

(2009) 07 GUJ CK 0015
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 6974 of 2009

Yogendra Shankarlal Jani

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 28-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 195, 239, 464, 482
Income Tax Act, 1961 — Section 132, 136, 147(1), 147(a), 148
Penal Code, 1860 (IPC) — Section 120B, 120B, 195(1)(b), 415, 420
Prevention of Corruption Act, 1988 — Section 5(1)(d), 5(2)

Citation : (2009) 3 GLH 104

Hon'ble Judges : Harsha Devani, J

Bench : Single Bench

Advocate : A.D. Shah 1, for the Appellant; Y.N. Ravani for Respondent 2, for the Respondent

Final Decision : Allowed

Judgement

H.N. Devani, J.—By this application u/s 482 of the Code of Criminal Procedure, 1973, the petitioner seeks quashment of the proceedings of Special Case No. 58/2004 pending in the Court of the learned Additional Chief Metropolitan Magistrate and Special Judge (CBI) 2nd Court, Ahmedabad. The facts giving rise to the present application are that a first information report came to be registered against the petitioner and one P. S. Bhagwat, I. T. O on 23rd April, 1987 being Crime Register: No. RC 16/87 for the offences u/s 120B, 420 IPC and Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act. The allegations made in the first information report are reproduced hereunder:

"It is reliably learnt that Shri P. S. Bhagat was working as I. T. O in Circle VI E Ward at Ahmedabad and was expected to ensure that no double refund is given to any party for the same period. Similarly Shri Y. S. Jani was required to disclose in the Income Tax Return, if he had filed a return earlier for the same period.

Shri Y. S. Jani, Cash Officer filed an Income Tax return for the period 1983-84 on 14. 6. 83, which was processed by an Inspector of Income Tax who recommended the refund of Rs. 467/- on 17. 10. 84. The order was issued under the signature of Shri Bhagat on 13. 11. 84 vide refund order No. 040958/095752. Thereafter, Shri Y. S. Jani filed another return for the period 1982-83, 1983-84 and 1984-85 on 28. 8. 84 showing CCA, HRA, Leave encashment on non taxable in the above return. Shri Bhagat did the assessment on the same day i. e. 28. 8. 84 and ordered refund of Rs. 4, 467/-. The refund order No. 022529/ B-2 252855 of Rs. 4, 467/- was signed by Shri Bhagat on 31. 8. 84.

Although there is a specified column in the form of income tax return to the "effect", If this is a revised return, please state the date filing the previous return" yet Shri Y. S. Jani failed to show that he had filed a return for the period 1983-84 on 14. 6. 83 therefore, suppressed the fact and obtained a refund of Rs. 2501/- showing that CCA, HRA and leave encashment as non taxable income through they were taxable. Shri Bhagat in collusion with accused No. 2 and others accepted the returns and on the same day passed orders of refund of Rs. 2501 on 28. 8. 84 and thereby caused pecuniary advantage to accused No. 2.

The accused Shri P. S. Bhagat and Shri Y. S. Jani in collusion with others have thus cheated the Income Tax Department dishonestly and fraudulently to the tune of Rs. 2501/- and A-2 also obtained a refund of Rs. 475/- and Rs. 1491/- by showing CCA, HRA as non taxable and A-1 accepted the same though these are taxable income and gave refund of the above amounts to him. They thus committed an offence punishable u/s 120-B, 420 IPC and 5(2) read with Section 5(1)(d) of PC Act."

2. On completion of investigation, on 16th September, 1988, a charge sheet came to be submitted by the Investigating Officer of CBI/SPE Division Ahmedabad, in the Court of the Chief Metropolitan Magistrate, Ahmedabad for the offences punishable under Sections 420 and 467 IPC and Sections 277 and 278 of the Income Tax Act against the petitioner accused alone. No charge sheet was filed against Shri P. S. Bhagwat, ITO. The concise details of the charge are as follows:

"That the accused Shri Y. S. Jani was serving as Cash Officer at State Bank of India, Bala Hanuman Branch Ahmedabad during the year 1984 and 1985.

That he was an assessee of the Income Tax Department. That he twice filed the income tax return for the assessment year 1983-84 on 14. 6. 83 and 28. 8. 84 and dishonestly obtained refunds by misrepresentation of facts and thereby cheated the income tax department to the tune of Rs. 2968/-.

That the accused Shri Y. S. Jani had submitted the false statements in his returns filed on 28. 8. 84 for the assessment year 1982-83, 83-84 and 84-85 as well as on 17. 9. 85 for assessment year 1985-86 and obtained wrongful gain of Rs. 4467 and Rs. 1859 respectively to himself and causing corresponding wrongful

loss to the Government of India.

That the accused has thus committed an offence punishable u/s 420 and 467 IPC and u/s 277 and 278 of the Income Tax Act and hence the charge against him."

3. It appears that in the meanwhile the Income Tax Officer, Circle-VI, Ward-E, had reopened the assessment proceedings of the petitioner for the years 1982-83, 83-84, 84-85 and 85-86 under the provisions of Section 147(a) of the Income Tax Act. In response to notice u/s 148 of the Income Tax Act, the petitioner had filed a revised return in 1987. By order dated 18th November, 1987 the petitioner was called upon to make payment of tax. The petitioner made payment on 21. 12. 1987 as per the orders in respect of assessment years 1982-83, 83-84, 84-85 and 85-86. The petitioner also made payment of tax amount on 7th March, 1988 for the assessment year 1982-83.

4. The petitioner-accused being in custody, submitted an application for discharge u/s 239 CrPC on 28th April, 2009 before the learned Additional Chief Judicial Magistrate and Special Judge, CBI Court No. 2 Ahmedabad, who vide order dated 9th June 2009 rejected the application. Being aggrieved the petitioner has filed the present application.

5. Mr. A. D. Shah learned Advocate for the petitioner has invited attention to the provisions of Section 279 of the Income Tax Act to submit that under the said provision as it stood at the relevant time, a prosecution for an offence u/s 277 and 278 of the said Act, could be instituted only at the instance of the Chief Commissioner or Commissioner. It was submitted that the Charge Sheet papers do not disclose that the proceedings under Sections 277 and 278 of the Income Tax Act are being initiated at the instance of the Chief Commissioner or Commissioner, hence no cognizance could have been taken of offences under Sections 277 and 278 of the said Act on the basis of the charge sheet filed by the Police Inspector of CBI.

6. Next, it is submitted that in absence of any forged documents being produced before the Officers of the Income Tax Department during assessment proceedings, the charge u/s 467 IPC could not have been leveled, more particularly when no charge sheet is submitted for use of forged documents as genuine knowing the same to be forged. Referring to the contents of the charge sheet, it is submitted that the only averment emerging therefrom is relating to false recital in the return of income tax for claiming exemption under the provisions of income tax Act. Referring to the provisions of Sections 463, 464, 467 and 468 IPC it is submitted that a false claim by itself would not be a forgery of a return, hence, prima facie the provisions of Section 463 IPC and 277 of the Income Tax Act would not be attracted. It is contended that the return filed by the petitioner in respect of his assessment proceedings and the alleged false recital for making claim under the provisions of income tax Act cannot be considered as forgery and thus no offence can be said to have been made out u/s 467 IPC. Reliance is placed upon a decision of the Supreme Court in Devendra

and Others Vs. State of U.P. and Another, for the proposition that in view of the definition of "forgery" making of any false document is the sine qua non therefor. What would amount to making of a false document is specified in Section 464 CrPC. What is, therefore, necessary is to execute a document with the intention of causing it to be believed that such document inter alia was made by the Authority of a person by whom or by whose Authority he knows that it was not made. It is submitted that in the facts of the present case, it is nobody's case that the petitioner has executed any document with the intention of causing it to be believed that the such document was made by the Authority of a person by whom or by whose Authority he knows it was not made. Reliance is also placed upon a decision of this Court in State of Gujarat v. Motibhai Jethabhai Makwana, 1992 (2) GLH 306 wherein it has been held that in view of the definitions of the terms "forgery" and "making false document" u/s 463 and 464 IPC, the assertion of a false claim in a document does not constitute the document a false one, when it is executed by the party who purports to execute it and there is no intention of causing the belief that it was executed by some other person, real or fictitious. Reliance is also placed upon a decision of this Court in State v. Maganbhai Jivramdas and Another, 1984 GLT 21 for a similar proposition. It is contended that in the circumstances, the basic ingredients of Section 464 are not satisfied, hence, there cannot be said to be any forgery as envisaged u/s 463 IPC so as to constitute an offence punishable u/s 467 IPC.

7. Next it is contended that the income tax return wherein tax-exemption was claimed on certain income had been submitted on the basis of advice of the income tax Practitioner and considering those provisions under which exemption of tax liability was claimed, the exemption was granted by the Income Tax Officer while passing the Assessment Order. It is submitted that even if the tax exemption were not claimed on the advice of an Income Tax Practitioner, the same was subject to the scrutiny of the Income Tax Officer who had all the power to disallow such claim. That even if such claim is wrongly allowed by one Income Tax officer, such claim can be denied by reopening the assessment under the provisions of Section 147(1) of the Income Tax Act. That in the facts of the present case, upon reopening of assessment, the petitioner under the advice of the Chartered Accountant submitted a revised return, which clearly rules out any dishonest intention. It is, accordingly, submitted that when the income tax return is filed on the basis of expert advice that he is entitled to claim some exemptions, then certainly no dishonest intention can be attributed to such assessee who, in view of the expert advice harbours the belief that he is entitled to such claim. Reliance is placed upon a decision of this Court in B. T. X. Chemical Pvt. Ltd. and others v. Suraj Bhan/or his successor, I. T. O. and State of Gujarat, 1989 (1) Crimes 327 wherein this Court has held thus:

"xxx it appears that what would be punishable u/s 276(c) of the income tax Act would be a dishonest intention or a malafide intention and there should be mens-rea for committing a particular crime before an assessee can be prosecuted. All bonafide mistakes made by the assessees while filling in the income tax return

forms would not necessarily amount to an intention to commit crime and if Section 276(c) were to be used for penalising every delinquent assessee on that score, it would wreak havoc".

"3. The second ground which Mr. Bhatt, learned Advocate appearing for the Revenue, urged was that the loss of Rs. 1, 00, 112/-, if it was not deducted by the income tax Officer, would have resulted in an advantage to the assessee by way of double deduction and it was only when the income tax Officer drew the attention of the assessee that the assessee came out with a story that it was a mistake of the Chartered Accountant. Here also there is a snag inasmuch as the assessee could not have escaped with impunity because this loss of Rs. 1, 00, 112/- would have been definitely found out in the next year's opening stock and with the enormous powers with which the income tax Officers are armed for reopening the previous year's assessment, this would certainly have been found out. So, ultimately it would not have resulted in any advantage to the assessee. I, therefore, feel that the complaints were misconceived and would, if allowed to continue, definitely amount to an abuse of the process of the Court."

8. It is submitted that, on source of information, the complaint had been filed by the complainant against the Income Tax Officer who had passed the assessment order and granted refund suspecting his involvement under the provisions of the Prevention of Corruption Act. That when on investigation, the assumption of involvement of the Income Tax Officer for the charges under the Prevention of Corruption Act, have not been substantiated, there is no question of the petitioner attempting to cheat the income tax Department. That, thus the necessary ingredients of the offence u/s 420 IPC are absolutely missing and more particularly, when notice for reopening of the assessment u/s 147(1) was issued, the petitioner had appeared personally before the income tax Officer and pointed out the circumstances on the basis of which revised returns came to be filed and the tax liability under the revised order of assessment was fully discharged. Thus, no offence u/s 420 IPC can be said to have been made out.

9. It is submitted the learned Additional Chief Judicial Magistrate has not properly applied his mind to the ingredients of the offence of forgery, Section 420 IPC as well as on the question of taking cognizance when the proceedings had not been initiated at the instance of the Chief Commissioner or Commissioner. In conclusion, it is submitted that as the necessary ingredients of the offences alleged are not satisfied; and the proceedings have not been initiated at the instance of the Chief Commissioner or Commissioner, the same cannot be permitted to continue and as such are required to be quashed in the interest of justice.

10. Mr. Y. N. Ravani learned Standing Counsel for the respondent No. 2 Central Bureau of Investigation has opposed the application. It is submitted that on facts an offence of cheating is clearly made out, as false averments were made in the income tax return to claim benefits which the petitioner was not entitled to. That merely because subsequently when the assessment was reopened, the petitioner

has paid the amount would not entitle him to be exonerated of the offence committed by him. Inviting attention to order dated 9th June 2009, of the learned Additional Chief Judicial Magistrate, and more particularly the findings recorded in paragraph (3) thereof, it is pointed out that the petitioner had shown taxable income as non taxable income of CCA, HRA, CTD and Leave Encashment and had also wrongfully claimed refund of N. S. C. and its interest. That though the petitioner had not purchased N. S. C., for the purpose of getting tax benefit he had dishonestly and with the intention of cheating the Government of India shown purchase of N. S. C. and other amounts to fraudulently claim tax deductions. It is submitted that in the circumstances, on facts, a case is made out for framing charge u/s 420 IPC and Section 277 of the Income Tax Act. Reliance is placed upon a decision of the Supreme Court in the case of Sanghi Brothers (Indore) Pvt. Ltd. Vs. Sanjay Choudhary and Others, , wherein the Court had in the facts of the said case, found that it was a case where the High Court conceded that there was no offence made out. Charges were framed and therefore the High Court should not have by the impugned order aborted the whole trial. The High Court is wrong in stating that there was no allegation of any criminal intention at the initial stage. It was contended that, as held by the Supreme Court in the said case, even if there is a strong suspicion about the commission of offence and the involvement of the accused, it is sufficient for the Court to frame a charge.

11. As regards the contention that the proceedings could not have been initiated except at the instance of the Chief Commissioner or Commissioner, the learned Counsel is not in a position to show that the complaint was registered at the instance of the Chief Commissioner or Commissioner. However, it is contended that when prosecution has been initiated at the instance of the State, the sanction of the Commissioner is not mandatory. In support of the said contention reliance is placed upon an unreported judgment dated 3rd August, 1990 of the Bombay High Court in State of Maharashtra and First income tax Officer v. Narayan Champalal Bajaj and another, rendered in Criminal Appeal No. 195 of 1987 and Criminal Revision Application No. 153 of 1987, wherein it has been held thus:

"6. Contravention of the prohibitory order purported to be under sub-Section (3) of Section 132 is made punishable u/s 275A of the Act. Section 279 of the Act, as it then stood, provided that a person shall the instance of the Chief Commissioner or Commissioner. As per the mandate of the provisions, it follows that the income tax Department cannot proceed or prosecute the offender who has committed a breach of the prohibitory order except at the instance or with the Authority of the Commissioner of the Department. In the instant case, it is true that the report to the police station has been made by P. S. -2, Krishnamachari, vide exhibit 16. However, P. W. -2, Krishnamachari, the local income tax Officer, in his report, after narrating the incident had merely prayed for registration and investigation of the offences. After completion of the investigation the State has launched the prosecution. In the case before us, the

prosecution of the accused-respondent is neither on the complaint nor by the complainant. The prosecution being at the instance and on behalf of the State, Section 279 of the Act has no application."

It is, accordingly, submitted that in the present case the prosecution is at the instance of the State and not the income tax Authorities, and as such, the provisions of Section 279 of the income tax Act would not be applicable. It is submitted that in the facts of the present case a cognizable offence is clearly disclosed, hence, no case is made out for intervention by this Court in exercise of powers u/s 482 of the Code.

12. In rejoinder Mr. Shah, learned Advocate for the petitioner has submitted that the reference to the NSC certificates in the order passed by the learned Additional Chief Judicial Magistrate is misconceived inasmuch as there is nothing in the charge sheet or the record in support of such findings. That it was never the case of the Investigating Officer or the Department that NSC purchases had been considered in any assessment order. Referring to the order passed by the learned Additional Chief Judicial Magistrate it is submitted that the learned Judicial Magistrate has mainly been swayed by the fact that the petitioner had not purchased NSC certificates and yet claimed tax deduction in respect thereof, which is contrary to and dehors the record of the case. It is submitted that the findings arrived at by the learned Additional Chief Judicial Magistrate being based on irrelevant factors, it cannot be said as to, to what extent such factors have weighed with the learned Judge and as such the said order stands vitiated as being based in irrelevant facts.

13. As regards the contention that the prosecution having being initiated at the instance of the State the provisions of Section 279 of the income tax Act would not be applicable, it is submitted that such an interpretation would be contrary to the legislative intent in enacting the provisions of Section 279 of the income tax Act, inasmuch as what could not have been done directly in view of the legislative mandate cannot be permitted to be done indirectly. Reliance is placed upon a decision of the Calcutta High Court in *Hiralal Banka and others v. P. S. Bose and others*, 1994 Tax. L. R. 712 for the proposition that the police cannot investigate offences u/s 277 and 278 of the income tax Act on their own Authority and that prosecution in respect of the said offence can be launched only with the previous sanction of the Chief Commissioner etc.

14. In the background of the facts and contentions noted hereinabove, the questions that arise for determination are firstly as to whether, on facts, any offence as alleged is made out and secondly as to whether the investigation in the matter by the CBI is unauthorized in law as the same has not been initiated at the instance of the Chief Commissioner or Commissioner as required u/s 279 of the income tax Act.

15. The petitioner herein is alleged to have committed the offences punishable under Sections 420 and 467 of the Indian Penal Code and Sections 277 and 278

of the income tax Act. The allegations as borne out from the charge sheet are that the petitioner had (1) filed income tax return for the assessment year 1983-84 twice and had obtained refund by misrepresentation of facts and thereby cheated the income tax Department and (2) submitted false statements in his returns for the assessment years mentioned therein and had obtained wrongful gain to himself and corresponding loss to the Government of India. Thus, insofar as the offence of cheating is concerned the same is based upon the accusation that the petitioner has submitted income tax returns twice for the same assessment year and obtained refund thereby cheating the department. The facts as emerging from the record reveal that initially the allegation as regards the return for the period 1983-84 was that Shri Bhagat, income tax officer, in collusion with the petitioner and others accepted the returns on the same day and passed orders of refund and thereby caused pecuniary advantage to the petitioner-accused. The charge sheet is filed against the petitioner alone and Shri Bhagat is not prosecuted. If the petitioner had obtained the order of refund in collusion with the Income Tax Officer, there would be no question of his obtaining the order by cheating, inasmuch as the said officer would not have been induced to pass the order through deception or fraud as envisaged u/s 415 IPC so as to attract the provisions of Section 420 IPC. Since the said officer is not named as an accused in the charge sheet assuming that he had been misled into granting the refund, the case would be squarely covered by the decision of this Court in B. T. X. Chemicals Pvt. Ltd (supra) viz. the accused assessee would not have escaped with impunity in view of the enormous powers which the income tax Officers are armed for re-opening the previous year's assessment. So ultimately, as has happened in the present case, it would not result in any advantage to the assessee. Besides on facts, upon notice for reassessment u/s 147(1) of the income tax Act being issued, a revised return was filed and the liability as determined by the income tax Officer was duly discharged by the petitioner. Thus, ultimately the petitioner has not gained any advantage, nor has any loss been caused to the Government of India. In the circumstances, prima facie no offence u/s 420 IPC is made out.

16. As regards the offence u/s 467 IPC, neither the allegations made in the first information report nor in the charge sheet satisfy the ingredients of the same. The allegation is to the effect that there are false statements in the income tax returns. It is not even the case of the prosecution that there is any forgery or that any forged document has been submitted before the income tax Authorities. As held by the Supreme Court as well as this Court in the decisions cited hereinabove, to attract the provisions of Section 464 it is necessary to execute a document with the intention of causing it to be believed that such document inter alia was made by the Authority or a person whom or by whose Authority he knows it was not made. Unless the ingredients of Section 464 are satisfied, there cannot be said to be any forgery within the meaning of the said expression as laid down u/s 463, so as to constitute an offence u/s 467 IPC. In the circumstances, no case whatsoever is made out for invocation of Section 467 IPC

against the petitioner.

17. Insofar as the offence u/s 277 of the income tax Act is concerned, what is provided as an offence u/s 277 is the making of a statement in any verification under the Act or under any rule made thereunder, which the person either knows or believes to be false or does not believe to be true. Insofar as the ingredients of the Section 277 are concerned, if the petitioner has submitted an income tax return claiming certain benefit on the basis of the advice of the income tax practitioner, prima facie the provisions of Section 277 would not be satisfied inasmuch in that case it cannot be said that such statement has been made by him knowing or believing the same to be false or that he does not believe the same to be true. However, considering the finding of fact recorded by the learned Additional Chief Judicial Magistrate that there is no clear letter on record which could be said that the complaint was registered at the instance of the Chief Commissioner, it would not be necessary to go into the question as regards the applicability of the said provision. Section 279 (1) of the income tax Act, as it stood at the relevant time, mandates that prosecution for the offence u/s 277 and 278 of the income tax Act, can be instituted only at the instance of the Chief Commissioner or Commissioner. On facts, Mr. Ravani learned Standing Counsel for the CBI is not in a position to dispute the fact that the proceedings u/s 277 and 278 have not been initiated at the instance of the Chief Commissioner or Commissioner. Taking support of the decision of the Bombay High Court in the case of State of Maharashtra v. Narayan Champalal Bajaj (supra), on behalf of the respondent CBI, it has been contended that when the investigation is at the instance of the State, the provisions of Section 279 would not be applicable, hence, in such cases, as in the present case, it was not necessary that the proceedings be instituted at the instance of the Chief Commissioner of Commissioner. On the other hand the said contention is strongly resisted by the learned Advocate for the petitioner who has placed reliance upon the decision of the Calcutta High Court in Hiralal Banka (supra) wherein it has been held thus:

"It is also to be noted in this connection that sub-Section (1) of S. 279 of the income tax Act provides that a person shall not be proceeded against for an offence u/s 275A, S. 276, S. 276A, S. 276B, S. 276BB, S. 276C, S. 276CC, S. 276D, S. 277 or S. 278 except with the previous sanction of the Chief Commissioner or Director-General or Commissioner unless the prosecution is at the instance of the Commissioner (Appeals) or of the appropriate Authority referred to therein. S. 279A of the income tax Act provides that notwithstanding anything contained in the Cr. P. C. 1973, an offence punishable under S. 276B or S. 276C or S. 276CC or S. 277 or S. 278 shall be deemed to be non-cognizable within the meaning of that Code. Reading S. 279 A and S. 279 together, it is evident that offences under S. 277 and S. 278 of the income tax Act are not cognizable offences and as such the police have no power of their own to investigate any such offence and any prosecution for any such offence can be launched by a complaint with the previous sanction of the Chief Commissioner or Director-General or Commissioner. As we have seen the FIR in this case mentions

Ss. 277 and 278 of the income tax Act but the offences under the said Sections being non-cognizable the police cannot investigate the same on the basis of their own power as a matter of course although prosecution under those Sections can be launched by filing complaint with the previous sanction or at the instance of any of such Authorities as mentioned in S. 279 of the income tax Act which evidently is not the case here. There is no doubt that the FIR of the present case also includes several Sections of the I. P. C. Such as, Ss. 120B, 420, 468 and 471. From the averments contained in the FIR, it is evident, apparent and transparent that substantially the allegation on the basis of which the investigation has been started is that the petitioners in collusion and conspiracy with others evaded payment of proper income tax and also submitted income tax returns based on false statements and forged and fabricated materials. The basic offences, if any, being under the income tax Act the requirement regarding sanction for prosecution and the bar of lack of Authority on the part of the police to investigate such offences in view of the specific provisions of the income tax Act cannot be circumvented by inclusion of some other ancillary offences under the Indian Penal Code which are only components of or rather only incidental to or instrumental in the commission of the basic offences under the income tax Act or which are closely linked up with such offences and which have no separate consequences other than what are sought to be prevented by enacting specific penal provisions in the income tax Act, namely, evasion of tax and steps in that direction. In that view of the matter also, the FIR cannot be sustained simply because offences punishable under certain Sections of the Indian Penal Code, such as, Ss. 420, 468, 471 read with S. 120B have been included in the FIR along with the main offences punishable under the income tax Act which, under law, the police cannot investigate on the basis of their own Authority. "

"6. In view of the discussions made above, it is evident that for any offence punishable under S. 277 or S. 278, income tax Act prosecution cannot be launched except with the previous sanction of the appropriate Authority mentioned in S. 279 of the income tax Act. Obviously no complaint has been filed for the said offences against the petitioners with any such previous sanction and instead, the police or for that matter, the CBI has suo motu recorded an FIR and started investigation in respect of those offences by including therewith certain other offences punishable under the Indian Penal Code although the offences under Ss. 277 and 278 of the income tax Act are non-cognizable in view of the S. 279A of the said Act. Again, in respect of the offences punishable under the IPC, as mentioned in the FIR, the provisions of S. 195(1)(b) are directly attracted so far as S. 468, S. 471 and S. 120B (conspiracy) are concerned and therefore, police investigation in respect of those offences in this case is a mis-directed and unauthorized action on the part of the CBI in view of the provisions of the said S. 195, Cr. P. C. read with S. 136 of the income tax Act. For our consideration there now remains only S. 420 IPC, which has been included in the FIR along with the other Sections discussed earlier. Even if it is accepted that S. 420, IPC is prima facie attracted in this case on the assumption that the petitioners committed the

offence of cheating and thereby dishonestly induced the concerned income tax officer to issue income tax Assessment Certificate, this is an offence which, in view of the allegations in the FIR, is closely linked up and; associated with and is wholly based on the other offences alleged in the FIR for which prosecution can be launched or initiated only at the instance of the appropriate income tax Authorities and not at the instance of the police. Having regard to the objects of the different provisions of the income tax Act that in respect of the offences relating to evasion of income tax, it is the appropriate income tax Authorities who are to initiate actions, to the exclusion of others, in the manner provided by law for the purpose, it will be an abuse of the process of law and will frustrate the very purpose of engrafting the different-provisions of law as discussed above restricting the right to initiate prosecution in respect of offences under the income tax Act or relating to income tax assessment proceedings to certain Authorities only, if the police is allowed to undertake suo motu, contrary to the provisions of law, investigation in respect of offences regarding the prosecution for which special provisions are there, simply by incorporating S. 420 IPC in the FIR where such offence is closely linked up and associated with and is wholly based on those very offences which in view of the special provisions of law the police is not empowered to investigate. The salutary provisions of Ss. 279, 279A, 136 of the income tax Act and S. 195 of the Code of Criminal Procedure, which the legislature in its wisdom thought it fit to enact for a wholesome purpose, will virtually stand scrapped from the statute books if the police is granted the liberty to undertake an investigation suo motu in respect of the very same matters squarely coming within the purview of the said provisions of law, by simply superadding thereto a label of S. 420, IPC."

18. A perusal of the judgment of the Bombay High Court shows that the said Court has not taken into consideration the provisions of Section 279A, which lay down that the offences u/s 277 and 278 of the Act are non-cognizable. This Court is in complete agreement with the above referred view taken by the Calcutta High Court. In the opinion of this Court, the view taken by the Calcutta High Court that reading Section 279A and Section 279 together, it is evident that offences u/s 277 and 278 of the income tax Act are not cognizable offences and as such the police have no power of their own to investigate any such offence and any prosecution for any such offence can be launched by a complaint with the previous sanction of the Chief Commissioner, is the correct view. On the facts of this case, as the relevant period pertains to the year 1988, the prosecution could only have been launched at the instance of the Chief Commissioner or Commissioner.

19. As rightly contended on behalf of the petitioner, in view of the checks and balances as provided under the income tax Act itself, Section 279 has been enacted with a view to protect the assesseees from false or malicious prosecution. Since, assessment orders are subject to further examination in appeal, revision etc., unless the Authority comes to a definite conclusion as regards the commission of an offence u/s 277 of the Act, no prosecution can be instituted.

That is why such power is vested in the Chief Commissioner or Commissioner so that prosecutions are launched with circumspection and due responsibility. The provision of Section 279 which has been enacted for the benefit of the assessee cannot be permitted to be circumvented under the specious plea that prosecution is not launched by the income tax Authorities but by the State. It is settled legal position that when a statute provides for a thing to be done in a particular manner, it can be done in that manner alone. When the income tax Act provides that prosecution shall be at the instance of the Chief Commissioner or Commissioner, it has to be done in that manner alone, and the respondent CBI cannot be heard to contend otherwise.

20. In view of the above discussion, this Court is of the view that no offence is made out u/s 467 IPC. Prima facie the ingredients of the offence u/s 420 are also not satisfied. Insofar as the offences u/s 277 and 278 of the income tax Act are concerned, no proceedings could have been initiated except at the instance of the Chief Commissioner or Commissioner. When proceedings for the offences u/s 277 and 278 of the Income tax Act, which are the main offences giving rise to the prosecution, are required under law to be initiated only by the Chief Commissioner or Commissioner, the CBI/police is not empowered to investigate on its own merely by incorporating the provisions of Section 420 and 467 IPC.

21. In the result the application succeeds and is, accordingly, allowed. The proceedings of Special Case No. 58/2004 pending in the Court of the Additional Chief Judicial Magistrate and Special Judge (CBI) 2nd Court, Ahmedabad are hereby quashed. Rule is made absolute accordingly. At this stage, the learned Advocate for the petitioner has submitted that the petitioner is in custody in connection with the offence in question. In the circumstances, the petitioner shall be set at liberty forthwith if not required in connection with any other offence. Direct Service is permitted.