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C.C.No.276/SW/2018.
Judgment.

CNR No.MHMM20-000757-2018
Filed on : 16.02.2018
Registered on :16.02.2018
Decided on : 17.04.2023
Duration : Y M D
05 02 01

**IN THE COURT OF ADDL. CHIEF METROPOLITAN MAGISTRATE,
38th COURT, BALLARD PIER, MUMBAI
(Presided over by L.S.Padhen)
C. C.NO.276/SW/2018.**

Exh.51

Income-Tax Department,
Through,
Shri. Sudhansu B. Mohapatra,
DCIT 4(3)(2), Aayakar Bhavan,
M.K.Road, Mumbai.

... Complainant

V/s.

1. M/s. Saloni Jewellers Pvt Ltd.,
2. Shri. Jitendra Fatechand Jain.
3. Shri. Kiran Fatechand Jain.
All R/o. 80-80/B, Patwa Chawl.
3rd floor, Mumbadevi Mandir,
Sheikh Memon Street,
Zaveri Bazaar, Mumbai.

... Accused

Shri. Amit Munde, Special Public Prosecutor for the complainant.
Ms. Rutuja Pawar, counsel for the accused.

JUDGMENT

(Delivered on 17th April 2023)

The complainant Sudhansu Mohapatra, DCIT 4(3)(2), had filed the complaint against the accused for an offence under section

276-CC read with section 278-E of The Income Tax Act,1961 (in short the Act).

2. The facts of the complainant's case in short is that the accused no.1 is a Pvt. Ltd. Company, accused no.2 and 3 are its directors. Tax audit report and balance sheet of the assessee dt. 29.04.2014 was received by the Assessing Officer showing profits of Rs.10,75,38,482/-, profit after tax of Rs.6,83,41,265/- and provision for current tax liability of Rs.3,91,91,750/-. The accused was having taxable income for A.Y. 2014-2015, but they did not file return of income though every company is liable to file a return of income for an assessment year by the due date.

3. The accused nos.02 and 03 being directors are responsible for paying tax. Since they have committed default the show cause notice was issued to them on 17.10.2017 to explain as to why the sanction for prosecution should not be given. On 05.12.2017, the director of the company by written submission stated that the profit of company had reduced for A.Y. 2014-2015 and the accused has financial difficulties therefore, the return was not filed. As the accused have failed to file their return within stipulated time, therefore, the present complaint.

4. After appearance of the accused evidence before charge was led. Thereafter, my learned predecessor had framed the charge (Exh.20) against the accused, it was read over and explained to them in vernacular. They pleaded not guilty and claimed to be tried.

5. The points for determination alongwith my findings thereon are as under :

Sr.No.	POINTS.	FINDINGS.
1.	Does the complainant prove that, accused no.1 willfully failed to furnish returns of income for the assessment year 2014-2015 within due date and at that time accused nos.02 and 03 were in-charge of and responsible to accused No.01 for the conduct of its business ?	In the affirmative.
2.	What order ?	As per final order.

REASONS.

6. To prove the guilt of accused, the Income- Tax department has examined the complainant Sudhanshu Bushan Mohapatra (C.W.1) and R.S.V.S. Pavan Kumar (C.W.2). The complainant has filed following documents ;

- 1) Audit report (Exh.16),
- 2) Notices (Exh.17 colly.),
- 3) Sanction order (Exh.18),
- 4) Certified copy of information (Exh.32),
- 5) Copy of ledger statement of accused company (Exh.33),
- 6) Copy of survey report (Exh.34),
- 7) Copy of board resolution of accused company (Exh.35),
- 8) Certified copies of Assessment Orders (Exh.36 colly.).

7. On the other hand, in their defence the accused have examined only Kiran Fatechand Jain (D.W.1) and filed following documents;

- 1) Objections filed on 05.12.2017 against show cause notice dt. 17.10.2017,
- 2) Acknowledgment of return of Income-tax return for A.Y. 2015-2016, 2016-2017 and 2017-2018,
- 3) Chart showing status of returns of Income filed by the accused,
- 4) Copy of summons of DRT, Mumbai of December,2017,
- 5) Copy of letter from State Bank Of India,
- 6) Copy of RBI Sectoral Deployment of Bank Credit-May 2015,
- 7) Copy of guidelines and SOP issued by the C.B.D.T.,
- 8) Original Medical Certificate of Kiran Jain,
- 9) Copy of circular of C.B.D.T. dt.10.03.2003,
- 10) Copy of written notes of argument is filed at Exh.49.

8. The accused have also relied on the following authorities ;

- 1) S.Sundaram Pillai V/s V.R. Pattabiraman etc. S.C., 1985 AIR 582,
- 2) B.K.Gooyee v/s. Commissioner of Income-Tax [1966] 62 ITR 109 (Calcutta),
- 3) Umeshchandra Mishra v/s. Commissioner of Income-Tax, 11 Taxman 75 (M.P.),
- 4) Yeshoda Electricals v/s. Assistant Commissioner of Income-Tax, 1175/Bang/2016,
- 5) National Co-operative Development Corporation V/s. CIT Delhi, Civil Appeal Nos 5105-5107 of 2009,

- 6) Janata Sahakari Bank V/s Tax Recovery Officer, WP
No. 15437 of 2014.
- 7) CIT V/s. Khander Khan and Son, 300 ITR 157 (Mad.),
- 8) CIT V/s Khader Khan and son, 25 Taxmann,
413(SC).

9. Heard the learned counsels for both the parties at length. The learned Spl.A.P.P. argued that the complainant has examined two witnessess. Sudhanshu Mohapatra (C.W.1) is the complainant and R.S.V.S. Pavan Kumar (C.W.2) is the sanctioning authority. Survey report (Exh.34) gives the information received from the sister concerned company of the accused. Though the accused were having taxable income they have not filed ITR. The evidence of Kiran Jain (D.W.1) is identicle to other case (C.C.275/SW/2018). No question is asked to the compalainants witnessess in cross-examination on sanction order. Even suggestions are not given.

10. The audit report (Exh.34) is the crux of the case which is a document of the accused and not denied by them wherein the amount is given. In the balancesheet the profit of Rs.10,00,00,000/- and turnover of Rs.1,19,00,00,000/- is mentioned. Accused have certain sources to file the return, even though they did not file the same. Defence witness has admitted that the audit report is found in their business premises. Copy of information (Exh.32) is recovered by the Income Tax department which belongs to the accused. The accused did not deny it in their statement under section 313 of Cr.P.C. The accused nos.2 and 3 are responsible to accused no.1, which is admitted. The accused have failed to discharge the burden. All the citations filed by

the accused are on recovery of Income Tax and not filling of Income-Tax. The guidelines are issued for departmental administrative purpose only. Therefore, the accused can not use it for their evidence. Hence, the complainant has proved it's case beyond reasonable doubt.

11. The learned counsel for the accused has filed her detailed written notes of argument at Exh.49. Besides, she argued that under section 276-CC wilful disobedience is required which is explained in the authority of **S.Sundaram Pillai v/s. V.R. Pattabiraman etc. S.C., 1985 AIR 582**. However, in this case there is no intention of the accused to commit wilful default. The show cause notices (Exh.17 colly.) are not signed. In this regard Sudhanshu Mohapatra (C.W.1) stated that only initials are put on notices (Exh.17 colly.), whereas R.S.V.S. Pavan Kumar (C.W.2) stated that he had two signs. Thus, there is contradictory evidence on the signatures. The mandate of CBDT circular regarding issuance of notice is not complied by the PCIT. In this regard the accused relied on the authority of **B.K.Gooyee v/s. Commissioner of Income-Tax [1966] 62 ITR 109 (Calcutta)** and **Umeshchandra Mishra v/s. Commissioner of Income-Tax, 11 Taxman 75 (M.P.)** Besides, the reference of section 292 (c) is not mentioned in the notice or sanction. The guidelines of CBDT are necessary to follow by the Income-Tax Department.

12. As per the reply dt.05.12.2017, the accused did not come within the ambit of wilful default as financial difficulties are mentioned therein. The chart filed by accused shows returns, notice of SBI and medical papers of the accused, which are important. It shows that there is no intention, motive or mens rea to avoid the tax payment or filling

return. In the complaint itself it is mentioned that there were short borrowings therefore, the complainant was aware about the financial position of the accused. In this regard the authority of **National Co-operative Development Corporation v/s. CIT Delhi, Civil Appeal Nos 5105-5107 of 2009** is important. The complainant had cross-examined Kiran Jain (D.W.1) on Saloni Infracom and not on Salony Jewellers. Both companies are different entities. The accused are not habitual offender as the present case is the first instance when they are being prosecuted. It is, therefore submitted that no case is made out against the accused.

AS TO POINT NO.1:

13. Sudhanshu Mohapatra (C.W.1) deposed that the jurisdiction of the accused company was with him for assessment purpose for A. Y. 2014-2015. The audit report (Exh.16) of the accused company was submitted by accused to the Income Tax Department in assessment proceedings of another case. It revealed that accused had turnover of Rs.11,93,05,98,153/-. There was profit before tax of Rs. 10,75,38,482/- and Rs.68,34,1265/- was profit after tax. From profit and loss account, it is seen that the accused company had taxable profit/income and therefore it was liable to file income tax return. But the accused failed to file ITR. Therefore, notices (Exh.17 colly.) were issued by the department. Thereafter, the sanction order (Exh.18) was accorded by PCIT-04, Mumbai. During the cross-examination, it is admitted that survey report is not filed on the record. It is also admitted that he had no personal knowledge whether facts were considered by PCIT-4. He was not aware whether appeal is still pending before CIT.

14. R.S.V.S. Pavan Kumar (C.W.2) deposed that in present case, he had accorded sanction against the accused for A.Y. 2014-15. Before according sanction, he had issued notices (Exh 17 colly.) to the accused and gave an opportunity of hearing to them. Thereafter, he accorded sanction for not filing return of income within due date though they have income. He has filed certified copy of transaction information (Exh.32), copy of ledger statement of Saloni Infracom (Exh.33). He further filed survey tax audit report of the accused company (Exh.34) showing profit before tax of Rs.6,83,41,256/-. Thereafter, he filed copy of board resolution (Exh. 35) and assessment order (Exh.36).

15. During the cross-examination, a question was put to him whether the accused willfully failed to furnish the return of income to which he answered in the affirmative. The accused brought on record that said witness had passed Sanction Order and approval was accorded by him as well as show cause notice were issued. He further stated that the reply of accused is mentioned in paragraph no.5 of the Sanction Order. It is also brought on the record that submission of the accused was considered. However, it is admitted that reply of the accused is not filed along with the complaint. It is further admitted that the accused has mentioned the reason of grave financial difficulty. He do not know whether the account of accused is declared NPA. He is unaware about DRT proceeding and assessment proceedings against the accused.

16. Defence witness Kiran Jain (D.W.1) deposed that in the year 2014-2015 his company was dealing in the business of manufactured gold ornaments. He is director of the company. In the

year 2014-2015, he had obtained loan from SBI for the upliftment of his business. Due to loss the loan was NPA. There was drastic change in the loan policy. The rate of interest changed from 2.05% to 14%. Therefore, his company was closed in 2014-2015. SBI had attached his residence, office and everything. They have auctioned the same and credited the sale proceeds. He produced summons of DRT, Mumbai, letter of SBI dt. 13.07.2015 declaring his loan NPA. He had also filed copy of objection raised to the show cause notice (Exh.17) and stated that the department did not considered his objections while passing sanction order. He has also filed income tax history. However, it is deposed that he had not filed return only in the year 2014-2015 and the complainant has filed the case for the said reason. He could not file the return due to financial crunches and no document was seized from the office of M/s. Saloni Jewellers.

17. In his cross-examination, it is admitted that he and his brother are partners, in-charge and responsible for Saloni Jewellers. It is also admitted that Saloni Infracon is his company and responsible for its activities. He identified the audit report (Exh.34). It is further admitted that in the audit report (Exh.34) the provision of tax liability is mentioned of Rs.3,91,91,750/-. Further, it is specifically admitted that in the relevant financial year his income was taxable but he did not file the return. Further, he admitted that the entries of statement of ledger (Exh.33) were made as per his instructions. It is denied that he had prepared and filed afterthought documents on the record. It is denied that the Government sustained loss as he failed to deposit tax.

18. In re-examination Kiran Jain (D.W.1) deposed that the audit report (Exh.34) and other documents are seized from the office of Saloni Infracon and he was appointed as Director of Saloni Infracon in February 2015.

19. The present proceeding came to be initiated on the basis of audit report (Exh.16). As per Sudhanshu Mohapatra (C.W.1) from the audit report (Exh.16) submitted by accused company to the Income Tax Department in assessment proceeding of another case, it came to know that accused have failed to file return though they have taxable income. R.S.V.S.Pavan Kumar (C.W.2) supported the above said version. He had filed certified copy of information (Exh.32) received from assessing officer regarding financial position of the accused company. However, the accused have failed to cross-examine Sudhanshu Mohapatra (C.W.1) on the audit report (Exh.16) and R.S.V.S.Pavan Kumar (C.W.2) on audit report (Exh.34). Even no suggestion is also not given on the audit report, balance sheet or its contents. The accused brought on the record through R.S.V.S.Pavan Kumar (C.W.2) that assessing officer of Saloni Infracon informed the complainant about Saloni Jewellers. Further, the defence also brought on record that the information received about the accused from the assessing officer of Saloni Infracon is mentioned in para 7 of the copy of information (Exh.32). No attempt was made to challenge the copy of information (Exh.32). It is also brought on the record through re-examination of Kiran Jain (D.W.1) the the audit report (Exh.34) came to be seized from the office of Saloni Infracon.

20. In this regard, it is argued that the complainant had not proved the figures of the audit report. The complainant had neglected the figures of short borrowing, liability and loan taken from SBI etc. which are in favour of the accused. In this regard, the accused relied on the authority of **National Co-operative Development Corporation V/s. CIT Delhi** (cited supra) wherein the real income theory is elaborately discussed. As per defence the figures mentioned in the case are not real income of the accused. Sudhanshu Mohapatra (C.W.1) testified that accused had turn over of Rs.11,93,05,98,153/-, profit before tax of Rs. 10,75,38,482/- and Rs.68,34,1265/- was profit after tax. It is supported by documentary evidence. However, the defence has utterly failed to cross-examine complainant's witnesses on the correctness of figures or real profit. Any of the witness in not confronted with the audit report (Exh.16 or Exh.34), balancesheet, the copy of information (Exh.32) etc. on this point. Therefore, the evidence of complainant remained unchallenged. Moreover, Kiran Jain (D.W.1) in his cross-examination, has specifically admitted correctness of above said figures. As such, the accused have failed to bring the real profit theory either in cross-examination of the complainants witness or during his own evidence. Therefore, in my humble opinion, the ratio of above said authority will not helpful to the accused. Thus, it is clear that the complainant had succeeded to prove the income of accused as per audit reports and balance sheet.

21. So far as non-filing of return for A.Y. 2014-15 is concerned, in this regard, the complainant had produced notices (Exh.17 colly.) and sanction order (Exh.18) on the record, wherein the same contentions of non-filing of return are made. The accused have also not

disputed the same. However, the defence of the accused is that it was not intentional, willful and caused due to financial loss. The learned counsel for the accused argued that failure to file return in time itself does not amount an offence. Under section 276-CC the prosecution is bound to establish beyond reasonable doubt that failure to file the return was 'willful' on the part of accused.

22. In this regard, the accused relied on the authorities of **S. Sunderam Pillai V/s. V.R. Pattabiraman**, (cited supra). The Hon'ble Apex Court in this case elaborately discussed the meaning of 'willful default'. It is observed that in order to be willful must be intentional, deliberate, calculated and conscious with full knowledge of legal consequences flowing there from". In this context, the case of the accused is that due to RBI guidelines they faced financial crunches which are communicated to the department therefore, the delay can not be said willful. Kiran Jain (D.W.1) deposed that he is regularly filing the Income Tax return. He had borrowed business loan from SBI, which is NPA at present. Therefore, the bank has attached his property and sold in auction. The reason for NPA is increase of interest due to RBI guidelines. After receipt of show cause notice, he replied the same wherein he had mentioned situation of his business and loan. He had filed copy of said reply, copy of return showing status of return yearwise, copy of summons of D.R.T. and the letter received from SBI.

23. In this regard, it is argued that the notice does not bear signature of the PCIT. The guidelines are not followed while issuing notice. In this regard the accused relied on the authorities of **B.K.Gooyee v/s. Commissioner of Income-Tax, Umeshchandra**

Mishra v/s. Commissioner of Income-Tax and Yeshoda Electricals v/s. Assistant Commissioner of Income-Tax (cited supra). In this regard on perusal of the evidence of R.S.V.S.Pavan Kumar (C.W.2) is important. He has specifically admitted that he had signed notice (Exh.17) and he had two signatures. Sudhanshu Mohapatra (C.W.1) has also stated that notices (Exh.17) are signed by PCIT-4 and it bears initials. It is argued that a public officer can not have two signatures. The signatures bearing on notice (Exh.17) and sanction order (Exh.18) are different. It is therefore submitted that the notice is not proper notice.

24. Considering the objection of the accused, in order to ascertain the signatures, I have gone through the notices (Exh.17) and sanction order (Exh.18). Notices bears initials of R.S.V.S. Pavan Kumar (C.W.2) and sanction order bears his full signature. He had also confirmed the same in his cross-examination. A public officer in discharge of his duties has to sign to many times in a day. Therefore, it is not possible for him/her to put complete signature everywhere. For that purpose they put initial or even stamp of signature is also used somewhere. Since R.S.V.S. Pavan Kumar (C.W.2) has identified his signature therefore, no doubt remained on it. So far as authorities filed on this point are regarding unsigned document, therefore, it will not be applicable here. Thus, it can safely concluded that the notices (Exh.17 colly.) are issued with the signature of PCIT-4.

25. From the contents of notices (Exh.17 colly.) and sanction order (Exh.18), the complainant established that the accused have failed to file return for A.Y.2014-2015. Besides, Kiran Jain (D.W.1) in

the cross-examination admitted that in the relevant financial year his income was taxable, but he had not filed the return. Now the burden shift on the accused to show that it was not wilful default but it was due to some circumstances. In this regard, at the cost of repetition, again I reproduce the defence of the accused that at that time, his business was suffering loss due to RBI guidelines. However, Kiran Jain (D.W.1) in his cross-examination admitted that in disputed A.Y. 2014-15, his net profit was Rs.6,83,41,265/-. It is further admitted that as per the audit report the provision of tax liability is mentioned of Rs.3,91,91,750/-. Moreover, as per copy of information (Exh.32), in the year 2014, M/s. Salony Infracorn had made investment of Rs.14,84,27,000/- in M/s. Saloly Jewellers. The accused has failed to give any explanation in this regard.

26. Here, the accused have put their case only by oral evidence without exhibiting any document. Moreover, the accused have taken said risk at the cost of material admissions. The reply submitted by the accused was material document which could have been used to raise their defence but it is filed at belated stage. It is not confronted to any of the complainants witness. Even the said reply is not proved through Kiran Jain (D.W.1). The same position is regarding other documents field on the record. Thus, the accused have failed to prove that they were facing financial crunch or loss in business in the A.Y. 2014-15 by giving cogent evidence.

27. Thus, the accused have failed to discharge burden that they have not committed willful default in filing of return. Therefore, the ratio of the authority of **S. Sunderam Pillai V/s. V.R. Pattabiraman,**

(cited supra), will not be applicable here. The accused have also relied on the authority of **Janata Sahakari Bank v/s. Tax Recovery Officer** (cited supra) and submitted that the Income-Tax Department under section 281 of the Act can treat the mortgage/transfer as void as Income Tax Department supersedes as the areas of tax due to the state can claim priority over private debts. Here, it is pertinent to note that the case is not for recovery. It is filed for the prosecution. The facts of said authority are different from the facts of present case in hand. Therefore, in my humble opinion the ratio of said authority will not be applicable here. The accused also relied on the authorities of **CIT V/s. Khander Khan and Son** and **CIT V/s Khader Khan and son**, (cited supra). These authorities are on the point of recording of statements by income tax officers during survey. However, in this case no such statement recorded by the income tax officer is not used by the complainant therefore these authorities are not useful to the accused.

28. In view of above said discussion, I come to the conclusion that accused have failed to file return of A.Y. 2014-2015 in time. Accused nos.02 and 03 are directors of accused no.1 company. They have not denied their directorship. Therefore, they are responsible for the defaults made by accused no.1. Hence, it can safely concluded that the complainant has proved the guilt of accused under section 276-CC read with Sec.278-E of the Act beyond reasonable doubt. In the result, I answer point No.01 in the affirmative.

AS TO POINT NO.2:

29. As the complainant has succeeded to prove the guilt of the accused. Therefore, it is necessary to hear the accused on the

point of sentence. Heard the accused, their advocate and Spl.P.P. on the point of sentence. The learned advocate for accused submitted that the accused have regularly filed income tax return except alleged financial year due to financial crunches. Therefore, prayed to take leniency. On the other hand, the learned Spl.P.P. submitted that accused are habitual and similar case is pending against them. Therefore, prayed for maximum punishment. As the accused have been held guilty, first of all, it is necessary to see whether benefit of Probation Of Offenders Act can be extended to them. Here, it is pertinent to note that the offence is economic offence. This is not the first case of the accused. They have also committed similar default. Considering the nature of offence, it will not be proper to extend them the benefit of Probation of Offenders Act.

30. Section 276-CC of the Act prescribes rigorous imprisonment up to seven years and minimum punishment of six months. However, considering the circumstances of the case and request of the accused and their advocate, a minimum punishment will suffice the purpose. Therefore, the accused are liable for said minimum punishment along with fine. In the result, I answer point No.2 accordingly and pass the following order.

ORDER.

- i) Accused No. 1 M/s. Saloni Jewellers Pvt.Ltd. is convicted under section 248 (2) of the Code of Criminal Procedure for the offence punishable under section 276CC of The Income-Tax Act,

1961 and sentenced to pay the fine of Rs.5,000/- (Rs. Five Thousand only).

- ii) The accused No.2. Jitendra Fatechand Jain and accused No.3 Kiran Fatechand Jain are convicted under section 248 (2) of the Code of Criminal Procedure for the offence punishable under section 276CC of The Income- Tax Act and sentenced to suffer rigorous imprisonment for a period of six months each and to pay the fine of Rs.5,000/- (Rs. Five Thousand only) each in default of payment of fine, the accused No. 2 and 3 shall undergo simple imprisonment for a period of 30 days.
- iii) The accused No. 2 and 3 shall pay the fine imposed on accused No.1.
- iv) Bail bonds of accused are surrendered.
- v) Copy of Judgment be provided to the accused free of costs.

Date:17.04.2023.

(L.S.Padhen)
Addl. Chief Metropolitan Magistrate,
38th Court, Ballard Pier, Mumbai.