(1990) 08 MAD CK 0007

In the Madras High Court

Case No : Criminal M.P. No. 3452 of 1986

A. Radhakrishnan APPELLANT

Vs

I.T.O. City Circle I (4) Madras RESPONDENT

Date of Decision : 01-08-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Income Tax Act, 1961 — Section 269P
Penal Code, 1860 (IPC) — Section 193
Transfer of Property Act, 1882 — Section 53

Citation : (1991) LW(Cri) 87

Hon'ble Judges : Arunachalam, J

Bench : Single Bench

Advocate : K.A. Panchapagesan, for the Appellant; Ramasami K., Special Public Prosecutor, Income tax cases on behalf of Respondent, for the Respondent

Judgement

Arunachalam, J.—In this prosecution initiated against the Petitioner, by the Respondent, who is the income tax Officer, City Circle 1(4),

Madras, the Additional Chief Metropolitan Magistrate (E.O.I.), Madras in E.O.C.C. No. 636 of 1985, has framed charges u/s 193 I.P.C. read

with Section 136 of the income tax Act, Section 196 I.P.C. and Section 276-C(1) read with Section 278-C of the income tax Act.

2. This petition has been filed by invoking the inherent powers of this Court, u/s 482, Code of Criminal Procedure to quash the charges framed, as

being totally opposed to oral and documentary evidence and further there being no ground for presuming, that the Petitioner had committed any of

the offences, on the basis of the complaint laid and evidence adduced which if unrebutted, would warrant the conviction of the Petitioner.

3. Material facts necessary to dispose of this petition will have to be briefly

stated. In the course of a search made by the income tax Department

on 17-11-1984 in the premises of the Petitioner, the former became aware that the latter had purchased a piece of land at No. 13, Babu Rajendra

Prasad Road, West Mambalam, Madras-600 033 by two documents numbered 3058 and 3059 dated 24-10-1984 and 25-10-1984 respectively

for Rs. 46,000/- each. The first document refers to purchase of 2330 sq.ft. of land, while the latter document shows the purchase of 2400 sq.ft. of

land. The documents were registered at the Office of the District Registrar, Madras South by the same vendor Smt. K. Jayalakshmi Devi,

examined as P.W.2. After the search, the vendor was examined by the income tax Department on 2-2-1985 and in the course of her sworn

statement, P.W.2 had stated, that she had received totally Rs. 3,85,000/- and that the Petitioner himself had introduced her, Smt. K. Jayalakshmi

Devi (P.W.2) and her daughter Smt. Kalyani Raghunathan (P.W.4) to the Indian Overseas Bank, west Mambalam, where he was having an

account and had invested Rs. 90,000/- each in three Fixed Deposits, totalling to Rs. 2,70,000/- besides paying the balance of Rs. 1,15,000/- by

cash, demand draft and cheque.

4. The sale agreement stated to have been returned by the seller to the Petitioner, was not produced before the search party by the Petitioner, but,

it has been later produced by the prosecution as Ex.P.-6 before the trial Magistrate. The Petitioner had given Form No. 37-G, prescribed under

Rule 48-G of the income tax Rules and u/s 269-P of the income tax Act, before the District Registrar, solemnly declaring that the market value of

the property was as recorded in the registered sale deeds Exs.P-2 and P-3; whereas the truth is that the Petitioner had paid Rs. 3,85,000/-

towards the market value of the property purchased, but had the documents registered for a lesser consideration totalling to Rs. 92,000/- only.

The Respondent would have it, that the Petitioner had understated the real purchase consideration and thereby tried to conceal the unexplained

investment of Rs. 2,93,000/- in the purchase of property and thereby committed the offences for which he has now been charged.

5. During the course of trial, u/s 244, Code of Criminal Procedure, the Trial Magistrate recorded the evidence of P.Ws.1 to 5. Ex.P-1 to P-25

were also marked. P.W.1 is the Respondent, while P.W.2 is the vendor of the property. P.W.4 Kalyani Raghunathan is the wife of M.

Raghunathan, P.W.3. and daughter of P.W.2. The Assistant Director of Inspection in the income tax Department was examined as P.W.5. Of the

documents filed, Ex.P.1 is the authorisation issued by the Commissioner of income tax income tax in favour of P.W.1 to institute this prosecution

Ex.P.2 and P-3 are the sale deeds. Ex.P-4 is the summones, issued to P.W.2 by the Assistant Director of income tax. The statement recorded

from P.W.2 by P.W.5 is Ex.P-5. Ex.P-6 is the undated draft agreement for sale, entered into between the Petitioner and P.W.2. Exs. P-7 to P-

10, P-19 and P-20 to P-25 are chelans, summons and letters by the Bank to the income tax Authority etc. Ex.P-11 is the certified copy of the

original search warrant marked as Ex.P.-15, Exs.P-12 and P-16 are the search lists prepared at the residence and the office of the Petitioner,

while Exs.P-13, P-14 and P-17 are the annexures to the search lists. Ex.P-18 is the statement of the Petitioner recorded on 17-11-1984 by

P.W.5

6. Mr. K.A. Panchapagesan, learned Counsel appearing on behalf of the Petitioner, contended that the trial magistrate had totally misconstrued the

scope of Sections 193 and 196 I.P.C. as well as Section 276-C(1) read with Section 278-C of the income tax Act. He specifically argues, that

the prosecution case was that the Petitioner, who was legally by express provisions of law to state the truth and make a declaration regarding the

market value of the property having failed to do so, has reference to the alleged declaration of the Petitioner in Form 37-G prescribed under Rule

48-G of the income tax Rules. There was no evidence placed before the Court at the stage of framing of the charges, with reference to the

aforestated declarations, thereby ruling out the possibility of a charge being framed u/s 193, I.P.C. In addition, he submitted that the allegations in

the complaint and the evidence have absolutely no relevance to Section 136 of the income tax Act and, therefore, the charge framed u/s 193,

I.P.C. read with Section 136 of the income tax Act was the outcome of total misconception. He further urged that there was no basis to frame a

charge u/s 196, I.P.C. on the evidence of P.Ws.2 and 3. As far as the offences under the income tax Act are concerned, he contended that

Exs.P.2 and P-3 clearly and unequivocally refer only to vacant sites and when

P.W.2 had admitted that she had received only Rs. 92,000/- for the

vacant sites sold under Exs.P-2 and P-3 that she had received Rs. 2,93,000/- for the demolished building materials, it will be doing violence, on

the facts and circumstances of the case, for the prosecution to claim that the Petitioner had made false entries in Exs.P-2 and P-3 and caused to

exist circumstances to have the effect of enabling him to evade income tax, penalty etc. A specific reference was made by the learned Counsel to

Ex.P.-18, the sworn statement recorded from the Petitioner, where no reference has been made to this transaction. Even subsequently the

Department had not questioned the Petitioner in respect of this transaction and had thereby denied the Petitioner a reasonable opportunity to

explain his case and in that background the prosecution was absolutely misconceived. He also contended that the Petitioner had not yet submitted

his return of income for the relevant year leading as a consequence to an order of assessment being made and, therefore, the prosecution was

totally premature and unsustainable. Finally, while winding up his arguments, the learned Counsel urged, that on the evidence referred to in Section

244, Code of Criminal Procedure no case had been made out against the Petitioner which, if unrebutted, would warrant his conviction and,

therefore, the framing of charge in a case where an order of discharge must have been pronounced, cannot be allowed to survive.

7. Mr. Ramaswami, K. learned Counsel appearing on behalf of the Respondent contended, that the prosecution had cited 16 witnesses in the

complaint and, therefore, they should be allowed to examine all the witnesses irrespective of the stage of framing of charge and any attempt made

by the Petitioner to have the proceedings stifled cannot be countenanced at this stage. He also contended that the Petitioner had not explained the

source of his income for Rs. 2,93,000/- and, therefore, u/s 278-E of the Act, the culpable mental state of the Petitioner, had to be presumed. He

would seriously urge, that the Petitioner should wait till the stage contemplated u/s 246(5) Code of Criminal Procedure had reached before

attempting to invoke the inherent jurisdiction of this Court. He then argued, that even an attempt to evade tax would be sufficient to sustain the

prosecution and Exs.P.2 and P-3 would be sufficient on this aspect of the case. He submitted that once Exs.P-2 and P-3 had been ""fabricated"", the offence u/s 193, I.P.C. was complete and as a corollary the offence u/s 196, I.P.C. would get attracted. It was his submission, that

unexpectedly P.W.2 shocked the prosecution by giving a different version and on that score alone, the Petitioner cannot be exonerated. Even if the

culpable mental state contemplated u/s 278-E of the income tax Act may not be available to the prosecution, the presumption u/s 132(4A) of the

income tax Act, will certainly be available to its benefit. Finally, he contended that building is a part of the land and a clever attempt made by the

Petitioner to evade the provisions of law cannot be permitted and the prosecution should be allowed to pursue its complaint, leading to its natural

termination, as provided u/s 248 of the Code of Criminal Procedure.

8. Both the counsel have placed before me certain decided cases, which will be referred to at the relevant context.

9. To appreciate the contentions raised in this petition it will be necessary to extract the relevant portion of Section 276-C(1) of the income tax

Act:

276-C(1). If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this act, he

shall, without prejudice to any penalty that may be impossible on him under any other provision of this Act, be punishable.

(i) in a case where the amount sought to be evaded exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not

be less than six months but which may extend to seven year and with fine;

(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with

fine.

The Explanation to the section does not in any way restrict or cut done the ambit of the expression ""wilfully"" occurring in Section 276-C(1) of the

Act. Therefore, mens rea is important, and if, there was any wilful attempt to evade tax, will necessarily depend upon the facts of each case.

Though the line of demarcation between ''preparation'' and ''attempt'' may be thin, before a person can be prosecuted for an offence punishable u/s

276-C(1) of the Act, there must be material available, that the stage of preparation had been crossed and attempt to evade wilfully, payment of

tax, was the only conclusion possible, on facts.

10. Section 278-C of the Act is only an enabling provision to find the karta of a Hindu undivided family guilty of an offence, punishable in this case,

u/s 276-C of the Act. Section 136 of the Act mentioned in the first charge read with Section 193, I.P.C. appears to have no bearing, in this

prosecution. All that Section 136 of the Act states, in that the proceeding before the income tax authority, shall be deemed to be a judicial

proceeding, within the meaning of Sections 193, 228 and 196 of the Indian Penal Code. The substance of the charge is, that the Petitioner in

recording the sale consideration in Exs.P-2 and P-3 at Rs. 46,000/- each, contrary to the contents of the agreement of sale, Ex.P-6, had

fabricated false evidence and caused circumstances to exist for the purpose of being used in a judicial proceeding before the income tax authority.

It is admitted by the prosecution that no market value of the house sites purchased had been arrived at to christen Exs.P-2 and P-3 as documents

containing false recitals. It is also in evidence that the Petitioner, a builder, was naturally interested in buying vacant sites, it is not opposed to the

normal course of human conduct that the Petitioner wanted to buy the building material also, to use it in the constructions, he will put up in the sites

purchases, which will ultimately be sold as flats to willing buyers. The learned Counsel for the Respondent conceded that if the offence u/s 276-C

of the Act had not been made out, as a necessary corollary, the offences under Sections 193 and 196, I.P.C. will cease to exist. To prove an

offence u/s 193, I.P.C. it must be established that the Petitioner was legally bound to state the truth, either by an oath or by an express provision of

law, or had made the declaration in question while so bound. It must also be shown that such statement or declaration was made in a stage of a

judicial proceeding and that such statement or declaration was false to the knowledge and belief of the Petitioner. If the case falls under the second

part of the Section, it is not necessary to prove that the statement or the declaration was made in the course of a judicial proceeding. To prove

fabricating false evidence, it must be shown that the Petitioner caused certain circumstances to exist or made a false entry or made the document to

contain a false statement. It must be further shown that the Petitioner did so intending that such circumstances, entry or statement should appear in

evidence in a judicial proceeding, or a proceeding taken by law, before a public servant, or in a proceeding before an arbitrator. The further requirement is that the person conducting the judicial or other proceeding had to form an opinion upon the evidence in which such false evidence

appeared and the Petitioner intended that person to entertain an erroneous opinion upon such evidence. Finally, it must also be shown that such

erroneous opinion touched a point material to the result of such proceeding. To attract an offence punishable u/s 196, I.P.C. there must be proof

that the piece of evidence in question was false or fabricated and that the Petitioner used or attempted to use such false or fabricated piece of

evidence, as true or genuine evidence, knowing it to be false or fabricated and acted corruptly.

11. In the background of the requirement of law, it must be seen whether on the evidence placed before Court, the Respondent had made out a

prima facie case, against the Petitioner which, if unrebutted, would warrant his conviction. That is the mandate of Section 245(1) Code of Criminal

Procedure. Even at this stage, it has to be stated, that the contention of the learned Counsel appearing for the Respondent, that the prosecution

should be allowed to examine all the witnesses irrespective of the stage of framing of charges, cannot be countenanced for ""at this stage

contemplated by Section 244, Code of Criminal Procedure, if the prosecution had not placed before the trial Magistrate material, which if

unrebutted, would warrant the conviction of the Petitioner. Availability of any number of witnesses on behalf of the Respondent, will not enure in

favour of the prosecution, if they had not placed relevant evidence u/s 244, Code of Criminal Procedure to facilitate the Magistrate to frame a

charge. Equally the argument, that the Petitioner should wait till the stage contemplated u/s 246(5), Code of Criminal Procedure had reached has

also to be rejected. The Code of Criminal Procedure under Chapter XIX has laid down the procedure to be followed, in trial of warrant cases by

Magistrates, of cases instituted on a police report and cases instituted otherwise than on a police report. Several stages for discharge of the

accused are contemplated under the provision in Chapter XIX and the accused will be entitled to plead for discharge u/s 245(1), Code of Criminal

Procedure, if no case had been made out against him which, if unrebutted, would warrant his conviction. Of course, at any stage of the proceeding,

the Magistrate has the power to discharge the accused if he considered the charge to be groundless, for reasons to be recorded. If the accused is not discharged u/s 245, Code of Criminal Procedure, then further proceedings follow, as contemplated u/s 246 Code of Criminal Procedure. If an

accused is entitled to a discharge u/s 245(1), Code of Criminal Procedure, there will be no need to refer to the provision of Section 246 Code of

Criminal Procedure, Further Section 246(5), Code of Criminal Procedure concern itself with recalling of witnesses already examined by the

prosecution for further cross-examination and re-examination, if any. This argument on behalf of the Respondent appears to be totally

misconceived. The words in Section 245(1), Code of Criminal Procedure ""which, if unrebutted, would warrant his conviction"" clearly imply that

what the Magistrate has to ask himself, at that stage was, whether, if he framed a charge and the accused did not further cross-examine the

witnesses for prosecution or, cite defense witnesses, he would convict the accused on the evidence on record, prior to the framing of the charge.

What these words clearly imply, had been noticed by Anantanarayanan, J. as he then was, in S.V. Aiyar v. K.B. Kafyanasundaram 1966 L.W

(Crl.) (S.N.) 14. Even at this stage, it will be better to dispose of the argument of the learned Counsel for the Respondent, that the culpable mental

state of the Petitioner, had to be presumed u/s 278-E of the Act. It is seen that this presumption as to the culpable mental state was inserted in the

Act, by the Taxation Laws (Amendment and Miscellaneous Provision) Act, 1986 only with effect from 10-9-1986. If that be so, the provisions of

Section 278-E of the Act cannot be invoked in this prosecution, which relates to an earlier period, before the Section was inserted in the Statute

Book. The argument which was an appendage to the one u/s 278-E of the Act was that, in any event, the presumption u/s 132(4A), would still be

attracted, Section 132 of the Act refers to search and seizure and Sub-clause(4A) permits a presumption to be drawn, that where any books of

account, other documents, money, bullion, jewellery or other valuable article or thing were found in possession or control of any person in the

course of a search, it may be presumed that they belonged to such person and that the contents of such books of account or other documents

were true and so also the genuineness of the document in relation to the purported author of those documents. All that had been seized during the

search from the possession or control of the Petitioner are Exs.P-2, P-3 and P-6, so far as they are relevant to this prosecution. The seizure of these documents, not having been disputed, the presumption contemplated u/s 132(4A) had worked itself out and cannot have any bearing on the

culpable mental state contemplated under the then non existing provision, now available u/s 278-E of the Act.

12. The oral evidence placed before the trial Magistrate can be classified under two heads; (a) The evidence of the officials of the income tax

Department and (b) the evidence of the vendor of the property and her relatives. In the first category we nave the evidence of P.W.1 D.

Sampathkumar, who is the complainant in this prosecution. He has stated nothing more other than his authorship of the complaint, to connect the

Petitioner with the offences alleged. The only other witness under this head, is P.W.5 D. Venkatesan, who is the Assistant Director of Inspection

(Investigation) in the income tax Department. It is P.W.5 who had searched the residential premises and the office of the Petitioner, after obtaining

a search warrant. It is he who had examined the Petitioner on 17-11-1984 and recorded his statement Ex.P-18. He had seized during search

Exs.P-2, P-3 and P-6. Again, he had examined P.W.2 and recorded her sworn statement Ex.P-5. He has also received from the Indian Overseas

Bank documents regarding investments made by the vendor, on the introduction of the Petitioner.

13. I have carefully perused the statement recorded from the Petitioner on 17-11-1984 by P.W.5. Except in page 3 of the statement, where it is

stated that house construction work was going on in several places including No. 13, Babu Rajendra Prasad Street, West Mambalam, Madras-

33, there is no reference whatsoever to the purchase of the property from P.W.2, which is the subject matter of this prosecution. I find that several

questions had been addressed to the Petitioner, but none of them related to this transaction. The search itself was on 17-11-1984 and for that

assessment year, the Petitioner will be entitled to file his returns on or before 31st July, 1985. P.W.5 who admits, that he was one of the Officers

who had investigated this matter, for launching the complaint, does not remember whether he saw the income tax returns for 31-3-1984 and 31-3-

1985. He had confessed of not having brought his preliminary record of investigation in full, except the documents he had chosen to file in this

prosecution. Further he had conceded, that he did not know as to whether the income tax assessment as individual and HUF had been completed for the assessment year 1985-86, viz., the year ending 31-3-1985. It is further seen from his cross-examination, that he had not perused the

transactions of the Petitioner with the Indian Overseas Bank, West Mambalam, though he knew, that the Petitioner had over draft facility with that

bank. He has further categorically deposed, that apart from Ex.P.18, the statement recorded from the Petitioner by him, he did not further examine

him in respect of this sale transaction, during his part of investigation. So far as the evidence of the Departmental witnesses are concerned, except

that Exs.P-2, P-3 and P-6 were during search and the sworn statements of P.W.2 and the Petitioner were recorded, nothing further had been

brought on record, to clinchingly connect the Petitioner with the offences alleged. The answers of P.W.5 in cross-examination, referred to earlier,

certainly postulates, that the prosecution had been launched prematurely without proper investigation and prima facie satisfaction, of the offences

alleged, having been committed by the Petitioner.

14. It now becomes necessary to consider the second category of evidence falling under Clause (b) P.W.2 Jayalakshmi Devi, the vendor of the

property to the Petitioner, her daughter Kalyani (P.W.4) and Raghunathan (P.W.3), the husband of P.W.4 fall under this head. The evidence of

these witnesses, needs careful scrutiny. In the chief-examination, P.W.2 had stated that Exs.P-2 and P-3 were the copies of the sale deeds dated

24-10-84 and 25-10-1984, each registered for Rs. 46,000/-. She had further deposed that the Petitioner had agreed to purchase that property

for Rs. 3,85,000/- and had paid the entire consideration to her. She had spoken of a written agreement of sale, on which date an advance of Rs.

25,000/- was paid to her by the Petitioner. Rs. 3,60,000/- the balance of sale consideration was paid, when Exs.P-2 and P-3 were registered.

She had admitted that a major portion of Rs. 3,85,000/- was invested in Fixed Deposits in the Indian Overseas Bank, West Mambalam, in her

name and a portion thereof in the name of her daughter examined as P.W.4. She affirms having been examined by P.W.5 and proves her statement

Ex.P-5 so recorded, in which her son-in-law, P.W.3 had attested. When cross-examined she was unable to state the terms of the agreement,

unless the agreement itself was produced for perusal. She was definite that though the total sale consideration for the vacant site and the building was Rs. 3,85,000/-, Exs.P-2 and P-3 related to the sale of vacant sites only, since the Petitioner wanted the site for constructing flats, it is also in

evidence that the Petitioner was running an agency under the name and style of ""Ponga Agencies"" which constructed and sold house property.

P.W.2 has also deposed that the building in Door No. 13, which was sold to the Petitioner, was an old building with 21 teak door frames of first

quality and iron rods. The Petitioner who wanted to purchase vacant plots, stated while he purchased the vacant plots that he would himself

remove the superstructure and take those articles obtained on demolition of the building, by paying Rs. 2,93,000/- for such materials. This was

agreed to by P.W.2 and then the transaction was completed. It was elicited from P.W.2 in re-examination that she did not execute any separate

document to the Petitioner for the building material. It was elicited that during negotiations she offered for sale only with the building, which had

three big portions. The answers in re-examination do not wipe out the evidence of P.W.2 in cross-examination, that the value of vacant plots and

building material was fixed separately and then the documents were executed. It will be necessary to refer to the sworn statement, Ex.P-5 made by

P.W.2 to P.W.5. In Ex.P-5 she has stated that on 19-8-1984 the sale agreement was entered into for sale of 1 ground and 2330 sq.feet of house

site with house to the Petitioner for Rs. 3,85,000/-. She has referred to the two sale deeds for Rs. 46,000/- each and the details of the sale

consideration received, to make up the total of Rs. 3,85,000/-. She had also stated that she had handed over the copy of the agreement to the

Petitioner. This sale consideration includes brokerage, legal and eviction expenses apart from a gift to one Padmavathi Ammal. In this context

marked as Ex.P-6, on the ground, that the Petitioner must have destroyed the original agreement, since it was not produced by him before the

Officers, who searched his premises. The schedule to the agreement shows that house, ground and premises at old No. 45, new number 13, Babu

Rajendra Prasad Street, West Mambalam Madras, was being sold to the Petitioner. This agreement confirms the oral evidence of P.W.2 that

during negotiation the sale with the building was talked about, while later vacant plots were sold and for the value of the building material, a

separate sum was paid. The learned Counsel for the Respondent fairly stated, that if the sale deed was executed for a value less than Rs. 50,000/-

a clearance certificate from the income tax Department was not necessary and, therefore, Exs.P-2 and P-3 were validly registered for the

consideration, mentioned in each one of those documents. All that he would submit is that the Petitioner was bound to explain the source of his

income for having paid Rs. 2,93,000/- to P.W.2 over and above Rs. 92,000/- denoted in Exs.P-2 and P-3. Though there cannot be any dispute

that the Petitioner will have to explain his source of income, it is apparent on the evidence placed before court, that he was not furnished with an

opportunity to explain his source. Admittedly no further examination was done of the Petitioner except the record in Ex.P-18, which does not

contain any details about this sale transaction. The Petitioner had time till the end of July, 1985, to submit his returns and it was quite possible that

he would have declared his source of income for having purchased the building material. This aspect assumes importance, since the entire

transaction does not appear to be an underhand dealing where clandestinely money had been passed on to the vendor. The Petitioner himself had

taken the vendor and her daughter P.W.4, to the Indian Overseas Bank where he holds an account and had introduced them to the bankers;

leading to investment by the vendor and her daughter, a major portion of the sale proceeds, in that Bank. Obviously unassailable documents

available in a Nationalised Bank and prima facie it does not appear that there was any attempt to hide the whole transaction and thereby wilfully

evade payment of tax.

15. One other important circumstances which is available in the evidence of P.W.3 cannot be overlooked even at this stage. He has specifically

stated that he did not know whether the building had been demolished before execution of Exs.P-2 and P-3, the sale deeds, since he had not

visited that building after August, 1984. The prosecution had not even shown that at the time when Exs.P-2 and P-3 were executed, they were not

vacant sites. If they were vacant sites on 24-10-1984 and 25-10-84. Exs.P-2 and P-3 cannot be assailed as documents containing false recitals. I

am unable to hold as contended by the learned Counsel for the Respondent, that there was an attempt to cheat, since the entire documentary

evidence, prevents such an inference being drawn. P.W.3 has further admitted that the draft agreement Ex.P-6 was for the building and the site on which it stood and Exs.P-2 and P-3 were only for the sale of vacant sites. P.W.4 has confirmed the investment of the sale proceeds in the Indian

Overseas Bank, West Mambalam, on the recommendation of the Petitioner. In this prosecution we are not concerned about the duties of the

transferor of the property, and if she had failed to disclose her income, out of the sale of this property, for what needs to be looked into is all that

the Petitioner had done, to attract the ingredients of the offences, with which he has been charged. At the risk of repetition, there was no scope yet,

for non accounting of the source of income of Rs. 2,93,000/- by the Petitioner, because he had still time to furnish his returns. P.Ws.2 and 4 have

not been treated hostile by the prosecution and when their evidence enures in favour of the accused, that cannot be overlooked at the stage of

framing of charges, on facts, it is impossible to conclude, that prima facie material has been placed before the trial Court to facilitate charges being

framed for the offences alleged.

16. As far as the offences under Sections 193 and 196 I.P.C. are concerned, the allegations in the complaint show that the Petitioner had given

Form No. 37G prescribed under Rule 48G of the income tax Rules framed u/s 269-F of the income tax Act before the District Registrar, Madras,

solemnly declaring that the market value of the property was that which had been recorded in the sale deeds as consideration, whereas the

Petitioner had paid towards its market value Rs. 3,85,000/- Therefore, the false evidence projected by the prosecution, relates to the Petitioner,

having made a false statement, which e either knew or believed to be false or did not believe to be true, referable to the declaration made under

Form 37G before the District Registrar. Neither the declaration form had been produced in evidence, nor the District Registrar ad been examined

to speak about such declaration. Therefore, the basis for the charge u/s 931 I.P.C. vanishes and the offence u/s 196 I.P.C. automatically gets

erased for the same reason. What remains to be considered is the case law placed before me.

17. In Commissioner of Income Tax, Gujarat II Vs. Vimlaben Bhagwandas Patel and Kamlaben Kanjibhai Patel, Division Bench of the Gujarat

High Court while considering the question of acquisition of immovable properties to prevent the evasion of tax, held, that proceedings before the competent authority were penal and quasi-judicial. It was also observed that proof of motive of tax evasion was a condition precedent for

acquisition proceedings, the meaning of ""apparent consideration"" was also considered, in relation to ""fair market value"". A specific observation was

made, that it was not merely the untrue statement of consideration in the instrument of transfer but, coupled with that, the ulterior motive of tax

evasion or concealment of income was the gist of the offence. The Court was considering the provisions of the Act under Chapter X dealing with

acquisition of immovable properties in certain cases of transfer, to counter act evasion of tax. I am unable to see how this decision will help the

prosecution, though the Petitioner can derive advantage, of the specific observations above, on the ulterior motive of tax evasion or concealment of

income, being the gist of the offences.

18. In Anandi Prakasham v. 1st Asst. C.I.T. (M.P.) 144 I.T.R 79 (M.P.) a Division Bench of the Madhya Pradesh High Court was deciding a

case of acquisition of property to avoid evasion of tax. The ""apparent Consideration"" shown in the sale deed was Rs. 49,000/- while the fair

market value determined was Rs. 85,600/-. The transferor as well as the transferee admitted, that Rs. 90,000/- was paid as sale consideration at a

later date, and correct entries were made in books. The transferor did not file returns, for over two assessment years, after initiation of acquisition

proceedings. The transferee was unable to explain the source from which money was obtained. As a question of fact, it was noticed that an

affidavit was filed by one of the partners of the transferee that only Rs. 49,000/- was paid as sale consideration. In that context the Court held that

omission to state the true sale consideration by the transferor was intended to avoid payment of tax on capital gains. The object was clearly to

facilitate the transferor to evade payment of tax. The transferee was also unable to wholly explain the source from where money was obtained for

the purchase. The decision of the Tribunal was upheld on the ground that the cause arising out of the presumption u/s 269C(2)(b) had not been

discharged. The facts in the present case are totally different. Further the decision relates to acquisition of a property and not to a prosecution.

19. The decision of the Supreme Court in K.P. Varghese v. I.T.C. Emakulam 131 ITR 507 has no bearing to the case on hand, for the apex

Court was considering the scope for invoking of the provisions of Section 52(2) of the Act. It was held that only where the consideration for

transfer of a capital assets has been understated by the Assessee, or in other words, the full value of the consideration in respect of the transfer was

shown at a lesser figure than that actually received by the Assessee, the said provision could be invoked.

20. The decision of this Court in S.R. Arulprakasam Vs. Prema Malini Vasan, Income Tax Officer, Central Circle-XV, Madras, related to non-

disclosure of income in the original return and the filing of a revised return before completion of assessment, disclosing the true income. This Court

held that the original return was not wiped out and that prosecution as well as penalty proceedings can be launched. In this prosecution no return

had been filed and there was time enough, for the submission of the returns.

21. Equally the decision in P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, will be inapplicable, for that case related to the

institution of a prosecution against the Assessee, pending re-assessment proceedings.

22. The decision of the Madhya Pradesh High Court in Dilicet Singh v. I.T.C. (M.P.) 148 ITR 58 related to a pronotes were introduced to

evidence credit. Investigation disclosed that the pronotes which were valuable securities were pre-dated. Therefore, on such facts it was held that

the partner was liable to be convicted. There is not even a semblance of connection between that decision and the facts unfurled in this

prosecution.

23. The decision in A.K.T.K.M. Vishnudatta Andharjanam represented by D.V. Nambudripad Desamangalam Vs. The Commissioner of

Agricultural Income Tax, Trivandrum, Commissioner of Income Tax, Bombay South Vs. N.T. Patwardhan, COMMISSIONER OF Income Tax

Vs. RAJAGIRI RUBBER AND PRODUCE CO. LTD. (NO. 1)., V. Venugopala Verma Rajah Vs. Commissioner of Income Tax, Kerala, and

Commissioner of Agricultural Income Tax, Kerala Vs. Kailas Rubber and Co. Ltd., refer to sale of trees which were either cut or completely

removed from the land together with their roots for the purpose of planting that area with rubber or sale only of trees with stumps remaining in tact

to yield further, to arrive at a decision whether the receipt from sale was capital in nature or otherwise, none of these cases can even remotely

connect, the proposition involved in this petition.

24. In Prasad and Others Vs. V. Govindaswami Mudaliar and Others, the Apex Court was considering Section 53 of the Transfer of Property

Act with regard to genuineness of the sale deed, not supported by adequate consideration and executed nominally with a view to stave off

creditors. The Supreme Court held that the said transaction was vitiated. To my mind, this decision appears to have been cited out of thorough

misconception.

25. In McDowell and Co. Ltd. Vs. Commercial Tax Officer, the Apex Court observed, that colourable devices were not part of tax planning. It

was the duty of the Court to expose and refuse approval of tax avoidance devices, though tax planning may be legitimate provided it was within the

framework of the law. The Court was considering the excise duty payable by the manufacturer, who held a D-2 licence. This decision was cited

for the proposition that evasion of tax should not be approved. On facts I have held that the prosecution had not placed even the minimum

evidence before Court to frame charges against the Petitioner.

26. Again, the decision of the Supreme Court in Workmen Employed in Associated Rubber Industry Ltd., Bhavnagar Vs. Associated Rubber

Industry Ltd., Bhavnagar and Another, will be totally inapplicable to this case, for in that case decided by the Supreme Court, a subsidiary

company was created for avoiding the welfare legislation. The company had transferred all shares wholly to one subsidiary. The subsidiary had no

other source of income or business. The dividends received by subsidiary, according to the Supreme Court, must be taken into account in

assessing gross profit for calculating rate of bonus payable to workmen of holding company. It was specifically found that the creation of the

subsidiary company was a device to reduce the amount of bonus to be paid to the workmen of the company.

27. The decision of the Patna High Court in Mahabir Prasad Saraogi Vs. State of Bihar and Another, concerned itself with an Assessee who had

fabricated a declaration in Form No. 12. It was held that the offence was complete as soon as document was fabricated. In that case, the certified

copy of the declaration was filed before the Appellate Tribunal and the proceedings therein were later withdrawn. It was held that the income tax

Officer was in those circumstances competent to file a prosecution for offences under Sections 193 and 471 I.P.C.

28. In C.G.T. v. I.P. Soni 136 ITR 839 the question for decision related to the gift of a plot of land with building constructed thereon. The gift was

of the land only and there was no indication that the building was withheld from the gift. Sections 3 and 8 of the Transfer of Property Act were

considered. The donor originally filed a return disclosing income from the house property only for a period of sue months claiming that thereafter

the plot as well as the house had been transferred to his son, but subsequently submitted the revised return on the basis that he continued to be the

owner of the building. It was held that in view of Sections 3 and 8 of the Transfer of Property Act the transfer of land would also convey to the

transferee all interests of the transferor in the building was either expressed or necessarily implied. I have referred to the evidence of P.W.4, that he

was not aware as to whether the building in the site was existing or had been demolished before the execution of Exs.P-2 and P-3. No other

evidence to substantiate the prosecution case, that the sale was of the building and the site on the date of sale deeds, had been placed before the

Court.

29. The decision of the Supreme Court in Jamatraj Kwalji Govani v. State of Maharashtra 1968 L.W. (Crl.) 65 was referred to for the

proposition that u/s 540 of the old Code corresponding to Section 311 of the present Code it was difficult to limit the power to cases which

involved something arising ex improviso which no human ingenuity could foresee, in the course of the defence, for the Code did not made this as a

condition for the exercise of power and it was not right to embark on judicial legislation. This decision was pressed into service to facilitate the

prosecution to let in further evidence. Since, it did not expect P.W.2 to turn turtle. We are not concerned now with the exercise of powers u/s 311,

Code of Criminal Procedure, but the consideration relates to the scope of framing charges u/s 245, Code of Criminal Procedure on the evidence

adduced u/s 244, Code of Criminal Procedure.

30. The decision of the Supreme Court in State of Maharashtra v. Md. Yakub 1980 L.W. Crl. 96 (S.C.) was relied upon to impress upon the

Court, that narrow interpretation for the word ""attempt"" was not warranted. In that case the Supreme Court considered the distinction between

preparation and attempt and held on facts, that the attempt began where preparation ended and an inference had to be drawn that the accused

therein had attempted to export silver out of India. It was observed that the act must reveal, with reasonable certainty, in conjunction with other

facts and circumstances and not necessarily in isolation, an intention, as distinguished from a mere desire or object, to commit the particular

offence, though the act by itself may be merely suggestive or indicative of such intention. The act, committed must be proximate to the intended

result. In the earlier part of this order, I have discussed the facts and found that wilful attempt to evade tax, cannot be legitimately found.

31. It is rather unfortunate, that the prosecution had not placed sufficient material before the trial Magistrate, even prima facie, to frame charges

against the Petitioner for the offences alleged. The institution of prosecution certainly appears to be premature, as well. I have no hesitation in

quashing the charges framed, which necessarily terminates the entire proceedings in E.O.C.C. No. 636 of 1985 on the file of the trial Magistrate.

The quashing of the prosecution can have no bearing whatsoever in the assessment proceedings against the Petitioner, under the provisions of the

Income tax Act. The provision of law have been interpreted on the peculiar facts of this case and, therefore, this judgment can have no universal

application irrespective of facts. This Petition is allowed.

