* **IN THE HIGH COURT OFDELHI AT NEW DELHI**

% ***Reserved on:07th April, 2025***
Pronounced on: 21st July,2025

\+ **CRL.M.C. 1575/2018 & CRL.M.A. 5713/2018**

ANURAG DALMIA .....Petitioner
Through: Mr. Manish Kumar Singh and Ms. Nusrat Hossain, Advocates.

versus

INCOME TAX OFFICE .....Respondent
Through: Mr. Shlok Chandra, Sr.SC with Ms. Naincy Jain and Ms. Madhavi Shukla, Jr. SCs.

\+ **CRL.M.C. 1576/2018 & CRL.M.A. 5716/2018**

ANURAG DALMIA ....Petitioner
Through: Mr. Manish Kumar Singh and Ms. Nusrat Hossain, Advocates.

versus

INCOME TAX OFFICE ....Respondent
Through: Mr. Shlok Chandra, Sr.SC with Ms. Naincy Jain and Ms. Madhavi Shukla, Jr. SCs.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. These two petitions have been filed under Section 482 and Section 483 of the Code of Criminal Procedure, 1973 (*hereinafter referred to as the "Cr.P.C"*), read with Article 227 of the Constitution of India, seeking quashing of the ***Criminal Complaints No. 536622/2016*** (old Complaint

Case No. 177/4/16) ***and Complaint No. 517460/2016*** (old Complaint Case No. 179/4/16), initiated against the Petitioner under *Sections 276C(1)(i), 276 (D) and 277(1) Income Tax Act*, before the Court of the ACMM, Delhi.

2. The main ground for seeking quashing is that the Assessment Order dated 23.03.2015 which was the very foundation of the Criminal Complaints, has been set aside in Appeal by the Income Tax Appellate Tribunal (ITAT) and nothing survives for prosecution of the Complaints.

3. ***Briefly stated***, Petitioner filed his original Income Tax Return for the year 2006-07 and 2007-08, by declaring his total income for the said years. The original Income Tax Return for the year 2006-07 and 2007-08, got finalized and even ***Refund*** was given to the Petitioner under **Section 143(1) Income Tax Act**, 1961 (*hereinafter referred to as the IT Act*) on 25.05.2007.

4. An information was received from the **French Government** under the **Double Taxation Avoidance Agreement (DTAA) in 2011,** indicating that the Petitioner along with certain others, held bank accounts in HSBC Private Bank (Suisse), SA, Switzerland. The profile of the Petitioner was also linked to four other accounts, namely: *Portland Holdings Ltd.*; *Shagun 21* (formerly *Shagun*, until 25.11.2005); *Willaston Investments Ltd.*, and *Chotuman 21* (formerly *Chotuman*, until 25.11.2005), in which he was shown as the beneficial holder.

5. Further, the account of CHOTUMAN-21 where he is shown as the Account holder, had names of his brother and wife as Attorney and Account Holder 2, respectively. Additionally, in the Account of Shagun 21 in which he has the right to inspection, his friend Vivek Chadha is shown as the

Account Holder. These Accounts could not have been opened, without his prior permission. It was contended that no steps have been taken by the Petitioner to verify the statements in the HSBC Accounts.

6. Based on the aforesaid information received under DTAA, a Search under Section 132 IT Act was carried out on the premises of the Petitioner on 20.01.2012 but ***no incriminating material*** was found qua him.

7. Certain Independent communication was also sought by the Authorities through FT &TR Division of the Central Board of Direct Taxes. Once that communication was received, the taxability of the income on the basis of subsequent Documents/ communications for the said period also became liable for fresh Assessment.

8. The Petitioner was confronted with the aforesaid documents and his Statements were recorded under *Section 132 (4)* IT Act, in which he denied having any Account in the HSBC Bank.

9. *Notice dated 17.10.2012 under Section 153A IT Act*, was sent requiring the Petitioner to file his Return within 15 days from the date of service. The Petitioner in his Reply to the said Notice dated 05.11.2012, declared the same income as was previously disclosed in his earlier Returns.

10. Thereafter, *Notice was issued under Section 142 (1) IT Act* on 18.07.2013, requiring the Petitioner to file certain information in respect of the HSBC Bank and *to sign the Consent-Waiver Form* to procure details of his Bank account from the Swiss Bank. It was contended that no prejudice would have been caused to the Petitioner, in signing the *Consent-Waiver Form* which instead would have facilitated the Indian Government to bring back the amount lying in Foreign Banks.

11. *Upon his failure to comply with the said Notice,* ***penalty of Rs. 10,000 was imposed upon him under Section 271 (1) (b) of the IT Act vide Order dated 01.10.2013, which was upheld by the CIT(A) vide Order dated 06.05.2014.***

12. Another Notice was issued on 21.10.2013, and a Questionnaire dated 26.11.2012 was served upon him, seeking necessary details to be filled therein. In response to the statutory Notices, Shri M.L.Dujari, CA attended the proceedings on behalf of the Petitioner from time to time and filed the details before the Assessing Officer.

13. Copies of the documents received under DTAA, were once again furnished to the Petitioner. *He filed his Reply in respect of the said information dated 20.01.2015, wherein he reiterated his denial of having any knowledge or association with any Swiss Bank Account.*

14. A *Show Cause Notice* was issued to the Petitioner on 04.03.2015 essentially on the basis that the said document received from the French Government containing details of the Petitioner's Bank Accounts, which could not have been accessed without his consent.

15. In Reply **to the said Show Cause Notice**, it was submitted that in the document received from the French Government, there was neither any specific source of information mentioned, nor were there any details of the Banks or the Government of any specific Country who had provided the said information. The said document neither had been authenticated by the concerned Bank or any Competent Authority.

16. **It is further stated in the Reply to said the *Show Cause Notice* that** further information was being sought from the Swiss Authorities, which

shows that the Revenue itself is not sure about the information received. A photocopy of the News Report dated 01.02.2012, downloaded from the website *'www.swissinfo.ch'* and a News Report dated 03.05.2012, published in *Nouvel Observateur* was enclosed which stated that the information as received, *was stolen and modified and no reliance can be placed upon the said information.*

17. It was further submitted that even though information was sought by FT &TR Department, but nothing has been received after so many years. Therefore, interest calculated on the alleged undisclosed amount on the basis of such unauthenticated documents on the presumed rate of 4%, is bad.

18. After granting opportunity of being heard and after due consideration, the Assessment proceeding against the accused were completed on 23.03.2015 and ***Assessment Order was passed under Section 153A/ 143(3) IT Act,*** making certain additions on account of undisclosed alleged *Foreign Bank Accounts* of the Petitioner, particularly the HSBC Bank in Switzerland and the interest presumed to have been received from the alleged Foreign Bank Accounts for the years 2006-07 and 2007-08,under Section 69 IT Act.Additionally, a penalty along with interest, was imposed upon the Petitioner, vide Order dated 30.06.2015.

19. Petitioner preferred ***an Appeal against the Assessment Order dated 23.03.2015 before the CIT (A)***, claiming that in the absence of any incriminating material found against the Petitioner, these additions could not have been made under 153A. ***The Order of the Assessing Officer (AO) was confirmed in Appeal by CIT (A) vide Order dated 11.08.2017.***

20. Aggrieved by the Order of CIT (A), an ***Appeal was preferred before the Income Tax Appellate Tribunal (ITAT),*** which vide its Order dated 15.02.2018, ***set aside the additions made by the AO*** in the Order dated 23.03.2015.

21. Further, following the Order of ITAT dated 15.02.2018, the penalty imposed upon the Petitioner under Section 271 (l)(c) in terms of Assessment Order dated 23.03.2015, was also cancelled by the *Commissioner of Income-Tax (Appeals) in Appeal, vide Order dated 20.02.2018*.

22. On 27.01.2016, the ***Criminal Complaint*** **under** ***Sections 276C(1)(i), 277(1)*****and** ***276 (D) IT Act,*** was instituted against the Petitioner in regard to Income Tax Returns for the years 2006-07 and 2008-09, *for willful attempt to evade tax in relation to the alleged Foreign Bank Accounts in HSBC Bank, Switzerland;alleged false verification given while filing original Return of Income; and non-compliance of Notice dated 18.07.2013 wherein the Petitioner was required to sign "the Consent Form"and thereby committed offences punishable thereunder,respectively.*

23. ***Petitioner has sought quashing of these Complaints on the ground*** that the Orders of the AO and of the CIT (A) merged into the Order of the ITAT, being the final *Fact-Finding Body* under the Income-Tax Act, 1961. Once the Assessment Order passed by the AO itself is set aside, the criminal proceedings initiated against him, would become infructuous.

24. The Petitioner has relied on *State of Haryana v. Bhajan Lal*, AIR 1992 SC 604, where the Supreme Court held that interference under Article 226 or Section 482 Cr.P.C. may be warranted to prevent abuse of process or to secure justice, though this power is to be exercised sparingly.

25. Reliance is also placed on *Baijnath Jha v. Sita Ram &Anr.*, 2008 (3) JCC 1823, where the Court noted that judicial process should not be an instrument of oppression, and the discretion under Section 482 Cr.P.C. must be exercised with caution.

26. Further reliance is placed on *Uttam Chand & Ors. v. Income Tax Officer*, (1982) 2 SCC 543, and *K.T.M.S. Mohammed v. Union of India*, (1992) 197 ITR 196 (SC), wherein it was held that the Prosecution may be quashed if the Assessee receives a favourable finding from the highest fact-finding Authority under the Act.

27. Likewise, in *Dapel Investment Ltd. & Ors. v. Assistant Commissioner of Income Tax*, (2000) 160 CTR (Del) 428, it was held that if the Tribunal finds no concealment or inaccuracy warranting penalty under Section 271(1)(c) IT Act, then criminal proceedings under Section 276C(1) IT Act become unsustainable.

28. ***Per contra, the Respondents*** have vehemently submitted that non-recovery of incriminating material during *Search and Seizure Operation,* is not material in a criminal case if all the ingredients of an offence are established for conviction of an accused. Even though the Assessment proceedings under the Act/ Order of the ITAT would have a bearing on the question in issue involved in a criminal case and it may be sufficient to drop the Criminal proceedings in appropriate case, but such Orders are not binding on the Criminal Court.

29. Further, ITAT's Order which set aside the Assessment Order under Section 153A IT Act, was based solely on *technical grounds of lack of jurisdiction* of the AO to assess the income in absence of any incriminating

material found during search and it did not give any findings in regard to the alleged undisclosed *Foreign Bank Accounts*.

30. In support, the Respondent has placed reliance on the case of *Rinkoo Steels and Ors vs. KP Ganguly, Income Tax Officer &Anr.,*(1989) 179 ITR 482 to assert that if the ingredients under Section 276C, 277 of the IT Act, if prima facie made out and was not merely dependant on Assessment Order, then even if the Assessment Order has been set aside, Criminal proceedings would continue. It would not be tenable or desirable to interfere in the criminal proceedings at an early stage when the accused has been summoned as Court has yet to appreciate the evidence.

31. They have also placed reliance on the case of *Sasi Enterprises v. Assistant Commissioner of Income Tax*, (2022) 19 Taxmann.com 54 (Del), to assert that in the said case, it was held that the offence under Section 276CC for non-filing of Returns, is independent of Assessment proceedings.

32. It is submitted that the prosecution is based not only on the Assessment Order, but on independent information received from the Government of France under the *Double Tax Avoidance Treaty*, that the Petitioner held undisclosed HSBC Switzerland Accounts and there is no reason to doubt the veracity of the said information. The Petitioner never disclosed about these *Bank Accounts n*either in his Returns filed under Section 139 IT Act nor in response to the Notice under 153 (A) IT Act.

33. Reliance was placed on the case of *S. Surya v. DCIT*, (2022) 288 Taxman 209 (Del), to assert that Adjudication proceedings are not a bar to criminal proceedings.If adjudication proceedings were decided on technical

grounds and not on merits, proceedings will continue and Assessee cannot take advantage of adjudication proceedings.

34. The Respondent has also relied upon the judgement of this court in the case of *Karan Luthra v. Income Tax Officer*,(2019) 259 Taxmann.com 500 (SC), asserting that non-compliance with the Notice under Section 142(1) of the IT Act and the questionnaire issued by the AO and refusal to cooperate, including not signing Consent Forms to allow verification from Swiss Banks, are separate offences that have not been looked into by the ITAT.

35. Reliance is placed on the case of *Jayanti Dalmia v. DCIT*, (2022)159 Taxman.com 54, to assert that if the Assessee really had no connection with the Swiss Bank accounts, no prejudice would have been caused to her if she had complied with the Notice under Section 142(1) of the IT Act and filled the Consent Form.

36. *Therefore, there are sufficient reasons to proceed with the Criminal Complaint.*

37. Reliance has also been place on *S Suryah v. DCIT*,(2025) 172 Taxmann.com and *DM Kathir Anand v. NS Panidharan Assistant Commissioner of Income Tax* (2023) 154 Taxman.com to assert that prosecution, under S. 482 Cr.P.C, cannot be quashed without appreciation of facts and materials; it must be seen whether the offences have been prima facie made out.

38. It is further contended that the result of proceeding under the IT Act, would not exonerate the Petitioner or cause any criminal proceeding initiated under the Act, to come to an end. The result of any proceeding

under the IT Act would not be binding on the criminal court, which must independently decide on the basis of evidences before it, as was held in *Jayappan v. SK Perumal*,149 ITR 696 (SO) (2022) 139 Taxmann.com 54.

39. It is submitted that the Petitioner had also preferred another Revision Petition under Section 482 Cr. P.C. before this Court seeking quashing of impugned Order dated 16.05.2017 of the Ld. ASJ dismissing the Petition filed by Petitioner to challenge the Order of Ld. Trial Court dated 12.04.2017 directing recording of *Pre-Charge Evidence*, without deciding the Application under Section 245 Cr. P.C. for his Discharge. The same tantamounts to non-disclosure of material information before this Court.

40. It is therefore, submitted that the present Petition is without merit and is liable to be dismissed.

41. ***Petitioner in his Rejoinder***,submitted that while dismissing the impugned additions in respect of *Foreign Bank Accounts*, Ld. ITAT considered that the impugned Statement in Letter dated 28.06.2011, relied by the Revenue, neither had any mention of HSBC Bank nor was there any authentication by French Authority that the true copy of the HSBC Swiss Bank Account belonged to the Petitioner. Any document so receivedmust be proved as genuine and authentic beyond reasonable doubt.

42. It is contended that the reliance placed on the case of *P. Jayappan* (supra),is misplaced inasmuch as the facts in that case were different wherein during the course of search, incriminating material was found against the Assessee.

43. Respondent has itself averred in paragraph 9 of the impugned Assessment Order dated 23.03.2015, which stated that the Respondent had

sought further information from the Swiss Authorities about the impugned document or the alleged *Bank Account*,though nothing has been received so far. Thus, mere surmise and conjectures is not enough to prosecute a person alleging a criminal offence under Section 276D.

44. *Section 276C (1)* of the IT Act applies only where the Revenue clearly proves beyond doubt, a willful attempt to evade any tax, penalty or interest chargeable or leviable under the Act by the Assessee.

45. In so far as offence under Section 277 IT Act is concerned, Petitioner submits that nothing has been placed on record by the Revenue authorities to show that the Assessee has made a false statement in any verification under the Act.

46. Further, in Reply to the Notice dated 18.07.2013 sent under Section 142(1), Petitioner had stated that he had no connection with any of the alleged Accounts and transactions as mentioned, and therefore, there was no question of providing a signed Consent Letter. Any such Letter could only be issued by an Account Holder of HSBC Bank, to instruct HSBC Bank to divulge information pertaining to Account maintained with HSBC Bank(Suisse), Switzerland. Furthermore, since now the Assessment Order with the impugned addition for foreign Bank Account is no more surviving, the prosecution also must not survive.

47. The Petitioner also submits that the alleged Bank details which have been collected admittedly at the back of the accused, were never found or was never given by him, and he was never confronted with the same before imposition of the penalty. Reference is made to the case of *Andaman Timber*

Industries 281 CTR 241 (SC), *Kishanchand Chellaram*185 ITR 713 (SC) and *Sunita Dhadda* SLP (Civil) No. 9432/2018.

48. Insofar as the aforesaid criminal proceedings bearing *Criminal MC No. 2791 of 2017* instituted by the Petitioner are concerned, reliefs claimed in the same are nowhere connected with relief sought in the present Petition and the same has already been withdrawn on 27.11.2018.

49. It is therefore, submitted that the aforesaid Complaints initiated against the Petition under *Sections 276C(1)(i), 276 (D) and 277(1) IT Act*, be quashed.

50. Submissions heard and record perused.

51. Admittedly, original Income Tax Return for the year 2006-07 and 2007-08, declaring the total income for the said years, was filed by the Petitioner, **which was accepted and finalized a**nd even ***Refund*** was given to the Petitioner under **Section 143(1)** of the IT Act on 25.05.2007.

52. However, after about **eight years**, a *fresh Assessment Order dated 23.03.2015* with additions for the Assessment Years 2006-07 and 2007-08, was passed by AO and penalty imposed on account of some information received *under DTAA from France about the Petitioner* having some undisclosed Bank Accounts in Swiss bank and non-signing of Consent waiver Form to access the Swiss Accounts.

53. The pertinent questions that arise for consideration are:

1. *Whether the information received from France under DTAA can be relied upon to initiate criminal case against the accused?*
2. *Whether on the basis of the aforesaid information, could the Assessee be compelled to sign the Consent Waiver Form?*

3. *Whether the Criminal Complaints under Sections 276(1), 276D, and 277(1) of the IT Act* ***can be*** *sustained* ***when the*** *Assessment Order* ***has been*** *set aside by ITAT for want of incriminating material****?***

I. ***Whether the information received from France under DTAA can be relied upon to initiate criminal case against the accused?***

54. The Petitioner had filed Income Tax Returns for the Year 2006-07 and 2007-08 by declaring his total income for the said years. The Returns were finalized and refund was given to the Petitioner under Section 143(1) IT Act.

55. The case of the Respondent was that in 2011, they received some documents from the French Government under *Double Taxation Avoidance Agreement* indicating that the Petitioner along with certain other persons held Bank accounts in HSBC, Switzerland which led to reopening of the Assessment Orders of the years 2006-07 and 2007-08. On the basis of this information and unauthenticated documents, raid was conducted at the premises of the Petitioner, *but admittedly no documents were recovered*. Despite this, the Assessment for the Years 2006-07 and 2007-08 was reopened and the Assessment Officer imposed fresh penalties. However, these penalties as imposed upon the Petitioner was set aside by ITAT *vide* its Order dated 15.02.2018.

56. Indisputably, if credible information about a wrongdoing associated with the income of an individual is received, the Department is duty bound

to investigate the same, within the boundaries of constitutional permissibility.

57. However, in the present case, the source of information is *the non-authenticated documents received from French Government under DTAA.*Petitioner has also relied on a photocopy of the News Report dated 01.02.2012, downloaded from the website '*www.Swissinfo.ch'*and a News Report dated 03.05.2012, published in *Nouvel Observateur* which stated that the information as received, *was stolen and modified and no reliance can be placed upon the said information.*

58. The ***first significant aspect*** is that the information about unauthenticated documents was received from French Government and not from the original or primary source, namely the Swiss Government, which casts a doubt on its authenticity. Even no prima facie evidence whatsoever, has been placed on record to establish ownership or linkage of any funds in Foreign Bank Accounts, to the Petitioner. Mere presence of his name in unauthenticated document obtained ***indirectly*** through a Foreign Government about alleged Swiss Bank Accounts, does not shift the burden of proof onto the Petitioner to rebut the allegations as mentioned therein.

59. Moreover, it has been rightly asserted by the Petitioner that the Respondent had sought further information from the Swiss Authorities about the impugned document or the alleged *Bank Account*, though nothing has been received so far, as is averred in paragraph 9 of the impugned Assessment Order dated 23.03.2015.

60. It cannot be said that it was the responsibility of the Petitioner to verify the correctness of the information received. Respondent has no cogent

evidence whatsoever, to establish that the Petitioner has any Swiss Bank accounts and the unauthenticated documents have no evidentiary value, to make out a prime facie case against the Petitioner.

61. *Another material aspect* is that on the basis of these un-authenticated documents, a raid was conducted in the premises of the Petitioner, but no incriminating document even remotely suggesting existence of foreign Account, was discovered. In the absence of any evidence of there being a concealment of the income or non-disclosure of the complete income for the two Financial Years, *it cannot be said that the income Assessment as submitted by the Petitioner, was fraudulent or there was any concealment of true income.*

62. This aspect also finds reinforcement from the ***Order of the ITAT dated 15.02.2018*** which also quashed the revised Assessment Order made purely on the basis of unauthenticated documents so received under DTAA, by observing that there was no basis for revising the Income tax Return of the Petitioner. There was nothing even remotely to suggest that either the Assessee was having any bank account in Switzerland with HSBC or he was in any way linked with these bank accounts It thus concluded that if no incriminating material has been found during the course of search, no additions can be made in the Assessment year where Assessments had attained finality. This is more so when the AO did not confront the Assessee with any material which could be said to have been recovered from the possession of the Assessee in the course of search with regard to deposits or any link with Foreign Bank Accounts. It was further noted that CIT(A) while upholding the Order of AO had also given a finding, not on account of

any document or evidence qua the linking of foreign account with the Assessee but only on the basis of information received under DTAA.

63. Ld. Counsel on behalf of the Respondent has contended that Assessment Order **was set aside on technical ground** and the fresh Assessment is sustainable if additional information is collected, as held in the case of *Kabul Chawla* [2016] 380 ITR 573 (Del). This proposition of law is well settled as also observed in the case of *Abhisar Buildwell* .[2023] 149 taxmann.com 399.

64. There is no denying on the legal proposition that if ITAT Order quashing the Assessment Order has its basis in technical grounds, the offence under Section 276CC for non-filing of Returns is independent of Assessment proceedings as has also been held in the case of *Jayappan* (Supra). Furthermore, it is a settled principle of criminal law that prosecution can be initiated only where sufficient evidence exists to justify criminal proceedings to *establish a prima facie case*.

65. However, in the present case, the sole basis to re-open the Assessment and to seek prosecution under S. was the unauthenticated documents received under DTAA claiming that the Petitioner had some accounts in Swiss Bank, but this information never got authenticated by any independent verification as was held in the Order dated 15.02.2018 of ITAT.

66. The basis for charging the Petitioner with the offences in the present criminal proceedings, is solely the unauthenticated information of Bank Accounts, which was held to be not established.The contention that the Order of ITAT was on technical ground, is absolutely incorrect.

67. Similar facts were considered in the case of ***Ram Jethmalani v. Union of India*****, (2011) 8 SCC 1** wherein the information shared by Germany with regard to certain bank accounts in Liechtenstein, also contained names of individuals who appeared to be Indians.While some of the Foreign Bank Accounts were claimed to have been investigated, others had not been. It was also claimed that names of all the individuals have been made public by certain segments of the media**.** ***It was held that*** *no conclusion can be drawn against those who had not been investigated, or only partially investigated, have committed any wrongdoing. There is no presumption that every account-holder in banks of Liechtenstein, has acted unlawfully.*

68. A bare reading of the aforesaid judgement, makes it abundantly clear that merely on some unauthenticated information received from a third Country with no material evidence, is not sufficient to make out a prima facie case and there cannot be a presumption that a person has committed any wrongdoing.Thus, mere surmise and conjectures is not enough to prosecute a person alleging a criminal offence under Section 276D.

69. The Respondent has also relied on the case of S.J. Surya v. DCIT (2022) 139 Taxman.com wherein it was observed that "*when it comes to quashing a Criminal Proceedings, it is very well settled that uncontroverted averments in the Complaint without any addition or subtraction should be looked into to examine whether an offence can be made out are not. It was held that only when the Respondent/Complainant makes out a prima-facie case to proceed against the Petitioner for the offences alleged in the Complaint. Section 278 (e) of the Income Tax Act, 1961, can the Court presume culpable mental state of the accused, unless the accused shows*

that he had no such mental state with respect to the act charged as an offence in the prosecution.

70. In view of the aforesaid judgement, it is reaffirmed that presumption of guilty mind under S. 278E IT Act would arise only if prima facie case is disclosed in the Complaint. As noted above, the Complainant has merely relied on some unauthenticated documents received under DTAA, with no corroborative evidence of there being concealment in disclosure of Income by the Petitioner. *Therefore, when there is no prima facie case made out, no such presumption of culpable mind can be drawn in the present case*.

71. ***To sum up, first aspect*** which emerges from the case of the Respondent itself is that their entire basis rested on unauthenticated documents received from French Government under DTAA. These documents have not been verified and without verification, no authenticity can be attached to these documents received by the Respondent and cannot be a basis to even make out any case, what to talk of prima facie case.

72. The ***second pertinent fact*** is that on the basis of the information so received, the Respondent had conducted raid at the premises of the Petitioner, *but again no incriminating evidence of any kind was recovered*.

73. ***The Third aspect*** is that the Respondent was never confronted with the alleged Bank details allegedly found by the Respondent, before imposition of the penalty.

74. It, therefore, has to be concluded that the unauthenticated documents under DTAA cannot be a basis to conclude that there was no complete disclosure of the income by the Petitioner for the relevant Financial Years.

II. ***Whether on the basis of the aforesaid information, can the Assessee be compelled to sign the Consent Waiver Form?***

75. The Respondent has mentioned in the Complaint that Notice under Section 142(1) IT Act dated 06.05.2013 was issued requiring the Petitioner to furnish the details as per the Questionnaire dated 26.12.2012. Another Notice under Section 142(1) IT Act dated 18.07.2013 was issued requiring him to file information in respect of HSBC Bank, Switzerland. The Petitioner denied to sign the *Consent Waiver Form* which was sent to him, to enable the Respondent to procure the Statements of the Foreign Bank Account.

76. It was claimed that if the Petitioner had no Bank Accounts in Switzerland as was being claimed by him, no prejudice would have been caused to him to sign the Consent Waiver Form.

77. The Respondent haa made as endeavour to contend that not signing the Consent Waiver Form, has not only made it impossible to verify the information about his Swiss Accounts, but his conduct leads to the conclusion of his guilt or else there was no reason for giving the consent to confirm the information received under DTAA.

78. The Consent Waiver Form requires the Assessee to give his consent to enable the Tax Authorities to obtain information from the Swiss Banks about the bank accounts held by the Assessee therein. The Consent Form was a part of the Notice issued *under of the IT Act*. It is contended by the Respondent that Non-compliance with the Notice so issued, leads to imposition of penalty as provided under ***Section 271(1)(b)*** **of the IT Act**. Additionally, the same is also an offence under **Section *276D IT Act***.

79. *In the light of the facts of this case**, first and the foremost***, there was no basis for the Respondent to have sought the signing of the Consent Waiver Form. It was essentially a roving enquiry with no authentic basis and the Petitioner cannot be compelled to be a witness against himself. Had there been some concrete incriminating evidence with authenticated details of Foreign account, the non-signing of Consent waiver Form may have led to some adverse inference, but in the given circumstances, non-signing of Consent Waiver Form, cannot be considered as a basis for criminal prosecution.

80. ***Secondly,*** failure on the part of the Petitioner to submit the requisite information sought in terms of the Section 142 (I) IT Act, led to imposition of the penalty of Rs.10,000/- under Section 271(1) (b) IT Act, vide Order dated 01.10.2013. The Appeal was preferred before CIT (A) by the Petitioner, but it was dismissed by CIT (A) vide Order dated 06.05.2014.

81. From the scheme of the Act and the penal action taken against the Petitioner for non-furnishing of the requisite information or non-signing of Consent Waiver Form, can at best be termed as an act which was liable to be penalized under *Section 271 of IT Act*, which already been done. The dereliction of the Petitioner to not sign the Consent Waiver Form, cannot lead to any adverse inference or to the conclusion that he in fact had the accounts in Swiss Banks.

82. In the case of *Karan Luthra* (supra), Co-ordinate Bench of this Court considered this aspect and observed that the Notices issued by the Assessing Authority under Section 142(1) are meant to facilitate a best judgment Assessment. Failure to comply with these Notices constitutes an offence

separate from the breach of Section 139(1) (*failure to file a Return*). The judgment emphasized that Assessment proceedings and criminal prosecutions are unrelated.

83. This is purely a conjectural conclusion based on surmises that the non-signing of Consent Waiver Form leads to an adverse inference of the Petitioner in fact, having Swiss Bank Account or that he was concealing his true income. Such conclusion is completely against the law and has no basis.

84. Respondent has placed reliance on the case of ***Jayanti Dalmia (Supra),*** in support of his assertions. However, the facts and issues involved were different **from the present *case***. *In the said case,* the penalty imposed under Section 271(1)(b) imposed upon the Assessee were upheld by ITAT relating to the Swiss Bank Accounts, which was challenged before *the Division Bench* of this Court. It is in this context, it was observed that if the Assessee really had no connection with the Swiss Bank Account, no prejudice would have been caused if she had complied with the Notice under Section 142(1) of the Act and filled the Consent Form.

85. However, in the present case the Assessment Orders wherein additional assessments were made on the basis of undisclosed HSBC accounts, had been set aside by the Order of ITAT on the ground that there was no basis for making such additions or imposing penalty. Moreover, the penalty for non-signing of Consent Waiver Form had already been imposed under Section 271 of IT Act and the Appeal preferred therein has already been dismissed by CIT(A). Therefore, when the ITAT concluded that there was no basis for making additional Assessment, no adverse inference on

account of non-signing of Consent Waiver Form by the Assessee could be termed as an act of concealing his true income.

86. It is therefore, held that non-signing of Consent Waiver Form in the present case, could be penalized under Section 271 of IT Act, which has already been done but this act in itself, especially on basis of some unauthenticated information cannot lead to initiation of criminal proceedings against the accused.

III. ***Whether the Criminal Complaints under Sections 276(1), 276D, and 277(1) of the IT Act*** *can be* ***sustained when the Assessment Order has been set aside by ITAT for want of incriminating material****?*

87. To understand the rival contentions, it would be pertinent to first understand the contours of *Sections 276C(1)(i), 276 (D) and 277(1) IT Act under which the Complaints have been filed.*

88. ***Section 276C (1)*** which deals with wilful evasion of Tax, Penalty or Interest. It provides that *if a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable, or under reports his income under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable* with imprisonment as well as fine.

89. Division Bench of Bombay High Court in the case of *Nayan Jayantilal Balu v. Union of India,* 2021 SCC OnLine Bom 5913, noted that the following ingredients must be fulfilled to attract the offence under Section 276(C):

a) Wilful attempt to evade any tax;or

b) Wilful attempt to evade any penalty; or

c) Wilful attempt to evade any interest chargeable or imposable under this Act; or

d) under reporting of his income.

90. Even if one of the above three ingredients are fulfilled, the prosecution can be initiated under Section 276(C).

91. The question for consideration is whether there is any basis to conclude concealment of his income, or evasion to pay tax, penalty or interest, for the relevant years or that he was liable for prosecution for acts under the aforementioned Section.

92. This is an interesting case, where Income Tax Assessment for the financial year 2006-2007 and 2007-2008 not only got finalised, but the excess amount was refunded to the Petitioner on 25.05.2007. The Income Tax Department sought to reopen these ITRs for these two years in January, 2012 on the pretext of having received some unauthenticated documents under DTAA. As already discussed, above in detail, these documents were unproved, unreliable documents, which have even been so held by ITAT in its Order dated 15.02.2018.

93. Therefore, there was no evidence or reason whatsoever to even prima facie establish that there was any evasion of tax punishable under Section 276C(1) of the IT Act**.**

94. The ***Second offence*** for which the Petitioner is sought to be prosecuted is **S. 276 (D)** if the IT Act, and the same is as under:

> ***"276D: Failure to produce accounts and documents [Inserted by Act 42 of 1970, Section 52 (w.e.f. 1.4.1971).]***
>
> *If a person wilfully fails to produce, or cause to be produced, on or before the date specified in any notice served on him under sub-section (1) of section 142, such accounts and documents as are referred to in the notice or wilfully fails to comply with a direction issued to him under sub-section (2-A) of that section, he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine equal to a sum calculated at a rate which shall not be less than four rupees or more than ten rupees for every day during which the default continues, or with both."*

95. The entire prosecution rests on non-signing of the Consent Waiver Form. As discussed above in detail, the basis for compelling him to sign the Consent Waiver Form was the unauthenticated information of Swiss Bank Accounts, which has already been discussed to be not justiciable. He has already been penalized under S. 271 (b) for this act. Therefore, no offence is even *prima facie* disclosed under this **S. 276 (D)** IT Act.

96. The ***third offence*** for which the Petitioner is sought to be prosecuted is **S. 277** which deals with **False statement in verification, *etc*.** It reads as under:

> *"**S.277**. If a person makes a statement in any verification under this Act or under any rule made thereunder, or delivers an account or statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable* with the sentence stated therein*."*

97. Likewise, as already discussed above, there is no basis on which it can be concluded that the Petitioner had made false statements for

verification or false accounts knowing them to be false, punishable under Section 277 of IT Act.

98. Whichever way the facts of the present case may be analysed, there is no evidence whatsoever of either there being any falsification or concealment of true income by the Petitioner. While, it has been rightly contended that the order of ITAT set aside the Order of AO, cannot be sole basis for quashing the present Criminal Complaint, but the aforesaid discussion dehorns the Order of ITAT, shows that there is not even an iota of averment in this regard. There is nothing whatsoever on record to merit the prosecution of the Petitioner under this Section.

99. The Petitioner has contended that once the Order wherein additions were made to the income of the AO, was set aside by the Ld. ITAT on the basis whereof penalty was also set aside by the Ld. CIT(A), there was no material to initiate criminal proceedings qua the Petitioner.

100. Identical question came up for considerationin the case of *K.C Builders and Another v. Assistant Commissioner of Income Tax*(2004) 2 SCC 731 wherein, while making reference to the case of *G.L. Didwania v. ITO*[1995 Supp (2) SCC 724], the Apex Court observed that where the whole question was whether the Appellant made a false statement regarding income which according to the Assessing Authority had escaped Assessment, and the finding of the Appellate Tribunal is conclusive of there being no false statement of Income, then it has to be concluded that the prosecution cannot be sustained. Accordingly, the criminal proceedings were quashed and the Appeal filed by the Assessee was allowed.

101. The State seeking to prosecute an individual through properly conducted investigations, has to be able to establish prima facie grounds to accuse the individuals of wrongdoing. It is only after the State has been able to arrive at a prima facie conclusion of wrongdoing based on material evidence, that the Petitioner can be prosecuted. On the basis of such unverified information about the Petitioner having account in any Swiss Bank, which is consistently denied by him, no prima facie offence is established by the prosecution.

102. Likewise, non-signing of Consent Waiver Form by no interpretation can be taken as proof of undisclosed income of the Petitioner or considered as evidence to prima facie establishing any case for criminal prosecution against the Petitioner.

Final Analysis:

103. The criminal prosecution in the present petition rests solely on these non-existent Bank Accounts. *The findings of ITAT also confirms and corroborates that there exist no Facts, no Accounts, no False Statement and no Falsification of Record, which merit the prosecution under Sections 376C(1)(i), 276D and 277(1) of IT Act.*

104. Similar facts as in hand were considered in the case of *CIT vs. Kabul Chawla (Supra) wherein,* it has been held that under 153A, Assessment cannot be made arbitrarily or without any relevance or nexus with the seized material. The Assessment has to be made only on the basis of seized material. In the absence of any incriminating material, the completed assessment can be reiterated and the Assessment or reassessment can be abated**.** It was further explained that where the Assessments are pending, the

jurisdiction to make the original Assessment and the Assessment under Section 153A merges into one. Only one assessment shall be made separately for each Assessment Year on the basis of findings of the search and any other material existing or brought on the record by the AO. Thus, *the completed Assessments can be interfered with by the AO while making the Assessment under Section 153A, only on the basis of some incriminating material unearthed during the search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced and were not already disclosed or made known in the course of original assessment.*

105. Similar observations were made by Bench of this Court in *Pr. CIT vs. Meeta Gutgutia* ITA No. 306 and 310/2010, affirming the earlier decisions in *Pr. Commissioner of Income Tax vs. Saumya Construction P. Ltd*. (2016) 387 ITR 529 (Guj) and in CIT vs. *IBC Knowledge Park Pvt. Ltd.* (2016) 385 ITR 483.

106. Nothing incriminating came in the hands of Respondent which could justify the Re-assessment.

107. An argument is raised on behalf of the Respondent that this Order of cognizance was also challenged before the Court of Ld. ASJ, but was dismissed. The said contentions cannot be raised in this petition.

108. This aspect was also discussed in the case of *K.C Builders and Another*(supra) wherein the Application was moved by the Assessee before the Magistrate to drop the Criminal proceedings, was dismissed by the Magistrate. The High Court also in a Petition filed under Sections 397 and

401 of the Code of Criminal Procedure, 1973, declined to revise the Order of the Additional Chief Metropolitan Magistrate and dismissed the same and refused to refer to the Order passed by the competent Tribunal. ***It was held*** that the High Court was not justified in dismissing the Criminal Revision ignoring the settled law that the finding of the Appellate Tribunal was conclusive.The prosecution cannot be sustained since the penalty after having been cancelled following the Appellate Tribunal's Order, no offence survives under the IT Act and thus, quashing of prosecution is automatic.

109. This legal position finds further support from the judgment of the Madras High Court in *S. Surya (supra)*, which relied upon *P. Jayappan v. S.K. Perumal*1984 Supp SCC 437 and *Radheshyam Kejriwal v. State of West Bengal* (2011) 3 SCC 581 to hold that an adjudication in favour of the Assessee, can aid the defence if all the issues raised in the Complaint, are discussed and decided on merits.

110. In the present case, the same facts were subject matter of Income Assessment before ITAT, i.e. alleged undisclosed Swiss Bank Accounts, which were held to be not established.

111. It would be significant to refer to the principles laid down by the Hon'ble Supreme Court in *CIT v. Abhisar Buildwell (P) Ltd*. *(Supra)* and by this Court in *CIT v. Kabul Chawla (Supra)*, wherein it is held that no additions can be made in respect of completed and unabated Assessments in the absence of any incriminating material discovered during the search under Section 153(A).

112. Reference be also made to the case *of PCIT vs. Best Infrastructure (India) Pvt. Ltd.* (2017) 397 ITR 82, wherein similar facts were considered

by the Coordinate Bench of this Court. It was held that during the course of search, statements recorded under Section 132(4) by themselves, do not constitute incriminating material and assumption of jurisdiction by the AO under Section 153A, solely based on the said statements is unsustainable. It was thus, concluded that in the absence of any incriminating evidence relating to implicate the assessee, the same could not be used within the scope of Section 153A when nothing was found from the search. In absence of any material in the possession of revenue, the additions made by the AO in the sum of Rs.2,82,448,860/- were deleted. ***As a parting comment***, it was further observed that as per the AO certain information was yet to be received and the material and information available with the Department needs to be corroborated and further enquired into. Under those circumstances also, it was held that the same does not fall within the scope of Section 153A. However, Revenue still has an option to enquire and rake up the said issue under other provisions of the Act and in accordance with law. Thus the Appeal of the Assessee for the Assessment Year 2006-2007 was upheld.

113. The Petitioner's contention also finds support in *Puran Mal Vs. Director of Inspection (1974) 93 ITR 505 SC*, wherein the Supreme Court held that any evidence or material which has been found during the course of search can be utilized, even if search is held to be invalid.

114. However, it was never a case of the Department that post search anything was found. The entire case rested on the unauthenticated information which was already in possession of the Department even prior to conducting the search. CIT(A) had tried to rope in the element of

incriminating material/evidence found during the course of search by holding that statement under Section 132(4) constitutes incriminating material within the meaning and scope of Section 153A. However, such an observation was found to be *de hors* the fact that in the statement recorded under Section 132(4) at the time of search, Assessee had categorically denied having any transaction or any link with the foreign bank account. *The observation of the CIT* that there was incriminating evidence by way of statement from foreign authorities wherein the name of Assessee was appearing, though at the outset appeared to be incriminating, but it was neither the information collected during the search or thereafter. ***It was thus concluded*** that such an addition on the basis of such unauthenticated documents which were already in power and possession of the Department, could not be the basis to make a re-Assessment under Section 153A, especially in the assessments which are not abated.

115. The Respondent has relied upon *Sasi Enterprises Vs. Assistant Commissioner of Income Tax (Supra)* to contend that the Assessment proceedings are not related to criminal prosecution and therefore, setting aside of the Assessment Order would not have any impact on the prosecution proceedings**.** The issue in the said case was whether non-filing of Income Tax Returns of the Partnership Firm, by the partners on the ground that the Assessment was being filed by the individual Partners, was tenable. The Assessee had sought to justify non-filing of Returns on behalf of Firm was that they had filed their Income statements and that Books of Account, had not been finalized. In this context, it was observed that a Firm is independently required to file Income Return and merely because partners

of Firm in their individual Returns, disclosed that no Return has been filed by the Firm due to non-finalization of Books of Account, would not nullify the liability of Firm to file its Returns, as per Section 139(1) of the IT Act. Thus, it was observed that the prosecution can be initiated in the absence of culmination of Assessment proceedings, especially when the Appellant has not filed the Returns as was 139(1) of the Act. The facts of the said case, are clearly distinguishable from the facts in hand.

116. The Respondent further contended that since there was no finding on merits by the ITAT and Order of the AO was set aside merely on technical ground of lack of jurisdiction, the same cannot be the basis to quash criminal proceedings.

117. To appreciate this contention, it would be relevant to reproduce the relevant observations made in the Order dated 15.02.2018 by ITAT wherein it was recorded that in the raid conducted on 20.01.2012 on the premises of Petitioner, no incriminating material was found against the Petitioner. All the information received about the Foreign Bank Accounts, was made available to the Department prior to the search i.e. on 28.06.2011, for which reason ITAT in its Order dated 15.02.2018 had set aside the additions made by the AO in its Order dated 23.03.2015. The relevant **observations are**:-

> *"**22**. Before parting, we make it very clear, that we have not given any findings on merits, and to the veracity of the information received from the department and from the foreign authorities, as to whether Assessee has any link with the foreign bank accounts or not. **Since we have already quashed the addition on legal grounds**, therefore, the other grounds raised on the legal issues, as well as grounds on*

merits, have been rendered academic, and the same are dismissed as infructuous."

118. The detailed Order of ITAT reflects that both the contentions of non-signing of Consent-Waiver Form and unauthenticated documents with no recovery in search and seizure were considered in detail and found to be non-sustainable and re-assessment was set aside. All the allegations made in the Complaint were discussed in detail and decided on merits in the adjudicating proceedings.

119. The concluding remark of ITAT clearly mentioned that the legal questions have been answered, thereby reflecting that the aspects on which the Complaint is based, have been duly considered and decided.

120. Moreover, the contention of the Respondent does not hold much water when all the allegations raised in the Complaint have already been scrutinized independently and it has already been established hereinabove that there is no cogent material to support the allegations in the Complaint.

Conclusion:

121. In the light of aforesaid discussion, considering the totality of the circumstances and the absence of any credible or corroborative evidence, the essential ingredients required to attract the provisions of Sections 276(1), 277(1), and 276D of the IT Act, cannot be said to have been established.

122. The Petitions are therefore, **allowed** and the Two Complaints No***536622/2016*** and ***517460/2016, are hereby quashed***.

123. Pending Applications, if any, are disposed of accordingly.

(NEENA BANSAL KRISHNA)

JUDGE

21 JULY, 2025
Rk