
(2007) 12 MP CK 0031
In the Madhya Pradesh High Court

S.S.R. Pirodia and Others

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 14-12-2007

Acts Referred:

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

Citation : (2008) 219 CTR 295 : (2008) 302 ITR 1 : (2008) 171 TAXMAN 221

Hon'ble Judges : S.C. Vyas, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.C. Vyas, J.—By this petition filed u/s 482 of the Cr. PC the order dated 25-7-2005 passed by Chief Judicial Magistrate, Ratlam in Criminal Case No. 15 of 1996 and order dated 14-7-2006 passed by IIIrd Additional Sessions Judge, Ratlam in Criminal Revision No. 180 of 2005 are called in question with a prayer to quash these orders and to quash the proceedings of Criminal Case No. 13 of 1990 which is pending in the court of Chief Judicial Magistrate against the present petitioners under Sections 276C, 277 read with 278B of the Income Tax Act, 1961. (hereinafter referred to as the "Act").

2. Short facts of the case are that a private complaint at the Instance of Income Tax Officer, Ratlam under Sections 276C, 277 read with Section 278B of the Act has been filed which was registered and petitioners were summoned. The complaint was filed on the ground that during the accounting year relevant for assessment year 1980-1981, certain income was concealed by petitioner Nos. 2 and 3, who are the partners of petitioner No. 1. Petitioner No. 1 was engaged in the business of sale and purchase of timber. The survey was conducted u/s 133A of the Act and on 30-31-10-1979 stock checking of timber was carried out and stocks inventory has been prepared. Petitioners were asked to furnish the stock position of timber as on 31-10-1979. They had filed their trading account for the period 1-4-1979 to 31-10-1979 and worked out closing stock of timber at Rs.

2,33,982 and stock of timber was shown as 219.561 cu. mtrs. on the date of survey. While according to the respondent department the stock on the date of survey was arrived at 373.481 cu. mtrs., which value @ 1,300 per cu. mtrs., and total value of which arrived at Rs. 4,85,525. The assessment was completed u/s 143(3) read with Section 144B of the Act on 9-8-1983. For the purpose of assessment, taking the average GP @17 per cent, the assessing officer worked out the difference in valuation of closing stock at Rs. 27,985.

3. For suppression of value of closing stock of Rs. 27,985, penal proceedings u/s 271(1)(c) of the Act were initiated and prosecution was also launched.

4. Petitioners preferred an appeal against the assessment year before the Commissioner (Appeals) on 21-5-1985 who has confirmed the addition. On 17-3-1986 Income Tax Officer levied the penalty of Rs. 22,226 u/s 271(1)(c) of the Act. On 21-10-1988 Commissioner (Appeals) confirmed the levy of penalty. Petitioner further preferred an appeal before the Tribunal who vide its order dated 13-8-1993 set aside the order of levied penalty and found that addition was made on the basis of mere estimate wherefrom it cannot be positively said that there was concealment of income. The stock could be known at the time of survey. The assessee furnished return of income when it was due. The assessee had come with certain explanation which could not be said lacking bona fide. No penalty is therefore leviable and has been deleted.

5. Learned Counsel appeared for petitioners has contended that since the penalty imposed by the department has already been set aside by Tribunal and held that it was not a case of concealment of income, the very basis of prosecution goes away when Tribunal has deleted the penalty. He has placed heavy reliance on the judgment reported in the matter of K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, in which the Apex Court has already laid down the law on the subject to the effect that the finding of Tribunal was conclusive and prosecution cannot be sustained. Since the penalty having been cancelled by the complainant following the Tribunal's order, no offence survives under the Income Tax Act, and thus quashing is automatic.

6. To counter the aforesaid arguments, learned Counsel appeared for respondent submitted that though the Tribunal has cancelled the penalty, but, even, then prosecution of present petitioners can be continued, because there is also a charge of false verification of Income Tax return which is punishable u/s 277 of the Act. It has also been submitted that the facts of present case are quite different and it was known to the petitioners from the very beginning that they are deliberately concealing the income for the relevant assessment year.

7. I have taken into consideration the arguments advanced by counsel appearing for both the parties and perused the record. I am of the view that petition is required to be allowed and prosecution of present petitioners should be quashed in the light of above referred decision of Apex Court reported in the matter of K.C. Builders (supra).

8. Some other features of the case are also required to be mentioned here. This is not the first round of litigation before this Court. Earlier also the matter has come up twice in the form of petition u/s 482 of the Code which was withdrawn by petitioners with liberty to take action before appropriate forum. Thereafter petition under Article 226/227 of the Constitution of India was filed for quashment of the proceedings. The petition was heard and decided by learned Single Judge on 30-10-1998 and it was observed in para 8 that Trial court is seized of the matter, has not refused to consider the petitioner's prayer in this regard which is manifest from the order of Trial court dated 2-3-1994. Thereafter LPA No. 484 of 1998 was filed against the aforesaid order passed in WP No. 1382 of 1998. While deciding the aforesaid LPA 484 of 1998 on 25-1-1999 the Division Bench of this Court has observed as under:

We have perused the order of learned Single judge with which we do not interfere. However we direct the Trial court that it must consider the changed situation wherein it is pointed out that the basis of the complaint had been knocked out by the Tribunal. The Trial court shall take up the matter and dispose of within three months and it shall not be influenced by the observations made in the earlier orders. The appeal is dismissed with above observations.

9. After it an application was filed by the petitioners before the Trial Court praying therein that prosecution against them be quashed in the light of judgment of Tribunal. The application has been dismissed by the Trial court and revisional court has also confirmed the same.

10. From perusal of the orders of two courts below, it can very well be seen that both the Courts have not considered the question and issue in its right perspective and the judgment of apex court reported in the matter of K.C. Builders (supra) has also not been considered In its proper spirit. Learned Magistrate has simply dismissed the application on the ground that as the stage of Section 245(2) of the Code has already been passed and charges have been framed, therefore, the court can only consider the matter on merits after recording evidence. The revisional court also confirmed the said order of trial court and while doing so the judgment of K.C. Builders (supra) was considered and observed that as the charge of Section 277 of the Act is also there" against the petitioners and stage of Section 242 has already passed, therefore, the charge could not be quashed by the trial court and court does not possess the inherent powers available u/s 482 of the Code. But that hardly makes a difference if a wrong section of the Code was quoted in the application even; then, the Trial Court as well as the revisional court were not precluded from considering the effect of the judgment of Tribunal for quashing the penalty and for holding that it is not a case of suppression on income.

11. It is also worth mentioning here that in the case of K.C. Builders (supra) also the prosecution was under Sections 276C, 277 and 278B of the Act. The apex court has considered all these provisions and the words "deliberately" and "concealment" were also considered. The judgments of various High Courts were

also taken note of and then in paras 18,19 and 20 it has been held as under:

18. In the instant case, the penalties levied u/s 271(1)(c) were cancelled by the respondent by giving effect to the order of the Tribunal in ITA Nos. 3129-3132. It is settled law that levy of penalties and prosecution u/s 276C are simultaneous. Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution u/s 276C is automatic.

19. In our opinion, the appellants cannot be made to suffer and face the rigors of criminal trial when the same cannot be sustained in the eyes of law because the entire prosecution in view of a conclusive finding of the Tribunal that there is no concealment of income becomes devoid of jurisdiction and u/s 254 of the Act, a finding of the Tribunal supersedes the order of the assessing officer u/s 143(3) moreso when the assessing officer cancelled the penalty levied.

20. In our view, once the finding of concealment and subsequent levy of penalties u/s 271(1)(c) of the Act has been struck down by the Tribunal, the assessing officer has no other alternative except to correct his order u/s 154 of the Act as per the directions of the Tribunal. As already noticed, the subject matter of the complaint before this Court is concealment of income arrived at on the basis of the finding of the assessing officer. If the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eyes of law and, therefore, the prosecution cannot be produced with by the complainant and further proceedings will be illegal and without jurisdiction. The Assistant Commissioner cannot proceed with the prosecution even after the order of concealment has been set aside by the Tribunal. When the Tribunal has set aside the levy of penalty, the criminal proceedings against the appellants cannot survive for further consideration. In our view, High Court has taken the view that the charges have been framed and the matter is in the stage of further cross-examination and, therefore, the prosecution may proceed with the trial. In our opinion, the view taken by the learned Magistrate and the High Court is fallacious. In our view, if the trial is allowed to proceed further after the order of the Tribunal and the consequent cancellation of penalty, it will be an idle and empty formality to require the appellants to have the order of Tribunal exhibited as defence document inasmuch as the passing of the order as aforementioned is unsustainable and unquestionable.

12. In view of aforesaid law settled by apex court it is clear that when Tribunal has already held that it was not a case of concealment of income and petitioners have given explanation of the return which was filed by them and excess income was assessed on the basis of estimate on account of survey conducted by the department and penalty imposed for concealment has been cancelled. Now it will be an idle and empty formality to require the petitioners to have the order of Tribunal exhibited as defence document and thereafter to wait for the judgment of acquittal after a long full-fledged trial. When the matter has been adjudicated and settled by Tribunal, then petitioners need not be dragged into Criminal court unless their Act could have been described as culpable.

13. In the matter of Sureshchand Gupta Vs. Union of India (UOI), this Court also expressed the similar view and prosecution launched under Sections 276(1)(c), 277 and 278 of the Act against all the petitioners was quashed on the ground that Tribunal in appeal deleted the penalty holding that there was no concealment of income on the part of assessee. Similar view has also been expressed in the matter of G.L. Didwania and Another Vs. Income Tax Officer and Another, .

14. In view of aforesaid discussions, the petition succeeds and is allowed. The impugned orders passed by Trial court as well as by revisional court are hereby set aside and prosecution of the petitioners in Criminal Case No. 13 of 1990 pending of the court of Chief Judicial Magistrate, Ratlam is hereby quashed.