

ORDER SHEET

WPO/2518/2022  
IN THE HIGH COURT AT CALCUTTA  
CONSTITUTIONAL WRIT JURISDICTION  
ORIGINAL SIDE

DILIP KUMAR AGARWAL  
VS  
UNION OF INDIA AND ORS

BEFORE:

The Hon'ble JUSTICE MD. NIZAMUDDIN

Date: 26<sup>th</sup> September, 2022.

Appearance:

Mr. J.P. Khaitan, Sr.Adv.

Mr. Pratyush Jhunjhunwala, Adv.

Mr. Mrigank Kegrival, Adv.

Mr. Indranil Banrjee, Adv.

Mr. Samit Rudra, Adv.

...For the Petitioner

Mr. Om Narayan Rai, Adv.

...For the Respondents

The Court: Heard learned counsel appearing for the parties.

Affidavit of service filed in Court be kept with the records.

By this writ petition, petitioner has challenged the impugned show cause notices dated 17<sup>th</sup> August, 2022 under Section 279(1) read with Section 2(35) of the Income Tax Act, 1961 for prosecution under Section 276C(1), 277 and 277A of the Income Tax Act, 1961 relating to assessment year 2021-2022 and further making prayer for stay of impugned penalty proceeding on the basis of notice dated 31<sup>st</sup> March, 2022 under Section 274 read with Section 271AAB of the Income Tax Act, 1961.

Mr. Khaitan, learned senior counsel submits that the impugned penalty proceeding initiated on the basis of assessment order is already subject matter of challenge before the Appellate Authority and the assessing officer should not proceed with the penalty proceeding till the final outcome

of the appeal in question and in support of his such submission he relies on Section 275(1) (a) of the Act.

So far as show cause notice against criminal prosecution is concerned, Mr. Khaitan submits that criminal prosecution should be waited and should not be initiated till the final outcome of the appeal against the assessment order in question out of which the appeal in question is pending. In support of his contention he relies on a decision of the Hon'ble Supreme Court in the case of "Commissioner of Income Tax vs. Bhupen Champak Lal Dalal and Anr." reported in 248 ITR 830.

On perusal of the aforesaid decision of the Hon'ble Supreme Court I am of the view that the said judgment is not applicable in the facts and circumstances of this present case for the reason that in that case prosecution was already lodged before the Metropolitan Magistrate and it was held in the said decision that High Court had already stayed the proceedings and the Hon'ble Supreme Court did not interfere with such order of the High Court staying criminal proceeding which was pending before the Metropolitan Magistrate. But in this case factual and legal position as of today is that no criminal prosecution has been initiated before the learned Magistrate and as such this case is premature for invoking constitutional writ jurisdiction of this Court.

Mr. Rai, learned counsel appearing for the respondent Income Tax Authorities opposes this writ petition by contending that the criminal proceeding before the Magistrate is independent of any assessment or adjudication proceeding and both can run simultaneously and in support of his contention he relied on a decision of the Hon'ble Supreme Court in the

case of “Radheshyam Kejriwal vs. State of West Bengal and Anr.” reported in (2011) 3 SCC 581, particularly paragraphs 37 and 38 of the said case which are quoted as hereunder :

“37 We find substance in the submission of Mr. Sharan. There may appear to be some conflict between the views in Standard Chartered Bank and L.R. Melwani holding that adjudication proceedings and criminal proceeding are two independent proceedings and both can go on simultaneously and finding in the adjudication proceedings is not binding on the criminal proceeding and the judgments of this Court in Uttam Chand, G.L. Didwania and K.C. Builders wherein this Court had taken a view that when there is categorical finding in the adjudication proceedings exonerating the person which is binding and conclusive, the prosecution cannot be allowed to stand. The judgments of this Court are not to be read as a statute and when viewed from that angle there does not seem any conflict between the two sets of decisions. It will not make any difference on principle that latter judgments pertain to cases under the Income Tax Act.

38. The ratio which can be culled out from these decisions can broadly be stated as follows :

- i) Adjudication proceedings and criminal prosecution can be launched simultaneously;
- ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;
- iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

- iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;
- v) Adjudication proceedings 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 proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and
- vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.”

Mr. Rai further on instruction submits that in this case sanction for prosecution has already been granted.

Mr. Rai also relies on a decision of the Supreme Court in the case of “Sasi Enterprises vs. Assistant Commissioner of Income Tax” reported in (2014) 5 SCC 139, particularly paragraph 30 of the said decision which is quoted hereunder :

“30. We also find no basis in the contention of the learned Senior Counsel for the appellant that pendency of the appellate proceedings is a

relevant factor for not initiating prosecution proceedings under Section 276-CC of the Act. Section 276-CC contemplates that an offence is committed on the non-filing of the return and it is totally unrelated to the pendency of assessment proceedings except for the second part of the offences for determination of the sentence of the offence, the Department may resort to best judgment assessment or otherwise to past years to determine the extent of the breach. The language of Section 276-CC, in our view, is clear so also the legislative intention. It is trite law that as already held by this Court in *B. Premanand v. Mohan Koikal* that :

“19. ‘19. It is well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is the determinative factor of legislative intent.....”

If it was the intention of the legislature to hold up the prosecution proceedings till the assessment proceedings are completed by way of appeal or otherwise the same would have been provided in Section 276-CC itself. Therefore, the contention of the learned Senior Counsel for the appellate that no prosecution could be initiated till the culmination of assessment proceedings, especially in a case where the appellant had not filed the return as per Section 139(1) of the Act or following the notices issued under Section 142 or Section 148 does not arise.”

Considering the facts and circumstances of the case as appears from record and submissions of the parties and relevant provisions of law wherefrom nowhere it appears that there is a specific bar under the Income Tax Act in initiating criminal proceedings/prosecution case during the

pendency of an appeal against the assessment order. As such I am not inclined to interfere with the impugned show cause notices for initiation of prosecution which according to me is premature at this stage.

So far as the impugned penalty proceeding is concerned, in view of Section 275(1) of the Income Tax Act, 1961, the said proceedings should be stayed and should be waited till the final outcome of the Appeal in question which arises from the assessment order in question.

With these observations and directions, this writ petition being WPO 2518 of 2022 stands disposed of.

(MD. NIZAMUDDIN, J.)

TR/