(1997) 12 MAD CK 0067

In the Madras High Court

Case No : Criminal R.C. No. 845 of 1996 and Criminal M.P. No. 3735 of 1996

Syed Ibrahim APPELLANT

Vs

Income Tax Officer and another RESPONDENT

Date of Decision : 05-12-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 305
Income Tax (Amendment) Act, 1962 — Section 159, 278B
Income Tax Act, 1961 — Section 159(6), 189(3), 189(5), 271, 275A

Citation : (1998) CriLJ 2711 : (2001) 171 CTR 244 : (1999) 235 ITR 394

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : K. Ramasamy, Sundar, for sunder Mohan, for the Appellant;

Judgement

M. Karpagavinayagam, J.—The impugned order passed in Crl.M.P. No. 282 of 1996 in E.O.C.C. Nos. 263 to 265 of 1994, dated

October 3, 1996, by the learned Additional Chief Metropolitan Magistrate (E.O. II), Madras, fixing the petitioner to represent the A-1 firm in

prosecution proceedings, is challenged in this revision.

2. Mr. Sundar, learned senior counsel representing Mr. Sunder Mohan, counsel on record appearing for the petitioner, would mainly contend that

the order passed by the lower court on the application filed by the complainant - Income Tax Officer, the respondent herein, u/s 305 of the Code

of Criminal Procedure making the petitioner as the representative to the first accused firm cannot be sustained under law. Therefore, the impugned

order is liable to be set aside.

3. The facts of the case are these : The Income Tax Officer filed a complaint against the first accused firm and its partner, Peer Mohideen (A-2),

for the offences under the Income Tax Act. When the proceedings were pending, Peer Mohideen (A-2) passed away. The petitioner, Syed

Ibrahim, filed a petition for waiver of interest and also paid a substantial amount of the bills on behalf of the first accused firm. The complaint was

filed in the year 1994. On April 17, 1996, the Income Tax Officer, the complainant, filed a petition u/s 305 of the Code of Criminal Procedure

requesting the lower court in Crl. M.P. No. 282 of 1996 to fix the liability on the petitioner to represent the first accused firm in the criminal

proceedings and issue processes to him for his appearance. The petitioner on receipt of summons filed a counter before the lower court that he did

not have any connection with the said firm and as such he was not competent to represent the firm as he was not in charge of or responsible for the

said firm. He also further contended that section 305 of the Code of Criminal Procedure would not apply to the firm and even assuming it to be so,

the representative can be appointed only by the accused and not by the complainant.

4. After hearing both sides, the learned Additional Chief Metropolitan Magistrate, while allowing the petition filed by the complainant observed as

follows :

Whatever may be the reason for taking part in the departmental proceedings it may be construed that he is the person to be considered as a

competent person to represent the firm in the prosecution proceedings also. The second respondent is competent person only to represent the first

accused firm and he has no personal liability in the offence.

5. Mr. Sundar, counsel for the petitioner in this revision, challenging the abovesaid order, would press into service the following two contentions :

(1) Section 305(1) of the Code of Criminal Procedure does not apply to the first accused firm and therefore, fixing the liability on the petitioner u/s

305(1) of the Code of Criminal Procedure to represent the firm is not permissible under law.

(2) As per section 305(2) of the Code of Criminal Procedure, even in case section 305(1) of the Code of Criminal Procedure applies, only the

accused firm has got a right to appoint its representatives and the complainant cannot pick and choose the representative, especially when the other

partners are still available.

6. Admittedly, the petitioner is the son of one late Mohammed Idris who was a partner of the firm. The father of the petitioner was not an accused

in this case. When it is so, it is stated, that the petitioner who is his legal representative cannot be asked to represent the firm.

7. Mr. K. Ramasamy, counsel for the Income Tax cases, in a bid to support the impugned order stated that section 305 of the Code of Criminal

Procedure would be very much applicable to the present case and even assuming that the said section is not applicable, the relevant provisions

under sections 159(6), 189(3) and (5) of the Income Tax Act would provide for the Department to make the legal representative of the partners of

the firm to be a representative for the firm in a criminal case. In support of the contentions raised on either side, several authorities have been

placed.

8. Now, this revision could be disposed of on a short ground. The question is this ""whether section 305 of the Code of Criminal Procedure under

which the court was asked to fix up the responsibility on the petitioner is maintainable or not ?

9. Section 305 of the Code of Criminal Procedure reads as follows :

305. Procedure when corporation or registered society is an accused. - (1) In this section, ''corporation'' means an incorporated company or

other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

(2) 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.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or

shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the

representative or read or stated or explained to the representative, and any requirement that the accused shall be examined, shall be construed as a

requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called)

having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has

been appointed as the representative of the corporation for the purposes of this section, is filed, the court shall, unless the contrary is proved,

presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a court is or is not

such representative, the question shall be determined by the court.

10. This section is applicable only to corporations or registered societies. According to this section, the meaning of ""corporation"" is an

incorporated company or other body corporate and includes a society registered under the Societies Registration Act. The contention of counsel

for the petitioner is that admittedly the first accused is a firm and it can neither be called a corporation nor a registered society. As pointed out by

counsel for the petitioner, in various other enactments the word ''company'' has been given an enlarged meaning to include firms. This is provided

even under the Income Tax Act, 1961, and in support of the above position, learned counsel cited a case in Haji Esmail Noor Mohammed and

Co. v. State of U. P. [1990] 2 F.A.C. 279. The relevant observation is as follows :

In my opinion the argument advanced by learned counsel cannot be accepted. Section 305 of the Criminal Procedure Code applies when a

corporation or a registered society is an accused. At the time of argument learned counsel for the petitioners conceded that Haji Esmail Noor

Mohammed is not a company or a registered society, but it is a firm. The description of Razak Abdul Latif as partner of the firm in the heading of

the petition clearly shows that it is a partnership firm and not a corporation or a registered society. Section 305 of the Criminal Procedure Code

has, therefore, no application to the present case.

11. In the instant case, though a faint attempt has been made by counsel for the respondent, that a corporation includes firm, the said submission

was not substantiated by any basis either with reference to the relevant section of the Code of Criminal Procedure or the section of the Income Tax

Act, or by citing authorities.

12. Instead, learned counsel for the respondent would contend that by virtue of sections 159(6), 189(3) and 189(5) of the Income Tax Act, the

legal representative of the deceased could be made a representative even in criminal proceedings. But the reading of the relevant section would

make it clear that it relates to the penalty impossible by the authorities of Income Tax falling under Chapter XXI from section 271 and it would not

relate to the prosecution and offences falling under Chapter XXII from section 275A of the Income Tax Act.

Therefore, in my view, the various sections pointed out under the Income Tax Act would not relate to prosecution. It is also made clear from the

above discussion that section 305 of the Code of Criminal Procedure would not be applicable to a firm. Therefore, the order passed by the

learned Additional Chief Metropolitan Magistrate, Madras, fixing the responsibility on the petitioner to represent the first accused firm cannot stand

and the same is liable to be set aside. However, if law permits, the complainant can proceed against the firm or against whomsoever who are

responsible for the affairs of the company, since it is stated that the other partners are available.

13. In view of the above conclusions, this revision is allowed setting aside the impugned order of the Additional Chief Metropolitan Magistrate,

Madras. Consequently, Crl. M.P. No. 3735 of 1996 is disposed of.