
(1989) 03 AP CK 0027

In the Andhra Pradesh High Court

Case No : Criminal Revision Case No. 27 of 1989

Income Tax Officer

APPELLANT

Vs

Abdul Razack and Others

RESPONDENT

Date of Decision : 06-03-1989

Acts Referred:

Income Tax Act, 1961 — Section 116, 132, 132(1), 132(11), 132(12)

Citation : (1990) 181 ITR 414

Hon'ble Judges : V. Bhaskara Rao, J

Bench : Single Bench

Advocate : N.V.S.R. Gopalakrishnamacharyulu, for the Appellant; Habib Ansari and Public Prosecutor, for the Respondent

Judgement

Bhaskar Rao, J.—This revision case is filed against the judgment of the Special Judge for Economic Offences, Hyderabad, in Criminal Miscellaneous Petition No. 2425 of 1987 in Civil Case No. 94 of 1987, dated February 1, 1988, dismissing the complaint filed by the petitioner herein and discharging the respondents-accused Nos. 1 to 3 u/s 245(2), Criminal Procedure Code.

2. The facts of the case are that A-1 is the assessee, A-2 is the wife of A-1, and A-3 is their relative. On September 26, 1986, at 11 a.m., a search was conducted in the house of A-1 by the Income Tax authorities. In the course of the search, they seized cash of Rs. 1,80,000 and the search completed at 5.30 p.m. At the time of the search, the respondents did not give any explanation. The respondents filed a representation on October 22, 1986, along with a xerox copy of an agreement of sale dated September 25, 1986, entered into between A-2 and A-3, for the sale of a residential for static that A-3 paid Rs. 1,00,000 to A-2 on September 25, 1986, under the said agreement and the balance amount of Rs. 80,000 was accumulation of A-1's professioner income. As per section 132(5) of the Income Tax Act of (hereinafter referred to as "the Act"), the Income Tax authorities have to pass an order within four months from the date of the seizure estimating the liabilities, tax, penalties, etc., and also pass an

order retaining the amounts seized. The matter was posted on January 16, 1987, and summons was issued to A-3; but A-3 did not appear. Thereafter, the order dated January 22, 1987, was passed u/s 132(5) of the Act by the Income Tax Officer, "B" Ward (Circle I), Hyderabad, stating that since the tax/interest/penalty, etc., were payable by the assessee for the seized amount of Rs. 1,80,000, the said amount was retained and no part of it could be released to the assessee and that the order was passed with the previous approval of the Inspecting Assistant Commissioner of Income Tax Range I, Hyderabad. In para 16 of the said order of the Income Tax Officer, it is stated that the officer wanted to see that the original agreement as there were corrections in the xerox copy of the same. It is further stated : "...I am afraid, I cannot take cognizance of the copy signed by the Notary later unless the original is produced before me." However, it is found : "The xerox copy of the acknowledgment form the Officer of the Inspecting Assistant Commissioner, Acquisition, produced by the assessee, signed by clerk in that office, no doubt, shows that a copy of the agreement was filed on September 26, 1986."

3. Aggrieved by the order of the Income Tax Officer, dated January 22 1987, the respondents herein filed a representation on February 10, 1987, u/s 132(11) of the Act before the Commissioner of Income Tax Andhra Pradesh, Hyderabad. Rejecting the representation, the Commissioner passed an elaborate order dated October 28, 1988 wherein, in para 3, it is observed as follows :

"3. As regards the question of release of seized cash of Rs. 1,80,000 is concerned, since the same has been adjusted against the various undisputed demands on the assessee which are not connected with the proceeding u/s 132(5) of the Act, in terms of section 132B, the applicant is not entitled to any relief on this point. As regards the assessee's contention that out of the seized cash of ? Rs. 1,80,000, a sum of Rs. 1,00,000 belongs to the time of making a regular assessment. Since the order u/s 132(5) is in the nature of a summary assessment order estimating the undisclosed income of the assessee, the findings given therein are not final and they had to be received at the time of the regular assessment on the basis of the evidence produced at that time. The Income Tax Officer is, therefore, directed to consider the issue afresh at the time of the regular assessment after giving due opportunity to the assessee to adduce evidence support of various contentions."

4. Thus, the Commissioner observed that the order of the Income Tax Officer passed u/s 132(5) of the Act was not a final order and the same has to be reviewed at the time of the regular assessment on the basis of the evidence produced. He, therefore, directed the Income Tax Officer to review the same at the time of the regular assessment after giving an opportunity to the assessee to adduce evidence in support of various contentions.

5. In the meanwhile, on the basis of the sanction order dated March 26, 1987 passed by the Commissioner for prosecution of the respondents on the Income Tax Officer filed a complaint on March 31, 1987, against the respondents herein

alleging the offences under sections 174 and 175 of Income Tax Act and section 193, Indian Penal Code. The court below cognizance of the case against the respondents herein. Thereupon, respondents herein filed Criminal Miscellaneous Petition No. 2425 of 1987. The court below, after hearing both the parties and going into the rules observed that the Commissioner did not apply his mind properly; that he did not give any opportunity to the respondents here in before giving sanction order for prosecution; that the complaint is premature as the respondents herein did not even filed their return for the assessment year 1987-88 and, therefore, discharged the respondents. Against that order, the present revision is filed by the Income Tax Officer.

6. Learned counsel for the petitioner submitted that the court below has in saying that the Commissioner has not applied his mind while directing the prosecution and further submitted that the observation of the court below that the complaint is premature is not correct and that a complaint can be filed as soon as the search is conducted u/s 132(1) and (1A) of the Act, even though no return is filed and no assessment made. It is further submitted that the alleged xerox copy of the agreement of sale shows the correction of date from September 29, 1986, to September 25, 1986, as if it was executed on September 25, 1986, but the stamp purchased was September 29, 1986. Therefore, the same is a false and fabricated document filed for the purpose of evading the tax and the penalties to be imposed under the Income Tax Act.

7. Learned counsel for the respondents, on the other hand, contended that the court below thoroughly considered the entire material on record and found that the complaint is premature and discharged the respondents keeping it open to the Department to file a complaint afterwards. There are no merits in this revision and the same is liable to be dismissed.

8 .The first contention to be considered is whether the complaint is premature or not. As per the facts of the case, the search was conducted on September 26, 1986. The order u/s 132(5) of the Act by the Income Tax Officer was passed on January 22, 1987. The complaint was filed on March 31, 1987. The respondents filed a representation on February 10, 1987, before the Commissioner and the Commissioner passed orders on October 28, 1988. The assessment year is 1987-88 and for that assessment year, the financial year starts from April 1, 1986, and ends with March 31, 1987. The return has to be filed within four months from March 31, 1987, i.e., on or before July 31, 1987. Therefore, there is ample time for the respondents to file the return.

9. For the undisclosed income of Rs. 1,80,000, the explanation offered by the respondents is that out of that amount found in the house, Rs. 1,00,000 belongs to A-2 who received the same as the consideration from A-3 for the sale of the plot under an agreement executed on September 25, 1986. It is the contention of the Department that the said agreement is only a fabricated one for the purpose of evading the tax and that, therefore, it amounts to an attempt to evade tax and attracts section 276C(1) of the Act. It is relevant to extract section

276C(1) :

"Section 276C(1) If a person wilfully attempts on 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 imposable on him under any other provision of this Act, be punishable,...."

10. Thus, as per the above section, if any person wilfully attempts to evade tax in any manner, he is liable for punishment. But in this cases, admittedly, no return was filed and the respondents had time to file the return up to July 31, 1987. Apart from that, the Commissioner of Income Tax, in his order dated October 28, 1988, passed u/s 132(12) of the Act, observed that all the contentions of the respondents can be raised at the time of the regular assessment and directed the Income Tax Officer to consider the same in the final order. But, however, before the Income Tax Officer passed such an order, the complaint was filed. The question whether the amount Rs. 1,00,000 belongs to A-2 which she realised by the sale of plot under the agreement dated September 25, 1986, is to be decided in the regular assessment proceedings as directed by the Commissioner of Income Tax. Therefore, when once that question has to be decided in the regular assessment, the question, whether the alleged agreement is a fabricated one or not, also has to be decided in the same proceedings. The finding of the Income Tax Officer that the said agreement is a fabricated one and created of Income Tax in his order passed u/s 132(12) of the Act. Therefore, there is no final decision holding that the agreement dated September 25, 1986, is a fabricated one or created for the purpose of evading tax.

11. Learned counsel for the petitioner relied upon some decisions of the courts to show that even though the regular assessment is not completed for the assessment is reopened or pending before the authority, it is not a bar to filing a complaint where the offences are committed under the Act.

12. One of the decisions relied upon by learned counsel for the petitioner is Jyoti Prakash Mitter Vs. Haramohan Chowdhury, , which is a decision rendered by a Division Bench of the Calcutta High Court. In that case, a complaint u/s 277 of the Act was filed against the accused, J. P. Mitter, before the Chief Metropolitan Magistrate, who took cognizance of the same. It was challenged by the accused before the Calcutta High Court contending that the penalty proceedings and prosecution cannot be proceeded with pending finalisation of the regular assessment. Dealing with that contention Mr. Justice N. C. Talukdar, speaking for the Bench, held (at page 387) :

"... We have given our anxious consideration to the contentions, and we hold ultimately that the assessment should be completed before the proceedings, either by way of a penalty or a prosecution under Chapter XXI and Chapter XXII of the Income Tax Act, 1961, respectively, can be instituted and that although the finding in either of the said proceedings may not be binding on the other, it does not rule out the necessity of completing the assessment which is the sine

quo non for instituting either of the proceedings. The second dimension also of Mr. Mitter's contentions, therefore, succeeds."

13. Thus, the Division Bench quashed the order passed by the Chief Metropolitan Magistrate, Calcutta, in that case. This decision is in favour of the respondents herein and it is not helpful for the petitioner.

14. Another decision referred to by learned counsel is that of the Supreme Court in *P. Jayappan Vs. S.K. Perumal*, First Income Tax Officer, Tuticorin, . In that case, the accused-assessee filed his return for the assessment year 1977-78 in January, 1978, disclosing some income along with accounts. In August, 1981, a search was conducted in the house of the assessee u/s 132 of the Act, which revealed suppression of income and accounts not disclosed by the assessee in the return. Therefore, a complaint was filed against him before the Additional Chief Judicial Magistrate (Economic Offences), Madurai, under sections 276C and 277 of the Act and under sections 193 and 196, Indian Penal Code, alleging that he had deliberately filed a false return. Thereupon, the assessee filed petitions u/s 482, Criminal Procedure Code, before the Madras High Court for quashing the prosecution proceedings launched against him on the ground that the same were premature as the reassessment was pending. The Madras High Court dismissed those petitions. Then, the assessee filed a petition under article 136 of the Constitution of India before the Supreme Court. The question which arose before the Supreme Court was whether prosecutions u/s 276 and 277 of the Act and under sections 193 and 196, Indian Penal Code, instituted by the Department while the reassessment proceedings under the Act are pending, are liable to be quashed on the ground that they were not maintainable. The Supreme Court, in the circumstances of that case, found in para 7 of its judgment, thus (at page 702) :

"On a careful consideration of the relevant provisions of the Act, we are of the view that the pendency of the reassessment proceedings cannot act as a bar to the institution of the criminal prosecution for offences punishable u/s 276C or section 277 of the Act. The institution of the criminal proceedings cannot in the circumstances also amount to an abuse of the process of the court. The High Court was, therefore, right in refusing to quash the prosecution proceedings..."

15. The Supreme Court in that case also held that the reasons given by the Calcutta High Court in *Jyoti Prakash Mitter Vs. Haramohan Chowdhury*, do not apply to the case before them.

16. But, there is lot of difference between *P. Jayappan Vs. S.K. Perumal*, First Income Tax Officer, Tuticorin, and the present case. In *P. Jayappan Vs. S.K. Perumal*, First Income Tax Officer, Tuticorin, , the return was already filed and the same was found to be false during the search and the reassessment proceedings were pending. Therefore, the Supreme Court in that case held that merely because the reassessment proceedings are pending, it is no ground for quashing the prosecution proceedings. Whereas, in the present case, the return has not

been filed, there is time for filing the same and the regular assessment has yet to be made. Therefore, the decision of the Supreme Court in *P. Jayappan Vs. S.K. Perumal*, First Income Tax Officer, Tuticorin, is not applicable to the present case.

17. Another decision relied upon by learned counsel is that of the Madras High Court in *Madras Vanaspathi Ltd. and Others Vs. S. Subramanian*, Income Tax Officer, . In that case, the return was filed for the assessment year 1975-76 in September, 1975, in which the total income, after adjustments, was shown as nil. While the assessment proceedings were going on, a search was made on July 30, 1976, of the premises of the assessee company. In that search, it was found that the accounts of the assessee-company were manipulated by its staff. The Income Tax Officer completed the assessment and filed prosecution for offences under sections 120B, 420, 511 and 193, Indian Penal Code, and section 277 of the Act. On appeal against the assessment, the Tribunal remanded the case to the Income Tax Officer. The assessee invoked the inherent powers of the High Court u/s 482, Criminal Procedure Code, to quash the prosecution on the ground that the assessment on the basis of which prosecution had been launched had been asset aside. The Madras High Court, by relying upon the decision of the Supreme Court in *P. Jayappan Vs. S.K. Perumal*, First Income Tax Officer, Tuticorin, , dismissed the petition filed u/s 482, Criminal Procedure Code. This decision is also not applicable to the present case as, in that case, the return was already filed and the assessment was completed.

18. Another decision relied upon by learned counsel is that of the Delhi High Court in *Electric Construction and Equipment Co. Ltd. and Another Vs. N. Kumar and Another*, , which is also similar to the cases referred to above and in that case also, the decision of the Supreme Court in *P. Jayappan Vs. S.K. Perumal*, First Income Tax Officer, Tuticorin, was relied upon. That decision is also not applicable to the present case.

19. In view of the facts of the present case referred t above, as the respondents have to file a return and the genuineness of the agreement of sale has to be decided in the regular assessment as directed by the Commissioner of Income Tax, the prosecution in the present case is premature and the court below has rightly dismissed the complaint.

20. It is next contended that the court below has erred in saying that the Commissioner has not applied his mind in directing the Income Tax Officer to file a complaint. It is necessary to refer to section 279(1) of the Income Tax Officer Act. Section 279(1) reads as follows :

"Section 279. Prosecution to be at instance of Chief Commissioner or Commissioner. - (1) A person shall not be proceeded against for an offence u/s 275A, section 276, section 276A, section 276B, section 276BB, section 276C, section 276CC, section 276D, section 277 or section 278 except with the previous sanction of the Chief Commissioner of Director General or Commissioner :

Provided that no such sanction shall be required if the prosecution is the instance of the Commissioner (Appeals) or the appropriate authority.

Explanation. - For the purposes of this section, "appropriate authority" shall have the same meaning as in clause (c) of section 269UA.

(1A) A person shall not be proceeded against for an offence u/s 276C or section 277 in relation to the assessment for an assessment year in respect of which the penalty imposed or imposable on him under clause (iii) of sub-section (1) of section 271 has been reduced or waived by an order u/s 273A.

(2) Any offence under this Chapter may, either before or after the institution of proceedings, be compounded by -

(a) the Board or a Chief Commissioner or a Director General authorised by the Board in this behalf, in a case where the prosecution would lie at the instance of the Commissioner (Appeals) or the appropriate authority;

(b) the Chief commissioner or Director General or Commissioner, in any other case.

(3) Where any proceeding has been taken against any person under sub-section (1), any statement made or account or other document produced by such person before any of the Income Tax authorities specified in clauses (a) to (g) of section 116 shall not be inadmissible as evidence for the purpose of such proceedings merely on the ground that such statement was made or such account or other document was produced in the belief that the penalty imposable would be reduced or waived, u/s 273A or that the offence in respect of which such proceeding was taken would be compounded."

21. This section is substituted by the Finance Act, 1988, with effect from April 1, 1989. Prior to its substitution, sub-section (1), as substituted by the Taxation Laws (Amendment) Act, 1975, with effect from October 1, 1975, and later on amended by the Income Tax (Second Amendment) Act, 1981, with effect from July 11, 1981, the Finance Act, 1982, with effect from July 1, 1982 (see [1982] 137 ITR 6), and the Taxation laws (Amendment) Act, 1984, with effect from April 1, 1984, stood as under :

"(1) A person shall not be proceeded against for an offence u/s 275A, section 276A, section 276AA, section 276B, section 276C, section 276CC, section 276D, section 276DD, section 276E, section 277, section 278 or section 278A except at the instance of the Chief Commissioner or Commissioner."

22. As per the unamended section, the person shall not be proceeded against for an offence u/s 279(1) except at the instance of the Chief Commissioner or the Commissioner. As per the above provision, any prosecution must be at the instance of the Chief Commissioner or the Commissioner. It is contended that the words "at the instance of the Commissioner" mean the Commissioner's mere direction, which is sufficient. In this case, there is such a direction and,

therefore, there is no violation of the provision.

23. The proceedings in F. No. Pros/1/8/86-87 of the Commissioner of Income Tax reads as follows :

"Order u/s 279(1) of the Income Tax Act, 1961 :

On a perusal of the assessment records of Sri Abdul Razack, an Income Tax assessee on the file of the Income Tax Officer, B-Ward, Circle-I, Hyderabad, for the assessment year 1987-88, it is found that Sri Abdul Razack has committed :

(i) the offence punishable u/s 276C(1) of the Income Tax Act, 1961, inasmuch as he had willfully attempted to evade tax on an income of Rs. 1,00,000;

(ii) the offence punishable u/s 276C(2) of the Income Tax Act, 1961, inasmuch as he has wilfully attempted to evade the payment of tax by trying to take the amount of Rs. one lakh seized from him on September 26, 1986, out of the reach of the Department.

24. It is also found that Smt. Gul Bane Razack, wife of Sri Abdul Razack, and Shri Mohd. Ashraf committed the offence punishable u/s 278 of the Income Tax Act inasmuch as they have abetted the commission of the aforementioned offences by Sri Abdul Razack.

25. It is also found that Sri Abdul Razack, Smt. Gul Bane Razack and Sri Mohd. Ashraf have committed the offences punishable u/s 277 of the Income Tax Act, 1961, inasmuch as they made false statements in their letters dated October 22, 1986, and delivered the same to the Income Tax Officer, B-Ward, Circle-I, Hyderabad, with the knowledge about the false statements made therein and also made false statements on oath in their sworn statements recorded on January 16, 1987, respectively, knowing the same to be false.

26. The Income Tax Officer, B-Ward, Circle-I, Hyderabad, is, therefore, directed to file complaints against Sri Abdul Razack, Smt. Gul Bane Razack and Shri Mohd. Ashraf for the aforesaid offences in the Court of the Special judge for Economic Offences, Hyderabad."

27. In the above, order it is mentioned that the assessment records of Abdul Razack were perused by the authorities. However, A-1, Abdul Razack, has not filed any return by March 26, 1987, as he was having time to file the return up to July 31, 1987. Therefore the question of perusing the assessment record of A-1 for the assessment year 1987-88 does not arise.

28. Learned counsel also wanted to rely upon a decision of the Supreme Court in T.S. Baliah Vs. T.S. Rengachari, . In that case a prosecution was launched. An objection was taken that the prosecution was illegal as the complaint was not filed by the inspecting Assistant Commissioner Section 53 of the 1922 Act only requires that a person shall not be proceeded against for an offence u/s 51 or section 52 of the 1922 Act "except at the instance of the Inspecting Assistant Commissioner." The complaint was filed on the authority of the Inspecting

Assistant Commissioner. But it was signed by another officer and, therefore, the objection was taken that it was not properly filed. There is no statutory requirement that the complaint petition must be filed by the Inspecting Assistant Commissioner. The Supreme Court, while interpreting the clause "at the instance" occurring in section 53 of the 1922 Act, held that it only means "on his authority" and it is, therefore, sufficient compliance with the statutory requirement if the complaint petition is filed "on the authority" of the Inspecting Assistant Commissioner. The Supreme Court also held there that if the complaint is on the authority of the Inspecting Assistant Commissioner, there is sufficient compliance. In the present case, the objection is not that some other officer has signed instead of the Commissioner. The allegation in the present case is that the Commissioner has not applied his mind to show that the complaint is filed at his instance. To find out whether the complaint is filed at his instance or not, the mere signature of the authority on the instrument to prosecute is not sufficient. There must be application of mind while ordering the prosecution. As stated *supra*, in this case, in the order issued u/s 279(1) of the Income Tax Act, it is stated that it was made on a perusal of the assessment record for the year 1987-88, but actually no return was filed for that year and no record is there in that regard. Therefore, the judgment of the Supreme Court is not applicable to the facts of the present case. The observation in the order clearly shows that the same is contrary to the facts on record as there was no assessment record for the year 1987-88.

29. The further contention that the record pertaining to the seizure u/s 132 itself is taken as an assessment record for the year 1987-88 cannot be accepted. Had the Commissioner mentioned that he has perused the record from the file pertaining to the proceedings u/s 132 of the Act, it would have been a different matter.

30. It is next contended that, as per the amended section, sanctions are required before any proceeding is filed. But before the amendment, the proceedings have to be filed at the instance of the Commissioner. The interpretation given to the term "at the instance", meaning it to be "on his authority" has got to be accepted. Once proceedings are to be initiated, one has to apply one's mind to the entire facts of the case before passing any order to file a complaint. But, in this case, as observed *supra*, the Commissioner has not perused the record for the assessment year 1987-88, which shows that there was no compliance with section 279(1) of the Income Tax Act. So, it cannot be held that the Commissioner applied his mind while passing the order u/s 279(1) of the Act.

31. It is further contended that, as per section 276C(1), if a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under the Act, he shall, without prejudice to any penalty that may be imposed on him under any other provision of the Act, be liable for the offence. To appreciate the contention, it is relevant to refer to section 276C(1) and (2) of the Income Tax Act :

"276C. Wilful attempt to evade tax, etc. - (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 imposable 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 years 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.

(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine.

32. Explanation. - For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person -

(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or...

(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or

(iv) causes any other circumstances of exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof."

33. As per the principles of interpretation of statutes, the provisions of the statute must be interpreted as per the language used therein. By reading the above section, it is clear that a person who wilfully attempts to evade any tax, penalty or interest chargeable or imposable, be punishable as laid down in that section. Thus, there must be wilful attempt to evade. To decide this wilful attempt, there must be assessment on the return filed. In the case on hand, there was still time for the respondent to file the return. Further, there is an order of the Commissioner of Income Tax directing the Income Tax Officer to decide the questions in issue including the genuineness of the agreement during the regular assessment proceedings. If, during those proceedings, the authority comes to the conclusion that the agreement is a genuine one, it cannot be said that the respondent wilfully attempted to evade payment of tax, penalty or interest. Therefore, at a stage when the return is not filed and there was still time for filing it, it cannot be said that the respondent committed any offence u/s 276C(1) of the Act or that any such allegation would constitute the offence. In

the circumstances, it cannot be presumed beforehand that, after filing of the return and on its scrutiny, the authorities would find concealment of income by holding that the agreement of sale is not a genuine one, and, accordingly, it cannot be concluded that there was an attempt to evade payment of tax, etc.

34. The point is, whether the act of attempt is complete or not and this depends upon the facts and circumstances of each case. In the instant case, there was ample time to file the return and there was chance to the respondent to explain about the amount seized by adducing cogent and convincing evidence. Even before filing the return, it cannot be anticipated that he would not explain and, accordingly, it cannot be presumed that the respondent attempted to evade tax, etc.

35. Thus, even before the act of attempt to evade is started, on a mere anticipation or contemplation that there was possibility of accruing liability after finalisation of regular assessment proceedings, it cannot be said that the respondent is liable for conviction u/s 276C(1) of the Act.

36. It is next contended that, as per the Explanation to section 276C(1) of the Act, once the amount of Rs. 1,80,000 was found in the possession of the respondents, they must be construed to have attempted to commit the offence. It must be noted that the Explanation cannot come to the rescue of the Department. Even to constitute an offence as per the above Explanation, there must be a specific finding by the Department in regard to the amount seized during the regular assessment proceedings. In the present case, there is no such order or finding and the order of the Income Tax Officer is set aside by the Commissioner of Income Tax.

37. It is next contended that the xerox copy of the agreement shows that the stamp was purchased on September 29, 1986, whereas the agreement was executed as if it is executed on September 25, 1986, and, therefore, the same is fabricated. It must be noted that the original document is not filed before the authority and only a xerox copy of the agreement was filed. Whether there is any correction or not can only be found and verified from the original itself. Apart from it, the Commissioner has clearly stated that all the objections can be raised at the time of regular assessment and directed the Income Tax Officer to decide the same in the regular assessment. Therefore, there cannot be any proceedings against the respondents on the ground that the said documents is fabricated.

38. Therefore, in view of the above stated circumstances, when there is time to file the return and the genuineness of the alleged agreement of sale is subject to the regular assessment proceedings as directed by the Commissioner, it cannot be held that there is evasion of payment of tax, penalty or interest as contemplated u/s 276C(1) or u/s 277 of the Act or any offence u/s 193 of the Indian Penal Code is committed.

39. Therefore, in view of the above circumstances, the court below has rightly discharged the accused Nos. 1 to 3 u/s 245(2) of the Code of Criminal Procedure.

40.The criminal revision case is, accordingly, dismissed.