IN THE HIGH COURT OF JHARKHAND AT RANCHI
Cr.M.P. No. 2266 of 2017

Pralay Pal **... Petitioner**

-Versus-

1. The State of Jharkhand
2. Union of India, Income Tax Department through Shri Sunil K. Agawane, Assistant Commissioner, Income Tax Department, Jamshedpur, Dist. East Singhbhum **... Opposite Parties**

CORAM: HON'BLE MR. JUSTICE SANJAY KUMAR DWIVEDI

For the Petitioner : Mr. Amit Kumar Das, Advocate
For the State : Mr. Vishwanath Roy, S.P.P.
For O.P. No.2 : Mr. Anurag Vijay, Jr. S.C.
Mr. R.N. Sahay, Sr. S.C.
Ms. Sharda Kumari, Advocate

07/23.08.2023 Heard Mr. Amit Kumar Das, learned counsel for the petitioner, Mr. Anurag Vijay, learned counsel for opposite party no.2 and Mr. Vishwanath Roy, learned counsel for the State.

2. This petition has been filed for quashing the entire criminal proceedings in connection with C/2 Case No.684 of 2016 including the order dated 30.05.2016, whereby, summon has been issued against the petitioner and also the order dated 15.07.2017, whereby, substance of accusation under Section 276(c)(1) of the Income Tax Act, 1961 has been explained to the petitioner, pending in the court of the learned Special Judge (Economic Offence) cum Civil Judge (Sr. Div.)-II, Jamshedpur.

3. The complaint case was filed by opposite party no.2 alleging therein that the assessee (petitioner) filed returns of income for the Assessment Year 2011-12 on 31.07.2011 declaring a total income of Rs.18,83,940/-. The case of the petitioner was selected for scrutiny under Section Computer Assisted Scrutiny Selection (CASS). The assessment order under Section

143(3) of the Income Tax was passed by the learned Deputy Commissioner of Income Tax, Jamshedpur on 13.09.2013 determining the total income at Rs.20,66,090/- only. In assessment order, three additions, first one at Rs.1,64,695/- only on the account of undisclosed interest income on National Saving Certificates, second one at Rs.4,351/- on account of undisclosed Bank Interest and third one at Rs.13,100/- on account of undisclosed interest on Fixed Deposits with Telco Ltd. were made. Before making the said additions as mentioned above, the assessee is said to have been given the reasonable opportunity of being heard, but the assessee failed to offer any satisfactory explanation in this regard. The assessee had concealed the income of Rs.1,82,146/- deliberately as mentioned above. The assessee has deliberately provided inaccurate details of his income which leads to concealment of income. Therefore, in this matter penalty proceeding was also initiated under Section 271(1)(c) of the Income Tax Act, 1961 and the penalty proceeding was also confirmed by the learned Commissioner of Income Tax (Appeal), Jamshedpur vide his order dated 27.11.2015 passed in appeal No.206/JSR/2013-14. The assessee is alleged to have attempted to evade the tax liability by furnishing inaccurate particulars of income leads to concealment of income of Rs.1,82,146/-. Thus, the accused made himself liable to be prosecuted under Section 276C(1) of the Income Tax Act, 1961. The sanction order under Section 279(1) of the Income Tax Act, 1961 for launching prosecution under Section 276C(1) of the Income Tax Act, 1961 against the accused for the Assessment Year 2011-12 has been accorded to by the Principal Commissioner of Income Tax, Jamshedpur on 03.03.2016. However, in the aforesaid sanction order, some mistake was apparent which later on was

rectified by the learned Principal Commissioner of Income Tax, Jamshedpur vide order dated 21.03.2016 passed under Section 154 of the Income Tax Act, 1961.

4. Mr. Amit Kumar Das, learned counsel for the petitioner submits that the subject matter of the assessment in the complaint case was also the subject matter of penalty under Section 271(1)(c) of the Income Tax Act, 1961. He submits that against the penalty order dated 27.11.2015, the petitioner filed an appeal being ITA No.117/Ran/2016 before the appellate tribunal under the said Act and vide order dated 08.12.2016, the said appeal was allowed and penalty order was set aside. He submits that in view of this fact, the foundation itself has been set aside. The entire criminal prosecution with regard to the said Act is malicious one. He also submits that the case of the petitioner is fully covered in view of the judgment passed by the Hon'ble Supreme Court in ***K.C. Builders and another v. Assistant Commissioner of Income Tax; [(2004) 2 SCC 731]***.

5. On the other hand, Mr. Anurag Vijay, learned counsel for the Income Tax Department submits that the counter affidavit has already been filed. He submits that on the Computer Assisted Scrutiny Selection (CASS), it was found that there was difference of assessment to the tune of Rs.1,82,146/-, however the petitioner has only filed the return with regard to Rs.18,83,940/-. He further submits that thereafter only penalty proceeding was initiated against the petitioner. He submits that in view of Section 271(1)(c) of the said Act, the assessing officer imposed penalty of Rs.56,285/- upon the petitioner for the said laches on behalf of the petitioner. He further submits that offence is made out for concealment of

income and in view of that even if the penalty order has been set aside by the appellate tribunal, the case cannot be quashed on that ground. He submits that in view of the order passed by the Hon'ble Supreme Court in ***Radheshyam Kejriwal v. State of West Bengal and another; [(2011) 3 SCC 437]***, both proceedings can go separately. He submits that same ratio was also there in the order passed by the Jammu and Kashmir High Court in ***CRMC No.205 of 2015***, dated 28.09.2018 in ***Arun Arya v. Income Tax Officer***. On these grounds, he submits that the entire criminal proceeding may not be quashed.

6. In view of the above submissions of the learned counsel for the parties, the Court has gone through the materials on record and finds that admittedly the petitioner has already filed return with regard to income of Rs.18,83,940/-. On Computed Assisted Scrutiny Selection (CASS), the Income Tax Department found that the petitioner has not disclosed further income to the tune of Rs.1,82,146/- and pursuant thereto the complaint case has been filed. The penalty proceeding has already been initiated against the petitioner under Section 271(1)(c) of the Income Tax Act, 1961, whereas, the sum of Rs.56,285/- was imposed in penalty proceeding. The said order was challenged by the petitioner before the Income Tax Appellate Tribunal, Ranchi in ITA No.117/Ran/2016 which was decided vide order dated 08.12.2016 and the said penalty order has been set aside. The prosecution was initiated under Section 276C(1) of the Income Tax Act, 1961.

7. The willful default of payment of tax was the subject matter before the Calcutta High Court in ***Gopal Ji Shaw v. Income Tax Officer, Calcutta & others***; ***[(1988) 173 ITR 554 (Cal)]***. Relevant paragraphs

of the said judgment read as under:

> "*The Division Bench of this court held as follows:*
>
> *"In the facts of this case, it appears to us that interest having been charged by the Income-tax Officer up to the date of the filing the return, the principles laid down by the Supreme Court in M. Chandra Sekhar [1985] 151 ITR 433 are clearly attracted. The fact that such interest was waived Subsequently by the Commissioner of Income-tax would make no difference in principle inasmuch as it is the primary act of the Income-tax Officer in accepting the return filed and charging interest up to the date of the filing which raises the presumption of extension of time. What was waived by the Commissioner was interest which was already charged by the Income-tax Officer. As held by the Gujarat High Court in Liberal Engineering Works' case [1986] 158 ITR 520, the Income-tax Officer, having levied interest up to the date of the filing of the return, was not justified in further invoking the penalty proceedings. We accept the contention of the assessee that even in the said three assessment years where time was in fact extended by the Income-tax Officer, the charging of interest up to the dates of the filing of the returns after the extended period gives rise to a presumption of further extension of time for filing of the returns,"*
>
> *It is, therefore, contended that if for the delay in filing the return, no penalty can be imposed as interest was charged, no criminal prosecution can be initiated for such default either. It is contended on behalf of the respondents by Mr. Mihir Bhattacharjee, learned advocate, that since the prosecution has been launched and the learned Metropolitan Magistrate has taken cognizance of the same, this court should not at this stage quash the proceeding. If the Department cannot prove the case, the petitioner will be acquitted. He has Submitted that the facts disclose an offence which should be tried by the learned Metropolitan Magistrate.*
>
> *I am, however, unable to accept the contentions of Mr. Bhattacharjee.*
>
> *A criminal prosecution for an offence under a special statute must not be initiated as a matter of course where the prosecution would involve intricate questions of interpretation of the Income Tax Act. The Department should not rush with the prosecution without any determination by the Income-tax Officer of the liability of the accused-assessee which is sought to be made the basis for prosecution. In this case, though penalty proceeding under Section 271(1)(a) was initiated against the petitioner for delay in filing the return, no order has been passed. In other words, the Income-tax Officer did not find any reason to penalise the petitioner for delay in filing the return. In Dooars Transport's case [1986] 162 ITR 383, this court held that once interest under section 139(8) of the Act has been charged up to the date of filing of the return, it must be presumed that the time to file a return was in fact extended. A proceeding under the Income-tax Act for imposition of penalty is quasi-criminal in nature. If the quasi-criminal proceeding, that is to say, the proceeding for*

> *imposition of penalty cannot be sustained when the Income-tax Officer, while making the assessment, charges interest under Section 139(8) of the Act, on a parity of reasoning, no criminal prosecution either can be launched in such a case. In the criminal proceeding, wilful default in filing the return has to be established. By charging interest under Section 139(8), the Income-tax Officer has impliedly extended the time to file the return and the question, therefore, of wilful default in filing the return of income does not and cannot arise. As a matter of fact, although in this case, penalty proceeding was initiated, it was not proceeded with thereafter, which only goes to show that the Department did not consider it necessary to impose any penalty after realisation of interest under Section 139(8).*
>
> *In a criminal case, it is not for the accused to establish his innocence. The onus is on the prosecution to bring home the guilt of the accused. Mens rea is an essential ingredient of a criminal offence. The fact of extension of time to file the return excludes the element of mens rea inasmuch as it must be presumed that the Income-tax Officer, being satisfied that there was ground for delay in filing the return, had extended the time.*
>
> *The object of launching criminal prosecution for wilful default in complying with the provisions of the Income-tax Act is to prevent evasion of tax. But in each and every case, without looking into the gravity of offence and without considering the attending circumstances, no prosecution should be launched. Unless there is wilful default in filing the return, no prosecution can be launched. From the complaint that has been filed in this case, it appears that no case of wilful default has been made out."*

8. Looking into the aforesaid judgment, it transpires that a criminal prosecution for an offence under a special statute must not be initiated as a matter of course where the prosecution would involve intricate questions of interpretation of the Income Tax Act. The object of launching criminal prosecution for willful default in complying with the provisions of the Income Tax Act is to prevent evasion of tax.

9. The willful failure on the part of the defaulter and the nature of penalty was again the subject matter before the Hon'ble Supreme Court in the case of ***Gujrat Travancore Agency v. Commissioner of Income-Tax, Kerala; [(1989) 177 ITR 455]***. Relevant paragraphs of the said judgment read as under:

"Learned counsel for the assessee has addressed an exhaustive argument before us on the question whether a penal- ty imposed under s. 271(1)(a) of the Act involves the ele- ment of mens rea and in support of his submission that it does he has placed before us several cases decided by this Court and the High Courts in Order to demonstrate that the proceedings by way of penalty under s. 271(1)(a) of the Act are quasi criminal in nature and that therefore the element of mens rea is a mandatory requirement before a penalty can be imposed under s. 271(1)(a). We are relieved of the necessity of referring to all those decisions. Indeed, many of them were considered by the High Court and are referred to in the judgment under appeal. It is sufficient for us to refer to s. 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to s. 276C which provides that if a person wilfully fails to furnish in due time the return of income required under s. 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of s. 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by Statute proceeds on the assumption that society suffers injury by and the act or omission of the defaulter and that a deterrent must be imposed to dis- courage the repetition of the offence. In the case of a proceeding under s. 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need of establish the element of mens tea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in s. 271(1)(a) which requires that mens tea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum, volume 85, page 580, paragraph 1023:

> *"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."*

Accordingly, we hold that the element of mens rea was not required to be proved in the proceedings taken by the Income tax Officer under s. 271(1)(a) of the Income-tax Act against the assessee for the assessment years 1965-66 and

1966-67."

10. Looking into the aforesaid judgment, it transpires that in most of the cases of criminal liability, the Hon'ble Supreme Court held that the intention of the Legislature is that the penalty should serve as a deterrent. In the case in hand, in view of the appellate order, penalty order is not there.

11. The willful failure of payment of tax was also the subject matter before the Andhra Pradesh High Court in the case of ***Income-Tax Officer v. Autofil & others; [(1990) 184 ITR 47 (AP)]***. Relevant paragraph of the said judgment reads as under:

> **"***Therefore, wilfulness contemplates some element of evil motive and want to justification. In CIT v. Patram Dass Raja Ram Beri [1981] 132 ITR 671, a Full Bench of the Punjab and Haryana High Court, considering the term "wilful failure" occurring in section 276CC of the Income-tax Act, held that "willfulness certainly brings in the element of guilt" and thus the requirement of mens rea. Our Supreme Court in Gujarat Travancore Agency v. CIT, has observed that the creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. It also observed that. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent."*

12. In the aforesaid judgment also, it has been held that the intention of the Legislature is that the penalty should serve as a deterrent.

13. The Hon'ble Supreme Court in ***G.L. Didwania & another v. Income-Tax Officer & another; [(1997) 224 ITR 687 (SC)]*** has held that if the appellate tribunal has set aside the order of penalty, how the criminal proceeding can be sustained. Relevant paragraph of the said judgment reads as under:

> **"***In the instant case, the crux of the matter is attracted and whether the prosecution can be sustained in view of the order passed by the Tribunal. As noted above, the assessing authority held that the appellant-assessee made a false statement in respect of income of Young India and Transport*

> *Company and that finding has been set aside by the Income-tax Appellate Tribunal. If that is the position then we are unable to see as to how criminal proceedings can be sustained."*

14. Further, if the penalty order has been struck down, criminal case cannot survive. It has been held by the Hon'ble Supreme Court in the case of ***K.C. Builders & another v. Assistant Commissioner of Income-Tax; [(2004) 265 ITR 562 (SC)]***. Relevant paragraphs of the said judgment read as under:

> **"***The above judgment squarely applies to the facts and circumstances of the case on hand. In this case also, similarly, the application was moved by the assessee before the Magistrate to drop the criminal proceedings which were dismissed by the Magistrate and the High Court also on a petition filed under Sections 397 and 401 of the Code of Criminal Procedure, 1973 to revise the order of the Additional Chief Metropolitan Magistrate has also dismissed the same and refused to refer to the order passed by the competent Tribunal. As held by this Court, the High Court is not justified in dismissing the criminal revision vide its judgment ignoring the settled law as laid down by this Court that the finding of the appellate Tribunal was conclusive and the prosecution cannot be sustained since the penalty after having been cancelled by the complainant following the appellate Tribunal's order, no offence survives under the Income Tax Act and thus quashing of prosecution is automatic. In the instant case, the penalties levied under Section 271(1)(c) were cancelled by the respondent by giving effect to the order of the Income Tax Appellate Tribunal in I.T.A. Nos. 3129-3132. It is settled law that levy of penalties and prosecution under Section 276C are simultaneous. Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution under Section 276C is automatic.*
>
> *In our opinion, the appellants cannot be made to suffer and face the rigorous of criminal trial when the same cannot be sustained in the eyes of law because the entire prosecution in view of a conclusive finding of the Income Tax Tribunal that there is no concealment of income becomes devoid of jurisdiction and under Section 254 of the Act, a finding of the Appellate Tribunal supersedes the order of the Assessing Officer under Section 143(3) more so when the Assessing Officer cancelled the penalty levied.*
>
> *In our view, once the finding of concealment and subsequent levy of penalties under Section 271(1)(c) of the Act has been struck down by the Tribunal, the Assessing Officer has no other alternative except to correct his order under Section 154 of the Act as per the directions of the Tribunal. As already noticed, the subject matter of the*

> *complaint before this Court is concealment of income arrived at on the basis of the finding of the Assessing Officer. If the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eyes of law and, therefore, the prosecution cannot be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction. The Assistant Commissioner of Income Tax cannot proceed with the prosecution even after the order of concealment has been set aside by the Tribunal. When the Tribunal has set aside the levy of penalty, the criminal proceedings against the appellants cannot survive for further consideration. In our view, the High Court has taken the view that the charges have been framed and the matter is in the stage of further cross-examination and, therefore, the prosecution may proceed with the trial. In our opinion, the view taken by the learned Magistrate and the High Court is fallacious. In our view, if the trial is allowed to proceed further after the order of the Tribunal and the consequent cancellation of penalty, it will be an idle and empty formality to require the appellants to have the order of Tribunal exhibited as a defence document inasmuch as the passing of the order as aforementioned is unsustainable and unquestionable."*

15. In view of the above judgments, the Court comes to the conclusion that once penalty order is set aside, it will be presumed that there is no concealment and quashing of prosecution under Section 276C(1) of the Income Tax Act is automatic. The petitioner cannot be allowed to suffer and to face criminal trial and the same cannot sustain in the eyes of law.

16. There is no doubt that penalty proceeding and prosecution can go simultaneously in the facts and circumstances of the cases, however, in the case in hand, the penalty proceeding has already been set aside in view of the appellate order. The Court finds that in view of the above judgments, the case of the petitioner is fit to be allowed. Further, if the penalty proceeding has been set aside, *mens rea* is one of the essential ingredient of a criminal offence.

17. In view of the above facts, reasons and analysis, the entire criminal proceedings in connection with C/2 Case No.684 of 2016 including the order

dated 30.05.2016 and also the order dated 15.07.2017, pending in the court of the learned Special Judge (Economic Offence) cum Civil Judge (Sr. Div.)-II, Jamshedpur are quashed.

18. Accordingly, this petition is allowed and disposed of.

(Sanjay Kumar Dwivedi, J.)

Ajay/ A.F.R.