(1989) 11 PAT CK 0015

In the Patna High Court

Case No : Criminal Miscellaneous No. 2714 of 1987 (R)

Rama Devi and Another APPELLANT

Vs

State of Bihar and Another RESPONDENT

Date of Decision : 23-11-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Income Tax Act, 1961 — Section 276C, 277, 278B

Citation : (1990) 183 ITR 660 : (1990) 53 TAXMAN 209

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : S.B. Gadodia and Biren Poddar, for the Appellant; K.K. Jhunjhunwala and A.M. Sahay, for the Respondent

Judgement

S.B. Sinha, J.—This application is directed against an order dated March 29, 1985, passed by Sri D.N. Chakravarty, Chief Judicial Magistrate, Hazaribagh, in Complaint Case No. 19 of 1985, whereby and whereunder the said learned court took cognizance of an offence as against the petitioners and others purported to be under Sections 276C and 277 of the Income Tax Act, 1961.

2. The facts of the case lie in a very narrow compass.

3. Opposite party No. 2 being the Income Tax Officer, Ward-A of Hazaribagh, filed a complaint petition before the learned court below on March 28, 1985, to the effect that, for the assessment year 1980-81, a firm commonly known as Messrs. Patwari Motors Stores of which the petitioners are partners, had furnished a return showing the income of the firm wrongly.

4. It is further alleged that the said return was filed under the declaration and verification made by one Sri Rameshwar Prasad Agarwal on March 24, 1981, at Hazaribagh.

5. It was further alleged that a search was conducted u/s 132 of the Income Tax Act in the business premises of the said firm in which several incriminating

documents were found.

6. For the purpose of disposal of this case, it is not necessary to state the allegations made in the complaint petition in detail.

7. Mr. S.B. Gadodia, learned counsel appearing on behalf of the petitioners, has raised a three-fold contention in support of this application.

8. Firstly, learned counsel submitted that so far as an offence u/s 277 of the Income Tax Act is concerned, the alleged declaration and verification having been made by Sri Rameshwar Prasad Agarwal, the petitioners cannot be proceeded against for the alleged commission of the said offence.

9. Learned counsel, secondly, submitted that so far as the alleged offence u/s 276C of the Income Tax Act is concerned, the petitioners cannot be proceeded against as no allegation has been made in the complaint petition that the petitioners, at the material time, were in charge of, and responsible to, the conduct of the business of the firm, as required u/s 278B of the said Act.

10. Learned counsel, in this connection, has placed strong reliance upon a recent decision of the Supreme Court in Sham Sunder v. State of Haryana [1989] 67 Comp Cas 1 ; [1989] 3 JT 523 ; in L.K. Ahuja v. State of Bihar [1988] BLT 165 (Pat) and in Murari Lal and Others Vs. Income Tax Officer "A" Ward, .

11. Learned counsel also submitted that so far as an offence u/s 276C is concerned, mens rea is an essential ingredient for constitution of an offence and in this case, no allegation has been made in the complaint petition that the petitioners had made wilful attempts to evade tax.

12. Learned counsel, in this connection, has relied upon a decision of the Supreme Court in Gujarat Travancore Agency v. CIT [1989] 177 ITR 456 .

13. Learned counsel, lastly, submitted that, in any event, by reason of a notification which has been issued in this regard by the State of Bihar, all the cases under the Income Tax Act are to be tried by a Special Magistrate at Muzaffarpur and in this view of the matter, the learned court below had no jurisdiction to take cognizance of the offence alleged as against the petitioners.

14. Mr. K.K. Jhunjhunwala, learned counsel appearing on behalf of the Income Tax Department, on the other hand, submitted that the question whether the petitioners are sleeping partners or not, can be judged only upon a perusal of the partnership deed and other relevant documents which would be produced at the time of trial.

15. It was further submitted that the question whether the petitioners, at the relevant time, were in charge of and responsible for the conduct of the business of the firm or were merely sleeping partners, can be decided only at the time of trial.

16. Learned counsel submitted that for this purpose, it is not necessary to make

any specific allegation in this behalf in the complaint petition itself.

17. Learned counsel, in this connection, has relied upon the Full Bench decision of this court in Mahmud Ali Vs. State of Bihar and Another, , in Badri Prasad Gupta and Others Vs. State of Bihar and Another, and in Madan Mohan Upadhya v. State of Bihar [1986] PLJR 537 as also a decision of the Supreme Court in J.P. Sharma Vs. Vinod Kumar Jain and Others, .

18. It was further submitted by learned counsel that so far as the question of mens rea is concerned, the same is also a question of fact.

19. Learned counsel drew my attention to the Explanation appended to Section 276C of the Income Tax Act for the purpose of showing that even possession of or control over any books of account or other documents containing a false entry or statement shall constitute a wilful attempt to evade any tax, penalty or interest chargeable or imposable under the said Act or the payment thereof.

20. According to learned counsel, the Explanation appended to Section 276C of the Income Tax Act being absolutely clear, the existence or absence of mens rea must be held to be a question of fact which can only be decided at the time of trial of the case.

21. So far as the third contention raised by Mr. Gadodia is concerned, Mr. Jhunjhunwala, in reply, submitted that even in such a case, the order taking cognizance will not be vitiated but merely the case has to be transferred from that court to the Court of the Special Judge, Muzaffarpur.

22. In view of the order proposed to be passed by me, it is not necessary to deal with the rival contentions of the parties.

23. From the order dated August 5, 1987, it appears that an application was filed on behalf of the petitioners to discharge them.

24. The learned court below refused to pass an order on the said application, inter alia, on the ground that the stage for framing of the charge having not reached, as the prosecution had not examined any witness before the charge, the question of discharging the accused persons, at that stage, did not arise.

25. The learned court below appears to be correct.

26. It is true that this court, in exercise of its power u/s 482 of the Criminal Procedure Code, may quash the criminal proceeding in the event it is found that the pendency of such a proceeding as against the petitioners would be an abuse of the process of the court.

27. However, in this case, as noticed hereinbefore, the petitioners themselves filed an application before the learned court below for their discharge.

28. The learned court below has rightly suggested that the question whether the petitioners should be discharged or a charge should be framed against them or not, can be decided only after following the procedure as laid down in the

Criminal Procedure Code.

29. As the prosecution did not examine any witness, the question of discharging the accused, at that stage, did not arise.

30. In this view of the matter, in my opinion, in the interests of justice, the petitioners should be permitted by the learned court below to raise all these contentions, as referred to hereinbefore, at the time of framing of the charge and he shall pass an appropriate order at that stage.

31. The learned court below may, however, consider the question whether, in view of the notification constituting special courts for trying of an offence under the Income Tax Act at Muzaffarpur, it will be in a position to continue with the trial of the case or not and in the event it is found that it is not so empowered, it may pass an order transferring the case to an appropriate court for trial and disposal. The question of the jurisdiction of the court below may be decided at the first instance.

32. With the aforementioned observations and directions, this application is dismissed.