W.P. No. 568 of 2018
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side
Shrivardhan Mohta
Vs.
Union of India & Ors.

For the Petitioner : Mrs. Manju Agarwal, Advocate
Mr. Bajrang Manot, Advocate

For the Respondent : Mr. Kaushik Chanda, Ld. A.S.G.
Mr. D.K. Bhowmick, Advocate
Mrs. Debjani Ray, Advocate
Ms. Nabonita Karmakar, Advocate
Mr. Yogesh Bhatt, Advocate

Hearing concluded on : January 28, 2019
Judgment on : February 14, 2019

DEBANGSU BASAK, J.:-

The petitioner has sought a declaration that, the provisions of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 must be applied prospectively with effect from April 1, 2016. The petitioner has also sought quashing of notices dated June 13, 2018, September 6, 2018 and the sanction for prosecution dated September 17, 2018.

Learned Advocate appearing for the petitioner has submitted that, the petitioner is an assessee under the Income

Tax Act, 1961. A search and seizure was carried out by the Income Tax Authorities at the residence of the petitioner on March 7, 2018. During such search and seizure, foreign bank accounts, held by the petitioner with HSBC Bank (Foreign Assets), were found. The petitioner explained such bank accounts as belonging to the deceased mother of the petitioner and that, the petitioner received such bank accounts as a part of his inheritance. A notice under Section 153A of the Act of 1961 was issued upon the petitioner. The petitioner was called upon to furnish return of income for the assessment years 2009-10 to 2015-16 within 30 days of receipt of such notice. The petitioner duly filed return for such assessment years. A notice under Section 142(a) of the Act of 1961 was received by the petitioner. During the pendency of the assessment proceedings, the petitioner approached the Settlement Commission for the assessment years 2009-10 to 2015-16. Such settlement proceedings did not result in a settlement. The Settlement Commission declared the application of the petitioner as invalid. Thereafter, the petitioner made an application under Section 154 of the Act of 1961 for rectification of the order of the Settlement

Commission which was rejected. The Assessing Officer proceeded to complete the assessment for the years 2009-10 to 2015-16 under Section 153A read with Section 143(3) of the Act of 1961. The foreign bank accounts and the amount lying thereat were taken into consideration by the Assessing Officer. The Assessing Officer raised demands after giving credit to the payments made by the petitioner during the settlement proceedings. The authorities initiated proceedings under Section 271(1)(b) and 271(1)(c) of the Act of 1961 for penalty. The order of the Assessing Officer was challenged by the petitioner before the Appellate Authority.

During the pendency of the assessment proceedings, the Act of 2015 came into effect. Since proceedings under the Act of 1961 were pending, the petitioner could not avail of the opportunity to make a voluntary disclosure under the Act of 2015. The petitioner received show cause notices under the Act of 2015 to which the petitioner replied. Ultimately, the authorities purporting to exercise jurisdiction under the Act of 2015 granted a sanction to prosecute the petitioner.

Learned Advocate appearing for the petitioner has submitted that, the Act of 2015 is prospective in nature. Any fiscal statute is prospective in nature. Moreover, given the nature of the Act of 2015 so far as it allows the delinquent to make a declaration within the time period specified under the Act of 2015 and since, the petitioner was debarred by statute in availing of such window of opportunity, the penal provisions of the Act of 2015 should not be applied against the petitioner. Learned Advocate for the petitioner has drawn the attention of the Court to the show-cause notice dated March 13, 2018 and submitted that, the show-cause notice was for launching prosecution under Section 50 and 51 of the Act of 2015, since the petitioner failed to make a disclosure under Section 59 of the Act of 2015. Section 71 of the Act of 2015 prevented the petitioner from making any disclosure under the Act of 2015 as at the material point of time a proceeding under Section 153A of the Act of 1961 was pending.

She has submitted that, since, the petitioner was precluded statutorily from filing a declaration under the Act of 2015, therefore, there was no failure on the part of the petitioner

to make a disclosure under Section 59 of the Act of 2015. Consequently, provisions of Sections 50 and 51 of the Act of 2015 cannot be invoked against the petitioner. She has drawn the attention of the Court to the fact that, the petitioner, by a writing dated June 19, 2018 replied to such show-cause notice and challenged the applicability of the Act of 2015 against the petitioner. The petitioner also submitted a legal opinion dated July 18, 2018 with the authorities. She has highlighted the fact that, the petitioner was served a show-cause notice dated September 6, 2018 for launching a prosecution under Section 51 of the Act of 2015. She has drawn the attention of the Court to the fact that, by the second show-cause notice, the authorities have sought to invoke the provisions of Section 51 of the Act of 2015 in view of Section 48 of the Act of 2015. She has referred to the provisions of Section 48, 49, 50, 51 and 71 of the Act of 2015 and submitted that, the Act of 2015 cannot have retrospective effect. It is to apply from April 1, 2016. The petitioner not being guilty of making any violation under the Act of 2015 cannot be proceeded thereunder. Moreover, there was no mens rea on the part of the petitioner for prosecution under the Act of 2015.

Consequently, the petitioner cannot be prosecuted. The petitioner cannot suffer double jeopardy. For the same period Income Tax Authorities have launched proceedings. The authorities under the Act of 2015 cannot launch proceedings in respect of the self-same violations. In support of her contentions, learned Advocate for the petitioner has relied upon ***All India Report 1953 Supreme Court page 394 (Rao Shiv Bahadur Singh & Anr. v. State of Vindhya Pradesh)***, ***All India Report 1968 Calcutta page 355 (Commissioner of Income-tax (Central) Calcutta v. Anwar Ali)***, ***1981 Volume 2 Supreme Court Cases page 790 (Commissioner of Wealth Tax, Amritsar v. Suresh Seth)*** and ***1983 Volume 3 Supreme Court Cases page 529 (Shiv Dutt Rai Fateh Chand & Ors. v. Union of India & Anr.)***.

Learned Additional Solicitor General appearing for the respondents has submitted that, the petitioner is not suffering double jeopardy as sought to be contended. The Act of 2015 has been invoked for the failure of the petitioner to disclose the foreign assets in his returns. He has submitted that, the petitioner, apart from the opportunity to file a return under the

Act of 1961, where the petitioner did not disclose the foreign assets, had two further opportunities to make a true and honest disclosure of the foreign assets. One of such opportunity was when the petitioner approached the Settlement Commission. In the Settlement proceedings, the petitioner did not make the disclosure of the foreign assets. The Settlement proceedings were dropped as the petitioner had failed to make a true and honest disclosure of all his assets. The other one was when, after a search and seizure was conducted, the petitioner was allowed one opportunity to file his return. There also, the petitioner did not disclose the foreign assets. Consequently, there being violations on the part of the petitioner to disclose the foreign assets, the provisions of the Act of 2015 stand attracted. The failure to disclose the foreign assets, were subsequent to the Act of 2015 coming into effect. Therefore, there is no infirmity in the authorities invoking the provisions of the Act of 2015 against the petitioner. Act of 1961 and Act of 2015 operate in different fields so far as the quality of the proceedings is concerned. Under the Act of 1961, an assessee is penalized financially while, under the Act of 2015, an assessee found guilty is punished with

imprisonment. Therefore, the question of the petitioner suffering double jeopardy does not arise. He has interpreted various provisions of the Act of 2015 and submitted that, the proceeding under the Act of 2015 is maintainable against the petitioner.

Learned Additional Solicitor General for the respondent has relied upon ***1989 Volume 3 Supreme Court Cases page 52 (M/s. Gujarat Travancore Agency, Cochin v. Commissioner of Income Tax, Kerala, Ernakulam)*** for the proposition that, element of mens rea is not required to be proved in penalty proceedings under Section 271 of the Act of 1961. He has relied upon ***2018 SCC Online Supreme Court page 1580 (State of Maharashtra v. Sayyed Hassan)*** for the proposition that, there is no bar to a trial or conviction of an offender under two different enactments. The bar is only to the punishment of the offender twice for the same offence. In the facts of the present case according to him the offences are different.

Learned Advocate appearing for the petitioner has submitted that, mens rea is required to be established in any

criminal proceedings. She has sought to rely upon few authorities for such proposition in reply.

The writ petition has been heard without inviting affidavits as the materials required for consideration are on record. The respondents did not opt for filing any affidavit. The writ petition raises few issues. The writ petition contains the issues raised and the law points involved. It was for the writ petitioner to cite such authorities as the writ petitioner deem appropriate in support of his case. In reply, the petitioner is afforded an opportunity to deal with any points of law that may arise in course of the submissions of the respondents. In the present case the question as to whether mens rea is required to be established by the prosecution or not in the criminal proceeding, can be decided in the criminal proceeding itself. A Writ Court need not enter into such an issue as, today, there is a sanction to prosecute without any prosecution being launched. Moreover, there are sufficient materials on record for the petitioner to stand trial for violation of the provisions of the Act of 2015. Therefore, as a Writ Court, I need not enter into such arena.

Essentially, the petitioner is aggrieved by a sanction for prosecution granted by an order dated September 17, 2018. By such order, the authorities have granted sanction to prosecute the petitioner under the provisions of the Act of 2015. The petitioner was found to have violated provisions of Section 139(1) and 153A of the Act of 1961.

A search and seizure under the Act of 1961 took place against the petitioner on March 17, 2015. The petitioner was required to file a return under Section 153A of the Act of 1961. Failure to make a disclosure under Section 153A of the Act of 1961 is punishable under the provisions of the Act of 2015. The Act of 2015 came into effect from April 1, 2016. The Act of 2015 allowed a window of opportunity from July 1, 2015 to September 30, 2015 to make disclosures. Notwithstanding such window of opportunity, the petitioner had opportunity under the Act of 1961 to make a true and proper disclosure of the foreign assets. The petitioner did not do so. It failed to make true and full disclosure after the search and seizure and also in the Settlement proceedings.

The Act of 2015 is divided into seven chapters. Section 71 of the Act of 2015 provides that Chapter VI will not apply where a notice under Section 153A of the Act of 1961 has been issued in respect of an assessment year. Provisions of the taxing statutes are to be strictly construed. Applying such principle to the interpretation of Section 71 of the Act of 2015, the inference is that, Section 71 lays down, that Chapter VI only will not apply to a person against whom a proceeding under the specified provision of the Act of 1961 is pending. The authorities however have invoked provisions of Section 50 read with Section 55 of the Act of 2015 to prosecute the petitioner. Both Sections 50 and 55 are in a different chapter. Section 50 provides for punishment for failure to furnish any return of income, any information about an asset (including financial interest in any entity) located outside India. Admittedly, the petitioner is in possession of financial assets located outside India. The petitioner admits to have four bank accounts with HSBC Singapore in foreign currency such as Singaporean Dollar, Great Britain Pound, U.S. Dollars and Australian Dollars. The explanation is inheritance. Inheritance did not prevent him from disclosing. It is just an

unacceptable excuse. The petitioner had an opportunity to make the disclosure with regard thereto while submitting his return in the proceedings under search and seizure. The petitioner also had an opportunity to disclose such assets before the Settlement Commission. The petitioner did not avail of any of the two opportunities. Those opportunities were subsequent to the Act of 2015 coming into effect. Therefore, the petitioner failed to furnish in his return of income, an information about an asset located outside India. It attracts the provisions of Section 50 of the Act of 2015. He can be proceeded against under the Act of 2015. There are sufficient materials on record for proceeding against the petitioner under the Act of 2015. Section 55 of the Act of 2015 provides the persons at whose instance, the prosecution will be made for an offence under Section 49 to Section 53 both inclusive.

Rao Shiv Bahadur Singh & Anr. (supra) has dealt with Article 20 of the Constitution of India. It has held that, ex post facto laws which retrospectively create offences and punish them are bad being highly inequitable and unjust. The fact scenario in the present case is different. The petitioner was required to file a

return after the search and seizure proceedings. It did not do so. It also did not make true and proper disclosure in the settlement proceedings. It cannot be said that, a retrospective effect has been sought to be given to the Act of 2015 so far as the petitioner is concerned. The failure of the petitioner to file the requisite return was subsequent to the Act of 2015 coming into effect. ***Anwar Ali (supra)*** has considered the issue as to whether the Income Tax Authorities were justified in imposing a penalty on the assessee under Section 28(1)(c) of the Act of 1961 in the facts of that case. It has held in such context that, contraventions of Section 28 of the Act of 1961 may give rise both a criminal offence as well as a statutory offence. However, if a penalty has been imposed under Section 28, no prosecution before the Criminal Court shall again lie in respect of the same offence. In the present case, the petitioner is charged with violating the provisions of Section 51 of the Act of 2015 which is different to that of any provisions of the Act of 1961.

Suresh Seth (supra) has considered the provisions of the Wealth Tax Act and has held that, an assessee is not required to file a return during every month after the last day to file is over

under Section 18 of the Wealth Tax Act. It has interpreted the provisions of Section 18 of the Wealth Tax Act. The provisions of the Act of 2015 are different. ***Shiv Dutt Rai Fateh Chand & Ors. (supra)*** has dealt with the provisions for penalty under the Central Sales Tax Act, 1956. Again, the provisions of the Act of 2015 are different.

M/s. Gujarat Travancore Agency, Cochin (supra) has considered Sections 271 and 276C of the Act of 1961 and held that, in most cases of criminal law, the intention of the legislature is that the penalty should serve as a deterrent. The creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In a proceeding under Section 276 the intention of the legislature is to emphasize the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. It goes on to say that, there is nothing in Section 271 which requires that mens rea must be proved before penalty can be reviewed under that provision.

Sayyed Hassan (supra) has held that, there is no bar to a trial or conviction of an offence under two different enactments. The bar is only to the punishment of the offender twice for the same offence. Where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence. In the facts of the present case, the Act of 1961 does not impose a punishment of imprisonment while the Act of 2015 does. In such circumstances, it cannot be said that, the petitioner has been sought to be punished twice for the same offence.

In view of the discussions above, I find no merit in the present writ petition.

W.P. No. 568 of 2018 is dismissed. No order as to costs.

[DEBANGSU BASAK, J.]