

(2005) 03 P&H CK 0050

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal M. No. 4095-M of 1995

Income Tax Officer

APPELLANT

Vs

Shiv Sewak Cotton Co. and
Others

RESPONDENT

Date of Decision: March 7, 2005

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 397(2), 482
- Income Tax Act, 1961 - Section 194A, 2(35), 201(1A), 221, 276B

Citation: (2006) 202 CTR 542 : (2006) 282 ITR 73 : (2006) 1 RCR(Criminal) 720

Hon'ble Judges: Satish Kumar Mittal, J

Bench: Single Bench

Advocate: N.L. Sharda, for the Appellant; P.S. Brar and Akshay Bhan, for the Respondent

Final Decision: Dismissed

Judgement

Satish Kumar Mittal J.

The Income Tax Officer, Faridkot, has filed the instant petition u/s 482 of the Criminal Procedure Code, for setting aside the order dated April 4, 1994 passed by the Sessions Judge, Faridkot, whereby the revision petition filed by the petitioner against the order of the Chief Judicial Magistrate, Faridkot, dated October 28, 1991 has been dismissed.

2. The Chief Judicial Magistrate, by his order dated October 28, 1991, had dismissed the complaint filed by the petitioner against 17 partners of firm, M/s. Shiv Sewak Cotton Company, Kot Kapura, u/s 276B read with Section 278B of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), and discharged the accused.

3. During the pendency of the instant petition, respondents Nos. 5, 7, 12 and 18 have expired and proceedings qua them were ordered to be abated vide order dated May 29, 2002.

4. In this case, the complaint was filed by the petitioner on the allegation that the respondent-firm M/s. Shiv Sewak Cotton Company filed a return of its income for the assessment year 1980-81 showing an income of Rs. 54,966. During the said assessment year, the accused firm credited a sum of Rs. 55,500 showing the same as carrying charges, but on examination of the account of the firm, it was found that the assessee had obtained a loan from M/s. Shri Shiv Cotton Company and paid estimated interest to the tune of Rs. 55,500. But the assessee-firm did not deduct the tax at source, as required u/s 194A of the Act. In this regard, penalty proceedings were initiated against the respondent-firm u/s 221 and 201(1A) of the Act. During those proceedings, the accused firm explained that no interest had been paid by it and the aforesaid amount was paid as carrying charges. This explanation given by the firm was not accepted, therefore, the penalty u/s 221 of the Act was imposed and the accused firm was held liable to be proceeded against u/s 194A of the Act. Hence, the complaint was filed.

5. After summoning of the accused, pre-charge evidence was recorded and the matter was heard regarding framing of charge. After considering the evidence produced by the petitioner, the Chief Judicial Magistrate came to the conclusion that the complainant was not able to prove his case and there was no sufficient evidence against the accused on the basis of which respondents accused could be convicted. After this conclusion, the trial court dismissed the complaint and discharged the accused.

6. Primarily, the trial court came to the conclusion that no notice was given to the partners of the firm (accused) u/s 2(35) of the Act and without serving such notice, the partners cannot be considered as principal officers and as such, they cannot be convicted u/s 278B of the Act. In this regard, the learned trial court relied upon a decision of the Madras High Court in [Shital N. Shah and others Vs. Income Tax Officer](#), wherein it was held that the partner of a firm cannot be treated as person responsible to the firm for the conduct of its business unless notice of the Income Tax Officer's intention to treat him as such is served on him. It was held by the trial court that in the case in hand, no such notice was ever given to any of the partners of the firm by the Income Tax Officer showing his intention to treat those partners as principal officers of the firm, therefore, none of them can be proceeded against.

7. Secondly, it was held by the trial court that in the complaint, it has not been averred that the respondent partners were in charge of and responsible to the firm for the conduct of the business of the firm. In the absence of such an averment, the complaint was held liable to be dismissed. In this regard, reliance was again placed upon the aforesaid judgment of the Madras High Court in [Shital N. Shah and others Vs. Income Tax Officer](#), wherein it was held that u/s 278B of the Act, the basic requirement is that the prosecution must prove that the persons concerned were in charge of, and were responsible to, the firm for the conduct of its business. It is only then that they can be vicariously prosecuted along with the firm.

8. Against the order of discharge, the petitioner filed a revision petition, which has been dismissed by the Sessions Judge, Faridkot, while observing as under :

In this case, there is no allegation in the complaint as to which of the partners was in charge of and responsible to the firm for the conduct of the business of the firm. No notice was given to the partners before initiation of action against them. It was held in [Shital N. Shah and others Vs. Income Tax Officer](#), that only person responsible for paying as mentioned in Section 194A of the Act can be held guilty. Person connected with the management of the firm has to be served with a notice by the Income Tax Officer showing his intention to treat the partner as principal officer of the firm. In this case, no such notice was given to any of the partners.

9. Counsel for the petitioner submitted that the question whether the partners are liable to be prosecuted on the failure of the firm to pay tax deducted at source is a question of fact and the complaint filed u/s 276B of the Act cannot be quashed. In this regard, he relied upon a decision of the Madras High Court in [S.M. Kabeer Vs. Income Tax Officer](#). Counsel for the petitioner further submitted that for the purpose of prosecuting a partner of a firm for an offence u/s 276B of the Act, issue of a separate notice to the partner is not necessary and a notice to the firm is sufficient. He submitted that prosecution u/s 278B of the Act can be launched against any person who is in charge of and responsible for the conduct of the business of the firm, even though such person was not the principal officer or person responsible for paying tax. Therefore, according to him, both the courts below have wrongly discharged the accused.

10. On the other hand, counsel for the respondents submitted that Section 397(2) of the Criminal Procedure Code barred the second revision and the instant petition is nothing but a second revision. In order to circumvent provisions of Section 397(2) of the Criminal Procedure Code, the petitioner has filed the instant petition u/s 482 of the Criminal Procedure Code for setting aside the order of the trial court as well as the revisional court. In support of their contention, counsel for the respondents relied upon a decision of this Court in ITO v. Adinath Sales Corporation [1992] 2 C.C.C 105. On the merits, learned Counsel relied upon a judgment of this Court in [Smt. Pushpa Maini and Others Vs. Income Tax Officer and Another](#), wherein it was held that where an offence under the Act has been committed by a company, every person who, at the time of commission of the offence was in charge of and responsible for the conduct of its business shall be deemed to be guilty of the offence and shall be liable for prosecution. He submitted that in this case, respondents Nos. 2 to 18 were not mentioned to be in charge of the affairs of the firm nor was it alleged that they were conducting business of the firm in any manner. There was no allegation that the accused had prepared a false record and used the same in any manner. They had not signed or verified the return, as such they were not liable to be prosecuted. Counsel for the respondents further submitted that in the absence of any allegation made in the complaint about the

involvement of the respondents accused in submitting a false return by the managing partner and any wilful attempt made by them to evade tax, it cannot be held that the order of discharge, passed by the courts below, is illegal. Relying on the aforesaid judgment, counsel for the respondents submitted that the trial court was justified in discharging the accused partners of the firm.

11. After hearing counsel for the parties and going through the record of the case, I am of the opinion that no interference is required in the impugned order, particularly when the order of discharge was affirmed in revision by the Court of Sessions. Though this petition has been filed u/s 482 of the Criminal Procedure Code, in substance it is a second revision against the order of discharge which is barred u/s 397(2) of the Criminal Procedure Code. The provisions of Section 397(2) of the Criminal Procedure Code cannot be circumvented merely by filing the petition u/s 482 of the Criminal Procedure Code. On the merits also, in similar circumstances, this Court in [Smt. Pushpa Maini and Others Vs. Income Tax Officer and Another](#), has held that in the absence of pleading in the complaint about the involvement of the respondents and about their responsibility for the conduct of the business, the discharge order passed by the trial court on the said ground cannot be said to be unjustified. Similarly, regarding the notice part, the Himachal Pradesh High Court in [Income Tax Officer Vs. Dayal Sons and Others](#), has held that prosecution of the accused for offences under Sections 276C and 279 of the Act, is bad and vitiated if no notice was given to him before launching the prosecution. It was held that the requirement of natural justice is inherent in the provisions of Section 279(2) of the Act, and that the person accused is entitled to notice before initiation of the proceedings in respect of which a right of compounding has been given. A similar view has been taken by the Madras High Court in [Shital N. Shah and others Vs. Income Tax Officer](#), which has been followed by the trial court, while discharging the accused. In view of this legal position, on the merits also, I do not find any infirmity or illegality in the impugned order.