

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED: 05.06.2007

CORAM

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

CrI. R.C. No.889 of 2002

A.B.Shanthi @ Venniradai Nirmala .. Petitioner/Accused

Vs

The Asst. Director of Inspection (Investigation)

O/o. The Deputy Director of Investigation

Income Tax Office

Nungambakkam High Road

Chennai 34.

.. Respondent/Complainant

Prayer:

This Revision petition has been preferred against judgment dated 30.11.2001 made in CrI.A.No.182 of 1997 on the file of the Principal Session Judge, Chennai, confirming the judgment in E.O.C.C.No.207 of 1986 on the file of the Additional Chief Metropolitan Magistrate, Chennai, dated 01.10.1997.

For Petitioner : Mr.A.K.Mylsamy

For Respondent : Mr.K.Ramasamy, Sr. Spl. Public Prosecutor for Income Tax cases

**JUDGMENT**

This revision petition has been preferred against the judgment in C.A.No.182 of 1997 on the file of the Principle Sessions Judge, Chennai, which had arisen out of the judgment rendered by the learned Additional Chief Metropolitan Magistrate, Chennai, in E.O.C.C.No.207 of 1986.

2. The short facts of the complaint is that the revision petitioner/accused, a cinema actress, had obtained a loan of Rs.4,65,000/- from the All India Anna D.M.K party, Chennai, as per the entry made in the above said party's ledger folio on 17.4.1986. The accused had admitted in her sworn statement given before the Assistant Director of inspection (investigation) on 23.4.1986 about the above said borrowal of Rs.4,65,000/- from the above said political party. According to the prosecution as per section 269SS of Income Tax Act 1961, a person can obtain any loan or deposit only through an account payee cheque or an account payee bank draft if the amount of loan exceeds Rs.10,000/-. Since the loan obtained by the accused which is above

Rs.10,000/- was not by way of account payee cheque or account payee bank draft, according to the prosecution, there is a violation of Section 269SS of the Income Tax Act, 1961, by the accused which is liable to be punished under Section 276DD r/w 269SS of the Income Tax Act.

3. The case was taken on file by the learned Additional Chief Metropolitan Magistrate EO-II, Egmore, as E.O.C.C.No.207 of 1986 and on appearance of the accused on summons copies under Section 207 Cr.P.C., were furnished to the accused and when charges were explained to her, she pleaded not guilty.

4. Before the Trial Court P.Ws.1 to 5 were examined and Ex.P.1 to Ex.P.27 were marked. On the basis of the evidence of P.Ws.1 to 5 when the incriminating circumstances were put to the accused, the accused had denied her complicity with the crime. The accused has examined herself as D.W.1 and Ex.D.1 to Ex.D.3 were marked on her side.

5. When the proceedings were pending, the accused approached the Honourable Apex Court of India in CrI.A.601/1992 against the order passed by this Court in CrI.M.P.2854/1988 challenging the constitutional validity of Section 269SS, 276DD & 271D of the Income Tax Act. The Honourable Apex Court in CrI.A.No.601/1992 (alongwith CrI.A.4478/2000) has held that Section 269SS, 271D, 276DD are constitutional. CrI.A.No.601/1992 was filed by the Assistant Director of Inspection (Investigation) of the Income Tax Department and the respondent therein is the present accused Kumari.A.B.Shanthi. When the above said CrI.A.No.601/1992 was pending before the Honourable Apex Court, a direction was given by the Honourable Apex Court in CrI.M.P.5557/1992 in CrI.A.No.601/1992, dated 26.7.1993, to the effect that the substantive sentence in E.O.C.C.No.207 of 1986 shall not be given effect to until further orders from the Honourable Apex Court.

6. The learned Trial Judge after due consideration of the evidence both oral and documentary placed before him has come to the conclusion that the charges levelled against the accused under Section 276DD r/w 269SS of Income Tax Act has been proved beyond any reasonable doubt and accordingly convicted the accused and sentenced her to undergo 2 years RI and a fine of Rs.4,65,000/- with default sentence. The learned trial judge has suspended the sentence of imprisonment alone as per the directions of the Honourable Apex Court in CrI.M.P.5557 of 1992 in CrI.A.No.601 of 1992 dated 26.7.1993. Aggrieved by the findings of the learned Trial Judge, the accused had preferred an appeal before the Principal Sessions Judge, Chennai, in C.A.182/87. The learned Sessions Judge, after giving due deliberations to the arguments adduced on both sides, has confirmed the orders of the learned trial judge in E.O.C.C.No.207 of 1986 on the file of the Additional Chief Metropolitan Magistrate EO-II, Egmore at Chennai, thereby dismissing the appeal. The learned Sessions Judge has also suspended the sentence of imprisonment and fine as per the directions of the Honourable Apex Court in CrI.M.No.5557 of 1992 in CrI.A.No.601 of 1992 dated 26.7.1993, which necessitated the accused to prefer this revision.

7. The learned counsel Mr.A.K.Mylsamy appearing for the revision petitioner has not touched the merits of the case, but entire arguments of the learned counsel for the revision petitioner would revolve around the subsequent amendment in the Income Tax Act in respect of Section 276DD which is the penal section for violation of the provision of Section 269SS of the Income Tax Act, 1961. Section 276DD of the Income Tax Act, 1961 was omitted by Direct Tax Laws (Amendment) Act, 1987 which came into force with effect from 1.4.1989. Relying on the ratio of the Honorable Apex Court in AIR 2002 SC 3126 (M/s.General Finance Co. and another Vs. Assistant Commission of Income Tax), the learned counsel for the revision petitioner would contend that after the omission of Section 276DD from the Income Tax Act, 1961 by Direct Tax Laws (Amendment) Act, 1987, a prosecution cannot be launched or continued for the violation of the provisions under Section 269SS of the Income Tax Act. The short facts of the above cited case are that:

"The appellants viz. General Finance Company and another had received deposits from one Amar Singh, Gurdev Singh and Hardev Singh on different dates in the year 1985 and the said fact was disclosed in the income tax returns filed by them for the assessment year 1986-87. The Income Tax department initiated prosecution against the appellants for an offence under Section 269SS of the Income Tax Act, 1961, which provides that no person shall take or accept any other person any loan or deposit otherwise than by the account payee cheque or account payee bank draft which exceeds Rs.10,000/- (now Rs.20,000/-). Section 276DD is the penal section for the violation of the provision under Section 269SS of the Income Tax Act (herein after referred as the "Act"). Section 276DD has been omitted from the Act by the Direct Tax Laws (Amendment) Act, 1987, with effect from 1.4.1989. A complaint was filed under Section 276DD of the Act before the Chief Judicial Magistrate, Sangrur, on 31.3.1989. A petition under Section 482 of the Cr.P.C., and article 227 of the Constitution was filed for a direction to quash the proceedings for prosecution under Section 276DD of the Act. The High Court took a view that at the time of initiation of the prosecution by the department the provision was in force ie., during the accounting year 1986-87 and that the said provision under Section 276DD of the Act was omitted from the statute book only from 1.4.1989 and accordingly dismissed the writ petition.

Aggrieved by the orders of the High Court, the appellants preferred an appeal before the Honourable Apex Court by Special Leave. The contention putforward by the appellants before the Honourable Apex Court was that the offence, if at all, had been committed in the year 1985 prosecution could not be continued nor could the punishment be imposed under Section 276DD of the Act after it was omitted on and from 1.4.1989.

After hearing the learned counsel appearing on both sides and also referring two earlier decisions rendered by the Constitution Benches of the Honourable Apex Court in AIR 1970 SC 494 (Messrs Rayala Corporation (P) Ltd. and M.R.Pratap Vs. Director of Enforcement, New Delhi), and AIR 2000 SC 811 (Kolhapur Canesugar Works Ltd. Vs. Union of India), wherein in has been held that Section 6 of the General Clauses Act applies to a repealed law and not to omission, ultimately rendered the findings to the effect that Section 276DD of

the Act stood omitted from the Act, but not repealed and hence the prosecution could not be launched or continued by invoking Section 6 of the General Clauses Act after its omission.

The relevant observation noteworthy in the above said ratio decidendi for the purpose of deciding this revision runs as follows:

"Though we find the submissions of the learned counsel to be forceful, we are constrained to follow the two decisions of the constitution Benches of this Court in Messrs Rayala Corporation (P) Ltd case (supra) and Kolhapur Canesugar Works Ltd. case (supra). This view has held the field for over three decades and reiterated even as late as two years ago. Non-compliance with Section 269SS of the Act attracted prosecution as well as penalty. Omission of the provision regarding prosecution will not affect the levy of penalty. The advantage arising out of application of the ratio of the two decisions resulting in prosecution in cases of non-compliance with Section 269SS of the Act is only transitional affecting a few cases arising prior to 1.4.1989. Such cases may be few and far between. Hence, we find this is not an appropriate case for reference to the larger Bench.

Net result of this discussion is that the view taken by the High Court is not consistent with what has been stated by this Court in the two decisions aforesaid and the principle underlying Section 6 of the General Clauses Act as saving the right to initiate proceedings for liabilities incurred during the currency of the Act will not apply to omission of a provision in an Act but only to repeal, omission being different from repeal as held in the aforesaid decisions. In the Income Tax Act, Section 276DD stood omitted from the act but not repealed and hence a prosecution could not have been launched or continued by invoking Section 6 of the General Clauses Act after its omission."

8. The learned counsel appearing for the revision petitioner relying on the above observation would content that the initiation of proceedings under Section 269SS of the Act against the revision petitioner itself is not maintainable after the omission of Section 276DD of the Act as per the Direct Tax Laws (Amendment) Act with effect from 1.4.1989. The learned counsel would attract the attention of this Court to the penal section provided under Section 271D of the Act which was also incorporated into the statute book by Direct Tax Laws (Amendment) Act, 1987 with effect from 1.4.1989 i.e., on the same day on which section 276DD of the Act was directed to be omitted by the Direct Tax Laws (Amendment) Act, 1987. Section 271D of the Act gives enormous powers to the Commissioner (Joint) of the Income Tax to levy penalty against any person who contravenes the provisions of Section 269SS of the Act. After the induction of the above said provision of law, the Commissioner of Income Tax is empowered to levy penalty on a person who violates the provision of Section 269SS of the Act. Relying on the above said provision of law i.e., Section 271D of the Act, the learned counsel for the revision petitioner would contend that the judgment of the Courts below are liable to be set aside and matter may be remanded to the Commissioner of the Income Tax, who had initiated the proceedings before the Court of law against the accused.

9. The learned counsel would further contend that the prosecution initiated by the Complainant/Commissioner of Income Tax itself is null and void in lieu of the omission of Section 276DD of the Act from the statute book. This contention of the learned counsel for the revision petitioner, in my view, cannot be sustainable because even a criminal proceedings were pending before the trial Court in E.O.C.C.No.207 of 1986 on the file of the Additional Chief Metropolitan Magistrate EO-II, Egmore, the Honourable Apex Court has passed an order in CrI.M.P.5557 of 1992 in CrI.A.No.601 of 1992 directing the trial Court to the effect that the substantive sentence shall not be given effect to until further orders. There was no direction given by the Honourable Apex Court to stay the proceedings in E.O.C.C.No.207 of 1986 before the trial Court. In fact CrI.A.No.601 of 1992 was preferred by the Assistant Director of Inspection (Investigation) of the Income Tax Department against the order passed by the learned judge of this Court in a petition filed by the accused under Article 227 of the Constitution of India challenging the validity of Section 269SS and 271D of the Income Tax Act, 1961, as ultra vires and unconstitutional.

10. After setting aside the findings rendered by the trial Court, the Honourable Apex Court in CrI.A.No.601 of 1992 has held that Section 269SS, 271D and 276DD of the Act are constitutional and cannot be said that they are draconian or expropriatory in nature. Under such circumstances, it cannot be said that the initiation of proceedings by the complainant/Commissioner of Income Tax department in E.O.C.C.No.207 of 1986 after the omission of Section 276DD of the Act is invalid or nonest in law because both the initiation as well as the continuation are prior to 1.4.1989 on which date section 276DD of the Act was omitted by way of Direct Tax Laws (Amendment) Act.

11. Now the point to be considered is whether the imposition of sentence by the Court below can be sustained. The accused was convicted by the Court below to undergo RI for 2 years and a fine of Rs.4,65,000/- even after the amendment and after the omission of Section 276DD of the Act, as per the penal provision inducted thereafter under Section 271D of the Act, the Income Tax Commissioner can levy only penalty and the person who violates the provisions of Section 269SS of the Act, cannot be sentenced to any imprisonment. Under such circumstances, I am of the view that the penalty levied by the Courts below by way of fine should be sustained and only the sentence of 2 years RI alone is to be set aside in lieu of march of law on this subject.

12. In fine, the revision is allowed in part and the sentence of two years RI on the accused passed in E.O.C.C.No.207/1986 on the file of the Additional Chief Metropolitan Magistrate E.O-II, Egmore, Chennai, is set aside while confirming the fine of Rs.4,65,000/-