

(1991) 02 KAR CK 0047

In the Karnataka High Court

Case No : Criminal Petition No's. 916 and 917 of 1988

Shankar and Co.

APPELLANT

Vs

R. Viswanathan

RESPONDENT

Date of Decision : 22-02-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 305, 482
Income Tax Act, 1961 — Section 131

Citation : (1991) ILR (Kar) 2730

Hon'ble Judges : Mirdhe, J

Bench : Single Bench

Advocate : N. Nagaraj, for M.V. Devaraju, for the Appellant; G. Chanderkumar, for the Respondent

Final Decision : Dismissed

Judgement

Mirdhe, J.—These Criminal Petitions are preferred by the petitioners u/s 482 Cr.P.C. praying to quash the proceedings in C.C.No. 365 of 1987 on the file of the Special Court for Economic Offences, Bangalore.

2. The petitioners in Criminal Petition No. 916 of 1988 are Accused Nos. 1 and 2 in C.C.No. 365 of 1987 and petitioner in Criminal Petition No. 917 of 1988 is Accused No. 3 in that case. Since both these petitions are filed by the petitioners who are accused in the same C.C. number and against the same order of issuing process by the learned Presiding Officer of the Special Court for Economic Offences, Bangalore, I have heard these petitions together and I am passing a common order in these cases.

3. I have heard the learned Counsel for the petitioners and the learned Counsel for the respondent fully in these petitions and also pursued the records of the case.

4. Petitioner-1 in Criminal Petition No. 916 of 1988 is a firm called M/s Shankar and Company and petitioner-2 is the Managing Partner of that firm. The

petitioner in Criminal Petition No. 917 of 1988 is an Auditor of that firm who appeared before the respondent as the authorised agent having a Power of Attorney to represent the firm. Accused No. 1 is the firm dealing in wholesale distribution of medicines. Accused No. 3 as the Auditor of Accused No. 1 Firm filed assessment return of the Firm for the year 1982-83 before the respondent. The respondent issued notice u/s 143(2) and 142(1) of the Income Tax Act to produce the documents and evidence in support of the said returns and on 20-12-1984 Accused No. 1 i.e., the Firm produced certain documents through Accused No. 3 its Auditor. The respondent noticed certain discrepancies on the following heads:

G.L.No.

in P & L Statement

Salary and wages

381

Rs 34,916-28

Rs 52,916-38

Interest

57

Rs 9,210-75

Rs 16,651-25

Commission & Rebate

31

Rs 2,646-00

Rs. 21,482-53

Bank Commission

13

Rs 2,411-79

Rs 2,507-33

Cooly & Cartage

25/432

Rs 12,705-00

Rs 12,725-48

Repairs and Renewals

He held the enquiry and during the enquiry he examined certain witnesses and he also recorded the sworn statement of Accused Nos. 2 and 3. Thereafter he filed his complaint u/s 200 Cr.P.C. in the Special Court for Economic Offences at Bangalore against all the three petitioners as Accused Nos. 1 to 3 alleging that they have committed the offences punishable u/s 276(C), 277 and 278 of the Income Tax Act. The complaint came to be registered at C.C. No. 365 of 1987 and the learned Presiding Officer after taking cognizance of the offences issued summons to the petitioners. Being aggrieved by this order of issuing summons to them, they have preferred these Petitions u/s 482 Cr.P.C.

5. The learned Counsel for the petitioners contended that Accused No. 1 is a Company and, therefore, it cannot be prosecuted. He relied on *Vijaya Commercial Credit Ltd. Vs. Sixth Income Tax Officer*, wherein it has been held by this Court that prosecution of Company u/s 277 of the Act and rejection of application for discharge being challenged as futile inasmuch as imposition of sentence of imprisonment is impossible. His Lordship Justice Patil in that Ruling has held that for an offence u/s 277 of the Income Tax Act mens rea is necessary and although the word or expression "person" as defined u/s 2(31) of the Income Tax Act is wide enough to include a Company or other juristic person, it is not possible for the Court on conviction to impose a sentence of imprisonment on a Company or a Firm. His Lordship has also further held that although u/s 278-B, where an offence under the Act is committed by a Company, every person who at the time of 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 punished accordingly. His Lordship has also held that there is no statutory compulsion to prosecute a Company alongside the Officers or persons in charge and responsible to the Company. Section 305 Cr.P.C. deals with the procedure when Corporation or registered Society is an accused. It lays down that where a Corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the Corporation. In view of Section 305 Cr.P.C. even a Company or a Firm or a juristic person can be accused and it will have to appoint a representative for the purpose of inquiry or trial to represent it. Even in the Ruling that is relied upon by the learned Counsel for the petitioners, it has not been held that no prosecution can be launched against the Company. But all it has stated is that there is no statutory compulsion to prosecute a Company alongside the Officers or persons in charge and responsible to the Company.

6. In *Sheoratan Agarwal and Another Vs. State of Madhya Pradesh*, the Supreme

Court while dealing with Sections 3 and 10 of the Essential Commodities Act and offences by Companies has held as follows:

"Section 10 does not state that if the person contravening the Order made under the Essential Commodities Act is a Company, the prosecution of the Directors, the Officers, and servants of the Company or other persons is precluded unless the Company itself is prosecuted. There is no statutory compulsion that the person in charge or any officer of the Company may not be prosecuted unless he be ranged alongside of the Company itself. Section 10 indicates the persons who may be prosecuted where the contravention is made by the Company. It does not lay down any condition that the person in charge or an officer of the Company may not be separately prosecuted if the Company itself is not prosecuted. Each or any of them may be separately prosecuted or along with the Company. Section 10 lists the person who may be held guilty and punished when it is a Company that contravenes an order made u/s 3 of the Essential Commodities Act. Naturally, before the person in charge or an officer of the Company is held guilty in that capacity it must be established that there has been a contravention of the Order by the Company. Case law discussed."

The Supreme Court in that Ruling has held that "the liability of the persons in charge of the Company only arises when the contravention is by the Company itself." To repeat the words of the Supreme Court in the said Ruling for the purpose of emphasis: "Naturally, before the person-in-charge or an officer of the Company is held guilty in that capacity it must be established that there has been a contravention of the Order by Company."

The Supreme Court in its recent Judgment reported in T.J. STEPHEN AND ORS. v. PARLE BOTTLING CO. (P) LTD. AND ORS., 64 Company Cases 151 has reiterated the principle enunciated in the case of Sheoratan Agarwal and Anr. v. State of Madhya Pradesh. In view of this pronouncement of the Supreme Court, it cannot be said that under no circumstances a Company or a Firm or a juristic person can be prosecuted. The Company, Firm or juristic person may not be subjected to the punishment of imprisonment. But certainly for the purpose of proving the offence as alleged to have been committed by its Officers and other persons responsible and in charge of that Company or Firm or juristic person, impleading of that juristic person in a prosecution is essential. In fact, Section 278B deals with the offences committed by the Companies. Therefore, the argument of the learned Counsel for the petitioners that the Company, Firm or any juristic person cannot be prosecuted is not acceptable.

7. The learned Counsel for the petitioners contended that the respondent had no power to record the statements of Accused Nos. 2 and 3 in this case. Section 131 of the Income Tax Act deals with the powers regarding discovery, production of evidence, etc., to the Assessing Officer and other Authorities mentioned in that Section. Clause (b) of the said Section gives power to the Officers mentioned in that Section to examine any person on oath. The respondent was making an enquiry regarding the details that were filed by Accused No. 3 for and on behalf

of Accused No. 1. The respondent was acting as an Assessing Officer at the time when he recorded the sworn statement of Accused Nos. 2 and 3 in this case. In view of the powers given by Section 131 of the Income Tax Act to the Officer and Authorities mentioned therein, it cannot be said that the respondent had no power to examine Accused Nos. 2 and 3 on oath and record their sworn statement.

8. It has been further contended by the learned Counsel for the petitioners that the accused preferred an appeal against the order of assessment passed by the respondent and that appeal came to be partly allowed and the petitioners have preferred further appeal against the order of the Appellate Authority to the Income Tax Tribunal and that appeal is pending and therefore, the prosecution launched against the petitioners during the pendency of the appeal instituted by them is bad in law. In *P. Jayappan Vs. S.K. Perumal*, First Income Tax Officer, Tuticorin, this question came to be considered. The question was whether the pendency of the reassessment proceedings can be a bar to the institution of the criminal prosecution for offences punishable u/s 276C or Section 277 of the Income Tax Act or Sections 193 and 196 of the I.P.C. Their Lordships of the Supreme Court have held that there is no provision in law which provides that a prosecution for the offences in question cannot be launched until reassessment proceedings are completed. The Supreme Court has held as follows:-

"There is no provision in law which provides that a prosecution for the offences in question cannot be launched until reassessment proceedings initiated against the assessee are completed. It is not law that no proceedings can be initiated at all u/s 276C and Section 277 as long as some proceedings under the Act in which there is a chance of success of the assessee is pending. A mere expectation of success in some proceeding in appeal or reference under the Act cannot come in the way of the institution of the criminal proceedings u/s 276C and Section 277 of the Act. In the 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 proceeding 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 the assessee or any other person liable under the Act has 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."

In view of this position of law, it is difficult to accept this contention of the learned Counsel for the petitioners. The learned Counsel for the petitioners also contended that the discrepancies on the basis of which the respondent has given

the complaint can be explained and Accused No. 3 who is after all an Auditor of the Firm cannot be made liable to answer the criminal charges levelled against Accused No. 1. The powers to be exercised u/s 482 Cr.P.C. are the extraordinary powers and they are to be exercised very sparingly and [not] casually. It is not within the domain of Section 482 Cr.P.C. to assess the material on record to find out whether the material will be enough for the conviction of a particular person or not, The petitioners are at liberty to urge their defence in the Court below which is competent enough to take into consideration the points urged by the petitioners and dispose of the matter in accordance with law. I do not find any merit in these revision petitions.

9. Hence, I make the following order:-

The petitions are not admitted. They are dismissed.