Case Citation: (2017) taxcode.in 363 SC

CASE NO.:
Appeal (crl.) 1377 of 1999

PETITIONER:
MADHUMILAN SYNTEX LTD. & ORS

RESPONDENT:
UNION OF INDIA & ANR

DATE OF JUDGMENT: 23/03/2007

BENCH:
C.K. THAKKER & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T

C.K. THAKKER, J.

The present appeal is filed by the appellants against an order passed by the High Court of Madhya Pradesh (Indore Bench) on March 12, 1999 rejecting in limine Miscellaneous Criminal Petition No. 4730 of 1998.

The facts giving rise to the present appeal are that appellant No.1 Madhumilan Syntex Ltd. is a Public Limited Company registered under the Companies Act, 1956. Appellant Nos. 2 to 4 are its Directors. Appellant-Company deals in the production and business of yarn at Madhumilan Cinema Building, Ahata. The tax assessment of the Company is done by the Deputy Commissioner of Income Tax (Tax Assessment), Special Range No.1, Indore. It was the case of the respondents that for the Assessment Year 1989-90, Returns were submitted by the Company on December 29, 1989. On verification of the Returns, it was found that though an amount of Rs.1,29,348/- was deducted by the Company as Tax Deducted at Source ('TDS' for short), it was not credited by the Company in the account of the Central Government as required by Sections 194C and 200 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') read with Rule 30 of the Income Tax Rules, 1962 (hereinafter referred to as "the Rules"). It is, however, not in dispute that the amount of TDS was credited by the Company with interest later on. But there was delay on the part of the Company in depositing such amount. Income Tax Officer (TDS), Bhopal, therefore, issued a notice to the appellants on March 11, 1999 alleging therein that there was failure to credit TDS to the Central Government as required by Section 276B of the Act by them. The appellants had thus committed an offence punishable under Section 278B of the Act. A show-cause notice was, therefore, issued against the appellant-Company as also against appellant Nos. 2 to 4 (and one Smt. Chandraprabha Modi) being principal officers of the appellant-Company. The Income Tax Officer, TDS, Bhopal asked the appellants to show-cause as to why proceedings should not be initiated against them. The appellants were asked to submit their reply on or before March 18, 1991 failing which it would be presumed that they had nothing to say in the matter and action would be taken accordingly. It was also stated in the notice that the appellant Nos. 2 to 4 (and Smt. Chandraprabha Modi) were to be considered as 'principal officer' within the meaning of Section 2(35) of the Act.

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The appellants filed a reply to the show-cause notice raising various objections. It was, inter alia, contended that they had not committed any offence nor violated provisions of the Act. It was stated that it was not a case of 'no payment' of TDS. The amount of tax along with interest had been paid and statutory provisions had been complied with. There was some delay in receiving loan from Industrial Development Bank of India (IDBI) due to which TDS could not be paid in time. Moreover, because of construction of one unit by the Company, there was shortage of liquid funds and hence the payment could not be made. There was thus a 'reasonable cause' for non-payment of amount within the prescribed period but the payment had been made with interest and there was no loss to Revenue. It was, therefore, submitted that no case had been made out for taking action against the appellants and notice was required to be revoked.

The Commissioner of Income Tax, Bhopal-respondent No. 2 herein, vide his order dated February 4, 1992 granted sanction to prosecute appellants under Section 279 of the Act observing therein that the assessee had committed default under Section 194C of the Act in paying TDS to the credit of the Central Government. It was also observed that the reason put forward by the Company was not correct. He, therefore, granted sanction to prosecute the appellant-Company as well as the Directors of the Company. In view of sanction to prosecute, accorded by the Commissioner, a complaint was filed against the appellants on February 26, 1992 in the Court of the Additional Chief Judicial Magistrate (Economic Crime), Indore.

The appellants filed applications under Section 245 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') for discharge from the case contending that they had not committed any offence and the provisions of the Act had no application to the case. It was alleged that proceedings were initiated mala fide. In several other similar cases, no prosecution was ordered and the action was arbitrary as also discriminatory. Moreover, there was 'reasonable cause' for delay in making payment and the case was covered by Section 278AA of the Act. The Directors further stated that they could not be treated as 'principal officers' under Section 2(35) of the Act and it was not shown that they were 'in charge' of and were 'responsible for' the conduct of business of the Company. No material was placed by the complainant as to how the Directors participated in the conduct of business of the Company and for that reason also, they should be discharged.

The trial Court, however, rejected the prayer of the appellants. According to the Court, the contention raised by the appellants required evidence as to whether a particular accused was or was not a 'principal officer' of the Company and it can be considered only at the trial and an appropriate decision could be taken. According to the Court over and above the Company, other accused persons were Directors and as they were treated as principal officers, the prayer for discharge could not be granted. The applications were accordingly rejected.

The appellants being aggrieved by the above order of the trial Court, filed Revision Petition being Criminal Revision No. 358 of 1994 in the Court of the Sessions Judge, Indore under Section 397 read with Section 399 of the Code. The First Additional Sessions Judge, Indore (MP), vide his order dated July 10, 1998 rejected the

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revision filed by the appellants-applicants and confirmed the order passed by the trial Court.

The appellants moved the High Court of M.P. (Indore Bench), by filing Miscellaneous Criminal Petition under Section 482 of the Code on December 14, 1998. It appears that the petition was dismissed for default of appearance on February 2, 1999. An application for restoration was filed on March 12, 1999 which was allowed and the matter was restored to file but was heard on the same day, and by the impugned order, it was summarily rejected. The said order has been challenged by the appellants in this Court.

On July 26, 1999, notice was issued and further proceedings were stayed. Leave was granted on December 15, 1999 and stay was ordered to continue. The matter has now been placed for final hearing before us.

We have heard learned counsel for the parties.

Mr. Ranjit Kumar, Senior Advocate appearing for the appellants raised several contentions. He submitted that the orders passed by the Courts below as well as by the High Court deserve to be set aside. According to him, the present case is neither a case of 'non deduction' of tax nor of 'non payment' of tax. The tax required to be deducted at source had been deducted by the Company and the said amount had also been credited in the account of Central Government. Only thing was that there was some delay on the part of the Company in crediting the amount. In some cases, there was delay of few days only (two days). As such, there was no reason to prosecute the Company and/or its Directors. It also cannot fall within the mischief of the Act so as to give rise to criminal liability. It was also submitted that Company is not a natural person but merely a legal or juristic person and hence it cannot be punished. If it is so, obviously, for such act, Directors or Officers of the Company also cannot be punished. The action of the respondents, therefore, is illegal and not warranted by law. The counsel also submitted that appellant Nos. 2 to 4 cannot be said to be 'principal officers' under the Act and no prosecution can be initiated against them. It was urged that to be a 'principal officer' with reference to a Company, it must be shown that such person is "connected with the management or administration of the Company" and who has been served with a notice that he would be treated as principal officer of the Company. No such notice had been issued by the respondents. Notice which had been issued in the instant case is to show cause as to why prosecution should not be launched against them as they were to be treated as principal officers under the Act. Such notice cannot be said to be a notice to treat a particular officer as 'principal officer' under the Act. It was also submitted that criminal prosecution is a drastic step and should not be taken lightly particularly when there are several provisions in the Act providing for payment of interest, penalty, etc. Recourse to prosecution should be had as a last resort. According to the appellants, there was non-application of mind on the part of the second respondent-Commissioner of Income Tax in granting sanction under Section 279 of the Act. The second respondent has not considered the relevant facts, reasons and grounds relied upon by the appellants as to why the amount could not be deposited. The circumstances pleaded by the appellants in their reply to the show cause notice clearly disclosed that there was 'reasonable cause' for delay in

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depositing the amount and it was not a fit case for prosecution of appellants.

The counsel also urged that in any case, appellant No.4 is a lady who cannot be said to be in charge of business or management and at least to that extent, the order to prosecute her is not sustainable.

As to the order passed by the High Court, it was submitted that on two grounds the order deserves to be set aside. Firstly, the matter was dismissed for default and when application for restoration was filed, the High Court allowed the application, restored the matter but insisted the appellants to proceed with the matter on merits on the same day which could not have been done. Secondly, the petition was dismissed summarily by a cryptic order without recording reasons. The matter raised important questions of law which could not have been dismissed in such a manner.

Finally, it was submitted that the so called default relates to 1989-90, and almost two decades have passed. Moreover, the Revenue has not suffered. In the facts and circumstances, therefore, by exercising plenary powers under Article 136 read with Article 142 of the Constitution, the proceedings may be ordered to be dropped even if they could have been taken. The appellants had suffered a lot and this Court may now close the proceedings.

Mr. K. Radha Krishnan, Senior Advocate for the respondents, on the other hand, supported the order passed by the Courts below. According to him, when the tax was deducted at source and was not paid within the prescribed period and sanction to prosecute the appellants was granted by the second respondent, the action of filing a criminal complaint cannot be said to be illegal, unlawful or otherwise objectionable. Other points as to 'reasonable cause', circumstances in which the payment could not be made within the statutory period and other defences can be considered at the time of trial and not now. At the stage of framing of charge, the Court only considers whether prima facie case has been made out. Once there is material to show that the amount was not paid in the manner provided by law, proceedings cannot be quashed.

Having given anxious and thoughtful consideration to the rival contentions of the parties, in our opinion, it cannot be said that by ordering charges to be framed, any illegality has been committed by the trial Court.

As far as an objection against the order passed by the High Court is concerned, we are not impressed by the argument of the learned counsel. It is true that the petition was dismissed for default on 2nd February, 1999. It is also true that an application for restoration of the matter was made by the appellants on March 12, 1999 and the matter was restored to file asking the advocate for the applicants to argue the case. But, it cannot be contended that the Court could not have insisted on the appellants-applicants and/or their counsel to proceed to conduct the case on merits. We have come across several cases in High Courts as well as in this Court where a case is dismissed for default to secure the presence of the learned counsel. Normally, when the matter is called out and the advocate is absent, a Court may adjourn the matter to next date of hearing. But it may also dismiss the matter for default so as to secure appearance of the advocate. He may apply for restoration of the case either

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by written application or by oral prayer and the Court may restore it asking him to argue the case so that an appropriate order may be passed on merits. Appearance of a party or his advocate and prayer for recalling an order of dismissal for default may be a good ground for restoring the matter but it cannot be said to be a good ground for restoration of the matter for hearing in future. In other words, a matter may be restored for hearing and not for adjournment. We are, therefore, unable to uphold the argument of the learned counsel that the Court could not have insisted on the advocate to argue the matter after the order of dismissal for default was recalled and restoration was ordered.

Similarly, we do not see force in the contention that the petition could not have been dismissed in limine without recording reasons. It was not a substantive appeal which was heard by a Court. An application for discharge of accused was rejected by the trial Court. Revision petition was also dismissed by the Sessions Court and the said order was challenged before the High Court under Section 482 of the Code (Inherent power of High Court). If the High Court did not think it fit to exercise inherent powers in the light of the controversy raised, question involved and the stage at which the applicants had approached the Court, it cannot be said that the Court must pass detailed speaking order or record reasons in support of such order. That contention also, therefore, has no force.

Before adverting to the controversy raised in the appeal, it is necessary to consider the relevant provisions of the Act. Chapter XVII deals with "Collection and Recovery of Tax" and 'Deduction at Source' in certain cases. It requires certain persons to deduct tax at source and also consequences of failure to deduct or pay such tax. Whereas Section 200 provides that any person deducting any sum under the Act has to pay within the prescribed period the sum so deducted to the credit of the Central Government, Section 201 lays down consequences of failure to deduct or to pay such tax. Chapter XXII relates to offences and prosecutions. Section 276B deals with "Failure to pay tax. The section at the relevant time read as under;

276B. Failure to pay the tax deducted at source. If a person fails to pay to the credit of the Central Government, the tax deducted at source by him as required by or under the provisions of Chapter XVII-B he shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine.

Section 278B covered cases where offences were committed by Companies. The section stated;

278B. Offences by companies. (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

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he had exercised all due diligence to prevent the commission of such offence.
(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
Explanation.--For the purposes of this section,-

(a) "company" means a body corporate, and includes\027
(i) a firm; and
(ii) an association of persons or a body of individuals whether incorporated or not; and
(b) "director", in relation to--
(i) a firm, means a partner in the firm;
(ii) any association of persons or a body of individuals, means any member controlling the affairs thereof.
Clause (20) of Section 2, inter alia, defines 'Director' in relation to a Company having the meaning assigned to it in the Companies Act, 1956. [Section 2(13) of the Companies Act, 1956 defines 'Director'. The definition is inclusive and includes "any person occupying the position of Director by whatever name called"]. Clause (31) of Section 2 defines 'person' which includes Company. Clause (35) defines 'principal officer' and it reads;
(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.
From the above provisions, it is clear that wherever a Company is required to deduct tax at source and to pay it to the account of the Central Government, failure on the part of the Company in deducting or in paying such amount is an offence under the Act and has been made punishable. It, therefore, cannot be said that the prosecution against a Company or its Directors in default of deducting or paying tax is not envisaged by the Act.
It is no doubt true that Company is not a natural person but 'legal' or 'juristic' person. That, however, does not mean that Company is not liable to prosecution under the Act. 'Corporate criminal liability' is not unknown to law. The law is well settled on the point and it is not necessary to discuss it in detail. We may only refer to a recent decision of the Constitution Bench of this Court in Standard Chartered Bank & Ors. V. Directorate of Enforcement & Ors., (2005) 4 SCC 530 : JT

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(2005) 5 SC 267. In Standard Chartered Bank, it was contended on behalf of the Company that when a statute fixes criminal liability on corporate bodies and also provides for imposition of substantive sentence, it could not apply to persons other than natural persons and Companies and Corporations cannot be covered by the Act. The majority, however, repelled the contention holding that juristic person is also subject to criminal liability under the relevant law. Only thing is that in case of substantive sentence, the order is not enforceable and juristic person cannot be ordered to suffer imprisonment. Other consequences, however, would ensue, e.g. payment of fine etc.

K.G. Balakrishnan, J. (as His Lordship then was), speaking for the majority, summarized the law thus;

"As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.

In our opinion, therefore, it cannot be successfully contended that prosecution could not have been ordered against the Company and no charge could have been framed.

So far as Directors are concerned, it is alleged in the show-cause notice as well as in the complaint that they were 'principal officers' of the Company. In the show-cause notice, it was asserted that the appellants were considered as principal officers under Section 2(35) of the Act. In the complaint also, it was stated that the other accused were associated with the business of the Company and were treated as principal officers under Section 2(35) of the Act and hence they could be prosecuted. Dealing with an application for discharge, the trial Court observed that accused No.1 was Company whereas other accused were Directors. Whether they could be said to be principal officers or not would require evidence and it could be considered at the stage of trial and the application was rejected. In Revision, the First Additional Sessions Judge took similar view.

The learned counsel contended that the Courts committed an error of law in ordering prosecution against the Directors. The counsel, in this connection, invited

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our attention to certain decisions. In Municipal Corporation of Delhi v. Ram Kishan Rohtagi & Ors., AIR 1983 SC 67, the accused invoked the jurisdiction of the High Court under Section 482 of the Code praying for quashing of criminal proceedings initiated against them under the Prevention of Food Adulteration Act, 1947. Whereas accused No. 1 was Manager of the Company, accused Nos. 2-5 were Directors. A complaint was filed by the Food Inspector of the Municipal Corporation, inter alia, alleging that 'Morton toffees' sold by the accused did not conform to the standards prescribed for the commodity. The Metropolitan Magistrate issued summons to all the accused for violating the provisions of the Act. It was contended on behalf of the accused that proceedings were liable to be quashed as it was not shown that accused persons were in-charge of and responsible for the conduct of business. The High Court allowed the petition and quashed the proceedings. Aggrieved Municipal Corporation challenged the decision. This Court was called upon to consider as to whether the High Court was right in quashing the proceedings against the accused.

The Court reproduced clause (5) of the complaint which read thus\027

"That the accused No. 3 is the Manager, of accused No. 2 and accused Nos. 4 to 7 are the Directors of accused No. 2 and as such they were in charge of and responsible for the conduct of business of accused No. 2 at the time of sampling." (emphasis supplied)

Considering the above clause, this Court held that as far as the Manager was concerned "it was not and could not be reasonably argued that no case is made out against him because from the very nature of his duties, it is manifest that he must be in the knowledge about the affairs of the sale and manufacture of the disputed sample". But so far as accused Nos. 4 to 7 were concerned, it was alleged that they were Directors. Interpreting the words 'as such' the Court observed that there was no clear averment that the Directors were in charge of and responsible for the conduct of business and the complainant has merely presumed that the Directors of the Company must be guilty because they were holding a particular office.

This Court, in the circumstances, observed;

"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

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quashed."

A similar question came up for consideration before the Court in Municipal Corporation of Delhi v. Purshotam Dass Jhunjunwala & Ors., AIR 1983 SC 158. There also, a complaint was filed under the Prevention of Food Adulteration Act, 1947 against the Directors of the Company.

In para 5 of the complaint, it was stated;

"That accused Ram Kishan Bajaj is the Chairman, accused R.P. Neyatia is the Managing Director and accused Nos. 7 to 12 are the Directors of the Hindustan Sugar Mills Ltd and were in charge of and responsible to it for the conduct of its business at the time of commission of offence."
(emphasis supplied)

Setting aside the order of the High Court quashing the proceedings against the Directors and distinguishing Ram Kishan Rohtagi, the Court held that there was a clear averment as to the active role played by the accused and the extent of their liability. A prima facie case for summoning of accused was, therefore, made out and the High Court was wrong in holding that allegations were vague. Further details could be given only in evidence.

In Puran Devi & Ors. V. Z.S. Klar, Income Tax Officer, (1988) 169 ITR 608, the High Court of Punjab & Haryana held that a person or a partner of a firm prosecuted for false verification of return must have been in charge of and responsible to the firm for the conduct of its business. Necessary allegations, therefore, must be made in the complaint.

In K. Subramanyam v. Income Tax Officer, (1993) 199 ITR 723, the High Court of Madras held that before prosecuting a person under the Act, it must be proved that the person was 'in charge' of and 'responsible to' the Firm or Company for the conduct of business. The Court observed that the word used is 'and' and not 'or'. Both the ingredients, therefore, have to be pleaded and proved by the prosecution and the burden is on the prosecution that the accused was 'in charge of' and 'responsible to' the Firm or Company.

In Jamshedpur Engineering & Machine Manufacturing Company Ltd. & Ors. v. Union of India & Ors., (1995) 214 ITR 556, the High Court of Patna (Ranchi Bench) held that no vicarious liability can be fastened on all Directors of a Company. If there are no averments in the complaint that any Director was 'in charge of' or 'responsible for' conduct of business, prosecution against those Directors cannot be sustained.

In M.A. University & Ors. v. Deputy Commissioner of Income Tax (Assessment), (1996) 218 ITR 606, the High Court of Kerala held that when there was failure to deduct tax at the source by a firm, prosecution can be launched for violating the provisions of the Act against the Firm. But if the complaint is filed against partners also, there must be specific allegation that such partners were responsible for conduct of business of firm. In absence of such allegation, proceedings against the partners cannot continue.

Attention of the Court was also invited to a decision of this Court in Sham Sunder v. State of Haryana, (1989) 4 SCC 630. In Sham Sunder, this Court indicated that it

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is not uncommon that some of the partners of a firm may not even be knowing what is going on day to day in the firm. There may be partners known as 'sleeping partners' who are not required to take any part in the business of the firm. Then there may be ladies and minors who are admitted to the partnership firm only for the benefit of business. They also may not be aware about the business of the firm. It would be a travesty of justice to prosecute all the partners and ask them to prove that the offence was committed without their knowledge. The requisite condition, according to this Court, was that it is for the prosecution to prove that the partner was responsible for carrying on business and was, during the relevant time, in charge of the business. Reference was also made to State of Karnataka v. Pratap Chand & Ors., (1981) 2 SCC 335. In that case, this Court held that 'person in charge' would mean a person in over all control of day to day business. A person who is not in over all control of such business cannot be held liable and convicted for the act of firm. In Monaben Ketanbhai Shah & Anr. v. State of Gujarat & Ors., (2004) 7 SCC 15 : JT (2004) 6 SC 309, dealing with the provisions of Sections 138 and 141 of the Negotiable Instruments Act, 1881, this Court observed that when a complaint is filed against a firm, it must be alleged in the complaint that the partners were in active business. Filing of the partnership deed would be of no consequence for determining the question. Criminal liability can be fastened only on those who at the time of commission of offence were in charge of and responsible for the conduct of business of the firm. The Court proceeded to observe that it was because of the fact that there may be sleeping partners who were not required to take any part in the business of the firm; there may be ladies and others who may not be knowing anything about such business. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. "For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and established that fact." Finally, the counsel referred to S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr., (2005) 8 SCC 89 : JT (2005) 8 SC 450, wherein this Court held that essential averments must be made in the complaint that the person against whom complaint is made was in charge of and responsible for the conduct of business of the Company. Without such averment, no criminal liability would arise.

From the statutory provisions, it is clear that to hold a person responsible under the Act, it must be shown that he/she is a 'principal officer' under Section 2(35) of the Act or is 'in charge of' and 'responsible for' the business of the Company or Firm. It is also clear from the cases referred to above that where necessary averments have been made in the complaint, initiation of criminal proceedings, issuance of summons or framing of charge, cannot be held illegal and the Court would not inquire into or decide correctness or otherwise of the allegations levelled or averments made by the

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complainant. It is a matter of evidence and an appropriate order can be passed at the trial.

In the case on hand, in the show cause notice dated March 11, 1991 issued under Section 276B read with Section 278B of the Act, it was expressly stated by the Income Tax Officer, TDS, Bhopal that the Directors were considered to be Principal Officers under Section 2(35) of the Act. In the complaint dated February 26, 1992 filed by respondent No.2-Commissioner also, it was stated that appellants were considered as Principal Officers. In the above view of the matter, in our opinion, contention of the learned counsel for the appellants cannot be accepted that the complaint filed against the appellants, particularly against appellant Nos. 2-4 is ill-founded or not maintainable.

It was urged that a separate notice and/or communication ought to have been issued before issuance of show cause notice under Section 276 B read with Section 278B of the Act that the Directors were to be treated as Principal Officers under the Act. In our opinion, however, no such independent and separate notice is necessary and when in the show cause notice it was stated that the Directors were to be considered as Principal Officers under the Act and a complaint was filed, such complaint is entertainable by a Court provided it is otherwise maintainable.

In view of the aforesaid discussion, the sanction to prosecute granted by the second respondent cannot be held illegal or unlawful nor the complaint can be held bad in law.

The next contention that since TDS had already been deposited to the account of the Central Government, there was no default and no prosecution can be ordered cannot be accepted. Mr. Ranjit Kumar invited our attention to a decision of the High Court of Calcutta in Vinar & Co. & Anr. v. Income Tax Officer & Ors., (1992) 193 ITR 300. Interpreting the provisions of Section 276B, a Single Judge of the High Court observed that "there is no provision in the Income Tax Act imposing criminal liability for delay in deduction or for non-payment in time. Under Section 276B, delay in payment of income tax is not an offence". According to the learned Judge, such a provision is subject to penalty under Section 201(1) of the Act.

We are unable to agree with the above view of the High Court. Once a statute requires to pay tax and stipulates period within which such payment is to be made, the payment must be made within that period. If the payment is not made within that period, there is default and an appropriate action can be taken under the Act. Interpretation canvassed by the learned counsel would make the provision relating to prosecution nugatory.

The learned counsel is right in stating that one of the appellants is a female-member. The counsel is also right in contending that in some of the cases referred to by him, this Court held that normally a lady member may not be aware of day to day business of the Firm or the Company. Without laying down general rule, it would be sufficient if we observe that in the case on hand, she was also treated as 'principal officer' under the Act and hence proceedings cannot be dropped at this stage against her.

As to contention that the case is squarely covered by Section 278AA of the Act and that no offence has been

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committed in view of 'reasonable cause' shown by the appellants, we may state that the question can be decided on the basis of evidence which would be adduced by the parties before a competent Court. Hence, even that contention, does not detain us.

It is true that the Act provides for imposition of penalty for non payment of tax. That, however, does not take away the power to prosecute accused persons if an offence has been committed by them. A similar contention was raised before this Court in Rashida Kamaluddin Syed & Anr. v. Shaikh Saheblal Mardan (Dead) Through LRs & Anr., JT (2007) 4 SC 159 that since a civil suit was filed for recovery of amount, no criminal proceedings could have been initiated.

Negating the contention, one of us (C.K. Thakker, J.) stated;

> Finally, the contention that a civil suit is filed by the complainant and is pending has also not impressed us. If a civil suit is pending, an appropriate order will be passed by the competent Court. That, however, does not mean that if the accused have committed any offence, jurisdiction of criminal court would be ousted. Both the proceedings are separate, independent and one cannot abate or defeat the other.
> (emphasis supplied)

It is true that the matter relates to remote past. Alleged non-payment of TDS pertains to 1989-90. It is also true that the complaint was filed in the beginning of 1992 and more than fifteen years have passed but it cannot be ignored that prosecution could not be over in view of the fact that applications were made by the appellants for their discharge under Section 245 of the Code initially in the trial Court, then in the Sessions Court and then in the High Court. Even after dismissal of the petition by the High Court, the appellants approached this Court and obtained interim stay of further proceedings. It is because of the pendency of proceedings and grant of interim relief that the case remained pending. It, therefore, cannot be urged that there was failure, negligence or inaction on the part of the prosecuting agency in not proceeding with the matter. The ground of delay, in our considered opinion, cannot help the appellants.

Finally, the learned counsel submitted that an appropriate direction may be issued to the trial Court so that personal presence of respondent Nos. 2-4 may be dispensed with and they may be granted exemption from appearance. In our opinion, it would not be appropriate to issue such direction to the Court. We have, however, no doubt that if such a prayer is made by the appellants, the Court would consider the prayer in its proper perspective and will pass an appropriate order. If personal presence of appellant Nos. 2-4 is not necessary, the Court would grant exemption on such terms and conditions as it would think appropriate.

For the foregoing reasons, the appeal deserves to be dismissed and is hereby dismissed.

Before parting with the matter, however, we may clarify that we have not entered into merits of the matter and have decided the question raised by the appellants as to maintainability of criminal complaint. We may not

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be understood to have expressed any opinion one way or the other on merits and as and when the matter will come up for trial, it will be decided strictly on its own merits without being inhibited by the observations made by us hereinabove. All contentions of all parties are kept open.

JUDIS

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