

CRIMINAL APPEAL NO.117/2020.

JUDGMENT

MHCC020024482020



Presented On : 31.01.2020.
Registered On : 31.01.2020.
Decided On : 30.01.2023.
Duration : 02Y 11M 30D

IN THE COURT OF ADDITIONAL SESSIONS JUDGE MUMBAI,

AT GR. BOMBAY

CRIMINAL APPEAL NO. 117 OF 2020.

IN

C.C.NO.136/SW/2016.

Hema Chetan Shah

... Appellant/
Org. Respondent.

Vs.

1. Government of India,

2. The State of Maharashtra.

... Respondents/
Org. Applicants.

Appearance :-

Ld. Adv. Mr. Bharat Gandhi A/w Adv. A. K. Chauhan for the Appellant.
Ld. Adv. Mr. Pranil Pawar A/w Adv. Madhura Muley H/f SPP Ravi Goenka for the Respondent No. 1.
Ld. APP. Mr. Abhijit Gondwal for the State/ Respondent No.2.

CORAM : H.H. THE ADDITIONAL SESSIONS JUDGE,
DR. A. A. JOGLEKAR (C.R.NO.37.)

DATED : 30TH JANUARY, 2023.

J U D G M E N T

Appellant being aggrieved by the impugned order/judgment of conviction dated 20.12.2019 passed in C.C.NO.136/SW/2016, by the Addl. Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai, seeks to set aside and quashing the impugned order passed by the Ld. Trial Court.

2. The fulcrum of the facts giving rise to file present appeal ensue as under,
3. The parties in the appeal would be referred to, as per their original nomenclature in the proceeding before Ld. Trial Court.
4. It is the case of the complainant that, there was a search and seizure conducted as on dated 05.05.2014 and the documents were handed over to accused as on 26.09.2016. The notice under Section 153-A of Income Tax Act was issued to the accused as on 27.03.2015 for filing of the Income Tax Returns for the accounting year 2014-2015 within 30 days from the receipt of notice. The notice was served upon the accused as on 28.03.2015, and it was incumbent upon the accused to have filed such returns for the afore-stated assessment year within stipulated limitation. But the accused failed to file such Income Tax Returns within stipulated limitation. Further, show cause notice dated 22.09.2016 was served upon the accused thereby asserting to show cause why such prosecution under Section 276CC of the Income Tax Act be not initiated against the accused and against which no response was filed. Therefore, such prosecution

was initiated against the accused for willful failure on the part of the accused to furnish Income Tax Returns as required under the Act. And thus, the offence was registered under Section 276CC read with Section 278E of the Income Tax Act.

5. Thereafter, post recording of evidence before the charge, charge was framed by the Ld. Trial Court as on dated 18.03.2019, wherein the accused pleaded not guilty and claimed to be tried. Post affording opportunities to either parties Ld. Trial Court by way of impugned judgment and order convicted the accused and also directed to pay fine. Thus, aggrieved by the said judgment and order dated 20.12.2019 the accused has preferred the present appeal.

6. The Ld. Advocate for accused has filed their common written notes of arguments (placed in Cri. Appeal No.106/2020) and has stated that, the very provisions under Section 64 and 65 of the Evidence Act are not complied with as the documents must be proved by primary evidence except in the case hereinafter mentioned. Also, that Section 65 of the Evidence Act provides for appreciation of secondary evidence and that the Exh.13 and Exh.14 do not fall in such category and therefore, the said evidence ought to have been discarded by the Ld. Trial Court. It is further stated that, as per the panchnama dated 05.05.2014 it is nowhere stated that, the personal data of the accused qua the seized documents/hard disk were only related to the company i.e. M/s. Decent Dia Jewels Pvt. Ltd.

7. Also, that the Ld. Trial Court failed to appreciate that the prosecution has failed to prove the case beyond reasonable doubt.

Moreover, considering the case in hand the ingredients of Section 276CC read with Section 278E of the Income Tax Act do not match with that of the case in hand. Also, that the Ld. Trial Court committed an error on the factual aspect of the matter and that has also failed to consider the testimonial evidence led by the prosecution in proper perspective, which generated a reasonable doubt, as accused was prevented from filing returns as the relevant files/papers had been taken in custody of IT Department as on 05.05.2014. Thus, upon all such set of facts the Ld. Advocate for accused prayed for allowing the appeal and thereby setting aside the impugned judgment and order dated 20.12.2019.

8. Per contra the Ld. Advocate for complainant has filed their written notes of arguments vide Exh.5 and *inter alia* have resisted the appeal contentions and grounds upon various factors. It is categorically stated that, the accused is an individual assessee was issued with the impugned notice dated 27.03.2015 which was duly served upon him and inspite of that, the accused failed to comply the show cause notice issued against him. Thereafter, upon obtaining appropriate sanction under Section 279(1) of the Income Tax Act which was duly accorded by the Principal Commissioner of Income Tax such prosecution was initiated against the accused. It is further stated that the complainant agency had afforded several opportunities to the accused for such compliance of notice under Section 153(A) of the Income Tax Act and the accused responded vide letters requesting for photocopy of documents seized during search for compliance of the notice under Section 153(A) which was

only an excuse for causing willful delay the filing of Income Tax Returns.

9. In spite of this the complainant agency as on dated 15.09.2016 gave such last and final opportunity to the accused to collect such photocopy of seized documents by 23.09.2016. It is pertinent that, the accused in capacity as director of M/s. Decent Dia Jewels Pvt. Ltd., complied with filing of returns, but failed to comply filing of Income Tax Returns pertaining to his individual entity. Furthermore, the Ld. Advocate for complainant states that, apart from the same no any book of accounts, diary or any paper of the accused in his individual capacity were seized, nor is such evidence tendered by the accused. Thus, upon all such set of facts the Ld. Advocate for complainant prayed for dismissal of the appeal.

10. Heard Ld. Advocate for Appellant, Ld. SPP for respondent No.1. and Ld. APP for the State. Perused Appeal Memo and written submissions filed by either parties.

11. In the aforesaid parlance following points arise for determination. I have recorded my findings for the reasons as follows :

Sr. No.	Points	Findings
1.	Whether complainant proves that, the accused willfully failed to furnish Income Tax Returns for the accounting year 2014-2015 within stipulated limitation and thereby committed an offence punishable under Section 276CC of the Income Tax Act ?	No.

2.	Whether indulgence in the judgment/order of the Ld. Trial Court at the hands of this Court is required?	No.
3.	What Judgment/Order?	Appeal is Dismissed.

:REASONS:**AS TO POINT NOS. 1 TO 3 :-**

12. As the point Nos. 1 and 3 are intertwined and interwoven the same are held for appreciation together to avoid re-agitation of facts. Admittedly the accused was issued with notice under Section 153-A of Income Tax Act as on 27.03.2015 for filing of the Income Tax Returns for the accounting year 2014-2015 within 30 days from the receipt of notice. The notice was served upon the accused as on 28.03.2015. But the accused failed to file such Income Tax Returns within stipulated limitation and hence a show cause notice dated 22.09.2016 was served upon the accused thereby seeking explanation for the cause why such prosecution under Section 276CC of the Income Tax Act be not initiated against the accused. Prior to proceeding with the factual matrix it will be profitable to reproduce the *sine qua non* elements under Section 276CC of the Income Tax Act.

“276CC. Failure to furnish returns of income if a person willfully fails to furnish in due time the return of income which he is required to furnish under sub-section (1) of Section 139 or by notice given under clause (i) of sub-section (1) of Section 142 or Section 148, he shall be punishable.

(i) in a case where the amount of tax, which would have been evaded if the failure had not been

discovered, exceeds one 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 imprisonment for a term which shall not be less than three months but which may extend to three years and with fine: Provided that a person shall not be proceeded against under this section for failure to furnish in due time the return of income under sub-section (1) of Section 139-

(i) for any assessment year commencing prior to the 1st day of April, 1975 ; or

(ii) for any assessment year commencing on, or after the 1st day of April, 1975, if-

(a) the return is furnished by him before the expiry of the assessment year; or

(b) the tax payable by him on the total income determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source, does not exceed three thousand rupees.”

13. Thus, the entire substratum of appeal has to be dealt upon the parameters laid under the aforementioned provision and in this regard the factum of compliance and its offshoots have to be analyzed considering the testimonial evidence and the appended documents.

14. Ld. Advocate for the accused states that, Section 64 and 65 of the Evidence Act were not complied by way of the primary evidence subject to exception and that law demands that best evidence must be led. He further stated that, the accused has not committed a willful default in filing the material Income Tax Returns

and therefore no such criminal liability can be fastened against the accused and the reason assigned against the same is that, the documents/files of the accused were lying in the custody of the complainant agency and therefore, the factum of culpable mental state cannot be laid under the purview of Section 278E of the Income Tax Act. In this regard, considering the trail of event since 05.05.2014 when the accused was issued with notice under Section 153A of the Income Tax Act and was received by the accused as on 27.03.2015. Thereafter, a show cause notice was issued to the accused, wherein the accused failed to file reply to the show cause notice vide Exh.14. Thus, inspite of the notice dated 27.03.2015 and the show cause notice, the complainant agency had issued letter dated 15.06.2016 vide Exh.41 thereby stating that, as per the Income Tax Act providing/supplying of copies of the seized documents/statements is not a pre-condition for compliance of notice under Section 153A of the Income Tax Act.

15. Furthermore, the complainant agency as on 15.09.2016 again corresponded by letter (Exh.43) thereby providing such last and final opportunity to the accused to collect such photocopies of the seized documents by 23.09.2016 to which the accused corresponded vide letter dated 23.09.2016 (Exh.44) thereby stating that, the wife of the accused would collect such copies as on 26.09.2016 on his behalf. Upon the testimonial evidence led by the accused D.W.1 has admittedly stated upon the anvil of cross-examination that, he had collected account related documents xerox copies from the complainant agency and that his accountant had

collected xerox copies from the department as on 26.09.2016. It is also stated that, the personal documents of the accused and his wife were also seized as they being directors of the company. Further, accused also states that, his accountant had not collected the xerox copy. Considering the same it is evident that, the accused upon anvil of cross-examination has made contrary statements and therefore the factum of culpable mental state in congruence with the willful default can be well gathered.

16. The Ld. Counsel for accused on the date of judgment has made submissions and also had invited the attention of this Court on the notice under Section 153A of Income Tax Act 1961 issued to the accused, wherein it is stated that, certain material including documents belonging to the accused were seized during the course of search and seizure action. Hence, the Ld. Counsel states that, when the documents were seized with the complainant agency it was not possible for the accused to have complied with the impugned notice under Section 153A of Income Tax Act. I find no force in this argument as considering the same upon twofold parameters on one hand, there is no such prerequisite that such documents were required for the purposes of compliance and that it is the accused himself who corresponded vide Exh.44 thereby stating for collecting such documents as on 26.09.2016.

17. Also, that upon anvil of cross-examination on one hand accused claims that, he was in receipt of documents, as he collected account related documents xerox copies from the complainant

agency, further states accountant had collected and then states for the fact that, the accountant had not collected. Ignoring this speculation pertaining to collection of documents by the accountant of the accused it has went uncontroverted that, the accused himself has stated for have collected the account related documents from the complainant agency. Therefore, considering this categorical admission it is not the case of the accused that, the complainant agency was awry in supplying the documents as claimed by the accused. On the contrary, it clearly transpires without stretch of imagination that, the accused was well afforded with such opportunity of collecting such relevant documents in xerox form as required by him. Therefore, in this regard, undoubtedly the factum of willful default is well propelled and the complainant agency has succeeded in proving their case beyond reasonable doubt.

18. Furthermore, it is also evident that, apart from the contrary stand taken by the accused in his testimonial evidence there is a categorical statement during the course of reexamination of the officer of complainant agency that, no documents were seized, as alleged by the accused required for such compliance. On the contrary the panchnama vide Exh.38 categorically states for such documents/articles that were seized under panchnama and the said documents seized by the complainant agency were of company i.e. Decent Dia Jewels Pvt. Ltd., wherein the accused is merely a director and that no any documents pertaining to his personal capacity were seized. Therefore, the accused has failed to rebut such theory led by the prosecution.

19. It is pertinent that, the complainant agency has admittedly stated for the fact that, they have conducted search of the accused company i.e. Decent Dia Jewels Pvt. Ltd., and the accused is one of the director in the said company. Upon anvil of cross-examination he also has deposed that, he had filed the material Income Tax Returns of the company within limitation. This particular admission will naturally have bearing upon the case wherein the accused on one hand has filed such returns pertaining to the company of which he is director while has failed to comply with filing of such material Income Tax Returns, wherein the presumption as to the culpable mental state can be well derived and therefore, it can be clearly inferred that, the accused has committed, violated and transgressed the provision under Section 276CC read with Section 278E of the Income Tax Act.

20. The Ld. Advocate for accused has filed and relied upon the following case laws.

1. Ashish Agarwal Vs. Income Tax Department, S.B. Criminal Misc. (Pet.) No. 3106/2022, decided on 04.08.2022.

2. Lal Saraf Vs. State of Bihar, [1999] 235 ITR 116 (Patna).

3. State of Orissa And Others Vs. Md. Illiyas, (2006) 1 Supreme Court Cases 275.

4. Income Tax Officer Vs Autofil And Others, 1990 (184) ITR 47.

5. Narayan Vs. Union of India, 1994 (208) ITR 82 (M.P.).

6. Rajkumar Thiyagarajan Vs. Income Tax Department, Madurai, [2021] 124 taxmann.com 119 (Madras).
7. S. P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. And Others, AIR 1994 Supreme Court 853.
8. Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. And Others, (2003) 2 Supreme Court Cases 111.
9. State of Haryana Vs. Ranbir Alias Rana, (2006) 5 Supreme Court Cases 167.
10. Jagjit Singh Vs. State of Haryana and Ors., AIR 2007 Supreme Court 590.
11. Digamber Vaishnav & Anr. Vs. State of Chhatisgarh, Criminal Appeal Nos. 428-430/2019 (Arising out of S.L.P. (Crl.) Nos. 5530-5532/2015), decided on 05.03.2019.
12. Shashi Bhusan Prasad Vs. Inspector General Central Industrial Security Force & Ors., Civil Appeal No(s). 7130/2009, decided on 01.08.2019.
13. Prakash Nath Khanna & Anr. Vs. Commissioner of Income Tax and Anr., Appeal (Crl.) Nos. 1260-1261/1997, decided on 16.02.2004.
14. Sasi Enterprises Vs. Assistant Commissioner of Income Tax, Criminal Appeal No. 61/2007, decided on 30.01.1947.
15. Jay Polychem India Ltd., New Delhi Vs. Department of Income Tax, ITA No. 4850/Del/2009, decided on 31.03.2015.
16. Ashoksinh Jayendrasinh Vs. State of Gujarat, Criminal Appeal No. 1123/2010, decided on 07.05.2019.
17. H. Siddiqui (dead) by Lrs. Vs. A. Ramalingam, Civil Appeal No. 6956/2004, decided on 04.03.2011.
18. Pravin Vs. Ghanshyam & Others, M.P.No. 1144/2017, decided on 23.03.2018.

21. Per contra the Ld. Special Prosecutor for complainant has filed and relied upon following case laws.

1. **Sasi Enterprises Vs. Assistant Commissioner of Income Tax, (2014) 5 Supreme Court Cases 139.**
2. **Prakash Nath Khanna And Another Vs. Commissioner of Income Tax And Anr.,**
3. **R. Sundararajan Vs. State By DSP, SPE, CBI, Chennai, (2006) 12 Supreme Court Cases 749.**
4. **Deputi Commissioner of Income Tax Vs. M Sundaram, 2010 SCC OnLine Mad 6180.**
5. **ITO Vs. Gupta, C No. 42/4, decided on 26.06.2015.**
6. **Madhumilan Syntex Ltd. And Others Vs. Union of India And Another, (2007) 11 Supreme Court Cases 297.**

22. Considering the conspectus of the aforesaid case laws it is evident that, upon the aforesaid set of facts the factum of culpable mental state naturally deserves consideration. In this regard, one significant term used in Section 276CC is “in due times” and the purpose underlined in the said significant term has to be gathered. The accused undoubtedly failed to comply with the notice under Section 153A and therefore, is an offender under Section 276CC also that in a prosecution of offence as in the instant case it can be well presumed the existence of *Mens rea* and it is for the accused to prove the contrary and that to beyond reasonable doubt as stated in the case of Sasi Enterprises (Supra), which is relied by either parties. Thus, in my considerate view the reason tendered with regard to noncompliance pertaining seizure of documents with the complainant

agency will carry no force and therefore, the Ld. Trial Court has rightly considered the said aspect.

23. I have minutely perused the judgment and order of the Ld. Trial Court, wherein it evinces to myself that, the Ld. Trial Court has well appreciated the documents placed on record and more especially the panchnama vide Exh.38. So also, it is rightly inferred that, inspite of such correspondence and affording of opportunity to the accused with regard to collecting such documents the accused failed to comply and have not proved in its rebuttal. It is also rightly inferred that, when the accused himself states for receipt of documents in xerox form and still failed to comply with the notice it was incumbent upon the accused to have cleared the cloud of suspicion. Therefore, I find no reason to interfere with the judgment and order of the Ld. Trial Court. Resultantly, I answer point Nos. 1 and 2 in the negative and accordingly, point No. 3 is answered by following order infra :-

ORDER

1. Criminal Appeal No. 117 of 2020 stands dismissed.
2. The impugned order/judgment of conviction dated 20.12.2019 passed in C.C.NO.136/SW/2016, by the Addl. Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai is hereby confirmed.
3. The Ld. Trial Court is hereby directed to take appropriate steps for execution of sentence on receipt of this judgment in accordance with law.
4. The copy of order and findings be sent to the District Magistrate, Mumbai City vide Section 365 of the Cr.P.C.

5. Record and proceedings be sent to the Ld. Trial Court and copy of this judgment alongwith writ be sent to the Ld. Trial Court forthwith.
6. Criminal Appeal No. 117 of 2020 stands disposed of accordingly.

Judgment is dictated and pronounced in the open Court.



Date : 30.01.2023.

(DR. A. A. JOGLEKAR)
Additional Sessions Judge,
City Civil & Sessions Court,
Gr. Bombay (C.R.37.)

Dictated on : 30.01.2023.

Transcribed on : 31.01.2023.

HHJ signed on : 02.02.2023.

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER.”

Upload Date	Upload Time	Name of Stenographer
02.02.2023	04.50 p.m.	Mahendrasing D. Patil Stenographer (Grade-I)

Name of the Judge (With Court Room No.)	HHJ DR. A. A. JOGLEKAR (Court Room No. 37)
Date of Pronouncement of JUDGMENT/ORDER	30.01.2023
JUDGMENT/ORDER signed by P.O. on	02.02.2023
JUDGMENT/ORDER uploaded on	02.02.2023