K. T. M. S. Mohd. and another

Vs

Union of India

Criminal Appeal Nos.631 with 632 of 1990

(S. R. Pandian Ms. M. S. Fathima Beevi JJ)

28.04.1992

JUDGEMENT

S. RATNAVEL PANDIAN, J.

1. The Criminal Appeal No. 631/ 90 is directed by the two appellants namely, K. T. S. Mohammed and M. Jamal Mohamed and Criminal Appeal No. 632/ 90 is directed by Amanullah Quareshi. All the three appellants are challenging the correctness of the common order made by the High Court of Madras in Criminal Revision Cases Nos. 229/81 and 239/81 respectively dismissing the revisions and confirming the judgment of the lower appellate Court made in Cr.A. Nos. 221 and 222 of 1980 which in turn affirmed the judgment of the trial Court convicting and sentencing the appellants under the provisions of the Indian Penal Code and the Income-tax Act (hereinafter referred to as the I.-T. Act).

2. The facts leading to the prosecution case are well set out in the judgments of the Courts below. Nevertheless, we think it necessary to recapitulate the basic matrix, though not in details, in order to enable us to give our own reasons for the findings which we will be arriving at.

3. The first appellant who is the brother-in-law of the second appellant received a cash of Rs. 6 lakhs, brought by a person from Bombay for distributing the said amount to various persons as per the instructions received from a person at Singapore. While he was engaged in the said illegal transaction, the Enforcement Directorate, Madras raided his premises at No. 34, Appu Maistry Street, Madras- 1 on 19-10,66 and recovered a sum of Rs.4,28,713/- and certain documents in coded language relating to the disbursement of the cash. After the search the first appellant K. T. M. D. Mohammed was interrogated by Shri Amritalingam, Enforcement Officer of Madras (PW 4) and the second appellant, Jamal Mohammed was interrogated by Shri Pancheksharan, Enforcement Officer on 19-10-66 and their statements were recorded under Exhs. P 39 and P 40. The first appellant under Exh. P 39 has admitted that he (sic) a sum of Rs. 6 lakhs from a person of Bombay on the previous day for being disbursed to various parties, and that Rs. 50,000 / - and Rs. 48,000 / - were paid to one Baskaran alias Kannan and Angappan of Sarathy & Co. respectively and the amounts were disbursed on receipt of instructions from one Gopal of Singapore whose full address he did not know. The second appellant in his statement Exh. P 40 has admitted the receipt of the amount by the first appellant and the disbursement of Rs. 50,000/- to Bhaskaran and Rs. 40,000/to Angappan as instructed by the first appellant in compliance of the instructions received from Singapore.

4. The Enforcement Officers conducted a further search at the premises of Sarathy and Co., and discovered a cash amount of Rs.48,100/- and three bank drafts. Angappan when examined admitted the receipt of Rs. 49,000/ - for being disbursed as per the details given in certain sheets of paper

available with him.

5. On 20-10-66, both the appellants sent their retraction to the Deputy Director of Enforcement Directorate through their Advocate stating that their statements recorded under Exhs. P 39 and P 40 on 19-10-66 were not voluntary statements but obtained under threat and force and the facts stated therein were not correct.

6. While it was so, the Income-tax Officer, Karaikudi (PW 1) on coming to know about the raid, issued summons to the first appellant who was then an assessee within his jurisdiction and recorded a statement Exhibit P 3 from him on 16-11-66. The first appellant denied of having any connection with the cash of Rs. 4,28,718/ - said to have been recovered from his premises and reiterated that the statement by the Enforcement Officers was taken from him under force. The second appellant also gave a similar statement under Exh. P 73 on 11-1-74 before PW 8 when examined after eight years. The appellant in Criminal Appeal No. 632/ 90, namely, Amanullah who was arrayed as accused No. 3 (hereinafter referred as 'third appellant' sent a letter under Exh. P 41 dated 4-11-66 to the Enforcement Officers claiming the money seized as belonging to him and explaining that he was negotiating with some film producers for financing film production and the seized amount included a sum of Rs. 2,79,000/- being the sale proceeds of his bother's jewels and Rs. 70,000/- being his father's money and therefore the said amount should be returned to him. Thereafter, the third appellant gave a statement before the Enforcement Officers on 22-12-66 reiterating what he has stated in his letter dated 4-11-66.

7. In view of the subsequent developments, proceedings were initiated against the third appellant under the provisions of the I.-T. Act. The third appellant submitted his return of income for the years 1967-68 to the Income-tax Officer accompanied by statements showing the business income at Rs. 4,000 and that a sum of Rs. 2,79,000 was realised by him by sale of rubies and jewels belonging to his mother, Smt. A. M. Safia who was arrayed as accused No. 4 in the complaint. PW 8 on enquiry found that the third appellant was not in affluent position and as such he could not have accumulated such huge sum and that his statement about the sale of the family jewels was false.

8. After rejecting the claim of the third appellant, the amount of Rs. 6 lakhs said to have been received by the first appellant has been treated as the income of the first appellant from some undisclosed sources and the first appellant was assessed under the relevant provisions of the I.-T. Act. According to the complainant, all the appellants have conspired together to give false evidence at all stages of the proceedings under the I.-T, Act. and to fabricate false evidence intending that the same might cause the Income-tax Officer to arrive at an erroneous opinion touching the nature and source of the sum of Rupees 4,28,713/- which is alleged to have been recovered from the first appellant and that all the appellants thereby have committed the offences punishable under S. 120-B, I.P.C. read with S. 193, I.P.C, under S. 120-B read with S. 277 of the I.-T. Act and under S. 193 (simpliciter) of Indian Penal Code and in addition the appellants 1 and 3 were indicted under S. 277 (simpliciter) of the Act.

9. On the above allegations, the Income-tax Officer, Central Circle, XIV, Madras filed the criminal complaint before the Chief Judicial Magistrate, Egmore in C. C. No. 356 of 1977 on his file which proceedings have culminated to these appeals.

10. Be that as it may, we would like to refer certain proceedings before the Income-tax Authorities which are very much relevant for the disposal of these appeals.

11. The Income-tax Officer on the basis of the statement of the first appellant given before the Enforcement Authorities found that the amount of Rs. 6 lakhs was the income from other sources of the assessee (the first appellant) and that the explanation given by him was not satisfactory and included that amount in his taxable income. The Appellate Assistant Commissioner agreed with the ITO but the Income-tax Appellate Tribunal held that the department had not brought any material to show that the assessee was the owner of the money in question and that the evidence only indicated that the assessee had been engaged for disbursing the money not belonging to him but belonging to a third party. On the above finding, the Tribunal set aside the assessment order and referred the case back to the I-T.O. to make a fresh assessment. But the ITO again made the same type of assessment. The first appellant took his statutory appeals under the Act and ultimately went before the Tribunal once again which by its order dated 12-5-1980 allowed the appeal of the assessee namely the first appellant and dismissed the cross objection of the department. In the meantime, the criminal proceedings against these three appellants were initiated in January 1977. To substantiate the case, the prosecution examined 12 witnesses and marked Exhs. P 1 to P 87. The appellants did not examine any witness but filed Exhs. D 1 to D 4. The Tribunal Court accepting the evidence adduced by the prosecution, convicted and sentenced the appellants by its judgment which was confirmed in C. A. Nos. 221 and 222 of 1980 on the file of the Vth Additional Judge, Madras. In the result, the three appellants stood convicted under S. 120-B read with S. 193, I.P.C. and S. 277 of the I.-T. Act besides under S. 193, I.P.C. and appellants Nos. 1 and 3 separately under S. 277 of the I.-T. Act. But coming to the question of sentence, the trial Court taking into consideration of the fact that the appellants were detained under COFEPOSA in respect of the amount seized and they have also undergone the ordeal of enquiries and trial for a considerable length of time sentenced each of them to undergo imprisonment till the rising of the Court for each of the offences and to pay a total fine of Rs. 2,000/-, Rs. 600/- and Rs. 1,500/- respectively with the default clause.

12. Being aggrieved by the judgment of the first appellate Court confirming the judgment of the trial Court, two revisions were filed before the High Court as aforementioned. The High Court for the reasons mentioned in its order confirmed the judgment of the first appellate Court and dismissed the revisions. Hence these two appeals.

13. Mr. A. T. M. Sampath, the learned counsel appearing on behalf of the appellants assailed the impugned order of the High Court raising multiple questions of law the core of which is formulated hereunder:

> 1. The evidence - both oral and documentary - produced by the complainant does not constitute the requisite ingredients to make out a case punishable under the charges levelled against all the three appellants.
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> 2. In view of the specific findings of the Income-tax Appellate Tribunal in its order - Exh. D 4 (enclosed as Annexure 'J' to the tax appeal papers) that the assessee is not the owner of the money seized, that "any other conclusion of ownership will only be perverse and uncalled for" and that "so Section 69-A of the Income-tax Act has no application to the facts of the case", appellants 1 and 2 on the basis of Exhs. P 39 and P 40 cannot be held to nave intentionally resiled from their earlier stand when subsequently examined by the Income-tax Authorities thereby making themselves liable to be punished under S. 193, IPC for perjury and under S. 277 of the I.-T. Act for making false statements in verification.
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> 3. The accusation made in the notice issued to the first appellant dated 8-5-70 by the

Income-tax Officer, Karaikudi stating "on 19-10-66 you have admitted in your statement before the Enforcement Directorate that the amount belongs to you ..... Subsequently on 28-2-67 you have sent a letter to this office wherein you had denied ownership of the amount above" is factually incorrect because at no point of time, the first appellant as pointed out by the Income-tax Appellate Tribunal had admitted the ownership of the amount. Therefore, the very basis of the notice for launching the prosecution under Sections 193, IPC and 277 of the I.-T. Act is absolutely unsustainable.

4. The statements recorded from appellants 1 and 2 under Exhs. P 39 and P 40 by the Officers of the Enforcement Directorate fall only within the meaning of S. 39 of FERA and those statements, therefore, cannot be made use of for initiating a criminal case of perjury in the absence of any legal fiction bringing the investigation or proceeding as a judicial proceeding within the meaning of Ss. 193 and 228, IPC as contemplated under S. 40(4) of FERA.

5. The Income-tax Officer in exercise of his power under Section 136 of 1.-T. Act cannot make use of the statements recorded by the Enforcement Directorate (an independent authority) under the provisions of the special Act - namely, FERA, for prosecuting the deponents of those statements in a separate and independent proceeding under another special Act namely the I.-T. Act on the ground that the deponents have retracted their statements given before the authorities of the Enforcement Directorate.

6. If any criminal proceeding is initiated under FERA against the appellants 1 and 2 on the strength of their statements Exhs. P 39 and P 40 recorded under S. 39 of FERA the appellants herein would partake the characteristic of an accused or become an accused of an indictable offence, and therefore, on a mere denial, normally, the appellants should not be subjected to face the grave charge of perjury, unless such a serious action is warranted.

7. The third appellant cannot be held to have committed the offences charged merely because he has failed to establish his consistent rightful claim of the amount of Rs. 4,28,713 / - as being the sale proceeds of his mother's jewels.

8. The Courts below ought to have seen that Exh. P 18, the Income-tax returns filed by the third appellant was accepted on enquiry and though reopened belatedly it still stands incomplete in spite of several years.

9. The evidence available on record is not sufficient to put the third appellant in a joint trial along with appellants 1 and 2 under the conspiracy charge as well as for recording the conviction under Ss. 193, IPC and 277, I.-T. Act especially when the third appellant has consistently taken an uniform stand and when it is not the case of the Department that the amount of Rs. 4,28,713 was taxable amount in the hands of the third appellant.

10. The cognizance of the offence under Ss. 120-B read with 193 and 193 (simpliciter) was taken beyond the period of limitation, prescribed under Section 468 of the Code of Criminal Procedure.

14. Before pondering over the above contentions, we would like to make reference to certain salient facts for proper understanding and appreciation of the issues involved.

15. The Officers of the Enforcement Directorate conducted the raid and seized the amount on 19-10-66 on which day itself the statements under Exhs.P39 and P40 were recorded from the appellants 1 and 2 by the Officers of the Enforcement Directorate. On the very next day i.e. on 20-10-66 both the appellants sent their retraction to the Director of Enforcement through their Advocate stating that the statements were involuntary and bereft of truth. While it was so, the I-T.O. of Karaikudi recorded the statement of the first appellant on 16-11-66. Meanwhile, the third appellant sent a letter to the Enforcement Officers claiming that he was the owner of the said amount of Rs. 4,28,713/- and asked for the return of the same. On 22-12-66 the third appellant gave a statement before the Enforcement Officers explaining how the said amount came into his possession. But that explanation was not accepted. In view of the above developments, proceedings were taken against the third appellant under the provisions of the I.-T. Act. The third appellant on 1-3-67 submitted his return of income on 27-2-67 for the assessment year 1967-68 accompanied by a statement showing the business income at Rs. 4,000/-. The fourth accused before the trial Court who died during the proceedings gave a sworn statement on 2-5-67 before the I-TO stating that she gave a cash amount of Rs. 70,000/ - to the third appellant and also one necklace studded with red stones and two bangles studded with blue stones besides some ornaments. The statement of the fourth accused was also not accepted. The fifth accused (since acquitted) gave a statement on 11-8-70 before the I-TO denying the receipt of any amount from the appellants 1 and. 2 on 18-10-66. Thereafter, appellants 1 and 3 gave separate statements on 27-2-71 and 4-11-71 respectively. The second appellant gave his statement before the I-TO on 11-1-74 repudiating his earlier statement dated 19-10-66 (Exh.P 40) and stated that the said statement was obtained under duress. On the basis of the above statements and subsequent correspondence, it is stated that appellants Nos. 1 to 3 and accused No. 5 have committed the offences punishable under S. 120-B read with S. 193, IPC and S. 120-B read with S.277 of the I.-T. Act.

16. The trial Court after having considered the allegations of the complaint, indicted the accused inclusive of the appellants thus:

17. The first and second appellants wilfully caused the Advocate's letter dated 20- 1066 with a false statement; that they, thereafter gave separate statements dated 16-11-66 and 11-1 -74 respectively before the I-TO repudiating their earlier statements given before the Enforcement Officers and that they thereby, have committed an offence punishable under Section 193, IPC. Similarly, the third appellant not only by fabricating a letter dated 10-10-66, but also by filing a false affidavit dated 23-3-67 and thereafter by making a false statement before the I-TO on 4-11-71 has made himself liable to be punished under S. 193, IPC. In addition, accused No. 1 has committed an offence under S. 277 of the I.-T. Act by delivering a letter to the I-TO on 27-2-71 containing a false statement that his statement under Exh. P 39 was not true and obtained under duress. Accused No. 3 has also committed similar offence under S. 277 of the I.-T. Act by wilfully delivering to the I-TO a false statement dated 1-3-67 claiming the amount of Rs. 4,28,713 / - as belonging to him. Accused No. 5 has made him liable for the offence under S. 277 by delivering a false statement to the I-TO on 1 1-8-70 denying the receipt of a sum of Rs. 50,000/ - on 18- 10-66.

18. Be that as it may, a perusal of the entire records shows that the gist of the allegations levelled against these appellants is that the appellant No. 1 disowned his ownership of the amount contrary to the version in Exh. P 39 and the appellant No. 2 has repudiated the statement given under Exh. P 40 and that the appellant No. 3 made a false claim and that, thus, all the three appellants did, so only

in pursuance of a conspiracy.

19. Though a specific ground is taken in the appeal grounds that Exhs. P 39 and P 40 are clearly relatable to the provisions of S. 39 of FERA and that no other statement was taken on oath, the respondent namely the Union of India represented by the Commissioner of Income-tax, Central Circle, Madras has not filed any counter denying that plea. Therefore, we are constrained to hold that Exhs. P 39 and P 40 were recorded by the officers of the Enforcement in exercise of the power conferred under S. 39 of the Act.

20. Section 39 of FERA empowers the Director of Enforcement or any other Officer of Enforcement authorised by the Central Government in this behalf, (i) to require any person to produce or deliver any document relevant to the investigation or proceeding and (ii) to examine any person acquainted with the facts and circumstances of the case. Section 40 of FERA qualifies the officers stating that the Officer of Enforcement empowered to summon any person to give evinence and produce documents must be a gazetted officer.

21. The exercise of the power under S. 40 of FERA to summon persons to give evidence and produce documents must satisfy the condition that the officer acting under that Section should be a gazetted officer of Enforcement which is similar to Sec. 108 of the Customs Act. That is so because every person summoned by a gazetted officer of Enforcement to make a statement, under sub-sec. (1) of S. 40 is under a compulsion to state the truth on the pain of facing prosecution in view of sub-sec. (4) there of To say in other words, if the officer exercising the powers under S. 40 is not clothed with the insignia of a gazetted post, there is no sanctity attached to the statements recorded under S. 40(1) of FERA.

This Court in Pushpadevi M. Jatia v. M. L. Wadhawan, (1987) 3 SCC 367: (AIR 1987 SC 1156),while dealing with the intent of S. 40 of FERA held as follows:

> "All that is required by S. 40(1) of the FERA is that such officer recording the statement must be holding a gazetted post of an officer of Enforcement in contradistinction to that of an Assistant Officer of Enforcement which is a non-gazetted post." ..... In our opinion, the expression 'gazetted officer of Enforcement appearing in S. 40(1) must take its colour from the context in which it appears and it means any person appointed to be an officer of Enforcement under S. 4 holding a gazetted post."

22. Every investigation or proceeding under S. 40 is deemed to be a judicial proceeding by a legal fiction embodied in sub-sec. (4) of that Section though the proceedings are neither in nor before any Court at that stage. But there is no such deeming provision under S. 39 of FERA bringing every investigation or proceeding in its ambit as "a judicial proceeding" within the meaning of Ss. 193 and 228 of the Indian Penal Code. When it is so, as rightly pointed out by Mr. A. T. M. Sampath, the statements recorded under Exhs. P 39 and P 40 cannot be brought as having been recorded in ' judicial proceeding' so as to make use of them as the basis for fastening the makers of those statements with the criminality of the offences under Ss. 193 and/ or 228 of the Indian Penal Code on the ground that the deponents of those statements have retracted from their earlier statements in a subsequent proceeding which is deemed to be 'a judicial proceeding'.

23. It is pertinent to note in this connection that in the manner of recording a statement under S. 40 of FERA there are no safeguards as. in the case of recording a statement of an accused under S. 164

of the Criminal Procedure Code by a Magistrate. Nevertheless, before receiving that statement in evidence and making use of the same against the maker, it must be scrutinised to find out whether that statement was made or obtained under inducement, coercion, threat, promise or by any other improper means or whether it was voluntarily made. There is a catena of decisions of this Court that the statements obtained from persons under the provisions of FERA or the Customs Act, should not be tainted with any illegality and they must be free from any vice. In the present case, we have to hold as pointed out ibid that the statements under Exhs. P 39 and P 40 were recorded only under S. 39 but not under S.40 of the FERA.

24. Needless to emphasise that the FERA and the I.-T. Act are two separate and independent special Acts operating in two different fields.

25. This Court in Subba Rao v. I. T. Commr., AIR 1956 SC 604: 1956 SCR 577, has pointed out (para 16 of AIR):

> "The Indian Income-tax Act is a self contained Code exhaustive of the matters dealt with therein, and its provisions show an Intention to depart from the common rule, qui facit per alium facit per se."

26. Further, in M/s. Pannalal Binjraj v Union of India, AIR 1957 SC 397:1957 SCR 233, it has been observed thus (para 27 of AIR):

> "It has to be remembered that the purpose of the Act is to levy income-tax, assess and collect the same. The preamble of the Act does not say so in terms it being an Act to consolidate and amend the law relating to income-tax and super tax but that is the purpose of the Act as disclosed in the preamble of the First Indian Income-tax Act of 1886 (Act 11 of 1886). It follows, therefore, that all the provisions contained in the Act have been designed with the object of achieving that purpose."

27. Coming to the FERA, it is a special law which prescribes a special procedure for investigation of breaches of foreign exchange regulations. Vide Shanti Prasad Jain v. The Director of Enforcement, (1963) 2 SCR 297: (AIR 1962 SC 1764). The proceedings under the FERA are quasi-criminal in character. It is pellucid that the ambit, scope and intendment of these two Acts are entirely different and dissimilar.

28. Therefore, the significance of a statement recorded under the provisions of FERA during the investigation or proceeding under the said Act so as to bring them within the meaning of judicial proceeding must be examined only qua the provisions of the FERA but not with reference to the provisions of any other alien Act or Acts such as I.-T. Act.

29. If it is to be approved and held that the authorities under the I.-T. Act can launch a prosecution for perjury on the basis of a statement recorded by the Enforcement Officer then on same analogy the Enforcement authority can also in a given situation launch a prosecution for perjury on the basis of any inculpatory statement recorded by the Income-tax Authority, if repudiated subsequently before the Enforcement authority. In our opinion, such a course cannot be and should not be legally permitted.

30. Leave apart, even if the officers of the Enforcement intend to take action against the deponent of a statement on the basis of his inculpatory statement which has been subsequently repudiated, the officer concerned must take both the statements together, give a finding about the nature of the

repudiation and then act upon the earlier inculpatory one. If on the other hand, the officer concerned bisect the two statements and make use of the inculpatory statement alone conveniently by passing the other such a stand cannot be a legally permissible because admissibility, reliability and the evidentiary value of the statement of the inculpatory statement depend on the bench mark of the provisions of the Evidence Act and the general criminal law.

31. Next we shall pass on to examine the admissibility and evidentiary value of a statement recorded by an Enforcement authority in exercise of his power as in the case of a customs officer.

32. This Court in Vallabhdas Liladhar v. Asstt. Collector of Customs, AIR 1965 SC 481: (1965) 3 SCR 854, while dealing with the question of admissibility of the statements made-before the Customs Officers held, "Section 24 would however apply, for customs authorities must be taken to be persons in authority and the statements would be inadmissible in a criminal trial if it is proved that they were caused by inducement, threat or promise." In a subsequent decision P. Rustomji v. State of Maharashtra, AIR 1971 SC 1087: 1971 SCR (Supp) 35, wherein this Court while answering a question as to whether S. 24 of the Evidence Act is or is not a bar to admissibility in evidence of a statement made by a person to Customs Officers in an enquiry under S. 108 of the Customs Act held, "In order to attract the bar, it has to be such an inducement, threat or promise which should lead the accused to suppose that 'by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceedings against him."

33. We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected brevi manu. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means have been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the FERA or the Customs Act etc. the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order will be vitiated. Reference may be made to a decision of the Full Bench of the Madras High Court in Roshan Beevi v. Joint Secretary to the Govt. of Tamil Nadu, Public Deptt., 1983 Mad LW (Cri) 289: 1984 (15) ELT 289: (1984 Cri LJ 134) to which one of us (S. Ratnavel Pandian, J.) was a party.

34. In this context, reference may be made to Section 340 of the Code of Criminal Procedure under Chapter XXVI under the heading "Provisions as to certain offences affecting the administration of justice". This section confers an inherent power on a Court to make a complaint in respect of an offence committed in or in relation to a proceeding in that Court, or as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, if that Court is of opinion

that it is expedient in the interest of justice that an enquiry should be made into an offence referred to in clause (b) of sub-section (1) of Section 195 and authorises such Court to hold preliminary enquiry as it thinks necessary and then make a complaint thereof in writing after recording a finding to that effect as contemplated under sub-section (1) of Section 340. The words "in or in relation to a proceeding in that Court" show that the Court which can take action under this section is only the Court operating within the definition of Section 195(3) before which or in relation to whose proceeding the offence has been committed. There is a word of caution inbuilt in that provision itself that the action to be taken should be expedient in the interest of justice. Therefore, it is incumbent that the power given by this Section 340 of the Code should be used with utmost care and after due consideration. The scope of Section 340(1) which corresponds to Section 476(1) of the old Code was examined by this Court in K. Karunakaran v. T. V. Eachara Warrier, (1978) 1 SCC 18: (AIR 1978 SC 290) and in that decision, it has observed (paras 21 and 26 of AIR):

> "At an enquiry held by the Court under Section 340 (1), Cr.P.C., irrespective of the result of the main case, the only question is whether a prima facie case is made out which, if unrebutted, may have a reasonable likelihood to establish the specified offence and whether it is also expedient in the interest of justice to take such action..... .....
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> .... The two preconditions are that the materials produced before the High Court make out a prima facie case for a complaint and second that it is expedient in the interest of justice to permit the prosecution under Section 193, IPC.

35. The above provisions of Section 340 of the Code of Criminal Procedure are alluded only for the purpose of showing that necessary care and caution are to be taken before initiating a criminal proceeding for perjury against the deponent of contradictory statements in a judicial proceeding.

36. The mere fact that a deponent has made contradictory statements at two different stages in a judicial proceeding is not by itself always sufficient to justify a prosecution for perjury under Section 193, IPC but it must be established that the deponent has intentionally given a false statement in any stage of the 'judicial proceeding' or fabricated false evidence for the purpose of being used in any stage of the judicial proceeding. Further, such a prosecution for perjury should be taken only if it is expedient in the interest of justice.

37. The facts of the present case when examined in the light of the above proposition of law, it can be safely concluded that the statements Exhs. P 39 and P 40 were recorded only in exercise of the powers under Section 39 of the Act and that the prosecution has not established that those statements were recorded by any gazetted officer of the Enforcement under the provisions of Section 40 of the FERA for bringing them within the meaning of 'judicial proceeding'. Even assuming for the sake of arguments that those statements fall within the mischief of Section 40 of the FERA, there is absolutely nothing on record to show that either the sanctioning authority or the prosecuting authority applied its mind even subjectively and found that the appellants 1 and 2 gave their earlier inculpatory statements voluntarily but not under any inducement, coercion, threat or promise; that the deponents have intentionally given a false statement before the ITO at the subsequent stage within the ambit of Section 193, IPC and that it was expedient in the interest of justice to initiate the criminal proceedings for perjury.

38. The statement Exhs. P 39 and P 40 were recorded on 19-10-66 from appellants 1 and 2 as repeatedly pointed out above only under the provisions of FERA. But the subsequent two statements

recorded by the Income-tax Officer from the first and the second appellants on 16-11-66 and 11-1-74 respectively were in exercise of the powers under the provisions of the I.-T. Act It is not the case of the prosecution that these two appellants gave any inculpatory statement before the ITO and thereafter retracted. In fact, the appellants 1 and 2 have retracted their earlier statements even on the very next day which retraction was not taken note of by the ITO. On the other hand, the ITO, Central Circle, XIV, Madras in his reply letter sent on 8th March 1972 addressed to the first appellant has stated as follows:

> "The statement made by you before the Income-tax Officer on 16-11-66, that is long after the statement was made before the Officer of the Enforcement Directorate, immediately after the seizure, and the statement was made before the Income-tax Officer to get over the difficult situation of having to explain the source for the sum of Rupees 60,000/-".

39. The above statement unambiguously shows that the ITO has not taken into consideration of the letter of retraction sent by both the appellants through their lawyer even on 20-10-66 alleging that "they were coerced to sign statements by using bodily force and threatening with causing injuries to them and they signed the statements fearing danger to their life and body." It may be stated in this connection, that only the Enforcement Officer, namely, Shri Amritalingam who recorded the statement from the first appellant alone has been examined as PW 4 and the other Enforcement Officer, Shri Panchaksharam who recorded the statement from the second appellant has neither been cited as a witness in the complaint nor appears to have been examined before the Court.

40. Hence for all the reasons stated supra, hold that the convictions recorded by the Courts below under Sections 120-B read with 193, IPC and 193 (simpliciter) as against the appellants 1 and 2 cannot be sustained. It is very surprising and shocking to note that the complainant has stepped into the shoe of the Enforcement Directorate, and appears to have assumed the authority under the FERA and levelled a charge stating that the appellants 1 and 2 by sending the letter of retraction on 20-10-66 denying their earlier statements dated 19-10-66 have made themselves liable to be convicted under Section 193, IPC (vide paragraph 25(i) of the complaint).

41. Still more shocking, the Trial Court has not only convicted the appellants 1 and 2 for sending the letter of retraction dated 20-10-66 but also found the third appellant and accused Nos. 4 and 5 as having been parties to a conspiracy for causing a letter dated 20-10-66 to be sent to the Enforcement Directorate.

42. The next question for consideration relates to the prosecution under Section 277 of the I.-T. Act.

43. In the notice issued by the ITO, Karaikudi dated 8-5-70 asking the first appellant to appear before him, the ITO has stated as follows..

> "Thus in your statement before the Enforcement Directorate you have owned the amount whereas before the Income-tax authorities, you have denied ownership of the amount."

44. It transpires from the notice that the consistent case of the prosecution is that the entire amount of Rs. 6 lakhs was owned by the first appellant and that the said amount was assessable in the hands of the first appellant as his income from other sources. The matter, as we have indicated earlier, came before the Tribunal twice. In the first instance, the Tribunal observed that the evidence

indicated that the assessee had been engaged only in disbursing the money not belonging to him but belonging to some third party and on that basis, the Tribunal set aside the assessment and referred the case back to the ITO to make a fresh assessment. But ITO again made the same type of assessment which once again came before the Tribunal. It was under such circumstances, the Tribunal by its order dated 12-5-80 held as follows:

> "But the error they committed was in thinking that assessee is also not the owner of the money..... The assessee has said that he is only a distributor of some other's money. This explanation is quite satisfactory. It is not a cock and bull story or of imagination..... The only conclusion possible in the case is that the assessee is not the owner but only a person in possession of others money and that he is only a distributor of those amounts on commission basis. The possession of the assessee is certainly not as owner but only as a distributor of the money belonging to others. That conclusion is the only possible conclusion in the case. Any other conclusion of ownership by assessee will only be, perverse and uncalled for. So Section 69A of the Income-tax Act, 1961 has no application to the facts on the case. The appeal of the assessee has to be allowed and cross-objections dismissed."

45. This finding has not been challenged and it reached its finality. A close reading of the order of the Tribunal shows that the first appellant has been exonerated completely from the specific case of the ITO that he is the owner of the entire amount of Rs. 6 lakhs. Therefore, now the point that arises for consideration is whether the conviction recorded by the subordinate Courts as affirmed by the High Court under Sections 120-B read with 277 and 277 I.-T. Act are or are not liable to be set aside in the light of the judgment of the Tribunal.

46. Mr. A. T. M. Sampath very strenuously contended that the convictions recorded by the subordinate Courts as affirmed by the High Court under Sections 120-B read with 277 and 277 I.-T. Act are liable to be set aside in the teeth of the judgment of the Tribunal completely exonerating the appellants from the liability of the income-tax. We shall examine this contention and dispose of the same in the ratio of the decisions of this Court in P. Jayappan v. S. K. Perumal, (1985) 1 SCR 536: (AIR 1984 SC 1693). In that case, the following dictum has been laid down (para 5 of AIR):

> "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."

47. In the penultimate paragraph of the same judgment, the following observation was made (para 6 of AIR):

> "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 Section 309 of the Code of Criminal Procedure 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 else."

48. The above principle of law laid down by this Court gives an indication that the result of the proceedings under the I.-T. Act 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.

49. It may not be out of place to refer to an observation of this Court in Uttam Chand v.I.T.O., (1982) 133 ITR 909 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 Jayappan's case (AIR 1984 SC 1693), it has been held that the decision in Uttam Chand's case is not an authority for the proposition that no proceedings can be initiated at all under Section 276(c) and Section 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 Jayappan's case that 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 I.-T. Act.

50. 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 Exh. D4, the Tribunal has further held that Section 69 (a) dealing with the 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 Sections 120-B read with 277 and 277 (simpliciter) of the I.-T. Act 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 the appellants 1 and 2.

51. Now coming to the case of the third appellant, it is his specific case throughout that the entire amount of Rs. 4,28,712/ belonged to him. It appears from paragraphs 70 and 71 of the judgment of the trial Court that the third appellant filed a suit in O. S. No. 62/ 71 on the original side of the High Court of Madras against the Enforcement Directorate claiming the said amount but that suit was dismissed. Exh. P 87 is the certified copy of the judgment. While it was so, PW 2 who was then the Income-tax Officer, City Circle, Madras during 1967-68 issued a letter dated 2-2-67 enclosing a notice under Section 139(2) of the I.-T. Act and also another notice under Sections 177 and 175 of the Act both relating to the assessment, years 1967-68 which notices are marked as Exhs. P 14 and P 15. He was further directed to file his return of income within a week of the receipt of Exh. P 15. The third appellant's plea for extension of time was rejected. The third appellant, thereafter, filed his statement in verification accompanied by a signed statement claiming exemption of the sum of Rs. 4,28,713 / - as non-taxable on the ground that the said amount represented the sale proceeds of his mother's jewels etc.

52. The allegations in the complaint on the basis of which the charges were framed against the third appellant are that he along with the first and the second appellants conspired to fabricate false evidence and to file a false statement on oath before the ITO thereby making himself liable under Sections 120-B read with 193, IPC and 120-B read with 277 I.-T. Act, and that he also committed offences punishable under Sections 193, IPC and 277 of I.-T. Act (simpliciter). On the allegations of

the complaint, in our considered opinion, the third appellant could not be jointly indicted for the above conspiracy charges since the first and the second appellants are stated to have conspired (1) by sending the letter of retraction dated 20-10-66 and (2) by giving a false statement before the ITO retracting their earlier statements given before the Enforcement Officers which are not the case qua the third appellant. The allegations against the third appellant are that he along with appellants 1 and 2 conspired (i) to cause false entries in the account books of M/ s Precious Stone Trade Company and (ii) to wilfully make false statement before the ITO on 4-11-71.

53. A careful perusal of the complaint leaves an impression that it has been illdrafted and the necessary ingredients to make out a case for conspiracy are not brought out in the complaint. It is true that in case of conspiracy, an agreement between the conspirators need not be directly proved but it can also be inferred from the established facts in the case. As pointed out by this Court in Bhagwan Swarup v. State of Maharashtra, AIR 1965 SC 682: (1964) 2 SCR 378 that the offence of conspiracy can be established either by direct evidence or by circumstantial evidence and this section will come to play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired to commit an offence or an actionable wrong, that is to say, there should be prima facie evidence that a person was a party to the conspiracy. The charges levelled in the complaint in paragraph 25 (i) (ii) and (iii) read that the first and the second appellants by sending the letter through their lawyer on 20-10-66 committed an offence under Section 193, IPC and that they, thereafter, individually committed an offence under Section 193, IPC by retracting their earlier statements given before the Enforcement Authorities. Under Paragraph 25(iv), (vi) and (vii) of the complaint, the third appellant is stated to have caused false entries to exist in the account books of M/ s Precious Stone Trading Company and then wilfully made a false statement in verification before the Income-tax Authority accompanied by a false statement. Nowhere, it is stated that the individual acts of appellants 1 and 2 and that of the third appellant were due to any conspiracy among all the three. On the other hand, the offence said to have been committed by the third appellant is specifically attributed only to him. So the question is, whether any conspiracy could be inferred under these circumstances. In our opinion, on the facts of the case, no such inference could be drawn for the simple reason that the appellants 1 and 2 were interrogated by the Enforcement Authorities on 19-10-66 and they sent their letter of retraction through their advocate on the very next day i.e. on 20-10-66 and that the ITO, Karaikudi has recorded the retraction statement of the first appellant even on 16-11-66. It was only thereafter the third appellant sent his letter to the Enforcement Authorities claiming the controversial amount on 22-12-66. The charges levelled against appellants 1 and 2 are only on the basis of their retractions made through their lawyer on 20-10-66 and by their subsequent statements. In the letter dated 20-10-66, the appellants 1 and 2 have not stated that the amount belonged to the third appellant. Similarly, it is not the case of the Prosecution that the first appellant by his " statement dated 16-11-66 explained the amount as belonging to the third appellant. Nor is it the case of the prosecution that the second appellant came forward by his statement recorded in the year 1974 which is the basis for prosecuting him for perjury stating that the amount belonged to the third appellant. Therefore, no agreement to commit the offence punishable under Sections 193, IPC or 277 I.-T. Act can be said to have been hatched among all the three appellants. Further, it is neither the case of the complainant nor could it be said that the appellants 1 and 2 knew that the third appellant intentionally fabricated false evidence or wilfully made a false return before the ITO. Merely because the third appellant happens to be related to the first appellant and claimed that amount as owner thereof, no irresistible inference can be safely drawn that there was a conspiracy among all the three appellants and he accused Nos. 4 and 5. Moreover, the evidence, direct or circumstantial is very much lacking to bring all the three and the other two accused under the charge of conspiracy. Hence the third appellant

cannot be put on a joint trial along with appellants 1 and 2 and others under the charge of conspiracy. Therefore, the conviction of the third appellant under the conspiracy charge has to fail.

54. It is pertinent to note, in this connection, that the trial Court in paragraphs 87 and 88 of its judgments, after finding appellant No. 3 guilty of the conspiracy charge along with appellants 1 and 2.A 4 (since dead) and A 5 punishable under Sections 120-B read with 193, IPC and 120-B read with 277 I.-T. Act has acquitted the fifth accused (Bhaskar alias Kannan) of all the charges in paragraph 89 of its judgment. This contradict finding of the trial Court has not been noted either by the appellate Court or by the High Court.

55. The next question that arises for consideration is whether the third appellant can be convicted for the offence under Sec7 tions 193, IPC and 277 of the I.-T. Act (simpliciter). The third appellant has not voluntarily submitted any return before the ITO but only on receipt of a notice from the ITO. No doubt, this will not absolve the criminal liability of the third appellant if the ingredients to constitute the offences under these two sections are established and the trial of the case is not vitiated by any illegality.

56. Section 277 of the I.-T. Act in general seeks to penalise one who makes a false statement in order to avoid his tax liability. In the present case, the Revenue has not come forward that the money represents the income of the third appellant liable to be taxed but on the other hand it is the case of the ITO that it is not the third appellant's money at all. Moreover, a cursory reading of the penal clause proposes to impose punishment depending upon the quantum of tax sought to be evaded. Here no question of evading the tax will arise. Even assuming, that the third appellant has made himself liable to be punished under Sections 193 and 277 (simpliciter) of the I.-T. Act, inasmuch as he has been put in a joint trial with the appellants 1 and 2 for the conspiracy of the said offences without any specific allegation or acceptable evidence to connect the third appellant with the activities of the appellants 1 and 2, there is a clear misjoinder of charges which includes misjoinder of parties also. In the facts and circumstances of the case on hand, the misjoinder of charges cannot be said to be a mere irregularity. In our considered opinion by the joint trial with misjoinder of charges, as pointed out by Mr. ATM Sampath, a failure of justice has in fact been occasioned since all he Courts below have clubbed all the allegations levelled against all the three appellants and two other accused (A 4 and A 5) together and considered the same as if all the offences were committed in the course of the same transaction pursuant to a conspiracy which is neither supported by the allegations in the complaint nor by any evidence as required under the law. Hence, the conviction under Sections 193, IPC and 277 of I.-T. Act (simpliciter) also have to be set aside.

57. The High Court, without adverting to the above important intricated questions of law involved in this case and examining them in the proper perspective has disposed of the revisions in a summary manner and hence the impugned orders warrant an interference. Since we are inclined to allow all these appeals mainly on the various questions of law which we have discussed in the preceding part of this judgment, we feel it unnecessary to deal with the other questions raised in the appeal.

58. In the upshot, for the discussion made above, we allow the appeals by setting aside the convictions and sentences as affirmed by the High Court and acquit the appellants of all the charges. The fine amount, if already paid is directed to be refunded to the appellants.

59. Both the appeals are allowed accordingly. Appeals allowed.

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