

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 28.10.2020
CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

CRL.O.P.No.3891 of 2020
and Crl.M.P.Nos.2232 & 2233 of 2020

Rohit Kumar Nemchand Piparia
PAN- AKZPP0661M
No.34, Old No.77,
Swatik Dyechem Industries,
Maddox Street, Choolai,
Chennai - 600 112.

... Petitioner

Vs.

The Deputy Director of Income Tax (Inv)
Unit - 4(3),
No.46 (Old No.108)
1st Floor, Room No.125,
Nungambakkam High Road,
Chennai - 600 034.

... Respondent

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C. praying to call for the entire records in E.O.C.C.No.401 of 2018 on the file of the Court of the Additional Chief Metropolitan Magistrate, Economic Offences-II, Egmore, Chennai and quash the entire proceedings as against the petitioners.

For Petitioner : Mr.P.Kumar, Senior Counsel
For Mr.P.Meghana Nair

For Respondent : Ms.M.Sheela
Special Public Prosecutor
for IT Cases.

ORDER

This petition has been filed to quash the proceedings in E.O.C.C.No.401 of 2018 on the file of the Court of the Additional Chief Metropolitan Magistrate, Economic Offences-II, Egmore, Chennai, thereby taken cognizance for the offence under Section 276C(1) of the Income Tax Act, 1961, as against the petitioner.

2. Mr.P.Kumar, learned Senior Counsel appearing for the petitioner would submit that the respondent lodged complaint for the offence under Section 276C(1) of the Income Tax Act, 1961, alleging that during the course of the enquiry by the investigation wing it was noticed that in the bank account maintained by the petitioner, there was unusual credit of large amount through RTGS and funds were debited for investment in the stock market. The petitioner had entered into 165 share transaction during the financial year 2007-08 and filed his return of income for the assessment year 2008-09 on 05.02.2009 declared taxable income of Rs.3,10,226/-. However, the petitioner has not disclosed any capital gain in the return of income filed for financial year 2007-08 relevant to the assessment year 2008-09.

2.1. Further alleged that the petitioner entered into 165 share transactions to the tune of Rs.155.20 crores and short term capital gain arose from the said transactions is Rs.52.13 crores. Though the tax has been deducted, it was not fully deducted and the petitioner did not disclose in his return of income under the head Capital Gain and paid the tax. Thus, the petitioner failed to show the same in his return of income and attempted to evade payment of tax. Only after deduction by the income tax department, the petitioner had share transactions during the relevant financial year and accepted the same. Therefore, the petitioner committed the offence punishable under Section 276C(1) of the Income Tax Act, 1961.

2.2. The learned Senior Counsel further submitted that the complaint has been filed only based on the assessment order dated 25.02.2018 passed by the Income Tax Officer. The said assessment order has been challenged by the petitioner before the Income Tax Appellate Authority and by an order dated 28.08.2018, the said assessment order has been set aside. Therefore, the very basis of the lodgement of the complaint itself set aside and as such the petitioner is not at all liable to be prosecuted. He further submitted that while being so, suppressing the said fact that the said assessment order itself was set aside, the respondent herein granted sanction order dated 16.10.2018 to prosecute the petitioner under the Income Tax Act. Before the date of sanction, the assessment order itself set aside and it was wantonly suppressed by the respondent and obtained sanction from the authority concerned. Therefore, on this ground alone, the complaint cannot be sustained as against the petitioner, since the sanction authority without application of mind, without perusal of records, and without any reasonable satisfaction, accord

sanction to prosecute the petitioner herein. When the assessment order for the assessment year 2008-09 is the basis for the lodgement of complaint, the order of set aside ought to have been disclosed before the authority concerned before granting sanction to prosecute the petitioner herein.

2.3. He further submitted that if the criminal prosecution is allowed to be continued, the respondent could not be able to produce the assessment order before the trial Court as such there is absolutely no possibility for convicting for the offence under Section 276C(1) of Income Tax Act, since the assessment order itself was set aside by the Income Tax Appellate Authority. The very basis of lodgement of the complaint itself now set aside as such, there is no basis to proceed the complaint further. He further submitted that the Income Tax Appellate authority set aside the assessment order pertaining to the assessment year 2008-09 and remitted the matter back to the Assessing Officer. Further directed the Assessing Officer to re-examine the matter afresh and bring on record all the transaction correctly, thereafter decide the issue afresh in accordance with law. The Assessing Officer found that the petitioner entered into 165 share transactions for the total sum of Rs.155.20 crores, and subsequent short term capital gain arose from the said transaction is Rs.52.13 crores. After remitted the matter back for fresh consideration, the entire quantum of tax has been deducted and reduced the income tax. In fact, in the reduced amount major portion is interest for the tax and it is challenged by way of appeal. Therefore, the impugned complaint is nothing but clear abuse of law and it cannot be sustained as against the petitioner. Hence, he sought for quashment of the entire proceedings.

3. Per contra, the learned counsel appearing for the respondent filed counter and submitted that the complaint is not filed on the basis of any assessment order or assessment proceedings and it is in consequence of the concealment of share transactions in the return of income. The complaint has been filed after analysing the materials with the return of income and concluded that the transactions were suppressed and not brought in the return of income with a view to evade the payment of income tax due to the exchequer, thereby committed offence under Section 276C(1) of the Income Tax Act.

3.1. She further submitted that the petitioner had entered into 165 share transactions to the tune of Rs.155.20 crores which was not disclosed in the return of income filed for the assessment year 2008-09. The petitioner filed his return of

income for the assessment year 2008-09 only for Rs.3,10,226/-. The above said transactions having taxable income of Rs.52,13,72,203/- and it was not brought as capital gain in the return of income by the petitioner herein. Simultaneously, the assessment proceedings was also initiated under Section 147 & 148 of the Income Tax Act, and taxable income of Rs.52,13,72,203/- was determined and accordingly, the demand was raised by the Assessing Officer. Therefore, the petitioner was issued show cause notice, why prosecution proceeding should not be initiated for concealing the particulars of income. After receipt of the same, the petitioner submitted his explanation that he was under impression that the TDS Rs.3,53,22,371/- deducted on such income will be sufficient to meet the Tax liability. He also submitted that on enquiry further revealed that TDS amount disclosed in the Income Tax Return was only Rs.10,000/- and computation of the Total Income and Tax Memo did not show these share transactions. The act of the petitioner is nothing but to evade the payment of tax.

3.2. She further submitted that the complaint is not consequent to any assessment order and it is only based on the enquiry of the Investigation Wing of the Income Tax Department. The complaint is off shoot of investigation and is not on the basis of assessment order. More over, the assessment order is not set aside on merits but is remanded back by the Tribunal only on the technical aspect to decide the issue afresh. Accordingly, the Assessing Officer completed the assessment proceedings where the total demand was reworked at Rs.40,36,84,241/- and new amount payable was determined at Rs.4,21,31,164/-. After adjusting the TDS amount the tax liability and penalty stood at Rs.1,45,23,900/- and Rs.4,56,94,344/- respectively, by the assessment order dated 28.06.2019. Thus it is established that there was a concealment of income with a view to evade the payment of taxes. In support of her contention, she relied upon the following reported judgments :-

i) (2011) 3 SCC 437 - Radheshyam Kejriwal Vs. State of West Bengal

and anr

ii) 1992 195 ITR 137 Mad - G.S.R.Krishnamurthi Vs.

M.Govindaswamy

iii) 1984 AIR SC 1693 - P.Jayappan Vs. S.K.Perumal, I.T.O.

iv) CRMC.No.205 of 2015 dated 28.09.2018 - Arun Arya Vs. Income

Tax Officer

v) Crl.O.P.No.28469 of 2018 batch dated 18.03.2019 - J.Dinakaran Vs.

Deputy Director of Income Tax

Therefore, she sought for dismissal of the quash petition.

4. Heard Mr.P.Kumar, learned Senior Counsel appearing for the petitioner, and Ms.M.Sheela, learned Special Public Prosecutor for IT cases appearing for the respondent.

5. The petitioner is a sole accused in the complaint lodged by the respondent for which the offence punishable under Section 276C(1) of the Income Tax Act, 1961, alleging that the petitioner had entered into 165 share transactions to the tune of Rs.155.20 crores and it was not disclosed in the return of income filed for the assessment year 2008-09. The petitioner has filed return of income for the assessment year 2008-09 for Rs.3,10,226/-. However, the above said transactions have been taxable income of Rs.52,13,72,203/- and it was not brought as Capital Gain in the return of income by the petitioner. Further alleged that the petitioner being a Non Resident of India, residing in Dubai and carrying gold business in the name of M/s.Al Rayan Jewellery, Dubai and he assessed the tax under the jurisdiction of International Taxation Department, Chennai. He had two NRI bank accounts in Mumbai viz., Abudhabi Commercial Bank, Mumbai and HDFC Bank, Mumbai. He invested shares through M/s. Ventura Securities Ltd., Mumbai and HDFC Securities, Mumbai. On the show case notice issued by the Principal Director of Income Tax Investigation, Chennai, the petitioner replied that he was under impression that the TDS Rs.3,53,22,371/- deducted on such income will be sufficient to meet the tax liability. On enquiry, it revealed that the TDS amount disclosed in the income tax return was only Rs.10,000/-. Therefore, the petitioner evaded the payment of taxes which was due to the exchequer.

6. The learned Senior Counsel raised grounds on three folds. First one is that the complaint lodged only on the basis of the assessment order dated 25.02.2018 and the said assessment order itself was set aside by an order dated 28.08.2018 by the Income Tax Appellate Authority as such, there is no basis for the respondent to proceed further in the impugned complaint. The second one is that the respondent suppressed the above fact and obtained sanction from the authority concerned by an order dated 16.10.2018, to prosecute the petitioner for the offence punishable under Section 276C(1) of the Income Tax Act, 1961. The third point is that the sanction authority without considering the above order passed by the Appellate Authority and mechanically accorded sanction to prosecute the petitioner by the sanction order dated 16.10.2018, since the basis for lodgement of complaint viz., assessment order itself was set

aside by the Income Tax Appellate Authority, the respondent could not proceed the complaint further.

7. It is seen from the records, the complaint is not filed on the basis of any assessment order or assessment proceedings. On perusal of complaint, it is filed in consequence of the concealment of share transactions in the return of income. During the enquiry, it was noticed that the petitioner had entered into 165 share transactions during the year 2007-08. But he did not disclose any capital gain in the income tax filed for the financial year 2007-08 relevant to the assessment year 2008-09. The petitioner filed his return of income for Rs.3,10,226/-. But the said transactions having taxable income of Rs.52,13,72,203/- was not brought as capital gain in the return of income by the petitioner. The act of the petitioner established that he was with a view to evade the payment of tax which was due to the exchequer. Therefore, the order of assessment is nothing to do with the present proceeding.

8. Subsequently, the Income Tax department initiated assessment proceedings under Section 147 & 148 of the Income Tax Act, and determined the taxable income which would be Rs.52,13,72,203/- and accordingly the demand was raised. Though it was set aside by the Income Tax Appellate Authority by an order dated 28.08.2018, it was observed that the share transactions were admittedly not disclosed by the assessee viz., the petitioner herein. Further observed that since the figures with regard to share transactions are claimed to be wrongly mentioned by the CIT(Appeals), the matter needs to be re-examined. Accordingly remanded the matter back to the Assessing Officer and directed to re-examine the matter afresh. Accordingly the Assessing Officer completed the assessment proceedings and total demand was reworked as Rs.40,36,84,241/- and the net amount payable was determined at Rs.4,21,31,164/-. After adjusting the TDS amount the tax liability and the penalty stood at Rs.1,45,23,900/- and Rs.4,56,94,344/- respectively, by an assessment order dated 28.06.2019. Thus it is established that there was a concealment of income with a view to evade the payment of taxes. Therefore, the order of assessment is nothing to do with the present complaint and it is simultaneous proceeding of the Income Tax Department.

9. That apart, the sanctioning authority viz., the Principal Director of Income Tax Investigation, Chennai, issued show cause notice to the petitioner, why prosecution proceeding under Section 276C(1) of the Income Tax Act, would not be initiated against the petitioner for wilful attempt to evade the tax, interest/penalty, chargeable or imposable under the Act. On

receipt of the same, the petitioner appeared through his Chartered Accountant viz., Kalyanasundaram, under authorization and submitted his written submission stating that the prosecution proceedings may be kept in abeyance until the disposal of the appeal filed before the Income Tax Appellate Tribunal, Chennai. Therefore, the authorized representative of the petitioner informed the sanctioning authority about the pendency of the appeal. The learned Principal Director of Income Tax, after careful consideration of the submission made by the petitioner through his authorized representative stated as follows:-

"6. The submissions made by the assessee have been carefully considered. The submissions made are not acceptable for the following reasons:-

i) The assessee has not disclosed the Capital Gain arising on sale of shares in the Return of Income filed for the Assessment Year 2008-09. But for the enquiries made by the Deputy Director of Income Tax, the income chargeable to tax would have escaped assessment.

ii) The volume of transactions are high; assessee has entered into 165 share transactions for a total sum of Rs.155.20 crores. The short term capital gain arising from the said transaction is Rs.52.13 crores. There is wilful failure on the part of the assessee in not disclosing the income under head Capital Gains in the return of income filed and paying due taxes thereon. Though tax has been deducted, as per assess's own admission, taxes have not been fully deducted.

iii) Prosecution proceedings are separate and distinct from assessment/reassessment proceedings. There is no requirement in the Act that assessment proceedings should be completed before launching of prosecution. One of the functions of the Investigation Wing of the Income-tax Department is to take deterrent action against large tax evaders. Prosecution being the most potent weapon in the fight against the tax evasion, it is required that prosecution should be filed

at the earliest. The proposition that prosecution can be launched without waiting for assessment to be completed is upheld by the Hon'ble Supreme Court in the case of Jayappan Vs. S.K.Perumal, First ITO 1984 AIR 1693."

The sanctioning authority further stated that the petitioner has willfully attempted to evade tax by not filing true and correct return of income and thereby not disclosing the correct turnover and the income derived by him. Therefore, the presumption contemplated under Section 278 E of the Income Tax Act comes into play and Court is to presume that the assessee has not admitted the true and correct income and thereby the assessee has committed an offence under Section 276C(1) of the Income Tax Act, 1961. Therefore, the Principal Director of Income Tax considered the submission made by the petitioner and stated the reasons in detail manner and accorded sanction to prosecute the petitioner.

10. In support of this contention, the learned Special Public Prosecutor relied upon the judgment reported in 1984 AIR (SC) 1693 in the case of P.Jayappan Vs. S.K.Perumal, I.T.O., as follows :-

".....we are of the view that the pendency of the reassessment proceedings cannot act as a bar to the institution of the criminal prosecution for offences punishable under section 276C or section 277 of the Act. The institution of the criminal proceedings cannot in the circumstances also amount to an abuse of the process of the court....."

She also relied upon the judgment of the Hon'ble Jammu & Kashmir High Court made in CRMC.No.205 of 2015 dated 28.09.2018 in the case of Arun Arya Vs. Income Tax Officer, as follows :-

".....In the fight against tax evasion, monetary penalties are not enough. When a calculating tax dodger finds it a profitable proposition to carry on evading taxes over the years, if the only risk to which he is exposed is a monetary penalty in the year in which he happens to be caught. The public in general also tends to lose faith and confidence in tax administration when a tax evader is caught, but the administration lets him get away lightly after paying only a monetary penalty- when money is no longer a major

consideration with him if it serves his business interest....."

She also relied upon the judgment reported in (2011) 3 SCC 437 in the case of Radheshyam Kejriwal Vs. State of West Bengal & anr, in which the Hon'ble Supreme Court of India held as follows :-

- "(i) Adjudication proceeding and criminal prosecution can be launched simultaneously;
- (ii) Decision in adjudication proceeding is not necessary before initiating criminal prosecution;
- (iii) Adjudication proceeding and criminal proceeding are independent in nature to each other;
- (iv) The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;
- (v) Adjudication proceeding by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20 (2) of the Constitution or Section 300 of the Code of Criminal Procedure;
- (vi) The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue; and
- (vii) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances can not be allowed to continue underlying principle being the higher standard of proof in criminal cases.

In our opinion, therefore, the yardstick would be to judge as to whether allegation in the adjudication proceeding as well as proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits. In case it is found on merit that there is no

contravention of the provisions of the Act in the adjudication proceeding, the trial of the person concerned shall be in abuse of the process of the court. "

She also relied upon the judgment of this Court passed in Crl.O.P.No.28469 of 2018 batch cases dated 18.03.2019 in the case of J.Dinakaran Vs. Deputy Director of Income Tax, which held as follows:-

".....The petitioner willfully made false statement of return of income and willfully under reported the income earned. Therefore, the entire proceedings cannot be quashed....."

It is held that the adjudication proceedings and the criminal prosecution can be launched simultaneously and the decision in adjudication proceeding is not necessary before initiating criminal prosecution.

11. In the case on hand, the assessment order passed by the Assessing Officer has been set aside by the Income Tax Appellate Authority by an order dated 28.08.2018. Even when the appeal was pending, the authorized representative of the petitioner submitted before the sanctioning authority and it was duly considered and accorded sanction for the reason that the prosecution proceedings are separate and distinct from the assessment or re-assessment proceedings. There is no requirement under the Act that the assessment proceedings should be completed before launching prosecution. Therefore, the above judgments are squarely applicable to the case on hand and the respondent is rightly lodged the complaint as against the petitioner for the offences under Section 276C(1) of the Income Tax Act, 1961.

12. In fact, after the order passed by the Income Tax Appellate Authority, the Assessing Officer completed the assessment proceedings, where the total demand was reworded for Rs.40,36,84,241/- and the net amount payable was determined at Rs.4,21,31,164/-. After adjusting the TDS amount the tax liability and the penalty stood at Rs.1,45,23,900/- and Rs.4,56,94,344/- respectively by an assessment order dated 28.06.2019. It is categorically established that there was a concealment of income with a view to evade the payment of taxes. Therefore, the grounds raised by the learned Senior Counsel appearing for the petitioner are not helpful to the case on hand.

13. In view of the above discussions, this Court is not inclined to quash the proceedings in E.O.C.C.No.401 of 2018 on the file of the Court of the Additional Chief Metropolitan Magistrate, Economic Offences-II, Egmore, Chennai. The petitioner is at liberty to raise all the grounds before the trial Court. Considering the facts and circumstances of case, the personal appearance of the petitioner is dispensed with and he shall be represented by a counsel after filing appropriate application. However, the petitioner shall be present before the Court at the time of furnishing of copies, framing charges, questioning under Section 313 Cr.P.C. and at the time of passing judgment. The trial Court is directed to complete the trial within a period of six months from the date of receipt of copy of this Order.

14. Accordingly, this Criminal Original Petition stands dismissed. Consequently, connected miscellaneous petitions are also closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

rts
To

1. The Additional Chief Metropolitan Magistrate,
Economic Offences-II, Egmore, Chennai.
 2. The Deputy Director of Income Tax (Inv)
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