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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : September 08, 2006
Pronounced on : November 22, 2006

1) **Crl.M.C. No. 153/2005 & Crl.M. No. 498/2005**

S.N.P. Punj .....Petitioner

! ***through***: Mr. Sanjiv Rajpal, Advocate

VERSUS

$ Dy. Commissioner of Income Tax, ...Respondent
Special Range 15, New Delhi

^ ***through***: Mr. R.D. Jolly, Advocate
Mr. Rajiv Awasthi, Advocate

WITH

2) **Crl.M.C. No. 2480/2004 & Crl.M. No. 8366/2004**

Maya Rani Punj & Ors. .....Petitioner

! ***through***: Mr. Sandeep Sethi, Sr. Advocate
Mr. Sanjiv Rajpal, Advocate

VERSUS

$ T.V.P. Punj, Dy.Commissioner of Income Tax,
Dy. Commissioner of Income Tax, ...Respondent
Special Range XV, New Delhi

^ ***through***: Mr. R.D. Jolly, Advocate
Mr. Rajiv Awasthi, Advocate

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3) **Crl.M.C. No. 774/2005**

N.P. Punj .....Petitioner

! ***through***: Mr. Sanjiv Rajpal, Advocate

VERSUS

$ Roshan Sahay, Dy.Commissioner of Income-Tax
Special Range XV, New Delhi .....Respondent

^ ***through***: Mr. R.D. Jolly, Advocate
Mr. Rajiv Awasthi, Advocate

CORAM :-
***THE HON'BLE MR.JUSTICE A.K.SIKRI**

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

1. These three petitions arise out of the same complaint filed by the Income-Tax Department for the assessment year 1988-89 and, therefore, are heard and decided together. For the sake of convenience, facts of Crl.M.C. No. 153/2005 are taken.

2. The respondent herein, namely Dy. Commissioner of Income Tax, has filed a complaint under Section 276 CC and 276D read with Section 278B of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') against M/s. Dayagen & Ors. The petitioner herein is arraigned as accused No.4 in the said complaint. Matter relates to the assessment year 1988-89 and the allegation in the complaint is that the accused persons failed to file the return for the assessment year 1988-89 as required under Section 139 (1) of the Act. M/s.Dayagen was a partnership firm, which is made accused No.1. Accused Nos. 2 to 7 were the partners of M/s. Dayagen. At the time of filing of the complaint, M/s. Dayagen was no longer a partnership firm but became sole proprietorship concern of Mr.V.P. Punj (accused No.8) and, therefore, he is also made an accused. *Qua* him it is further alleged that he is associated with the firm since March 1988 and was actively participating in the functioning of the firm since then. It is alleged that for the year 1988-89 the firm was required to file the return on or before

30.6.1988 as required under Section 139 (1) of the Act. It was not filed and instead Form No.6 was filed on 30.12.1988 seeking extension of time upto 31.3.1989. This request was rejected and the same was conveyed to the accused persons vide order dated 14.1.1989. A notice under Section 139(2) of the Act was issued on 10.3.1989 by registered post, however, no return of income-tax was filed despite this notice. For the purpose of completing the assessment, notice under Section 142(1) of the Act was issued on 11.12.1990, which was served on the accused persons on 12.12.1990 asking them to produce the books of accounts, etc. However, in spite of service of this notice, books of accounts were not produced. Accordingly, assessment under Section 144 of the Act was completed on 7.3.1991 and income of the firm had been assessed at Rs.9 lacs. In the meantime, showcause notices was issued on 6.12.1989, which was served on 7.12.1989. Another showcause notice for prosecution was issued on 11.12.1990, which was served on 12.12.1990. No reply to the showcause notice was

furnished. A showcause notice for prosecution under Section 277D was also issued on 31.3.1989, to which reply was sent by the accused No.8 on behalf of the accused No.1. The complainant found this reply to be unsatisfactory and thereafter, in the year 1991, the complaint in question was filed and registered as Criminal Complaint No. 6406/1991. Summoning orders were issued, notice of charge was framed and the matter was argued for framing of the charge. At the stage of arguments on charge, accused Nos. 3, 6 & 7 contended that they were not the persons responsible for the affairs of the firm and that they had ceased to be the partners in the firm w.e.f. 7.8.1987, when the partnership firm was converted into a proprietorship concern. Accused No.8 also submitted that he was more than 70 years of age and, therefore, in view of the existing guidelines issued by the Board of Direct Taxes, persons with 70 years of age or more should not be prosecuted. Vide order dated 3.7.2001, the learned ACMM rejected the contentions of the aforesaid accused persons and adjourned the

case to 10.8.2001 for framing of the charge. Feeling aggrieved against this order, revision petition was filed by the petitioner herein taking the same plea that the petitioner had ceased to be the partner in the firm w.e.f. 7.8.1987 and, therefore, could not be treated as person responsible for filing of the income-tax return and should have been discharged. This revision petition has been dismissed by the learned ASJ vide impugned order dated 7.7.2004 and challenging the said order, these petitions are filed under Section 482 Cr.P.C. invoking the extraordinary jurisdiction of this Court.

3. Before adverting to the impugned order passed by the learned ACMM, let me state here the facts, on the basis of which it is claimed by the petitioners that they ceased to be partners in the firm with effect form 7.8.1987. All the accused persons are related to each other and are family members. It appears that there were some disputes regarding family properties and business and, for deciding these disputes, matter was referred to arbitration. The family members were divided into

groups. Petitioners belonged to Group No.1, which consisted of 14 members, whereas Mr.V.P. Punj (accused No.8) and his family members were in Group No.2, which had 12 members and in Group No.3 was Mrs. Dayawanti Punj, mother of accused Nos. 4 & 8. Award dated 6.8.1987 was rendered by the learned Arbitrator dividing all the assets, residential and commercial, including business, among the three groups. Insofar as the business of M/s. Dayagen is concerned, it fell in the share of Group No.2 headed by Mr.V.P. Punj. Result of this award, therefore, was that the said firm was dissolved as a partnership firm with effect from 7.8.1987 and, thereafter, became the sole proprietorship concern of the accused No.8. On the basis of the aforesaid award and these facts, it was pleaded by the petitioners that they had no concern with M/s.Dayagen with effect from 7.8.1987 and, therefore, they could not be held responsible for filing the income-tax return for the assessment year 1988-89, which was required to be filed by 30.6.1988.

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4. Let me now discuss the order as passed by the learned ASJ while dismissing the revision petitions of the petitioners. Perusal of this order would show that the learned ASJ took note of Sections 276CC, 276D and 278B of the Act to find that if a person willfully fails to furnish the return of income in time or fails to produce the accounts and documents within the provisions of the Act, he can be punished under the said provisions. Thereafter, he went into the question of framing of the charge. Noting language of Section 240 Cr.P.C., which relates to framing of the charge and stipulates that if the Magistrate is of the opinion that there is a ground for presuming that the accused has committed the offence triable under the said chapter, he shall frame in writing a charge against the accused, the learned ASJ interpreted the provisions of Section 240 Cr.P.C. in the following manner :-

> "In my considered opinion, if there is ground for presuming that the accused has committed the offence, a Court can justifiably say that a prima facie case against him exists, and so frame charge against him for committing that offence. In Black's Law Dictionary word "Presume" has been defined to mean "to believe or accept upon probable evidence". Legal Dictionary

has quoted in this context a certain judgment according to which "A presumption is a probable consequence drawn from facts (either certain or proved by direct testimony) as to the truth of a fact alleged". The aforesaid shows that if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of charge, probative value of the materials brought on record by the prosecution has to be accepted as true at that stage.

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In my opinion, the Magistrate shall frame a charge if after (i) considering the police report and documents referred to in sec. 173, (ii) examining the accused, if necessary, and (iii) hearing the arguments of both sides he thinks that there is ground for presuming that the accd. has committed an offence triable by him as a warrant case which he is competent to try and adequately punish. The basis for such a presumption would be a consideration of the police report and documents and the circumstances of the case supplemented by the examination of the accused, should it be necessary. The Magistrate has to apply his judicial and mindfully adverting to the material on record for considering whether or not there is a ground for presuming the commission of the offence by the accused. He must not automatically frame the charge merely because the prosecution by relying on the documents referred to in Section 173 consider it proper to institute the case. The magistrate has jurisdiction to commit or discharge on the basis of the documents referred to in Section 173. Section 240 gives

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ample power to frame charges on a perusal or the papers and without examining witnesses. Only the documents in Section 173 can be considered while framing charge and not the case diary. Framing charge has the main objection, viz. putting an accused upon trial on the ground that there appears to be a prima facie case against him".

5. In respect of the aforesaid observations, the learned ASJ referred to the judgments of the Supreme Court in ***R.S. Nayak v. A.R. Antulay & Anr.,*** AIR 1986 SC 2045; ***Mahantaswamy & Ors. v. State of Karnataka,*** 1987 Crl.L.J. 497; ***Kanti Bhadra Shah & Anr. v. The State of West Bengal,*** 2000 I AD (SC) 1 and certain other judgments. Applying the aforesaid ratio to the facts of the present case, the learned ASJ opined that the material which had come on record *prima facie* discloses that the petitioners were in-charge of the affairs of the firm and could be charged of the offence. Relevant portion of the impugned order dated 7.7.2004 reads as under :-

"In the present case, the allegations are that M/s.Dayajan was required to file its return of income for the assessment year 1988-89 on or before 30.6.88 which they failed to comply within time and despite notice u/s. 139(2) dated 10.3.89 and

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u/s. 142(1) dated 11.12.90 the Company failed to produce the books of accounts etc. and also failed to file its return.

On perusal of the documents, it has come out that the revisionists have been clearly shown as Directors of the Company for the assessment year 1988-89, 1989-90 and they cannot be absolved of their legal duty for filing the returns within time and making available of the documents before the concerned authority merely on the ground that they ceased to be the partners after passing of the award dated 7.8.87, which became rule of the court on 17.3.88.

On perusal of the records, it is also evident that despite statutory notice u/s. 139(2) and 142(1) of the Act, the firm failed to comply with the said notices which culminated into the prosecution against them.

In pre-charge evidence, PW1 Sh. Roshan Sahai has stated that the revisionists were persons in-charge of and responsible for the firm for the conduct of the business. He further stated that the return of income of the Firm was not filed within the prescribed time as required u/s. 139(1) of the Act.

He further stated that the notices were sent and reply on behalf of the Firm was received and he had also issued notices to accused firm under the Act asking them to furnish the return of income as well as asking them to furnish the copies of profits and loss accounts, balance sheets, auditor's report as well as their books of accounts to enable him to comply the assessment. He further stated that despite service of the notices and letters, the return or income was not filed.

He further stated that a show cause notice was also sent as to why the prosecution should not be launched for non-filing

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of return of Income. The accused furnished the names of the partners as well as details of Company Account vide their letter dated 11.2.91. He further deposed that accused No. 2 to 7 were actively involved into the day to day affairs of the Firm. In the cross examination nothing material has come out which could thwart the prosecution against the present revisionists.

Keeping in view the entire material placed on record, a prima facie case u/s. 276 CC, 276 D r/w 278 B of the Income Tax Act has been made out against the revisionists."

6. Learned counsel for the petitioners submitted that when there was no dispute about the factum of arbitration award, which was also made rule of the Court by orders of this Court dated 17.3.1988, it was clear that the petitioners ceased to have any concern with the said firm with effect from 7.8.1987. It is submitted that the learned ASJ in the impugned order failed to appreciate that when the petitioners were no more partners in the firm with effect from 7.8.1987, they could not be treated as in-charge of and responsible for the conduct of the business of the firm and, therefore, cannot be deemed to be guilty of the offence. It was also submitted that the impugned order failed to consider or appreciate that the complainant itself specifically alleges that "*at*

present accused No.8 i.e. Shri V.P.Punj has been signing relevant papers on behalf of the accused No.1 and has been filing the documents on behalf of the accused No.1 during the proceedings relevant for the assessment years 1988-89". Even the complainant admitted that it was the accused No.8 who was in-charge of the affairs of the firm, as it is admitted in the complaint itself that he is associated with the firm since March 1988. In view thereof, he submitted, there was no *prima facie* case. Strong reliance was placed on judgment and order dated 22.1.1992 passed by this Court in Crl. Writ Petition No. 482/1991. That was a case where similar prosecution launched by the respondent in respect of M/s. Punj Sons Pvt. Ltd. for failure to file the return was challenged under similar circumstances and this Court had quashed the proceedings on the ground that in the complaint nothing was stated as to how the petitioners were in-charge of the affairs of the company and mere reproduction of the words used in the section was not sufficient. He submitted that even in the instant complaint the

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complainant had not stated as to in what manner the petitioners were in-charge of and responsible for the firm in the conduct of its business in the year 1988. He argued that even when this order was specifically produced and relied upon by the petitioners at the time of arguments before the learned ASJ, he failed to consider the impact thereof. It was also argued that the accused No.4 was, in fact, more than 75 years of age besides being sick and as per Circular dated 7.2.1991, the prosecution could not have been initiated against him. It was also submitted that in any case the courts below failed to consider or appreciate that the alleged offences are compoundable but no opportunity was given to the petitioners to exercise any such right as per the guidelines for compounding issued by the Government. Learned counsel also submitted that for the assessment year 1988-89, the Revenue has charged the interest under Section 139(8) of the Act for late filing of return by M/s.Dayagen in the complaint filed by the respondent. When the Revenue levies interest under Section 139(8), it

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must be presumed that the Revenue has extended the time for filing the return beyond the prescribed period after satisfying that it is a case for extension of time. Therefore, no criminal prosecution can be launched or continued after charging the interest under Section 139(8) as it is an implied extension of time to file the return of income. Therefore, no question of willful default in filing the return of income arises in the present case. The prosecution of the petitioners is liable to be quashed on this ground alone. Reference in this regard is made to a decision of the Supreme Court in ***CIT v. M. Chandra Sekhar,*** (1985) 1 SCC 283. It is submitted that following the aforesaid decision of the Supreme Court, the Calcutta High Court in ***Gopalji Shaw v. ITO,*** Vol. 173 ITR 554, had held that having charged interest under Section 139(8) of the Act there is a presumption that the ITO has extended the time for filing the return beyond the period of limitation, hence, the prosecution for late filing of return after charging the interest under Section 139(8) is liable to be quashed. The aforesaid judgment of the

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Supreme Court was further followed in ***CIT v. M/s. M.J. Daveda,*** 1993 Supp.(1) SCC 408.

7. Another submission of the petitioners was that a penalty of Rs.5 lacs imposed upon the accused No.1 under Section 271(1)(c) of the Act was challenged before the CIT (Appeal), which set aside the said penalty imposed by the ITO. On this ground also there could not have been prosecution in view of the CBDT's Circular dated 20.10.1995 issuing the guidelines that in case where the penalty levied under Section 271(1)(c) of the Act had been deleted by the Appellate Authority and such decisions had been accepted by the Department, the prosecution of the assessee should be withdrawn. Learned counsel also referred to the judgment of this Court in ***Bhavnesh Kumar @ Pappu v. Union of India & Ors.,*** 1992 JCC 476, to the effect that where the Tribunal or such like authority finds no case, then on same facts and evidence criminal prosecution cannot be allowed to

proceed. On the other hand, learned counsel for the respondent supported the impugned order by adopting the reasoning given thereunder as his arguments, note whereof is already taken.

8. After hearing the counsel for the parties, I am of the view that these petitions warrant to be allowed in view of the Division Bench judgment dated 22.1.1992 in Crl.W.P. No. 482/1991. That case also related to the non-filing of the return by M/s. Punj Sons Pvt. Ltd., which was also a company jointly owned by the same family members, that was also subject matter of the award dated 7.8.1987. Prosecution against the said company was also launched on the same ground and under the same provisions, namely for non-filing of the return for the assessment year 1988-89. As per the award, this company had also fell into the share of Group No.2 and persons belonging to Group No.1 had, on the basis of the said award, challenged the prosecution launched against them and submitted that they were not responsible for the affairs of the

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company. Insofar as the plea based on award dated 7.8.1987 is concerned, the Division Bench categorically stated that it was not going into that aspect as it relates to the defence of the petitioner, meaning thereby that such a defence based on facts could be gone into only at the stage of trial. However, the petition was allowed on the ground that nothing was stated in the complaint which would indicate as to how the said directors (petitioners thereon belonging to the Group No.1, as in the instant case) were in-charge of the affairs of the company. The order passed is brief and it would be apposite to reproduce the same in entirety :-

> " Rule D.B.
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> The petitioners herein are being prosecuted under Section 276-CC/276-D read with Section 278-B of the Income-Tax Act. In para 2 of the complaint, it is stated as under :-
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> "That the accused No.1 is a Company and during the period relevant to the assessment year 1988-89, accused No.2 to 8 were the Directors of accused No.1 and they were incharge of and responsible to the company for conduct of its business. The accused No.9 is presently the Chairman of accused No.1. Accused No.9 has been signing relevant papers on

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behalf of accused No.1 and has been filing the documents on behalf of the company during the proceedings relevant to the assessment year 1988-89. The offences, which are the subject matter of this complaint, have been committed with the consent and connivance of accused No.9 and are also attributable to the neglect on part of accused No.9 also."

The main objection of the petitioners is that even though the company was incorporated in 1954, the petitioners totally came out of it under an award dated 7th August 1987 which was made rule of the Court on 17th March 1988. The period for which the petitioners are being prosecuted for non-filing of return pertains to the year 1988-89 when according to the award, the petitioners had nothing to do with the company. We are not going into this aspect as this relates to the defence of the petitioners. But, we are of the view that the prosecution of the petitioners is unwarranted for the reason that there is no indication of any sort in the complaint as to how the petitioners were incharge and responsible to the company for the conduct of its business.....**Dinesh Verma & Another**, reported in Income-Tax Reporter, Volume 169 of 1988, decided on 11th August 1987, has held that mere reproduction of the expression in Section 278-B in the complaint does not meet the requirements of law. The complainant is bound to provide indication, though not evidence as to in what manner a particular partner of the firm is supposed to be incharge of and responsible for the conduct of business. Mere reproduction of the words used in the Section is not sufficient.

We consider it to be good and valid law and since we find no indication in the complaint as to how and in what manner the petitioners were responsible and incharge for the

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conduct of business of the company, their prosecution is liable to be quashed.

Accordingly, we allow this petition and quash the complaint against the petitioners.

The interim order is recalled and the complaint shall proceed against others.

The petition stands disposed of."

9. The position in the present case is identical. Except stating that the petitioners herein were in-charge of and responsible to the firm for conduct of its business, which amounts to reproduction of language of Section 278-B, nothing is attributed to the petitioners and it is not indicated as to how and in what manner the petitioners were in-charge of the affairs of the firm. In fact, the case of the petitioners in the present petitions is a shade better inasmuch as in the complaint itself it is specifically averred that it is the accused No.8 who was controlling the affairs of the firm and it was he who was corresponding with the income-tax authorities. In view thereof, it is not necessary for me to go into the other issues raised by the petitioners. These petitions

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accordingly succeed on this ground. Summoning orders issued against the petitioners are quashed, the petitioners are discharged and the complaint *qua* them is dismissed.

(A.K. SIKRI)
JUDGE

November 22, 2006
nsk