IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.41483 of 2013

Arising Out of PS.Case No. -24 Year- 2013 Thana -PATNA COMPLAINT CASE District- PATNA

Vijay Kumar Mallik, son of late Inder Lal Mallik, resident of 1/158, Gali Bagichiwali, Punjasharief, Kashmiri Gate, P.S. - Kashmiri Gate, Opposite Railway Station, Delhi

.... Petitioner/s

Versus

1. Commissioner of Income Tax, Central, having its Office at Central Revenue Building, Beer Chand Patel Marg, Patna
2. Asst. Commissioner of Income Tax, Central Circle-I, Patna

.... Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. D. V. Pathy, Advocate
For the Opposite Party/s	:	Mr. Rishi Raj Sinha, Sr. SC
		Ms. Archana Prasad, Jr. SC

CORAM: HONOURABLE MR. JUSTICE SANJAY PRIYA
CAV JUDGMENT
Date: 16-05-2017

1. This application under Section 482 of the Code of Criminal Procedure has been filed for quashing the order dated 01.02.2013 passed by the Presiding Officer (Special Court), Economic Offences, Patna, in Complaint Case No.24(C) of 2013 by which the Court below has taken cognizance against the petitioner under Section(s) 276C (1) and 276C (2) of the Income Tax Act, 1961.

2. The complaint has been filed by the Assessing Officer before the Presiding Officer (Special Court), Economic Offences, Patna, alleging therein that the accused has evaded income tax, interest and penalty for the period 1993-94 and has, thus, committed offences which are liable to prosecution under Section(s) 276 C(1) and 276 C(2) of the Income Tax Act. Learned Commissioner of Income Tax has granted permission to launch prosecution under Section 279 of the Act. The Presiding Officer (Special Court), Economic Offences, Patna, on the basis of the averments made in the Complaint Petition held that there are sufficient materials for proceeding against the accused and, accordingly, took cognizance of the offence under Section(s) 276 C(1) and 276 C(2) of the Income Tax Act, 1961.

3. Petitioner-accused was partner of M/s Mallick enterprises up to 31.10.1991 and thereafter he became the Proprietor thereof. The accused at the material time was carrying on the business of supply of fodder to the Animal Husbandry Department of the State Government of Bihar. The accused is assessed to tax with the Opposite Party No.2.

4. The accused had filed its return for the year 1993-94 with Assistant Commissioner of Income Tax, New Delhi, along with the tax audit report in the prescribed form 3 CD as required under Section 44 AB of the Income Tax Act disclosing a total income of ₹1,02,02,760/-.

5. The return so filed by the accused was selected for its scrutiny. The Assessing Officer issued notice to the accused to produce all books of accounts, other papers and documents in support of its returns. The accused in compliance thereto produced all papers and books of accounts etc. The Assessing Officer thereafter completed the assessment at a total income of ₹1,69,88,170/- under Section 143(3) of the Act.

6. The Fodder Scam came into light in the State of Bihar during 1995-96. First Information Report was lodged by the State of Bihar and the case was handed over to the Central Bureau of Investigation. The accused named in the First Information Report was taken into custody. The petitioner-accused remained in custody for the period 20.05.1996 till 18.08.1997 and thereafter released on bail.

7. As a result of the petitioner-accused being named in the First Information Report, a notice under Section 148 of the Act was issued by the ACIT (Investigation), Circle-10(1), New Delhi, on the ground that the accused has inflated the expenditure and thereby a portion of income had escaped assessment.

8. The case of the petitioner-accused was transferred from the learned Commissioner of Income Tax, New Delhi to learned Commissioner of Income Tax, Patna, in exercise of powers under Section 127 of the Act. Learned Deputy Commissioner of

Income Tax, Special Range-IV, Patna, issued notice to the accused under Section 142(1) of the Act directing furnishing of all papers and documents. The said notices were not served personally on the accused. The same were served by affixture while accused was in judicial custody.

9. Assessment thereafter was completed in a purported exercise of jurisdiction under Section 143(3) of the Act read with Section 147 of the Act. The Assessing Officer brought to tax the entire receipt from the Animal Husbandry Department. The Assessing Officer disallowed all the expenditure related to business and allowed a paltry expenditure. The assessment were completed at a total income of ₹5,01,77,210/- under Section 143(3) read with section 147 of the Act. As a consequence of the assessment, demand of ₹2,79,45,854/- were raised. Interest was charged under Section 234 B of the Income Tax Act. Penalty under Section 271(1)(c) of the Income Tax Act were also initiated.

10. The petitioner-accused filed an appeal before the first appellate authority i.e. learned Commissioner of Income Tax (Appeals) aggrieved with the order of assessment that additions were made without an independent enquiry. Learned Commissioner of Income Tax (Appeals) after hearing the parties set aside the assessment for making the same *de novo*. Learned Commissioner of

Income Tax (Appeals), however, held that initiation of proceedings was bad in law.

11. The accused aggrieved with the order under appeal passed by the learned Commissioner of Income Tax (Appeals) filed an appeal before the Hon'ble Income Tax Appellate Tribunal on the ground that since very initiation of proceeding under Section 147 of the Act were held to be bad in law, setting aside of the assessment with a direction to pass order afresh were not just and proper.

12. The Income Tax department also filed cross-appeal before the Hon'ble Income Tax Appellate Tribunal. The assessing authority after setting aside the first order of assessment by the learned Commissioner of Income Tax (Appeals), proceeded to pass an assessment order afresh under Section 144/251 of the Act. The appeals filed by the accused were, however, dismissed by the Hon'ble Income Tax Appellate Tribunal and the appeal filed by the Revenue was allowed.

13. Petitioner-accused, then, filed an appeal before the Hon'ble Patna High Court vide M.A. No.140 of 2006 being aggrieved with the order under appeal passed by the Hon'ble Income Tax Appellate Tribunal. The petitioner-accused in the said appeal raised substantial question of law to the effect that in absence of issue of notice under Section 127 of the Act and grant of opportunity of being heard, entire proceeding of assessment under Section 148 of the Act were vitiated in law. The accused submitted before the High Court that transfer of cases in purported exercise of jurisdiction under Section 127 of the Act without issuance of notice and opportunity of being heard in the matter rendered the proceeding without jurisdiction.

14. The Hon'ble High Court after hearing the parties held that since accused participated in proceeding of assessment, the service of notice under Section 127 were not material. The Hon'ble High Court held that even though no such notice under Section 127 or 148 was issued, the proceedings were valid. The Hon'ble High Court, accordingly, held that no substantial question of law arose for consideration in the appeal by order dated 09.05.2012 passed in M.A. No.140 of 2006.

15. The petitioner-accused being aggrieved with the order of the Hon'ble High Court filed Special Leave petition before the Hon'ble Supreme Court of India. The petitioner-accused in the petition before the Hon'ble Supreme Court has submitted that transfer of case from learned Commissioner of Income Tax, New Delhi, to learned Commissioner of Income Tax, Patna, without proper service of notice and without giving an opportunity of being heard in the matter were not justified. The petitioner-accused further submitted that the Hon'ble High Court erred in not appreciating the matter in its true perspective.

16. As per the submission made on behalf of the petitioner, the said Special Leave Petition is likely to be heard by the Hon'ble Supreme Court shortly.

17. In the instant case, learned counsel for the Income Tax has appeared and made argument on behalf of Income Tax Department.

18. Learned counsel for the Income Tax has submitted that the criminal proceeding and the adjudication proceeding are independent in nature to each other. The finding in the adjudication proceeding against a person facing prosecution is not binding on the proceeding for criminal prosecution. He has further submitted that there is no illegality in the impugned order.

19. Counsel for the petitioner, in reply to the aforesaid submission, has submitted that order of assessment, which is the basis of criminal prosecution, is under challenge before the Hon'ble Supreme Court of India. Counsel for the petitioner has further submitted that once order of assessment is set aside, whole prosecution launched on the basis of order of assessment is bad. Counsel for the petitioner has further submitted that no *prima facie* offence is made out.

20. Learned counsel for the petitioner has relied on the decision of the Supreme Court in the case of ***Radheshyam Kejriwal Vs. State of West Bengal*** reported in ***[2011] 333 ITR 58 (SC)*** and has argued that on exoneration in adjudication proceedings, no case for criminal proceedings thereafter on same facts.

21. In this manner, after looking into the submission made on behalf of both the parties and the materials available on record, it appears that accused (petitioner) being aggrieved with the order of assessment filed appeal before the first appellate authority i.e. learned Commissioner of Income Tax (Appeals). The learned Commissioner of Income Tax (Appeals) set aside the assessment order and ordered for making the same *de novo*. The accused aggrieved with the aforesaid order of learned Commissioner of Income Tax (Appeals), filed an appeal before Hon'ble Income Tax Appellate Tribunal, which was dismissed. Cross-appeal filed by the revenue before the Hon'ble Income Tax Appellate Tribunal was allowed. The learned Commissioner of Income Tax (Appeals) proceeded to pass an assessment order under Section 144/251 of the Act after setting aside the first order of assessment by the learned Commissioner of Income Tax (Appeals). Accused-petitioner filed an appeal before the Hon'ble High Court vide M.A. No.140 of 2006 aggrieved with the order of Hon'ble Income Tax Appellate Tribunal. The Hon'ble High Court held that no substantial question of law arose for consideration in the appeal by order dated 09.05.2012 passed in M.A. No.140 of 2006. The petitioner has filed Special Leave Petition before the Hon'ble Supreme Court being aggrieved with the order of the Hon'ble High Court. The aforesaid SLP is still pending in the Hon'ble Supreme Court.

22. In the decision reported in ***[2011] 333 ITR 58 (SC) [Radheshyam Kejriwal Vs. State of West Bengal],*** it has been held that "yardstick would be to judge whether the allegation in the adjudication proceedings as well as for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on the merits. If it is found on the merits that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned would be abuse of the process of the Court."

23. As such, in terms of the aforesaid decision of the Hon'ble Supreme Court on exoneration of the person concerned in adjudication proceeding on merits, criminal proceeding on the same facts and circumstances cannot be allowed to continue.

24. In the instant case from the facts mentioned, in detail, it is apparent that the petitioner has not been exonerated by the Income Tax Department in the adjudication proceeding till date. The assessment done by the Income Tax Department has been upheld by the Hon’ble High Court by order dated 09.05.2012 passed in M.A. No.140 of 2006 annexed as Annexure-4 to the application. As per own averment of the petitioner, Special Leave Petition filed by the petitioner is still pending in the Hon’ble Supreme Court of India.

25. In such circumstances, this Court does not find any illegality in the impugned order dated 01.02.2013 passed by the Presiding Officer (Special Court), Economic Offences, Patna, in Complaint Case No.24(C) of 2013 taking cognizance against the petitioner under Section(s) 276(1) and 276(2) of the Income Tax Act.

26. Accordingly, this application is dismissed.

(Sanjay Priya, J)

J.Alam/-

AFR/NAFR	**NAFR**
CAV DATE	**27-04-2017**
Uploading Date	**22-05-2017**
Transmission Date	**22-05-2017**