

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of reserve : 26.02.2009.
 Date of decision : 23.03.2009.

+ CrI.M.C.128/2003

M/S THE PRINTER HOUSE PVT. LTD. Petitioner
Through: Mr. J.P. Singh with Mr. Arjun
Bhandari, advs.

Versus

NISHI SINGH Respondents.
Through: Mr. Paras Chaudhary, adv. for Mr.
R.D. Jolly, adv.

+ CrI.M.C.4825/2000

R.N. SAHNI & ORS. Petitioners
Through: Mr. J.P. Singh with Mr. Arjun
Bhandari, advs.

Versus

NISHI SINGH Respondents.
Through: Mr. Paras Chaudhary, adv.
for Mr. R.D. Jolly, adv.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

: **MOOL CHAND GARG, J.**

1. The petitioner in CrI.M.C.128/2003 is an assessee under the Income Tax Act and has been made an accused in a complaint

(Annexure-B) instituted against them and others under Section 276-C(1) and 277 of the Income Tax Act, 1961 read with Sections 193 and 196 of IPC for the assessment year 1989-90.

2. The petitioners in Crl.M.C.4825/2000 are the co-accused arrayed in the aforesaid compliant case.

3. Both the petitions raise a common question as to whether in view of the subsequent orders passed by the Income Tax Appellate tribunal in favour of the petitioners revoking the order of penalty imposed by the assessing officer and holding that the depreciation was rightly claimed by the petitioners in respect of the machines which were purchased in the assessment year 1989-90 and further direction of the Tribunal to refund the levy of the penalty imposed upon petitioners, will it not be appropriate to quash the complaint and the summoning order by invoking the extraordinary jurisdiction of this Court under Section 482 of the Cr.P.C.

4. The relevant averments made in the complaint are as follows:

4. That the accused No.1 filed its duly signed and verified return of income on 22.12.1989, along with a total income of Rs.1,36,96,534. Sh. Manoj Khann and Sh. C.L. Sehgal attended the assessment proceedings from time to time on behalf of accused No.1.
6. That during the course of assessment proceedings, it came to the notice of the assessing officer that accused no.1 claimed the depreciation of Rs.1,08,78,392.00 including a claim of Rs.37,90,541.00 @33-1/2% of the total cost of a new machine-TDS Horizontal Boring and Milling Machine of cost of Rs.90,98,208.00 before 31.3.1989. The said depreciation amount was checked up by the assessing officer and found to be a bogus and false claim which was added in the income of accused No.1, and the assessment was completed at a total income of Rs.167,04,156.00/-

7. That accused No.1 claimed this depreciation on the said new machine-TDS Horizontal Boring and Milling Machine, Model:WHN-13 4C, allegedly purchased from M/s Batli Boi and Company, for a total consideration of Rs.95,63,212.00 vide their sale bill dated 20.3.1989. In the chart filed by the accused No.1, it was stated that the said machine was installed on 31.3.1989 and that on the same date, it was put to trial, production as well as commercial production.
9. That from the documentary as well as oral evidence collected during the enquiries and the assessment proceedings, it transpired that the machine in question was not even installed on or before 31.3.1989, and there is no question of its being put to trial, production or commercial production on or before 31.3.1989. The documents/correspondence between accused No.1 and the said M/s Batli Boi and Company Limited and also statement of the representatives of M/s Batli Boi and Company during the course of assessment proceedings clearly prove that the said machine was not installed before 31.3.1989 nor put into use on or before the said alleged date.
10. That accused No.1 willfully, intentionally and deliberately claimed a bogus and false depreciation on the machine which was not even installed up to 31.3.1989, with a view to decrease its income, to avoid tax, penalty and interest chargeable and imposable under the Act, and hence, offence under Sec. 276-C(1) of the Act in the manner mentioned above.
11. That accused No.1 and its chairman, Managing Director, Directors/Principal Officers delivered a duly signed and verified return, statements and the other documents/annexures which they know to be false or which they do not believe to be true, and which are false or which they know to be false, and do not believe to be true and hence, committed offence under Section 277 of the Act.
12. That accused No.1, through its Chairman, Managing Director, Directors/Principal Officers corruptly for wrongful gains and intentionally gave false evidence in the judicial proceedings and fabricated and false evidence for the purpose of being used in the judicial proceedings, and attempted to use the same as true or genuine evidence, and when they know the same to be false and fabricated; hence, committed the offence under Sections 193 and 196 IPC.

5. On the basis of the aforesaid assertions it was prayed that the petitioners be summoned and be directed to stand trial and thereafter be sentenced accordingly.

6. It is, thereafter, that the petitioners received the summons from the Court of learned ACMM to face the trial in the aforesaid complaint.

7. Some more facts which are relevant for the purpose of

deciding these cases are:

- i) The Assessing Officer, while assessing the income tax of the petitioners for the assessment year 1989-90, disallowed the claim of depreciation of Rs.37,90,541.00 which was claimed by the petitioners @ 33.12% of the total costs of the new machines-TDS Horizontal Boring Machines and the allegedly purchased by the petitioners in the said year and levied a penalty of Rs.65,67,114/- on the alleged concealed income of Rs.37,90,541/-, i.e., 300% of the tax allegedly evaded under Section 276(1)(c) of the Income Tax Act, 1961 even though the said amount was deposited by the petitioners.
- ii) The petitioners assailed the order of the assessing officer by filing an appeal before CIT(A)-I. However, the same was dismissed vide order dated 08.08.1992.
- iii) Against the order of the CIT(A)-I, the petitioners filed an ITR before this Court which came for disposal before a Division Bench. The High Court admitted the said reference and passed a speaking order. The relevant portion of the said order is as follows:

“Having heard the learned counsel for the parties, we are of the opinion that the following questions do arise as question of law from the order of the Tribunal and therefore the Tribunal was not justified in rejection the petitioner’s application under Section 256(1) of the Act. May be that the question are required to be re-framed so as to crystallize the real controversy between the parties as reflected by the questions suggested. The exercise can be left to be taken up at the stage of hearing the reference:

The petition is allowed. The tribunal is directed to draw a statement of the facts of the

case and refer the following questions for the opinion of this Court:

i) Whether on the facts and in the circumstances of the case, the Tribunal is right in holding that the claim for allowance of depreciation on TOS Horizontal Boring Machine for the Assessment year 189-90 is not allowable under the Income Tax Act, 1961.

ii) Whether on the facts and the various evidence that are placed before the Income Tax Authorities and the Hon'ble Tribunal, the conclusion of the Tribunal that the assessee-company was not the owner of TOS Horizontal Boring Machine till the last week of March, 1989, is invalid and perverse inasmuch as the various evidences on record have not been considered including the provisions of law applicable to the purchase of the aforesaid machine.

iii) Whether on the basis of offer by the supplier M/s batliboi & Co. Ltd., the purchase order by the assessee-company dated 7th February, 1989, the acceptance of such offer by the assessee company vide letter dated 07.02.1989 and other evidences, the assessee-company has become the owner of the said machine during the previous year ended on 31.03.1989 as per the provisions of Sale of Goods Act, 1930.

iv). The appeal preferred by the petitioners before the Income Tax Appellate Tribunal, New Delhi was allowed vide order dated 26.11.2001.

8. By the aforesaid order the Appellate Tribunal accepted the contentions raised by the petitioners and after dealing the points and contentions and in this case illegalities and infirmities in the impugned assessment order dated 28.02.1991. The tribunal held that the provisions of Section 271(1)(c) cannot be applied to the circumstances of this case and accordingly cancelled the penalty order. The Income Tax Appellate Tribunal vide its order dated 26.11.2001 while allowing the appeal held:

13. We are therefore clear that the claim has been made on the aforesaid basis whatever had been claimed earlier then loses its significance.

Therefore, such a circumstances of the earlier claim will not be available to the Revenue to view the conduct of the appellant tinged with any motive to avoid tax”

14. Then what remains is the claim of the appellant on the one side and the conclusion of the Revenue on the other. Though, the Tribunal had concurred with the Revenue, yet the two different views on the appreciation of the same set of facts and circumstances were present throughout the proceedings. Such controversy is also for consideration of the Hon’ble High Court.

15. We are of the opinion that the claim of the depreciation appears to be normal and bonafide as any other assessee might have done. In the decided cases, the assessee have made such claim inspite of the judgment in Hindustan Sugar Mills case. The Supreme Court held in Cement Marketing case that the claim is bonafide. Applying the ration laid down by the Supreme Court, to the set of circumstances prevailing in the appellant cases, we are of the view that the provisions of Section 271(1)(c) cannot be applied to such circumstances. In view of the same, we have no hesitation in cancelling the penalty order.”

9. It is after the passing of the aforesaid order by the Income Tax Appellate Tribunal that the petitioners have filed the present petitions under Section 482 of the Cr.P.C. for quashing of the complaint by alleging that in view of the finding returned by the Appellate Tribunal as aforesaid there was no question of the petitioners having willfully, intentionally and deliberately claiming bogus and false depreciation with a view to decrease its income to avoid tax penalty and interest chargeable and imposable under the Act and/or signed verified the return of statement as alleged by the respondents in the complaint before the learned ACMM and, therefore, filed these petitions praying that the complaint and the summoning order be quashed.

10. To support the petition the petitioners also stated that even otherwise the present complaint is not tenable in view of the provision under Section 279(1A) of the Act as broadly interpreted by the Supreme Court in the case of Prem Dass Vs. ITO, 1999 (5) SCC 241 which categorically states that a person shall not be proceeded against for an offence under Section 276-C-1 or Section 277 in relation to the assessment for an assessment year in respect of which the penalty imposed or imposable on him under clause (iii) of Sub-Section 273A. The relevant portion of the said Section 279 of the Act is reproduced hereinunder:

279. Prosecution to be at instance of ¹ [Chief Commissioner or Commissioner]:- [(1) A person shall not be proceeded against for an offence under section 275A ³ [, section 275B], section 276, section 276A, section 276B, section 276BB, section 276C, section 276CC, section 276D, section 277 ⁴ [, section 277A] or section 278 except with the previous sanction of the Commissioner or Commissioner (Appeals) or the appropriate authority:

Provided that the Chief Commissioner or, as the case may be, Director General may issue such instructions or directions to the aforesaid income-tax authorities as he may deem fit for institution of proceedings under this sub-section.

Explanation.-For the purposes of this section, "appropriate authority" shall have the same meaning as in clause (c) of section 269UA.]

⁵ [(1A) A person shall not be proceeded against for an offence under section 276C or section 277 in relation to the assessment for an assessment year in respect of which the penalty imposed or imposable on him under clause (iii) of sub-section (1) of section 271 has been reduced or waived by an order under section 273A.]

11. In Prem Dass Vs. ITO (Supra) while dealing with Section 279(1A) of the Income Tax Act, the Apex Court made the following observations:

We also find sufficient force in the contention of Mr. Salve that the legislative mandate in Section 279(1A) of the Income Tax

Act has not been borne in mind by the High Court while interfering with an order of acquittal. Mr. Shukla, no doubt has indicated that the said provision will have no application as the penalty imposed has not been reduced or waived by an order under Section 273A. We do not agree with the aforesaid literal interpretation of the provisions of Section 279(1A) of the Act, when we find that the Commissioner of Income Tax (Appeal) has reduced the penalty. Further the Tribunal has totally set aside the order, imposing penalty could not have been lost sight of by the High Court while considering the question whether the order of acquittal passed by the Sessions Judge has to be interfered with or not, particularly, when the gravamen of indictment relates to filing of incorrect return and making wrong verification of the statements filed in support of the return, resulting in initiation of penal proceedings. Bearing in mind the legislative intent engrafted under Section 279(1A) of the Income Tax Act and the conclusion of the learned Sessions Judge, on appreciation of evidence not having been reversed by the High Court and the grounds of acquittal passed by the Sessions Judge not having been examined by the High Court, we have no hesitation to come to the conclusion that the High Court was not justified in interfering with an order of acquittal.

12. The petitioners have also relied upon a judgment delivered by the Apex Court in the case of Sh. G.L. Didwania & Anr. Vs. Income Tax Officer & Anr. 1995 Supp. (2) SCC 724 where similar view has been taken.

13. The petitioners have submitted that in view of the finding by the Income Tax Appellate Tribunal, Delhi Bench, New Delhi dated 26.11.2001, it is apparent that there is absolutely no question of the petitioners having willfully, intentionally and deliberately claimed a bogus and false depreciation with a view to decrease its income, to avoid tax, penalty and interest chargeable and imposable under the Act and/or signed or verified any false return or statement as alleged by the respondent in the complaint filed before the learned ACMM, Delhi. The Tribunal had found on the basis of facts, evidence on record and

circumstances of the case, that the claim is normal and bonafide.

14. It is also submitted that the present complaint was filed on the allegation that the petitioner had claimed a bogus and false depreciation and concealed income and penalty was imposed under Section 271(1)(c) of the Act, is no more correct in view of the order of the tribunal dated 26.11.2001 and thus, the complaint filed by the respondent against the petitioners and others cannot proceed. It is thus, prayed that the complaint pending before the Id. ACMM be quashed.

15. On the other hand, learned counsel appearing for the respondent has denied the claim of the petitioners by relying upon the provisions of Section 277 of the Income Tax Act which reads as under:

277.[False statement in verification, etc:-If a person makes a statement in any verification under this Act or under any rule made thereunder, or delivers an account or statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable,-

(i) in a case where the amount of tax, which would have been evaded if the statement or account had been accepted as true, 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 years and with fine;

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

16. It is submitted that in view of the aforesaid provisions the right to take out the criminal prosecution against the accused persons in addition to taking out departmental adjudicatory proceedings is very much vested in the respondents.

17. The respondents, also submits that neither the complaint nor the summoning order can be quashed by this Court at this stage in view of the provisions contained under Section 278(E) which is applicable to the facts of this case. The said provision came into the statute book prior to the assessment in question and reads as under:

“Presumption as to culpable mental State:

278E. (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution

Explanation.—In this sub-section, “culpable mental state” includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability”

18. It has been submitted that in view of that, it is for the trial Court to decide if there was no willful avoidance of the tax and that there was no culpable state of mind on the part of the petitioners when they claimed depreciation in respect of the machines were not used by them in the relevant assessment year and therefore the petition is liable to be dismissed.

19. This question as to whether criminal proceedings as well as the departmental adjudication can go on simultaneously firstly is clear from reading of the provisions contained under Section 277. The matter has also been discussed by this Court in various judgments where similar issues were raised. In the case of Anil

Mahajan & Anr. Vs. UOI & Anr. in Crl.REV.P.No.160/2007 decided on 05.02.2008 as well as the judgment of Sunil Gulati Vs. R.K. Vohra in Crl.M.C.No. 2173/2004 and Crl.M.C.991/2004 decided on 20.12.2006 delivered by another Single Judge of this Court wherein also it was held:

14. However, what is relevant for us is the discussion in the judgment on one of the arguments which was raised by counsel for the appellant Bank. The contention was that criminal proceedings under Section 56 of the FERA Act could not be initiated before holding adjudication proceedings in terms of Section 51 of the FERA and if only satisfied, proceed with the prosecution under Section 56 of the said Act. This argument was on the premise that first there have to be findings in the adjudication proceedings about the violation of the provisions of FERA and imposition of penalty and only in the light of those findings in the adjudication for penalty that the Directorate of Enforcement could decide as to whether to impose or not to impose any further punishment under Section 56 of the Act and thus launch prosecution or not. This argument was countered on behalf of Union of India by arguing that adjudication and prosecution are two separate and distinct proceedings with distinct purposes and there was no bar either in FERA or in any other law to an adjudication and prosecution being launched simultaneously in respect of an alleged contravention of FERA. It was argued that for the violation of those provisions both civil and criminal action could be taken under the law criminal action was not wait till the outcome of the adjudication proceedings as even when penalty was imposed in the adjudication proceedings criminal action was still warranted in view of the provisions Section 56 of the FERA which commences with the words "without prejudice to any award of penalty by the Adjudicating Officer under this Act".

15. The Court accepted the argument of the Government and held that a complaint under Section 56 of the FERA can never be said to be pre-mature if it is initiated before the award of the penalty under Section 51 of the Act and such proceedings being independent proceedings can be initiated during the pendency of adjudication proceedings under Section 51 of the FERA. Reading of the judgment, thus, in the manner indicated above, would clearly show that what is decided by the Supreme Court is that since two proceedings are independent," even when the adjudication proceedings are not over, the department was competent to launch criminal proceedings as well, alleging violation on the part of the accused person.

16. However, in the present case, we are not concerned with this question. A fine distinction of the issue involved in the case before the Supreme Court and before us in the present case has to be borne in mind. No doubt, as per the aforesaid

judgment of the Supreme Court, adjudication proceedings as well as criminal proceedings can be initiated simultaneously. In fact, for initiating criminal proceedings one does not have to wait for the outcome of adjudication proceedings. Therefore, filing of the criminal proceedings by the department against the petitioner in the instant case cannot be termed as bad in law. However, the question with which we are concerned is the impact of the findings which is recorded on the culmination of adjudication proceedings, on criminal adjudication. To put it in simple words, the issue is, if in the adjudication proceedings the petitioner is exonerated, whether on that basis the petitioner can state that criminal proceedings should also be dropped. Case of the petitioner is that since it is held by the adjudicating authority itself that the petitioner has not committed any violation of FERA provisions, same authority cannot be allowed to continue the criminal proceedings.

20. In view of the aforesaid once a departmental adjudication exonerates the petitioners on merits and there is a finding that there was no evasion of tax the question of culpable state of mind cannot be presumed and for that reason even the complaint filed by the petitioner which is based upon their original assumption would not survive.

21. It may be observed here that in the order of the Appellate Tribunal, the Tribunal it has been very categorically held that the claim of the revenue is not available with them in view of the conduct of the petitioners tinged without any motive to avoid the tax. The tribunal has formed an opinion that in the present case the claim of depreciation appears to be normal and bonafide as any other assessee might have been done. In the decided cases, the assessee have made such claim inspite of the judgment in Hindustan Sugar Mills case. The tribunal also quoted the judgment of the Apex Court in Cement Marketing case and held

that the claim is bonafide. It is on the basis of the aforesaid legal position that the appellate authority has taken a view that the provisions of Section 271(1)(c) cannot be applied to such circumstances and therefore they had no hesitation in cancelling the penalty order pursuant where to the amount of penalty deposited by the petitioners has been returned to them with interest.

22. It may also be relevant to make a reference to the reasoning given by the Appellate Tribunal while reaching to the aforesaid finding which are as follows:

11. We have heard the rival parties and considered the submissions made before us by the counsel of the assessee and the Id.DR. We have perused the evidence placed before us and find that while the appellant is claiming that he has purchased the machine and, therefore, he is the owner and has also used the machine and on this account, relied upon the permission of the excise authority for the removing of the goods from its factory and taking the same to Bombay. Evidence have also been placed before us for the goods reached back its factory. On such proposition, the Id. Counsel submit that the machine has been used. At the time of use of the machine, it had become owner as it has placed order, paid part of the said price of the machine. Reliance has also been placed on section 18 of Sale of Goods Act. The Revenue is claiming that the appellant had become the owner of the machine only at the end of the accounting year. It had been installed at the factory and operational in June or next year. It is, therefore, concluded that the claim has been made with a view to postponing the tax liability. The claim has been thus preponed to A.Y. 89-90. Thus, it was held that the appellant has concealed the income and filed inaccurate particular in respect of the claim of depreciation.

12. Thus, the dispute is based on the infarance drawn by the two parties before us in opposite ways. We find that the claim of depreciation was initially based that the machinery has been used in the factory at Ballabgarh. But subsequently. The appallant has abandoned such a claim and rested the same on a different footing as detailed above.

This is quite evident from the orders of assessment and appellate proceedings. The Revenue has referred to the formal claim based on use of the machine at factory in order to show the intention of the appellant. The Revenue, thus, concluded that the claim is to postpone tax liability. It was claimed before the year of installation of the machine at the factory. A perusal of the assessment order shows that considerable efforts have been put in by the Assessing officer to arrive at the conclusion that the machine has not been used in the factory during the previous year. At the same time, the officer has referred to appellant's letter dated 26/10/90 wherein the claim was based on the use of the machine at the Exhibition. The contents of the aforesaid letter including, the following two paragraphs have been extracted in the assessment order:-

In view of the above documents, we were of the opinion that since the "The Printers House Ltd." machine had been put to use on 9th and 10th February 1989 at IMTEX 89 itself by Printers House as explained above, the requirement of section 32 in regard to the claim of depreciation were duly satisfied and the claim for depreciation was accordingly made."

"We would like to state that the depreciation has not been claimed on the basis of the installation in the factory premises as specified in your show cause notice."

23. In view of the aforesaid categorical finding returned by the Appellate Tribunal that the claim of depreciation by the petitioners was genuine based upon such claims made by others and there was no intention to avoid the tax at their instance; the question of petitioners having made a statement which is false or which he believed to be false or did not believe to be true does not arise. It also does not arise for consideration that there was any evasion of tax by the petitioners and therefore there could be no presumption of the culpable mental state or any intention, motive or knowledge of evasion of tax in this case.

24. In these circumstances leaving the matter to be decided by the ACMM in view of the provisions contained under Section 277E of the Act and for that purpose to direct the petitioners to face the trial further would only be abusing the process of Court and would be against interest of justice and fair play. It will also be restriction on the part of the petitioners unnecessarily only to follow a procedure written in the papers without any specific purpose. More so when this Court while exercising the powers under Section 482 of the Cr.P.C. is competent to do substantial justice by exercising its inherent powers.

25. Thus, taking into consideration the overall circumstances of this case, the petitioners are justified in submitting that there is no reason to prosecute them any further and as such the complaint filed against them bearing No.694/1994 and all the proceedings emanating therefrom are quashed.

26. In view of the aforesaid, I need not refer to the other submissions made by the petitioners in Crl.M.C.4825/2000. Accordingly, both the petitions are allowed.

MOOL CHAND GARG, J.

MARCH 23, 2009
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