In the High Court of Judicature at Madras

Reserved on : 06.7.2023	Delivered on : 11.7.2023

Coram :

The Honourable Mr.Justice N.ANAND VENKATESH

Criminal Original Petition No.4688 of 2017
& Crl.M.P.Nos.3533 and 3534 of 2017

D.M.Kathir Anand ...Petitioner

Vs

1.Shri N.S.Phanidharan,
Assistant Commissioner of
Income Tax, Circle-I,
Central Revenue Building,
No.2, Barrack's Cross Street,
Officer's Line, Vellore-1.

2.The Principal Commissioner of
Income Tax-8, 6th Floor,
Kannammal Building, 611,
Anna Salai, Chennai-6. ...Respondents

PETITION under Section 482 of the Criminal Procedure Code to call for the order of sanction dated 28.6.2016 pending on the file of the second respondent together with complaint made in C.C.No.499 of 2016 pending on the file of the Judicial Magistrate of First Class, Vellore and quash the same.

For Petitioner : Mr.P.Wilson, SC for
M/s.P.Wilson Associates

For Respondents : Ms.M.Sheela,
Special Public Prosecutor
for Income Tax Department

ORDER

In this criminal original petition filed under Section 482 of the Criminal Procedure Code (for brevity, the Code), the petitioner has challenged (i) the sanction order dated 28.6.2016 issued by the second respondent and (ii) the subsequent proceedings initiated by the first respondent in C.C.No.499 of 2016 on the file of the Judicial Magistrate of First Class, Vellore .

2. The Income Tax Department filed a criminal complaint against the petitioner for offences under Sections 276CC and 276C(2) of the Income Tax Act, 1961 (hereinafter called the Act) on the following grounds :

(i) For the financial year 2012-13 relevant to the assessment year 2013-14, the petitioner did not furnish his return of income along with the audit report as mandated under Section 139(1) of the Act. The petitioner is under a statutory obligation to furnish his return of

income for the assessment year 2013-14 on or before 30.9.2013.

(ii) The petitioner belatedly furnished the return of income for the assessment year 2013-14 on 29.3.2015 by taking advantage of Section 139(4) of the Act, which provides for belated furnishing of return of income till 31.3.2015.

(iii) As per the return of income furnished by the petitioner on 29.3.2015, the petitioner himself had assessed the tax liability at Rs.1,04,94,060/-. Having made such an assessment, the petitioner ought to have paid the tax before filing his return of income or at least on the date of filing his return on 29.3.2015. However, the petitioner paid the self assessment tax only after the receipt of notice from the Assessing Officer, on 14.3.2016.

(iv) The petitioner was issued a show cause notice dated 11.3.2016 as to why criminal prosecution proceedings under Sections 276CC and 276C(2) of the Act should not be initiated against him. There was no response for the said show cause notice even though it was served on the petitioner on 16.3.2016.

(v) In the light of the above allegations, the Income Tax Department proceeded to file a private complaint against the petitioner for the alleged offences under Sections 276CC and 276C(2) of the Act.

Aggrieved by that, the petitioner is before this Court.

3. Heard the learned Senior Counsel appearing on behalf of the petitioner and the learned Special Public Prosecutor appearing for the Income Tax Department.

4. The learned Senior Counsel appearing on behalf of the petitioner submitted that the mere delay in filing the return or the delay in paying the self assessment tax, cannot be a ground to initiate criminal prosecution against the petitioner unless the delay is wilful and wanton and that there is not even an averment to that effect in the complaint. He further submitted that the petitioner paid the entire tax before the sanction was accorded by the second respondent and hence, the criminal prosecution against the petitioner is a clear abuse of process of law.

5. The learned Senior Counsel appearing on behalf of the petitioner also submitted that the Income Tax Department is misusing their powers against the petitioner since the petitioner is not a habitual offender and that in the present case, there is a valid reason assigned

for the delay in filing the return and paying the self assessment tax. According to him, even if the delay on the part of the petitioner has to be accounted for, there is no need for launching a criminal prosecution, as it is always open to the Income Tax Department to impose penalty and interest. He further submitted that such an extreme step of launching the criminal prosecution is not within the scope of Section 276CC of the Act.

6. In order to substantiate his submissions, the learned Senior Counsel appearing on behalf of the petitioner relied upon various judgments.

7. Per contra, the learned Special Public Prosecutor appearing on behalf of the Income Tax Department submitted that the time, within which, the return is to be filed, is indicated under Section 139(1) of the Act, that the 'due time' that has been mentioned under Section 276CC of the Act is relatable only to the time indicated under Section 139(1) of the Act and not to the extended time under Section 139(4) of the Act. She further submitted that even if the return is filed in terms of Section 139(4) of the Act, that will not dilute the infraction in not

furnishing the return in due time as prescribed under Section 139(1) of the Act. She also submitted that the petitioner, even at the time of filing the return with delay under Section 139(4) of the Act, did not pay the self assessment tax along with the return and rather, it was paid only on 14.3.2016 after receipt of the notice from the Assessing Officer and that this, by itself, indicates the wilfulness on the part of the petitioner in not furnishing the return and paying the tax on time.

8. The learned Special Public Prosecutor appearing for the Income Tax Department further relied upon Section 278E of the Act, which provides for a statutory presumption of the culpable state and contended that it is for the petitioner to establish in defence that he did not have the culpable state in causing the delay in filing the return and paying the tax, that it can be done only in the course of trial and that it cannot be decided in a petition filed under Section 482 of the Code. In view of the same, she sought for dismissal of the above petition.

9. This Court has carefully considered the submissions of the learned counsel on either side and perused the materials available on

record.

10. Loads of judgments were cited on either side and it is not necessary for this Court to list all those judgments and unnecessarily burden this order. It will suffice to take note of the allegations made and see if the offences are prima facie made out and if necessary, to place reliance upon a couple of judgments.

11. There is no dispute with regard to the fact that the return of income along with the audit report has to be filed on or before 30.9.2013 as per Section 139(1) of the Act for the assessment year 2013-14. Section 139(4) of the Act provides for belated furnishing of return of income till 31.3.2015. The petitioner filed the return of income on 29.3.2015 by admitting an income of Rs.3,48,31,480/- with a tax liability of Rs.1,04,94,060/-. Except filing the return on 29.3.2015, the petitioner did not pay the tax liability. As on that date, there was only a pre-paid tax to the extent of Rs.28,75,281/-. The show cause notice was issued for initiation of proceedings under Sections 276CC and 276C(2) of the Act on 11.3.2016. The petitioner received this notice and no reply was given immediately. Further, the

self assessment tax was paid only on 14.3.2016.

12. The main issue to be considered by this Court is as to whether, based on the allegations in the complaint, the offences are made out under Section 276CC and 276C(2) of the Act.

13. The judgment of the Apex Court in the case of ***Prakash Nath Khanna & Another Vs. CIT & Another [reported in 2004 (135) Taxman 327]*** has a lot of relevance. For proper appreciation, the relevant paragraphs are extracted as hereunder :

> *"One of the significant terms used in Section 276-CC is 'in due time'. The time within which the return is to be furnished is indicated only in Sub-Section (1) of Section 139 and not in Sub-Section (4) of Section 139. That being so, even if a return is filed in terms of Sub-Section (4) of Section 139, that would not dilute the infraction in not furnishing the return in due time as prescribed under Sub-Section (1) of Section 139. Otherwise, the use of the expression "in due time" would lose its relevance and it cannot be said that the said expression was used without any purpose. Before substitution of the expression "Clause (i) of Sub-Section (1) of Section 142" by Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1.4.1989, the expression used was "Sub-Section (2) of Section 139". At the relevant point of time the assessing officer was empowered to issue a*

notice requiring furnishing of a return within the time indicated therein. That means the infractions which are covered by Section 276-CC relate to non-furnishing of return within the time in terms of Sub-Section (1) or indicated in the notice given under Sub-Section (2) of Section 139. There is no condonation of the said infraction, even if a return is filed in terms of Sub-Section (4). Accepting such a plea would mean that a person who has not filed a return within the due time as prescribed under Sub-Sections (1) or (2) of Section 139 would get benefit by filing the return under Section 139(4) much later. This cannot certainly be the legislative intent.

Another plea which was urged with some amount of vehemence was that the provisions of Section 276-CC are applicable only when there is discovery of the failure regarding evasion of tax. It was submitted that since the return under Sub-Section (4) of Section 139 was filed before the discovery of any evasion, the provision has no application. The case at hand cannot be covered by the expression "in any other case". This argument though attractive has no substance.

The provision consists of two parts. First relates to the infractions warranting penal consequences and the second, measure of punishment. The second part in turn envisages two situations. The first situation is where there is discovery of the failure involving the evasion of tax of a particular amount. For the said infraction stringent penal consequences have been provided. Second situation covers all cases except the first situation elaborated above.

The term of imprisonment is higher when the

amount of tax which would have been evaded but for the discovery of the failure to furnish the return exceeds one hundred thousand rupees. If the plea of the appellants is accepted it would mean that in a given case where there is infraction and where a return has not been furnished in terms of Sub-Section (1) of Section 139 or even in response to a notice issued in terms of Sub-Section (2), the consequences flowing from non-furnishing of return would get obliterated. At the relevant point of time Section 139(4)(a) permitted filing of return where return has not been filed within Sub-Section (1) and Sub-Section (2). The time limit was provided in Clause (b). Section 276-CC refers to "due time" in relation to Sub-Sections (1) and (2) of Section 139 and not to Sub-Section (4). Had the Legislature intended to cover Sub-Section (4) also, use of expression "Section 139" alone would have sufficed. It cannot be said that Legislature without any purpose or intent specified only the Sub-Sections (1) and (2) and the conspicuous omission of Sub-Section (4) has no meaning or purpose behind it. Sub-Section (4) of Section 139 cannot by any stretch of imagination control operation of Sub-Section (1) wherein a fixed period for furnishing the return is stipulated. The mere fact that for purposes of assessment and carrying forward and to set off losses it is treated as one filed within Sub-Sections (1) or (2) cannot be pressed into service to claim it to be actually one such, though it is factually and really not by extending it beyond its legitimate purpose.

Whether there was wilful failure to furnish the return is a matter which is to be adjudicated factually by the Court which deals with the prosecution case. Section

278-E is relevant for this purpose and the same reads as follows:

'278-E: Presumption as to culpable mental state-

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation: In this Sub-Section, "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability'.

There is a statutory presumption prescribed in Section 278-E. The Court has to presume the existence of culpable mental state, and absence of such mental state can be pleaded by an accused as a defence in respect to the act charged as an offence in the prosecution. Therefore, the factual aspects highlighted by the appellants were rightly not dealt with by the High Court. This is a matter for trial. It is certainly open to the appellants to plead absence of culpable mental state when the matter is taken up for trial."

14. It is pellucid from the above judgment that Section 139(4) of the Act cannot, by any stretch, control the operation of Section 139(1) of the Act, which actually fixes the period for furnishing the returns. The term 'wilfully fails to furnish in due time' as contained in Section 276CC of the Act takes within its fold the due time that has been fixed under Section 139(1) of the Act and not the extended time provided under Section 139(4) of the Act. Therefore, the mere filing of return during the extended time will not come to the aid of the petitioner to escape from the criminal prosecution.

15. The next important issue to be considered is as to whether there is wilfulness on the part of the petitioner in filing the returns with delay. To deal with this issue, one cannot avoid Section 278E of the Act. This provision brings in a statutory presumption with regard to the existence of a culpable mental state. Therefore, the issue as to whether there was wilfulness in not filing the returns on time and not paying the tax on time, is only a matter of fact, which can be ascertained only through appreciation of evidence. In the light of this provision, this Court, exercising its jurisdiction under Section 482 of the Code, cannot presume innocence or absence of wilfulness on the

part of the petitioner. On the other hand, what can be presumed is only culpable mental status and the onus is upon the petitioner to prove the contrary and that can be done only at the time of trial.

16. If hypothetically Section 278E is not available in the Act, this Court can certainly look into the materials and come to a prima facie conclusion as to whether there was wilfulness on the part of the petitioner in filing the returns with delay. Such an exercise cannot be done in the light of Section 278E of the Act. It is enough for the Income Tax Department to lay the foundational facts and thereafter, the statutory presumption under Section 278E of the Act takes care of the culpable mental state, which is directly relatable to wilfulness. Once onus is shifted to the petitioner by virtue of the statutory presumption, it has to be discharged by the petitioner only in the course of evidence. That exercise cannot be carried out in a petition under Section 482 of the Code.

17. On the facts alleged in the complaint, the offences have been prima facie made out. In view of the same, the statutory presumption under Section 278E of the Act comes into operation. Under such

circumstances, this Court, in exercise of its jurisdiction under Section 482 of the Code, cannot disregard the statutory presumption. This Court also cannot go into the facts of the case nor the defence taken by the petitioner to discharge the onus since it will be beyond the jurisdiction under Section 482 of the Code. This exercise can be carried out only in the course of trial since the determination of culpable state of mind is primarily a determination of fact, which requires appreciation of evidence.

18. This Court has consistently taken a stand in a line of recent decisions and it will suffice to take note of the following judgments :

> ***"(a) Shri Raman Krishna Kumar Vs. DCIT [Crl.O.P.No.25561 of 2016, dated 26.10.2021];***
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> ***(b) M/s.World Bridge Logistics Private Ltd. Vs. DCIT [Crl.O.P.No.11998 of 2018, dated 28.1.2022]; and***
>
> ***(c) Guruprasad Angisetty Vs. ACIT [Crl.O.P. No.12046 of 2019, dated 30.9.2022]."***

19. In the light of the above discussions, this Court does not find any ground to interfere with the proceedings pending before the Court below. It is made clear that it will be left open to the petitioner to raise

all the grounds before the Court below and the same will be considered on their own merits and in accordance with law. Any observations made in this order will not have a bearing on the Court below while deciding the case on merits.

20. In the result, the above criminal original petition is dismissed. Consequently, the connected Crl.M.Ps are also dismissed.

11.7.2023

Index : Yes
Neutral Citation : Yes
Speaking Order : Yes

To
1.The Judicial Magistrate of First Class, Vellore.
2.The Principal Commissioner of Income Tax-8, 6th Floor, Kannammal Building, 611, Anna Salai, Chennai-6.
3.The Assistant Commissioner of Income Tax, Circle-I, Central Revenue Building, No.2, Barrack's Cross Street, Officer's Line, Vellore-1.
4.The Public Prosecutor, High Court, Madras.

RS

N.ANAND VENKATESH,J

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