IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 05.07.2018	Delivered on 13.07.2018

CORAM:

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

CRL.R.C.615 of 2011

Mrs.Sujatha Venkateshwaran
W/o.Late G.Venkateshwaran
Director M/s.Aruna International,
No.4, Seshadri Road,
Chennai 600 018. ... Petitioner/Petitioners/Accused No.3

.Vs.

The Assistant Commissioner of Income Tax,
(Prosecution), City Circle- I,
Chennai - 35
... Respondent/Respondent/Complainant

Criminal Revision case filed under Section 401 of Cr.P.C. R/w Section 397 of Cr.P.C. to set aside the judgment dated 07.04.2011 passed by Learned Additional Chief Metropolitan Magistrate (EO-1), Egmore, Chennai dismissing Crl.MP.No.140 of 2011 seeking discharge in E.O.C.C.No.140 of 1991.

For Petitioner : Mr.B.Kumar, Senior Counsel
for Mr.K.Anantha Krishna

For Respondent : Mr.N.Baaskaran,
Senior Special Public Prosecutor
(IT Cases)

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O R D E R

This Criminal Revision Petition has been filed aggrieved by the order dated 07.04.2011 passed by the learned Additional Chief Metropolitan Magistrate (EO-1), Egmore, Chennai dismissing the discharge petition filed in Crl.MP.No.140 of 2011 in E.O.C.C.No.140 of 1991.

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2. The respondent who is the complainant in E.O.CC No.140 of 1991 filed a complaint against M/s.Aruna International Private Limited and three others for an offence under Section 34, 120B, 193, 196, 420 and 511 of IPC and under Section 276 C (1), 277, 278 and 278B of the Income Tax Act.

3. The petitioner in this Criminal Revision Petition is Accused No.3 in the complaint.

4. The crux of the complaint filed by the respondent is that during the assessment year 1985 - 1986, a return of income was filed on behalf of the 1st Accused Company accompanied interalia by the profit and loss account and balance sheet, signed by the 2nd and 3rd accused persons. In the said return, a loss was declared to a tune of Rs.10,10,731/-(Rupees ten lakhs ten thousand seven hundred and thirty one only). Thereafter, the revised return was filed showing a loss of Rs.5,80,330/- (Rupees five lakhs eighty though three hundred and thirty only). The Assessing Officer in the course of his investigation and on examination of the accounts noticed that with a view to evade a tax by reducing the income, the 1st accused company had claimed in the profit and loss account a bogus payment of brokerage to a tune of Rs.13,95,525/-(Rupees thirteen lakhs ninety five thousand and five hundred and twenty five only) and a bogus payment of sub-agency commission to a tune of Rs.23,20,000/- (Rupees twenty three lakhs twenty thousand only) and a bogus loss to a tune of Rs.60,42,644/- (Rupees sixty lakhs fourty two thousand six hundred and fourty four only) from out of the films purchased from M/s.Sujatha Films Private Limited, in which the 2nd and 3rd accused were also shareholders as well as Directors. The Assessing officer after detailed examination found these items of expenditure and loss claimed by the 1st Accused Company, to be false and bogus.

5. In the light of findings of the Assessing Officer, the respondent proceeded to file the above said complaint against the Company, its Managing Director and two other Directors. In the complaint at paragraph No.13, the commission of offence by each of the accused persons under different provisions, has been averred in detail. During the pendency of the complaint, 2nd accused/A2 died and insofar as the other accused persons are concerned, the respondent proceeded to prosecute the complaint.

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6. The petitioner who subsequently became 2nd accused/A2 on the death of the Managing Director, filed an application for discharge under Section 245 of the Criminal Procedure Code. The Court below on consideration of the grounds raised in the discharge petition and also after considering the arguments made on either side was pleased to dismiss the discharge petition and aggrieved by the same, the present Criminal Revision petition has been filed before this Court.

7. Mr.B.Kumar, learned Senior Counsel appearing on behalf of the petitioner made the following submissions :-

- The respondent ought to have issued a notice under Section 2(35) of the Income Tax Act 1961, expressing his intention to treat the petitioner as the Principal Officer of the Company and without such a notice, the complaint filed by the respondent is not maintainable.
- The entire complaint is based on the assessment order made by the Assessing Officer for the Assessment year 1985-1986. This order was challenged by way of an appeal before the CIT (Appeals), which confirmed the orders of the Assessing Officer and subsequently, a further appeal was made before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal by an order dated 23.01.2003 was pleased to sustain the order of the Assessing Officer only insofar as the commission payment made towards sub-agency commission is concerned. However, insofar as the loss claimed towards film distribution, the Tribunal held that the same requires reinvestigation by the Assessing Officer and accordingly, the matter was remanded to the Assessing Officer insofar as this issue is concerned and the appeal was partly allowed. In view of this development, the substratum for filing the very criminal complaint itself goes and even though, this is a subsequent event, the foundation for filing the compliant no longer exists.
- The petitioner was only the wife of the 2nd accused who was the Managing Director and she was not in-charge and responsible for carrying on the day today affairs of the Company.
- The signing of profit and loss account and balance sheet by the petitioner does not ipso facto make her an accused person.
- The Court below has not applied its mind while taking cognizance of the complaint. The cognizance has been taken by merely putting a Rubber Stamp to the effect that " taken on file issue summons to the accused". It clearly shows

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that the Court below has not applied its mind to the contents of the complaint.

- The complaint apart from the offence under the Income Tax Act also alleges offence under the Indian Penal Code and the respondent is not competent to file a complaint for an offence under the Indian Penal Code.
- In support of his submission, the learned Senior Counsel appearing for the petitioner placed reliance on the following Judgments.
- [Thanjai Murasu and others Vs. Income Tax Officer] reported in CDJ 1998 MHC 740 (Madras High Court)
- [Income Tax Officer Vs. Roshini Cold Storage P Ltd.,] reported in CDJ 1998 MHC 530 (Madras High Court)
- [M.A.Unnerikutty and others Vs. Deputy Commissioner of Income Tax (Assessment)] reported in 1994 CJ (Ker) 186 (Kerala High Court)
- [Income Tax Officer Vs. Shiv Sewak Cotton Company and others] reported in 2005 CJ (P&H) 301
- [C.C.Alvai Haji Vs. Palapetty Muhamed and another] reported in 2003 Scc online Bom 118 (High Court of Bombay).
- [G.L.Didwania and Another Vs. ITO and another] reported in 1995 Supp (2) SCC 724
- [Swathy Chemical Limited Vs. Union of India] reported in CDJ 2001 MHC 578 (High Court of Madras).
- [M/s.Tata Ropbins Fraser Limited.,Jamshedpur Vs. State of Jharkand and others] reported in 2005 Cri.L.J.2318 (Jharkand High Court).
- [Madhumilan Syntex Limited and others Vs. Union of India and another] reported in 2007 11 SCC 297 (Supreme Court)
- [Greatway Private Limited Vs. Assistant Commissioner of Income Tax (P&H)] reported in 1993 (76) Comp Cas 259 (Punjab and Haryana High Court).
- [Sushil Suri and Others Vs. State and others] reported in Manu/De/9898/2006
- [Income Tax Officer Vs. Delhi Iron Works Private Limited and others] reported in 2010 SCC online Del. 3921
- [Vikram Singh Latwal Vs. State of Uttarkhand] reported in 2013 SCC Online Utt 2579

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- [Devendra and others Vs. State of Uttarpradesh and another] reported in 2009 (7) SCC 495.

8. Per contra, Mr.N.Baaskaran, learned Senior Special Public Prosecutor for IT Cases would submit as follows :

- A notice under Section 2(35) of the Income Tax Act will be a pre-requisite only if the offence is under Section 276(B) wherein the duty is cast upon the person responsible for paying, who in case of a company is the Principal Officer thereof, as per Section 204(iii) of the IT Act. In the present case, the complaint is not under Section 276(B) and Section 278 (B) does not require such a notice. In view of the same, all the Judgments relied upon by the learned Senior Counsel for the petitioner in this regard has no application to the present case.
- The entire assessment order has not been set aside by the Tribunal and it is now a settled principle of law that partial setting aside of an order or remanding a case to the Assessing Officer for fresh consideration of certain issues, does not in any way affect the criminal complaint filed by the respondent.
- There are sufficient allegations made in the complaint and also spoken by the witness to show that the petitioner had signed the profit and loss account and the balance sheet in her capacity as the Director of the Company since she was incharge and responsible for the running of the day today affairs of the Company and therefore, there is no ground to dismiss the complaint filed by the petitioner.
- It is a settled law that the Indian Penal Code offence can also form part of the complaint filed by the respondent and there is no bar for the same.
- The Rubber Stamp cognizance taken by the Court below is a mere irregularity and that by itself will not vitiate the complaint filed against the petitioner.
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9. Discussion :-

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9.1 The main point that was canvassed by the learned Senior Counsel with regard to issuance of notice under Section 2(35) of the Income Tax Act is concerned, the same is only a requirement if the offence is under Section 276(B) of the Income Tax Act. The person responsible for paying the tax Deducted at Source (TDS), if it is a company under Section 204 (iii) specifically provides that the person responsible will be the Company itself including the Principal Officer thereof. The Principal Officer is defined under Section 2(35) of the Income Tax Act. If the Assessing officer intends to treat any person connected with the Management or Administration of the Company to be a Principal Officer, he has to serve a notice to that effect and inform the concerned person. Therefore, when a compliant is filed for an offence under Section 276(B), the issuance of this notice becomes mandatory even to maintain the complaint. However, the offence that is involved in the present case is under Section 276(C) (1) which deals with wilful attempt to evade a tax, Section 277 which deals with making false statement in any verification under the Act and Section 278(B) which deals with offence by companies including every person at the time when the offence was committed was incharge of and was responsible to the company for the conduct of the business of the Company. For filing a complaint under these offences, the determination of a Principal Officer is not necessary and non-issuance of individual notice before filing of the complaint will be of no consequence. This issue has been discussed in detail by the Court below.

9.2 This Court, therefore does not find any substance in the first submission that was made by the learned Senior counsel appearing for the petitioner and consequently, all the judgments that were referred and cited by the learned Senior Counsel will not have any applicability in the present case and in all those judgments, the offence in question was under Section 276 (B) of the IT Act.

9.3 The next submission made by the learned senior counsel with regard to the effect of the order passed by the Income Tax Appellate Tribunal also does not convince this Court. A perusal of the order of the Income Tax Appellate Tribunal shows that the Tribunal has upheld the findings of the Assessment Officer insofar as the commission payment is concerned and insofar as the loss on film distribution is concerned, the Tribunal has merely found that in the earlier years, the same issue was remanded to the file of the Assessment Officer for investigation and following the same, this case pertaining to the assessment year 1985 - 1986 is also remanded for re-investiation to the Assessment Officer. In my considered view, this order does not in any way affect the continuation of the present criminal complaint. If the entire order of the Assessment Officer had been set aside by the Tribunal, the submission made by the learned Senior Counsel that the substratum itself will be erased, will have force. However in the present case, admittedly, the entire order of the Assessment Officer has not been set aside. The Judgements that have been cited by the learned Senior Counsel in this regard only covers cases where

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the entire order of the Assessment Officer is set aside and those Judgments will have no application in the present case. Therefore, the order passed by the Tribunal will not have any effect in the continuance of the criminal proceedings initiated by the respondent.

9.4 The submissions with regard to the petitioner not being the person in-charge of and responsible for the conduct of business of the company is concerned, there are sufficient averments that have been made in the complaint and spoken to by the witness which makes out a prima facie case against the petitioner. More particularly, since admittedly the petitioner has signed the profit and loss account and balance sheet for the relevant assessment year and whether the petitioner signed it after understanding the consequence of the same is something which cannot be decided at the threshold stage.

9.5 The petitioner in this case has subscribed her signature in the profit and loss account and balance sheet for the assessment year 1985-1986. This was filed along with the returns and this by itself is a prima facie material at the stage of framing charges and no more material is required at this stage to exonerate the petitioner for the offence under section 277 of the Income Tax Act. The reason why she signed it and whether at the time of signing the profit and loss account and balance sheet, she had the requisite knowledge are all matters to be considered at the time of Trial.

9.6 Including the Indian Penal Code offence along with the offence under the Income Tax Act has also been questioned by the learned senior Counsel appearing for the petitioner. For an offence committed in relation to IT proceedings, the assesee can be prosecuted and tried both under the provisions of the Income Tax Act and under the provisions of Indian Penal Code and there is no bar for the same. Therefore, the submissions made by the learned senior counsel in this regard also stands rejected.

9.7 Insofar as the cognizance is concerned, it is true that the Supreme Court Judgement in [Pawan Kumar Sharma Vs. State of Uttaranchal] reported in 2014 139 AIC 652 has deprecated the practice of "Rubber Stamp orders" while taking cognizance of a complaint. This used to be a practise some years back. In view of the Judgments of the Supreme Court and the administrative instructions given by this Court, this practise has stopped in the State of Tamil Nadu long back. It is true that taking cognizance of the complaint requires application of mind and the same must also get reflected in the order taking cognizance. In the present case, this Court finds sufficient materials in the complaint as well as the documents filed along with the complaint and also the evidence given by the witnesses and therefore, this Court does not want to interfere with the

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cognizance taken by the Court below on the irregularity pointed out by the learned Senior Counsel. In the considered opinion of this Court, the irregularity pointed out by the learned senior counsel does not vitiate the entire proceedings.

10. The Court below at the time of framing charges must only see whether there are prima facie materials against the accused persons. Even strong suspicion is a ground for framing charges and the Court need not be satisfied, Whether ultimately the case will end up in acquittal.

11. Useful reference can be made to the judgment of the Supreme Court in (Amit Kapoor Vs.Ramesh Chander and another) reported in 2012 (9) SCC 460 :-

> 17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.
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> 19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible

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with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well settled law laid down by this Court in the case of State of Bihar v. Ramesh Singh (1977) 4 SCC 39:

"4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which— … (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused", as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is

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> no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. It the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

25. We have already indicated above that framing of charge is the first major step in a criminal trial where the Court is expected to apply its mind to the entire record and documents placed therewith before the Court. Taking cognizance of an offence has been stated to necessitate an application of mind by the Court but framing of charge is a major event where the Court considers the possibility of discharging the accused of the offence with which he is charged or requiring the accused to face trial. There are different categories of cases where the Court may not proceed with the trial and may discharge the accused or pass such other orders as may be necessary keeping in view the facts of a given case. In a case where, upon considering the record of the case and documents submitted before it, the Court finds that no offence is made out or there is a legal bar to such prosecution under the provisions of the Code or any other law for the time being in force and there is a bar and there exists no ground to proceed against the accused, the Court may discharge the accused. There can be cases where such record reveals the matter to be so predominantly of a civil nature that it neither leaves any scope for an element

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of criminality nor does it satisfy the ingredients of a criminal offence with which the accused is charged. In such cases, the Court may discharge him or quash the proceedings in exercise of its powers under these two provisions.

27.2 The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3 The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.10 It is neither necessary nor is the court called upon to hold a full- fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.12 In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

27.13 Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage . The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

12. The Court below has carefully considered each and every issue that was raised by the petitioner in the discharge petition and has come to a conclusion that there are no grounds to discharge the petitioner. This Court does not find any ground to interfere with the order passed by the Court below.

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Accordingly, this Court confirms the order passed by the Court below dismissing the discharge petition.

13. It is made clear that the findings that have been given both by the Court below and this Court, are only based on prima facie materials. None of these findings will have any bearing while Court below decides the case finally and the decision will be made only based on the evidence on record and on the merits of the case without being influenced by any of the findings given while dismissing the discharge petition.

14. The complaint is of the year 1991. It is therefore necessary for this Court to fix a time limit for the completion of the proceedings. The Additional Chief Metropolitan Magistrate (EO-1), Egmore, Chennai is directed to complete the proceedings strictly within a period of four months from the date of receipt of copy of this order. The petitioner and the respondent are directed to co-operate with the proceedings to ensure that the same is completed within a time stipulated by this Court.

15. In the result, the Criminal Revision Petition is dismissed. Consequently, the connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

सत्यमेव जयते

To

1. The Additional Chief Metropolitan Magistrate (EO-1),
Egmore, Chennai.

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2. The Assistant Commissioner of Income Tax,
(Prosecution), City Circle- I,
Chennai - 35.

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3. Public Prosecutor,
High Court, Madras.

+1cc to Mr.K.P.Anantha krishna, Advocate Sr.47223

+1cc to Mr.N.Baskaran, Advocate Sr.46071

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