

Received on : 02/03/2019.  
Registered on : 02/03/2019.  
Decided on : 16/12/2019.  
Duration : 0-Y, 9-M, 14-D.

**IN THE COURT OF SESSIONS AT GREATER MUMBAI**  
**CRIMINAL REVISION APPLICATION NO.267 OF 2019**

**IN**

**C.C. NO.231/SW/2018**

**CNR NO. : MHCC02-003365-2019**

Eckhard Garbers, ]  
Adult, Age : 50 years, ]  
Occupation : Business, ]  
Residing at Isle of Man. ]  
(Through Mr. Ajit Allwyn D'Souza, ]  
Constituted Attorney). ]

**... Applicant/  
(Original Accused No.7)**

**V/s.**

Shri Shubham Agrawal, ]  
Dy. Commissioner of Income Tax ]  
(TDS)-1(2), Mumbai, Smt. K. G. ]  
Mittal Ayurvedic Hospital Building, ]  
Charni Road (West), ]  
Mumbai – 400 002. ]

**... Respondent**

**CORAM : HIS HONOUR THE ADDL. SESSIONS JUDGE  
M. S. MUNGALE (C.R.NO.44).**

**DATE : 16<sup>th</sup> December, 2019.**

Shri Sujay Kantawala a/w Shri Subhash Jadhav I/b Parinam Law

Associates, Ld. Advocate for applicant.

Shri Amit K. Munde, Ld. Spl.P.P. for respondent.

**ORDER**

1. The respondent/Deputy Commissioner of Income Tax, has filed criminal case bearing C.C. No.231/SW/2018 against the revision applicant/original accused No.7 and other six accused persons with allegation that the accused No.1/Company had deducted Income Tax by way of TDS from the various parties and the total amount for the financial year 2016-2017 i.e. the period from 01/04/2016 to 31/03/2017 was Rs.1,87,18,459/-, but, immediately, the said Income Tax amount was not credited to the Central Government, but subsequently, by delay between 1 month to 11 months, the said amount was credited to the Government and as such, offences punishable under Section 276-B r/w. 278-B of the Income Tax Act, 1961, is attracted. The accused No.1 is the Company registered under the Companies Act, 1956, whereas the accused Nos.2, 3 and 5 to 7 are impleaded as the Directors and the accused No.4 is impleaded as the Chief Finance Officer of the said Company. The learned Additional Chief Metropolitan Magistrate, 38<sup>th</sup> Court, Ballard Pier, Mumbai, by order dated 24/07/2018, issued process against the accused persons for the offences punishable under Section 276-B r/w. 278-B of the Income Tax Act, 1961. Being aggrieved by the said order of issue of process, the applicant/accused No.7 has preferred this criminal revision application.

2. In the revision application, the applicant/accused No.7 has contended that he is a foreign national person and as such, he was just

professional and an Independent Director. He has not participated in day to day business of the Company. He was not in-charge of day to day business and as such, as per Section 278-B of the Income Tax Act, he is not liable for criminal proceeding. Further, before filing the said complaint, he had already submitted his resignation with effect from 23/09/2015 and the appropriate Form No.DIR-11 was submitted in the office of the Registrar of Companies and as such, criminal case against him is not maintainable. It is further contended that in the complaint, the complainant has given his residential address on the address of the Company which is wrong. He resides at Isle of Man country and his address is mentioned in the Form No.32 submitted in the office of the Registrar of Companies. The revision applicant/accused No.7 has produced copy of Form No.32 on record.

3. It is further contended that if the accused resides out of jurisdiction of the Court of Metropolitan Magistrate which takes cognizance of the case, then it is mandatory to postpone the issue of process and direct to hold enquiry and carry out investigation. However, the complainant gave wrong address of the applicant/accused No.7 and thereafter, without applying judicial mind, the learned Additional Chief Metropolitan Magistrate issued order of process against the applicant/accused No.7. On these grounds, the applicant/accused No.7 has requested to set aside the order of issue of process passed against him and discharge him from the prosecution.

4. The revision application is opposed by the respondent/Deputy Commissioner of Income Tax Department by filing reply. The respondent has contended that the TDS amount mentioned

by the revision applicant/accused No.7 in his revision application, was recovered by the accused No.1/Company from the various parties during financial year, but, did not immediately deposit the same to the Government Treasury. This fact was revealed in a survey action under Section 133A(2A) of the Income Tax Act, 1961, on 14/02/2017. It was revealed that the said TDS amount was deposited by the Company by delay of 1 month to 11 months. Therefore, show cause notices were issued to the accused No.1/Company, all the Directors and Chief Finance Officer of the Company. All the said notices were served on the address of the Company. However, reply was not given. When fresh notice was issued, reply was given by the Company. Any of the Directors has not given personal reply. The reply given by the Company was not satisfactory, therefore, by obtaining sanction from the Commissioner of Income Tax, the complaint is filed against the accused.

5. It is further contended that the accused Nos.2 to 7, being Directors, were in-charge and responsible to the Company for the conduct of the business and as such, along with the Company and Chief Finance Officer, all the Directors are also vicariously liable for prosecution and as such, the learned trial Magistrate has rightly issued process against the accused persons for the offences punishable under Section 276-B r/w. 278-B of the Income Tax Act, 1961. On these grounds, the respondent has requested to dismiss the revision application.

6. The following points arise for my determination, followed by my findings against each of them with reasons to follow :-

**POINTS**

**FINDINGS**

1. Whether it is necessary to interfere in the impugned order of issuance of process passed by the learned trial Magistrate passed against the applicant/accused No.7 for the offences punishable under Section 276-B r/w. 278-B of the Income Tax Act, 1961 ?

**In the affirmative.**

2. What order ?

**As per the final order.**

**REASONS**

**POINT NO.1 :-**

7. Heard the arguments submitted by the learned Advocate Shri Sujay Kantawala for the revision applicant, the learned Spl.P.P. Shri Amit Munde for the respondent/Deputy Commissioner of Income Tax. Perused the copy of complaint and other documents produced on record.

8. As per Form No.32 of the Registrar of Companies office produced by the applicant/accused No.7, he was Director of the accused No.1/Company with effect from 29/03/2012. The applicant/accused No.7 has contended that he had resigned from the Company with effect from 23/09/2015. However, he has not produced the copy of resignation letter and the prescribed form DIR-11 submitted to the Registrar of Companies. Therefore, prima facie, the contention of the applicant/accused No.7 that he had resigned from the Company on 23/09/2015 is not established by the applicant/accused No.7.

9. Now about merits of the case. The complaint is filed under Section 276-B r/w. 278-B of the Income Tax Act, 1961. Section 278-B which deals with offence by Companies provides as under :-

*“(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge 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 : Provided that nothing contained in this sub- section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.”*

10. On perusal of the impugned complaint, it appears that in paragraph 8 of the complaint, there are certain averments regarding position and liability of the accused persons. The said clause is reproduced as under :-

*“8. It is further respectfully submitted that the Accused are being the directors Accused are also liable for the said acts, omission and contravention committed by the Accused and therefore they are also liable to be prosecuted and to be punished for the act committed by the Accused as per U/s.276-B of the I.T. Act, 1961.”*

11. Except the aforesaid averment which is in vague nature, there is nothing in the complaint showing how each of the accused/Directors were in-charge of and responsible for the day to day business of the accused No.1/Company. The learned Advocate for the applicant/accused No.7 has contended that as per legal ratio down in various judgments by Their Lordships of the Hon'ble Supreme Court and the Hon'ble Bombay High Court, only vague pleadings that the accused/Director was in-charge and responsible for day to day business of the Company is not sufficient. But, there must be additional sufficient averment showing how the particular Director had participated in the day to day affairs of the Company and if such averment is not there, the prosecution cannot lie against the Director. In this regard, reliance has been placed on the ruling of the Hon'ble Supreme Court in the case of *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and others reported in AIR 1983 SC 67*. In paragraph 15 of the judgment, it is observed by their Lordships of the Hon'ble Supreme Court as under :-

*“15. So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence ; vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also*

*be vicariously liable. In these circumstances, therefore, we find ourselves in complete agreement with the argument of the High Court that no case against the Directors (accused Nos.4 to 7) has been made out ex facie on the allegations made in the complaint and the proceedings against them were rightly quashed.”*

12. Reliance has also been placed on the ruling of the Hon'ble Bombay High Court in the case of *Homi Phiroz Ranina and others Vs. State of Maharashtra and others reported in 2003 Bom.C.R. (Cri.) 793*. In paragraph 11 of the judgment, it is observed by their Lordships of the Hon'ble Bombay High Court as under :-

*“11. Unless the complaint disclosed a prima facie case against the applicants/accused of their liability and obligation as principal officers in the day today affairs of the company as directors of the company under section 278(b) the applicants cannot be prosecuted for the offences committed by the company. In the absence of any material in the complaint itself prima facie disclosing responsibility of the accused for the running of the day to day affairs of the company process could not have been issued against them. The applicants cannot be made to undergo the ordeal of a trial unless it could be prima facie showed that they are legally liable for the failure of the company in paying the amount deducted to the credit of the company. Otherwise, it would be a travesty without their knowledge. The Supreme Court in the case of (Shyam*



*Sunder v. State of Haryana*)<sup>3</sup>, in A.I.R. 1984 S.C. 53 held as follows :-

*“It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub-section (1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in-charge of the business. In the absence of any such proof no partner could be convicted.”*

13. Thus, in view of the aforesaid legal ratio laid down by Their Lordships of the Hon'ble Supreme Court and the Hon'ble Bombay High Court, in the complaint, there must be detail averment showing how the particular Director/accused was participating in day to day conduct of the business of the Company and that he was in-charge of and responsible to the Company for its business and if such averments are missing, the Court cannot issue process against such Director.

14. The learned Spl.P.P. for the respondent has contended that in the sanction letter, the Commissioner of Income Tax, has discussed how the Directors of the Company are liable for prosecution. However,

even in the said sanction letter, there is no whisper about participation by the applicant/Director in day to day business of the Company. Therefore, on this ground itself, the order of issue of process passed against the applicant/accused No.7 is liable to be set aside.

15. The further argument of the learned Advocate for the applicant/accused No.7 is that the applicant/accused No.7 does not reside within the jurisdiction of the Court and as such, it was mandatory for the learned Additional Chief Metropolitan Magistrate, as per amended Section 202 of the Code of Criminal Procedure to postpone the order of issue of process and order to make enquiry and investigation, but, any such enquiry was not held and in very vague nature, the order of issue of process is passed.

16. It appears that the complainant had given address of the applicant/accused No.7 on the address of the accused No.1/Company and on that basis, the learned trial Magistrate had taken cognizance and the complainant, being public officer, without holding any enquiry, passed order of issue of process. It appears that the complainant had given misleading address of the applicant/accused No.7 by mentioning his residential address on the address of the Company itself. In the sanction letter, it was mentioned by the sanctioning authority i.e. the Commissioner of Income Tax that the survey was held under 133A(2A) of the Income Tax Act, 1961, and during enquiry, the statement of the Chief Finance Officer i.e. the accused No.4 Shri Ramesh T. Patel was recorded. The enquiry report of the statement of the accused No.4 was not annexed to the complaint. Under Section 133A(2A) of the Income Tax Act, there are wide powers to the Income Tax authorities to make

enquiry by visiting the office premises of the Company and even to check the account books and other documents and also, to attach the documents and use the same in any proceeding under the Income Tax Act. While making enquiry with the accused No.4, the Income Tax Officer could get information from him about details of Directors, their tenure, their residential addresses, particularly of foreigner persons, who are Directors of the Company. Further, the Income Tax Officer has not explained on which basis of documents, he had mentioned the address of the accused No.7/applicant on the address of the Company. Due to misleading address of the applicant/accused No.7 mentioned by the respondent/complainant in the complaint, the further mandatory enquiry under Section 202 of the Code of Criminal Procedure was not held by the learned trial Magistrate.

17. In view of the aforesaid legal ratio, the Chief Finance Officer, who was responsible for the day to day finance matters including recovery of TDS from the customers and to deposit in the account of the Central Government, was prima facie responsible for the criminal prosecution for the alleged default committed, but, certainly, the Director, who is not in-charge of and not responsible for day to day business of the Company, is not liable for criminal prosecution, unless specifically it is described in the complaint how he is involved in day to day conduct of the business of the Company.

18. Therefore, in view of the aforesaid discussion, the order of issue of process passed by the learned Additional Chief Metropolitan Magistrate against the applicant/accused No.7, is liable to be set aside. Hence, accordingly, I answer the point No.1 in the affirmative and

answer the point No.2 as per the following order :-

**ORDER**

1. Criminal Revision Application No.267 of 2019 is allowed.
2. The order of issue of process dated 24/07/2018 passed by the learned Additional Chief Metropolitan Magistrate, 38<sup>th</sup> Court, Ballard Pier, Mumbai, in C.C.No.231/SW/2018 is hereby set aside to the extent of the applicant/accused No.7 Eckhard Garbers.
3. The applicant/accused No.7 is discharged from the charge of an offence punishable under Section 276-B r/w. 278-B of the Income Tax Act, 1961.
4. The bail bonds of the applicant/accused, if any, stand cancelled.
5. Criminal Revision Application stands disposed off accordingly.



**(M. S. Mungale)**  
Additional Sessions Judge,  
City Civil & Sessions Court,  
Gr. Mumbai.

Date : 16/12/2019.

Directly typed on Laptop on : 16/12/2019.  
Signed on :

"CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER."	
UPLOAD DATE AND TIME 30/12/2019 at 4.15 p.m.	NAME OF STENOGRAPHER Bahushruta Y. Jambhale
Name of the Judge ( With Court Room No.)	H.H.J. Shri. M. S. Mungale (Court Room No.44)
Date of Pronouncement of JUDGMENT/ORDER	16/12/2019.
JUDGMENT/ORDER signed by P.O. on	30/12/2019.
JUDGMENT/ORDER uploaded on	30/12/2019.