
(1990) 09 MAD CK 0095

In the Madras High Court

Case No : Criminal Miscellaneous Petitions No's. 9493 and 9495 of 1986

S.P. Murugappan

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 04-09-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Income Tax Act, 1961 — Section 2(24), 271(1), 276, 276C, 276C(1)

Citation : (1992) 194 ITR 531

Hon'ble Judges : Arunachalam, J

Bench : Single Bench

Advocate : V. Ramachandran, for the Appellant; K. Ramaswami, for the Respondent

Judgement

Arunachalam, J.—Both these petitions are disposed of together since the point raised is common and the parties are also the same. In Criminal M. P. No. 9493, the prayer is to call for the records in C. C. No. 177 of 1985, pending on the file of the Judicial First Class magistrate, Coimbatore, and to quash the proceedings therein as not maintainable and as an abuse of the process of court.

2. In Criminal M. P. No. 9495 of 1986, the prayer is similar, but it relates to C. C. No. 176 of 1985, pending on the file of the same court.

3. The petitioner in each one of these petitions is being prosecuted at the instance of the respondent, who is the Income Tax Officer, Circle-III (3), Coimbatore, for commission of offences punishable under sections 120B, 193, 196 and 420 read with section 34 of the Indian penal Code and under sections 276C(1) and 277 read with section 278B of the Income Tax Act, 1961.

4. It is the prosecution case that in the normal course of business transactions, the first accused, Muruga Steel Corporation, which is the petitioner in criminal M. P. No. 9495 of 1986, purchased iron and steel materials from Iron and Steel Traders, 77, Sembudoss Street, Madras-600 001. Enquiry and investigation made

in the case of Muruga Steel Corporation revealed that the demand drafts mentioned in the complaint had been purchased by K. Thavamani alias Mani, employee of the first accused, in favour of one E. Muthu, and employee of Iron and Steel Traders, 77, Sembudoss Street, Madras-600 001. In the course of the sworn statement recorded from K. Thavamani alias Mani, it was admitted by him that the purchases of the demand drafts were made by him as directed by S. P. Murugappan, the petitioner, in criminal M. P. No. 9493 of 1986 or the third accused S. P. Chokkalingam or on the directions of both. He also admitted that he had handed over the drafts to one or other of the above two accused who had given the money for the purchase of those drafts. In the complaint, it has been stated that the above financial transactions have not found a place in the account bulks maintained by Muruga Steel Corporation. S. P. Murugappan, the second accused in this prosecution, when examined, admitted that Thavamani alias K. Mani was an employee of the first accused on a monthly salary of Rs. 250. He also admitted the purchase of M. S. sheets from iron and steel Traders, Sembudoss Street, Madras, on a few occasions for the amounts mentioned in the invoices. However, he denied that the demand drafts were purchased by Thavamani out of the money advanced on behalf of the first accused. The complaint also states that the firm filed a return of income accompanied by the trading and profit and loss account and balance-sheet for the current assessment years which were the subject-matter of these two prosecutions. The Income Tax assessment was completed on the basis of the figures mentioned in the day-book and ledger which do not record the demand drafts. which have been detailed in both the complaints. The verification column in the Income Tax return had been signed by the third accused for and on behalf of the first accused firm. The complaint further reads that it was clear that the petitioners, with a view to evade Income Tax and defraud the exchequer of its legitimate revenue and to mislead and deceive the Income Tax officer, had acted in concert in furtherance of their intention while committing the offences alleged in the complaint.

5. Mr. V. Ramachandran, learned senior counsel appearing on behalf of the petitioner in each one of these petitions, contended that the transactions mentioned in the complaint had not been stated to have been financed out of the income. The word "funds" used in the complaint need not necessarily be income and the Income Tax officer, who is presumed to know the difference between "income and anything other than income" ought to have alleged in the complaint that the transactions had been financed out of the income. He also commented that there was an absence of averments in the complaint that the sale transactions were in fact effected yielding a profit which was not shown in the return submitted. Therefore, the prosecution, on the ground of "escaped income", cannot arise.

6. For substantiating his contention, he stated that, if the prosecution case was that the expenses incurred had not been included in the returns, it was totally opposed to common sense in the commercial world. He added that, by non-disclosure of a debit, only income goes up and, therefore, the prosecution cannot

allege that the petitioner had concealed his income. The non-disclosure, according to learned counsel, of the expenses would only inflate the income and if that be so, obviously, the prosecution was totally misconceived.

7. To impress upon the court the scope of "income", learned counsel referred to section 28 of the Income Tax Act, which, under the head "Profits and gains of business or profession", states the categories of income detailed therein, as chargeable to Income Tax. He reiterated that the term "funds" cannot be equated with the term "income". He then referred to the view of the authors, N. A. Palkhivala and B. A. Palkhivala on the law and practice of Income Tax (Eighth edition), at page 455, wherein section 2(24), defining income, had been taken note of. The word "income" includes profits and gains. The charge was not on gross receipts but on profits and gains properly so called. Gross receipts or sale proceeds, however, include profits if the business of the year ends in profit, and, therefore, profits would be received at the time and place at which the gross receipts or sale proceeds are received. He invited my attention to section 69C of the Income Tax Act, which came into the statute book with effect from April 1, 1976. Section 69C of the Income Tax Act deals with unexplained expenditure. Where, in any financial year, an assessee had incurred any expenditure and he offered no explanation about the source of such expenditure or part thereof, or the explanation, if any offered by him, was not, in the opinion of the Assessing officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year.

8. On the language of the section, he contended that unless an explanation had been called for from the petitioners and if any was offered by them and subsequently, it was the opinion of the Assessing Officer that the explanation was not satisfactory and the amount covered by such expenditure or part thereof must be deemed to be the income of the assessee, then only the subsequent facets will follow. In other words, according to learned counsel, without following section 69C of the Income Tax Act, initiation of the prosecution would be absolutely premature. In passing, he referred to the assessment made for relevant years relating to the prosecution having been set aside on appeal. I did not allow him to continue any further with this argument, because the fact had not yet been brought on record in evidence before the trial court. The documents will have to be brought on record and their genuineness established before learned counsel could be permitted to advance this argument. Thereafter learned counsel referred to portions of the report of the Wanchoo Committee to gain support for his argument that, u/s 271(1)(c) of act, the assessee would be liable to pay penalty, but would not have to face prosecution. With specific reference to paragraph 2.76 of the report, he contended that the Wanchoo Committee, while they were of the view that penalty should not be draconian, strongly felt that those who are tempted to resort to concealment of income should not be allowed to get away with tenuous legal interpretations and, therefore, recommended the changes in the Act by way of penalty in section 271(1)(c). Finally, he referred to

section 28, 45 and 56 which take in their fold the income assessable specifically, and not on fictional notions. He insisted that section 69C was a discretionary provision and unless the discretion vested in the Income Tax Officer was exhausted, the prosecution cannot be maintained. He urged that the complaint does not state either about concealment of income or about non-disclosure of income and, therefore, on the totality of his arguments, the law laid down by David Anouswamy J., in S. VAIDYANATHAN, Income Tax OFFICER Vs. DR. B. MATHURAM AND SONS AND OTHERS., should be made applicable.

9. Per contra, Mr. K. Ramaswami, appearing on behalf of the respondent in each one of these petitions, took me through paragraphs 5 and 8 of the complaint to contend that the transactions which form part of the earlier paragraphs did not find a place in the account books maintained by the first accused. He pointedly referred to paragraph 8 which shows that the Income Tax assessment was made on the basis of the figures mentioned in the day book and ledger which did not record the demand drafts mentioned in the earlier part of the complain. According to learned counsel, there was a deliberate concealment of income and the volume of transactions had been reduced purposely to avoid getting into the net of taxation. He contended that u/s 276C, Explanation, clauses (i) and (iv), for the purpose of the said 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 has in his possession or control any books of account or other documents (being books of account or other documents relevant of any proceeding under this Act) containing a false entry of statement, or had caused 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. The argument of learned counsel for the respondent was that section 276C, Explanation, clauses (i) and (iv), was a complete answer to refuse to quash the pending prosecution if the returns submitted by the petitioner were false.

10. He then contended that the criminal court had to judge the case independently on the evidence placed before it and the contentions of learned counsel for the petitioner may be available to him in penalty proceedings, but would not ensure in his favour for having the prosecution quashed. Learned counsel submitted that there was no scope whatever to accede to the prayer made in these petitions, and, as a logical corollary, the prosecution may have to be afforded an opportunity to lead evidence to substantiate its allegations in the complaint which formed the basis or foundation for the commission of offences by the petitioners.

11. Both counsel have placed before me certain decided cases which I will refer to in the relevant context. I have considered the rival contentions of counsel with great care and anxiety. Though arguments were advanced at length, I am of the firm view that, at this stage, the prosecution evidence does not commerce. We have, therefore, to generally consider the effect of the averments made in the

complaint to decide whether the prosecution can be allowed to be conducted. The standard, test, Proof or judgment, which has to be applied before finding the accused guilty or otherwise is not exactly to be applied at this stage, for, if the averments in the complaint lead to the formation of an opinion as to the existence of factual ingredients constituting the offences alleged, refusing to exercise the inherent powers to quash the pending prosecution will be justified.

12. It is on this basis that the arguments advanced by either counsel will have to be scrutinised. At this stage, I do not think it is necessary that a hair-splitting distinction has to be drawn to differentiate between "funds" which can be treated as income and "funds" which need not necessarily be christened as income. The allegations in the complaint, taken as a whole, show that the petitioners had business transactions with Iron and Steel Traders, 77, Sembudoss street, Madras-600 001. It is only in the normal course of business transactions that certain demand drafts detailed in the complaint have been utilised for the purpose of the trade carried on by Maruga Steel Corporation and those transactions, in terms of the complaint, have not found a place in the account books maintained by the first accused. It cannot be overlooked at this stage that the second accused had also admitted the purchase of M. S. sheets from Iron and Steel Traders during the normal course of business, though he had denied that the demand drafts were purchased by Thavamani alias Mani out of the funds advanced on behalf of the first accused. The evidentiary value that could be attached to the words used in paragraph 7 of the complaint, that the demand drafts mentioned in the complaint were encased by Mathu, a employee of Iron and Steel Traders, 77, Sembudoss street, Madras-600 001, towards on money or extra money consideration due to Iron and Steel Traders of which he was an employee for the sales effected by them, cannot be gone into in very great detail and appreciated, for such consideration will have to form part of the realm of appreciation of evidence by the trial magistrate. The further averments in the complaint that the circumstances pinpointed therein indicate that the transactions have been financed by the first accused and that they represented the unaccounted transactions of the first accused firm dealing in the purchase as Sale Traders, Sembudoss Street, Madras-600 001, and that they have used the name of a petty employee as the purchaser of the demand drafts only to conceal their identity in the course of their paying the extra money or premium demanded by Iron and Steel Traders, Madras-600 001, cannot be brushed aside as not material or as not forming part of facts showing the ingredients of the offences alleged in the complaint. All that the complaint is required to allege is the basic foundation on which the prosecution rests and complete details of evidence need to be stated therein, for the latter part of it can always be brought record through the witnesses to be examined and the documents to be produced in evidence. In that background, I am unable to appreciate the arguments that this prosecution is totally misconceived on the ground that the income goes up by non-disclosure of debit and hence the prosecution cannot allege that the accused had concealed their income.

13. A reference to section 28 of the Income Tax Act as well as the observations of the authors. N. A. Palkhivala and B. A. Palkhivala on The Law and Practice of Income Tax (English edition) defining "income" need not detain us very seriously, for if the allegations in the complaint taken at their face value show the commission of the offences alleged, at least prima facie, these matters of detail may not have to be gone into in the exercise of inherent powers to halt the pending prosecution. It is quite true that u/s 69C of the Income Tax Act, unexplained expenditure is dealt with. It can also be noticed from the provisions of the said section that certain procedure has to be adopted by the authority concerned before the unexplained expenditure vis-a-vis the source of expenditure can be deemed to be the income of the assessee for the financial year concerned. I am unable to comprehend as to how this procedure u/s 69C would affect the institution of this prosecution. As rightly conceded by Mr. K. Ramaswami, the provisions of section 69C of the Act may be available during the assessment proceedings. On facts found in the complaint, if the prosecution can certainly be sustained, recourse to section 69C of the Act will not help the petitioners at this stage. I am unable to hold that the prosecution is premature.

14. Section 271(1)(c) of the Income Tax Act does indicate the recommended changes in the Act by the Wanchoo Committee. However, this prosecution initiated for totally different offences inclusive of conspiracy to cheat cannot be thrown out by a reference to section 271(1)(c) of the Income Tax Act. The decision of David Annoussamy J. in S. VAIDYANATHAN, Income Tax OFFICER Vs. DR. B. MATHURAM AND SONS AND OTHERS., is distinguishable on facts. In that case, the reassessment order was set aside and the matter was remanded. The competency of the Income Tax Officer to file a complaint was upheld. The observation was that in view of the reassessment order having been set aside and remanded for fresh consideration, the complaint had to be withdrawn with permission to file it again if circumstances so warranted. The aforesaid decision cannot be attracted to the facts of this case. The allegations in the complaint taken in their entirety do prima facie show that there was a deliberate concealment of income and the column of transactions had been reduced purposely. Section 276C, Explanation, clauses (ii) and (iv) of the Income Tax Act would certainly permit the continuance of this prosecution for a wilful attempt to evade any tax which shall include a case of any person having in his possession or control books of account or other documents contain any false entry or statement. It would also take in its fold any other circumstances which had been caused to exist which have the effect of enabling such person to evade payment of any tax, penalty or interest chargeable under the Act.

15. The allegations in the complaint certainly affirm that the Income Tax assessment was made on the basis of the figures mentioned in the day-book and ledger which had not recorded the demand drafts mentioned in the complaint. The transactions which form part of the complaint have not been entered in the account books maintained by the first accused. The offence u/s 276C(1) has been alleged in the complaint and the averments referred to above in the

complaint prima facie attract the ingredients of the said offence.

16. As stated earlier, in paragraph 11 above, the test to be applied at this stage to allow the prosecution either to continue or to be sopped cannot be so rigorous as the requirement, before finding the accused guilty or otherwise. On the averments in the complaint, the prosecution must certainly be afforded an opportunity to lead evidence to substantiate its case. Needless to add that the petitioners will also have an opportunity to cross examine the prosecution witnesses and challenge their documents in the conduct of their defence.

17. It is settled law that the inherent powers to quash the pending prosecution cannot be exercised if the averments in the complaints, without adding or subtracting, do indicate prima facie commission of the offences alleged. Detailed proof of the allegations will have to form part of the evidence to be recorded during trial. If the first test of the existence of prima facie allegations in the complaint is satisfied, the prayer to quash the pending prosecution will have to be necessarily negatived.

18. On a careful consideration of the arguments advanced by either counsel, coupled with the averments made in the complaints, I am of the firm view that no ground has been made out to allow the petitions and erase the pending prosecutions. These petitions are accordingly dismissed.