
(1993) 12 GUJ CK 0021
In the Gujarat High Court

Case No : Miscellaneous Criminal Application No's. 2125 and 2126 of 1989

Vinaychandra Chandulal Shah

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 30-12-1993

Acts Referred:

Income Tax Act, 1961 — Section 139(1), 139(2), 139(8), 140A, 143(3)

Citation : (1995) 213 ITR 307

Hon'ble Judges : B.C. Patel, J

Bench : Single Bench

Judgement

B.C. Patil, J.—The petitioner has invoked section 482 of the Criminal Procedure Code, 1973, to quash the process issued by the Chief Metropolitan Magistrate, Ahmedabad, in Criminal Cases Nos. 339 and 340 of 1986.

2. In both the petitions, the petitioner as well as the respondents are common. The learned advocates appearing for both the sides submitted that the point involved in the matters is common and hence both the matters are disposed of by this common judgment.

3. So far as Miscellaneous Criminal Application No. 2125 of 1989 is concerned, it arises out of proceedings initiated in the Court of the Chief Metropolitan Magistrate at Ahmedabad, vide Criminal Case No. 339 of 1986 by Shri M. C. Katharin, respondent No. 2, herein, It is alleged in the complaint that for the assessment year 1981-82, the petitioner accused was required to file his return of income by June 30, 1981, and was required to make payment of advance tax in three instalments as provided in section 209 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). It is averred in the complaint that the petitioner accused failed to file return as per section 139(1) of the Act, notice dated August 29, 1981, was issued u/s 139(2) of the Act and was served on September 1, 1981. It is also stated in the complaint that the petitioner furnished his return of income on September 29, 1981, disclosing a total income of Rs. 2,01,380. The accused paid Rs. 9,130 towards advance tax on December

19, 1980, and paid self-assessment tax of Rs. 1,00,914 u/s 140A of the Act on September 29, 1981, i.e., after filing the return. The assessment was finalised u/s 143(3) of the Act by an order dated December 8, 1982. However, his income was determined at Rs. 2,03,523 and he was required to pay tax of Rs. 1,11,445 and interest of Rs. 2,046 u/s 139(8) and Rs. 5,325 u/s 215 of the Act. Penalty u/s 271(1)(a) was also imposed on the petitioner by an order and he was required to pay Rs. 4,093. The matter was carried in appeal and the order passed by the Assessing Officer was confirmed. It also appears from the complaint that there was further penalty of Rs. 14,890 u/s 273(2)(a) of the Act. The accused was required to pay the advance tax and he did not pay as required under the Act and, therefore, the complaint was filed alleging that he wilfully failed to pay the tax from December 15, 1980, to September 29, 1981, and thereby committed an offence punishable u/s 276C(2) of the Act.

4. The learned advocate appearing for the petitioner submitted that the petitioner has committed no offence; penalty provided under the Act has been paid; and there is no provision for prosecution in a case like this where there is nothing to show that the petitioner wilfully attempted in any manner whatsoever to evade payment of any tax, penalty or interest chargeable or imposable under the Act.

5. Section 276C reads as under :

"276C. (1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable, -

(i) in a case where the amount sought to be evaded exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven year's and with fine;

(ii) in any other case, with rigorous imprisonment for term which shall not be less than three months but which may extend to three years and with fine.

(2) If a person willfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine."

6. Mr. Soparkar, the learned advocate, submitted that the word "evasion" is defined in various dictionaries as under :

Stroudd's Judicial Dictionary :

"Everybody agrees that "evade" is capable of being used in two senses : (1) which suggests underhand dealing; (2) which means nothing more than the

intentional avoidance of something disagreeable."

Webster's Dictionary :

"1. An avoiding of a duty, question, fact, etc., by deceit or cleverness.

(2) the means of doing this; excuse, subterfuge, equivocation, artifice."

7. Wharton's Law Lexicon :

"The art of escaping by means of artifice, a trick or subterfuge."

8. According to him except not filing a return and not paying the advance tax in the due date there is nothing in the complaint which would go to suggest that the petitioner acted in such a manner by which it could be suggested that he has wilfully evaded payment of any tax. Mr. Soparkar submitted that there must be allegation that by way of some device the petitioner evaded to pay the tax or played any tricks or there was any underhand dealing, etc. Relying upon a decision of the Privy Council in the case of *Simms v. Registrar of Probates* [1900] AC 323 Mr. Soparkar submitted that there must be intention to evade the payment of tax. There was the Succession Act of 1876 which has been superseded by the Succession Duties Act on receiving Royal Assent on October 25, 1893, and that statute imposed much heavier rates of duty amounting for an estate so large as that of the testator to an increase of eight per cent. The appellant in that case was entitled under a will of William Knox Simms who died on December 25, 1897, domiciled in South Australia. The appellant claimed that duty is not payable in respect of sum of 2,00,000 shilling which the testator had covenanted to pay in the year 1896. The Registrar of Probates contended that the testator's covenant was made with intent to evade the payment of duty and under the provisions of the Succession Duties Act, 1893, double duty is chargeable on this sum. The word "evade" was examined and the meaning thereof as per the views of the learned Chief Justice is as under :

"I am thus driven to the conclusion that the word "evade" in section 27 means to avoid by some direct means, by some device or stratagem. Without attempting, what is probably impracticable, to give an exhaustive definition of the phrase "with intent to evade the payment of duty here-under", I am of opinion that the phrase would cover some arrangement, trust or other device, whether concealed, or apparent on the face of the non-testamentary disposition by which what is really a part of the estate of the deceased is made to appear to belong to somebody else in order to escape payment of duty."

9. The two learned judges did not agree with the opinion of the learned chief justice and the matter was carried in appeal before the Privy Council. The Privy Council observed that "it does not appear to their Lordships that an examination of the decisions in which the word "evade" has been the subject of comment leads to any tangible result. Everybody agrees that the word is capable of being used in two senses : one which suggests underhand dealing, and another which means nothing more than the intentional, avoidance of something disagreeable."

Considering the meaning of the words "to evade", Mr. Soparkar submitted that there is nothing in the complaint from which one can even think that the accused did anything to evade the payment of any tax. There must be positive averments in the complaint and reading the complaint it is not possible to say that the petitioner acted in such a way as to evade the payment of any tax that was determined under the provisions of the Act. Looking to the language of section 276C, according to Mr. Soparkar, the tax amount must have been determined. Sub-section (2) of section 276C, if read, makes it very clear that a person who is wilfully attempting in any manner whatsoever to evade the payment of any tax is made punishable meaning thereby tax must have been determined and thereafter the person is wilfully attempting in any manner whatsoever to evade the payment of such tax (penalty or interest as the case may be). Mr. Soparkar relied on the observations of a Bench of the Kerala High Court in *G. Viswanathan Vs. Income Tax Officer, A-Ward, Parameswar Nagar*, and submitted that sub-section (2) is so clear that at any rate it takes in to the cases of evasion of tax, penalty or interest after assessments were made. Avoidance of tax is avoidance of tax liability under some manner as distinguished from evasion of tax whether before or after charging or imposition. He further submitted that section 276(2) deals with evasion after quantification. It becomes applicable only after the income is assessed and the assessee attempts to evade the payment of tax determined. In the instant case, the petitioner was called upon by a notice u/s 139(2) to file a return and within the time stipulated under the statute, not only the return was filed, but the tax was also paid and it is not the case of the Department that after the assessment that is to say after the determination of the liability of the petitioner to pay the tax the petitioner has evaded to make the payment of tax. If one reads the complaint, it is very clear that after the service of the notice within the stipulated period the petitioner filed the return disclosing his income and paid the tax, i.e., after finalisation of assessment he paid the tax that was determined. What sub-section (2) of section 276C requires is three things : (1) wilful attempts in any manner, (2) to evade the payment of any tax, penalty or interest under this Act, and (3) the tax, penalty or interest that is assessed, imposed or charged as the case may be and not otherwise. If one reads the complaint, it is very clear that on determining the amount of tax the petitioner has paid the tax.

10. Mr. Soparkar, relied on a decision of the Supreme Court in the case of *Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam*, wherein the court has observed : "There can be no dispute that having regard to the provisions of section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established." There is nothing in the complaint to show that the act of not filing return is with dishonest intention or a mala fide intention and it is clear that in cases like this, there must be an element of mens rea.

11. Mr. Bhatt, the learned advocate appearing for respondent No. 2, submitted

that it is not necessary to mention clearly in the complaint but only at the trial it can be decided whether there is evasion or not and, therefore, according to his submission, only after giving an opportunity to the prosecution to lead evidence one can come to the conclusion whether there is evasion or not. Merely a complaint is filed and the process is issued, and at this stage, the court should not interfere. According to Mr. Bhatt, section 276C(2) is attracted and, therefore, there is no question of interference. Taking the second contention first, the Legislature has used different connotations on sub-sections (1) and (2). Sub-section (1) refers to wilful attempt in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under the Act while sub-section (2) refers to wilful attempt in any manner whatsoever to evade the payment of any tax, penalty or interest under the Act. Therefore, it clearly appears that, as the words "chargeable" or "imposable" being absent in sub-section (2), the clear meaning could be payment of any tax, penalty or interest and that too, which is determined. Therefore, sub-section (1) contemplates evasion before charging or imposing tax, penalty or interest. Reading sub-section (2) it becomes very clear that it refers to the cases of tax evasion after charging or imposition, that is evasion after completion of assessment comes within the purview of the sub-section. As observed by the Kerala High Court in G. Viswanathan Vs. Income Tax Officer, A-Ward, Parameswar Nagar, sub-section (2) is so clear that at any rate it takes in the cases of tax evasion of tax, penalty or interest after assessments were made. Therefore, in view of the clear position, the submission made by the learned advocate, Mr. Bhatt, cannot be accepted that the case is covered by section 276C(2) as the petitioner has failed to pay the advance tax. Sub-section (2) of section 276C could be attracted only when a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act and not otherwise. The complaint is for offences punishable u/s 276C(2) of the Act. In view of what is discussed above, it is very clear that there is not even a whisper that there is wilful attempt in any manner whatsoever to evade the payment of tax and hence the process issued is required to be quashed and is hereby quashed.

12. So far as Miscellaneous Criminal Application No. 2126 of 1989 is concerned, it arises out of Criminal Case No. 340 of 1986 filed by respondent No. 2 in the Court of the Chief Metropolitan Magistrate. The facts are similar to that of Miscellaneous Criminal Application No. 2125 of 1989, except the year of assessment, tax amounts, and that the return was filed without being called upon by the Department. Hence, in view of what is stated above, the process issued in this case also is required to be quashed. Rule made absolute in both the matters.