
(1997) 07 MAD CK 0056

In the Madras High Court

Case No : Criminal R.C. No"s. 459 and 460 of 1995

Kothari and Sons (Industries) (P) Ltd. and Others	APPELLANT
Vs	
M.V. Subramaniam, Assistant Commissioner of Income Tax	RESPONDENT

Date of Decision : 22-07-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 245
Income Tax Act, 1961 — Section 245(D(4)), 276C, 277, 278, 69A

Citation : (1998) 233 ITR 294

Hon'ble Judges : N. Arumugham, J

Bench : Single Bench

Advocate : N.T. Vanamamalai, for the Appellant; K. Ramaswamy, for the Respondent

Judgement

N. Arumugham, J.—As the revision petitioners in both the above cases are almost the same and the respondent is also the same person and

both the revisions involve the determination of a common question of law on identical facts, both the revisions were heard together and they are

disposed of by delivering this common order.

2. The accused in both the cases in E.O.C.C. Nos. 503 and 504 of 1988, on the file of the learned Addl. Chief Metropolitan Magistrate (E.O.-II)

Court, Madras-8, have preferred these two revisions, challenging the propriety and legality of the impugned orders passed by the learned

magistrate in M.P. Nos. 209 of 1995 and 210 of 1995 on 27th April, 1995, ordering the issuance of subpoenas to the prosecution witnesses.

Two complaints were filed against the first accused in both the cases, namely, Kothari & Sons (Industries) (P) Ltd. Madras, and Teatex (P) Ltd.,

Madras, with its directors and employees for the offences committed by them

under s. 120B r/w ss. 193, 420, 511 and 34, IPC, 1860, and ss.

276C, 277 and 278 of the IT Act, 1961, by the Asstt. CIT, Madras-34, as complainant. It is alleged in the complaint that the premises of one

H.C. Kothari were searched during August, 1981, and on the basis of the seized materials, it came to light that certain amounts were claimed to

have been paid to the several employees of the companies but, however, which were not actually meant for the employees and that the monies

were gone in the guise of pay and allowances to the employees and the said employees were paid only some portion of the amounts mentioned in

the seized document dt. 30th July, 1981, that too only for signing the slips and not for any services rendered and that there was an attempt to

evade tax, falsification of accounts on the part of the companies and filing of false return with false verification and the false returns submitted

related to the asst. yr. 1980-81. However, the cases were stayed by the High Court and disposed of in the month of December, 1991. The order

of stay continued in respect of some of the accused only until the orders were passed by the Settlement Commission on their applications.

3. The Settlement Commission has passed orders during January, 1993, and pursuant thereto, it appears that no immunity from prosecution was

given to the accused in these cases. During February, 1994, the companies and other accused filed petitions before the Court below praying for

dismissal of the complaints and to drop further proceedings against them on the ground that in view of the findings of the Settlement Commission,

the complaints will not survive any more and that the very basis of the prosecution has been completely nullified and that the Tribunal passed orders

setting aside all the assessments as well as penalties and orders out of the subject-matter of the complaints and remanded the matter to the AO to

complete the assessments de novo in the light of the Settlement Commission's order. Therefore, the complainant filed counter to those applications

and the matter is pending inquiry. In the meantime, the petitioner/complainant, who is the respondent in these revisions, has filed M.P.S. Nos. 209

and 210 of 1995 for issue of process to the prosecution witnesses for taking evidence under s. 244, CrPC. It has been averred in those petitions

that the petitions to dismiss the complaints cannot be inquired into unless the prosecution is allowed to let in evidence and place a prima facie case

before the Court to frame charges against the accused.

4. The petitions were resisted on the ground that the complaints initiated on the basis of the seized documents dt. 30th July, 1981, will no longer

survive in view of the findings of the Settlement Commission on perusal of the copies of the seized documents that employees whose names

indicated therein were not fictitious persons but are actually working in the group of companies and there is no evidence to show that no payments

were made to them as indicated in the seized documents. It was repudiated on behalf of the complainant by contending that in the document dt.

30th July, 1981, certain amounts were sought to have been paid to several employees of the company as pay and allowances and for that purpose

amounts were withdrawn from the private limited companies of this group and that a part of the same was paid to various persons for signing false

vouchers and the balance amount were shared by D.C. Kothari and H.C. Kothari and thereby, the accused company deliberately understated the

income under the head of salary and, as such, the seized documents and evidence are to be placed before the Court necessarily to appreciate the

commission of offences.

On hearing the further contentions and counter arguments placed on behalf of the respective parties, after a full consideration of the whole matter,

the learned Magistrate, by quoting a passage of a ruling held by this Court, has concluded as follows :

A reading of the above decision will clearly indicate that in a private warrant procedure case, the petition for discharge under s. 245(2), CrPC

cannot be entertained unless the prosecution is allowed to adduce evidence under s. 244, CrPC. Therefore, considering the circumstances of the

case, I feel that the prosecution should be given an opportunity to adduce evidence in the first instance before considering the petition filed by the

accused for dismissal of complaints and discharge of the accused. Accordingly, the petition is allowed and process will be issued on filing process

memo by the complainant for examination of witnesses.

The above impugned orders are being challenged by the petitioners herein questioning their propriety and legality.

5. I have had the opportunity of hearing the arguments of Thiru N. T. Vanamamalai, learned senior counsel, for and on behalf of the petitioners,

assailing the impugned orders and the contra from Thiru K. Ramasamy, special public prosecutor, for the IT Department cases, justifying the impugned orders.

6. The main plank of attack made by learned senior counsel, Mr. N.T. Vanamamalai, in assailing the impugned orders, is that the learned Magistrate, while passing the impugned orders, to issue the process has misconstrued the legal principle enunciated by the Courts of law and the case law, and that the legal ratio enunciated by this Court and the Supreme Court, if imported to the factual aspects of the instant case, would make it clear, that the very complaint itself is totally a groundless one and that, therefore, the learned magistrate has erred seriously in taking cognizance of the very complaints itself to the file and that as such, the revisions are to be allowed by setting aside the impugned orders.

7. Counteracting the same, Mr. K. Ramasamy, learned special public prosecutor, for the IT Department, contended that in view of ss. 244 and 245 of the CrPC and the case law decided by this Court and the apex Court, it is made clear that once the complaint by the IT Department is entertained and process issued to the accused, then, the prosecution has to be allowed to produce all the witnesses on its behalf and that, therefore, the question of stopping the issuance of subpoenas to the prosecution witnesses does not arise in any event and that the revision petitions are not at all maintainable.

To substantiate the above referred contentions, the Bar for the respective parties placed reliance on a plethora of case law.

8. In the context of the above rival position, the only common question that arises for consideration in these revisions, is whether the impugned orders passed by the learned magistrate are vitiated and have become liable to be set aside.

9. Since the pure question of law that a magistrate, after entertaining a complaint filed under s. 200 of the CrPC and issuing process to the accused is empowered to issue subpoenas for the examination of the witnesses on behalf of the complainant, is involved in these two revisions, the narration of the factual aspects of the instant case in all details has become unnecessary and certain facts which are relevant for the issue alone are adverted to. The individual persons as accused in both these revisions are the directors

and employees of the two companies by name Kothari & Sons (Industries) (P) Ltd. and Teatex (P) Ltd., Madras, is not in controversy. So also, the fact that a search was made by the IT Department in the premises of one H.C. Kothari during the month of August, 1981, and during the said search some materials were claimed to have been seized were also not in dispute among the parties herein. However, it was alleged that certain amounts were said to have been paid to several employees of the companies which were not actually meant for the employees and that the monies were gone in the guise and pretext of pay and allowances to the employees and that only some portion of the amounts mentioned in the seized document dt. 30th July, 1981, were alone paid to the employees, that too only for signing the slips and not for any services rendered and that there was an attempt to evade tax, falsification of accounts on the part of the companies by filing false returns with false verification and so on for the asst. yr. 1980-81 involving the offences under s. 120B r/w ss. 193, 420, 511 and 34, IPC, 1860, and ss. 276C, 277 and 278 of the IT Act, 1961. It was also not in dispute that the cases initiated by the IT Department were stayed by the High Court for some time and the petitions were disposed of in the month of December, 1991, and that the order of stay continued in respect of some of the accused only until the orders were passed by the Settlement Commission on their applications and that the Settlement Commission has passed orders during January, 1993, and it appears that no immunity from prosecution was given to the accused in these cases. However, in February, 1994, it appears that the companies and other accused, namely, the revision petitioners filed before the Court below petitions to drop further proceedings against them on the ground that in view of the findings of the Settlement Commission, the complaint will not survive any more as the very basis of the prosecution has been completely nullified and that the Tribunal passed orders setting aside the assessment as well as the penalties and orders out of the subject-matter of the two complaints and remanded the matter to the AO to complete the assessments de novo in the light of the Settlement Commission's order. As it was resisted, the matter is pending inquiry.

10. It was brought to my notice that proceedings before the Addl. Bench of the Income Tax Settlement Commission, Madras, which was seized of

the matter on the filing of settlement application numbers 16/2/162/B2-IT; 16/2/225/83-IT; 16/2/254/84-IT, dt. 23rd October, 1982; 12th

December, 1983, and 21st September, 1984, respectively, by one of the revision petitioners, viz., Mrs. Indira D. Kothari, relating to the asst. yrs.

1974-75 to 1982-83, and in which, after hearing both the parties, an order by the Settlement Commission was passed under s. 245D(4) of the IT

Act, 1961, on 28th January, 1993. The above applications were filed relating to the assessment of the directors of the company by name (1)

Kothari & Sons (Agencies) (P) Ltd., (2) Kothari Mehta & Co. (P) Ltd., (3) Kothari & Sons (Industries) (P) Ltd., (4) Kothari & Sons

(Nominees) (P) Ltd., (5) Investment and Finance Corporation (P) Ltd., (6) Underwriters & Financiers (P) Ltd. and (7) Planting & Agencies (P)

Ltd.

11. In paragraph 5.4 of the said order, the following has been held by the Settlement Commission :

On a perusal of the copies of the seized documents we find that the employees, whose names were indicated therein, were not fictitious persons,

but were actually working with the group companies and there is no evidence to show that no payment was made to them as indicated in the seized

documents. In the circumstances, the offer of additional income made by the four lady directors is accepted. This income will be added under the

head "Income from other sources". The manner of distribution of the amounts going to each member of the two groups has been indicated by the

applicant in the paper-book filed on 19th January, 1993.

In paras 10 and 11 of the order, it was also observed as follows :

As regards immunity from prosecution, V. K. Jayaraman stated that prosecution has been launched against the private limited companies in which

the applicant was a director and the applicant has also been impleaded in the prosecution proceedings launched under the IT Act as a director of

these companies. In view of this, he submitted that no immunity from prosecution should be granted to the applicant. On the other hand, Quadir

Hoseyn, submitted that as the applicant has co-operated with the Settlement Commission in the proceedings before it and has made a full and true

disclosure of her income before it, immunity from prosecution should be granted, even in regard to the prosecution proceedings initiated against the

applicant as a director in the private limited companies.

We find that the conditions mentioned in s. 245H are satisfied and, therefore, the applicant is granted immunity from prosecution for offences under

the IT Act in respect of the matters covered by this application. However, in regard to the prosecution proceedings launched against the applicant

as co-accused in the capacity of director in the case of the concerned companies, we make no observations, as it is not necessary to do so.

The matter appears to have been taken on appeal before the Tribunal, Madras Bench-C, and the Tribunal by its order dt. 27th August, 1993, has

passed the following :

These appeals relate to the disallowance of certain expenditure in computing the income of the assessee. It has been brought to our notice that in

the case of the recipients of the amounts, the Settlement Commission has passed an order treating them as perquisites. If so, the said amounts may

be admissible as business expenditure in the hands of the assessee-company. Since the authorities below did not have the benefit of the order of

the Settlement Commission, we deem it fit to set aside the orders of the authorities below and restore the matter to the AO to make fresh

assessments after taking into account the order of the Settlement Commission.

12. It is thus seen that the Tribunal by its order dt. 27th August, 1993, has observed that in the case of the recipients of the amounts, the

Commission has passed an order treating them as perquisites and that for the said reason, the Tribunal has held that the said amounts may be

admissible as business expenditure in the hands of the assessee-company and for the said reasoning, the orders passed by the authorities below

were set aside and the entire matter was restored to the AO to make fresh assessment after taking into account the order of the Settlement

Commission. It is also noticed that on getting the report of the CIT, under s. 245D(4) of the IT Act, 1961, the Settlement Commission has passed

the order and it was followed by the order passed by the Tribunal as above referred to. It is in this context, it has to be necessarily held that there

was no scope for initiating the prosecution for all the offences against the revision petitioners in both these cases for the very basic reasoning that all

the seized documents by the IT authorities have been considered by the Settlement Commission and the Tribunal and, as such, the order of the

Tribunal as above referred to has become final and binding on both the parties. In the light of the above binding nature of the order passed by the

Tribunal, it has become highly doubtful that the very complaints in original are maintainable as there is no scope to launch the prosecution against

the accused. The respondent IT Department appears to have not disputed the orders passed by the Settlement Commission or of the Tribunal.

What they would contend was that the abovesaid orders are separate and have nothing to do with the original complaint for prosecution initiated in

the Court below. In the light of the fact that Income Tax assessment for the relevant period 1981-82 is included and covered by the Settlement

Commission's order and the Tribunal's order, it cannot be said that separate prosecution as initiated can be launched.

13. However, the respondent herein has pleaded through the Bar, that irrespective of the order passed by the Settlement Commission as well as

the Tribunal, the truth or otherwise of the documents seized on 30th July, 1981, would come to light only if the respondent is allowed to let in

evidence under s. 244 of the CrPC and that, therefore, the impugned orders shall be maintained.

14. On almost identical facts of this case, in K.T.M.S. Mohd. and another Vs. Union of India, , their Lordships of the Supreme Court, by referring

to the earlier judgments, had observed the following :

We shall examine this contention and dispose of the same on the ratio of the decisions of this Court in P. Jayappan Vs. S.K. Perumal, First

Income Tax Officer, Tuticorin, . In that case, the following dictum has been laid down :

"The criminal Court no doubt has to give due regard to the result of any proceeding under the Act having a bearing on the question in issue and in

an appropriate case, it may drop the proceedings in the light of an order passed under the Act. It does not, however, mean that the result of a

proceeding under the Act would be binding on the criminal Court. The criminal Court has to judge the case independently on the evidence placed

before it."

In the penultimate paragraph of the same judgment, the following observation was made :

It may be that in an appropriate case, the criminal Court may adjourn or

postpone the hearing of a criminal case in exercise of its discretionary power under s. 309 of the CrPC, if the disposal of any proceeding under the Act which has a bearing on the proceedings before it is imminent so that it may take also into consideration the order to be passed therein. Even here the discretion should be exercised judicially and in such a way as not to frustrate the object of the criminal proceedings. There is no rigid rule which makes it necessary for a criminal Court to adjourn or postpone the hearing of a case before it indefinitely or for an unduly long period only because some proceeding which may have some bearing on it is pending elsewhere."

The above principle of law laid down by this Court gives an indication that the result of the proceedings under the IT Act, 1961, is one of the major factors to be considered and the resultant finding in the said proceeding will have some bearing in deciding the criminal prosecution in appropriate cases.

It may not be out of place to refer to an observation of this Court in *Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar*, wherein it was observed that the prosecution once initiated may be quashed in the light of a finding favourable to the assessee recorded by an authority under the Act subsequently in respect of the relevant assessment proceedings. But, in *P. Jayappan's case (supra)*, it has been held that the decision in *Uttam Chand's case (supra)*, is not an authority for the proposition that no proceedings can be initiated at all under s. 276C and s. 277 as long as some proceeding under the Act in which there is a chance of success of the assessee is pending. Though, as held in *P. Jayappan's case (supra)*, a criminal Court has to judge the case before it independently on the materials placed before it, there is no legal bar in giving due regard to the result of the proceedings under the IT Act, 1961.

In the present case, on two occasions, the Tribunal has held that the amount of Rs. 6 lakhs was not owned by the first appellant. In exhibit D-4, the Tribunal has further held that s. 69A dealing with unexplained money, etc., has no application to the facts of the case. Taking this finding of the Tribunal into consideration, we are constrained to hold that the appellants cannot be held to be liable for punishment under s. 120B r/w s. 277 and s. 277 (simpliciter) of the IT Act, 1961, as the very basis of the prosecution is

completely nullified by the order of the Tribunal which fact can be given due regard in deciding the question of the criminal liability of appellants Nos. 1 and 2".

15. In another case of the similar type, in G.L. Didwania and Another Vs. Income Tax Officer and Another, their Lordships of the Supreme Court, had the occasion to rule the following :

After the Tribunal passed the order, allowing the appeal in favour of the appellant, he filed a petition before the magistrate to drop the criminal proceedings. The magistrate by his order dt. 2nd September, 1979, dismissed the said application and held that the prosecution has got a right to lead evidence in support of his complaint and the Court can come to the conclusion whether or not any criminal offence is made out. The learned magistrate also observed that the order of the Tribunal can be taken only as evidence. Aggrieved by the same, the appellant-assessee filed an application under s. 482, Cr.PC, before the High Court and the High Court dismissed it in limine. Hence, the present appeal.

Mr. R. K. Jain, learned senior counsel, submits that the averments in the complaint would clearly show that the prosecution was sought to be

launched on the basis that the appellant wrongly and falsely declared that the income of Young India and Transport Company does not belong to

him and that he made a false verification to that effect and the income of Young India and Transport Company does not belong to him and failing to

include the said income of Young India and Transport Company in his income amounted to suppression and thus he was liable under s. 277 of the

IT Act and that in view of the fact that in the order of the Tribunal those conclusions reached by the assessing authority have been set aside;

consequently, the very basis of the complaint is knocked out and, therefore, in the interest of justice the proceedings ought to have been quashed

by the High Court. In support of his submission, he also relied on a judgment of this Court in Uttam Chand and Others Vs. Income Tax Officer,

Central Circle, Amritsar, , wherein this Court quashed the prosecution. It was observed in that decision that it would be clear from the order of the

Tribunal that the assessee was a partner of the firm and the firm was a genuine firm. There is a reference to this judgment in another decision of this

Court in P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, .

In the instant case, the crux of the matter is attracted and whether the prosecution can be sustained in view of the order passed by the Tribunal. As noted above, the assessing authority held that the appellant-assessee made a false statement in respect of income of Young India and Transport Company and that finding has been set aside by the Tribunal. If that is the position then we are unable to see as to how criminal proceedings can be sustained.

Mr. A. Raghuvir, learned senior counsel appearing for the Department, submitted that the fact whether the firm is a genuine firm, still remains as a question to be resolved and, therefore, the proceedings cannot be quashed at this stage. We do not agree. The whole question is whether the appellant-assessee made a false statement regarding the income which according to the assessing authority has escaped assessment. So far as this issue is concerned, the finding of the Tribunal is conclusive. Therefore, as held in Uttam Chand's case (supra), the prosecution cannot be sustained.

Accordingly, the proceedings are quashed and the appeal is allowed.

16. In Mohamed I. Unjawala and etc. etc. Vs. Assistant Commissioner of Income Tax, City Circle VI (1), Madras, a learned single judge of this

Court had the occasion to follow the same logic as observed by the Supreme Court in the following terms :

From the views expressed by the Supreme Court in Patnaik and Co. Ltd. Vs. Commissioner of Income Tax, Orissa, , it has to be accepted that

the finding of fact given by the Tribunal has to be respected by the Court unless the Court takes the view that the Tribunal erred in law in arriving at

the finding on fact. Otherwise, the conclusion on the question of fact cannot be disturbed by the Court. Even though the Supreme Court has, in P.

Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, , observed that the result of the proceedings under the Act is not binding on the

criminal Court and the criminal Court has to judge the case independently on the evidence placed before it, a rider also is provided expressing that

the criminal Court, no doubt, has to give due regard to the result of any proceedings under the Act, having a bearing on the question in issue and in

an appropriate case, it may drop the proceedings in the light of an order passed under the Act. Therefore, it cannot be treated that every finding of

the authorities under the IT Act has to be disregarded and ignored for the

criminal prosecution. On the other hand, due regard must be given and in appropriate cases, the criminal prosecution has to be dropped. Therefore, in the deserving cases, the criminal Court has to give weight to the findings of the authorities under the IT Act and it is not in all cases to ignore the conclusion of the Tribunal. The Supreme Court has accepted that the findings of the Tribunal on the facts are final and the Court had no jurisdiction to go behind the statements of fact made by the Tribunal. Therefore, the criminal Court is bound to accept the findings of the Tribunal on the questions of fact. In the considered view of the Court, as the Tribunal has concluded that the mistake was not known to the partners, this finding of fact has to be accepted by the Court which deals with the criminal prosecution of the petitioners. In the result, the proceedings in C.C. Nos. 143 to 145 of 1991, before the Addl. Chief Metropolitan Magistrate (E.O.-II), Madras, are quashed.

17. To substantiate the contention of non-maintainability of the prosecution by the respondent, learned senior counsel, Mr. N. T. Vanamamalai, submitted that even after the issuance of the process under s. 204, Cr.PC, if the grounds and facts warrant, it can be agitated before the Court and the Court can stop the proceedings. In this regard, reliance was placed on the ruling held by the Supreme Court in K.M. Mathew Vs. State of Kerala and another, , wherein it was held as follows (headnote) :

When the accused enters appearance in response to the summons, the magistrate has to take proceedings under Chapter XX of the Code. But the need to try the accused arises when there is allegation in the complaint that the accused has committed the crime. If there is no allegation in the complaint involving the accused in the commission of the crime, it is implied that the magistrate has no jurisdiction to proceed against the accused.

It is open to the accused to plead before the magistrate that the process against him ought not to have been issued. The magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No specific provision is required for the magistrate to drop the proceedings or rescind the process. The order issuing the process is an interim order and not a judgment. It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings

if the complaint on the very face of it does not disclose any offence against the accused.

18. Reliance was also placed in a case of J. Ranganathan, Second Income Tax Officer Vs. M.S. Bhavani, , in which, I had the occasion to

observe the following with regard to the scope of ss. 144 and 145 of the Cr.PC :

A plain reading of sub-s. (1) of s. 244 of the Cr.PC clearly leads to the fact that in a warrant case instituted otherwise than on a police report like

the one in the instant case by the IT authorities before the learned Judicial Magistrate, No. 1, in the context, the accused appears or is brought

before him, the magistrate shall proceed to hear the prosecution, and take all such evidence as may be produced in support of the prosecution,

which would mean clearly that all the evidence, both oral and documentary, produced by the prosecution shall be necessarily recorded by the

learned magistrate. That act of the learned magistrate is held mandatory and not directory or obligatory. Even though his duty to take all such

evidence produced by the prosecution is clearly mandatory in this provision, it is quite a pity and rather unfortunate that the learned magistrate has

failed to perform the same and also ignored it as if he is not aware of the said provision of law. This section is further qualified by sub-s. (2) in the

context that for the said purpose, enjoined in sub-s. (1), on the application made by the prosecution, the magistrate may issue the process to all

such persons to attend and produce any document or other witness before him as required by the prosecution. Therefore, a combined reading of

both sub-ss. (1) and (2) of s. 244 of the Cr.PC makes it clear, rather mandatory, that the magistrate shall necessarily record all the evidence both

oral and documentary adduced by the prosecution on instituting a case as contemplated under this section.

Then coming to s. 245(1) of the Cr.PC, the very object and scheme provided under s. 244(1) and (2) of the Cr.PC would be fortified and further

qualified by sub-s. (1) of s. 245 of the Cr.PC. The language adumbrated in sub-s. (1) "if, upon taking all the evidence referred to in s. 244, the

magistrate considers, for reasons to be recorded" would clearly emphasise the fact that before the learned magistrate decides whether there is a

case or not for the prosecution, he shall record every evidence as provided under s. 244 of the Cr.PC and he must give the reasons for such

conclusion he has to arrive for the purpose of sub-s. (2) of s. 245 of the Code or to discharge as provided therein. The word "groundless" in sub-s. (2) of s. 245 of the Code would clearly mean that the evidence must be such that no conviction can be rested on it. A combined reading of the above sub-sections. of law clinchingly enjoins the fact that the duty of the learned magistrate in recording such of the evidence, both oral and documentary, produced by the prosecution to be recorded is not only onerous but also a mandatory one, before passing the order of discharge or otherwise. If the sections of law aboveresferred to are to be taken to mean in this way, perhaps, may be the proper interpretation, then there may not be any difficulty for the learned magistrate to pass the impugned order in the petition filed by the prosecution under s. 244(2) of the Code to issue the process. However, he has overlooked the same. In short, without recording any evidence or ascertaining from any other documentary evidence, a petition filed on behalf of the accused praying for the discharge under s. 245(2) of the Code cannot at all be entertained and cannot be even thought of for a moment.

19. In the decision in Rama Devi and Another Vs. State of Bihar and Another, , a single Judge of the High Court has held as follows (headnote) :

"The question whether the persons accused of an offence should be discharged or a charge should be framed against them or not can be decided only after following the procedure laid down in the Cr.PC.

Held accordingly, that as the prosecution did not examine any witness, the question of discharging the accused at that stage did not arise".

In yet another case, R.S. Nayak Vs. A.R. Antulay and Another, , the apex Court has observed as follows (headnote) :

"The power to discharge is exercisable under s. 245(1) when the magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction. . . ." It is a fact that ss. 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the

two parties to be heard. The stage for discharge under s. 245, on the other hand, is reached only after the evidence referred to in s. 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the magistrate is required to consider the question of framing of charge under s. 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections the legal position is that if the trial Court is satisfied that a prima facie case is made out, charge has to be framed.

20. In *R.S. Nayak Vs. A.R. Antulay*, , the apex Court has held as follows (headnote) :

Where cognizance of an offence is taken under s. 8(1), the judge has to hold trial according to the procedure prescribed in Chapter XIX-B, i.e., the procedure prescribed in ss. 244 to 247 of the Code. To be precise, the judge has to try the case according to the procedure prescribed for cases instituted otherwise than on police report.

21. The case law decided by my learned brother Arunachalam J. in *S.A.R. Somasundaram Vs. Assistant Commissioner of Income Tax*, , is also relevant to be quoted in the context of the present case. The learned Judge in the aforesaid ruling has observed as follows (headnote) :

Held, dismissing the petition, that it had been contended that the complaint had been filed by a person who was not competent to do so and that the penalty imposed had been set aside in appeal, though subsequent to the filing of this prosecution. Both these contentions related to appreciation of evidence by the trial magistrate and more so when certain documentary evidence would have to be brought on record to scrutinise the validity of these submissions. The contentions related to mixed questions of law and fact and it would be more appropriate to urge these during trial. The complaint could not be quashed.

Therefore, unfortunately on the basis of the said observation, the learned Judge was not inclined to quash the said proceedings.

22. With the strength of these legal ratios enunciated and referred to above and making them applicable to the case in hand it is apparent that

without taking any evidence, both oral and documentary, the learned judicial magistrate was not inclined to issue process and thereby to record

any evidence to be let in on behalf of the prosecution, as contemplated under s.

244 of the Code. But at the same time, it is very interesting to note that a petition filed on behalf of the accused under s. 245(2) of the Code praying for the discharge was entertained by the learned magistrate. But, however, he added the same with the original case records. "The total irony of the entire case is that the learned magistrate, while refusing to issue process as specifically contemplated under s. 244(2) of the Cr.PC, kept the petition filed on behalf of the petitioner pending and has not even looked into it. It is thus that the procedure adopted by the learned magistrate has become quite unknown to procedural law and practice, which in my considered view not only amounts to a denial of fair justice but also protracting the proceedings for any length of time.

23. The above view and finding of mine, perhaps was taken as the only ground and very basis for the contentions very strenuously being made on behalf of the respondent/complainant that once the complaint has been filed under s. 200 of the Cr.PC and the cognizance has been taken and after having been satisfied, process has been issued under s. 204 of the Code, Mr. K. Ramasamy, learned special public prosecutor, appearing for the IT Department, urged before me that I have held in the above ruling that without recording of the evidence produced by and on behalf of the complainant, no discharge can be done at this stage, which argument, in my considered view, is not on par with the findings given by me in the above case. In short to say, my findings given in the above case have been totally misconstrued, to make it clear, on identical facts of the present case, in an unreported judgment held by me between K.V. Joy vs. Sankara Narayanan in CrI.R.C. No. 483 of 1992, I had my preference to say the following in para 12 at p. 12 :

A minimum understanding of the phraseology inbuilt in s. 244 that "the magistrate shall proceed to hear the prosecution and take all such evidence as may be produced" emphasized in the subsequent section by the words "upon taking all the evidence referred to in s. 244" would clearly be indicative that the magistrate shall take and record all evidence produced by the complainant under the above two sections of law and cannot abruptly stop and confine his legal exercise to a particular extent. In this respect, it is noticed that the mandate spelt out in s. 244 to take all such evidence in support of the prosecution case is not only obligatory but also

mandatory in nature and that is the reason why the phraseology adopted in sub-s. (1) of s. 245 has once again emphasized for taking of the evidence referred to in s. 244 by the learned magistrate. Of course, it is true that if upon taking all such evidence, wider power given to the learned magistrate is to record the reasonings that no case has been made out against the accused, which if unrebutted, would warrant his conviction, and to discharge the accused. That is the first stage as provided in sub-s. (1). In the second stage, the magistrate has been given a still wider power to halt the proceedings at any stage of the case if he is satisfied that the recorded evidence, or for other reasons, he considers that the taking cognizance of the charge was found to be groundless. The intention of the legislature in providing such wider power to the magistrate is quite obvious, in order not only to render justice in its proper perspective but also on the principle of fair play and equity. It is, therefore, under such circumstances the power vested with the magistrate under the earlier section seems to have been regulated and confined by the two grounds specifically spelt out in the subsequent sections. to discharge the accused in the middle. If the accused wants to get the discharge in the middle, he could approach the Court of law only in accordance with the above sections of law and it is imperative on the part of the magistrate to exercise his power in accordance with the same.

24. It is, therefore, clear that I had clearly given a finding that in the second stage, under s. 245(2), a magistrate has been given a still wider power to halt the prosecution at any stage of the case if he is satisfied that the recorded evidence or for other reasons he considers that the taking cognizance of the charge was found to be groundless and that the intention of the legislature in providing such wider power to the magistrate is quite obvious, in order not only to render justice in its proper perspective but also on the principle of fair play and equity. It is, therefore, under such circumstances, the power vested with the magistrate under the earlier section seems to have been regulated and confined by the two grounds specifically spelt out in the subsequent sections to discharge in the middle. It is quite apt to quote at this stage what I had observed : ""If the accused wants to get the discharge in middle, he could approach the Court of law only in accordance with the above sections of law [i.e., sub-s. (2) of s. 245 of the Code] and it is imperative on the part of the magistrate to exercise his

power in accordance with the same"". Though the two findings of mine in the two judgments above referred to have been referred by Mr. K. Ramasamy, learned special public prosecutor, for the IT Department, in the light of my specific finding and observation given as abovereferred to in the second case cited, it is not correct to say that I have come to the conclusion that asking for the discharge of the accused from a prosecution had practically come to a close the moment a complaint was taken to file and the process has been issued against the accused under s. 204 of the Cr.PC, however, it has become necessary to make it very clear that if at any point or stage, it was brought out before the learned magistrate that there was no scope for any punishment or necessity to proceed with the case, as provided under s. 245(2) of the Code, then, for the reasons to be recorded and the satisfaction to be arrived at, the magistrate can halt the prosecution abruptly only on finding the case as groundless. For the said reasonings and clarification, I feel with great constraint and respect to the special public prosecutor, the finding given by me in the earlier occasions though relied upon, has thus been totally misconstrued and misdirected and accordingly, the said contentions made by the learned special public prosecutor on behalf of the respondent cannot be countenanced.

25. In the light of the legal ratio ruled by their Lordships of the Supreme Court in the abovesited case law and in view of my findings given above, by applying the same to the factual aspects of the instant case, I have no doubt in my mind to say that the order passed by the Tribunal as quoted above, would be binding on the learned magistrate before whom the prosecution against the revision petitioners is pending and for the factual findings given by the Tribunal as relied on, further proceedings of the cases before the learned magistrate cannot be allowed.

26. If, on the other hand, the proceedings are allowed, to adduce further evidence and the magistrate gives a finding, it would definitely and certainly abdicate the factual findings given by the Tribunal, which is not a healthy trend for the Courts to follow. As was held by their Lordships of the Supreme Court in the above case law, the findings given by the Tribunal on factual aspects must be given due regard by the Court and if it is done, there is no concealment of any income or the fictitious company and so on.

It is also noticed that the further excess amount was the additional amount due to the women directors of the company. The order passed by the Settlement Commission as well as the ITO had thus been set aside (sic). In this context, it is not justifiable and safe to hold that the IT Department is entitled to continue the prosecution further.

27. A long catena of case law :

- (1) Dhanalakshmi Vs. R. Prasanna Kumar and Others, ;
- (2) Smt. Chand Dhawan Vs. Jawahar Lal and others, ;
- (3) State of U.P. Vs. Man Mohan and Others, ;
- (4) Madras Vanaspati Ltd. and Others Vs. S. Subramanian, Income Tax Officer, ;
- (5) G.S.R. Krishnamurthi Vs. M. Govindaswamy, Income Tax Officer, ;
- (6) Tip Top Plastic Industries P. Ltd. and others Vs. Income Tax Officer, ;
- (7) Geethanjali Mills Ltd. vs. V. Thiruvengadathan (1989) 179 ITR 558 : TC 48R.897;
- (8) Telu Ram Raunqi Ram and Another Vs. Income Tax Officer, "A" Ward and Another, ;
- (9) Dharma Pratishthan and Others Vs. B. Mandal and Another, ;
- (10) P. Jayappan vs. S.K. Perumal, ITO (supra);
- (11) Prakash Roadlines (Pvt.) Ltd. Vs. Union of India (UOI) and Another, ;
- (12) Jaswant Rai vs. CBDT (1982) 133 ITR 19 : TC 48R.992;
- (13) Commissioner of Income Tax, Madras Vs. M/s. Express Newspaper Ltd.,
- (14) Commissioner of Income Tax (Central) Vs. B.N. Bhattacharjee and Another, ;
- (15) Jamnadas Kanhaiyalal Vs. Commissioner of Income Tax, M.P., Bhopal, ;
- (16) S.R. Arulprakasam Vs. Prema Malini Vasan, Income Tax Officer, Central Circle-XV, Madras, ;
- (17) Maqbool Hussain vs. State of Bombay AIR 1953 SC 32;
- (18) Thomas Dana Vs. The State of Punjab, ; and
- (19) Assistant Collector of Customs and Another Vs. L.R. Malwani and Another, .

and some of the case law to which a reference has already been made in the course of this order, have been cited by Mr. K. Ramasamy, learned

special public prosecutor, to substantiate his contentions. Since his only main contention was that pursuant to the decision held by me in J.

Ranganathan, ITO vs. M.S. Bhavani (supra) once the complaint lodged by the ITO has been taken to file, cognizance taken and process issued

under s. 204 of the Code, then the magistrate is entitled to record all evidence produced before him by the complainant under s. 244(1) and (2)

and that, therefore, he is entitled to proceed with the prosecution case with recording of evidence irrespective of the fact the Tribunal had set aside

the order passed by the Settlement Commission or the ITO (sic) in the light of my observation and finding given that the above contention was not

at all maintainable and cannot be countenanced, for the aforesaid reasonings and the legal ratios, adverting to or considering the plethora of case

law relied on by learned counsel would become out of point and accordingly, I do not propose to deal with them in detail for the sake of brevity. It

is for the said reasons, I may hold that the referring of the above citation do not render any help to the respondent, who is the complainant in the

main cases.

28. Having considered all the case records and the impugned orders, it is seen that in substratum, the complaints are based on the assessment

order and that assessment order does not exist in the eye of law inasmuch as the Tribunal has set aside the orders of the ITO with a direction to

make fresh assessments taking into account the order of the Settlement Commission and that the Tribunal has observed further that the said

amounts may be admissible as business expenditure in the hands of the assessee-company and that in that event, the whole complexion of the case

is bound to change when assessments are to be completed in the light of the Settlement Commission's findings and that the Settlement Commission

as well as the CIT(A) has held that the amounts were paid to the employees as remuneration but in the complaint it was alleged that the amounts

were paid for signing slips and not for service rendered. However, taking an overall picture of the entire case records and the materials available it

can be said that with every definiteness that the prosecution launched by the respondent has been nullified as the order passed by the Tribunal set

aside the assessment in the face of the Settlement Commission's order and directed for the reassessment.

29. In the result, for all the said detailed reasonings and observations, both the revisions succeed and stand allowed. Accordingly, the impugned

order passed by the learned Addl. Chief Metropolitan Magistrate (E.O. II),
Madras, in M. P. Nos. 209 and 210 of 1995, dt. 27th April, 1995,
ordering the issuance of subpoenas to the prosecution witnesses is set aside.