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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on:- 1st October, 2018

\+ CRL.M.C. 602/2015 & Crl.M.A. 2345/2015

RAKSHIT JAIN ..... Petitioner

Through: Mr. Balbir Singh, Sr. Adv. with Mr. Yudhister Singh, Mr. Akhil Sachar, Ms. Monica Benjamin & Mr. Manoj Singh, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX (ACIT) ..... Respondent

Through: Mr. Puneet Rai, Standing counsel with Mr. S. Singh, Advocate

\+ CRL.M.C. 603/2015 & Crl.M.A. 2348/2015

M/S MGF DEVELOPMENTS LTD. ..... Petitioner

Through: Mr. Balbir Singh, Sr. Adv. with Mr. Yudhister Singh, Mr. Akhil Sachar, Ms. Monica Benjamin & Mr. Manoj Singh, Advocates.

Versus

ASSISTANT COMMISSIONER OF INCOME TAX (ACIT) ..... Respondent

Through: Mr. Puneet Rai, Standing counsel with Mr. S. Singh, Advocate

+ CRL.M.C. 606/2015 & Crl.M.A. 2353/2015

SHRAVAN GUPTA ..... Petitioner

Through: Mr. Balbir Singh, Sr. Adv. with Mr. Yudhister Singh, Mr. Akhil Sachar, Ms. Monica Benjamin & Mr. Manoj Singh, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX (ACIT) ..... Respondent

Through: Mr. Puneet Rai, Standing counsel with Mr. S. Singh, Advocate

+ CRL.M.C. 607/2015 & Crl.M.A. 2355/2015

ARUN MITTER ..... Petitioner

Through: Mr. Manoj Sharma & Mr. Kapil Kaushik, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX (ACIT) ..... Respondent

Through: Mr. Puneet Rai, Standing counsel with Mr. S. Singh, Advocate

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. These four petitions were filed invoking the inherent power and jurisdiction of this Court under Section 482 of the Code of Criminal Procedure 1973 (Cr.P.C.) to pray for setting aside the order dated 23.01.2015 of the Additional Chief Metropolitan Magistrate (ACMM) and quashing of the proceedings arising out of the criminal complaint (no. 91/2014) of the respondent which was instituted statedly on 20.01.2015 alleging offence under Section 276 CC of Income Tax Act, 1961 (for short "IT Act") read with Section 278 B of IT Act. By the impugned order, the ACMM took cognizance and issued process against the petitioners, they including company M/s MGF Development Ltd. (company accused), petitioner in Crl.M.C.603/2015, its managing director Mr. Arun Mitter, petitioner in Crl.M.C. 607/2015 and two directors namely Shravan Gupta and Rakshit Jain, petitioners in Crl.M.C. Nos. 606/2015 and 602/2015. The petitions are resisted by the respondent (complainant).

2. It is clear from the averments in the criminal complaint and the documents filed therewith that the criminal action has been initiated on the allegations that the petitioners (shown in the array of accused) willfully committed breach of the requirements of Section 139 (1) of IT Act by failing to file return of the income of company in respect of the assessment year (AY) 2011-12 by the stipulated date i.e. 30.09.2011, the default having been also committed *vis-a-vis* the compliance required with the notice under Section 142 (1) IT Act which was issued later. The return of the income for AY 2011-12 was

actually filed on 28.03.2013, concededly beyond the period stipulated for purposes of Section 139 (1) and Section 142 (1) of IT Act. It is admitted case of the respondent-complainant (Revenue) that the order on assessment of income of the company accused, for AY 2011-12 was finalised on 30.03.2014, it being based on scrutiny assessment under Section 143 (3) of IT Act. A copy of the said assessment order has also been submitted, it revealing the income of the assessee company having been computed and assessed in the sum of Rs. 30,15,90,603/- for AY 2011-12. It was pointed out that by the said assessment penalty proceedings under Section 271 (1) (C) of IT Act were also separately initiated on account of inaccurate particulars of income having been furnished. It is further pointed out on behalf of the petitioners that in the said assessment order no penalty as envisaged in Section 271F of IT Act (for failure to furnish return of income) was imposed by the assessing authority i.e. the Deputy Commissioner of Income Tax (DCIT).

3. It is also not in dispute, and this being the basis of some argument raised by the petitioners, that prior to the filing of the criminal complaint by the respondent Assistant Commissioner of Income Tax (ACIT) – sanction for prosecution had been granted under Section 279 (1) of IT Act on 14.01.2015 by the Commissioner of Income Tax (CIT), the said authority (CIT) having earlier issued the show cause notice on 16.07.2014, calling upon the company accused to respond as to why the prosecution for willful failure to file return of income be not launched.

4. It is the argument of the petitioners that it was improper on the part of the CIT to have *suo motu* initiated the proceedings leading to the criminal prosecution by issuing show cause notice under Section 279 (1) of IT Act on 16.07.2014 and by sanctioning the prosecution under Section 279 (1) of IT Act, although the question as to whether or not to initiate such action being actually within the domain of the assessing authority – ACIT which had passed the assessment order. It is submitted that the entire proceedings taken out in its wake are unjust, unfair and improper, the sanction for prosecution also suffering from the vice of non-application of mind because the facts of subsequent filing of return on 28.03.2013, followed by scrutiny assessment have not been taken note of nor the views of the assessing authority for expediency of criminal prosecution ascertained. It is the submission of the petitioners that since the criminal complaint was filed on sanction for prosecution issued on 14.01.2015 by the CIT, it is a case of the prosecutor being the judge of his own cause.

5. The arguments to the above effect do not appeal to this Court. As is clear from the proviso to Section 279 (1) of IT Act, the prosecution can be initiated at the instance of the authorities superior to the assessing authority, they including officer of the level of CIT or even those above in hierarchy who are permitted to issue instructions or directions for institution of proceedings under Section 279 (1) which provision also governs the process relating to offence under Section 276 CC. There was no impropriety on the part of CIT, in this view, in issuing the show cause notice on 16.07.2014 followed by the

grant of sanction for prosecution on 14.01.2015 it resulting in the criminal complaint being filed on 20.01.2015.

6. The submission that the fact that assessment order in the meanwhile had been passed on 30.03.2014 has not been taken note of or, for that matter, the submission that the filing of the income-tax return (ITR) on 28.03.2013 has been omitted from particular mention in the complaint, do not aid or assist the petitioners in evading the criminal prosecution. The accusations against them in the criminal complaint relate to the offence under Section 276 CC of IT Act which is an offence that deals with "*failure to furnish returns of income*". There is no denial at this stage that there was indeed a failure to furnish return of income within the time stipulated under Section 139 (1) or in response to the notice under Section 142 (1). Whether or not there was justification for such default is a matter of defence which may be agitated during the trial. The assessment proceedings are independent of this matter and they would not come in the way of criminal prosecution [*Sasi Enterprises v. Assistant Commissioner of Income Tax (2014) 5 SCC 139]*.

7. The following observations of the Supreme Court in *Sasi Enterprises* (supra) are germane to the issue raised:-

> "*28. We have indicated that on failure to file the returns by the appellants, the Income Tax Department made a best judgment assessment under Section 144 of the Act and later show-cause notices were issued for initiating prosecution under Section 276-CC of the Act. The proviso to Section 276-CC nowhere states that the offence under*

Section 276-CC has not been committed by the categories of assessees who fall within the scope of that proviso, but it is stated that such a person shall not be proceeded against. In other words, it only provides that under specific circumstances subject to the proviso, prosecution may not be initiated. An assessee who comes within clause (ii)(b) to the proviso, no doubt has also committed the offence under Section 276-CC, but is exempted from prosecution since the tax falls below Rs 3000. Such an assessee may file belated return before the detection and avail the benefit of the proviso. The proviso cannot control the main section, it only confers some benefit to certain categories of assessees. In short, the offence under Section 276-CC is attracted on failure to comply with the provisions of Section 139(1) or failure to respond to the notice issued under Section 142 or Section 148 of the Act within the time-limit specified therein.

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"30. We also find no basis in the contention of the learned Senior Counsel for the appellant that pendency of the appellate proceedings is a relevant factor for not initiating prosecution proceedings under Section 276-CC of the Act. Section 276-CC contemplates that an offence is committed on the non-filing of the return and it is totally unrelated to the pendency of assessment proceedings except for the second part of the offence for determination of the sentence of the offence, the Department may resort to best judgment assessment or otherwise to past years to determine the extent of the breach. The language of Section 276-CC, in our view, is clear so also the legislative intention…."

8. It is the argument of the petitioners that the assessing authority (DCIT) had not imposed any penalty under Section 271 F which was mandatory in the event of it being concluded that there was a willful

failure to furnish return of income. It is argued that, in this view, it has to be inferred that in the opinion of the assessing authority there was no willful default and, thus, the requisite *mens rea* required for Section 276 CC is amiss.

9. Noticeably, Section 278 E of IT Act permits presumption of culpable mental state to be raised. Prior to the amendment by Finance Act, 2002, there was a mandate in the provision contained in Section 271 F for penalty to be imposed for failure to furnish of income, the provision after the said amendment, made effective from 1.07.2012, reads as under:-

"271 F Penalty for failure to furnish return of income.

> *If a person who is required to furnish a return of his income, as required under sub-section (1) of section 139 or by the provisos to that sub-section, fails to furnish such return before the end of the relevant assessment year, the Assessing Officer may direct that such person, shall pay, by way of penalty, a sum of five thousand rupees."*

10. It is clear from bare reading of the above provision that whether or not the penalty as envisaged in Section 271 F is to be imposed, is a matter to be determined by the Assessing Officer/authority (DCIT) within the meaning of the section. He may direct such penalty to be paid and conversely, it would be correct to say, he may choose not to so direct for such penalty to be paid. At any rate, the omission on the part of the assessing officer to impose such penalty by itself does not mean that, in his opinion, the default was not willful. To determine whether the default was willful or otherwise, the explanation offered,

may be in response to the show cause notice, will have to be seen and construed.

11. It was fairly conceded at the hearing by the learned senior counsel for the petitioners that there is no requirement in law that prior to sanction for prosecution being accorded under Section 279 (1) of IT Act, the complainant authority of income tax must issue show cause notice. Be that as it may, since show cause notice was issued for the purpose of inquiry, the reply submitted by the company accused in response thereto will have to be looked into. As submitted by the counsel the Chartered Accountant being the authorized representative in the reply dated 03.11.2014 had pleaded financial difficulties and certain default on the part of the auditors. These defences give rise to questions of fact the truth or otherwise of which cannot be gone into in the proceedings under Section 482 Cr.P.C. [*Rajiv Thapar and Ors. Vs. Madan Lal Kapoor, (2013) 3 SCC 330]*. These defences, for whatever their worth, will have to be presented before the trial court for consideration at appropriate stage.

12. The fact remains that in the opinion of the complainant (Revenue), the default was willful and it will be the burden of the complainant (Revenue) to bring the said allegation home by requisite evidence at the trial. The petitioners will have ample opportunity to discredit the evidence to such effect and bring out facts to the contrary during such proceedings.

13. Aside from the company, the managing director and the two directors of the company are also being prosecuted and for this reference is made by both sides to the provision contained in Section 278 B of IT Act, the subsection (1) whereof reads thus:-

> *"278 (1) Where an offence under this Act has been committed by a company every person who, at the time the offence was committed, was incharge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly."*

14. The learned counsel for the petitioners submitted that in this context, the provision contained in Section 140 (C) of IT Act will have to be kept in mind. The said provision, to the extent relevant and relied upon, reads thus:-

> *"140. Return by whom to be verified*
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> *The return under section 115 WD or section 139 shall be verified*
>
> *Xxx*
>
> *(c) in the case of a company, by the managing director thereof, or where for any unavoidable reason such managing director is not able to verify the return, or where there is no managing director, by any director thereof.""*

15. It is the argument of the petitioners that the obligation to verify and submit the ITR on behalf of the company has been placed by the legislature at the door of the managing director of the company and,

consequently, it is inappropriate and unfair to rope in the directors of the company.

16. It does appear, on first blush, that the prime responsibility of furnishing the return of income of the company is of the managing director of such company. But then, it is not correct to read the above provision so as to conclude that it is always or invariably the responsibility of the managing director alone and of no other. In a situation where the managing director may not be in a position to verify or submit the return of income, this on account of numerous reasons which may be presented as "unavoidable" and in case of such difficulties for the managing director to abide by the requirements of law on behalf of the company, the responsibility of other directors – the provision noticeably uses the expression "any director thereof" – cannot be ignored.

17. Pertinent to note that in the reply dated 03.11.2014 in answer to the show cause notice, there was no explanation offered for failure on the part of the managing director to furnish income-tax return. Whether or not there was any difficulty on the part of managing director would be a matter of his defence at the trial. It cannot be assumed at this stage that such would be his defence, but if such defence were to be presented, it would be the responsibility of the directors to explain the default. Be that as it may, there is no escape from the conclusion that the directors are also equally responsible for

furnishing of return on behalf of the company as is the case of the managing director.

18. For above reasons, the petitions are found devoid of substance. They alongwith pending applications are dismissed.

R.K.GAUBA, J.

OCTOBER 01, 2018
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