

(1977) 03 OHC CK 0015

In the Orissa High Court

Case No : Criminal Revision No. 237 of 1976

Bijayananda Patnaik

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 04-03-1977

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 484
Income Tax Act, 1961 — Section 139, 277, 279

Citation : (1982) 136 ITR 861

Hon'ble Judges : B.K. Ray, J

Bench : Single Bench

Judgement

B.K. Ray, J.—This revision is directed against the order of the Additional Sessions Judge, Cuttack, allowing a revision application filed by the opposite party challenging the order of Shri B. Sahu, Magistrate, 1st Class, Cuttack, in 2CC-203 of 1974, discharging the petitioner u/s 253(1), Cr. PC (old) without framing a charge against him u/s 277 of the I.T. Act, 1961, for want of sufficient materials. The learned Additional Sessions Judge having allowed the revision before him directed further enquiry against the petitioner. The petitioner, therefore, has come up to this, court against the order of the court below.

2. The facts giving rise to this revision may briefly be stated thus: One Shri S.C. De in the capacity of an ITO filed a complaint u/s 277 of the I.T. Act, 1961, against the petitioner. The case made out in the complaint was that the petitioner had filed a return for the assessment year 1964-65 corresponding to the accounting year ending on March 31, 1964, on January 10, 1965, showing an income of Rs. 96,001.28 as income from other sources. Against the column "salaries and house property" in the return the petitioner had shown his income to be "nil". This statement made by the petitioner against the column "salaries and house property" was false, because he had not shown his income from his house property at 3, Aurangjeb Road, New Delhi, and had not mentioned his income as M.L.A. for the period commencing from October 2, 1963, to March 31, 1965, which was Rs. 1,420. This return filed by the petitioner having been signed

and verified by him, an offence u/s 277 of the I.T. Act was alleged to have been committed.

3. On the aforesaid allegations the petitioner was summoned to stand his trial (vide 2CC-203 of 1974) before the aforesaid Magistrate.

4. The defence of the petitioner during trial was that the omission to mention his income from house property and salary as M.L.A. for the period between October 2, 1963, and March 31, 1965, amounting to Rs. 1,420 was an inadvertent mistake; that, on March 27, 1967, when the assessment order was passed, the assessing authority was informed of that omission by Ex. A-1 and that the assessment order was passed on the basis of such information. So, no offence had been committed u/s 277 of the I.T. Act.

5. Before going into the merits of the present revision it is worthwhile to mention here certain facts relating to the proceeding in the trial court out of which the present revision arises as reference to those facts will be necessary for the disposal of the present case. The complaint was filed by Shri S. C. De, ITO, Central Circle, at the instance of the Commissioner in accordance with Section 279 of the I.T. Act and cognizance of the alleged offence was taken before the commencement of the Cr. PC, 1973, i.e., on March 28, 1974. Therefore, it follows that the trial was to proceed under the old Cr. PC as if the new Code had not come into operation. On August 12, 1975, P. W. 1, the complainant, was examined and cross-examined before charge. That very day the complainant filed a petition in the trial court praying to get other witnesses summoned and examined. The order sheet of that date reveals thus :

"The R.L. is present. One P.W. present. Examined and cross-examined him before charge. The advocate for the defence files a memo for getting the documents filed by the prosecution to be marked on admission. Ex. P-1 (i.e., the return in question) marked on admission as evidence. The time petition filed by the prosecution is not pressed in view of the document above being marked on admission. Accordingly, the petition for time is disposed of. Evidence before charge is closed by the prosecution. To 16-8-75 for consideration of charge and further orders.

Accused as before."

6. Thereafter, the complainant filed a petition u/s 528, Cr. PC (old) (vide Misc. Case No. 424 of 1975) before the S.D.J.M., Sadar, Cuttack, praying to transfer the case from the court of the trying Magistrate who had passed the order on August 12, 1975, on the ground that the said court had closed the prosecution before charge and posted the case to August 16, 1975, for a consideration of the charge despite submission by the complainant that material witnesses to the case be summoned through court. The learned S.D.J.M. rejected the petition for transfer. The relevant portion from the order of the S.D.J.M. is extracted below :

"So it is apparent from the order sheet dated 12-8-75 that the petition for time

was not pressed. That being so, there is hardly any justification for the petitioner to complain that evidence before charge was closed by the learned Magistrate despite a request made by the petitioner to summon his witnesses through the court. So, in that view of the matter, it must be held that there is hardly any ground for the petitioner to entertain a reasonable apprehension that he would not get fair trial and justice."

7. After disposal of the miscellaneous case in the above manner the original records of the complaint case was received by the trying court whereafter the case stood posted to September 17, 1975. On that date, the prosecution did not choose to move the court once again for summoning any witness to be examined before a consideration of the charge. The case, however, was not taken up on that day. The trying Magistrate having been transferred, the S.D.J.M. withdrew the case to his file and again transferred the case to Shri B. Sahu, Magistrate, 1st Class, for trial. Shri B. Sahu took up the case on September 24, 1975, to which date the case had been posted earlier. On that date four applications one after another were filed by the prosecution within a period of half an hour. The first one of those applications was for calling for the original sale deed in respect of the house situated at 3, Aurangzeb Road, New Delhi. As the copy of the sale deed had already been filed and the defence admitted the copy, the court did not grant time to the prosecution for the purpose of production of the original sale deed. The second application that was filed by the prosecution was to summon further witnesses. In view of the previous order dated August 12, 1975, showing that the prosecution did not press its application then filed for summoning other witnesses the trial court did not allow the second application. In this connection, it may be remembered here that after the order dated August 12, 1975, the prosecution had moved the S.D.J.M. for a transfer of the case from the file of the Magistrate before whom it was pending and that the S.D.J.M. had rejected the application for transfer after accepting the statement; made in the order sheet dated August 12, 1975, that the prosecution had not pressed its application to summon witnesses before a consideration of the charge. While rejecting the second application the trial court, however, observed as follows :

"The learned advocate for the prosecution was asked to argue on the merits of the case so that I would be in a position to decide as to the necessity and relevancy of summoning the witness named in the petition and for that reason to adjourn the case But the learned advocate for the prosecution refused to argue unless his prayer was allowed."

8. After the rejection of the second application the third application that was filed by the prosecution was for an adjournment on the ground that the prosecution wanted to go in revision against the orders of the trial court rejecting the first two petitions. The third petition was rejected by the trial court with the following observations :

"Considering the order dated 12-8-75 and observation of the S.D.J.M. in the misc. case referred to above and earlier orders giving opportunities to the

prosecution to examine witnesses and failure to make application for time on the previous dates and in view of the orders dated 12-8-75 closing the prosecution case before charge and the fact that the prosecution has not so far made any such prayer and taken no tangible steps to go in for revision, I consider such petition of the prosecution to be dilatory tactics to prolong the proceeding by filing several petitions from time to time. When the prosecution got enough opportunities to examine witnesses and to take steps to secure their attendance which were not availed of and there is no provision to allow time to the prosecution to obtain stay order, allowing of further time to the prosecution to go on revision and obtain stay order was not considered expedient in the interest of justice and as such the prayer of the advocate for the prosecution was rejected and the learned advocate for the prosecution was again requested to argue his case so that on merits I would consider if allowing of further time is essential. But the learned advocate for the prosecution-again refused to argue his case..... "

9. After rejection of the third application the fourth application that was filed by the prosecution was for time for two weeks to file a petition u/s 526, Cr. PC (old) for a transfer of the case to another court and to obtain a stay order. That application was rejected by the trial court on the ground that the old Code did not apply to such a petition and that the new Code did not contain a provision for staying further proceedings in a case as soon as a party to the proceeding expresses its intention to move for transfer. After rejection of the fourth petition the trial court, as the order sheet reveals, observed as follows :

"It is rightly remarked by the learned advocate for the defence that in course of half an hour of the court's proceeding the learned advocate for the prosecution has filed four petitions, at intervals, which were drafted earlier and this goes to show that this is a pre-planned dilatory tactics of the prosecution in order to protract the proceeding and harass the defence. So the petition for time to move an application u/s 521, Cr. PC, and obtain stay order was rejected and the learned advocate for the prosecution was called upon to argue his case for consideration of charge. But the learned advocate for the prosecution regretted his inability owing to his engagement in other court and wanted time. He was, however, given time and asked to argue his case at any time as per his convenience before 5.00 p.m..... "

10. After having observed as before the trial court, as the order-sheet reveals, passed the order quoted below :

"It is now 5.00 p.m. the learned advocate for the prosecution has not turned up. Heard the learned defence advocate. Put up on 25-9-75 for orders. The learned advocate for the prosecution may have his argument tomorrow in the first hour if he so likes ; failing which, orders as regards framing of charge or otherwise be passed on the materials available in record and evidence already recorded before charge. Accused as before."

11. On the next day, i. e., September 25, 1975, nobody on behalf of the prosecution turned up to argue its case as per the order of the previous day. Therefore, on that day the learned trying Magistrate passed the following order:

"Despite previous orders the advocate for the prosecution has not turned up to argue his case regarding consideration of charge. So, I am constrained to take up the consideration of charge on the materials available in record and evidence recorded before charge and submissions made by the prosecution previously."

12. After having recorded the above order the learned trying Magistrate by a reasoned order discharged the petitioner. It was against this order of discharge and against the order refusing to stay further proceedings in the case on the application of the prosecution expressing its intention to move for transfer of the case, the prosecution filed a revision application on September 26, 1975, before the Session Judge, Cuttack. That revision application was allowed by the learned Additional Sessions Judge which is now under challenge in the present revision.

13. As appears from the impugned order three points were urged by the prosecution before the Additional Sessions Judge in support of the revision petition. They were : (a) that the order of discharge passed by the trial court on September 25, 1975, was a nullity inasmuch as, it was mandatory on the part of the trial court to stay further proceedings before it as soon as intimation was given to it by the prosecution that it intended to move for a transfer of the case; (b) that the learned Magistrate had no power to discharge the accused without examining all the witnesses mentioned in the complaint petition and for that purpose the learned trying Magistrate should have summoned the witnesses through court instead of asking the prosecution to produce its witnesses ; and (c) that the evidence on record was sufficient to frame a charge against the accused.

14. The learned Additional Sessions Judge, on the first point as to whether the trial court was bound to stay its hands and to grant an opportunity to the prosecution to move for a transfer of the case, and to obtain a stay order as provided u/s 526 Cr. PC (old), and, as to whether the trial court not having acted as per the provisions of that section, its subsequent order discharging the accused was a nullity, decided the same in favour of the prosecution. The relevant portion of the order of the learned Additional Sessions Judge reads thus :

"In my view, since Section 484(2)(a), Cr. PC saves the pending trial from the application of the provisions of the new Code and provides for disposal of the same as per the provisions of the old Code, and the application filed u/s 526, Cr. PC being in continuation of the same proceeding, the provision of Section 526, Cr. PC is available, and as such, the order passed by the learned Magistrate on 24-9-75 refusing the adjournment of the case after intimation given to him for transfer of the case and subsequent orders passed therein are nullity and deemed to be non-existent in the eye of law. In taking that view of the matter, the said interlocutory order having been passed without jurisdiction which

constitutes nullity and is non-existent in the eye of law can be interfered within revision u/s 397, Cr. PC..... "

15. On the second point the court below held that the order of the learned trying Magistrate refusing to summon witnesses for the prosecution being an interlocutory one, no revision lay before it against the order of the trying court, refusing to summon.

16. On the third point, the court below held that there were enough materials on record to frame a charge against the accused and that the subsequent conduct of the accused as evidenced from the application (Ex. A-1) filed by him before the assessing authority that the omissions in the return were due to inadvertence could not be taken account of while framing the charge. The relevant portion from the order of the court below in this connection is extracted below:

"In my opinion, the materials as available in the record apparently tend to show that the accused has suppressed in giving his income in respect of the house owned by him at Aurangzeb Road, New Delhi, and also his salary drawn as an M.L.A. of the Orissa Legislative Assembly. Of course, at a later stage before any order is passed, the learned advocate for the accused has requested the I.T.O., to include his salary drawn by him as an M.L.A. But this offence being related to the verification made in the income return submitted to the I.T.O., the subsequent conduct can be only considered after the accused appears and gives his statement and will not be taken into account while framing a charge."

17. The impugned order goes to show that the learned Additional Sessions Judge has decided the case mainly on two points. According to him, the application filed by the prosecution on September 27, 1975, in the, trial court for adjourning the proceeding in order to enable it to move the Sessions Judge for transferring the case from the file of Shri B. Sahu is governed by the old Cr. PC, and, therefore, it was incumbent on the trying court to adjourn the hearing of the case u/s 526(8), Cr. PC (old). The learned trying Magistrate, therefore, was wrong in disposing of that application under the new Code and in not granting time to the prosecution to move for transfer. Hence the subsequent order passed by the trying court discharging the accused being without jurisdiction was a nullity. The second reason which actuated the learned Additional Sessions Judge to set aside the order of discharge was that the trying court in considering as to whether a prima facie case had been made out against the accused for the purpose of framing a charge should not have considered the subsequent conduct of the accused in filing the application (Ex. A-1) before the assessing authority saying that the omission in the return previously submitted was due to inadvertence. According to the learned Additional Sessions Judge, the subsequent application (Ex. A-1) filed by the accused petitioner before the assessing authority saying that the omission in the return was a bona fide mistake could not have been considered by the learned trying Magistrate at the time of framing a charge.

18. On both the points, the decision of the learned Additional Sessions Judge

appears to be contrary to law. I shall now take up the first point, viz., whether the application of the prosecution before the trial court for time to enable it to move for a transfer of the case to another court is governed by the old Code of 1898 or the new Code of 1973. As indicated above, the petition of complaint in the present case having been filed and cognizance of the alleged offence having been taken prior to the commencement of the new Code, the trial had to proceed as if the new Code had not come into operation at all by virtue of the provisions of Section 484(2)(a) of the new Cr. PC which reads thus :

"Notwithstanding such repeal,

(a) if, immediately before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898 (V of 1898), as in force immediately before such commencement (hereinafter referred to as the old Code), as if this Code had not come into force."

19. Therefore, the short question which arises is as to whether on an application for time having been filed by the prosecution before the trial court on September 24, 1975, to enable it to move the Sessions Judge for a transfer of the case, the trial court was bound to adjourn the case as required u/s 526(8), Cr. PC (old) and as to whether not having done so, the order of discharge passed by the trial court after dismissing the application for time was without jurisdiction and hence a nullity. The right of a party to move the Sessions Court to get a case transferred from one court to another is not a vested right, and, therefore, it cannot be said that in the present case the complaint having been filed and cognizance of the alleged offence having been taken under the old Code, a vested right to move for transfer of the case from one court to another accrued to the prosecution under the old Code. True, if an application for time by a party to enable it to move for transfer of the case from one court to another would have been pending under the old Code, certainly u/s 484(2)(a) of the new Code the said application had to be disposed of as if the new Code had not come into force. In such an event, it could be said that it was mandatory on the part of the court before which application was pending to grant time as prayed for in the application and that the order of the court disposing of the case on merit after dismissing the application for time was without jurisdiction. But in the case before me no such application was pending before the trial court when the new Code came into force. The application for time was filed by the prosecution on September 24, 1975, and as such, it had to be disposed of under the provisions of the new Code which does not provide that on such an application time must be granted. In other words, there is no provision in the new Code corresponding to Section 526(8) of the old Code. Section 484(2)(a) of the new Code clearly lays down that if an application is pending before the commencement of the new Code such application has to be disposed of under the old Code and not under

the new Code. The application for time to move the Sessions Judge for transfer of the case from the court of Shri B. Sahu filed by the prosecution had, therefore, to be disposed of under the new Code and the trial court is right in disposing of the application under the said Code. After dismissal of the application for time the trial court proceeded to dispose of the case on merit and discharged the accused. The application for time to move the Sessions Judge for transfer of the case is not a part of the trial and the right which was available to the prosecution u/s 526(8), Cr. PC (old), was not available to it after the commencement of the new Code, because Section 526(8), Cr. PC (old), appears under Chap. XLIV which relates to transfer of criminal cases and does not appear under a chapter relating to trial. It may be contended that the petition which was filed by the prosecution for adjournment was u/s 344, Cr. PC (old), which finds place under Chap. XXIV relating to general provisions as to inquiries and trials in the old Code. Therefore, since u/s 484(2)(a) of the new Code, trial of the case has to take place under the old Code, the application for time filed by the prosecution had to be disposed of u/s 344, Cr. PC (old). That may be so. But Section 344, Cr. PC (old), does not make it incumbent on the court to grant time when moved. The power to grant time under this provision is discretionary. True, the discretion to be exercised under this section is a judicial one and when a court acts capriciously in exercising its power under this section it may be a case for interference. But in the absence of a provision as contained in Section 526(8), Cr. PC (old) in Section 344, Cr. PC (old), it is not open to contend that the learned Magistrate was bound to grant time. If Section 526(8), Cr. PC (old) has no application to the petition that was filed by the prosecution on September 24, 1975, the order of dismissal of that petition cannot be said to be without jurisdiction. When the word "application" appears in Section 484(2)(a) of the new Cr. PC along with the words "trial" and "enquiry", it means an application which is not part of the trial or enquiry. The word "application" in the section has an independent existence different from "trial" or "enquiry". Where an application is to be deemed as part of the enquiry or trial and when a separate provision has been made in the Cr. PC (old) for disposal of such application under the chapters relating to trial or enquiry, such application has to be disposed of under the old Code and not otherwise. The observation in the decision in *Kanika Bewa Vs. State of Orissa*, to the effect that "this indicates the clear legislative intention that all other proceedings shall be dealt with and disposed of in accordance with the provisions of the old Code" can be of no assistance to the prosecution. The words "all other proceedings" used in the aforesaid passage must have to be understood in its context. The main provision of Section 484(2)(a) under the new Cr. PC is that notwithstanding the repeal of the old Code, "appeal", "application", "trial", "inquiry" or "investigation" pending at the date of the commencement of the new Code shall be disposed of in accordance with the old Code. The proviso to Section 484(2)(a) of the new Code takes away from the main provision of the only section the "commitment enquiry" and says that every enquiry under Chap. XVIII of the old Code, i.e., commitment proceeding pending at the commencement of the new Code shall be dealt with and disposed of in

accordance with the provisions of the new Code. If the proviso would not have been there, a commitment enquiry pending at the commencement of the new Code could have been governed by the old Code. The main purpose of the proviso is to take out commitment enquiry pending at the commencement of the new Code from the scope of the main section. Therefore, all applications pending at the commencement of the new Code, except those which relate to trial as mentioned above, would be governed by the old Code. If an application is not pending and is filed after the new Code comes into force, it has to be disposed of under the new Code. The words "all other proceedings" used in the observation made in the decision reported in *Kanika Bewa v. State* 41 [1975] CLT 798 (Ori) clearly refers to proceedings pending, viz., pending enquiry, pending trial and pending application mentioned in the main portion of Section 484(2)(a) of the new Code. No other meaning to the words "all other proceedings" used in the observation referred to above is possible. So the application filed by the prosecution for time in the trial court on September 24, 1975, does not come within the substantive part of Section 484(2)(a) of the new Code and has been rightly disposed of by the learned trying Magistrate under the new Code.

20. Now coming to the merit of the order of the trial court rejecting the application for time it may be remembered that on August 12, 1975, the prosecution filed a petition to summon witnesses. The order sheet of that date shows that when the defence admitted the return in question and the same was marked as Ex. 2-1, the prosecution did not press its application for time to get other witnesses. That day one witness for the prosecution was examined and cross-examined before charge and the case was posted to August 16, 1975, for consideration of charge. Immediately thereafter, the prosecution moved the S.D.J.M. for transfer of the case on the ground that despite petition by the prosecution praying to summon other witnesses through court the trial court closed the prosecution before charge and did not summon the witnesses as required by the prosecution. That application for transfer was rejected by the learned S.D.J.M. on the finding that the prosecution did not press its application for time to summon other witnesses before the trial court which, therefore, did not allow the same. This finding was not challenged by the prosecution. Thereafter, even though several dates passed, to which the case was posted, no further application was made by the prosecution till September 24, 1975, when the case was taken up. The first act done by the prosecution on that date was to file an application for the original sale deed. When the defence agreed to accept the copy of the sale deed already filed by the prosecution as evidence, and on this concession the copy of the sale deed was accepted, the trial court rejected the petition of the prosecution. Then a second petition was filed by the prosecution for time to summon more witnesses. In view of the fact that on August 12, 1975, the prosecution did not press its application for time to summon more witnesses, in view of the fact that the petition for transfer of the case filed by the prosecution before the S.D.J.M. on the ground that the trial court did not allow its petition to summon more witnesses was dismissed by the

learned S.D.J.M. and in view of the fact that since the rejection of the transfer petition no fresh attempt was ever made by the prosecution to get its witnesses summoned through court, the learned trying Magistrate dismissed the application for time to summon more witnesses. By this act the learned trying Magistrate cannot be said to have exercised his judicial discretion in dismissing the second application capriciously. It was only when the second petition was dismissed that the prosecution filed its third petition praying for an adjournment to enable it to go in revision against the order rejecting its previous applications. That petition was rejected by the trial court in view of its earlier order dated August 12, 1975, and in view of the order of the S.D.J.M. rejecting the transfer application. Here I must say that the trial court properly exercised its jurisdiction, and reading the order rejecting the petition I do not see that the trial court exceeded its limit. When the third petition thus failed, the prosecution as a last resort filed the fourth petition for time to enable it to move the Sessions Judge for transfer of the case. That petition was to be disposed of under the new Code in the absence of any provision in the new Code corresponding to Section 526(8), Cr. PC (old). In view of the previous conduct of the prosecution the trial court was right in holding that filing of the fourth petition was only a dilatory tactics and was intended to harass the defence. So, it rejected the petition, called upon the counsel for the prosecution to argue on materials available and also made it clear that if in the course of argument a case would be made out for further evidence, the court will have no hesitation to grant the opportunity. In spite of this, the counsel did not argue the case before the trial court on the plea that he had an engagement in another court. Even then the trial court said that it was open to the prosecution counsel to come any time before 5.00 p.m. to argue the case. Ultimately, therefore, when the prosecution counsel did not turn up on September 24, 1975, by 5 00 p.m. the trial court posted the hearing of the case to September 25, 1975, and in the order of postponement clearly mentioned that the prosecution counsel could come in the first hour on September 25, 1975, and argue the case. When this opportunity was not availed of by the prosecution, the trial court had no other alternative but to finally dispose of the matter and pass the order discharging the accused. This being the state of things, it is futile to contend that the trial court erred in law or exercised its discretion capriciously in not allowing the petition for time filed by the prosecution to enable it to move the Sessions Judge for transfer of the case. For the reasons stated above, the conclusion of the learned Additional Sessions Judge, that the order of discharge is without jurisdiction, cannot be sustained in law.

21. I shall now come to the next conclusion of the court below, viz., that at the time of consideration of the charge the trial court should not have taken into account the subsequent conduct of the accused and that it should have excluded from its consideration Ex. A-1. According to the court below, there were enough materials for framing a charge. Law provides that an accused should be given an opportunity to cross-examine the prosecution witnesses before charge. Therefore, anything brought out in the cross-examination of the witnesses has to

be taken into consideration at the time of framing of the charge. Ex. A-1 is a document which was admitted into evidence by the trial court while recording evidence before charge. Ex. A-1 is an application filed by the petitioner before the assessing authority before the assessment order was passed clearly mentioning therein that the omission in the return submitted by him earlier was a bona fide mistake. The prosecution has not led any evidence to show that from sources other than Ex. A-1 the assessing authority found that there was concealment in the return and accordingly passed the assessment order. That being so, it does not stand to reason when the learned Additional Sessions Judge says that Ex. A-1 should not have been taken into consideration by the trial court at the time of consideration of the charge. The impugned order shows that the court below has, without referring to the actual items of evidence against the petitioner, disposed of the case before it by only saying in a general way that there were enough materials for framing a charge and that the conduct of the petitioner subsequent to his filing of the, return evidenced by Ex. A-1 could not have been taken into consideration. I have already said that there was no bar on the part of the trial court to take into consideration Ex. A-1 at the time of framing the charge. I shall now discuss the different items of evidence that was against the petitioner before the trial court at the time of consideration of the charge. The considerations that weighed with the trial court in discharging the petitioner have not been dealt with by the court below and no reason has been given by it as to how the considerations that influenced the trial court were either wrong or irrelevant either factually or in law.

22. Section 277 of the I.T. Act reads thus :

" If a person makes a statement in any verification under this Act or under any rule made thereunder, or delivers an account or statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable with rigorous imprisonment for a term which may extend to two years :

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than six months."

23. Thus, it is very clear that the mere making of a statement in the return which is false does not ipso facto constitute an offence under the above section. Falsity of the statement is only one of the ingredients. The other main ingredient is that the false statement must be made knowing it to be false or believing it to be false or under the belief that it is not true. It follows, therefore, that the prosecution in order to make out an offence under the above section must prove both the ingredients. In other words, it must show that the statement made by the accused was false and that while making the statement the accused knew it to be false or believed it to be false or believed that it was not true. In the present case, the return for the assessment year 1964-65, filed by the petitioner on January 10, 1965, shows that there was an omission of his income from

house property and of the income from the salary as an M.L A. for some months amounting to Rs. 1,420. The petitioner had returned an income of Rs. 96,001.28 in the statement submitted by him on January 10, 1965. On March 27, 1967, the date on which the assessment order was passed, the assessing authority was informed by the petitioner under Ex. A-1 that the omission about his income from house property and salary was due to inadvertence. As has been stated earlier, the mere submission of a verified return containing a false statement does not by itself constitute an offence. The prosecution has further to show that the false statement had been made either with the knowledge of the accused that the statement was false or under the belief that the statement was false. Therefore, it has been lightly contended by Mr. B.M. Patnaik that mens rea which is the main ingredient is conspicuously absent in the present case. The very fact that on the date of the assessment order the assessing authority was informed of the mistake in, the return and that the petitioner was assessed on the basis of this information goes clearly to establish that the omission complained of is a bona fide mistake and that all the necessary requirements of Section 277 of the I.T. Act have not been established, P.W. 1, the complainant, is unable to affirm or deny the suggestion as to whether the salary income of Rs. 1,420 was arrived at in the assessment order (Ex.. C) on the basis of Ex. A-1. During the accounting year in question the petitioner had contributed his entire salary as Chief Minister of Orissa amounting to Rs. 7,000 to the National Defence Fund. The prosecution has not shown that the department ascertained the salary income of the petitioner as mentioned in Ex. C from sources other than Ex. A-1. u/s 139(5) of the I.T. Act, there is a provision that if any person having furnished a return under Sub-section (1) or Sub-section (2), discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the assessment is made. In the case before me, as has been noticed earlier, before the assessment order (Ex. C) was passed, the petitioner supplied the omission in his original return by Ex. A-1. Even though Ex. A-1 may be said not to satisfy the provisions of Section 139(5) of the I.T. Act, still by no stretch of imagination it could be said that the omission made in the original return was deliberate in view of the petitioner's own application (Ex. A-1) before the assessing authority. When P. W. 1 was asked in the course of cross-examination whether the omission regarding salary in the return was due to inadvertence, he replied that it was a question of opinion. Another circumstance which must go in favour of the petitioner and which has weighed with the trial court is that the relief in respect of the omitted salary in the original return is so negligibly small that it cannot be thought for a while that an assessee like the petitioner returning an annual income of Rs. 96,001.28 would resort to such deliberate omission which would not bring him practically any relief at all. The trial court, therefore, is right in coming to the conclusion that the omission regarding the income from salary is not intentional but is the result of a bona fide mistake. Regarding the omission of income from house property, it may be mentioned that the petitioner had specifically mentioned in his return that he had a house at 3, Aurangzeb Road, New Delhi. The only omission was that the petitioner had not disclosed in his

return the income from that house under a bona fide belief that the said house did not yield any income as per the provisions of law. The prosecution has led no evidence that that house yielded an income to the petitioner during the accounting year in question. So, in the absence of any evidence to show that the house yielded an income to the petitioner as required under the law, it is not possible to arrive at a conclusion that a prima facie case was made out against the petitioner on the basis of the original return. It is worthwhile to mention in this connection that the IAC in a penalty proceeding against the petitioner held him guilty of concealment in respect of income from salary and house property and imposed a penalty. The Income Tax Appellate Tribunal set aside the order of the IAC. On behalf of the department S.J.C. No. 224 of 1974 was filed in this court challenging the order of the Appellate Tribunal. This court refused to call for a statement in respect of the omission regarding the income from salary although it called for a statement regarding the income from house property. This fact clearly shows that this court in refusing to call for a statement regarding the income from salary accepted the petitioner's case that the omission regarding this head of income in the return was not intentional and did not amount to concealment. Regarding the department's case that the omission of the income from house property was a concealment, this court, after calling for a statement and after full hearing of the case, held by its judgment dated December 15, 1976 [see CIT v. Biju Patnaik [1978] 112 ITR 555] that the omission to state income from house property was not intentional. Of course, this judgment was not in the picture when the impugned order was passed by the court below and when the order of discharge was passed by the trial court. But still for the purpose of deciding the present case there can be no objection to look at the decision for the purpose of seeing if the order of the trial court discharging the petitioner has been rightly passed. Suppose, the judgment of this court is not taken into account at this stage and the case goes back to the trial court for further enquiry as per the direction of the learned Additional Sessions Judge, in the course of hearing of the case on merit once again at the trial court stage it would be open to the petitioner to rely upon the judgment of this court in S.J.C. No. 224 of 1974 disposed of on December 15, 1976. [CIT v. Biju Patnaik [1978] 112 ITR 555]. In that event, the finding arrived at by this court that the alleged omission in the return was not intentional must be held to be conclusive and the petitioner must be entitled to an acquittal. So, it will not serve any useful purpose if the case goes back for further enquiry as ordered by the learned Additional Sessions Judge.

24. So far as the other points raised by Mr. Patnaik in support of the revision, viz., that a revision before the Additional Sessions Judge was incompetent and that there was no verified statement as required u/s 277 of the I.T. Act are concerned, it is not necessary to decide them, as, upon the conclusions reached by me otherwise this revision is bound to succeed.

25. For all the reasons given above, I allow the revision, set aside the impugned order of the court below and restore the order of discharge passed by the trial

court.