(1990) 07 MAD CK 0112

In the Madras High Court

Case No : Criminal Miscellaneous Petition No''s. 2849, 2851, 2853, 2855, 2857, 2859, 2861, 2863, 2865, 2867, 2869, 2871 and 2873 of 1983

Kothari and Sons — APPELLANT

Vs

N. Subramanian, ITO — RESPONDENT

Date of Decision : 06-07-1990

Acts Referred:
Income Tax Act, 1961 — Section 245(1A), 245A, 245A(b), 245B, 245C
Penal Code, 1860 (IPC) — Section 120B, 193, 196, 34, 420

Citation : (1990) 07 MAD CK 0112

Hon'ble Judges : Arunachalam, J

Bench : Single Bench

Advocate : I. Subramanian, for the Appellant; K. Ramasamy, for the Respondent

Final Decision : Dismissed

Judgement

Arunachalam, J.—A common question arises for decision in all these petitions and, hence, they are disposed of together. The question is whether an assessee, who had filed an application before the Settlement Commission u/s 245C of the income tax Act, 1961 (''the Act'') the terms of which include grant of immunity from prosecution u/s 245H of the Act and such application had been allowed to be proceeded with by the Settlement Commission u/s 245D of the Act, would still be liable for prosecution when the Settlement Commission had not passed final orders on the said application u/s 245D(4). In each one of these petitions, certain relevant dates have to be recorded. Criminal Miscellaneous Petition No. 2849 of 1983 has been filed to quash the proceedings in C.C. No. 2163 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, initiated by the respondent, viz., ITO alleging commission of offences by the petitioner and another under sections 120B, 34, 193, 196 and 420 of the Indian Penal Code, 1860 and sections 276C, 277 and 278 of the income tax Act, referable to the assessment year 1977-78. The petitioners are A-1, A-2, A-4 and A-5. A-3 has not chosen to invoke the inherent powers of this Court to have the proceedings against him quashed. A complaint was filed before the trial

Magistrate on 1-8-1982. The first petitioner, Kothari & Sons (A-1), filed an application on 3-11-1982 before the Settlement Commission which, after notice to the Commissioner of income tax as contemplated u/s 245D, was allowed to be proceeded with by an order dated 20-10-1983. The second petitioner, D.C. Kothari (A-2), filed a similar application before the Settlement Commission on 21-9-1984, which was permitted to be proceeded with by an order dated 2-9-1990. The third petitioner, P.D. Kothari (A-4), had not filed any application before the Settlement Commission. The fourth petitioner, C.S. Menon (A-5), filed an application on 6-11-1982, before the Settlement Commission, but it was rejected on 9-11-1983, u/s 245D. As far as petitioner Nos. 3 and 4 are concerned (A-4 and A-5), the question raised will not attract their liability to face prosecution.

2. In Criminal Misc. Petition No. 2851 of 1983, quashing of the proceeding in C.C. No. 2164 of 1982, on the file of the same Court, has been prayed for. The offences alleged are also the same. The assessment year is 1978-79. The respondent filed the complaint before the trial Magistrate on 11-10-1982. Kothari & Sons, the first petitioner (A-1), had filed an application before the Settlement Commission on 3-11-1982, which was permitted to be proceeded with by an order dated 20-10-1983. The second petitioner, D.C. Kothari (A-2), filed an application u/s 245C on 21-9-1984, and the same was permitted to be proceeded with by an order dated (sic) 2,1990. The third petitioner, P.D. Kothari (A-4), had not filed any application before the Settlement Commission. The application dated 6-11-1982, filed by the fourth petitioner, C.S. Menon (A-5), before the Settlement Commission was rejected on 5-11-1983. A-3, H.C. Kothari had not chosen to challenge the maintainability of the prosecution against him.

3. In Criminal Misc. Petition Nos. 2853, 2855, 2857 and 2859 of 1983 connected with C.C. Nos. 2165, 2166, 2167 and 2168, respectively, on the file of the same trial Magistrate, the offences alleged against the petitioners are also the same. The assessment years are, respectively, 1979-80, 1980-81, 1981-82 and 1982-83. Complaints were filed by the respondent in each one of these cases on 11-10-1982. Kothari & Sons, the first petitioner (A-1), in each of these cases had filed application for settlement before the Settlement Commission on 3-11-1982. which was permitted to be proceeded with by orders dated 20-10-1983. The second petitioner, D.C. Kothari (A-2), filed similar application before the Settlement Commission on 1-9-1982 and they were all admitted by the Settlement Commission for further proceedings by orders dated 30-3-1983. Petition filed before the Settlement Commission u/s 245C by P.D. Kothari. third petitioner (A-4), on 1-9-1982 was permitted to be proceeded with by order dated 30-3-1983. An application dated 6-11-1982 before the Settlement Commission by the fourth petitioner (A-5) was rejected on 9-11-1983. referable to Criminal Misc. Petition Nos. 2853, 2855 and 2857 of 1983. while in Crl. M.P. No. 2859 of 1983. he had not filed any petition before the Settlement Commission. H.C. Kothari (A-3 in the trial Court) had not chosen to challenge the proceedings in the criminal court, pending against him.

4. Criminal Misc. Petition No. 2861 of 1983 is referable to C.C. No. 2181 of 1982. The petitioners are nine in number, and the offences alleged against them are the same as in the earlier cases, though the assessment year is 1982-83. The respondents filed the complaint before the trial Magistrate on 20-10-1982. The first petitioner, Kothari & Sons (Ind.) (P.) Ltd. (A-1), filed an application before the Settlement Commission on 3-11-1982, and the same was rejected on 20-10-1983. Similar petitions filed by the second petitioner, Indira D. Kothari (A-2), the third petitioner, Surekha P. Kothari (A-4) and the fourth petitioner, D.C. Kothari (A-5), on 1-9-1982, 15-9-1982 and 1-9-1982. respectively, were permitted to be proceeded with by the Settlement Commission by its orders dated 20-10-1983, in the case of petitioner Nos. 2 and 3 and an order dated 30-3-1983, in respect of the fourth petitioner. The applications filed before the Settlement Commission on 6-11-1982 and 22-10-1982 by the fifth petitioner, C.S. Menon (A-8) and the sixth petitioner, D.B. Saxena (A-9), respectively, were rejected on 9-11-1983 and 20-10-1983. Petitioner Nos. 7, 8 and 9. viz., K. Rangarajan (A-10). S. Venkoba Rao (A-11) and C.R. Ramakrlshnan (A-12) did not file any application for settlement.

5. A-1, A-2, A-4, A-6 and A-8 to A-12 in C.C. No. 2182 of 1982 are the petitioners in Crl. M.P. No. 2863 of 1983. The assessment year is 1982-83 and the complaint for the same offences as in earlier cases was filed on 21-10-1982. The petitions filed before the Settlement Commission by the first petitioner, Planting Ag. P. Ltd. (A-1), and the fifth petitioner, D.B. Saxena (A-8), on 5-11-1982 and 22-10-1982, respectively were rejected by the Settlement Commission on 20-10-1983. Similar petitions filed by the second petitioner, Indira D. Kothari (A-2). the third petitioner. Maya A. Dalai (A-4). and the fourth petitioner, D.C. Kothari (A-6), on 1-9-1982, 25-11-1982 and 1-9-1982, respectively, were permitted to be proceeded with by orders dated 20-10-1983 in respect of petitioner Nos. 2 and 3 and by an order dated 30-3-1983 in respect of the fourth petitioner. Petitioner Nos. 6 to 9, viz., V. Nageswaran (A-9), C.R. Ramakrishnan (A-10), Miss K. Nagasudha (A-11) and Dhilip Methaji (A-12) did not file any application before the Settlement Commission.

6. Petitioners in Crl. M.P. No. 2865 of 1983 are A-1, A-2, A-4, A-6 and A-8 to A-12 in C.C. No. 2183 of 1982. The offences alleged are the same as in the earlier cases. The assessment year is 1983-84, though for individual accused the assessment year is 1982-83. The complaint was filed by the respondent before the trial Magistrate on 21-10-1982. The first petitioner, Investment and Finance Corpn. P. Ltd. (A-1), the sixth petitioner, K. Rangarajan (A-9), the seventh petitioner, M.D. Varadan (A-10), the eighth petitioner, S. Venkoba Rao (A-11) and the ninth petitioner, Dhilip Methaji (A-12), did not file any application before the Settlement Commission. The application of the fifth petitioner (A-8) filed on 6-11-1982 was rejected on 9-11-1983. The petitions presented before the Settlement Commission by the second petitioner (A-2) and the third petitioner (A-4) on 1-9-1982 and 25-11-1982, respectively, were permitted to be proceeded with by orders dated 20-10-1989. A similar petition filed by the fourth

petitioner (A-6) on 1-9-1982 was allowed for further proceedings by an order dated 30-3-1983.

7. Criminal M.P. No. 2867 of 1983 relates to C.C. No. 2184 of 1982 and the assessment year is 1982-83. The complaint was filed on 21-10-1982, the offences alleged being the same as in the earlier cases. The petitioners are A-1 to A-5 and A-7 to A-12 in C.C. No. 2184 of 1982. The second petitioner, B.L. Chitale (A-2), the third petitioner, C. Srinivasan (A-3), the fourth petitioner, C.P. Shah (A-4), the eighth petitioner, C.R. Ramakrishnan (A-9), the ninth petitioner, E. Mahadevan (A-10). the tenth petitioner, B.S.R. Murthy (A-11) and the eleventh petitioner, P.L.N. Reddy (A-12) did not file any application before the Settlement Commission. The applications of the first petitioner Teatex Pvt. Ltd. (A-14) filed on 3-12-1982. of the sixth petitioner, C.S. Menon (A-7) filed on 6-11-1982 and of the seventh petitioner, D.B. Saxena (A-8), sent by registered post on 22-10-1982 were rejected on 20-10-1983, 9-11-1983 and 20-10-1983. respectively. The application of the fifth petitioner, D.C. Kothari (A-5), filed on 1-9-1982 was permitted to be proceeded with by an order dated 30-3-1983.

8. A-1, Underwriters and Financiers P. Ltd., A-2, Indira D. Kothari, A-4, Maya A. Dalai, A-6, D.C. Kothari, A-8, O.S. Menon, A-9, N.S. Dubey, A-10, Mahadevan, A-11, K Nagasudha and A-12, Dhilip Methaji are the petitioners in Crl. M.P. No. 2869 of 1983. The complaint was filed on 21-10-1982 for the same offences as in the earlier cases except that the assessment year relates to 1983-84, while, for the individual accused, the assessment year is 1982-83. Petitioner Nos. 1 and 6 to 9 (A-1 and A-9 to A-12) did not file any application before the Settlement Commission. The application of the fifth petitioner, C.S. Menon (A-8) filed on 6-11-1982, was rejected on 9-11-1983. Similar applications filed by petitioner Nos. 2 to 4 (A-2, A-4 and A-6) dated 1-9-1982, 25-11-1982 and 1-9-1982, were permitted to be proceeded with by orders dated 20-10-1983, 20-10-1983 and 30-3-1983, respectively.

9. In Crl. M.P. No. 2871 of 1983. quashing of the proceedings in C.C. No. 2186 of 1982 has been prayed for by A-1, Kothari Mehta and Co. P. Ltd., A-2, Indira D. Kothari, A-5, Surekha P. Kothari, A-6, D.C. Kothari, A-8, C.S. Menon, A-9, E. Mahadevan and A-10, K.V. Mahadevan. There is no difference in the offences alleged. The complaint was filed on 21-10-1982 referable to the assessment year 1982-83. Petitioner Nos. 6 and 7 (A-9 and A-10) did not file any application before the Settlement Commission, while the applications filed by the first and fifth petitioners (A-1 and A-8) on 5-11-1982 and 6-11-1982 were rejected by the Settlement Commission on 20-10-1983 and 9-11-1983, respectively. The applications filed by petitioner Nos. 2, 3 and 4 (A-2. A-5 and A-6) on 1-9-1982, 13-9-1982 and 1-9-1982 were allowed by the Settlement Commission to be proceeded with by orders dated 20-10-1983, 20-10-1983 and 30-3-1983, respectively.

10. The nine petitioners in Crl. M.P. No. 2873 of 1983 are Kothari & Sons (Agencies) P. Ltd., (A-1), Indira D. Kothari (A-2), Surekha P. Kothari (A-4). D.C.

Kothari (A-6), C.S. Menon (A-8), D.B. Saxena (A-9), K. Rangarajan (A-10), N.B. Dubey (A-11) and R. Vaidyanathan (A-12). in C.C. No. 2187 of 1982. The allegations in the complaint filed on 21-10-1982, and referable to the assessment year 1982-83 relate to the same offences as in the earlier cases. Petitioner Nos. 7 to 9 (A-10 to A-12) did not choose to file any application before the Settlement Commission. The applications dated 3-11-1982, 6-11-1982 and 22-10-1982 filed by petitioner Nos. 1.5 and 6 (A-1, A-8 and A-9) were rejected on 20-10-1983, 9-10-1983 and 20-10-1983, respectively. However, applications dated 1-9-1982, 13-9-1982 and 1-9-1983 filed by petitioner Nos. 2 to 5 (A-2, A-4 and A-6) were admitted for further proceedings by the Settlement Commission by orders dated 20-10-1983, 20-10-1983 and 30-3-1983, respectively.

11. The answer to the question in issue will naturally decide the scope of the pending prosecution being further proceeded with only in respect of these applications u/s 245C which have been permitted to be proceeded with by the Settlement Commission by exercise of its powers u/s 245D.

12. The learned counsel appearing for the petitioners and learned counsel appearing on behalf of the income tax Department in each of these petitions have placed before me certain decided cases on the sole issue to be decided in this group of petitions.

13. Before referring to the authorities cited, it will be better to extract sections 245C. 245D, 245E, 245H and 245-1 of the Act, as they existed at the time when the applications were filed before the Settlement Commission shortly after initiation of the prosecution:

245C. Application/or settlement of cases.-- (1) An assessee may, at any stage of a case relating to him, make an application in such form and in such manner and containing such particulars as may be prescribed to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided.

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(2) Every application made under sub-section (1) shall be accompanied by such fees as may be prescribed.

(3) An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant."

"245D. Procedure on receipt of an application u/s 245C. -(1) On receipt of an application u/s 245C. the Settlement Commission shall call for a report from the Commissioner and on the basis of the materials contained in such report and having regard to the nature and circumstances of the case or the complexity of the investigation involved therein, the Settlement Commission may, by order, allow the application to be proceeded with or reject the application:

Provided that an application shall not be rejected under this sub-section unless an opportunity has been given to the applicant of being heard.

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(1A) Notwithstanding anything contained in sub-section (1), an application shall not be proceeded with under that sub-section, if the Commissioner objects to the application being proceeded with on the ground that concealment of particulars of income on the part of the applicant or perpetration of fraud by him for evading any tax or other sum chargeable or imposable under this Act, has been established or is likely to be established by any income tax authority, in relation to the case:

Provided that where the Settlement Commission is not satisfied with the correctness of the objection raised by the Commissioner the Settlement Commission may, after giving the Commissioner an opportunity of being heard, by order, allow the application to be proceeded with under sub-section (1) and send a copy of its order to the Commissioner.

(2) A copy of every order under sub-section (1) shall be sent to the applicant and to the Commissioner.

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(3) Where an application is allowed to be proceeded with under sub-section (1), the Settlement Commission may call for the relevant records from the Commissioner and after examination of such records, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct the Commissioner to make or cause to be made such further enquiry or investigation and furnish a report on the matters covered by the application and any other matter relating to the case.

(4) After examination of the records and the report of the Commissioner, received under sub-section (1), and the report, if any, of the Commissioner received under sub-section (3), and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it. the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner under sub-section (1) or sub-section (3).

(5) Subject to the provisions of sub-section (2A) of section 245B, the materials brought on record before the Settlement Commission shall be considered by all the members thereof before passing any order under sub-section (4) and. in the case of a difference of opinion among the members, the opinion of the majority shall prevail and such order shall be expressed in terms of the views of the majority.

(6) Every order passed under sub-section (4) shall provide for the terms of settlement including any demand by way of tax, penalty or interest, the manner in which any sum due under the settlement shall be paid and all other matters to make the settlement effective and shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

(6A) ****

(7) Where a settlement becomes void as provided under sub-section (6). the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and the income tax authority concerned, may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of two years from the end of the financial year in which the settlement became void.

14. There was a second proviso to section 245D(1) till 1-4-1979, which was omitted with effect from that date by the Finance Act, 1979. The second proviso reads as hereunder:

Provided further that an application shall not be proceeded with under this sub-section if the Commissioner objects to the application being proceeded with on the ground that concealment of particulars of income on the part of the applicant or perpetration of fraud by him for evading any tax or other sum chargeable or imposable under the Indian income tax Act, 1922 (XI of 1922), or under this Act, has been established or is likely to be established by any income tax authority, in relation to the case."

"245F. Powers and procedure of Settlement Commission.--(1) In addition to the powers conferred on the Settlement Commission under this Chapter, it shall have all the powers which are vested in an income tax authority under this Act.

(2) Where an application made u/s 245C has been allowed to be proceeded with u/s 245D, the Settlement Commission shall, until an order is passed under sub-section (4) of section 245D. have, subject to the provisions of sub-section (3) of that section, exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under this Act in relation to the case.

(3) Notwithstanding anything contained in sub-section (2) and in the absence of any express direction to the contrary by the Settlement Commission, nothing contained in this section shall affect the operation of any other provision of this Act requiring the applicant to pay tax on the basis of self-assessment or by way of advance tax in relation to the matters before the Settlement Commission.

(4) For the removal of doubt, it is hereby declared that, in the absence of any express direction by the Settlement Commission to the contrary,

nothing in this Chapter shall affect the operation of the provisions of this Act insofar as they relate to any matters other than those before the Settlement Commission.

(5) The Settlement Commission shall, subject to the provisions of this Chapter, have power to regulate its own procedure (including the fixation of places and times of its meetings) and may act notwithstanding that all the members of the Settlement Commission are not present at any of its meetings."

"245H. Power of Settlement. Commission to grant immunity from prosecution and penalty.--(1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement u/s 245C has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his income and the manner in which such income has been derived, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also from the imposition of any penalty under this Act, with respect to the case covered by the settlement.

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(2) An immunity granted to a person under sub-section (1) may, at any time, be withdrawn by the Settlement Commission, if it is satisfied that such person has not complied with the conditions subject to which the immunity was granted or that such person had, in the course of the settlement proceedings, concealed any particulars material to the settlement or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the settlement and shall also become liable to the imposition of any penalty under this Act to which such person would have been liable, had not such immunity been granted.

15. A proviso to section 245H(1) was inserted by the Finance Act. 1987, with effect from 1-6-1987, which reads as hereunder:

Provided that no such immunity shall be granted by the Settlement Commission in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application u/s 245C."

"245-1. Order of settlement to be conclusive. -Every order of settlement passed under sub-section (4) of section 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force.

16. V.R. Krishna Iyer, J., speaking for the Bench in Commissioner of Income Tax (Central) Vs. B.N. Bhattacharjee and Another, , had the anatomy of Chapter XIXA dealing with settlement of cases dissected while narrating a few facts so that a hang of the controversy may be got and its just resolution sought. In the words

of the learned Judge, section 245A is the definition clause even as section 245B is the clause constituting the Settlement Commission. Applications for settlement of cases by assessees are regulated by section 245C. The process of the application is controlled by section 245C and section 245D. The Supreme Court was concerned in that case with the provisions of section 245M which does not arise in this case. In that context, the Supreme Court observed:

...Only if he can validly move the Commission u/s 245M, can his application be processed under sections 245C, 245D and other sections of the Chapter....

17. The further observations of the Supreme Court need extraction:

Any assessee may make an application to have his case settled, but it is one thing to make an application proceeded with. For, on receipt of an application the Commission is not empowered automatically to proceed with it the mechanics of section 245D must be remembered in this context. The application for settlement, when filed, shall be forwarded to the Commissioner for a report and it is only on the basis of the material contained in such report that the Settlement Commission may allow the application to be proceeded with or reject the application. To reject an application is to refuse relief outright and affects the applicant adversely. So it is provided ''that an application shall not be rejected unless an opportunity has been given to the applicant of being heard''. We are clearly of the view that an applicant before the Settlement Commission is entitled to a hearing before his application for composition is rejected....

The question now arises as to the course of the exercise of the Settlement Commission on receipt of an application for composition : The second proviso to section 245D(1) is compulsive in tone and import for it mandates that an application shall not be proceeded with under this subsection if the Commissioner objects to the application being proceeded with on the ground that concealment of particulars of income on the part of the applicant or perpetration of fraud by him for evading any tax...has been established or is likely to be established by any income tax authority in relation to the case. In the present case, the Commissioner did raise an objection on 1-4-1977, that:

''...prosecution proceedings for concealment of income and also false verification in the returns were pending before the Chief Metropolitan Magistrate and that in the circumstances he did not consider this as a fit case to be proceeded with by the Settlement Commission.''

This objection was in the normal course neither foolish nor futile but fatal, being in functional fulfillment of the requirements of the second proviso to section 245D(1). Indeed, when we observe that the Commissioner had, with full responsibility, prosecuted the assessee in a number of cases then pending for offences which attract the conditions required by the second proviso, there is little difficulty in holding that the application for settlement having been rejected by the Commissioner, could not be proceeded with. The veto of the Commissioner was the Waterloo of the application.

18. The apex Court was considering the second proviso to section 245D(1) which was deleted with effect from 1-4-1979, by the Finance Act, 1979. The present position to which these prosecutions relate is governed by section 245D(1A) which was ushered in on 1-4-1979, when the second proviso referred to earlier was omitted. By this provision, an application shall not be proceeded with under sub-section (1), if the Commissioner objected to the application being proceeded with on the ground that concealment of particulars of income on the part of the applicant or perpetration of fraud by him for evading any tax or other sum chargeable or imposable under the Act has been established or was likely to be established by any income tax authority, in relation to the case. The proviso to this section is significant, for, where the Settlement Commission was not satisfied with the correctness of that objection raised by the Commissioner, the Settlement Commission may, after giving an opportunity of being heard, by order, allow the application to be proceeded with under sub-section (1) and send a copy of its order to the Commissioner. Therefore, it is apparent that, in spite of the objection of the Commissioner, the Settlement Commission can still allow the application to be proceeded with if it was not satisfied with the objections raised.

19. On facts, after furnishing an opportunity to the Commissioner of being heard, the Settlement Commission, by orders made on different dates, had allowed the application of some of the petitioners to be proceeded with, as detailed in the earlier part of the order. The law as applicable to the case of the petitioners, therefore, cannot be vetoed by the Commissioner, for the Settlement Commission has the power to allow the application to be proceeded with, if it was not satisfied with the correctness of the objection raised by the Commissioner. In these petitions, that stage has been crossed and the final orders are yet to be passed by the Settlement Commission, u/s 245D(4).

20. In the aforestated case, the Supreme Court had observed that filing of a complaint for launching of a prosecution earlier was not a relevant matter for the exercise of Jurisdiction under the second proviso to section 245D(1) at that stage, in the light of the facts brought before it. However, it should be noticed that, with effect from 1-6-1987, due to the introduction of the proviso to section 245H(1), the Settlement Commission cannot grant immunity in cases where the proceedings for the prosecution for any such offence contemplated u/s 245H(1) have been instituted before the date of receipt of the applications u/s 245C. This proviso does not attract the settlement applications in these cases, for, the applications as well as the institution of prosecutions, were for years earlier to 1-6-1987. Taking note of the observations of the Supreme Court and the lack of the proviso to section 245H(1), it is clear that the filing of an application u/s 245C before the Settlement Commission, after the institution of the prosecution, can have no bearing on these cases.

21. While considering the provisions of section 245H, the Supreme Court observed as follows:

...And if he can purchase freedom from criminal prosecution and incarceratory sentence he may settle with the Commission; and, towards this end, try to buy those who remotely control the departmental echelons whose veto or green signal closes or opens the jurisdiction of the Settlement Commission and hushes or pushes the prosecutions. Thus, section 245H, which clothes the Commission with the power to grant immunity from prosecution...is a magnet which attracts large tax dodgers and offers, indirectly an opportunity to the highest departmental and political authorities a suspect power to bargain.

22. As stated earlier, the veto power of the Commissioner is no longer in existence and, on a consideration of the entire matter, after hearing both the authorities, the Settlement Commission either allows the applications to be proceeded with or rejects it.

23. It was also observed by the Supreme Court (at page 481 of 118 ITR) that a casual perusal of Chapter XIXA convinced the discerning eye that the Settlement Commission exercised many powers which affected, for good or otherwise, the rights of the parties before it and vested in it powers to grant immunity from prosecution and penalty, to investigate into many matters and to enjoy conclusiveness regarding its orders or settlement.

24. The law laid down by the Supreme Court in P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, that the prosecution for false evidence and wilful attempt to evade tax could not be held to be premature, while reassessment proceedings on the basis of material seized in a search were still pending, for a criminal Court had to judge the case independently, can have no application to the case on hand, since the provisions of Chapter XIXA had not been considered in the said case.

25. The Punjab and Haryana High Court in HARBANS SINGH Vs. UNION OF INDIA AND OTHERS, held that Chapter XIXA incorporated special provisions for settlement of cases, which was a complete code in itself. It provided the procedure and mechanism for the settlement of disputes. Section 245F spelt out the powers of the Settlement Commission. Sub-section (4) thereof provided that, in the absence of any express direction by the Settlement Commission to the contrary, nothing in Chapter XIXA shall affect the operation of the provisions of the Act insofar as they related to any matters other than those before the Settlement Commission. So, the mere filing of the application for settlement u/s 245C would not have the effect of staying the operation of the other provisions of the Act, like those providing for the prosecution of the assessee for concealing and making incorrect and false statements in the return. It was further held that, since the Settlement Commission had not passed any orders staying the proceedings in the criminal complaint, the Magistrate was duty bound to try and decide the case in accordance with law. This decision did not take note of the powers of the Settlement Commission u/s 245H to grant immunity from prosecution not only for any offence under the Act but also under the Indian Penal Code or under any other Central Act for the time being in force. On facts, the petitioners have prayed for immunity from prosecution before the Settlement

Commission and final orders are yet to be passed in all the pending applications, permitted to be proceeded with, after hearing the Commissioner. This decision, therefore, may not help in answering the question framed for consideration.

26. The same High Court in R.I. Chadha and Others Vs. Income Tax Officer, while considering the several sections under Chapter XIXA observed that, in the light of section 245F, it was patent that the Settlement Commission, during the pendency of proceedings before it, enjoyed all the powers which were vested in an income tax authority under the Act. Sub-section (2) made it manifest that, till the culmination of those proceedings, with the passing of an order under sub-section (4) of section 245D, it had exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the Act in relation to that case. Sub-section (4) further made it clear that the authorities under the Act, including the Commissioner and the ITO, may continue to exercise their jurisdiction under the Act with regard to any matters other than those which were before the Settlement Commission but that too was subject to any direction by the Commission to the contrary. It was, therefore, held that the Settlement Commission had exclusive jurisdiction to launch a prosecution against the assessees. The Commissioner could not direct or authorise the filing of the complaint against the petitioners during the course of the pendency of the proceedings before the Settlement Commission. This decision had not been brought to the notice of the learned Judge who decided Harbans Singh''s case (supra).

27. R.A. Mehta, J., of the Gujarat High Court in Ashvin Kumar Vadilal Patel Vs. S. Rajguru and Another, while considering the provisions of section 245H, observed that the prosecution was not required to be stayed merely because an application u/s 245H was made and was pending. Till such application was granted, there was no immunity and merely because an application was made about the merits of which there was nothing before the court and regarding the merits of which the criminal Court had no jurisdiction, the prosecution cannot be stayed. It was further observed that the power to grant immunity by the Settlement Commission was to be exercised sparingly and the criminal Court cannot grant even temporary immunity by granting stay of prosecution. Therefore, until immunity was granted, the criminal prosecution need not be stayed. The learned Judge had not considered section 245F(4) which states that, for the removal of doubt, it was declared that, in the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter affected the operation of the provisions of that Act insofar as they relate to any matters other than those before the Settlement Commission. There is no dispute on facts that the applications for settlement filed by the petitioners contain a prayer for immunity from prosecution and, in the exercise of powers u/s 245D, the Settlement Commission had allowed the applications to be proceeded with. It will also be relevant to refer to and extract once again section 245F(2) which reads as hereunder:

(2) Where an application made u/s 245C has been allowed to be proceeded with u/s 245D, the Settlement Commission shall, until an order is passed under sub-section (4) of section 245D, have, subject to the provisions of sub-section (3) of that section, exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under this Act in relation to the case.

28. In view of the aforementioned provision referred to by me, I am unable to agree with the view expressed by R.A. Mehta, J., in Ashvin Kumar Vadilal Patels case (supra). At this stage, it is better to consider the argument of learned counsel for the respondent that the definition of ''case'' contained in section 245A(b) would relate only to the proceedings under the Act for assessment or reassessment and will not take in its fold a prosecution. This contention has to be negatived, for section 245A reads that in that Chapter, unless the context otherwise required, ''case'' meant what had been contemplated under sub-section (b). Section 245H has also used the word ''case'' while dealing with the power of the Settlement Commission to grant immunity from prosecution and penalty. ''Case'' in that context naturally includes prosecution. In that context, the word ''case'' used in section 245F(2) will also be significant. The power of the Settlement Commission u/s 245H will certainly form part of the final order to be passed u/s 245D(4).

29. In another case in Ashwini Kumar Vadilal Patel (Dalal) Vs. P.T. Mehta, Income Tax Officer and Another, the Gujarat High Court, after referring to the decision rendered by R.A. Mehta, J., in Ashvin Kumar Vadilal Patel Vs. S. Rajguru and Another,] held that it might be that the Settlement Commission might not ultimately grant immunity to the petitioner and, in that case, the criminal proceedings would have to be carried to their logical conclusion. But, before the Settlement Commission arrived at its decision, to allow the proceedings before the criminal Court to continue might lead to an anomalous situation. Under these circumstances, it was the view of the learned Judge that the complaint need not be quashed at that stage, but it required to be stayed till the rendering of its final decision by the Settlement Commission. While distinguishing the judgment rendered in Ashvin Kumar Vadilal Patel Vs. S. Rajguru and Another, , the learned Judge took note of the recording of a finding by the Settlement Commission that no income had been concealed and none was likely to be established to have been concealed, while allowing the application to be proceeded with. In those cases, the Settlement Commission had observed that the charge of fraud or concealment cannot be said to be likely to be established against the applicants. The final orders of the Settlement Commission are still awaited.

30. The last of the cases cited is the one rendered by Jagdish Chandra, J., of the Delhi High Court in Dr. Mrs. Geeta Gupta Vs. Inspecting Assistant Commissioner of Income Tax (Assessment), Range XIV, New Delhi, and another, . That was a case where the prayer was to quash the complaint against the petitioner therein and the summons issued against her, on the ground that the continuance of the prosecution, until the Commission passed its final order of settlement u/s

245D(4), was not maintainable. While allowing the petition, the learned Judge had considered all the relevant sections in Chapter XIXA and their effect. It was the view of the learned Judge that when the Settlement Commission, after dealing with the objections of the Commissioner raised u/s 245(1A) to the entertainment of an application for settlement of a case, was not satisfied with the correctness of the objections and rejected them on the basis of the material available at that point of time, holding that concealment of income had not been established nor was it likely to be established, there was no material whatever that the department had, at that particular point of time, to continue the prosecution of the person who had made the application u/s 245C for settlement. After the making of the application, it was the Commission alone in whom exclusive jurisdiction was vested u/s 245F(2) to exercise the powers and perform the functions of an income tax authority under the Act in relation to the case including the power of continuing the prosecution already launched by the Commissioner prior to the making of the application. It was also observed that, if the Settlement Commission found any concealment of income on the part of the applicant in its final order, it may recommend the launching of a prosecution or in the absence of it, grant immunity from prosecution u/s 245H. If immunity is not granted, the thread may again be picked up by the Department for launching a fresh complaint. It was ultimately held that the continuance of prosecution during that period cannot be merely stayed and that the summons based on the complaint had to be quashed.

31. Both the learned counsels represented that the entire case law available on the subject has been placed before the Court. It was also brought to my notice that the Commissioner challenged the order of the Settlement Commission, permitting the applications to be proceeded with, in the Supreme Court of India, by filing petitions for special leave to appeal, in SLP Nos. 6086 of 1984 to 6090 of 1984, etc., and the apex Court rejected those petitions on the ground that there was no reason to interfere at that stage, inasmuch as the Commissioner''s order was to be processed for settlement.

32. I have carefully analysed the various provisions contained in Chapter XIXA in the light of the decisions rendered by various High Courts. The conclusions arrived at by me are:

(1) In Chapter XIX-A, the context requires that the word ''case'' should take in its fold a prosecution as well, if the object behind section 245H read with section 245F(1), (2) and (4) of the Act were to be taken note of.

(2) Once the application filed for settlement of a case had crossed the stage u/s 245D(1) after furnishing of an opportunity to the Commissioner of income tax of being heard, resulting in allowing the application to be proceeded with, till a final order is passed, allowing prosecution to be proceeded with will lead to an anomalous situation.

(3) If the prosecutions were allowed to be proceeded with, section 245F(2) would

be rendered meaningless and will also set at naught the object of the Act. Sub-section (4) thereof provides for removal of doubt and it is apparent that, insofar as matters which relate to those before the Settlement Commission, the provisions of Chapter XIX-A would stand affected.

(4) Section 245H vests power in the Settlement Commission to grant immunity to an applicant from prosecution for any offence under the Act or under the Indian Penal Code or under any other Central Act for the time being in force and also from the imposition of any penalty under the Act with respect to the case covered by the settlement and this power of granting immunity may be exercised at the discretion of the Commission in favour of the applicant on the conditions mentioned in the section being satisfied. Sub-section (2) thereof provides for withdrawal of immunity in certain circumstances contemplated therein. It is not as though the prosecution cannot be proceeded with in the event of the Settlement Commission holding against the applicant, for, as observed by Jagdish Chandra, J., in Dr. Mrs. Geeta Gupta''s case (supra), ''the thread may again be picked up for launching a fresh complaint'', ''or the prosecution kept pending can always be continued''.

(5) The provisions of section 245-1 appear to be very relevant, for, every order of settlement passed u/s 245D(4) shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in that Chapter, be reopened in any proceeding under the Act or under any other law for the time being in force; and

(6) The policy of the law engrafted in Chapter XTX-A is not a rescue shelter against prosecution, but provides a forum to take note of the entire picture placed by the assessee and the Department before exercising powers of immunisation against criminal prosecution. The expectation of the lawmakers was that the power of the Settlement Commission would be sparingly used in deserving cases. The object was to ''ensure that the settlement was fair, prompt and independent, given a high level machinery for administering the provision.

33. Therefore, the answer to the question framed is, when an assessee had filed an application before the Settlement Commission u/s 245C the terms of which include grant of immunity from prosecution u/s 245H and such application had been allowed to be proceeded with by the Settlement Commission u/s 245D till final orders u/s 245D(4) on the said application are rendered by the Settlement Commission, the prosecution cannot be proceeded with subject, of course, to the proviso to section 245H(1) inserted with effect from 1-6-1987.

34. I hold that the prosecutions initiated even before the filing of applications before the Settlement Commission u/s 245C need not be quashed, but will have to be necessarily stayed, pending final decision by the Settlement Commission on all these petitions u/s 245D(4), which includes the power exercisable u/s 245H either to grant or refuse immunity from prosecution.

35. It is seen that the applications for settlement are pending before the

Settlement Commission for over six years. It is hoped that the Settlement Commission can decide very soon and pass its final orders as early as possible, for the evidence which either the prosecution or the defence may intend leading, in the event of immunity from prosecution not being granted; should not be lost with the passage of time. The net result in each of the petitions is as follows:

Criminal M.P. No. 2849 of 1983 -- The proceedings in C.C. No. 2163 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, are stayed, pending final orders of the Settlement Commission in respect of petitioner Nos. 1 and 2 (A-1 and A-2). The petition stands dismissed with regard to petitioner Nos. 3 and 4 (A-4 and A-5).

Criminal M.P. No. 2851 of 1983 -The prosecution in C.C. No. 2164 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, will stand stayed in respect of petitioner Nos. 1 and 2 (A-1 and A-2) till final orders are passed by the Settlement Commission. The petition is dismissed as far as petitioner Nos. 3 and 4 (A-4 and A-5) are concerned.

Criminal M.P. No. 2853 of 1983 - Pending final orders of the Settlement Commission, the proceedings in C.C. No. 2165 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, are stayed as far as petitioner Nos. 1 to 3 (A-1, A-2 and A-4) are concerned, while the prayer of the fourth petitioner (A-5) stands rejected.

Criminal M.P. No. 2855 of 1983 -- Pending final orders of the Settlement Commission, proceedings in C.C. No. 2166 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, are stayed in the case of petitioner Nos. 1 to 3 (A-1, A-2 and A-4), while the plea of the fourth petitioner (A-5) stands rejected.

Criminal M.P. No. 2857 of 1983 -The prosecution in C.C. No. 2167 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras in respect of petitioner Nos. 1 to 3 (A-1, A-2 and A-4) shall stand stayed, while there will be no bar to proceed with the prosecution as far as the fourth petitioner (A-5) is concerned, whose plea stands rejected.

Criminal M.P. No. 2859 of 1983 -- The prosecutions in C.C. No. 2168 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, in respect of petitioner Nos. 1 to 3 (A-1, A-2 and A-4) are stayed pending final orders of the Settlement Commission. This petition is rejected in respect of the fourth petitioner (A-5).

Criminal M.P. No. 2861 of 1983 -- The prayer of petitioner Nos. 1, 5, 6, 7, 8 and 9 (A-1, A-8, A-9, A-10, A-11 and A-12) is rejected. The prosecution in C.C. No. 2181 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, is stayed as against petitioner Nos. 2, 3 and 4 (A-2, A-4 and A-6).

Criminal M.P. No. 2863 of 1983 -- This petition is dismissed as against the petitioner Nos. 1 and 5 to 9 (A-1 and A-8 to A-12), while stay of proceedings in

C.C. No. 2182 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, in respect of petitioner Nos. 2 to 4 (A-2, A-4 and A-6) is ordered, pending final orders of the Settlement Commission.

Criminal M.P. No. 2865 of 1983 -- This petition stands dismissed as against petitioner Nos. 1, 5, 6 to 9 (A-1, A-8 and A-9 to A-12). The prosecution in respect of the petitioner Nos. 2, 3 and 4 (A-2, A-4 and A-6) in C.C. No. 2183 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, will be stayed pending final orders by the Settlement Commission.

Criminal M.P. No. 2867 of 1983 -- This petition is rejected as far as petitioner Nos. 1 to 4 and 6 to 11 (A-1 to A-4 and A-7 to A-12) are concerned. The prosecution in respect of the fifth petitioner (A-5) in C.C. No. 2184 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, shall stand stayed till the final disposal of his application by the Settlement Commission.

Criminal M.P. No. 2869 of 1983 -- This petition is rejected as far as petitioner Nos. 1 and 5 to 9 (A-1 and A-8 to A-12) are concerned. The prosecution in C.C. No. 2185 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, is directed to be stayed in respect of petitioner Nos. 2 to 4 (A-2, A-4 and A-6) till the final decision is rendered in their settlement applications.

Criminal M.P. No. 2871 of 1983 -This petition is dismissed as far as petitioner Nos. 1 and 5 to 7 (A-1 and A-8 to A-10) are concerned. The proceedings in C.C. No. 2186 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, as far as petitioner Nos. 2, 3 and 4 (A-2, A-5 and A-6) are concerned, will be stayed pending final orders on their applications filed before the Settlement Commission.

Criminal M.P. No. 2873 of 1983 -- This petition is dismissed as against petitioner Nos. 1 and 5 to 9 (A-1 and A-7 to A-11). The prosecution in C.C. No. 2187 of 1982 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Madras, in respect of petitioner Nos. 2 to 4 (A-2, A-4 and A-6) will be stayed pending final orders of the Settlement Commission in their applications filed u/s 245C. It will be open to the respondent to proceed with the prosecution in each one of the calendar cases pending before the Additional Chief Metropolitan Magistrate, B.O.I., Egmore, Madras, as far as the petitioners against whom these petitions have been dismissed are concerned.

