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Court : Gujarat

Decided On : Oct-21-1993

Reported in : (1995)116CTR(Guj)620; [1995]211ITR157(Guj)

Appeal No. : Special Civil Application No. 3358 of 1993, October 21, 1993.

Appellant : Sukhdev Rathi

Respondent : Union of India and Another.

Judgement :

G. T. NANAVATI, ACTG. C. J. - The petitioner is a businessman and also a taxpayer. In the course of assessment proceedings pertaining to the assessment year 1990-91, the Assessing Officer issued a show-cause notice calling upon the petitioner to explain five deposits of Rs. 20,000 each and also to show cause why for contravention of section 269SS of the Income-tax Act, 1961, penalty should not be imposed upon him. The Assessing Officer held that the said deposits were genuine, but the explanation that the said deposits were accepted because cash funds were urgently required for the petitioners business, was not accepted by him and, therefore, by an order dated January 28, 1993, he levied penalty of Rs. 1,14,113.

A contention was raised before the Assessing Officer that section 269SS has been held ultra vires article 14 of the Constitution by the Madras High Court and, therefore, no penalty could be levied under that provision. That contention was

rejected on the ground that against the said judgment of the Madras High Court, an appeal is pending before the Supreme Court. The petitioner has preferred an appeal against that order to the Commissioner of Income-tax (Appeals). Possibly, realising that the challenge to section 269SS will not be entertained by the appellate authority, the petitioner has filed this petition challenging the validity of section 269SS on the ground that it is violative of article 14 and 19(1)(g) of the Constitution and for quashing the order of penalty dated January 28, 1993.

What is contended by learned counsel for the petitioner is that a loan or a deposit is a transaction to which there are two parties. In the case of a loan they are the borrower and the lender and similarly in the case of a deposit, they are the borrower and the persons giving the deposit. Even then, under section 269SS, only the borrower is under an obligation of not taking a loan or deposit except by way of account payee cheque or bank draft, if the amount of loan or deposit is Rs. 20,000 or more. He submitted that as between the borrower and the lender, the position of the borrower is weak because he needs money and, therefore, he borrows the same and yet the obligation is cast upon the borrower and not the lender. On this premise, he submitted that leaving the lender out of the purview of section 269SS amounts to discrimination as the classification made by the Legislature cannot be said to be based on any intelligible differentia which would distinguish these two classes, viz., the class of borrowers and the class of lenders. He further submitted that even if the classification is held to be based upon an intelligible differentia, the classification has no rational nexus with the object sought to be achieved by that section. He also submitted that while carrying on trade or business, a businessman is required to borrow money from time to time for various reasons and if, because of possibility or apprehension of delay in banking facilities, he accepted money in cash he has to pay a heavy penalty of 100 per cent. of the amount borrowed and, therefore, the provision contained in section 269SS should be regarded as an unreasonable restriction on the petitioners right to carry on trade or business.

Section 269SS appears in Chapter XX-B which came to be inserted by the Income-tax (Second Amendment) Act, 1981, with effect from July 11, 1981. The said Chapter was inserted to counteract evasion of tax by controlling the mode of

acceptance, payment or repayment of loans and deposits. The reason why the said provision was made and what was the object which was sought to be achieved thereby are disclosed in the Department Circular No. 387 : [1985]152ITR1(AP) dated July 6, 1984, to which reference is made by the petitioner in paragraph 6 of the petition. The relevant part of that circular is as under (at page 22) :

'32.1 Unaccounted cash found in the course of searches carried out by the Income-tax Department is often explained by taxpayers as representing loans taken from or deposits made by various persons. Unaccounted income is also brought into the books of account in the form of such loans and deposits, and taxpayers are also able to get confirmatory letters from such persons in support of their explanation.

32.2 With a view to countering this device, which enables taxpayers to explain away unaccounted cash or unaccounted deposits, the Finance Act, 1984, has inserted a new section 269SS in the Income-tax Act debarring persons from taking or accepting, after June 30, 1984, from any other person any loan or deposit otherwise than by an account payee cheque or account payee bank draft if the amount of such loan or deposit or the aggregate amount of such loan and deposit is Rs. 10,000 or more. This prohibition will also apply in cases where on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), and the amount or the aggregate amount remaining unpaid is Rs. 10,000 or more. The prohibition will also apply in cases where the amount of such loan or deposit, together with the aggregate amount remaining unpaid on the date on which such loan or deposit is proposed to be taken is Rs. 10,000 or more.'

As can be seen from the said explanatory memorandum, the necessity to make some provision in this behalf was felt because unaccounted cash often used to be found in the course of searches carried out by the Income-tax Department and the devices adopted by the taxpayers to explain away such unaccounted cash or unaccounted deposits. Though it is not stated in the explanatory memorandum, it can be said that the income-tax authorities were also coming across credit entries

in respect of which also the device of entering them in the names of fictitious persons or obtaining confirmatory letters from persons was followed by the taxpayers. These were the evils which were in the mind of the Legislature and considering the devices adopted by the taxpayers in this behalf necessary provisions have been made by the Legislature by inserting Chapter XX-B in the Act.

Though it is true that a transaction of loan or deposit involves two persons - a borrower and a lender - and both can be said to be similarly situated, so far as the transaction of borrowing or deposit is concerned, when it comes to evasion of tax, in our opinion, it cannot be said that they are similarly situated. However, in order to show that they can be said to be similarly situated, learned counsel for the petitioner relied upon the decision of the Madras High Court in *Kumari A. B. Shanthi v. Assistant Director of Inspection, Investigation* : [1992]197ITR330(Mad) . In that case, the Madras High Court has observed as under (at page 340) :

'The transaction of loan is a single transaction. It is the giving of money by the lender as well as the taking of money by the borrower. These two ingredients are to be necessarily present in a transaction of loan. In the absence of one ingredient, there cannot be any transaction of loan. While so, only the taker of a loan, viz., the borrower, is out under obligation by not taking the loan except by way of an account payee cheque or an account payee draft, if the loan was for Rs. 10,000 or more. No such obligation was cast on the lender who is an integral part of a loan transaction. This differentia looks all the more hostile, harsh and discriminatory when we take into account the normal circumstance that the borrower would be at the mercy of the lender. Ordinarily, he cannot dictate terms to the lender as to the manner in which he should advance the loan amount to him. While so, leaving the lender out of the purview of section 269SS and placing the borrower alone within the ambit of the same would amount to a classification which is not a rational one. It is not based on any intelligible differentia which distinguishes those that are grouped together from others, viz., the lenders. Furthermore, the differentia does not have a rational relation to the object sought to be achieved by this provision. The principle that like should be treated alike has been very clearly and grossly violated. The fundamental principles that those who are similarly situated should

be similarly treated has not been followed. It has transgressed the fundamental principle underlying the doctrine of equality. When the lender and borrower stand on the same footing in a transaction of loan, to some extent the borrower on a worse footing, the borrower alone was placed under an obligation, leaving the lender out of the scope of the section and furthermore non-compliance of section 269SS is made punishable under section 276DD of the Income-tax Act, 1961, which provides a very stringent punishment, viz., imprisonment for a period up to two years and fine equivalent to the amount of the borrowing. While so, it clearly infringes article 14 of the Constitution and hence is ultra vires.'

With due respect to the Madras High Court, it is not possible to agree with the view taken by it. A borrower by adopting the device of giving a false explanation or making false entries or by obtaining confirmatory letters is found evading payment of tax. Thus, the borrower as a class is found to be indulging in such practices. By making such false entries or by giving false explanations or by creating false evidence, it is the borrower who was found to be evading payment of tax. In the case of a lender, we fail to appreciate how while lending money by not making payment by a cheque or a draft, he would evade payment of income-tax. Therefore, though the transaction of loan can be regarded as a single transaction, and the borrower and the lender can be said to be equal integral parts, when we view them from the angle of tax evasion, we find that they cannot be regarded as equals or similarly situated. Compared to the class consisting of lenders, the class consisting of borrowers can be said to be in a position to evade tax by adopting the devices, for curbing which provisions have been made in Chapter XX-B by inserting section 269SS and other sections. In our opinion, the classification made by the Legislature is based on intelligible differentia and for that reason cannot be said to be discriminatory or in any manner violative of article 14 of the Constitution. This classification has obviously a rational nexus sought to be achieved by the provisions. Even learned counsel for the petitioner could not seriously challenge that the prohibition contained in section 269SS, if it is otherwise valid, is not likely to achieve the object for which the said provision is made. If the mode of taking or extracting loans or deposits is checked in this manner, it would certainly, to some extent, achieve the object of evasion of tax because the transactions of loans and deposits which are not genuine and which formerly could be passed off as genuine

would now be less as a result of the prohibition contained in the section.

The restriction which has been imposed by section 269SS cannot be said to be unreasonable and it has been held like that by the Madras High Court in K. R. M. V. Ponnuswamy Nadar Sons (Firm) v. Union of India : [1992]196ITR431(Mad) . In that case, section 269SS was challenged as 'draconian in nature or arbitrary in character'. This challenge was negated by the Madras High Court on the ground that if reasonable cause was shown by the assessee, then he could not be punished and that the prosecution could be at the instance of the Chief Commissioner or the Commissioner, who were the highest functionaries in the Income-tax Department. Now, there is no provision for prosecution but we have the provision for penalty only. But the same reasons would be available for holding that there is sufficient safeguard against any arbitrary action and, therefore, in that sense the provision is reasonable. Merely because this provision may cause hardships to some persons that can hardly be regarded as sufficient for the purpose of invalidating the section, particularly, when we find that it is preventive in nature, although penal in character, and that it has been enacted in the interest of public revenue.

As we do not find any substance in the contentions raised by learned counsel for the petitioner, this petition is dismissed. Rule is discharged with no order as to costs.

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