

**IN THE SUPREME COURT OF INDIA
ORDER XXII RULE 2(1)(A)
CRIMINAL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION
(UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA)**

SPECIAL LEAVE PETITION (CRL) NO. OF 2019

(Against the impugned Order dated 12.11.2019 passed by the Hon'ble High Court of Karnataka at Bengaluru in Criminal Revision Petition No. 955/2019)

BETWEEN

POSITION OF THE PARTIES

High Court This Court

D.K Shivakumar
Aged about 59 years, R/o No. 252,
18th Cross, Sadashivanagar,
Bengaluru-560080

Petitioner Petitioner

Versus

The Income Tax Department
Through its Deputy Director of
Income Tax Unit-3,(1), C.R.
Building (Annex) Queens Road,
Bengaluru-560001

Respondent Respondent

**SPECIAL LEAVE PETITION UNDER ARTICLE 136
OF THE CONSTITUTION OF INDIA**

To,

The Hon'ble Chief Justice of India and His Companion
Justices of the Hon'ble Supreme Court of India

The Special Leave Petition of the Petitioner abovenamed;

MOST RESPECTFULLY SHOWETH:

1. By the present Petition for Special Leave, the Petitioner seeks to challenge the common Order dated 12.11.2019 passed by the Single Judge of Hon'ble High Court of Karnataka at Bengaluru inter-alia dismissing Criminal Revision Petition No. 955/2019 that was preferred by the Petitioner herein, against the order dated

25.06.2019 passed by the Ld. Sessions Judge inter-alia dismissing the discharge application of the petitioner in Special Criminal Case No. 759/2018.

2. QUESTIONS OF LAW:

The following substantial questions of law of public importance arise in the present case for kind consideration of this Hon'ble Court:

- (a) Whether the High Court erred in law in upholding the rejection of the Petitioner's Application for discharge?
- (b) Whether a sum of money found in a search can be straightaway treated as the assessee's income without an assessment order having been passed, containing the findings required by section 69A?
- (c) Whether there can be any concealment of the current year's income when the time for filing the Return of Income has not yet elapsed, and the assessee has not yet filed the Return?
- (d) Whether a prosecution in the present case contrary to the CBDT Circular no.24 of 2019 and Section 275 of the Income Tax Act is illegal and bad in law?
- (e) Whether a Court other than the "Special Court" in terms of section 280-B can lawfully try a prosecution for violation of section 276C of the Income-tax Act?

3. DECLARATION IN TERMS OF RULE 3(2):-

The Petitioner states that no other Petition seeking leave to appeal has been filed by them against the impugned order dated

12.11.2019 passed by the High Court of Karnataka at Bengaluru in Criminal Revision Petition No. 955/2019.

4. **DECLARATION IN TERMS OF RULE 5:-**

The Annexure No. 1 to 7 produced along with the Special Leave Petition are true copies of the pleadings/documents which formed part of records of the case in the Court/Tribunal below against whose Order the leave to appeal is sought for in this petition.

5. **GROUND:-**

The Petitioner seeks special leave of this Hon'ble Court to appeal against the Impugned judgment on the following amongst other grounds each of which is in the alternative and, without prejudice to one another:-

- A. Because the Hon'ble High Court erred in not appreciating that an amount found can be treated as the assessee's income only if the conditions laid down by section 69A of the Act are fulfilled i.e that the Assessing Officer finds the assessee's explanation about the nature and source of acquisition of the money to be unsatisfactory. Such a finding can be given by the Assessing Officer only by passing a reasoned assessment order. Consequently, unless and until such an assessment order has been passed, the amount found cannot be considered to be income of the petitioner.
- B. Because even if that amount is found to be income under section 69A, it would be the income of the current accounting year during which the amount was found, for which the petitioner is yet to file his Return of Income. Consequently,

- until the Return is filed and the said amount is found not to be disclosed therein, the petitioner cannot be charged with concealment of income.
- C. Because no criminal prosecution for concealment of income can lawfully be initiated against an assessee unless he has filed his return of income for the year in question and an assessment order has been passed on the basis of such return.
- D. Because the issue is completely settled by the Circular no. 24 of 2019 issued by the Central Board of Direct Taxes which lays down unequivocally that a prosecution for concealment of income can be initiated against an assessee only if a penalty for concealment of income has been imposed on the assessee and that penalty has been upheld by the Appellate Tribunal. The Board Circular has laid down that this is the condition precedent for initiation of a prosecution against an assessee for concealment of income.
- E. Because the said prosecution was, therefore directly contrary to the aforementioned legal principles and also directly and irreconcilably contrary to the said Board Circular no. 24 of 2019. Further, the sanction for the prosecution has been given without any application of mind to the Assessing Officer's finding in terms of section 69A, and without any penalty for concealment having been imposed and then upheld by the Appellate Tribunal. Consequently, the sanction

for the prosecution has been vitiated by non-application of mind.

F. Because Section 275 of the Act lays down that where an assessee has filed an appeal against the assessment order, no penalty for concealment of income can be imposed until the disposal of the appeal by CIT(A). In other words, as no penalty for concealment can be imposed until the CIT(A) has passed the appellate order, no prosecution for concealment of income under Section 276C can be laid against the assessee until the CIT(A) has disposed the appeal against the assessment order. Even thereafter, as laid down by CBDT circular No. 24/2019, the prosecution cannot be initiated unless a penalty for concealment has been imposed on the assessee and such penalty has been upheld by the Appellate Tribunal. This legal position has been specifically laid down by the Madras High Court in Sayarmull Surana vs. The Income Tax Officer Business Ward XII (3) Chennai, Cri R.C. No. 111/2011.

G. Because the sanction for the prosecution was granted by the Principal Director, whereas section 279 of the Act mandatorily requires that such sanction should be granted by the Commissioner and not the Director. In the scheme of the Act, the Commissioner and the Director are distinct statutory officers, covered by distinct statutory provisions. For this independent reason also, the prosecution initiated against the Petitioner was bad in law.

- H. Because section 280B of the Act provides that, notwithstanding anything contained in the Criminal Procedure Code, the offence under sections 276C and 277 of the Act shall be tried only by the Special Court, which, as provided by section 280A consists of one or more designated Magistrate's Courts. However, in the present case, the prosecution has been initiated in a Sessions Court, which is not only directly contrary to the mandatory provisions of section 280B but also deprives the Petitioner of his right of appeal, which is contrary to settled legal principles.
- I. Because both the Trial Court and also the High Court relied strongly on the Judgment of this Hon'ble Court in Jayappan vs Perumal - (1984 Suppl SCC 437) without at all appreciating that, it was not a case arising under section 69A of the Act. In that case, the concealment of various transactions and the falsification of the assessee's books of account were discovered after the completion of the assessment. Thus the issues arising in the present case were totally absent there. Further, in any event, the crucial CBDT Circular was not in existence at that time. The Judgment in Jayappan vs Perumal, therefore, has no application at all to the present case.
- J. Because the Hon'ble High Court erred in not appreciating that before the levy of penalty, there can be no prosecution under Chapter XXII of the Income Tax Act, 1961 against the Petitioner.

- K. Because the authorities conducting the search under the Income Tax Act are empowered u/s 132 of the Act to conduct the search only. The power to quantify the undisclosed income has been taken away by repealing section 132(5) of the Act with effect from 01.06.2002 and the power has been vested with the jurisdictional assessing officer as per Section 139(9A) of the Act.
- L. Because the launch of prosecution before the culmination of penalty proceedings would lead to an anomalous position and would be contrary to the judgment of this Hon'ble Court in the case of *KC Builders & Anr. Vs. ACIT* (2004) 2 SCC 731 wherein it was held that no prosecution can be sustained after deletion of penalty.
- M. Because section 275(1) of the Act provides that no penalty can be imposed on an assessee till the time the appeal in quantum proceedings is pending before the CIT(A). In the present case, even the assessment has not been framed against the Petitioner determining the quantum of evasion of tax, if any.
- N. Because the phrase "willful attempt to evade tax" in section 276C(1) of the Act has not been defined under the Act and therefore the natural meaning attributed to the aforesaid phrase would lead to the conclusion that without determination of the tax evaded, which can only be done by framing of assessment and penalty thereafter, no Court can come to even a prima facie conclusion, that too only, on the

basis of material recovered during the course of search, that prosecution can be launched against the assessee. The charge in the prosecution complaint has to be specific.

- O. Because the Hon'ble High Court failed to appreciate that though the prosecution proceedings and assessment proceedings are separate in nature, the prosecution is necessarily based on the determination of evasion of tax in the assessment proceedings. The difference in both proceedings is only with respect to scope. There cannot be a case where penalty is deleted or no addition is made to the returned income and even then the assessee is prosecuted and later convicted.
- P. Because this Hon'ble Court in the case of P. Jayappan Vs. S.K. Perumal, First Income Tax Officer (1984) Supp. SCC 437 held that a Criminal Court u/s 309 Cr.P.C. in an appropriate case may adjourn or postpone the hearing in a criminal case if the disposal of any proceeding under the Act has bearing on the proceedings before it.
- Q. Because the Jayappan's case could not have considered the present version of section 275 of the Act which provides for no imposition of penalty till the disposal of quantum appeal by the first Appellate Authority. Thus, the position of law in Jayappan's case cannot be applied to the case of the Petitioner. The Petitioner submits that before the levy of penalty, the launch of prosecution is premature and void.

- R. Because the CBDT circular dated 09.09.2019 provides that prosecution u/s 276C(1) of Income Tax Act can only be launched only after confirmation of penalty by the Income Tax Appellate Tribunal. The reasoning in the said circular is in line with the provisions of the Act and the ratio of the judgment of this Hon'ble Court in the case of K.C Builders (Supra). The underlying premise is that till the confirmation of penalty by the final fact finding authority, i.e. the Income Tax Appellate Tribunal, no prosecution can be launched. The non-application of the circular to the cases where prosecution complaint has already been filed is arbitrary, whimsical and is in violation of Article 14 of the Constitution.
- S. Because the finding in the assessment order is binding on the criminal courts. Thus, without the determination of the alleged tax evasion in quantum proceedings and thereafter penalty proceedings, the launch of prosecution is premature and without the authority of law.
- T. Because the cognizance taken by the Special Court is void ab initio as the complainant was not examined in terms of the mandatory provisions of the proviso to section 200 Cr. P.C. As the prosecution complaint includes offences other than those mentioned in the Income Tax Act, the Complainant ought to have been examined by the Special Court before proceeding to take cognizance of the prosecution complaint as filing a complaint under IPC offences cannot be said to be discharge

of official duties of an authority of the Income Tax Department.

6. GROUND FOR INTERIM RELIEF:

The prosecution initiated against the Petitioner is directly contrary to the CBDT Circular no. 24 of 2019 which lays down that there should be no prosecution under the Income Tax Act unless the penalty imposed for concealment has been upheld by the Appellate Tribunal. In the present case, no proceeding for imposition of penalty has been initiated against the Petitioner. Furthermore, the basic ingredients of concealment of income as laid down in section 69A and 276C of the Act are patently and wholly absent in the present case. Moreover, the sanction for the prosecution has also not been given by the concerned authority as mentioned in Section 279 of the Act and the Court before which the prosecution has been laid is not the "Special Court" required in terms of section 280B of the Act. In these circumstances, the continuation of the prosecution would be without any warrant or justification whatsoever.

7. MAIN PRAYER:

It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to:

- a. grant Special Leave to Petition against the impugned common Order dated 12.11.2019 passed by the Hon'ble Karnataka High Court dismissing the Crl. Revision Petition No. 955/2019 filed by the Petitioner;

b. for such other and further reliefs as the nature of the circumstances of the case may require.

8. INTERIM PRAYER:

It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to:

- a. stay the proceedings in C.C. No. 759 of 2018 before the Court of LXXXI Additional City Civil and Sessions Judge, Bengaluru (CCH 82), till the final disposal of the present case; and
- b. For ad-Interim stay in terms of prayer (a) above.
- c. for such other and further reliefs as the nature of the circumstances of the case may require;

Parmatma Singh
Advocate for the petitioner
CC No. 2452

DATED: 17.12.2019

DRAWN ON: 18.12.2019

PLACE: NEW DELHI