

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL SIDE APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2698 OF 2021

Nayan Jayantilal Balu
residing at 72, 1st Floor,
Bhavangiri Building, Nanubhai
Desai Road, Near 1st Khetwadi Lane,
Mumbai 400 004.

.. Petitioner

v/s.

1. Union of India. Through the Secretary,
Department of Revenue, Ministry of Finance,
Government of India, North Block,
New Delhi-110 001.

2. The Central Board of Direct Taxes,
Department of Revenue, Ministry of Finance,
Government of India, North Block,
New Delhi-110 001.

3. Principal Commissioner of Income Tax- 19
Designated Authority, Mumbai
Matru Mandir, Grant Road (West),
Tardeo Road, Mumbai-400 007

4. Income-tax Officer, 19(2)(4),
Matru Mandir, Grant Road (West),
Tardeo Road, Mumbai-400 007.

5. Assistant Commissioner of Income-tax- 19(1)
Matru Mandir, Grant Road (West),
Tardeo Road, Mumbai-400 007.

6. State of Maharashtra .. Respondents.

Mr. Dharan V. Gandhi, for the Petitioner.
Mr. Akhileshwar Sharma, for the Respondents.

**CORAM: K. R. SHRIRAM &
AMIT B. BORKAR, JJ.**

DATED : 7th DECEMBER, 2021.

JUDGMENT:- (Per Amit B. Borkar, J)

By this Petition under Article 226 of the Constitution of India read with Section 482 of Code of Criminal Procedure, Petitioner is challenging the order dated 25th January 2018 passed by Respondent No.3, sanctioning the prosecution against Petitioner under Section 276C(1) of the Income Tax Act, 1961 (the said 'Act') and complaint filed against Petitioner in 38th Court of Additional Chief Metropolitan Magistrate, Ballard Pier, Mumbai bearing CC No.1123 of 2018.

2 Petitioner is engaged in the business of trading in ferrous and non-ferrous metals. Petitioner filed his return of income on 20th March 2010 for Assessment Year 2009-10. By notice dated 28th March 2014, the assessment of Petitioner was re-opened under Section 148 of the said Act. The Assessing Officer on 4th March 2015 passed an order of assessment, making addition of Rs.34,25,377/- being 12.5% of alleged bogus purchases of Rs.2,74,03,016/-. The Assessing Officer also issued show cause notice under Section 271(1)(c) of the said Act.

3 Petitioner, being aggrieved by order of assessment, filed an appeal with Commissioner of Income Tax (Appeals) [CIT(A)], Bombay, on 27th April 2015.

4 On 23rd March 2016, Assessing Officer issued another notice under Section 148 of the said Act, to which Petitioner replied. The

Assessing Officer, after hearing Petitioner made the addition of Rs.12,91,069/- being 12.5% of alleged bogus purchases of Rs.1,03,28,552/- by order dated 30th November 2016. CIT(A) by its order dated 19th December 2016 confirmed the order of Assessing Officer passed on 4th March 2015

5 Being aggrieved, Petitioner filed an Appeal before the Income Tax Appellate Tribunal (ITAT), which was dismissed on 3rd July 2017.

6 On 22nd November 2017, Respondent No.3 issued a show cause notice to Petitioner as to why prosecution under Section 276C(1) and 277 of the said Act should not be initiated against Petitioner.

7 Petitioner on 18th December 2017 filed a reply, pointing out that additions made were purely on an estimated basis. No penalty is levied on Petitioner. Thus, prosecution should not be instituted under Section 276C(1) of the said Act. On 26th March 2018 Respondent No. 4 filed Criminal complaint no. 1123/2018 against petitioner. After filing the complaint, Assessing Officer passed an order, imposing a penalty on Petitioner of Rs.10,58,440/- which was challenged by Petitioner before the CIT(A) on 2nd May 2018.

8 According to Petitioner, he became aware of the prosecution lodged against him under Section 276C(1) of the said Act when he received a summons dated 29th March 2019, requiring him to appear before the Additional Metropolitan Magistrate on 13th May 2019.

9 Petitioner has, therefore, filed present Petition on 12th July 2021, challenging the order of sanction of prosecution dated 25th January 2018 and filing of complaint bearing CC No.1123 of 2018.

10 Respondents have filed a reply as per order of this Court dated 24th August 2018. Petitioner has filed his affidavit in rejoinder on 22nd September 2021.

11 We have heard Mr. Dharan Gandhi, Counsel for Petitioner and Mr. Akhileshwar Sharma, Counsel for the Respondents.

12 Mr. Gandhi invited our attention to the instructions issued by Director (INV-I) and OSD(Legal), North Block, New Delhi. He submitted that prosecution under Section 276C(1) of the said Act could be initiated only when a penalty exceeding Rs.50,000/- is imposed under Section 271C (1) of the said Act, which is confirmed by ITAT. He submitted that the order of imposition of penalty is passed after the filing of the complaint. Said order is yet to be confirmed by ITAT. Therefore, the order of sanction of prosecution is contrary to law.

13 Mr. Sharma submitted that Petitioner had knowledge of the order of sanction in the first week of April 2019. Still, Petitioner has filed present Petition only on 12th July 2021 without explaining laches in filing the Petition. He invited our attention to Section 276 of the said Act. He submitted that Respondents are entitled to initiate prosecution whenever a person willfully attempts to evade any tax, penalty or interest chargeable. He submitted that allegation against Petitioner is of evasion

of tax and, therefore, ingredients of the offence alleged against Petitioner are, *prima facie*, satisfied.

14 For effective adjudication of the issue involved, it is necessary to set out relevant provision of the Income Tax Act. Section 276C(1) reads as under:-

“Section 276C (1):-

If a person willfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or [imposable, or under reports his income] 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 [or tax on under reported income] exceeds [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 [two] years and with fine.”

15 On perusal of the provision, it appears that following ingredients must be fulfilled to attract the offence under Section 276(C).

- a) Willful attempt to evade any tax.*
- b) Willful attempt to evade any penalty; or*
- c) Willful attempt to evade any interest chargeable or imposable under this Act; or*
- d) under reports his income.*

A perusal of Section 276 (C) of the said Act shows that a prosecution can be initiated against the person even if one of the three ingredients, i.e. (a)

evasion of tax, (2) evasion of penalty and (3) evasion of interest chargeable, is fulfilled. The order of sanction at Ex. 'D-3' shows that prosecution under Section 279(1) of the said Act has been accorded after recording satisfaction that Petitioner has attempted to evade tax. It is stated in the sanction order that Petitioner has failed to substantiate the claim of purchases amounting to Rs. 2,74,03,016/- and the assessing office held the purchases to be bogus and made an addition of Rs. 34,25,377/- (12.5% of the bogus purchases.) It is well settled that before granting sanction the authority must have before it the necessary report and the material facts which *prima facie* establish the commission of offence alleged for and that the sanctioning authority would apply its mind to those facts. The order of sanction is only an administrative act and not a quasi-judicial one nor is a lis involved. Therefore, the order of sanction need not contain detailed reasons in support thereof. But the basic facts that constitute the offence must be apparent on the sanction order and the record must bear out the reasons in that regard. A perusal of the sanction order clearly indicates that the sanctioning authority appears to have applied its mind to the facts placed before it and considered them and then granted sanction.

16 Laying down the scope of interference by the High Court in matters of quashing of FIR or complaint, the Apex Court, in the leading case of ***State of Haryana v. Bhajan Lal***,¹, observed as follows:—

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under chapter XTV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under arti-

1 1992 Supp (1) SCC 335

cle 226 of the inherent powers under Section 482 of the Code, which we have extracted and reproduced above, we give the following categories of cases by way of illustration, wherein such power could be exercised either to prevent abuse of the process of the any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases, wherein such power should be exercised:—

(1) Where the allegations made in the First Information Report or the complaint even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations made in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognisable offence justifying an investigation by police officers under section 156(1) of the Code except under an order of a Magistrate within the purview of section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegation in the FIR do not constitute a cognisable offence but constitute only a non-cognisable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific pro-

vision in the Code or the concerned Act providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance of the accused and with a view to spite him due to private and personal private grudge."

In the case of *Bhajan Lal* (supra), the Apex Court gave a note of caution on the powers of quashing of a criminal proceeding in the following words:

"103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."

17 The scope of power under section 482 of the Code of criminal procedure has been succinctly laid down by the Apex Court in the case of ***Rajiv Thapar v. Madan Lal Kapoor***²,

"28. The High Court, in exercise of its jurisdiction under Section 482 CrPC, must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of the allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused are. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so because it would result in giving finality

2 (2013) 3 SCC 347

to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed by establishing his defences by producing evidence in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position that in a case where the prosecution/complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held.”

18 Perusal of the complaint launched against Petitioner also disclose allegations that Petitioner failed to substantiate the claim of purchases amounting to Rs. 2,74,03,016/- and the assessing officer held the purchases to be bogus and made an addition of Rs. 34,25,377/- (12.5% of the bogus purchases). On Appeal by Petitioner, CIT (A) vide order dated 19.12.2016 confirmed the addition. ITAT also confirmed said order. It is stated that, therefore, Petitioner has willfully and intentionally evaded his tax liability.

19 Taking into consideration accusations in the complaint and material on record, we are satisfied that, *prima facie*, the ingredients of the offences under Section 276C(1) of the said Act are satisfied. At this stage, this Court can not go into the truth or otherwise of the allegations made against Petitioner.

20 In the circumstances, we are satisfied that no interference under extraordinary jurisdiction under Article 226 of the Constitution of

India is called for.

21 Petition is, therefore, dismissed.

(AMIT B. BORKAR,J.)

(K. R. SHRIRAM,J.)

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