

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Pronounced on: 19th July, 2022**

+ **CRL.M.C. 3894/2018, CRL.M.A. 29254/2018**

VIPUL AGGARWAL

..... Petitioner

Through: Mr. Arshdeep Singh, Mr. Hitesh Rai
and Mr. Abhimanya Singh,
Advocates

versus

INCOME TAX OFFICE

..... Respondent

Through: Mr. Zoheb Hossain, Senior Standing
Counsel with Mr. Vipul Agrawal
and Mr. Parth Semwal, Advocates

CORAM:

HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

1. The petitioner has been arrayed as an accused in complaint case No.514952/2016 which has been filed against him as well as the company M/s ASM Traxim Pvt Ltd. for violation of Section 276-CC read with Section 278-B of the Income Tax Act, 1961. The petition has been filed for the quashing of the said complaint and all proceedings arising therefrom including the order dated 14th December, 2017 of the ACMM (Special Acts) Central District, Tis Hazari Courts, Delhi directing the framing of charge against the petitioner and the order dated 14th May, 2018 passed by the Special Judge (PC Act)-05 (ACB) dismissing the revision petition preferred by the petitioner against the said order dated 14th December, 2017.

2. The allegation against the petitioner and the company M/s ASM Traxim Pvt. Ltd. (“Company”) was that they had not filed the Income Tax Returns (ITR) for the assessment year 2012-13 by 30th September, 2012 which was the last date to file the ITR. Furthermore, when a notice under Section 142(1) of the Income Tax Act (‘IT Act’ for short) to file the return on or before 2nd August, 2013, the returns were actually filed only on 12th August, 2013. Thus, an offence had been committed under Section 276-CC read with Section 278E. A Show Cause Notice had also been issued on 20th March, 2014, which was replied to by the Company. On 14th July, 2014, sanction was accorded under Section 276-CC read with Section 278-B of the IT Act for prosecution of the accused. On 6th August, 2014 the complaint was filed under Section 276-CC read with 278-B of the IT Act.

3. The Income Tax Department initiated prosecution against the Company and the petitioner by means of the complaint filed on 6th August, 2014 and the learned Magistrate took cognizance thereof. After recording pre charge evidence, the learned ACMM (Spl. Acts), vide the orders dated 25th May, 2017, concluded that sufficient material was available on record to establish that a case was made out against the petitioner and the Company. The learned ACMM (Spl. Acts) concluded that the contentions raised by the petitioner that there was no willful default on the part of the accused persons to file the ITR was their defence and that since the law provided for presumption (under Section 278-E) of the culpable mental state of the accused, and since the presumption could be rebutted only by the accused during trial, there was sufficient material to frame the charge. It framed charges under Section 276-CC read with Section 278-B of the IT Act against both, the Company and the petitioner.

4. Aggrieved by the decision of the learned ACMM (Spl. Acts), the order dated 25th May, 2017 was challenged by the way of a revision petition where it was argued that there was no loss caused to the Government Exchequer because the return had been filed with a delay of mere ten days; the sanction was defective as it did not disclose the role of the petitioner No.2 before the Revisionary Court, i.e., the present petitioner; and that no offence was made out against the present petitioner, as he was not responsible for the conduct of the business of the company. The learned Spl. Judge (PC Act) (ACB-5) also concluded that this was to be decided only during trial, as it was the defence of the present petitioner that he was not the person responsible for the conduct of the business and that no specific sanction had been taken to prosecute him. The revision petition was accordingly dismissed.

5. The present petition has also questioned the conclusion arrived at by the learned Spl. Judge (PC Act) (ACB-5).

6. I have perused the record and the written submissions filed by both sides and the cited judgments. I have also heard learned counsel for the petitioner Mr. Arshdeep Singh and learned counsel for the respondent, Mr. Zoheb Hossain, Senior Standing Counsel at length.

7. Mr. Arshdeep Singh, learned counsel for the petitioner has challenged the prosecution of the petitioner on the ground that before the petitioner could be treated as a Principal Officer, under Section 2(35)(b) of the IT Act, a prior notice had to be issued to him indicating that he would be treated as the Principal Officer of the Company. It is the contention of the learned counsel for the petitioner that no such notice had been issued to the petitioner.

8. Furthermore, the presumption that the petitioner was the Principal Officer could not be raised, in the absence of the notice, and because he had appended his digital signatures on the returns, that were actually filed subsequent to the notice dated 26th July, 2013. It was submitted that the signatures were appended in view of the provisions under Section 140 of the IT Act which made it mandatory for the Director, even if not dealing with the day-to-day affairs of the Company, to sign the returns. It was submitted that it was fallacious to conclude on the basis of this act that the petitioner was either the Principal Officer or in-charge of the affairs of the Company at the relevant time, i.e., in the year 2012.

9. The next argument advanced by the learned counsel for the petitioner was that sanction under Section 279 of IT Act had not been accorded qua the petitioner and therefore the entire prosecution was faulty and had to be quashed.

10. Reliance has been placed on *Dinesh Kumar vs. Airports Authority of India*, (2012) 1 SCC 531, *Consumer Action Group Vs. Cadbury India Ltd. &Anr.*, (2000) 9 SCC 56, *CBI v. Pramila Virendra Kumar Agarwal*, (2020) 17 SCC 664, *Pooja Ravinder Devidasani v. State of Maharashtra*, (2014) 16 SCC 1, *GHCL Employees Stock Option Trust v. India Infoline Ltd.*, (2013) 4 SCC 505, *Income Tax Officer v. Delhi Iron Works (P) Ltd.*, 2010 SCC OnLine Del 3921 and *Income-Tax Officer v. Autofil*, 1990 SCC OnLine AP 388.

11. *Per contra*, Mr. Zoheb Hossain, the learned counsel for the respondent contended that the notice dated 26th July, 2013 was addressed to the Managing Director/Principal Officer of the company and the response was by the petitioner when he filed the ITR for the assessment

year 2012-13 on 12th August, 2013 with his digital signatures. It is also pointed out that the petitioner has never disclosed as to who else, other than him, was the person-in-charge or responsible for the day-to-day affairs of the Company or was its Principal Officer. According to the learned counsel for the respondent, the very fact that it was the respondent alone who responded to the notice sent to the Principal Officer, led only to one presumption and that was the one drawn by the courts below to the effect that the petitioner had been the one in charge of the affairs of the Company at the relevant time.

12. Learned counsel for the respondent also pointed out to the provision of Section 278-E of the IT Act which provided that every “person” in charge or responsible to the company for the conduct of its business, as well as the company, were to be “deemed” to be guilty of the offence and that the culpability was not restricted to the Principal Officer. As such the absence of any notice under Section 235-B of the IT Act made no difference. With regard to the sanction, learned counsel pointed out to the penultimate paragraph of the same, referring to the role of the petitioner as the one in-charge of the affairs of the Company. If the petitioner claimed that he was not responsible for the affairs of the Company in the assessment year 2012-13, he would have ample opportunity to establish the same during trial. Thus, according to the learned counsel, the conclusions of the learned Sessions Court were correct and the present petition be dismissed. It was also canvassed before this Court by the learned counsel for the respondent that, a Director was an “agent” of the company and even under Section 2(35) of the IT Act as an agent, a Director of the company would also be a Principal Officer.

13. Reliance has been placed on *State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335, *Binod Kumar v. State of Bihar*, (2014) 10 SCC 663, *M.R. Pratap v. V.M. Muthukrishnan, ITO*, (1992) 3 SCC 384, *J. Tewari v. Union of India*, 1995 SCC OnLine Cal 292 and *Madhumilan Syntex Ltd. v. Union of India*, (2007) 11 SCC 297.

DISCUSSION

14. There can be no doubt that the Income Tax Department would be entitled to file a complaint for prosecution of a person under Section 276-CC for willfully failing to furnish in 'due time' the return of income. Under Section 139(4), if a return has not been furnished within time allowed to a person, such a person may furnish the return for any previous year at any time before three months prior to the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. It has been held by the Supreme Court in *Prakash Nath Khanna and Anr. Vs. Comm. of Income Tax and Anr.*, AIR 2004 SC 4552, which has been referred to by the learned ACMM in his order, that the compliance under Section 139(4) would not bar the prosecution for the non-furnishing of the return under Section 139 (1) of the IT Act as such filing under Section 139(4) would not dilute the infraction.

15. As per the scheme of the Act, before proceeding for prosecution, a notice under Section 142(1)(i) of the IT Act has to be issued. The second requirement is that prosecution could be only with the previous sanction of the appropriate authority under Section 279 of the IT Act. While the petitioner claims neither condition stands fulfilled in this case, the respondent claims full and complete adherence to the procedure prescribed. From the record it is evident that the notice that was served by

the respondent under Section 142(1)(i) in the present case, was admittedly, addressed to the Managing Director/Principal Officer/ M/s ASM Traxim (P) Ltd. The previous notice dated 26th July, 2013, requiring the filing of the return in accordance with the provisions of Section 140 of the Act by 2nd August, 2013, was addressed to the “Principal Officer” of M/s ASM Traxim (P) Ltd.

16. Section 2(35) of the IT Act reads as under:-

“Section 2 (35) "principal officer", used with reference to a local authority or a company or any other public body or any association of persons or any body of individuals, means-

(a) the secretary, treasurer, manager or agent of the authority, company, association or body, or

(b) any person connected with the management or administration of the local authority, company, association or body upon whom the Assessing Officer has served a notice of his intention of treating him as the principal officer thereof”

17. It is clear that a Principal Officer is specifically defined under the IT Act. The words “director”, “manager” and “managing agent” have been defined under Section 2(20) of the IT Act, and the words “director”, “manager” and “managing agent” in relation to a company have the same meanings as assigned to the words in the Sections 2(34) and 2(53) of the Companies Act, 1956 as well as the Companies Act, 2013.

18. Therefore, the Principal Officer is not equivalent to a Director, nor is an “agent” an equivalent of the Director. Even though in certain functions the Director may act as the agent of the company, for the purposes of Section 2(35)(a), the agent of the company cannot be treated as a Director of the company precisely for the reason that there is a separate definition

for a Director and had the Director to be included *per se* as a Principal Officer, nothing prevented the Legislature from including the Director in Section 2(35)(a) of the IT Act.

19. Thus, this argument of the learned counsel for the respondent that being an agent of the company the Director was included in the definition of Principal Officer has only to be rejected.

20. Coming to the sub-clause (b) of sub-Section (35) of section 2, any person connected with the management or administration of a company would no doubt include a director, but then the Assessing Officer would have to serve a notice of *his intention* of treating him as the Principal Officer. What is significant is the intention of the Assessing Officer, which cannot be presumed on the basis of surrounding facts. The notice of intention must be by a physical act, and the notice must be duly served on the person connected with the management, who was intended to be treated as a Principal Officer.

21. The notice dated 26th July, 2013 was not preceded by any such notice. Merely because, for the purpose of statutory compliance of this notice, as well as Section 140 of the IT Act, the petitioner appended his digital signatures to the ITRs would not suffice to meet the requirements of a notice in terms of Section 2(35) (b) of the IT Act. The act of appending the digital signatures by the Director of the Company being in compliance with the Section 140 of the IT Act cannot be an estoppel against such Director, here the petitioner, on the principles of holding out. The decisive factor is the intention of the Assessing Officer and not any act performed by the Assessee. The intention must be duly conveyed.

22. Therefore, the argument that because the petitioner had responded to

the notice dated 26th July, 2013, he would be debarred from raising the objection that he had not received any notice that the Assessing Officer had intended to treat him as the Principal Officer, cannot be accepted. It has to be held that whenever an Assessing Officer intended to treat a Director as a Principal Officer, he has to serve a notice and it is only if there is an acceptance of such treatment by the noticee, including by not objecting to it, that such a Director would become a Principal Officer under the IT Act and not otherwise.

23. However, there is force in the submission of the learned counsel for the respondent that under Section 278B, every “person” who at the time of the commission of the offence was in-charge of the company or responsible for the conduct of its business would be deemed to be guilty of the offence. This provision would cover the petitioner. Being a Director, there would be a presumption under Section 278B against him, when the ITR was not filed within time and the offence under Section 276 CC was committed. No doubt this presumption is rebuttable but that would be a matter of trial. Thus, even if for the sake of arguments, the contention urged on behalf of petitioner was to be accepted that he was not notified nor declared to be a Principal Officer by the Assessing Officer under Section 235-B, nevertheless, on that plea, he cannot avoid prosecution, other requirements being satisfied.

24. The prosecution will have to get over another hump and i.e., the sanction required under Section 279. A “person” could be a person as referred to in Section 278B being “every person” who was in-charge of or was responsible to the company for the conduct of its business. However, that “person” cannot be proceeded against for the offence under Section

276-CC except with the previous sanction of the Principal Commissioner/appropriate authority. Previous sanction is essential for prosecution. In the absence of sanction, naturally, the “person” cannot be proceeded against in a court of law. If there is no sanction, no cognizance of the complaint can be taken by the Trial Court and the complaint cannot be proceeded further.

25. In the present case, the sanction which is placed on the record as Annexure P-9 may be seen. It refers to the Company M/s ASM Traxim Pvt. Ltd as the “assessee”. It refers to a response to the show cause notice under Section 276 CC dated 20th March, 2014 vide a letter dated 25th March, 2014 by Mr. B.L. Gupta ITP on behalf of the “assessee company”, contending that the return had been filed within time allowed under Section 139(4) and that there was no willful default. It refers to the petitioner only in para no.10 in the following words, “*AND WHEREAS it is seen that the return of income was verified by Sh Vipul Agarwal director by digital signature*”, and nothing more. The sanction itself reads as under: “*NOW THEREFORE, I, R K Gupta, the Commissioner of Income-tax (Central)-- Ill, New Delhi, in exercise of powers conferred upon me u/s 279(1) of the IT Act, do hereby sanction prosecution of the assessee u/s 275CC read with Section 278E of the Income-tax Act, 1961 and authorize Sh Subhash Verma, DCIT, CC-22, New Delhi to institute criminal complaint under the above referred sections for AY 2011-12 against the company ASM Traxim Pvt Ltd in the court of competent jurisdiction at my instance.”*

Thus, the sanction is specifically to institute a criminal complaint against the Company M/s ASM Traxim Pvt Ltd. It is crystal clear that the

sanction has been accorded for the prosecution only of the “person” named as the “assessee”, namely the Company M/s ASM Traxim Pvt. Ltd. There is no sanction qua the petitioner, even as a “person” being a director/being responsible to the conduct of the business of the company. It cannot be held that the observation in para no.10 of this sanction, that the petitioner had verified the returns filed by appending his digital signatures, would tantamount to sanction qua him. That would be stretching language too far.

26. Since the law provides that without sanction u/s 278B of the IT Act, the Department cannot proceed against a person found liable to prosecute him for the offence under Section 276 CC of the IT Act, the present prosecution must fail qua the petitioner. In the absence of a specific sanction for prosecuting the petitioner, the learned ACMM could not have taken cognizance of the complaint against him and then framed charge against him. The edifice built without foundation must crumble.

27. The complaint dated 6th August, 2014 and all proceedings emanating therefrom, including the impugned orders qua the petitioner Vipul Aggarwal, stand quashed.

28. The petition is allowed. The pending application also stands disposed of.

29. Copy of this order be transmitted to the learned Trial Court electronically.

30. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

JULY 19, 2022/ak