

***HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO**

+CRIMINAL PETITION No.6862 OF 2015

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% Dated 15.09.2015

Between:

Kalluri Krishan Pushkar ...Petitioner

and

\$ The Deputy Commissioner of Income-Tax

and another Respondents

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! Counsel for the petitioner : P.Nagaraj

^ Counsel for 1st respondent : B.Narasimha Sarma,

Counsel for 2nd respondent : Special Public Prosecutor
Telangana State.

< GIST : ---

>HEAD NOTE : ---

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? Cases referred: _____ :

[1] 2004(2) SC 731

2 (1987) 168 ITR 705

3 (1992) 197 ITR 196

**HONOURABLE Dr. JUSTICE B.SIVA SANKARA
RAO**

Crl.P.No.6862 of 2015

ORDER :

This petition is filed under Section 482 of the Code of Criminal Procedure (for short, 'the CrPC') by the Petitioner-Accused to quash the proceedings in C.C.No.103 of 2014 on the file of the learned Special Judge for Economic offences, Hyderabad, taken cognizance for the offences punishable under Sections under Section 276© (2) of the Income Tax Act, 1961(for short, 'the Act') amended from time to time, on the complaint under Section 190 read with 200 Cr.P.C. of the

1st respondent/The Deputy Commissioner of Income Tax, Circle-11(1) Hyderabad.

2. The petitioner is the sole accused in the Calander Case supra. The 1st respondent laid the complaint with the prior sanction under Section 279(1) of the Act for his prosecution, obtained from the Commissioner of Income Tax, Hyderabad vide order dated 27.03.2014. The factual background is that the petitioner filed E-return for the assessment year 2012-13 of dated 30.09.2012 (Section 139-D makes provision for filing of E-return from the Rules provided by the Board). It is self-declaring return of Income of Rs.2,10,26,628.00(Section 140-A provides for self-assessment whereunder income tax is payable on the basis of return required to be furnished under Section 115 (wd) or (wh) or 139 or 142 or 148 or 153-A or 158-B, 158-C as the case may be. After taking into account the amount of tax if not already paid under the Act, any tax deducted or collected at source, any relief of tax or deduction of tax claimed under Section 90 or 91 on account of tax paid outside India, any relief of tax claimed under Section 90-A on account of tax paid in any specified territory outside India and any tax claimed to be set off as per Section 115 JA or ID;; the assessee shall be liable to pay such tax together with interest payable under the provisions of the Act, for any delay in furnishing return or any default or delay in payment of advance tax, before furnishing return and the return shall be accompanied by proof of payment of such tax and interest. As per the Explanation II of Section 141-A(i), where the amount paid by the assessee under the sub-section falls short of the aggregate of the tax interest as aforesaid, the amount so paid shall be first adjusted towards the interest payable and the balance towards the tax payable. As per the sub-section 2 of 141-A after regular assessment under Sections 115 (wf) or 143 or 144 or 153-A or 158-B, 158-C, has been made, any amount paid under Sub-section 1 supra, shall be deemed to have been paid towards said

regular(recurring) assessment or assessment as the case may be. As per sub-Section 3 of Section 141-A if the assessee fails to pay the whole or any part of such tax or interest or both in accordance with the sub-Section-1 supra, he shall without prejudice to any other Consequences which he cannot incur, be deemed to be an assessee in default, in respect of the tax or interest or both remaining unpaid and all the provisions of the Act shall apply accordingly.

3. It is pursuant to the provision for the income declared of Rs.2,10,26,628.00 the tax and interest shown payable in the return was Rs.68,28,133/- and there was TDS of Rs.10,12,293/- that was the only payment as per the E-return supra and the assessee later paid Rs.2 lakhs on 31.12.2015 and even therefrom the balance tax payable is Rs.58,15,840/- that was not paid while filing of the return of income though it was required to be. On the E-return filed by the accused as per the procedure, any amounts paid before or after receipt of intimation from the Central Processing Centre(for short, 'CPC'), Bangalore, under Section 143(1) of the Act, the application has to be made under Section 154 of the Act to the C.P.C. for enabling e-processing Centre to deduct the amount paid and the accused- assessee did not make any such application even the CPC intimated under Section 143(1) by determining net amount payable Rs.63,19,840/- including interest under Section 234 B and C. In fact, 2 lakhs if deducted out of Rs.58,15,840/- the amount will be with little variance and he could have been applied under Section 154 of the Act, to arrive a correct figure. The accused-assessee failed to pay the admitted tax, as such notice under Section 221(1) of the Act, was issued to him on 10.02.2014 by the complainant-DCIT to produce the details of tax paid if it has already been paid or to give reasons why penalty should not be levied under Section 221(1) of the Act for the failure to pay the demand raised in time. In response to it, the accused- assessee filed a letter dated 21.02.2014 stating that he did contracts of the State Government for which the tax due shown in the assessment

and he did not pay self-assessment tax as he did not receive the bills from the State Government and he will pay the tax dues as soon as the amounts received from the Government.

4. Pursuant to which the accused—assessee was summoned under Section 131 of the Act and after his appearance, statement was recorded on 28.02.2014 regarding pending tax dues, that too, he received 14.25crores in the financial year 2011-12 for the work done to the Government and his statement in this regard was he received but undisputedly utilized for business expenditure with intent to pay the tax after receiving the balance dues from the Government. In fact, Section 140(A) of the Act referred supra no way enables to delay or postpone the payment but for to pay whatever payable while furnishing return if not paid before as advance tax. It is therefrom the complaint is maintained with the permission obtained supra for the offence under Section 276(C)(2) of the Act saying the tax due but for more than a year without any valid reasons even received substantial amounts for the contract works done. In the complaint it is averred from para-10 onwards pursuant to the above that the assessee, having received more than 14.25crores for the works done though shown or claimed some balance still due for the works done, he has shown profit of 2,10,26,628/- for the assessment year-2012-13 (financial year 2011-12) he should have planned to pay the advance tax which he did not and at least with the return of self-assessment that not even paid though required to be as per Section 140(A) of the Act and the non-payment even after issuance of notice under Section 221(1) of the Act, claimed is nothing but default and consequently a penalty order was passed on 05.03.2014 imposing penalty of Rs.6,31,389/- and show cause notice for initiation of prosecution under Section 276(C)(2) of the Act dated 18.03.2014 was served on him and in his letter to it dated 24.03.2014 he responded by requesting not to take action against him by submitting that he can make payment as and when he receives the contract bills. It is averred in the complaint that this is the roose for the

past two years as explanation receiving from him without payment even received substantial amount of contract bills and it is manifested that he willfully evaded the payment of the tax as per the provisions of the Act and committed offence punishable under Section 276(C)(2) of the Act, with deliberate default in not clearing tax dues that too, even after received of notice under Section 221(1) of the Act. It is averred that as per Section 278(e) of the Act, the Court shall presume a culpable mental status on the part of the accused, hence sought for taking the complaint on file to punish the accused according to law. It was filed of dated 28.03.2014 and the learned Magistrate under Section 200 of Cr.P.C., from the complaint filed by the public servant(2nd respondent-DCIT) referring to the enclosures taken cognizance of the case and it is pursuant to the summons he filed the quash petition.

5. The contentions in the grounds of the petition to quash said prosecution proceedings taken cognizance against the accused by the learned Judge, are that there is no deliberate or intentional or willful attempt of concealment of income or postponement of the tax due, that there is no loss to the revenue and the ingredients of the offence under Section 276 of the Act not made out any offence and there is no notice of demand as required under Section 156 of the Act issued to him and there is efficacious alternative remedy under Section 226 of the Act by other modes of recovery thereby the prosecution is not sustainable and the proceedings are liable to be quashed.

6. The learned counsel for the quash petitioner/accused drawn attention of the Court to the provisions covered by Sections 156, 226 and 227 of the Act and also relied upon the expression of the Apex Court in **K.C.Builders Vs. Assistant Commissioner of Income Tax** ^[1] = Supreme SC 103 of two Judge Bench.

7. Section 221 speaks of penalty payable when tax is in default or

deemed to be in default by the assessee, in addition to the amount of arrears and interest however the penalty shall not exceed the amount of tax in arrears and before levying any such penalty, assessee shall be given a reasonable opportunity of being heard to show if the default was for the good and sufficient reasons, in such a case, no penalty shall be levied. Once show cause notice issued even before levy of penalty tax paid that will not absolve liability for penalty to be imposed. Thus, Section 221 only speaks of penalty but not prosecution. Section 220 of the Act deals with any amount other than advance tax specified payable in the notice of demand under Section 156 shall be paid within 30 days of service of notice at the place and to the person mentioned therein. If the amount specified in the notice of demand under Section 156 of the Act not paid within the period of 30 days supra, the assessee shall be liable to pay 1%p.a. interest. It is now to be seen in support of the contention of the accused as to any notice contemplated by Section 156 is required to be given before launching prosecution. As referred supra, a reading of Sections 220 and 221 deals with penalty and not prosecution. It is only before imposing penalty, a notice under Section 221 and 156 of the Act that are required to be given. For better appreciation, it is just to reproduce section 156 which deals with notice of demand. It reads *when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, officer shall serve upon the assessee a notice of demand in the prescribed form specified the sum so payable. Provided that whether any sum is the determined to be payable by the assessee or by the deductor under Section 143(1) or 200-A(1) of the Act, the intimation under those sub sections shall be deemed to be a notice of demand for the purpose of this Section.*

8. A reading of Section 156 reproduced referred supra clearly indicates notice of demand contemplated is for the tax etc., payable in consequence of any order passed under the Act. Here, the case on hand it is self-assessment by e-filing showing the tax paid and tax due

and even after the CPC, Bangalore intimated under Section 143(1), there is no application made under Section 154 to the CPC. In fact, the intimation was also sent under Section 143(1) determining the amount payable including the interest as per document No.4 referred in the complaint. Section 156 proviso speaks the sum determined to be payable under Section 143(1) and its intimation shall be deemed to be a notice under Section 156 as notice of demand. The contention of the learned counsel for the petitioner of no notice separately given under Section 156 of the Act thereby no legs to stand, not only for the reason of it is a deemed notice from the above but also for the reason, no such notice is required for the prosecution but for to the penalty to levy or impose, as the case may be.

9. Coming to Section 226 of the Act, as one of the contentions is that there are other modes for recovery and the prosecution cannot sustain. As per Section 226 read with 222 of the Act, for the assessee in default or deemed to be in default in making payment of tax, the Tax Recovering Officer may draw a statement in prescribed form specifying arrears due and shall proceed to recover by mentioning the modes with reference to the rules laid down in the II schedule either by attachment from the sale of movable and immovable property of the assessee or arrest of assessee and his detention in prison or by appointing a receiver by management of the properties of the assessee for realization. What section 226 says is whether any such certificate is drawn under Section 222 of the Act supra, the Assessing Officer may recover the tax by any of the modes provided viz. where certificate drawn under Section 222, without prejudice to the other modes of recovery under Section 222, the Recovering Officer may recover any one or other modes if the assessee is in receipt of any chargeable under the Head of salaries may require person paying sum to deduct from the payment subject to exemption under Section 60 of the Code of Civil Procedure and where money is due to the assessee requiring person who falls due to pay and recover or otherwise applied

to the Court in whose custody money belongs to the assessee for payment out of the same or otherwise if authorized by any order of recovery as arrears of tax due by distraining and sale of immovable property as laid down in III schedule. In fact, it is not a bar to the prosecution from the other modes of recovery available for the tax or interest or penalty it is for the following reason from reading Section 276C(2) of the Act:-

276C (1) If a person wilfully attempts in any manner whatsoever to evade⁷⁴ 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 ⁷⁵[twenty-five] 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 ⁷⁶[two] years and with fine.

(2) If a person wilfully 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 ⁷⁶[two] years and shall, in the discretion of the court, also be liable to fine.

Explanation.—For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person—

- (i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or
- (ii) makes or causes to be made any false entry or statement in such books of account or other documents; or
- (iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or
- (iv) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.]

10. A reading of Section 276© (1) and (2) shows its wording which is material to answer the same referred supra is crystal clear that without prejudice to any penalty which is imposable under any of the provisions of this Act for the tax or penalty or interest due under the Act evading that to be chargeable or imposable under the Act and he shall be punishable.

11. The saving provision of without prejudice to any penalty that to be imposable, the prosecution when sustainable, the modes of recovery is to the tax, interest and penalty for the non-payment that is not the only recourse for nothing to say without exhausting, prosecution won't survive. The only point is left to be answered from the contentions raised by the learned counsel for the quash-petitioner/accused is whether there is any willful non-payment on the part of the petitioner/accused. No doubt in his replies particularly one dated 21.02.2014 for the notice issued under Section 221(1) read with 220 and the other dated 24.03.2014 for the show cause notice issued before initiation of the prosecution under Section 276©() of the Act is not to initiate action and that he would make payment as and when he receives contract bills. As discussed supra, out of the works done by him for the assessment year 2012-13(financial year 2011-12) of more than 14.25crores received out of the total works the value even not before the Court and shown of it a profit of Rs.2,10,260.628 for which the tax payable of Rs.68,28,133/- and the TDS deduction only of Rs.10,12,293/- on his own showing by 30.09.2012 after e-return declaration of him and the subsequent payment only Rs.2,00,000/- (rupees two lakhs only) on 31.12.2010 even taken when received more than 14 crores and payable only 68lakhs and odd for the 56 lakhs and odd due, it is the case of the complainant that for more than a year after the amount due he has not paid which is nothing but willful act.

12.Now coming to the presumption under Section 278(E) of the Act

the Court shall presume the existences of such mental status on the part of the accused in the prosecution for the offence under the Act, but it shall be defence for the accused to prove the fact that he had no such mental status with respect to the act charged as an offence in that prosecution. Therefore, once the Court shall presume, the burden is on the accused under the reverse onus clause to prove it by preponderance of probabilities while facing the trial as part of his defence to rebut the presumption but he cannot pretend that there is no culpable much less willful non-payment or willful evading of the tax and interest and penalty.

13. Now coming to the accusation he places reliance of K.C. Builders(supra) entire reading of the judgment where the prosecution launched for the offences under Section 276(2), 276(B) of the Act and 120-B, 134,193,196 and 420 IPC on the allegations of conspiracy entered into between the accused in their filing of false returns of income before the Department which led to concealment of income to evade tax from the variation to the original return vis-à-vis to modify return. They preferred appeal before the Income Tax Appellate Tribunal(for short, the 'Tribunal') on the consolidated order passed by the Tribunal for the assessment years 1983-84, 1986-87 but the Tribunal found additions were on the basis of settlement between the assessee and the Department and represents voluntary offer made by the assessee and by applying principle of law laid down in **Sir Shadilal Sugar and General Mills Limited Vs. the CIT Delhi**^[2] -the Apex Court held that there was no concealment of income by the assessee and accordingly the penalties were cancelled and allowed the appeals. Thereupon, the appellant-assessee moved an application before the Additional Chief Metropolitan Magistrate, (E.O.II), Egmore, Chennai in M.P.No.614 of 1996 in C.C.No.425 of 1990 for adjourning the proceedings to enable them to move necessary petition and file copy of the order of the Tribunal dated 24.10.1996 which allowed the appeals preferred by the A.1 against levying of penalty and the learned

Magistrate permitted to mark the order of the tribunal in evidence at the appropriate stage of trial from no objection of prosecution. Giving effect to the order in ITAT's order in ITA Nos.3129-3132, the penalties levied under Section 271(1)© of the Act, were cancelled by the Department. In the meantime the Revenue Department filed application under Section 256(1) of the Act for reference of the question of law which had arisen from the order of the ITAT and the same was rejected. Thereupon, the appellant-assessee preferred a Criminal Revision before the Hon'ble High Court for setting aside the order of the Additional Chief Metropolitan Magistrate dated 21.07.1997 and the single judge of the Madras High Court rejected said Revision holding that the order of the ITAT was not applicable as not marked as defence document whereas the fact remains that order was passed at a subsequent date. The High Court referring to the expression of the Apex Court in **K.T.M.S. Mohammed Vs. Union of India** ^[3] held that the observation therein helps to the appellant to the extent that the trial Court should have given due regard to the order of the ITAT from the erroneous definition of the order was not exhibited though it was passed subsequently for its earlier marking does not arise. It is in the factual background by formulating 5 questions by the Apex Court viz:

a) Whether penalty imposed under Section 271(1)© of the Income Tax Act and prosecution under Section 276C of the Act, are simultaneous?

b) Whether the criminal prosecution gets quashed automatically when the Income Tax Appellate Tribunal which is the final Court on facts comes to the conclusion that there is no concealment of income, since no offence survives under the Income Tax Act thereafter?

c) Whether the High Court was justified in dismissing the Criminal Revision Petition vide its impugned order ignoring the settled law as laid down by this Court that the finding of the Appellate Tribunal was conclusive and the prosecution cannot be sustained since the penalty after having been cancelled by the complainant following the Income Tax Appellate Tribunal's

Order no offence survives under the Income Tax Act, and thus the quashing of the prosecution is automatic?

d) Whether the finding of the Income Tax Appellate Tribunal is binding upon the Criminal Court in view of the fact that the Chief Commissioner and the Assessing Officer who initiated the prosecution under Section 276C(1) had no right to overrule the order of the Income Tax Appellate Tribunal. More so when the Income Tax Officer' giving the effect to the order cancelled the penalty levied under Section 271(1)@?

e) Whether the High Court's order is liable to be set aside in view of the errors apparent on record?

It is ultimately held that the penalty proceedings and prosecution proceedings are clearly independent and that the result of proceedings does not bind and Criminal Court has to independently judge on the evidence placed before it. It further held that it is the settled law that levy of penalties and prosecution under Section 276C are simultaneous and once penalties are cancelled on that ground there is no concealment, the prosecution for concealment is liable to be quashed automatically and thereby held the prosecution will not survive and is liable to be quashed thereby the High Court held committed an error.

14. Here, it is not the case of the accused/petitioner that penalty proceedings are quashed or set aside and thereby automatically the prosecution is liable to be quashed. It is not even his case that even there is any finding by any Tribunal of no willful default on the part of him despite presumption against him with a burden on him under reverse onus clause to say consequently that finding is binding on the criminal Court with the analogy of law laid down in R.K.Builders(supra) para-26 to quash the prosecution thereby the decision relied has no application for the factual matrix referred supra.

15. In fact, it is though not mentioned in the original quash petition about the trial Court's order, after hearing both sides as a private warrant procedure framed charges against the accused and the

accused was examined, in the course of hearing it is filed as additional material. On perusal of the charges framed by the trial Court also it nowhere requires any interference from what is referred surpa.

16. Having regard to the above there are no grounds to quash the prosecution proceedings in C.C.No.103 of 2014 on the file of the learned Special Judge for Economic offences, Hyderabad which reached stage for commencement of trial before the learned Special Judge. But for to say the observation herein no way much less, the charges framed by the trial Court, influence the trial Judge in deciding the criminal cases on its own merits from the ultimate appreciation of the evidence oral and documentary on record.

17. Accordingly, the Criminal Petition is dismissed. Miscellaneous petitions, if any pending, in this Criminal Petition shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 15.09.2015
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[\[1\]](#) 2004(2) SC 731

[\[2\]](#) (1987) 168 ITR 705

[\[3\]](#) (1992) 197 ITR 196