IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 05.04.2023

Pronounced on : 12.04.2023

CORAM

THE HONOURABLE MR. JUSTICE SUNDER MOHAN

Crl.O.P.No.23734, 23751 and 23738 of 2019

and

Crl.M.P.No. 12498, 12502 and 12510 of 2019

1.M/s.Bharathiraja Hospitals and Research Centre Pvt.Ltd.,
No.20, G.N.Chetty Road,
T.Nagar,
Chennai – 600 017.

Represented by its Directors

2.Dr.C.Natesan,
No.20, G.N.Chetty Road,
T.Nagar, Chennai – 600 017.

3.Dr.Vasanthi Natesan,

Director,

No.14, Porur Somasundaram Street,

T.Nagar,

Chennai – 600 017. Petitioners in all Crl.O.Ps

Vs.

Deputy Commissioner of Income Tax,

TDS Circle – 1,

Chennai – 600 034. ...Respondent in all Crl.O.Ps

COMMON PRAYER : Criminal Original Petitions have been filed under Section 482 of the Criminal Procedure Code, to quash the proceedings in E.O.C.C.Nos.16, 17 and 18 of 2019 on the file of Additional Chief Metropolitan Magistrate, Economic Offences – I, Egmore, Chennai.

For Petitioners
in all three cases : Mr.K.Suresh Babu
for M/s.M.Balaji

For Respondent
in all three cases : Mr.V.J.Arul Raj
Special Public Prosecutor
for Income Tax

C O M M O N O R D E R

The petitions have challenged the complaints on the file of the Additional Chief Metropolitan Magistrate, Economic Offences – I, Egmore, Chennai under Section 276 B r/w 278 B of the Income Tax Act, 1961.

2.It is alleged in the complaints that the first petitioner had deducted TDS from the payments made to various parties. However, after deducting the tax at source, the petitioners failed to deposit the tax to the credit of the Central Government within the prescribed time. The impugned complaints pertain to three different Assessment Years. It is alleged that in all the three Assessment Years, the petitioners had delayed the deposit of tax deducted at sources and therefore, they were liable for offence under Section 276 B r/w 278 B of the Income Tax Act.

3.The learned counsel for the petitioners would submit that the second and third petitioners are aged above 70 years. He pointed out to the Central Board of Direct Taxes (CBDT) instructions No.5051 of 1991 dated 07.02.1991 wherein, there is an instruction given to the prosecuting officers not to initiate prosecution against persons who had attained the age of seventy, at the time of commission of offence. The learned counsel for the petitioners submitted that the Honourable Supreme Court in ***Union of India vs. Arviva Industries Pvt. Ltd and others*** reported in ***(2014) 3 SCC 159*** held that the circulars are binding on the Department; that the revenue cannot take a stand contrary to its own circulars; that in any case, the petitioners 2 and 3 cannot be said to be the principal officers of the company. There is no allegation in the impugned complaint to show that they were the persons in charge of and responsible to the company for the conduct of its business. The learned counsel relied upon the Judgment of this Court in W.P.No.34010 of 2014 dated 28.03.2018 ***(Mr.Kalanithi Maran vs. Union of India***), wherein, this Court had held that where there is no material to show that the person prosecuted is the principal officer then, the persons cannot be asked to undergo the ordeal of trial. The learned counsel also pointed out the Judgment of the Hon'ble High Court of Delhi in Crl.R.P.No.36 of 2011 in ***Arunkumar Bhatia and another vs. Vijaykumar and others*** wherein, the Delhi High Court had quashed the prosecution since the accused persons were above the age of seventy years. Therefore, the learned counsel submitted that the petitioners 2 and 3 have to be exonerated and the impugned complaints insofar as the petitioners are concerned may be quashed.

4.Mr.V.J.Arul Raj, the learned Special Public Prosecutor appearing for the Income Tax Department would submit that the Department had issued a subsequent circular on 24.04.2008 stating that the instruction that a person above 70 years shall not ordinarily be prosecuted is subject to Clause 4 in the said circular which states that notwithstanding the other provisions, the Commissioner of Income Tax (CIT) can sanction the prosecution keeping in view the nature and magnitude of the offence. He submitted that in this case the Commissioner of Income Tax considering the nature and magnitude of the offence had sanctioned the prosecution against the petitioners. The learned Special Public Prosecutor for Income Tax further relied upon the Judgment of the Hon'ble Apex Court in ***Madhumilan Syntex Ltd., and others vs. Union of India and another*** reported in ***(2007) 11 SCC 297;*** wherein, the Hon'ble Apex Court held that the question whether the accused person is a principal officer or a person in charge of and responsible to the company for the conduct of its business has to be adjudicated only before the Trial Court. The Honourable Supreme Court in the said case had dismissed the quash petition.

5.This Court on perusal of the complaints and upon hearing the submissions made by the learned counsels on either side finds that the allegation is that the petitioners had failed to deposit the TDS on time which is an offence punishable under Section 276 B of the Income Tax Act. The petitioners 2 and 3 are sought to be prosecuted as principal officers of the company and also because they are vicariously liable under Section 278 B of the Income Tax Act. It is also seen that the Commissioner of Income Tax who is the competent authority had sanctioned the prosecution against the petitioners. The circular pointed out by the petitioners that the persons above 70 years cannot normally be prosecuted may not be applicable to the facts of the instant case. As rightly pointed out by the learned counsel for the respondent, the Department had issued another circular. The relevant clauses read as follows:-

> *"3.4 A case of an Individual shall not ordinarily be processed for launching prosecution for any offence, if the individual concerned has attained the age of 70 years at the time of commission of the offence.*

4. Notwithstanding anything contained in this procedure, prosecution under relevant provisions of Direct tax laws shall be launched in all cases where:

(a) The offence involves major fraud or scam or misappropriation of government funds or public property or;

(b) The assessee is linked to any anti-national/terrorist activity and cases being investigated by CBI, Police, Enforcement Directorate or any other Central Government, agencies; or

(c) The assessee has enabled others in large-scale concealment of income; or

(d) Any other case, where the CIT considers it a fit case for launching prosecution, keeping in view the nature and magnitude of the offence."

6.The above would show that the general rule that persons above 70 years cannot be prosecuted is subject to exceptions and in this case, the Commissioner of Income Tax (CIT) considered that this is a fit case for launching prosecution. The other submission of the learned counsel for the petitioners is that there is no averment to show as to how petitioners are either principal officer or persons in charge of and responsible for the conduct of the business of the company. This Court finds that this issue was decided by the Honourable Apex Court in ***Madhumilan Syntex Ltd., and others vs. Union of India and another*** reported in ***(2007) 11 SCC 297.*** In the said Judgment, the Honourable Apex Court held as follows:

> "*43.From the statutory provisions, it is clear that to hold a person responsible under the Act, it must be shown that he/she is a "principal officer" under Section 2 (35) of the Act or is "in charge of" and "responsible for" the business of the company or firm. It is also clear from the cases referred to above that where necessary averments have been made in the complaint, initiation of criminal proceedings, issuance of summons or framing of charge, cannot be held illegal and the court would not inquire into or decide correctness or otherwise of the allegations levelled or averments made by the complainant. It is a matter of evidence and an appropriate order can be passed at the trial.*"

7.Hence, this Court is of the view that the points raised by the petitioners have to be adjudicated only before the trial Court. The petitioners 2 and 3 are at liberty to submit before the trial Court that their case would not fall within the exceptions and that they are entitled to the benefit of the circular which restricts initiation of prosecution against persons above 70 years of age. It is needless to say that they would also be entitled to show that they were not in charge and responsible to the company for the conduct of its business, before the trial Court. Therefore, this Court is not inclined to entertain these petitions.

8.Since the petitioners 2 and 3 are admittedly aged above 70 years, their appearance before the trial Court is dispensed with unless, the learned Magistrate considers their appearance necessary for the progress of the Trial.

9.With the above observations, the Criminal Original Petitions are dismissed. Consequently, the connected miscellaneous petitions are closed.

12.04.2023

dk
NCC : Yes/No
Index : Yes/No
Speaking or Non Speaking Order

SUNDER MOHAN. J,

dk

To

The Deputy Commissioner of Income Tax,
TDS Circle – 1,
Chennai – 600 034.

Pre Delivery Common Order in

Crl.O.P.Nos.23734, 23751 and 23738 of 2019

and

Crl.M.P.Nos.12498, 12502 and 12510 of 2019

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