A

M. NATARAJAN

v.

STATE BY INSPECTOR OF POLICE, SPE, CBI, ACB CHENNAI

(Criminal Appeal No. 834 of 2008 etc.)

B

MAY 7, 2008

[P.P. NAOLEKAR AND V.S. SIRPURKAR, JJ.]

Penal Code, 1860 – ss. 102 B r/w s. 420, 467 and 471 – C *Evasion of custom duty by one of the accused – By producing fabricated documents – Appellant-accused alleged to have helped in preparation of some fabricated documents – Prosecution under the provisions of IPC – Petitions for discharge and quashing of criminal proceedings filed by* D *appellant-accused – Dismissal of by courts below – On appeal, plea that the evader of the duty having entered final settlement in terms of Kar Vivad Samadhan Scheme, 1998, earned complete immunity from the transaction and no one could be prosecuted – Held: Criminal proceedings not liable to be quashed against the appellant-accused – Immunity under the* E *Scheme refers to only direct and indirect tax enactments and not to the offences under IPC – Merely because the accused had been tried u/s 132 of Customs Act, it does not preclude trial for offences under IPC – Finance Act (No.2), 1998 – Kar Vivad Samadhan Scheme, 1998 – Customs Act, 1962 – s.* F *132.*

A charge-sheet was filed against the appellant-accused and five other accused, u/s. 120 B r/w s. 420, 467, 471 IPC. Prosecution case was that accused No. 3 sent a G **car from England to India. Accused No. 4, in order to take advantage of Transfer of Residence Scheme used fabricated documents for clearance of the car. Appellant-accused had helped in preparation of the fabricated documents. Appellant-accused filed a discharge**

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application as well as petition seeking quashing the proceedings. Both were dismissed by High Court. A

In appeals to this court, appellant contended that in respect of the transaction in question no prosecution could have been launched against the third accused or any other accused as the third accused had by making declaration under s. 88 of the Finance Act earned a complete immunity in respect of the transaction in view of Kar Vivad Samadhan Scheme, 1998. (KVSS) floated vide Finance Act No. 2 of 1998. B

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Dismissing the appeals, the Court

HELD: 1. The immunity under the Kar Vivad Samadhan Scheme, 1998 does not refer to the offences under the IPC or under any other central law, but restricts itself under Section 90 (1) of Finance Act only to the offences under the direct tax enactment or indirect tax enactment. The immunity could not cover certain other offences than those covered in direct and indirect tax enactments. The immunity could not be granted to any other person automatically, merely it was granted to a tax-payer who had made declaration under Section 88 of the Finance Act. The immunity could not cover certain other offences than those covered in direct and indirect tax enactments. [Paras 20 and 25] [1022-C-D; 1022-E-F] D E

Hira Lal Hari Lal Bhagwati v. CBI, New Delhi **2003 (5) SCC 257 – distinguished.** F

State, CBI vs. Sashi Balasubramanian and Anr. **2006 (13) SCC 252**; *Master Cables (P) Ltd. vs. State of Kerala and Anr.* **[(2007) 5SCC 416] – relied on.** G

Central Bureau of Investigation, SPE, SIU (X), New Delhi v. Duncans Agro Industries Ltd., Calcutta **1996 (5) SCC 591**; *Sushila Rani (Smt.) v. Commissioner of Income Tax and Anr.* **2002 (2) SCC 697**; *K.C. Builders and Anr. v. Assistant* H

A *Commissioner of Income Tax* **2004 (2) SCC 731**; *Duncans Agro Industries Ltd. Calcutta v. Commissioner of Central Excise, New Delhi* **2006 (7) SCC 642**; *Alpesh Navinchdnara Shah v. State of Maharashtra and Ors.* **2007 (2) SCC 777– referred to.**

B **2. It is not correct to say that the only offence which could have been alleged against any of the accused was under Section 132 of the Customs Act, 1962, i.e., of making a false declaration, since the offence complained of, related to the false declaration and false documents and** C **the appellant could be prosecuted only under Section 132 of the Customs Act and not under the offences covered under IPC. Merely because there may be some overlapping in the two offences, it does not mean that the appellant cannot be tried under the offences covered** D **under IPC. The Court would proceed to decide the question on the basis of the evidence led before it. Merely because the appellant could be tried under Section 132 of the Customs Act, it does not mean that he could not be tried for the offence committed under the IPC. There is no** E **such provision. [Para 27] [1023-H; 1024-A,B,E,-F]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 834 of 2008.

From the final Judgment and Order dated 3.10.2005 of F the High Court of Judicture at Madras in Criminal Revision Case No. 538 of 2005.

WITH

Criminal Appeal No. 835 of 2008.

G K. Subramaniam, R. Jayaseelan, E.C. Agrawala, Mahesh Agarawal, Rishi Agrawala, Gaurav Goel, Amit Kumar Sharma and Ashutosh Garg for the Appellant.

Vikas Singh, ASG, Vikas Sharma, Ranjana Narayan, B.K. Prasad and V.K. Verma for the respondent. H

The Judgment of the Court was delivered by A

V.S. SIRPURKAR, J. 1. Leave granted.

2. The challenge in these appeals is to the common judgment of the learned Single Judge of the Madras High Court whereby the High Court has dismissed the Criminal Revision B Case No.538 of 2005 and Criminal O.P. No.21636 of 2005 filed by the appellant herein.

3. Following facts will highlight the controversy involved.

4. One Dr.S. Balakrishnan, purchased the Toyota Lexus C Car which was sent by Ship to Madras Port in July, 1994. His son Yogesh Balakrishnan presented certain documents for getting clearance of the said car from the Customs Department. One such document was a letter dated 8.9.1994 authored by the appellant herein Shri M. Natarajan who is the publisher of a D magazine called "Tamilarasi" which publication had commenced in the year 1992. He is also the author of bi-monthly magazine "Pudiya Paarvai" which surfaced in the year 1993. One Baskaran was said to be assisting the appellant being the incharge of these publications. The said letter dated 8.9.1994 which was E used by accused Yogesh Balkrishnan was authored by the appellant and addressed to the Manager, Indian Bank, Abiramapuram, Madras on behalf of Tamilarasi publication to the following effect:

> "We invite reference to the various remittances made by F our purchase creditors on 22.6.94 into our account, and would like to inform you that a sum of Rs.12 lacs remitted relates to the remittances made by our Foreign buyers of our weekly and fortnightly magazines.
>
> Kindly issue a Foreign Inward certificate for this sum of G Rs.12 lacs."

On the basis of this letter the Foreign Inward Certificate, as sought for by the appellant, was issued by the bank. Ultimately the said car was cleared and was allowed to be imported. H

5. A First Information Report came to be lodged at the instance of Central Bureau of Investigation, Chennai for offences under Sections 120B read with Section 420, 468, 471 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. In that First Information Report, four accused were arrayed, they being, (i) Shri S. Senthivel, Commissioner of Customs (Retd.), Chennai, (ii) Shri Hariharan, former Asstt. Collector Customs, Chennai, (iii) Shri Raja Manoharan, Former Apprising Officer, Customs, Chennai and (iv) Shri Balakrishnan. It was suggested in the report that in the year 1994 the four accused persons entered into a criminal conspiracy in Chennai to cheat the Department of Customs, Government of India in the matter of assessment of duty on a car imported by fourth accused and in pursuance of the said conspiracy, the fourth accused, in connivance with Accused Nos.1 to 3 imported Toyata Lexus Car CS 300 of engine capacity 3000 CC bearing Engine No.2320283150 and Chassis No. JT 153-Jse 7 – 000727250 and had sought customs clearance under the condition of transfer of residence to India for permanent settlement by producing forged and fabricated invoice LEX00077 dated 13.7.1993 showing the value of ?21405 as if the car was purchased in 1993 for that value. In pursuance of this conspiracy A1 to A3 fraudulently and dishonestly abused their official position and cleared the car on 8.9.1994 after allowing 19% depreciation on the cost of the car, knowing fully well that firstly the car was not purchased in the year 1993 and the original cost of the car was more than the declared value and further that the importer was producing forged documents and thereby had caused wrongful loss of Rs.4 lakhs to the Government of India by way of customs duty. On the basis of this the investigation was started by the CBI.

6. Ultimately, however, the charge-sheet was filed against the present appellant and the four other accused, namely, (i) Shri V. Bhaskaran, (ii) Shri S. Balakrishnan, (iii) Shri Yogesh Balakrishnan and (iv) Smt.Sujaritha Sundarajan. In the charge-sheet it was stated that the first accused (appellant herein) was

Director of Tamilarasi Publication, the second accused was a private individual and authorized signatory to operate the current account of M/s.Tamilarasi Publication, the third accused was a private individual, the fourth accused was also a private individual and the fifth accused was the Branch Manager, Indian Bank, Abiramipuram Branch, Chennai and Smt.R. Bhavanai, Approver was working as the Assistant Manager, Indian Bank, Abiramipuram, Chennai in the year 1994. In the charge-sheet it was stated that the accused had conspired to cheat the Government of India and to commit act of criminal misconduct and in furtherance of the conspiracy, the appellant and the second accused fabricated documents for the purpose of clearing the imported Lexus Car which was imported by the third and fourth accused in order to take advantage of the provisions of Transfer of Residence and pay less customs duty, though they fully knew that the car was manufactured in the year 1994 which was mis-declared to be manufactured in the year 1993 and in pursuance of the said conspiracy, the fifth accused misued and abused her official position as the Branch Manager of the Indian Bank, issued the Foreign Inward Remittance Certificate to the effect that the Lexus Car which was imported would be released by the Customs Department on the basis of the same, knowing very well that the Current Account No.872 of M/s.Tamilarasi had not received any foreign remittance, though it was one of the pre-condition that only foreign remittances could be used for payment of customs duty, thereby the accused had caused loss to the Customs Department of Rs.1,06,20,472/-. It was suggested further that third accused had fraudulently and dishonestly imported the Lexus Car by ship while the fourth accused Yogesh Balakrishna has handed over five documents to Shri Janaki Raman of M/s.Samba Sivam & Company, Chennai for getting the car cleared. It was further stated in the charge-sheet that the original sale invoice of the car dated 13.7.1994 was replaced and substituted with another photocopy of fabricated invoice by changing the date to 13.7.1993 for the purposes of clearing the car under the provisions of Transfer of Residence since otherwise the car could not be cleared under

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A the said provisions. This was done by the fourth accused in connivance with the first accused. It was suggested that the assessment of the car was done on the basis of the fabricated documents. This assessment was made on Cost Insurance Freight value which suggested that consignment was imported B directly by the manufacturer to the country of the buyer as a new car. It was further suggested that the third accused falsely declared and showed that the car was one year old, when in fact, it was not. He had also filed a false affidavit that the car was in use for more than one year before he came to India for C permanent settlement. The accused had also filed fake First Registration Certificate showing the first registration on 15.7.1993 whereas the car itself was manufactured in March, 1994. It was, therefore stated that Accused Nos.1 to 4 had submitted documents for the clearance of the car imported by the third and fourth accused knowing them to be false documents D for taking advantage of the provisions of Transfer of Residence scheme. It was clarified that for taking advantage of the scheme of Transfer of Residence, the Customs duty has to be paid in foreign exchange or otherwise it should be through an account where there is foreign inward remittances and for this purpose E the Branch Manager of the Bank in which the account lies has to issue a certificate mentioning that the concerned account is receiving or had received foreign remittances. While the appellant herein and second accused Shri Balakrishnan very well knew that the Current Account bearing No.872 at Indian F Bank, Abiramipuram, Chennai did not receive any foreign inward remittance, got a false certificate issued by Smt.Sujarita Sudararajan, the fifth accused, Branch Manager of the bank on the basis of a false letter presented by the first accused and on the basis of that the Branch Manager had issued foreign inward G remittance certificate dated 8.9.1994 to the effect that the Lexus Car can be cleared from the Customs. She had also directed her Assistant Manager Smt.Bhavani to modify the certificate and issue the same to Shri M. Natarajan, appellant and Shri Bhaskaran, second accused. Thus the certificate was used by H the four accused persons (A1 to A4) for the purposes of clearing

the imported car, knowing fully well that the Current Account No.872 did not receive any foreign exchange remittance. A

7. The charge-sheet, therefore, went to show that the acts of accused Nos.1 to 5 constituted offences punishable under Section 120B IPC read with Sections 420, 467, 471 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. It was pointed out further that the other accused persons named in the FIR, who were government officials, were not sent for trial as the Departmental action for major penalty was recommended against them. It was further pointed out that Smt.Bhavani, original Accused No.6 was granted tender of pardon by the 2nd Metropolitan Magistrate, Egmore, Chennai while fifth respondent was already dismissed from service and as such no sanction order was required under the law. B C

8. This charge-sheet was filed on 30th January, 2004 and the case was posted in the month of April, 2004 for receiving copies by the accused. The case was split up as Non Bailable Warrant was pending against the third accused and had remained unexecuted. The trial commenced against the other accused in which 22 witnesses were examined, 82 documents were marked and the case stood posted for 5.9.2005 for examination of the Defence Witnesses. However, in the meantime, the present appellant filed a discharge application vide Criminal M.P. No.146 of 2005 on the file of the learned Principal Special Judge for CBI Cases, Chennai. This Criminal M.P. was dismissed on 18.4.2005 against which order a Revision Petition being Criminal Revision No.538 of 2005 came to be filed. Besides this the appellant also filed a Criminal Original Petition being Criminal O.P. No.21636 of 2005 for quashing the proceeding under trial. It seems that the appellant had approached this Court also and this Court had issued a direction on 13.5.2005 for the early disposal of the Criminal Revision Petition. The High Court ultimately came to decide and dispose off the Criminal Revision Petition as well as Criminal Original Petition by a common judgment which is D E F G H

A impugned before us.

9. In the application for discharge as also in the Revision Petition before the High Court as well as in the Criminal O.P., the contention of the appellant was firstly that he had no role with respect to the production of documents for clearance of
B the car, secondly in a scheme, namely, Kar vivad Samadhan Scheme, 1998 (KVSS) floated vide Finance Act No.2 of 1998 which commenced from 1.9.1998, it was clearly provided that if a tax-payer settles his dues regarding the direct and indirect taxes and once a final settlement is arrived at in pursuance of
C the scheme and once the payment is made as per the settlement, the tax-payer earns a complete immunity in respect of the transaction which includes the prosecution from all or any of the offences. It was pointed out that third accused in pursuance of Rule 3(1)(b) of the Rules had filed a declaration in Form 1-B
D under Section 88 of the Finance Act and the Customs Department had issued a certificate of intimation under Section 90(1) of the Finance Act and determined the tax under Section 88(f) of the Act as being Rs.2,84,325/- which was remitted by the third accused on 18.3.1999. This final settlement was arrived
E at between the parties as against the original claim arrears of tax of Rs.5,68,649/-. In short, the appellant prayed that in respect of the transaction in question no prosecution could have been launched against the third accused or for that matter any other accused. For this the appellant relied on the reported decisions
F of this Court in *Central Bureau of Investigation, SPE, SIU (X), New Delhi v. Duncans Agro Industries Ltd., Calcutta* [(1996) 5 SCC 591] and *Sushila Rani (Smt.) v. Commissioner of Income Tax & Anr.* [(2002) 2 SCC 697] and *Hira Lal Hari Lal Bhagwati v. CBI, New Delhi* [(2003) 5 SCC 257].

G 10. As against this, it was argued before the learned Single Judge by the Public Prosecutor that firstly the Revision Petition under Section 239 Cr.P.C. could not co-exist with the Criminal Original Petition under Section 482 of the Cr.P.C. It was secondly suggested that the law laid down by this Court in *Duncans Agro's*
H *case* and *Sushila Rani's case* (supra) was no more a good law

because of the decision of this Court in *State of Orissa v. Debendra Nath Padhi* [(2005) 1 SCC 568]. It is also suggested by the Public Prosecutor that for the purposes of framing charges under the provisions of Cr.P.C. what may be seen is the material produced by the prosecution in charge-sheet and no other material. It was, therefore suggested by the learned Public Prosecutor that the court could not have looked into the KVSS, 1998 to find out as to whether there was an absolute immunity to the tax-payer and other granted by that scheme and whether the appellate court utilized the alleged immunity.

11. Learned Single Judge went into the details of the scheme. In that the learned Judge considered Sections 88, 90, 91 and 95 of the KVSS 1998 and also referred to the case law cited and posed before him a question in the following words:

> "Thus the crux of the question is whether "KVSS" is applicable to the present facts of the case or not, and if not applicable, how the present case is different from the facts in issue of Hiralal's case."

In short the learned Judge came to the conclusion that it is permissible to look into the KVSS 1998 though it was not the part and parcel of the charge-sheet and for that purpose in order to decide as to whether the prosecution was legally launched or not and could continue or not, the court could look into the KVSS 1998. For this, the learned Judge relied on the decision of this Court in *State of Haryana & Ors. V. Bhajan Lal & Ors.* [1992 Supp (1) SCC 335) and more particularly on the following observations regarding the circumstances under which interference under Section 482 Cr. P.C. was possible:

> "Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party."

A In our opinion, the learned Judge was right in examining the KVSS 1998 to decide whether it provided complete immunity from the prosecution since that was the mainstay of appellants attack against the prosecution.

12. The learned Judge then undertook the detailed B examination of the KVSS 1998 as also the case law and came to the conclusion that the acts complained of against the appellant were outside the declaration statement under Section 88 made by third accused. The acts complained of in the charge sheet did not have any connection with the declaration of C statement (by accused no. 3) and the letter dated 8.9.1994 which was the basis for issuance of Foreign Inward Remittance certificate amounted to misrepresentation and false representation and it had no connection with the scheme whatsoever and as such the learned Judge came to dismiss D the Revision Petition as well as Criminal O.P. under Section 482 Cr.P.C.

13. It is on this background that we have to proceed to decide the present appeals.

E 14. Shri K. Subramaniam, Senior Advocate, appearing on behalf of the appellant very heavily relied on the decision in *Hiralal's case* (supra). He pointed out that the law laid down in *Duncans Agro's case* and *Sushila Rani's case* (supra) was reiterated in *Hiralal's case*, more particularly in para 27 thereof. F Para 27 reads as under:

> "On a reading of the judgment in the case of *Sushila Rani*, it is clear to us that if an assessee takes the option under this scheme, he obtains immediate immunity under any proceeding under any and all laws in force. As such the G present proceedings initiated under Section 120B read with Section 420 of the Indian Penal Code are bad and ought to have been quashed with immediate effect."

Learned counsel points out that the observations made in H this paragraph and more particularly the user of the terms "under

any and all laws in force" would go to suggest that the concerned accused earns an absolute immunity for the prosecution of all the offences including under Sections 120B and 420 IPC which were also alleged against the appellant herein in the present case. Learned counsel further very painstakingly took us through the provisions of KVSS 1998 as engrafted in the Finance Act and invited our attention to Sections 90, 91 and 95 of the same which are the relevant sections. It was further contended that the criminal act complained of against the appellant was so inextricably connected with the Customs transactions that it had to be held a part and parcel of the same and, therefore, all and every prosecution related to the customs transaction not only against the person who had made the declaration but also against each and every person connected with the transaction were covered in the immunity provided under Section 91 of the Act. Our attention was further invited to the judgment of this Court in *K.C. Builders & Anr. V. Assistant Commissioner of Income Tax* [(2004) 2 SCC 731] and also *Duncans Agro Industries Ltd. Calcutta V. Commissioner of Central Excise, New Delhi* [(2006) 7 SCC 642]. Learned counsel also relied on the judgment of this Court in *Alpesh Navinchdnara Shah v. State of Maharashtra & Ors.* [(2007) 2 SCC 777] where this Court had reiterated the law laid down in *Hiralal's case.*

15. As against this Shri Vikas Singh, learned Additional Solicitor General very carefully sifted the facts. He firstly suggested that at this stage the court should not interfere in the matter as the trial was complete and only the judgment had to be delivered. He then points out that the act complained of against the appellant is an independent offence inasmuch as he had made a false representation to the bank, knowing it to be false. He had known that there were no foreign remittances in Account No.872 of M/s.Tamilarasi and that his request for issuance of certificate to that effect was totally unfounded. On the basis of this letter, a certificate which was essentially false came to be issued by the Branch Manager and, therefore, this act is independent offence, though ultimately the said certificate

A had been used by the third accused for getting the clearance of the car. Our attention was invited to the provisions suggesting that under the scheme the remittance is either to be made in foreign currency or atleast on the basis of the remittance by an NRI credited in the account held in the Indian Bank. He further
B points out that the provisions of Sections 90, 91, 95 and more particularly Section 91 were clear and couched in the language which admitted of no doubts. Relying heavily on the language of Section 91, the learned ASG suggests that this immunity has to be restricted to the offence under the Act and it could not be
C viewed as general immunity providing immunity covering all the other offences covered by different Acts which are distinct and separate from the tax laws. Further the learned counsel urged that the immunity was not available to a totally non connected persons like the appellant. In that behalf he pointed out that the
D third accused had not claimed immunity before the trial court or before the High Court. The learned counsel also suggested that the observations made in para 27 of the *Hiralal's case* were entirely based on the observations in *Sushila Rani's case.* However, considering the narrow scope and the factual scenario
E in *Sushila Rani's case,* the broad observations made in para 27 in *Hiralal's case* were not justified. He further points out that those observations were ultimately diluted by Hon'ble Lakshmanan, J. in the subsequent decision in *Alpesh Navinchdnara Shah's case.* Learned counsel further invites our attention to the two judgments both by Hon'ble Sinha, J. reported
F in *State, CBI v. Sashi Balasubramanian & Anr.* [(2006) 13 SCC 252 and *Master Cables (P) Ltd. V. State of Kerala & Anr.* [(2007) 5 SCC 416]. According to learned counsel both these are direct judgments wherein the earlier judgments in *Duncans Agro's case, Sushila Rani's case, Hiralal's case and K.C. Builders's*
G *case* have been explained and this Court has drifted away from the broad propositions laid down in those judgments. He, therefore, urges for the dismissal of the appeals.

16. It will be, therefore, our task first to examine the
H provisions of KVS Scheme and more particularly,

Section 90, 91 and 95. Sections 88 to 98 which are included in Chapter IV of the Finance Act (No. 2) of 1998 cover the entire Kar vivad Samadhan Scheme. The basic object of the Scheme, undoubtedly, is to recover the taxes both direct as well as indirect. Section 87 (j) specifically brings into the fold of the Scheme the Customs Act, 1962, which is the concerned Act for the purpose of the present controversy. Section 87 (a) gives the definition of declarant as- "declarant means a person making a declaration under Section 88". Section 88 provides that a declarant has to make the declaration during the period from 1.9.1998 to 31.12.1998. The said declaration has to be in respect to the tax payable either under direct tax enactment or indirect tax enactment or any other provision of any law. Section 88 then provides the modality for settlement of such tax. There is no dispute that in the present case, it was the third accused and not the appellant who actually gave a declaration statement under section 88, in respect of the tax liability which was attracted on account of the import of the car. There is also no dispute that on the basis of this declaration under Section 88, the authorities went on to decide the liability on the part of third accused and ultimately, the tax liability was satisfied and the car was allowed to be imported. Section 90 provides for the time and manner of payment of tax arrear which have been settled on the basis of the declaration under Section 88. Indisputably, a certificate in the prescribed form was granted in favour of the third accused in which particulars of the tax arrear and the sum payable after such determination was mentioned being a full and final settlement of the tax arrears. Section 91 is the real crux of the matter. It provides immunity from prosecution and imposition of penalty in certain cases:

> "91. Immunity from prosecution and imposition of penalty in certain cases- The designated authority shall, subject to the conditions provided in Section 90, grant immunity from instituting any proceeding for prosecution for any offence under any direct tax enactment or indirect tax enactment, or from the imposition of penalty under any of

A such enactments, in respect of matters covered in the declaration under Section 88".

It is this Section 91, which has been relied upon by the appellant suggesting that the language is broad enough to cover not only the declarant but any other person and the prosecution B not only under the direct tax enactment or indirect tax enactment but any and every other offence also. It is for this purpose, that the learned senior counsel, Shri K. Subramanian heavily relied upon the observations in paragraph 27 of *Hiralal's case*. The learned counsel also relied on the concurring and supplementing C observations by Hon'ble Brijesh Kumar, J., in which, the learned Judge has made a specific reference to Section 95 after quoting that Section.

17. We were taken extensively through this judgment by D the learned counsel who was at pains to urge that the factual scenario in *Hiralal's case* is comparable to the present case, if not identical. There also, the High Court in a petition under Section 482 Cr.P.C. had refused to quash the FIR and the proceedings which were taken against the Director of Gujarat Cancer & Research Institute (for short "GCRI"), Secretary of E Gujarat Cancer Society (GCS) and one Dr. Viral C. Shah. It was the case of the prosecution that the three had cheated the Government of India in terms of the evasion of customs duty and by concealment of facts obtained customs duty exemption certificate in respect of MRI and lithotripsy machines and by F violating the provisions of "actual user" condition as per import-export policy and Customs Notification. In that case also, the customs duty had been paid by the appellant and was settled under the KVSS 1998. The charge against the appellant was that the machines were imported into India by the GCS who G availed of the duty exemption on the basis of the exemption certificate issued in the name of the GCRI on a bona fide premise that since all the activities of the GCRI were funded by the GCS and all the operations of GCS were carried out through the GCRI, such imports could be made. The Customs Authority

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raided the premise of the GCRI and seized the machines on the ground that the exemption certificate was issued in the name of the GCRI and not in the name of GCS and, therefore, GCS was not entitled to the exemption and was, therefore, liable to pay customs duty. The GCS was held liable to pay the customs duty, thus, denying the concessional duty benefit demanded from it under Section 28 of the Customs Act, 1962 read with the proviso to the said Section. Against the order imposing the duty by the Collector of Customs, the appeals were filed before Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Branch, Bombay which confirmed the findings of the Collector of Customs. Against that, the GCS filed an appeal before this Court and while the matter was pending before this Court, the Government of India launched a Kar Vivad Samadhan Scheme, 1998, and in accordance thereof, the GCS had agreed to deposit a stipulated amount of over Rs.98 lakhs and also withdrew the civil appeal pending before this Court. On 19.7.1999, a certificate for full and final settlement of the tax arrears was issued to the GCS. The said certificate provided the final settlement of tax arrears and also granted the immunity to the GCS from any proceedings for prosecution for any offence under the Customs Act, 1962 or from the imposition of penalty under the concerned enactments. However, a case was registered against the appellants on the ground that the appellants in conspiracy with the Director of the GCRI, Secretary of the GCS and others had cheated the Government of India. The prosecution was for the offence under Section 120-B read with Section 420 of the IPC. It was this prosecution which was challenged and after the challenge, failed at the High Court level, and the party had successfully approached this Court where the proceedings were ordered to be quashed.

18. In *Hiralal's case* heavy reliance seems to have been placed on the judgment of *Sushila Rani (Smt.) Vs. Commissioner of Income Tax & Anr.* and of *Central Bureau of Investigation, SPE, SIU (X), New Delhi Vs. Duncans Agro Industries Ltd., Calcutta*. The learned Judges in their separate

A but concurrent judgments upheld the challenge and had quashed the proceedings relying on the KVSS 1998. The learned Judges noted the various provisions of the Scheme from Sections 86 to 98. It was also noted that FIR in that case was filed on 6.1.1999, while the certificate under KVSS 1998 was issued on B 19.7.1999. Hon'ble Lakshmanan, J. in paragraph 23 observed:

> "23. *It is thus crystal clear that the Commissioner of Customs (Adjudication) and Designated Authority (KVSS-98) granted immunity from instituting any proceeding for prosecution for any offence under the* C *Customs Act, 1962, or from the imposition of penalty under the said enactment, in respect of matters covered in the aforesaid declaration made by the declarant.* After hearing the case of the GCS, as already noticed, the Collector of Customs, Bombay held that the GCS was D liable to pay the customs duty but in view of the activities of the Society and the bona fides of the Society, and considering the charitable and philanthropic activities of the Society, no prosecution was recommended. Moreover, only a token redemption fine of Re.1 was imposed."

E (Emphasis supplied).

19. In paragraph 25, the learned Judge analyzed the judgment in *Sushila Rani's case* (supra), which was also under the KVSS 1998. Paragraph 6 and 8 of *Sushila Rani's case* F were quoted by the learned Judge which suggested that once a certificate was granted under Section 90 (1), it was absolutely conclusive as to the matter stated and no matter covered could be reopened in any other proceeding under any law for the time being in force. It is probably on the basis of observations in G paragraph 6 of *Sushila Rani's case,* that the learned Judge made the observation in paragraph 27 which we have already quoted in para 13 of this judgment. We may at this stage itself point out that the observations in paragraphs 6 and 8 in *Sushila Rani's case* seem to have been made only in the pursuance of tax laws. The question of prosecution under some other offences H

(not under the Indirect Tax Act or the Direct Tax Act) was not there.

20. A reference must be made, at this stage, to the judgment of this Court reported in *Alpesh Navinchandra's case* (cited supra) which was again decided by the Division Bench consisting of Hon'ble Lakshman and Kabir, JJ., the judgment was, however, authored by Hon'ble Lakshmanan, J. This was the case of immunity granted under Sections 127H of the Customs Act, 1962, however, the appellant and his brother were preventively detained under COFEPOSA. The detention was challenged on the ground that once the immunity under Section 127H of the Customs Act was granted in respect of customs offences, after settling the taxes finally by the Settlement Commissioner, the preventive detention could not have been ordered by the authorities for the same reasons. The case of *Hiralal* (cited supra) was relied upon, which is clear from a reading of paras 17 and 46. This Court proceeded to hold in paras 46 and 47 of its judgment as under:

> "46. At the time of hearing, learned counsel for the petitioner relied upon *Hira Lal Bhagwati Vs. CBI.* According to learned counsel for the respondent the said relied upon case was a case of duty evasion and the appellant therein was booked by Customs Authority and therefore, customs duty was paid under KVS Scheme and further in the criminal proceedings under Sections 120-B and 420 IPC initiated by CBI was quashed by this Court. Therefore, it is admitted that the above cited case is different from the present case as in the case in hand the detention order was issued under the COFEPOSA Act against the petitioner with objective to prevent the nefarious activities in future. Therefore, the immunity granted by the Settlement Commission from fine, penalty and prosecution under the provisions of the Customs Act and IPC have no bearing on the order of detention passed under the COFEPOSA Act. Therefore, it is contended that the detention order issued by the detaining authority is very much legal and

A the same needs to be upheld.

47. The Settlement Commission was constituted with the aim and objective of settling the tax evasion issues and by virtue of disclosure by tax offender, they gain immunity from fine/penalty which is otherwise mandatory under the B provisions of tax laws. But, such opportunity is only extended to one-time tax offenders but not available to habitual smugglers. For the persons involved in smuggling activities, other than the provisions made for the prosecution under the Customs Act, 1962, an equal deterrent is emphasized C under the provisions of the COFEPOSA Act, 1974 i.e. provisions for preventive detention. Such preventive detention prohibits smugglers from indulging in further smuggling activities. In the present case the investigation reveals the consistent involvement of the petitioner detenu D and his brother, Kamlesh Navinchandra Shah in smuggling activities, therefore, the detaining authority on the basis of evidence placed before him felt it necessary to issue the detention orders in respect of both the detenus in order to prevent them from prejudicial activities in future. E Accordingly, the impugned order is justifiable in the eye of the law and the present writ petition deserves to be dismissed."

In our opinion, the rigour of the observations made in paragraph 27 in *Hiralal's case* is removed by the observations F made in paragraphs 46 and 47 in *Alpesh Navinchandra Shah's case*. It was contended that the legislature had created a Settlement Commission for generating revenue and had also made provisions for release of the goods on payment of duty and had also made provisions for granting immunity from G prosecution under the Customs Act, 1962 under the Penal Code and also under the other Central law and, therefore, it was clear that the intention of the legislature was more on revenue aspect rather than prosecution and punishment aspect or in continuing with multiple litigations. And, therefore, it would be unjust, unfair H and unreasonable if a person is made to suffer preventive

detention mainly after his application for settlement is allowed to be proceeded with, and after realization of the customs duties not only the goods are ordered to be released but on considering the cooperation extended by him in the settlement proceedings, the Settlement Commission had also granted to him immunity from prosecution under the Customs Act, 1962 as well as under IPC. The reliance there, however, was being made not on KVSS 1998, but on the Scheme under Section 127-H of the Customs Act, 1962 which provided the immunity not only from the Customs Act offences but also from the Indian Penal Code and other central enactments. We must hasten to point out that at this juncture itself, the immunity under the KVSS 1998 does not refer to the offences under the Penal Code or under any other central law, but restricts itself under Section 90 (1) only to the offences under the direct tax enactment or indirect tax enactment and as such Section 127H of the Customs Act is much broader than Section 90(1) of Finance Act in its operation.

21. The Court then in paragraph 46 of the above case held that the immunity granted by the Settlement Commission under the provisions of Customs Act and IPC had no bearing on the order of detention passed under the COFEPOSA Act. Thus inspite of the broader nature of Section 127H of the Customs Act as compared with Section 90(1) of the Finance Act, this Court proceeded to hold that the detention under COFEPOSA Act was *"outside the immunity"*. It was, therefore, clear that the rigour of observations made in paragraph 27 of *Hiralal's Case* was taken away in paragraphs 46 of *Alpesh Navinchandra Shah's case.*

22. It may be noted further that in *Hiralal's case* the learned Judge had specifically found that there was no prima facie material as regards the offences under Sections 120B and 420 of the Indian Penal Code and that was also the reason why the prosecution was quashed. Such is not the case here. It cannot again be forgotten that in *Hiralal's case* the immunity was granted to the tax-payer whereas the appellant in the present case was neither an applicant under Section 90(1) nor was any immunity

granted to him specifically. This aspect whether the immunity could be granted and could be enjoyed by any other person than the one who had made a declaration under Section 88 and was granted the immunity was considered in the subsequent judgment of this Court.

23. This situation was explained in *State, CBI Vs. Sashi Balasubramanian and Anr.* [(2006) 13 SCC 252]. There also, the private respondent had applied for import of cotton fabrics for a certain quantity of "cotton men's ensemble" under "the Duty Exemption Entitlement Certificate Scheme". That application was recommended and the Company was allowed to import cotton fabrics of a particular description. On allegations in regard to the grant of the license, an FIR came to be lodged on 2.3.1995 for commission of offences under Sections 120-B, 420 and 471 IPC as also Section 13 (2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and Section 136 of the Customs Act, 1962. The Company and its Directors had given a declaration on 31.12.1998. However, the charge sheet against them and the four public servants was filed on 12.4.1999, originally against the 7 accused persons, 3 out of whom were the private parties, namely, the Company and its 2 Directors. The High Court quashed the criminal proceedings against the private parties as also the Government servants. Challenging this quashing, the CBI came before this Court. It was urged before this court that: (i) the High Court had erred in holding that though the private parties have become entitled to immunity from prosecution, the official respondents would also be covered thereby, (ii) the High Court erred in holding Section 95(iii) of the Act to be inapplicable to the present case, and (iii) public servants were not entitled to any relief under the Scheme and far less immunity from prosecution. The questions which were formulated were: (i) Whether the Scheme was applicable in relation to a public servant?, (ii) when does a prosecution start? (iii) whether the offences enumerated under Section 95 (iii) were excluded from immunity under Section 91?.

24. Hon'ble Justice Sinha referred to the KVSS 1998 and

more particularly, to *Hiralal's case* in paragraph 42 of his judgment. This Court also referred to the observations of Justice Brijesh Kumar in *Hiralal's case.* In paragraphs 44 and 45, this Court observed:

> "44. An accused may be discharged from a criminal case under Section 245 of the Code, if his civil liability has been determined in his favour; but the same must have a direct nexus with his criminal liability. He would not acquire any immunity only because civil and criminal liabilities have some connection, however remote the same may be. The connection between the two types of liabilities must be direct and proximate. If in incurring the civil liability, he has committed offence wherewith determination thereof has no nexus, the immunity would not extend thereto.
>
> 45. We will give a simple example. A person while obtaining undue favour from an authority under the indirect tax enactment offers a bribe. Obtaining of an undue favour resulting in prosecution under the indirect tax enactment may be a separate offence, but involvement of the public servant qua offences under the Prevention of Corruption Act would be a separate and distinct one."

In paragraph 46, the Court took into consideration the observations of this Court made in *CBI Vs. Duncans Agro Industries Ltd.* (supra). In paragraph 47, *K.C. Builders case* was also referred to. This Court ultimately set aside the judgment of the High Court insofar as it was pertaining to the quashing of the prosecution in respect of public servants.

25. In the above case, the question was whether the immunity granted under the KVSS 1998 could also cover proceedings under the Kerala Sales Tax Act in respect of the same assessee. The learned Judges again referred in paragraph 15 to *Sushila Rani's case* as also to *Hiralal's case* and more particularly to the observations made in paragraphs 18 and 27, which we have already quoted above. The learned Judges then proceeded to hold that *Hiralal's case* was

A distinguished in *Sashi Balasubramanian's case* (cited supra) and held that the transfer of application of Salex Tax Act would not be covered by the immunity under KVSS, 1998. This Court in paragraph 33 observed as under:

> B "33.....an immunity is granted only in respect of offences purported to have been committed under direct tax enactment or indirect tax enactment, but by no stretch of imagination, the same would be granted in respect of offences under the Prevention of Corruption Act. A person may commit several offences under different Acts; immunity C granted in relation to one Act would not mean that immunity granted would automatically extend to others. By way of example, we may notice that a person may be prosecuted for commission of an offence in relation to property under the Penal Code as also under another Act, say for example, D the Prevention of Corruption Act. Whereas charges under the Prevention of Corruption Act may fail, no sanction having been accorded therefore, the charges under the Penal Code would not."

E Thus this Court accepted the principle that the immunity could not cover certain other offences than those covered in direct and indirect tax enactments. The Court also accepted that the immunity could not be granted to any other person automatically merely it was granted to a tax-payer who had made declaration under Section 88 of the Finance Act.

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26. One other judgment in *Master Cables (P) Ltd. Vs. State of Kerala and Anr.* (supra) is to be seen at this stage. The concerned Sections 90(1) & (3), Section 91 and Section 87(h) & (j) fell for consideration in this case also. It was declared in G paragraph 10 in unequivocal terms in this judgment as follows:

> "10. What is conclusive is the order passed under sub-section (1) of Section 90 of the Scheme determining the sum payable under the Scheme. The terms "direct tax enactment" or "indirect tax enactment" or "any other law H for the time being in force" refer only to those statutes

under which the order had been passed. Immunity, as noticed hereinbefore, is in respect of institution of any proceeding for prosecution of any offence under direct tax enactment or indirect tax enactment or from imposition of penalty under any of such enactments. The terms "direct tax enactment" and "indirect tax enactment" have been defined under Sections 87 (h) and 87 (j) of the Scheme, which read as under:

87. (h) "direct tax enactment" means the Wealth Tax Act, 1957 (27 of 1957) or the Gift Tax Act, 1958 (18 of 1958) or the Income Tax Act, 1961 (43 of 1961) or the Interest Tax Act, 1974 (45 of 1974) or the Expenditure Tax Act, 1987 (35 of 1987);

* * * * * * *

(j) "indirect tax enactment" means the Customs Act, 1962 (52 of 1962) or the Central Excise Act, 1944 (1 of 1944) or the Customs Tariff Act, 1975 (51 of 1975) or the Central Excise Tariff Act, 1985 (5 of 1986) or the relevant Act and includes the rules or regulations made under such enactment;" In paragraph 11, this Court observed:

"11. Admittedly, the case of the appellant does not come within the purview thereof. Amplitude of the provisions of the Scheme having been extended only to the enactments made by Parliament. Having regard to the constitutional scheme contained in Article 246 of the Constitution of India, in our opinion, the same cannot be extended to assessment of sales tax under a State Legislation....."

Once this Court had noticed the observations made in *Hiralal's case* and then narrowed the width of the observations expressed in paragraph 27 thereof, we must proceed in terms of the subsequent judgment where the earlier judgment was taken note of.

27. By way of almost a desperate effort Shri K. Subramaniam, learned Senior Advocate then urged that the only

A offence which could have been alleged against any of the accused was under Section 132 of the Customs Act, 1962, i.e., of making a false declaration. The argument was that since the offence complained of related to the false declaration and false documents, the appellant could be prosecuted only under B Section 132 of the Customs Act and not under the offences covered under the Indian Penal Code. Section 132 of the Customs Act is as under:

> **"132. False declaration, false documents, etc.** – Whoever makes, signs or uses, or causes to be made, C signed or used, any declaration, statement or document in the transaction of any business relating to the customs knowing or having reason to believe that such declaration, statement or document is false in any material particular, shall be punishable with imprisonment for a term which D may extend to two years or with fine, or with both."

The argument is only to be rejected. It is not at this stage that we would consider the nature of offences under Section 132 of the Customs Act and/or those under the Indian Penal Code, under which the appellant is being charged. However, E merely because there may be some overlapping in the two offences, it does not mean that the appellant cannot be tried under the offences covered under the Indian Penal Code. The Court would proceed to decide the question on the basis of the evidence led before it. We must hasten to add that merely F because the appellant could be tried under Section 132 of the Customs Act, it does not mean that he could not be tried for the offence committed under the Indian Penal Code. There is no such provision.

G 28. Considering, therefore, the overall situation and considering the law laid down by this Court in the earlier judgments, we are of the clear opinion that the appeals are without any merit. Therefore, both the appeals are dismissed.

K.K.T. Appeals dismissed.

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