Hira Lal Hari Lal Bhagwati vs C.B.I., New Delhi on 2 May, 2003

Author: Ar. Lakshmanan

Bench: Ar. Lakshmanan

```
           CASE NO.:
Appeal (crl.)  676 of 2003

PETITIONER:
Hira Lal Hari Lal Bhagwati

RESPONDENT:
C.B.I., New Delhi

DATE OF JUDGMENT: 02/05/2003

BENCH:
AR. Lakshmanan

JUDGMENT:
```

J U D G M E N T WITH Criminal Appeal No.677/2003 @ S.L.P.(Crl.)No.1363/2002 (Arising out of S.L.P.(Crl.) No. 1356/2002) Dr. AR. LAKSHMANAN, J.

Leave granted.

These two appeals arise out of the final judgment and order passed by the High Court of Delhi at New Delhi in Criminal Miscellaneous (M) Nos. 360/2002 and 447/2002 filed under Section 482 of the Criminal Procedure Code read with Article 227 of the Constitution of India by the appellants herein seeking the invocation of the inherent powers of the High Court for quashing the F.I.Rs and the proceedings initiated in pursuance thereto, as also the process issued by the Chief Metropolitan Magistrate, Delhi. The learned single Judge of the Delhi High Court, by the impugned final orders, held against the appellants that obtaining from the Ministry of Health Customs Duty Exemption Certificate, that was meant for `actual user' on false assertion makes out the offence under Section 120B read with Section 420 of the Indian Penal Code.

The respondent herein (Central Bureau of Investigation, New Delhi) initiated criminal proceedings under Section 120B read with Section 420 of the Indian Penal Code against the appellants on the ground that the appellants in conspiracy with the Director of Gujarat Cancer and Research Institute, Mr. T.B. Patel (deceased), Secretary of the Gujarat Cancer Society, Mr. N.L. Patel and Dr. Viral C. Shah with each other have cheated the Government of India in terms of evasion of Customs Duty and by concealment of facts obtained Customs Duty Exemption Certificate in respect of MRI and Lithotripsy machines and by violating the provisions of 'actual user' condition as per Import Export Policy and Customs Notification No. 279/83 dated 30.9.1983 and Customs Notification No. 64/88 dated 1.3.1988 during the year 1987-90, despite acknowledging the fact that the Customs Duty has

been paid by the appellants to the Customs Department and settled under the Kar Vivad Samadhan Scheme, 1998. In the instant case, two machines were imported into India by the Gujarat Cancer Society (hereinafter referred to as "the GCS") who availed of the duty exemption on the basis of the exemption certificate issued in the name of the Gujarat Cancer and Research Institute (hereinafter referred to as "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 and that they are akin to holding any subsidiary company, the same could be done. The Customs Authority raided the premises of the GCRI and seized the machines and necessary paper work on the ground that the exemption certificate was issued in the name of the GCRI and not in the name of the GCS and thus the GCS was not entitled to exemption and was, therefore, liable to pay Customs Duty. The machines were immediately released on giving a usual undertaking. On 11.10.1991, Show Cause Notice was issued to the GCS which was replied to by them. The Collector of Customs, Bombay by an order dated 10.4.1993 held that the GCS was liable to pay the Customs Duty, thus denying the concessional duty benefit under Customs Notification Nos. 279/1983 and 64/1988 and demanded a duty of Rs.2,16,80,444/- under Section 28 of the Customs Act, 1962 read with the proviso to the said Section. The said duty was to be paid by the importer GCS and Canbank Financial Services as well as ICICI being joint holder of the said imported machines. However, considering the charitable and philanthropic activities of the GCS, no prosecution was recommended and only a token redemption fine of Re.1/- was imposed. No penalty was imposed on the above said financial organisations, namely, Canbank Financial Services and ICICI as they were acting as a lessor, who had extended financial extension to the above charitable organisation for import of sophisticated machines. A personal penalty was imposed on M/s. Shah Diagnostic Institute Pvt. Ltd., Ahmedabad and its Director, Dr. Viral C. Shah jointly under Section 112 A the Customs Act, 1962.

Against the order of the Collector of Customs, the appellants preferred appeals before the Customs, Excise and Gold (Appellate) Tribunal, West Regional Branch, Bombay which confirmed the findings of the Collector of Customs. Against the order of the Customs, Excise & Gold (Appellate) Tribunal, the GCS came up in appeal before this Court in Civil Appeal No. 31/1999. Whilst the matter was pending before this Court, the Government of India launched the Kar Vivad Samadhan Scheme, 1998, whereby whoever takes the benefit under the said Scheme is granted immunity from prosecution from any offence under the Customs Act including the offence of evasion of duty. In accordance with the Kar Vivad Samadhan Scheme, 1998, the GCS had agreed to deposit the stipulated amount of over Rs.98 lakhs which had already been deposited earlier and withdrew the Civil Appeal pending before this Court. On 19.7.1999, a certificate for full and final settlement of tax arrears in respect of the Kar Vivad Samadhan Scheme, 1998 was issued to the GCS. The said Certificate, inter alia, certified the receipt of payment from the GCS towards full and final settlement of tax arrears determined in the order dated 10.2.1999 of the Designated Authority and further granting immunity to the GCS from any proceedings for prosecution from any offence under the Customs Act, 1962 or from the imposition of penalty under the said enactment, in respect of the matters covered in the declaration made by the GCS.

However, a case was registered against the appellants on 6.1.1999 by the respondent alleging that the appellants in conspiracy with the Director of the GCRI, Mr. T.B. Patel (deceased), Secretary of the GCS, Mr. N.L. Patel and Dr. Viral C. Shah had cheated the Government of India in terms of

evasion of Customs Duty and by violating the provisions of 'actual user' condition as per Import Export Policy during the year 1987-88. A charge sheet was prepared for commission of offence under Section 120B read with Section 420 of the Indian Penal Code. On presentation of the said charge sheet, the trial Court by its order took cognizance and summoned the appellants. The appellants were furnished copies of the charge sheet. In the meantime, the appellants preferred Special Criminal Applications before the High Court of Gujarat at Ahmedabad seeking quashing of the FIR. However, the same was disposed of as withdrawn on the ground of jurisdiction with a liberty to file a fresh petition before an appropriate Court. Thereupon the appellants filed Criminal Miscellaneous (Main) Petitions under Section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India in the High Court of Delhi at New Delhi seeking an appropriate order/directions to the respondent quashing the FIR concerned. The learned single Judge of the High Court of Delhi, by his final order, dismissed the said petitions. Hence these two appeals by way of special leave petitions.

We have heard Shri P. Chidambaram, learned senior counsel, appearing for the appellants in both the appeals and Shri K.K. Sood, learned Additional Solicitor General, appearing for the respondent.

Before considering the rival submissions of the respective counsel appearing on either side, it is useful to reproduce the short order passed by the learned single Judge of the High Court of Delhi on 4.3.2002 which reads as under:

> "This petition has been filed with a prayer to quash FIR No. R.C. 1(E)/99/EOW-I/DLI under Section 120B r/w 420 IPC and the proceedings initiated in pursuance thereto.
>
> It is the case of the petitioner that petitioner has compounded the offence by taking recourse to Kar Vivad Samadhan Kar Vivad Samadhan Scheme, 1998 and that no prosecution for offence after compounding of offence can be instituted. He draws my attention to a judgment of the Supreme Court in Smt. Sushila Rani vs. Commissioner of Income Tax & Anr., 2002 Vol.II AD Apex Decisions, where the Supreme Court has held that :
>
> "The appellant in the course of the declarations filed specifically stated that any adjustment of refunds towards tax arrears of the appellant by the Department in the earlier years without following the mandatory procedure of Section 245 of the Act would still remain as tax arrears for the purpose of the KVSS and it is on that basis the declarations were accepted by the Department. Having accepted the claim of the appellant on that basis, it will not be permissible for the respondents now to turn around and take a different stand."

The case of the prosecution is that this is not a question of mere evasion of custom duties but it is a question of obtaining custom duty exemption certificate from the Ministry of Health by making a false assertion that the machines imported are for actual user. The compounding of offence subsequent thereto only indicates that a certificate was falsely induced from the Ministry of Health.

Having heard learned counsel for parties and having gone through the judgment relied upon by learned counsel for the petitioner, I am of the view that obtaining a certificate, that was meant for actual user, on false assertion, makes out the offence.

Crl.M.(M) 360/2002 is dismissed."

Learned senior counsel appearing for the appellants submitted that to the show cause notice, the appellants had sent a proper reply and after hearing the case of the GCS, the Collector of Customs, Bombay held that the GCS was liable to pay the Customs Duty but in view of the activities of the Society and the bona fides of the Society, and considering charitable and philanthropic activities of the Society, no prosecution was recommended and moreover, only a token redemption fine of Re. 1/- was imposed. Thus, he submitted that the concerned authorities were satisfied that there was no intention to evade the Customs Duty as stated by the authorities. It was further submitted that the GCS was immuned from any criminal proceedings pursuant to the Certificates issued under the Kar Vivad Samadhan Scheme, 1998 and the present appellants are being prosecuted in their capacity as office bearers of the GCS. As the Customs Duty has already been paid, the Central Government has not suffered any financial loss. Moreover, as per the Kar Vivad Samadhan Scheme, 1998, whoever is granted the benefit under the Kar Vivad Samadhan Scheme, 1998 is granted immunity from prosecution from any offence under the Customs Act, 1962, including the offence of evasion of duty. In the circumstances, the complaint filed against the appellants is unsustainable and that the appellants are reputed persons who had never even contemplated committing any violation of law or thought of taking undue advantage of the exemption Notifications under the Customs Act and that when the Society availed of the exemption Notification in respect of the two machines, it acted bona fide in the belief, that since the machines were being imported, purely for the benefit of the cancer patients of the GCRI, by such importation, cancer patients would be benefited, as they would get diagnosis and treatment in the GCRI itself and would not have to go to Bombay and other places. He further contended that the impugned order passed by the High Court of Delhi is bad in law and fact inasmuch as the learned single Judge has erred in passing the impugned order, dismissing the petitions filed under Section 482 of the Criminal Procedure Code on the basis of an erroneous reading and a total misinterpretation of the judgment and despite the well- settled principle of law cited by the petitioners. In this context, he cited the judgment of this Court in the case of Sushila Rani (Smt) vs. Commissioner of Income Tax and Another, (2002) 2 SCC 697. He also cited the judgment of this Court in the case of Central Bureau of Investigation, SPE, SIU(X), New Delhi vs. Duncans Agro Industries Ltd., Calcutta, (1996) 5 SCC 591. Placing reliance on the above judgments, he urged that the alleged criminal liability stands compounded on a settlement with respect to the civil issues and, therefore, the FIR was erroneously issued and was totally unwarranted. He further submitted that under the penal law, there is no concept of vicarious liability unless the said statute covers the same within its ambit. In the instant case, the said law which prevails in the field i.e. the Customs Act, the appellants have been therein under wholly discharged and the GCS granted immunity from prosecution. He also contended that the learned single Judge failed to appreciate that the GCS had taken the benefit of the Amnesty Scheme of Kar Vivad Samadhan Scheme, 1998 and, therefore, implicating the appellants being office bearers of the Society under Section 120B read with Section 420 of the Indian Penal Code is against the purpose and object of the said Scheme, and, therefore, there is no prima facie case against the appellants in respect of the alleged offence.

He further submitted that evasion of Customs Duty, in the present case, was predominantly a civil case and that the ingredients of criminal offence were missing/wanting and which liability, in any case, stood settled and that, therefore, in such a scenario, the appellants to undergo an agony of a long criminal trial would be an abuse of process of Court and against the interest of justice.

He invited our attention to the pleadings, in particular, the F.I.R., the Annexures of the S.L.Ps, the provisions of the Kar Vivad Samadhan Scheme, 1998, the relevant provisions of the Indian Penal Code, the Customs Act, 1962 and the rulings relied on by him.

Shri K.K. Sood, learned Additional Solicitor General, appearing for the respondent, submitted that the material gathered in the investigation clearly show and establish commission of offences by the accused persons indicating the appellants herein under Sections 420 and 120B of the Indian Penal Code and that there is no infirmity in the order of the Chief Metropolitan Magistrate taking cognizance or in the order of the High Court declining to quash criminal proceedings at the interlocutory stage. He further submitted that the criminal proceedings in respect of which cognizance has been taken by the Court can be interfered with or quashed only if the allegations even if taken on their face value do not satisfy or make out the ingredients of offences alleged and no offence is at all made out or there is legal or statutory impediment in prosecuting the accused person. He submitted that none of these grounds exist in the present case. According to him, in the present case, material on record clearly show and establish commission of offences under the Indian Penal Code by the appellants and since the charges are supported by documentary evidence which establish the same, there is no warrant or justification or basis for seeking the relief of quashing the criminal proceedings. He further submitted that the High Court has rightly declined to quash the criminal proceedings and, therefore, the same does not call for any interference by this Court. In regard to the judgments cited by Shri P. Chidambaram, learned senior counsel appearing for the appellants, he submitted that the reliance placed upon those judgments is also without any merit and in the present case, material on record clearly show and establish the criminal conspiracy to cheat the Government and actually cheating the Government of India pursuant to the same and that it is not a civil dispute as has been sought to be made out and that the conduct of the accused persons is criminal in nature and material on record clearly establish commission of criminal offences by them. Thus, he would submit that the judgment in the case of Duncans Agro Industries Ltd., Calcutta (supra) has no application to the present case. Referring to the plea that the duty payable has been subsequently paid, he submitted, that such payment is not a ground for quashing criminal proceedings or absolving the accused persons of their criminal liability. According to him, the judgment in the case of Sushila Rani (supra) dealt with proceedings under the Income Tax Act and held that once the matter is settled under the Kar Vivad Samadhan Scheme, 1998, such settlement cannot be reopened except under specified grounds and that the stated grounds do not exist in the said case and that there is nothing in the said judgment warranting the plea of the appellants, in the present case, that criminal proceedings under the Indian Penal Code are prohibited merely because disputes concerning tax have been settled under the Kar Vivad Samadhan Scheme, 1998. According to him, such settlement only protects the individual from prosecution under the taxing Statute which is a limited protection and limited to the proceedings under the taxing Statute only. Coming to the certificate issued by the authorities under the Kar Vivad Samadhan Scheme, 1998, he submitted that the certificate issued by the authorities under the

said Scheme cannot be the ground and basis for quashing the criminal proceedings. According to him, a perusal of the certificate would show that the settlement under the Kar Vivad Samadhan Scheme, 1998 gives immunity only from prosecution under relevant taxing Statute and not under the Indian Penal Code. Concluding his arguments, he submitted that the criminal proceedings cannot be quashed merely on account of the fact that Customs Duty payment has been settled. Before proceeding to consider the rival submissions, it is beneficial to refer to certain annexures filed along with the special leave petitions. The true copy of the agreement dated 28.4.1988 between the GCS and Dr. Viral C. Shah has been filed. This agreement was made at Ahmedabad on 28.4.1988 as an addendum to the original agreement dated 24.2.1987 entered into between the GCS on the one part and Dr. Viral C. Shah as the second part. The relevant clauses of the agreement are extracted below:

> "(1) The Gujarat Cancer Society shall acquire ESWL and MRI machines in its own name and for this Dr. Viral Shah shall make necessary arrangements for the construction of the buildings for housing the said two equipments by way of arranging donations to the Society of an amount equivalent to the total cost of construction of premises required for the instalment of said machines. The Society shall construct the required premises in a portion of the land in the hospital complex and on completion the said building, the ownership of the said premises so constructed shall vest with the Society.
>
> (2) The overall control in regard to appointment of all categories of staff and running and maintenance of these two equipments will be with the Gujarat Cancer & Research Institute, Ahmedabad as per the tripartite agreement with the Govt. of Gujarat, the Gujarat Cancer Society, and the Gujarat Cancer and Research Institute.
> (3) Raising of loan, Dr. Shah will arrange for the Society procuring finance from financial institutions including leasing company or companies for meeting the cost for the matching out the purchase of procuring such finance the said machines may be mortgaged or leased to leasing company or financial institution which in turn will be leased out to the Society.
>
> (4) In consideration of the Society having entrusted the running and maintaining the said machine to the said Dr. Shah as herein provided the said Dr. Shah shall pay to the Society rental which shall be equivalent to the amount of monthly instalment and interest and/or hire charges payable by the Society to the financial institutions and/or to the leasing company from whom the finances shall have procured for the said machines.
>
> (6) The Institute agrees that Dr. Shah through the Gujarat Cancer Society shall be entitled to work, run, and maintain the said two machines for a maximum period of ten years and Dr. Shah or his nominees shall be responsible for the repairs and replacements of parts thereof, during the said period."

The First Information Report filed as Annexure P-2 along with the S.L.P. is as under:

"RC.1(E)/99-EOW.I.DLI 06.01.1999 at 16.00 hrs. Place of occurrence with State Delhi, Mumbai and Ahmedabad Date and time of occurrence during the year 1987-90 Name of complainant and Joint Secretary, Ministry of Health and Informant with address Family Welfare, Government of India, New Delhi.

Offence IPC 120-B r/w 420

Name and address of accused 1. Sh. N.L. Patel, Director
Gujarat Cancer Research Institute
Ahmedabad.

2. Dr. Viral C. Shah, Director
M/s. Shah Diagnosis Institute (P) Lt
Mumbai and Ahmedabad.

3. Sh. D.D. Patel, Secretary
Gujarat Cancer Society, Ahmedabad.
& others unknown

Action taken RC is registered and investigation taken up.

Investigating Officer Shri Rajveer Singh,
DY.SP.CBI/EOW-I/NEW DELHI

INFORMATION

The Joint Secretary, Ministry of Health & Family Welfare, Government of India, New Delhi vide his D.O. No. C-18011/5/96-VIG(PT) dated 22/24.12.98 has sent a copy of the report dated D.O. F.No. IMP/CDE/1/1/97-RC (GUJ-4), dated 17.08.1998 submitted by Sh. P. Rosha, Chairman of Special Committee appointed by Hon'ble High Court, Delhi to inquire into the import of equipments against Customs Duty exemption certificate for use in Charitable Hospitals. The Hon'ble High Court, Delhi has approved the suggestion to refer the matter to CBI for registration of case and investigation. Accordingly, the Joint Ministry of Health and Family Welfare, Government of India, New Delhi has requested CBI to investigate the matter."

Our attention was drawn to the Rosha Committee Report dated 17.08.1998 and application dated 15.10.1987 for import licence for import of LITHO ESWL Equipment by 'actual users' (Non-Industrial). There is another application for import of another machine. The agreement copy was also enclosed for ready reference to the Joint Chief Controller, Import and Export Trade Organisations, Ahmedabad. Along with the application, the agreement between the GCS , the GCRI and the State Government of Gujarart was also enclosed as Annexure No.4. Our attention was also drawn to the Text of the Kar Vivad Samadhan Scheme, 1998, under Chapter IV of Finance (No.2) Act, 1998. Our attention was also drawn to Sections 86 to 98 of the said Scheme which are relevant for the present purpose. Our attention was further drawn to the Memorandum to Finance(No.2) Bill, 1998 explaining the provisions of the Kar Vivad Samadhan, 1998. The said Scheme seeks to provide a quick and voluntary settlement of tax dues outstanding as on 31.3.1998, both in various

direct tax enactments as well as indirect taxes enactments by offering waiver of a part of the arrear taxes and interest and providing immunity against institution of prosecution and imposition of penalty. The assessee on his part shall seek to withdraw appeals pending before various appellate Authorities and Courts. The Kar Vivad Samadhan Scheme, 1998 comes into force on the first day of September, 1998 and ends on 31st day of December, 1998. The Kar Vivad Samadhan Scheme, 1998 is applicable to tax arrears outstanding as on 31.3.1998 under various direct tax enactments and indirect tax enactments. Clauses 3 & 4 of the Memorandum to Finance (No.2) Bill, 1998 read as under:

> "3. A person desiring to avail the scheme is required to file a declaration in the prescribed form before the designated authority notified for this purpose. The designated authority shall pass an order within sixty days of the declaration determining the amount payable in accordance with the provisions of the Scheme and grant a certificate indicating the particulars of tax arrears and the sum payable and intimate the same to the declarant. The declarant will pay the sum payable as determined by designated authority within thirty days of the passing of such order. The order passed by the designated authority shall be conclusive and shall not be reopened in any other proceedings or under any law for the time being in force. Where the declarant has filed an appeal or reference before any Authority, Tribunal or Court, notwithstanding anything contained in any other provision of law for the time being in force, such appeal, reference or reply shall be deemed to have been withdrawn. Where writ petitions have been filed before the High Court or Supreme Court the declarant shall move an application for withdrawing such petitions and furnish the proof of the same along with the intimation. Any amount paid in pursuance of declaration made under the Scheme shall not be refundable under any circumstances.
>
> 4. The designated authority shall subject to the conditions provided in the Scheme grant immunity from prosecution or penalty under the relevant Acts in respect of matters covered in the declaration."

Section 87 (h) of the Kar Vivad Samadhan Scheme, 1998 defines "direct tax enactment" which reads thus:

> ""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)."

Sub-clause (j) of Section 87 defines "indirect tax enactment" which reads thus:

> "indirect tax enactment" means 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."

The present case comes under the tax arrears payable under the indirect tax enactment. Section 89 of the Kar Vivad Samadhan Scheme, 1998 deals with particulars to be furnished in declaration and Section 90 of the Scheme deals with time and manner of payment of tax arrears. Clause (2) of Section 90 provides that the declarant shall pay, the sum determined by the Designated Authority within thirty days of the passing of an order by the Designated Authority and intimate the fact of such payment to the Designated Authority along with proof thereof and the Designated Authority shall thereupon issue the certificate to the declarant. Clause (3) of Section 90 of the said Scheme provides that every order passed under sub- section (1), determining the sum payable under this Scheme shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the direct tax enactment or indirect tax enactment or under any other law for the time being in force. Sub-clause (4) of Section 90 of the said Scheme provides that where the declarant has filed an appeal or reference or a reply to the show-cause notice against any order or notice giving rise to the tax arrear before any authority or Tribunal or Court, then, notwithstanding anything contained in any other provisions of any law for the time being in force, such appeal or reference or reply shall be deemed to have been withdrawn on the day on which the order referred to in sub-section (2) is passed.

It is pertinent to notice that the First Information Report was filed on 6.1.1999 and the Certificate under the Kar Vivad Samadhan Scheme, 1998 was issued to the appellants on 19.7.1999 by the Commissioner of Customs (Adjudication) & Designated Authority (KVSS-98). It is also to be noticed that Section 95 of the Kar Vivad Samadhan Scheme, 1998 provides that the provisions of this Scheme shall not apply in certain cases. Under Section 95(ii)(a) of the said Scheme, in a case where prosecution for any offence punishable under any provisions of any indirect tax enactment has been instituted on or before the date of filing of the declaration under Section 88, in respect of any tax arrear in respect of such case under such indirect tax enactment, this Scheme shall not apply. Clauses (ii) and (iii) of Section 95 of the Kar Vivad Samadhan Scheme, 1998, which are relevant for our purpose are reproduced hereunder:

> "(ii) in respect of tax arrear under any indirect tax enactment,-
>
> (a) in a case where prosecution for any offence punishable under any provisions of any indirect tax enactment has been instituted on or before the date of filing of the declaration under Section 88, in respect of any tax arrear in respect of such case under such indirect tax enactment;
>
> (b) in a case where show cause notice or a notice of demand under any indirect tax enactment has not been issued;
>
> (c) in a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court or no, application for revision is pending before the Central Government on the date of declaration made under Section 88;

(iii) to any person in respect of whom prosecution for any offence punishable under Chapter IX or Chapter XVII of the Indian Penal Code (45 of 1860), the Foreign Exchange Regulation Act, 1973 (46 of 1973), the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Terrorists and Disruptive Activities (Prevention) Act, 1987 (28 of 1987), the Prevention of Corruption Act, 1988 (49 of 1988), or for the purpose of enforcement of any civil liability has been instituted on or before the filing of the declaration or such person has been convicted of any such offence punishable under any such enactment;"

Sections 166 to 177 of Chapter IX of the Indian Penal Code deal with offences relating to public servants. Likewise, Sections 378 to 462 of Chapter XVII of the Indian Penal Code deal with offences against property. Thus immunity is granted to the persons in respect of whom the offence is punishable under Chapter IX or Chapter XVII of the Indian Penal Code.

Annexure P-1 is the Certificate issued to the GCS under the Kar Vivad Samadhan Scheme, 1998 , Form-4 (Rule 5[b]). This certificate has been issued for full and final settlement of tax arrears under Section 90(2) read with Section 91 of the Finance (No.2) Act, 1998 in respect of Kar Vivad Samadhan Scheme, 1998. Before issuing the certificate, the Commissioner of Customs (Adjudication) & Designated Authority (KVSS-98) takes into consideration the following facts:

(a) that the Gujarat Cancer Society, Ahmedabad had made declaration under Section 88 of the Finance (No.2) Act, 1998;

(b) that the designated authority by order dated 10.2.1999 determined the amount of Rs.98,40,222/- payable by the declarant in accordance with the provisions of the Kar Vivad Samadhan Scheme, 1998;

(c) that the certificate is granted towards full and final settlement of tax arrears as per the details given in the certificate;

(d) that the Civil Appeal No.31/1999 filed by the GCS, Ahmedabad in this Court under Section 130E of the Customs Act, 1962 against the judgment and order Nos. 758 to 761/98-b2 passed by the Customs, Excise and Gold (Control) Tribunal, New Delhi was withdrawn. The order was passed by this Court on 16.3.1999 and a copy of the said order was produced before the authorities as proof of such withdrawal in accordance with the provisions contained in the proviso to sub-section(4) of Section 90.

(e) The declarant has paid Rs.98,40,222/- being the sum determined by the Designated Authority.

In exercise of the powers conferred by sub-section(2) of Section 90 read with Section 91 of the Finance (No.2) Act, 1998, the Designated Authority issued the certificate to the declarant in the following terms:

(a) Certifying the receipt of the payment from the declarant towards full and final settlement of tax arrears determined in the order dated 10.2.1999 on the declaration made by the aforesaid declarant;

(b) Granting immunity, subject to the provisions contained in the Kar Vivad Samadhan Scheme, 1998, from instituting any proceeding for prosecution for any offence under the Customs Act, 1962, or from the imposition of penalty under said enactment, in respect of matters covered in the aforesaid declaration made by the declarant;

It is thus crystal clear that the Commissioner of Customs (Adjudication) & Designated Authority (KVSS-98) granted immunity from instituting any proceeding for prosecution for any offence under the 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 liable to pay the Customs Duty but in view of the activities of the Society and the bona fides of the Society, and considering charitable and philanthropic activities of the Society, no prosecution was recommended. Moreover, only a token redemption fine of Re.1/- was imposed. Thus it is seen that the Customs Authorities were satisfied that there was no intention to evade the Customs Duty. However, the Collector denied the GCS the concessional duty benefit under Customs Notification Nos. 279/1983 and 64/1988 and demanded the duty of Rs.2,16,80,444/- under Section 28 of the Customs Act, 1962 read with the proviso of the said Section. The said duty was to be paid by the GCS (Importer) and Canbank Financial Services as well as ICICI being the joint holder of the said imported machines. A personal penalty of Rs. 10 lakh was imposed on Dr. Viral C. Shah and M/s. Shah Diagnosis Institute Pvt. Ltd., Ahmedabad and Bombay jointly under Section 112 (a) of the Customs Act, 1962. We have carefully gone through the Kar Vivad Samadhan Scheme, 1998 and the certificate issued by the Customs Authorities. In our opinion, the GCS is immuned from any criminal proceedings pursuant to the certificates issued under the said Scheme and the appellants are being prosecuted in their capacity as office bearers of the GCS. As the Customs duty has already been paid, the Central Government has not suffered any financial loss. Moreover, as per the Kar Vivad Samadhan Scheme, 1998 whoever is granted the benefit under the said Scheme is granted immunity from prosecution from any offence under the Customs Act, 1962 including the offence of evasion of duty. In the circumstances, the complaint filed against the appellants is unsustainable.

We shall now analyse the judgment in the case of Sushila Rani (supra). That case also refers to the Kar Vivad Samadhan Scheme, 1998. The appellant before this Court in that case is the widow of the original assessee under the Income Tax Act,1961 for the Assessment Year 1988-89, the appeal was pending before the Commissioner of Income Tax (Appeals) while for Assessment Years 1989-90 and 1991-92, appeals were pending before the Income Tax Appellate Tribunal. The appellant requested the Department to indicate or compute the tax arrears as per the Kar Vivad Samadhan Scheme, 1998 so that all disputes in relation to these three assessment years can be resolved. As there was no response from the Department, the appellant submitted three separate declarations under Sections 88 and 89 of the Kar Vivad Samadhan Scheme, 1998 and also pointed out the mandatory nature of Section 245 of the Act. Respondent 1, on receipt of the declarations for the three assessment years

evaluated and verified the same in accordance with the provisions of the Kar Vivad Samadhan Scheme, 1998 and on being satisfied with the correctness of the declaration in every respect, issued on 26.2.1999 a statutory certificate prescribed in Form 2-A and Rule 4(a) under the provisions of Section 90(1) of the kar Vivad Samadhan Scheme, 1998. On receipt of the said certificate under Section 90(1) of the Kar Vivad Samadhan Scheme, 1998, the appellant deposited the sum determined and demanded the issue of certificate under Section 90(2) of the Scheme for the deemed withdrawal of the appeal filed by the appellant for these years which were pending adjudication. Respondent No.1 issued a certificate in Form 3 as required in favour of the appellant certifying the receipt of payments from the appellant towards full and final settlement of the tax arrears determined in the order dated 26.2.1999 and granting immunity from instituting any proceeding for prosecution of any offence under the Act or from imposing any penalty under the said Act. Thereafter on 11.8.1999 certificate was issued by the Department to the effect that no arrears or demand of any kind is outstanding against the appellant as per the records of the respondents. On 26.10.1999, the appellant submitted a representation requesting the respondents to refund all the amounts along with interest as per the provisions of the Act upon the finalisation of the declarations made by the appellant under the provisions of the kar Vivad Samadhan Scheme. This claim resulted in the issue of a notice on 23.6.2000 under Section 90(1) of the kar Vivad Samadhan Scheme calling upon the appellant to explain as to why, the certificate issued under Section 90(1) of the Scheme earlier be not amended, on the ground that the determination made by the Department for the three assessment years in question was on the Department's wrong understanding of the judgment of the Allahabad High Court. The appellant, thereupon, filed a writ petition challenging the issuance of the notice on the ground that the same is without jurisdiction. The High Court took the view that what is under challenge in the writ petition is only a show cause notice and it would be open to the appellant to highlight the question relating to lack of jurisdiction before the Commissioner when the matter is taken up for further consideration. The High Court did not express any opinion on the facts of the case and disposed of the writ petition. Hence, the appeal by special leave. In paragraphs 6 and 8 of the judgment, this Court held, "An examination of the scheme of Sections 89, 90 and 91 KVSS would reveal that every person entitled to make a declaration under the said Scheme was obliged to submit the declaration on or before 31-1-1999; that a period of 60 days has been stipulated under Section 90(1) for the designated authority under the Scheme to determine the amount payable by the declarant and the certificate to this effect under Section 90(1) has to be granted by the designated authority after determination towards full and final settlement of the tax arrears within a period of sixty days. Thereafter, except on ground of false declaration made by the declarant, every order passed under sub-section (1) of Section 90 determining the sum payable under the scheme, is absolutely conclusive as to the matters stated thereunder and no matter covered by such order can be reopened in any other proceeding under any law for the time being in force. After this determination under Section 90(1) KVSS, another certificate is issued under Section 91 KVSS on the basis of which immunity is granted to the declarant from instituting any proceeding for prosecution for any offence under any direct tax enactment or indirect tax enactment.

8. We may notice that a certificate issued under Section 90(1) KVSS making a determination as to the sum payable under KVSS, is conclusive as to the matter stated therein and cannot be reopened in any proceedings under any law for the time being in force, except on the ground of false declaration by any declarant. Therefore, before issue of a notice, there should be satisfaction that the

declarant has made a false declaratation. There is no such allegation in the course of the notice issued. All that is stated is that "adjustments already made should have been taken into account when calculating the tax arrears. As such there is a mistake in calculation, which needs rectification". The whole basis of the notice is only that adjustments already made had not been taken note of. If this is the basis of the issuance of the notice and not the false declaration and that information was available with the Department even at the time of the finalisation of the proceedings under Section 90 KVSS, we fail to understand as to how the matter could be reopened at this stage. That information was already available with them and there is no false declaration in that regard. In that view of the matter, the notice issued is without jurisdiction."

In that view of the matter, this Court allowed the appeal, set aside the order made by the High Court by allowing the writ petition filed by the appellant and quash the notice issued by the Department calling upon the appellant to explain as to why the order issued earlier under Section 90(1) KVSS be not amended. On a reading of the judgment in the case of Sushila Rani. (supra) , 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 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. We shall now consider the judgment cited by learned senior counsel for the appellants in the case of Duncans Agro Industries Ltd. Calcutta, (supra), which, inter alia, held that, "In the facts of the case, it appears to us, that there is enough justification for the High Court to hold that the case was basically a matter of civil dispute. The Banks had already filed suits for recovery of the dues of the Banks on account of credit facility and the said suits have been compromised on receiving the payments from the companies concerned. Even if an offence of cheating is prima facie constituted, such offence is a compounable offence and compromise decrees passed in the suits instituted by the Banks, for all intents and purposes, amounts to compounding of the offence of cheating."

It was further held that, "Considering the fact that the claims of Banks have been satisfied and suits instituted by the Banks have been compromised on receiving payments, we do not think that the said complaints should be pursued any further. In our view, proceeding further with the complaints will not be expedient."

In our view, in the present case, the alleged criminal liability stands compounded on a settlement with respect to the civil issues and, therefore, the First Information Report was erroneously issued and was totally unwarranted. From the aforesaid judgment, the proposition that follows in the instant case is that the Kar Vivad Samadhan Scheme, 1998 issued by the Government of India was a voluntary Scheme whereby if the disputed demand is settled by the Authority and pending proceedings are withdrawn by an importer, the balance demand against an importer shall be dropped and the importer shall be immuned from penal proceedings under any law in force. We are, therefore, of the opinion that this judgment squarely comes in the face of any argument sought to be propounded by the respondent that the Kar Vivad Samadhan Scheme, 1998 does not absolve the appellants from criminal liability under the Indian Penal Code. The learned single Judge of the High Court of Delhi, in our opinion, has not appreciated the fact that the continuance of the proceedings in the instant case would only tantamount to driving the present appellants to double jeopardy when

they had been honourably exonerated by the Collector of Customs by their adjudication and further the GCS of which one of the appellants is the General Secretary in which capacity he is accused in the present case was granted amnesty under the Kar Vivad Samadhan Scheme, 1998. In our opinion, the present case does not warrant subjecting a citizen especially senior citizens of the age of 92 & 70 years to fresh investigation and prosecution on an incident or fact situation giving rise to offence under both the Customs Act and the Indian Penal Code when the matter has already been settled. Likewise, the respondent herein has initiated criminal proceedings against Accused No.2 & Accused No.1, inter alia, on the ground alleging that the appellants in conspiracy with the co-accused named therein with each other have cheated the Government of India in terms of evasion of Customs Duty and by concealment of facts obtained CDEC in respect of MRI and Lithotripsy machines and by violating the provisions of 'actual user' condition as per Import Export Policy and Customs Notification No. 279/83 dated 30.9.1983 and Customs Notification No. 64/88 dated 1.3.1988 during the year 1987-90, despite acknowledging the fact that Customs Duty has been paid by the appellants to the Customs Department and settled and that commission of offences under Section 120B read with Section 420 of the Indian Penal Code are made out.

In our view, under the penal law, there is no concept of vicarious liability unless the said statute covers the same within its ambit. In the instant case, the said law which prevails in the field i.e. the Customs Act,1962 the appellants have been therein under wholly discharged and the GCS granted immunity from prosecution. It is well established principle of law that the matter which has been adjudicated and settled need not to be dragged into the criminal courts unless and until the act of the appellants could have been described as culpable. The true fact and import of the Kar Vivad Samadhan Scheme, 1998, in our view, is that once the said Scheme is availed of and all the formalities complied with including the payment of the duty, the immunity granted under the provisions of the Customs Act,1962 also extends to such offences that may prima facie be made out on identical allegations i.e. of evasion of Customs Duty and violation of any Notification issued under the said Act. In our view, there is no prima facie case made out in respect of the alleged offence under Section 120B read with Section 420 of the Indian Penal Code and, therefore, the charge sheet and the process issued thereunder has to be quashed. To bring home the charge of conspiracy within the ambit of Section 120B of Indian Penal Code, it is necessary to establish that there was an agreement between the parties for doing an unlawful Act. It is difficult to establish conspiracy by direct evidence.

Likewise the ingredients of Section 420 of the Indian Penal Code are also not made out. There is no reason as to why the appellants must be made to undergo the agony of a criminal trial as has been held by this Court in the case of G. Sagar Suri & Anr. vs. State of U.P. & Ors. (2000) 2 SCC 636. In this case, this Court held that, "Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused, it is a serious matter. The Supreme Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.

Merely because the accused persons had already filed an application in the Court of Additional Judicial Magistrate for their discharge, it cannot be urged that the High Court cannot exercise its jurisdiction under Section 482 of the Code. Though the Magistrate trying a case has jurisdiction to discharge the accused at any stage of the trial if he considers the charge to be groundless but that does not mean that the accused cannot approach the High Court under Section 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against them when no offence has been out against them and still why must they undergo the agony of a criminal trial."

Section 415 of the Indian Penal Code deals with cheating. To hold a person guilty of cheating as defined under Section 415 of the Indian Penal Code, it is necessary to show that he has fraudulent or dishonest intention at the time of making the promise with an intention to retain the property. In other words, Section 415 of the Indian Penal Code which defines cheating, requires deception of any person (a) inducing that person to: (i) to deliver any property to any person, or (ii) to consent that any person shall retain any property OR (b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person, anybody's mind, reputation or property. In view of the aforesaid provisions, the appellants state that person may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the Section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

In view of the aforesaid provisions of law, as the Customs Duty has been paid by the GCS, there is no fraudulent or dishonest intention on the part of the GCS or its office bearers to retain the property. Moreover, there is no inducing on the part of the GCS or its office bearers intentionally to retain the property in view of the fact that the Customs Duty has been paid by the GCS and, therefore the ingredients of the offence of cheating are missing for issuing the process against the appellants and, therefore, the same, in our view, is liable to be quashed and set aside. Section 111 of the Customs Act, 1962 which provides for confiscation of improperly imported goods, etc. insofar as it is relevant reads thus:

> "Section 111. Confiscation of improperly imported goods, etc. The following goods brought from a place outside India shall be liable to confiscation-
>
> (o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;"

The question is whether the import of the machines in question was contrary to law in any manner and whether the machines are liable to be confiscated under the Customs Act, 1962, the only provision relied upon by the learned counsel for the appellants is clause (o) in Section 111 of the Customs Act, 1962 which we have set out herein above. In our opinion, clause (o) of Section 111 of the Customs Act, 1962 is not attracted in the present case. The subsequent proceedings initiated for

confiscation of the goods is of no relevance nor does it retrospectively render the import illegal.

This Court in Union of India & Another vs. Sampat Raj Dugar and Another (AIR 1992 SC 1417) has, while considering the scope and ambit of Clause

(o) of Section 111, observed as under :

> "Clause (o) contemplates confiscation of goods which are exempted from duty subject to a condition, which condition is not observed by the importer. Occasion for taking action under this clause arises only when the condition is not observed within the period prescribed, if any, or where the period is not so prescribed, within a reasonable period. It, therefore, cannot be said that the said goods were liable to be confiscated on the date of their import under clause (o).
>
> In other words, clause (o) is a new provision under which any goods exempted from duty or from import prohibition subject to certain conditions will become liable to confiscation if those conditions are not observed without the prior permission of the appropriate officer. The penal clause is being introduced to check misuse of exemptions granted in respect of the goods imported. It is settled law, by catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. From his making failure to keep up promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the records that the exemption certificate contained necessary conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it and, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities as office bearers right at the time of making application for exemption. As there was absence of dishonest and fraudulent intention, the question of committing offence under Section 420 of the Indian Penal Code does not arise. We have read the charge sheet as a whole. There is no allegation in the First Information Report or the Charge sheet indicating expressly or impliedly any intentional deception or fraudulent/dishonest intention on the part of the appellants right from the time of making the promise or misrepresentation. Nothing has been said on what those misrepresentations were and how the Ministry of Health was duped and what where the roles played by the appellants in the alleged offence. The appellants, in our view, could not be attributed any mens rea of evasion of cus toms duty or cheating the Government of India as the cancer society is a non profit organization and, therefore, the allegations against the appellants leveled by the prosecution are unsustainable. Kar Vivad Samadhan Scheme Certificate along with the Duncan's and Sushila Rani's judgments clearly absolve the appellants herein from all charges and allegations under any other law once the duty so demanded has been paid and the alleged

offence has been compounded. It is also settled law that once a civil case has been compromised and the alleged offence has been compounded, to continue the criminal proceedings thereafter would be an abuse of the judicial process.

In the result, both the appeals stand allowed. The orders of the High Court which are impugned in these appeals are set aside.

New Delhi;