
(1994) 01 BOM CK 0047
In the Bombay High Court
Case No : CMA No. 155 of 1993

Vishnoo V. Kamat Tarcar

APPELLANT

Vs

First Income Tax Officer

RESPONDENT

Date of Decision : 07-01-1994

Acts Referred:

Constitution of India, 1950 — Article 21

Income Tax Act, 1961 — Section 139(1), 271(1)(a), 274, 276CC, 279

Citation : (1995) 79 TAXMAN 373

Hon'ble Judges : E.S. Da Silva, J

Bench : Single Bench

Advocate : M.B. D'costa, for the Appellant; S. Albuquerque, for the Respondent

Final Decision : Allowed

Judgement

Dr. E.S. Da Silva, J.—The applicants have approached this court challenging the order of the learned J.M.F.C, Panaji, in [N.C. Case No. 82 of 1988/C dated 4-9-1993] filed by respondent No. 1 against the applicants for offences u/s 276CC of the income tax Act 1961 ("the Act") whereby the learned Magistrate had dismissed the prayer made by the applicants that since the case relates to an alleged offence committed by them over ten years back in view of the enormous delay in filing the proceedings, the applicants should be discharged. The facts which are relevant to dispose of this petition can be summarised thus: The applicants were supposed to submit income tax returns in relation to the assessment year 1979-80 on or before 31-7-1979. However, the said returns were actually submitted by the applicants only on 14-9-1981. It is the applicants' case that criminal proceedings were lodged by the income tax Department on account of their delay in filing the returns u/s 139(1) of the Act only on 24-3-1988. In the meantime, the First ITO by order dated 4-2-1984, imposed on the applicants penalty provided u/s 271(1)(a) of the Act to the tune of Rs. 28,836. This amount was paid by the applicants, who, thereafter, preferred an appeal against the said order. The Appellate Tribunal by order dated

1-10-1984, confirmed the aforesaid penalty. After the complaint was lodged by the Department and the applicants were served with the process issued by the learned Magistrate, a writ petition was filed by the applicants in this court before a Division Bench being Criminal Writ Petition No. 33 of 1988. This petition was subsequently withdrawn allegedly after the court orally observed that the income tax Department should consider withdrawing the criminal proceedings against the applicants bearing in mind the delay taken in filing the proceedings and also after learned counsel appearing for the Department had stated before the court that he would advise the Department to do so. It appears that the Department felt that it was not possible for them to withdraw the proceedings in spite of the advice given by counsel, since there was no provision available for the purpose. The applicants then approached the learned Judicial Magistrate with an application praying for their discharge on the ground that the prosecution now lodged against them was without a show-cause notice, that a penalty had already been imposed on them and, thirdly, the criminal proceedings had been instituted after a long delay of many years. It was the rejection of this prayer made by the learned Magistrate which gave rise to this petition.

2. Shri M.B. D'Costa, the learned counsel appearing for the applicants, has advanced three submissions. It was, firstly, urged by learned counsel that under article 21 of the Constitution of India the applicants had a right to a speedy trial and hence the prosecution lodged by the Department, apparently after ten years, was not justified. The learned counsel contended that since the applicants were required to submit their returns on 31-7-1979, and failed to do so because the returns were submitted only on 14-9-1981, technically the offence was deemed to have been committed by them on 31-7-1979, therefore, the proceedings having been instituted by the department only on 24-3-1988, they have been thus instituted after a period of almost ten years. It was further submitted by learned counsel that the Department was certainly aware of the applicants' alleged wilful failure and negligence in filing the returns much prior to that. Also when on 4-2-1984, the Department imposed penalty on the applicants, at that time, according to the learned counsel, all the facts were before the income tax Department and available to them. In spite of that the Department took more than four years to lodge the complaint thus violating the applicants' right to a speedy trial, which is guaranteed to them under the Constitution of India. It was next submitted by the learned counsel that consequent upon the fact that the prosecution had been lodged by the Department after a period of about ten years, no sufficient justification could be advanced by the Department for such inordinate delay, more so when admittedly the provision under which the prosecution was lodged, being section 276CC, is distinct from the provision of section 271(1)(a) of the Act under which the First ITO has imposed on the applicants a penalty of Rs. 28,836. The last submission of learned counsel is that, before lodging the said prosecution, the Department has grossly violated the principles of natural justice by failing to issue a show-cause notice to them and which they were required to do. The learned counsel contended that u/s 279

of the Act, the prosecution could be lodged only at the instance of the Commissioner. The said provision gives to the Commissioner several options before lodging such proceedings, one of them being the option to compound any offence for which the prosecution is to be instituted. Reliance was placed by learned counsel on the judgment of the Rajasthan High Court in the case of Shree Singhvi Brothers and Others Vs. Union of India (UOI) and Others, , in which it has been laid down that the principles of natural justice must be read into the unoccupied interstices of the statute unless there is a clear mandate to the contrary. Thus, it is amply clear that every process of the quasi-judicial Tribunals must inform itself of the principles of natural justice. In case of concealment of any income, the Department has authority to add the concealed income in the assessment for that year of the assessee and can levy tax and it has also authority to levy a penalty. It has also authority to launch prosecution in addition. It is also provided in the Act that, in such cases of imposition of penalty, offences can also be compounded either before the filing of the prosecution or thereafter. Section 279(2) of the Act provides that the Chief Commissioner or Commissioner may either before or after the institution of proceedings compound any such offence. Thus, when four possibilities are open, the question whether prosecution has to be launched or whether the case should be compounded before filing of the prosecution or not, has to be decided after hearing the parties. In the instant case, the learned counsel has vehemently canvassed that the Department had already imposed penalty on the applicants and considering that the time consumed by the Department to launch criminal proceedings was quite long, the Department was expected to give a show-cause notice to the applicants before the filing of the criminal proceedings in order to enable the applicants to convince the Commissioner to avail of any other option provided by the Act.

3. Mrs. Albuquerque, the learned counsel appearing for the Department, in her turn has contended that it was not open to the applicants to make a grievance that no show-cause notice was given before proceeding against them. According to the learned counsel, at the time of imposition of penalty, the Department served them with a show-cause notice u/s 274 of the Act. At that time the conduct of the applicants was such that it perfectly justified the conclusion arrived at by the Commissioner that the failure on the part of the applicants to file their returns in time was not to be condoned or explained. After the order imposing penalty was passed, the applicants filed two appeals in which they had placed all the facts before the Tribunal and which were ultimately rejected by the competent authorities. All these facts which were pleaded by the applicants before the Tribunal were subsequently placed before the Commissioner, who had, therefore, an occasion to go through them and to be satisfied that the same were enough to justify the delay. The Commissioner had, therefore, sufficient material to come to the conclusion that it was thus a case of wilful failure on the part of the applicants to file the returns and, therefore, the prosecution was launched by the Department.

4. In my view, although the submissions of the learned counsel for the Department prima facie appear to be quite appealing, I am, however, afraid that I am not going to be impressed with that line of argument. I say so because since the provision under which the penalty was imposed by the Department, being section 271(1)(a), is different from the one under which criminal proceedings had been instituted, which was section 276CC, the Commissioner was expected in all fairness to give to the applicants a fresh opportunity to be heard on the question of their prosecution under the aforesaid provision. It is also to be borne in mind that the penalty having been imposed, the criminal proceedings were ultimately lodged only after a period of almost ten years from the date of the commission of the alleged offence. Mrs. Albuquerque's attempt to try to explain this delay need not be considered at this stage because, irrespective of the reasons advanced by her in this regard, I am still inclined to believe that nothing could have prevented the Department from instituting criminal proceedings against the applicants irrespective of the final outcome of the appeals filed by them against the order imposing penalty. Further and if the law itself provides for various options open to the Commissioner before launching the prosecution, it seems to be only in the fitness of things that the Commissioner should have heard the applicants before he chose to institute such proceedings in order to enable the applicants to show cause and satisfy him as to why the other options available should not have been preferred instead of filing criminal proceedings. In the result this petition is bound to succeed and is hereby allowed. The proceedings instituted by the Department before the learned J.M.F.C. are hereby quashed and set aside. It is, however, made clear that this will not prevent the Commissioner to institute fresh proceedings against the applicants, if he is so advised, but only after giving them an opportunity to be heard and after serving on them a competent show-cause notice for this purpose. Rule is accordingly made absolute.