections 276C(1) and 277(i) of the Act and under Sections 193 or 196, IPC, instituted by the Department while reassessment proceedings under the Act are pending, are liable to be quashed on the ground that they are not maintainable, came up for consideration before the Supreme Court in *P. Jayappan Vs. S.K. Perumal*, First Income Tax Officer, Tuticorin, . Their Lordships observed at page 700 :

"In a criminal case, all the ingredients of the offence in question have to be established in order to secure the conviction of the accused. The criminal court no doubt has to give due regard to the result of any proceedings under the Act having a bearing on the question in issue and in an appropriate case it may drop the proceedings in the light of an order passed under the Act. It does not,

however, mean that the result of a proceeding under the Act would be binding on the criminal court. The criminal court has to judge the case independently on the evidence placed before it. Otherwise, there is a danger of a contention being advanced that whenever an assessee or any other person liable under the Act had failed to convince the authorities in the proceedings under the Act that he has not deliberately made any false statement or that he has not fabricated any material evidence, the conviction of such person should invariably follow in the criminal court."

14. The allegation now made against the petitioner is that he filed false returns of income and fabricated and manipulated false accounts and other documents while filing the returns for the assessment year 1983-84 (accounting year 1982-83). The Tribunal's order and the order of the Commissioner (Appeals), as stated earlier, have not gone to state that the accounts produced by the petitioner and the return of income filed by him are correct. So, the criminal court has to go into the question as to whether the complainant succeeds in bringing out the offence charged against the petitioner. The second ground urged by the petitioner is answered accordingly.

15. The criminal miscellaneous case is disposed of by quashing that part of the complaint relating to the offences under Sections 193 or 196, IPC. The other offences alleged are to be enquired into and decided on the basis of evidence to be let in. The learned Magistrate is directed to dispose of C. C. No. 36 of 1988 in accordance with law as expeditiously as possible.