

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.04.2019

CORAM:

THE HON'BLE MR.JUSTICE P.VELMURUGAN

Crl.R.C.No.353 of 2019
and
CRL.MP.No.4961 of 2019

1. M/s.Vijay Shanthi Builders Ltd.,
No.20/43, Kasthuri Rangan Road,
Alwarpet, Chennai-18.

2.Chandan Jain
Managing Director
M/s.Vijay Shanthi Builders Ltd.,
Chennai-18

... Petitioners

Vs.

T.Mythili

... Respondent

Criminal Revision filed under Sections 397 and 401 Cr.P.C., praying to set aside the order dated 25.02.2019 made in Crl.M.P.No.1338 of 2018 in EOCC No.145 of 2017 on the file of the Additional Chief Metropolitan Magistrate (E.O.I), Egmore, Chennai-8.

For Petitioners : Mr.M.Kempuraj

सत्यमेव जयते
O R D E R

This Criminal Revision has been filed to set aside the order dated 25.02.2019 made in Crl.M.P.No.1338 of 2018 in EOCC No.145 of 2017 on the file of the Additional Chief Metropolitan Magistrate (E.O.I), Egmore, Chennai-8.

2. The petitioners stated that during the assessment year 2013-14 for the financial year 2012-13, the petitioners have deducted TDS of Rs.1,28,81,665/- under various sections of Chapter - XVII B of the Income Tax Act 1961. The said amount was not paid into the corpus within the stipulated time. Hence, default being committed under Section 200 and 204 r/w rule 30 of

the Income Tax Rules for failing to deposit the same to the credit of the Government without reasonable cause of excuse. A show cause notice was issued to pay the money within the stipulated time and further, reminder notice on 16.02.2016 was followed and the 1st petitioner had replied on 25.12.2016 stating that there was a delay in depositing the TDS due to slump in the market and there was no wilful neglect or intention for default. On 22.02.2017 a final notice was issued by the respondent as to why prosecution proceedings should not be initiated against the petitioners. Subsequently, on 13.3.2017, a notice under section 2(35) of the Income Tax Act 1961 was issued to the petitioners treating as Principal Officer for penal and prosecution proceedings of the company. The petitioners further stated that there was a presumption under section 278E of the Act regarding culpable mental state on the part of the petitioners that deducting the TDS for the relevant period and not depositing the same with the Government account within prescribed period intentionally and withheld the same deliberately with the mala fide intention to carry on business motive. Only after issuance of show cause notice for initiation of prosecution proceedings, the petitioners came forward to take steps and replied for the delay in remittance of the TDS. The respondent had invoked section 278B(a) of the Income Tax Act that TDS was not deposited in time and in the reply, there was no ground for not depositing the TDS within prescribed period and thus the prosecution was launched on 3.5.2017 with a presumption contemplated under Section 278B of the Income Tax Act. But it is pertinent to note that the said TDS amounts were duly deposited and paid, the same was not mentioned in the complaint or in the deposition.

3. Admittedly, in this case, TDS was deducted from various persons and the same has not been remitted to the credit of Central Government within the prescribed time as per the Income Tax Act. After receiving the show cause notice also, the petitioners/accused have not remitted the amount and subsequently, they defended the case, later they deposited with penalty. The department has filed a complaint in EOCC.No.145/2017 under Section 276B(a) r/w Section 278B of the Income Tax Act, 1961. During the pendency of the complaint, the petitioners filed the petition under Section 245(1) & (2) Cr.P.C to discharge from the case.

4. The main contention taken by the revision petitioners/accused in the discharge petition is that the provision invoked under Section 276B(a) of Income Tax Act does not attract in the present situation of the case, which deals with the non-payment of TDS collected at the source, but, failed to note that the same was duly remitted. The revision petitioners/accused also explained the TDS was collected from various parties totalling a sum of Rs.1,28,81,665/- as per the

Income Tax Act. The payment of TDS amount must be made within the next English Calendar month. In this case, the petitioners had deducted the TDS and had not remitted on the next English Calendar month, but the petitioner had taken sincere efforts to duly remit the entire TDS amount into the corpus of the Central Government within the reasonable time. Therefore, the question of non payment of TDS, does not arise in this case. The offence pertains to non remittance of TDS amount, whereas the petitioners had indeed remitted the TDS, which was collected from various others. There is no dishonest intention to receive the TDS and declined to remit the same to the Government account. It is not the case of misappropriating the relevant source or deducted sum being so remitted to the Central Government Treasury. In the present case, the petitioners had duly remitted the same, but reasonable delay, which reason was also explained, in the reply dated 25.12.2016. Therefore, the department filed a criminal complaint by invoking provision of 276B(a) of the Income Tax Act, 1961. The revision petitioners/accused remitted all the TDS amount, which was collected from various sources, with interest and penalty. The said fact was not considered by the learned Magistrate. The revision petitioners have also presented the petition before the competent authority, which is pending for consideration. The learned Magistrate failed to consider the fact that it is not a case of misappropriation on non payment of TDS and the delay has been properly explained and dismissed the petition filed by the revision petitioners before the learned Additional Chief Metropolitan Magistrate for discharging, which warrants interference.

5. Heard learned counsel for the petitioner and perused the materials on record.

6. Admittedly, the revision petitioners collected TDS of Rs.1,28,81,665/- from various sections of chapters - XVII B of the Income Tax Act. They have also admitted that they have not remitted the TDS to the credit of the Central Government within the prescribed time limit as contemplated under the Income Tax Act. Even, show cause notice has also been issued and the petitioners/accused replied to the show case notice stating that they are not liable to pay the amount and the department has taken the decision to file the complaint. After filing the complaint, the petitioners/accused have remitted the amount with penalty. The non payment of TDS deducted from various sources to the Government account is an offence. Once the department filed the complaint, whether the delay in non payment is with intention or without intention can be decided only after examining the witnesses. While deciding the petition under Section 245 Cr.P.C, the Court has to see the allegations levelled in the complaint, the documents produced by the

department, but not the defence taken by the accused and also the documents filed by the accused. On a perusal of the entire records filed by the department and also the averment made in the complaint and even the petition filed by the revision petitioners under Section 245 Cr.P.C, it is seen that the petitioners/accused have admitted that they have deducted the TDS from various persons and failed to remit the same to the Government account and subsequently, they have paid the said amount with penalty. The learned counsel for the petitioner would submit that the offence itself is compoundable and that they have filed the petition before the Competent Authority for compounding the offence and the same is pending. The deduction of TDS amount is accepted and also the said deduction has not been remitted to the Government account within the stipulated time and after receiving the show cause notice, they have not explained the delay. Hence, the subsequent payment will not be taken at this stage, the mere pending the petition for compounding the offence before the Competent Authority is not the ground for discharging the revision petitioners/accused.

7. In the circumstances, this Court does not find any perversity in the order passed by the Additional Chief Metropolitan Magistrate (EOI), Egmore, Chennai and the revision is liable to be dismissed.

8. Accordingly, this Criminal Revision Case is dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-VIII)

//True copy//

Sub Assistant Registrar

kmi

To

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

+1cc to Mr.M.Kempraj, Advocate SR.No.34545

Cr1.R.C.No.353 of 2019

RGN (CO)

GMV (11/10/2019)