

(1997) 03 MAD CK 0120
In the Madras High Court

S. MOHAN GANDHI

APPELLANT

Vs

SRI VISALAM CHIT FUNDS and Others

RESPONDENT

Date of Decision : 07-03-1997

Acts Referred:

Citation : (1998) 149 CTR 106

Hon'ble Judges : R. Balasubramanian, J

Bench : Division Bench

Advocate : Ramasamy, K. Special Public Prosecutor, for the Assessee D. Nellaiappan, for the Revenue Nos. 1 to 5, 8, 9, 12, 19, 22, 24 and 25 in Criminal R.C. Nos. 584 of 1983 and Revenue, Nos. 1 to 4 in Criminal R.C. No. 794 of 1984 K. Ramasamy, for A. Abdul Gani, for the Revenue Nos. 10, 14, 16, 17, 18, 20, 23 and 27 in Criminal R.C. No. 584 of 1983 and for the Revenue Nos. 10, 18, 20, 22 and 23 in Criminal R.C. No. 794 of 1984 K. Thirumuruganandam, for the Revenue No. 26 in Criminal R.C. No. 584 of 1983 and for the Revenue Nos. 7, 8, 12 to 17 in Criminal R.C. No. 794 of 1984, for the Appellant;

Judgement

R. Balasubramanian, J.

These two revisions have been filed by the Income Tax Department questioning the order dated 11-4-1983, in C.M.P. No. 174 of 1983 in C.C. No. 22 of 1983 and against the order dated 4-9-1984, in C.M.P.No. 1073 of 1985 in C.C. No. 23 of 1983 both on the file of the Chief Judicial Magistrate, Madurai, discharging the respective accused u/s 245(2) of the Criminal Procedure Code.

2. A few facts are necessary to dispose of these two revision cases. The accused in the two complaints lodged by the Income Tax Officer, Madurai, one in the year 1979, taken on file as C.C. No. 82 of 1979 against Shri Visalam Chit Fund Ltd., and 28 others and another complaint in the year 1980 against Nellai Finance Private Limited and 26 others came up before the Chief Judicial Magistrate, Madurai. Both the complaints were lodged for offences under sections 120B, 195, 196, 420, 468 and 511 of the Indian Penal Code and sections 277 and 278B of the Income Tax Act 1961 (hereinafter referred to as "the Act") . The assessment

year in both the complaints was 1975-76. These two complaints on transfer have been taken on file as C.C. No. 22 of 1983 and 23 of 1983, respectively, on the file of the Additional Chief Judicial Magistrate, Madurai. The accused in the first case filed Crl. M.P. No. 174 of 1983 and the accused in the second case filed Crl. M.P. No. 1073 before the Additional Chief Judicial Magistrate, Madurai, to discharge them from the proceedings initiated against them. Those applications were opposed by the Income Tax Officer on various legal grounds. One of the main grounds is that the court can discharge the accused u/s 245 of the Criminal Procedure Code only when the complainant has let in some evidence and that evidence was found to be insufficient by the court for proceeding further. According to the complainant before the lower court no evidence whatsoever had been let in and, therefore, the application for discharge could not be decided at all and it is misconceived. However, the learned Judge ordered both the applications and thereby discharged all the accused from the prosecution. The learned Magistrate, while doing so, mainly took into account the settlement proceedings entered into between the accused on the one hand and the complainant on the other hand in each of the cases.

3. I have heard Mr. Ramasamy, K. learned advocate appearing for the Income Tax Department and Mr. K. Ramasamy, learned senior counsel appearing on behalf of Mr. Gani in both the cases. The argument of Shri Ramasamy, K. learned counsel appearing for the revision petitioner, is that the order of discharge passed by the trial court is illegal and premature. The submission of counsel is that the court gets power to discharge the accused u/s 245 of the Code only when some evidence is let in on behalf of the complainant. Counsel has cited several authorities on this point and out of the authorities cited by him, I only rely upon the judgment of the Supreme Court in the case of R.S. Nayak v. A.R. Antulay AIR 1986 SC 2045. The Supreme Court interpreting the scope and impact of sections 227, 239 and 245 of the Code, which operates at various spheres and stages, held that the order of discharge u/s 245 of the Code, can be passed only if the evidence referred to u/s 244 had been taken, admittedly, in this case no evidence whatsoever had been let in by the complainant which fact is not disputed by counsel appearing for the respondent and, therefore, the order of the learned trial Judge is wholly without jurisdiction and erroneous. Under these circumstances, I have no hesitation in setting aside the orders made in these two revision petitions as illegal and without jurisdiction.

4. Having decided so, the next question that I was asked to consider by learned counsel appearing for the respondent in these cases is whether the cases should be remitted back to the trial court for proceeding afresh. This request was totally opposed by Mr. Ramasamy, K. learned counsel appearing for the department, stating that if the matter is not remitted back on the ground of lapse of time, then the order of this court will act as a binding precedent in all the other cases initiated by the Income Tax Department and, therefore, many such cases initiated by the Income Tax Department may have to be terminated on this ground alone. I am able to appreciate the genuine apprehension in the mind of

learned counsel appearing for the Income Tax Department and I do appreciate the difficulties that may be encountered by the Income Tax Department if my order in these cases has to be construed as a precedent to other cases. In view of the submission made by learned counsel for the Income Tax Department, I have decided to apply my mind very carefully to the facts of this case and took abundant caution to see that the interest of the Income Tax Department is not affected in other cases before I pass the following order.

5. The assessment year in both the cases relates to the assessment year 1975-76. I am not, in this order, going into the merits of the case at all in passing this order. The returns filed by the respective accused for the assessment year referred to above were found to be false and, therefore, the returns were not accepted by the department. The department made assessment in respect of the accused on their own. These reassessment orders were appealed by the respective assesseees to the Commissioner (Appeals) on 9-10-1978. Ultimately, the liability of the respective accused were the subject-matter of settlement proceedings between the parties on the one hand and the department on the other. The Commissioner ultimately passed an order on 15-5-1982, on the basis of the settlement arrived at. Though the settlement proceedings contained a number of terms, for the purpose of my present decision in this case, I consider only two aspects out of them. One is that a total sum of Rs. 75,00,000 was fixed as income to be assessed in the hands of ten persons who represented the family members of A-2 in C.C. No. 22 of 1983 on the file of the chief Judicial Magistrate, Madurai.

The other important clause is as follows : "The question of withdrawal of prosecution proceedings pending in this group filed as a result of the assessment made in the cases of Shri. Visalam Chit Funds Ltd. (first respondent in CrI. R.C. No. 584 of 1983) and Nellai Finance Ltd. (first respondent in CrI. R.C.No. 794 of 1984) would be considered separately after deletion of the income referred to in paragraph 2".

6. The learned counsel appearing for the respondents in each of the revision petitions states that the entire sum of Rs. 75,00,000 as imposed on them in the settlement order referred to above had been completely paid and this statement is not disputed by learned counsel appearing for the department.

7. According to learned senior counsel appearing for the respondents in each of the cases, when the settlement was arrived at between the accused and the department, the question of withdrawal of the prosecution cases was one of the items looming large in the minds of the respective parties and that is why a provision for considering the withdrawal at a later stage was incorporated as one of the terms of settlement.

Learned senior counsel appearing for the respondents submitted that since the entire sum of Rs. 75,00,000 assessed had been paid and the terms of settlement contained a clause for considering the withdrawal of the prosecution cases at a

later stage, the learned trial Judge that had not committed an error in taking those two aspects into account while passing the impugned order. Besides learned senior counsel appearing for the respondent in each of the cases also states that in Crl. R.C. No. 584 of 1983, A3, A4, A8, A9, A10, A13, A14, A15, A17, A23 and A26 are dead. Likewise, in Crl. R.C. No. 794 of 1984, A2, A6, A7, A11, A14, A23 are reported to be dead.

8. Learned senior counsel appearing for the respondents in each of the cases submitted that no useful purpose would be served in remitting both the cases for trial considering the prejudice that would be caused to the accused, if after a lapse of nearly two decades after the assessment year, the matter is sent back for retrial. He would also state that the cases were filed in the year 1980 and on that ground also if retrial is ordered, considerable prejudice would be caused to the accused. Lastly, he submitted, that by taking the important aspect, i.e., A-2 in C.C. No. 22 of 1983, who is stated to be the prime beneficiary, and since he is dead, retrial, if ordered, would prejudice the accused. He would also submit that a reading of the complaint shows that a number of documents have been seized from the custody of A-2 and since the prosecution is relying upon the same, in the absence of the second accused, there would be no other person who would be able to speak about the entries made in those documents and, therefore, if the trial is allowed to be proceeded with further, the respondents would be considerably prejudiced. In this case, it is also noticed that in paragraph 20 of the complaint in C.C. No. 22 of 1985, it is stated that the second accused offered an explanation for the entries in the documents seized from him, besides the explanation offered by A- 6. The complainant states that the explanations given by those person are totally false. Under these circumstances, it cannot be disputed what if A-2 is alive (unfortunately he is not), then it would have been possible for him to offer his explanation before the court for the entries found in the documents seized from him which, if accepted, then the benefit would go to the accused, and if the explanation is not accepted, then all the legal consequences would follow. Why I am emphasising on this aspect is that the death of A-2 is likely to cause considerable prejudice to the accused, especially after a lapse of so many years. No doubt, it is not my idea to say that the delay in this case is certainly only due to the complainant. The delay is due to so many causes including the delay of nearly thirteen years of pendency of the case in this court.

9. Learned senior counsel appearing for the respondents in each of the cases cited the judgment of the Supreme Court in the case of Banwari and Others Vs. Income Tax Officer and Another, . Though the facts are different in that case, yet, the Supreme Court was of the view that the delay in that case resulted in the trial having become stale and on that ground restored the original order of discharge of the trial Magistrate which was interfered with by the High Court. I am fully aware of the fact that every case cannot be disposed of solely on the ground of delay but only on the facts and circumstances available in each case. To my mind, the peculiar facts available in this case are : (1) the payment of the

entire sum of Rs. 75,00,000 assessed as per the settlement proceedings : (2) settlement proceedings contained a clause for considering the withdrawal of the prosecution at a later stage; and (3) the non-availability of a few accused who would be in a position to explain the entries found in the documents seized from them which are relied upon by the department.

10. Learned counsel appearing for the department states that the delay alone could not be the deciding factor in refusing to order a re-trial and cited a judgment of the Supreme Court in the case of State of Gujarat Vs. Mohanlal Jitmalji Porwal and Another, . No doubt in this case the Supreme Court has said that the delay is part and parcel of our system and, therefore, the delay could not be put against the department. The facts available in that case are not similar to the facts on hand. On the peculiar facts available in this case enumerated by me earlier in this order. I am of the firm view that if the two cases are remitted back for retrial, the accused, who will be forced to face the trial, would be definitely and considerably prejudice. The prejudice which is likely to be caused to the accused in this case, if a retrial is ordered, would be very serious and irreparable. Under these circumstances, I am inclined to uphold the arguments Mr. K. Ramaswamy, learned senior counsel appearing for the respondents in each of the cases, for not sending back both the cases to the trial court.

12. Under these circumstances and for the reasons stated above, I feel, while holding that the order passed by the learned trial Magistrate, Madurai, in each of the cases is definitely erroneous and without jurisdiction, that no useful purpose would be served in remitting these two cases for retrial, I make it very clear that this decision of mine in not sending back these cases for retrial is wholly confined only to the facts and circumstances available in this case and it shall not be cited as a binding precedent in any other case to resist an order of retrial. With these observations, these two revisions are disposed of accordingly.

13. Learned counsel appearing for the Income Tax Department brings to my notice that there is an upward alarming trend in the subordinate courts in resorting to passing orders u/s 245 of the Code even before any evidence is brought on record u/s 244 of the Code. This situation is really alarming. The lower courts must be made aware of the judgment of the Supreme Court reported in R.S. Nayak Vs. A.R. Antulay and Another, , wherein the Supreme Court has categorically laid down that the power of discharge u/s 245 of the Code will be available to the lower court only when some evidence has come on record. If the lower courts have been acting in a manner against the spirit of the Supreme Court judgment cited above, then it must be taken note of with all seriousness. Therefore, the lower courts are directed, while exercising the power of discharge u/s 245 of the Criminal Procedure Code, to exercise their power only after evidence comes on record u/s 244 of the Code. The Registrar is directed to communicate the last paragraph of this order to the respective Chief Judicial Magistrates of each district with a further direction to communicate the same to

each of the courts within their jurisdiction for being taken note of and acted upon.