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

RESERVED ON – 20.09.2024

% ***PRONOUNCED ON – 08.11.2024***

\+ CRL.M.C. 805/2020, CRL.M.A. 3314/2020, CRL.M.A. 10806/2020, CRL.M.A. 10808/2020

SANJAY BHANDARI .....Petitioner

Through: Mr. Dayan Krishnan, Sr. Advocate along with Mr. Avneesh Arputham, Mr.Ankit Sharma and Mr. Abhishek, Advocates

versus

INCOME TAX OFFICE .....Respondent

Through: Mr. Zoheb Hossain Sr. Standing counsel for Revenue with Mr.Sanjeev Menon, Jr. standing counsel, Mr. Vivek Gurnani, Mr. Manish Dubey Advs.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA,J :

A. BRIEF FACTS

1. The present petition has been filed seeking the quashing of Criminal Complaint No. 2121/2019, pending in the Court of the learned ACMM, Tis Hazari Court, Delhi, and the summoning order dated 10.05.2019. The Additional Commissioner of Income Tax (Central), New Delhi, has filed the complaint under Section 51(1) of the Black Money (Undisclosed Foreign Income and Assets and Imposition of Tax) Act, 2015 (hereinafter referred to as the "Black Money Act"). The complaint alleges that a search and seizure operation was conducted on the assessee's premises at B-217, Greater Kailash-I, New Delhi, on 27.04.2016.

2. During the search and seizure operation, incriminating documentary evidence and information were discovered, establishing that the accused (Sanjay Bhandari) held the following undisclosed bank accounts and properties, tabulated as under;

S.No.	Foreign Bank Accounts	Sl no.	Foreign Properties including interests in foreign companies.
1.	Offset India Solutions FZC	1.	Property No. C-303, Maurya Grandeur, Palm Jumeirah, Dubai (in Sanjay Bhandari name)
2.	Santech International FZC	2.	Flat No. 6, Grosvenor Hill Court, Bourdon Street, London. (In the name of Shamlan Gros whose beneficial owner was Sanjay Bhandari)
3.	Serra Dues Technologies Ltd.	3.	Property no. 12, Ellerton House, Bryanston Square, London, (Held by Vertex Management Holdings Lt. whose shares were purchased by Sanjay Bhandari)
4.	Shamlan Gros. Panama	4.	**Companies where Sanjay Bhandari is a Director or has shares in Sanjay Bhandari name:** Offshore entities which were holding assets in the form of properties and / or bank accounts. The details of some of the offshore entities are as under:- 1. Santech International LLC. 2. Howelport Investment SA. 3. Banyan Corp. SA.
			4. Autentis S.A. R.L. 5. Wenham Major Ltd. 6. OIS Europe 7. Hepworth Court a. Halance Associated Inc. (which holds apartment no. 122, Hepworth Court, UK which was bought in year 2014) b. Hastel Enterprises Inc. (which holds apartments no 125, Hepworth Court, UK which was bought in year 2014)
5.	Global Technologies FZC	5.	**Interest in Offshore Companies /Entities** a. Offset India Solutions FZC. UAE b. Santech International FZC. UAE. c. Serra Dues Technologies UAE d. Shamlan Gros, Panama e. Petro Global Technologies FZC, UAE f. MVD Global.
6.	MDV Global		
7.	Bank accounts in the name of Shri Sanjay Bhandari		

3. It was alleged that as per provisions of the Income Tax, 1961 along with the return of income from the assessment year 2012-13 the accused failed to disclose as is evident below:

S. No.	A.Y	Date of filing of ROI. and Status		Return of Income (in Rs.)	Assets Declared in the Schedule FA of ITR -4 (available from AY 2012-13)
		Date	Status		
1.	2012-13	25-03-13	Belated	12,37,680	Nil
2.	2013-14	25-03-14		12,51,570	Nil
3.	2014-15	30-03-15	Invalid	13,40,890	Nil
4.	2015-16	30-03-16	Return uploaded	12,07,860	Nil
5.	2016-17	20-07-16	Return uploaded	18,74,420	Return filed in ITR-1

4. The complainant alleged that information was received through Foreign Tax and Tax Research regarding undisclosed foreign bank accounts, foreign properties, etc.

5. The complainant further alleged that a search operation under Section 132 of the IT Act, 1961 was conducted against Sh. Sanjeev Kapur, a Chartered Accountant, on 07.02.2017 at IGI Airport, Delhi, and at his office in South Extension, Part-II, New Delhi. Sh. Kapur was allegedly involved in backdating and fabricating documents for Sh. Sanjay Bhandari. Searches were also conducted on 10.02.2017 against Sh. Anirudh Wadhwa and Sh. Abhinandan Banerjee, advocates allegedly involved in similar activities under Section 132 of the IT Act, 1961.

6. The complainant alleged that incriminating evidence and documents were unearthed during these searches. Statements recorded under oath established that the accused, Sanjay Bhandari, was preparing to alienate his foreign assets and offshore entities by backdating documents to evade taxes under the Black Money Act, 2015. The investigation revealed that the accused held foreign assets in the form of foreign bank accounts, immovable properties, and interests in foreign entities. He had incorporated entities in Dubai as a director and/or beneficial

shareholder, and further inquiries indicated he had financial interests in an entity incorporated in Panama. Notices under Section 10(1) of the Black Money Act, 2015, were issued to the accused on 22.09.2016 and 10.10.2016, which he responded to on 03.11.2016.

7. The complainant alleged that evidence, including the admission of Sh. Sanjeev Kapoor, the accused's Chartered Accountant, revealed a scheme to appoint the accused as the sole trustee of the Alrahma Trust (based in the UAE) effective from 2006, to show that all foreign assets/offshore entities held by him were in a fiduciary capacity as trustee rather than in his individual capacity. It was alleged that the accused planned to transfer the sole trusteeship to Sumit Chadha, a close associate and UK national, from March 2015, just before the Black Money Act, 2015, came into effect. This would have enabled the accused to alienate his foreign assets by placing them under the trust's umbrella, achieved through fabrication and backdating of documents. Further, during the search of Sh. Sanjeev Kapoor at IGI Airport on 07.02.2017, incriminating evidence regarding the fabrication of documents related to the trust was found, including a copy of the Alrahma Trust deed dated 18.02.2006, naming the accused as the sole trustee and Hussain Darwish Saleh Alrahma (a UAE resident) as the settler. Correspondence between the accused, Alrahma, and Sumit Chadha dated between 23.02.2015 and 15.03.2017, regarding the accused's resignation and the appointment of Sumit Chadha as trustee, was also discovered. However, in his statement under Section 131(1A) of the Act, Sh. Sanjeev Kapoor admitted that the signatures on these documents were obtained during his visit to London and Dubai

between 31.01.2017 and 05.02.2017.

8. The complainant alleged further that documents and materials recovered from Sh. Sanjeev Kapoor and Sh. Anirudh Wadhwa indicated that the petitioner met Sh. Kapoor in his South Extension Part II office, along with his legal team, including Sh. Anirudh Wadhwa of Wadhwa Law Firm, in June-July 2016. During this meeting, they allegedly decided to establish a trust structure, appointing the accused as the sole trustee. Subsequently, the Alrahma Trust was set up in Dubai, UAE, with the accused as the sole trustee effective February 2006. Later, it was decided that the accused would resign as sole trustee effective March 2015, with Sumit Chadha appointed in his place retroactively.

9. The Learned ACMM, Special Acts, Central District, Tis Hazari, Delhi, vide order dated 10.05.2019, summoned the accused for the offense under Section 51(1) of the Black Money Act, 2015, for the assessment year 2017-18.

10. Aggrieved by this, the petitioner filed the present petition, predominantly on the ground that no prima facie case is made against the accused. The petitioner claims that the prosecution was initiated without completing the assessment proceedings, and there is no finding by the complainant's department that the petitioner evaded any tax. Furthermore, the petitioner submitted that there is no evidence showing that the alleged foreign assets belonged to him. The summons issued to the petitioner remained unserved, as he does not reside at the address given in the complaint and has been abroad for over three years. It was argued that the learned Magistrate illegally issued non-bailable

warrants, against which Criminal Revision Petition No. 444/2019 was filed but subsequently dismissed.

11. The petitioner has predominantly sought the quashing of the criminal complaints on the following grounds;

A. The impugned criminal complaint fails to disclose any evidence linking the alleged foreign assets to the petitioner. The Income Tax Department, has not produced any evidence in the complaint to connect the petitioner with the alleged assets. In the absence of such evidence, no case is made out against the petitioner as the essential elements of the offense are not established.

B. The complaint in paragraph 3 states that "information was received through FT and TR regarding undisclosed foreign bank accounts and foreign properties etc.," with Annexure E (colly) attached for detailed information. However, this annexure only includes letters dated 25.09.2017 and 26.09.2017 from the Assistant Director of Income Tax (Investigation) Unit 6(2) to the Assistant/Deputy Commissioner of Income Tax, Central Circle-26, New Delhi, without any details of the petitioner’s ownership of the alleged assets. Despite the complaint's claim that Annexure E provides details of the petitioner's alleged foreign assets, a review shows that none of the annexures contains evidence of ownership by the petitioner.

C. The Black Money Act, 2015 is designed to address "undisclosed assets located outside India" that are held by the assessee either as the owner or as the beneficial owner. This is

reflected in Sections 3 and 4 of the Act, among others, which address undisclosed foreign income and assets. The complaint lacks any evidence showing that the petitioner is the owner or beneficial owner of the alleged assets, even at a prima facie level. Ownership of an asset is typically proven by documentary evidence, yet no such document is provided by the complainant to establish the petitioner's ownership of the foreign assets in question. Therefore, the learned Additional Chief Metropolitan Magistrate (ACMM) should not have issued summons against the petitioner as the essential elements of the offense are not established, even at a prima facie level.

D. For an offense under Section 51 of the Black Money Act, 2015, the assessee must not only be the owner or beneficial owner of the alleged foreign asset, but the ownership must also have occurred after the commencement of the Black Money Act, i.e., after 1st July 2015. In this case, the respondent has failed to provide any evidence that the petitioner owns any alleged foreign assets or that such ownership existed after the Act's commencement. In absence of any such evidence, the entire case against the petitioner lacks merit and should be dismissed.

E. The petitioner is not the owner of the assets mentioned in the complaint, and there is no basis to initiate proceedings against him under Section 51 of the Black Money Act, 2015. This indicates a lack of due diligence by the learned ACMM when taking cognizance of the matter. The documents indicate that the petitioner does not own any of the alleged foreign assets, making

the complaint unfounded and potentially an act of harassment and misuse.

F. Further, criminal prosecution should not commence without first completing the petitioner's assessment proceedings to determine any tax evasion. The legislative intent is clear from a reading of Sections 2, 10, 13, and 30 of the Black Money Act, 2015. It is settled proposition that if criminal prosecution is contingent on the determination of tax evasion, it cannot be initiated before completing assessment proceedings.

G. The Income Tax Department cannot proceed with a case under Section 51 of the Black Money Act unless the petitioner is first assessed to tax under Section 10, is issued a demand under Section 13, and declared to be in default under Section 30(4). Section 30(4) of the Black Money Act states that an assessee will be considered in default if tax arrears remain unpaid after 30 days from receipt of the demand notice. Once an assessee is declared in default, recovery proceedings follow, as outlined in the Act. It is essential for the assessing officer to establish tax liability before alleging that an assessee attempted to evade tax.

H. A notice was issued to the petitioner under Section 10 of the Black Money Act on 22.09.2016. The petitioner responded on 03.11.2016, clearly stating that he is not the owner or beneficial owner of any alleged foreign assets. The petitioner also asserted that his statements made during a search and seizure in April 2016 were given under duress. According to Section 11(1) of the Black Money Act, an assessment order cannot be made more than two

years after the end of the financial year in which the Section 10(1) notice was issued. This two-year period expired on 31st March 2019, and no assessment can now be conducted.

I. A letter dated 09.07.2019 from the Income Tax Department confirmed that the petitioner's assessment under the Black Money Act, 2015, remains incomplete. This indicates that the mandatory time period under Section 11 of the Act has expired, rendering any criminal proceedings baseless. Without an assessment, there can be no finding of tax evasion, and thus, no grounds for prosecution.

J. The respondent must complete assessment proceedings and determine tax evasion before initiating a criminal complaint. It is settled law that completion of assessment is a prerequisite for criminal proceedings; without it, no basis exists to allege tax evasion.

K. Without conceding the allegations in the complaint, even if true, they would constitute preparation rather than an attempt. An attempt would only arise if a backdated document were submitted as a defense to the Income Tax Department. Consequently, no willful attempt to evade tax under Section 51(1) of the Black Money Act is made out.

12. During the pendency of the proceedings, the petitioner filed application CRL.M.A. 10806/2020, seeking to amend the petition. In this application, the petitioner argued that, during the course of the present petition, the respondent issued an assessment order dated 23.03.2022, which was allegedly time-barred. A demand notice dated 23.03.2020 was issued pursuant to the assessment order, along with a show cause

notice for penalty under Sections 41 and 43 of the Black Money Act. The petitioner also filed a criminal M.A. 10808/2020 seeking a stay on the assessment order dated 23.03.2020 under the Black Money Act. The respondent, Sh. Adarsh Kumar Modi, then Principal Commissioner of Income Tax (Central), New Delhi, filed a detailed counter-affidavit, asserting his familiarity with the case due to his role in the assessment wing of the Income Tax Department.

13. The deponent denied all of the petitioner's claims, labeling them as false, misleading, and contrary to legal standards, and submitted that the petition is not maintainable as it lacks an apostille, similarly to the amendment application, and stated that the affidavits filed with the petition and amendment were drawn in London, U.K. As per law, affidavits executed abroad must be legalized or apostilled, and thus, the affidavits lack legal validity. It was further argued that Section 51(1) of the Black Money Act, under Chapter V, operates independently under Section 48(2) and is not dependent on any assessment order under the Act. Therefore, any order not made due to time limitations or other reasons cannot be used as a defense. The deponent emphasized that assessment proceedings and orders are entirely separate from the prosecution initiated against the petitioner.

14. Additionally, the deponent submitted that if the petitioner is aggrieved by the assessment order, he has an effective alternative remedy under Section 15 of the Black Money Act, 2015, by way of filing of an appeal. The respondent asserted that the assessment order is a separate matter from the initiation of prosecution and has no bearing on it. It was argued that the Black Money Act does not require the completion

of an assessment before filing prosecution under Sections 50 or 51.

15. Reliance was placed on ***P. Jayappan v. S.K. Perumal***, AIR 1984 SC 1963, wherein it was *inter alia* held that ongoing assessment proceedings do not bar the initiation of criminal proceedings for offenses punishable under the law. It was also asserted that the assessment was completed within the time limits set forth in the Black Money Act, 2015, as detailed in paragraph 06 of the assessment order dated 23.03.2020 for the assessment year 2017-18.

16. The deponent stated that evidence regarding the petitioner's ownership of foreign assets has been discussed in detail in the assessment order for the year 2017-18. The deponent submitted that some evidence was obtained during a search and seizure operation on 26.04.2016 at the petitioner's premises under Section 132 of the IT Act, 1961, and was further corroborated through inquiries from Foreign Tax Authorities. The deponent argued that the petitioner's claims lack substance and should be summarily dismissed.

B. SUBMISSIONS OF PETITIONER

17. Sh. Dayan Krishnan, learned senior counsel for the petitioner, argued that the present complaint centers solely on the non-disclosure of foreign assets, with allegations related to backdating documents and efforts to disassociate the petitioner from these undisclosed assets. The counsel contended that, at most, the allegations pertain to an offense under Section 50 of the Black Money Act, as the alleged attempts relate to the creation of a scheme to avoid disclosing foreign assets. He argued that the specific act of failing to disclose assets in an income

return falls under Section 50 of the Black Money Act, 2015, which constitutes a separate offense for which a separate prosecution is already pending against the petitioner.

18. Learned senior counsel for the petitioner has argued that failing to disclose an asset in income tax returns does not constitute a willful attempt to evade tax, and thus does not fall under Section 51 of the Black Money Act, 2015. He contended that Section 51 requires a tax assessment, rather than merely non-disclosure. Since a complaint under Section 50 already exists, this separate prosecution should be quashed. He also argued that the Income Tax Department cannot pursue prosecution under Section 51 without first completing the tax assessment under Section 10, followed by an unpaid demand under Section 13 and declaring the assessee in default under Section 30(4). Learned senior counsel highlighted that a notice under Section 10(1) was issued on 22.09.2016, which the respondent replied to on 09.07.2019, confirming the petitioner's assessment was still incomplete. He pointed out that the complaint was filed on 22.12.2018, prior to the assessment order issued on 23.02.2020. Reliance was placed on ***Akhil Krishan Maggu v. Dy. Director, GST***, 2019 SCC OnLine P&H 7785.

19. Learned senior counsel also highlighted discrepancies between the complaint and the assessment order dated 23.03.2020, claiming that several alleged undisclosed properties in the complaint were omitted from the assessment order. He argued that the assessment order itself was time-barred and should be set aside, as there can be no tax evasion without a valid assessment. He further argued that the alleged

fabrication of documents amounts only to preparation, not an attempt to willfully evade tax, and therefore, no offense under Section 51 is established. Learned senior counsel submitted that the summoning order lacked application of judicial mind, as the learned ACMM initially mentioned a prima facie case under Section 50 but then took cognizance under Section 51(1). He argued that the order was mechanical and legally unsound. Lastly, it was asserted that the petitioner's statements during the search were obtained under coercion.

C. SUBMISSIONS OF RESPONDENT

20. Mr. Zoheb Hossain, Learned standing Counsel for the Income Tax Department, argued that search conducted on 27.04.2016 revealed undisclosed foreign bank accounts and properties, which the petitioner had failed to declare in his returns despite being required to do so.

21. Learned standing Counsel further stated that searches at the premises of CA Sanjeev Kapoor and advocates Anirudh Wadhwa and Abhinandan Banerjee revealed a scheme involving backdating and fabricating documents to show the petitioner as the sole trustee of the UAE-based Alrahma Trust from 2006, thus portraying that foreign assets were held in a fiduciary capacity rather than personal capacity. Allegedly, the sole trusteeship was then transferred to Sumit Chadha in March 2015. Learned counsel submitted that the details of the scheme have been detailedthe complaint which werefurther substantiated by Sanjeev Kapoor's statement, which suggests that the restructuring of the trust was prompted by a notice under Section 10(1) of the Black Money Act.

22. Learned standing Counsel for the respondent submitted that Criminal

Complaint No. 2121 of 2019 was filed by the Income Tax Department before the learned ACMM, Tis Hazari Court, for an offense under Section 51 of the Black Money Act, and that the learned ACMM took cognizance on 10.05.2019, citing a prima facie case. The learned counsel argued that the court's scope in reviewing the criminal complaint is limited to determining if the allegations, when taken at face value, make out a prima facie offense. Reliance has been placed upon***State of Haryana vs. Bhajan Lal***, 1992 Supp 1 SCC 335 and ***Nagawwa vs. V.S. Konjalgi***, 1976 3 SCC 736, which established that courts can quash complaints when the allegations do not constitute an offense or are absurd or improbable, or if the Magistrate's discretion was exercised arbitrarily without proper basis.

23. Learned standing counsel further submitted that in the present case, the Petitioner held undisclosed foreign assets which were never disclosed in the Petitioner's IT returns for multiple assessment years although he was required to mandatorily do so. It has further been submitted that the Petitioner did not disclose these foreign assets within the window provided under Section 59 of the Black Money Act. It has further been submitted that pursuant to the search and the notice under Section 10(1) of the Black Money Act served upon the Petitioner he hatched a scheme to back-date and fabricate documents in order to project himself as holding the properties as a sole-trustee/in fiduciary capacity and in order to project that sole trustee ship was transferred. Learned Standing counsel further submitted that these allegations, taken at face value, make out a prima-facie case of commission of the offence of willful attempt to evade tax under Section 51 of the Black Money Act.

24. Learned Standing counsel further submitted that Assessment and Prosecution are independent proceedings. Reliance has been placed upon ***P.Jayappan*** (Supra), ***Radheshyam Kejriwal v. State of W.B.,*** (2011) 3 SCC 581and ***Sasi Enterprises v. ACIT*** (2014) 5 SCC 139. It was submitted that the Section 51 of the Black Money Act makes an "attempt" to willfully evade tax an offence. It was submitted that an "attempt" to commit an act need not have consummated into the Act. Reliance has been placed upon ***Koppula Venkat Rao v. State of A.P.***, (2004) 3 SCC 602. It was submitted that the attempt to commit an offence begins when the accused commences to do an act with the necessary intention. Reliance has been placed upon ***Chaitu Lal vs. State of Uttarakhand*** (2019) 20 SCC 272 wherein the Apex Courtdetermined that an attempt to commit an offense begins with the accused's intentional acts.

25. Learned Standing counsel further submitted that therefore whether or not there has been actual evasion is irrelevant. If the Department discovers the attempt before it is successfully carried out, he will be liable for the offence whether the accused may not have successfully evaded tax.Learned Standing counsel further submitted that in the facts of the present case the accused had successfully evaded taxes by failing to disclose its foreign assets in its IT Returns for Assessment Years 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17.

26. Learned Standing counsel further submitted that Section 51 does not require completion of assessment for initiation of prosecution under that Section. Reference has also been made to Section 48 of the Black Money Act, 2015.

D. FINDINGS AND ANALYSIS

27. The petitioner in the present case has challenged the summoning order and has sought quashing of the complaint.

28. In support of his contentions learned senior counsel for the petitioner has relied upon ***Akhil Krishan Maggu*** (supra), wherein it was *inter alia* held that the enunciation of law relating to arrest during investigation reveals that the power of arrest should be resorted to in exceptional circumstances and with full circumspection. It is pertinent to mention that this case relates to GST. It was further inter alia held that the prosecution of any person is directly linked with the determination of tax evasion because if there is no tax evasion, there cannot be criminal liability. I consider that this is respectfully distinguished on the facts and circumstances of this case.

29. Learned senior counsel for the petitioner has also relied upon ***Jayachandran Alloys vs. Superintendent of GST & C.Ex.***, 2019 SCC OnLine Mad 39017. This case also relates to the CGST Act. In this case, the court inter alia held that the power to punish set out in the CGST Act would be triggered only once it is established that an assessee has 'committed' an offence, which has to necessarily be post-determination of the demand due from an assessee, following the process of an assessment. This judgment is also distinguished on the facts and circumstances of this case, as the procedures in the CGST Act and the Black Money Act are entirely different.

30. Learned senior counsel for the petitioner has also relied upon ***Makemytrip (India) Pvt. Ltd. vs. Union of India & Ors.***, 2016 SCC

OnLine Del 4951, which was upheld in ***Union of India vs. Make My Trip India Pvt. Ltd.*** (2019) 11 SCC 765. The reliance has been placed on this to buttress the point that prosecution should normally be launched only after the adjudication is complete. It is pertinent to mention that this case relates to the Finance Act, 1994. This case involved the power of the Directorate General of Central Excise Intelligence (DGCEI) regarding the investigation and assessment of service tax under the provisions of the Finance Act, 1994. This court considers that this case is also respectfully distinguished on the facts and circumstances of this case.

31. Learned senior counsel for the petitioner has also heavily relied upon ***Birla Corporation Ltd. vs. Adventz Investments & Holdings Ltd.***, (2019) 16 SCC 10 to buttress the point that summoning an accused in a criminal case is a serious matter and a summoning order should not be passed mechanically without application of mind. The proposition held in ***Birla Corporation Ltd.*** (supra) is no longer res integra. The court is conscious of the fact that summoning an accused in a criminal case is a serious matter and it should be resorted to only if there is credible material on record and the magistrate is of the opinion that there are sufficient grounds to proceed against the accused.

32. Before proceeding further it is necessary to examine the scope of jurisdiction to be exercised by the Magistrate at the time of issuing the summons. Section 204 Cr.P.C. provides as under:

> ***"204. Issue of process.***
> *(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be –*

(a) a summons case, he shall issue his summons for the attendance of the accused, or
(b) a warrant case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.
(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.
(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.
(4)When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.
(5) Nothing in this section shall be deemed to affect the provisions of section 87."

33. In the ***Nagawwa vs. V.S. Konjalgi***, 1976 3 SCC 736, it was *inter alia* held as under:

> *"The scope of the inquiry under Section 202 of the Code of Criminal Procedure is extremely limited - limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint(i) on the materials placed by the complainant before the court (i) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the f the complainant without at all adverting to any defence that the accused may have. It is not the province of the magistrate to enter into a detailed discussion of the merits or demerits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one. In proceedings under Section 202 the accused bas got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not.*

However, the magistrate in such proceedings can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. The magistrate has been given an un- doubted discretion in the matter and the discretion has to be judicially exercised by him. Once the magistrate has exercised his discretion it is not for the High Court, or even the Supreme Court, to substitute its own discretion for that of the magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. (Para 5)

In the following cases an order of the magistrate issuing process against the accused can be quashed or set aside:

(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused:

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction or absence of complaint by legally competent authority and the like."

Reliance can also be placed upon ***Chandra Deo Singh v. Prakash Chandra Bose,*** (1964) 1 SCR 619: AIR 1963 SC 1430 : (1963) 2 CriLJ 397 and ***Vadilal Panchal v. Dattatraya Dulaji Ghadigaonker***, (1961) 1 SCR 1113: 1960 CriLJ 1490

34. In ***State of Haryana vs. Bhajan Lal***, 1992 Supp (1) SCC 325 the scope of jurisdiction to be exercised by the High Court in respect of quashing of the complaint/FIR was discussed in detail. The Supreme Court after discussing plethora of judgments on inter alia held as under:

> *"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*
>
> *(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
>
> *(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

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

(7) Where a criminal proceeding is manifesty attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

35. Learned senior counsel for the petitioner has argued vehemently that the present complaint could not have been filed before completion of the assessment. It is not disputed that at the time when the complaint was filed, the assessment was not completed. The assessment was completed later on only on 23.03.2020. The respondent department has submitted that the assessment and prosecution are independent of each other. In ***P.Jayappan vs. S.K.Perumal*** *(supra)* it was inter alia held that there is no provision in law which provides that a prosecution for the offences in question cannot be launched until reassessment proceedings initiated against the assessee are completed. It is pertinent to mention here that this was a case under the income tax Act. Similarly, the department has placed reliance on ***Radheshyam Kejriwal v. State of W.B.,*** (2011) 3 SCC 581 and ***Sasi Enterprises v. ACIT*** Crl.A. No. 61 of 2007 dated 30.01.2014.

36. It is pertinent to mention here that Section 48 of the Black Money Act provides as under:

> *Section 48. Chapter not in derogation of any other law or any other provision of this Act.*
>
> *(1) The provisions of this Chapter shall be in addition to, and not in derogation of, the provisions of any other law providing for prosecution for offences there under.*
>
> *(2) The provisions of this Chapter shall be independent of any order under this Act that may be made, or has not been made, on any person and it shall be no defence that the order has not been made on account of time limitation or for any other reason.*

37. The bare perusal of Section 48 of the Black Money Act makes it clear that the offences and prosecution which falls in Chapter V of the Black Money Act are independent of any order made under this Act. It is relevant to note that the assessment under the Black Money Act is being made under Section 10, which falls in Chapter III of the Act. Therefore, this submission of the petitioner does not hold any force in the eyes of the law. The initiation of the prosecution is not dependent on the completion of assessment, if the conditions as required under Section 51 Black Money Act are fulfilled.

38. The petitioner has also argued in detail that since the complaint under Section 50 had already been filed, there was no occasion of filing the complaint under Section 51 of the Black Money Act. Sections 50 and 51 of the Black Money Act came up before the Supreme Court in ***Union of India vs. Gautam Khaitan***, (2019) 10 SCC 108 wherein it was *inter alia* held as under:

> ***"16.*** *The offences in respect of which sanction has been granted are under Sections 50 and 51 of the Black Money Act, which read thus:*
>
> > *"**50. Punishment for failure to furnish in return of income, any information about an asset (including financial interest in any entity) located outside India**.— If any person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of Section 6 of the Income Tax Act, who has furnished the return of income for any previous year under sub-section (1) or sub-section (4) or sub-section (5) of Section 139 of that Act, wilfully fails to furnish in such return any information relating to an asset (including financial interest in any entity) located outside India, held by him,*

as a beneficial owner or otherwise or in which he was a beneficiary, at any time during such previous year, or disclose any income from a source outside India, he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.

***51. Punishment for wilful attempt to evade tax**.—(1) If a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of Section 6 of the Income Tax Act, wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and with fine.*

(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest 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 rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine.

(3) For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person—

(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or

(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or

(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or

(iv) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof."

17. *Section 50 provides that if any person, being a resident other than not ordinarily resident in India, who has furnished the return of income for any previous year under sub-section (1) or sub-section (4) or sub-section (5) of Section 139 of the Income Tax Act, wilfully fails to furnish in such return any information relating to an asset (including financial interest in any entity) located outside India, held by a beneficial owner or otherwise or in which he was a beneficiary, at any time during such previous year, or disclose any income from a source outside India, he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.*

18. *The penalty of the offences under Section 51 is for wilful attempt in any manner whatsoever to evade the payment of any tax, penalty or interest chargeable or imposable under the Income Tax Act. The punishment provided under sub-section (1) is for rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and with fine. In respect to any other person not covered by sub-section (1) of Section 51, the punishment provided is rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine.*

19. *It could therefore be seen, that the scheme of the Black Money Act is to provide stringent measures for curbing the menace of black money. Various offences have been defined*

and stringent punishments have also been provided. However, the scheme of the Black Money Act also provided one time opportunity to make a declaration in respect of any undisclosed asset located outside India and acquired from income chargeable to tax under the Income Tax Act. Section 59 of the Black Money Act provided that such a declaration was to be made on or after the date of commencement of the Black Money Act, but on or before a date notified by the Central Government in the Official Gazette. The date so notified for making a declaration is 30-9-2015 whereas, the date for payment of tax and penalty was notified to be 31-12-2015. As such, an anomalous situation was arising if the date under sub-section (3) of Section 1 of the Black Money Act was to be retained as 1-4-2016, then the period for making a declaration would have been lapsed by 30-9-2015 and the date for payment of tax and penalty would have also been lapsed by 31-12-2015. However, in view of the date originally prescribed by sub-section (3) of Section 1 of the Black Money Act, such a declaration could have been made only after 1-4-2016. Therefore, in order to give the benefit to the assessee(s) and to remove the anomalies the date 1-7-2015 has been substituted in sub-section (3) of Section 1 of the Black Money Act, in place of 1-4-2016. This is done, so as to enable the assessee desiring to take benefit of Section 59 of the Black Money Act. By doing so, the assessees, who desired to take the benefit of one time opportunity, could have made declaration prior to 30-9-2015 and paid the tax and penalty prior to 31-12-2015."

39. Thus Section 50 of Black Money Act provides punishment for failure to furnish in return of income, any information about an asset (including financial interest in any entity) located outside India, whereas Section 51 of Black Money Act provide punishment for willful attempt to evade tax. Besides this, the bare perusal of Sections 50 and 51 makes it clear that both the provisions function in different

realms. The non-disclosure of an information about an asset (including financial interest in any entity) located outside India is to be dealt with differently than the willful attempt to evade tax. It is also pertinent to mention here that Section 51 Sub-section (3) of the Black Money Act defines willful attempt, which reads as under:

> *(3) For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person—*
>
> *(i) has in his possession or control any books of account or other documents(being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or*
>
> *(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or*
>
> *(iii) wilfuly omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or*
>
> *(iv) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.*

40. Therefore Section 51 of Black Money Act would come into play if even before filing of a return of income, the person is found to have done any of the acts as prescribed in Section 51(3) of Black Money Act, 2015. Apparently the prosecution under this provision cannot be dependent on the assessment. As the offence, if proved, stands completed as soon as the conditions as required under Section 51(3) of Black Money Act, 2015 are fulfilled, irrespective of return of income.

41. In this regard, it is relevant to note that on 27.04.2016, a search and

seizure operation was carried out at the premises of the petitioner at B-217, Greater Kailash, Part-I, New Delhi, which revealed that the accused/petitioner generated and held undisclosed foreign income and assets as defined under Section 2(12) of the Black Money Act. The petitioner allegedly made a statement under Section 131(1A) on 29.04.2016. During the course of the search action at his office at 12A, Panchsheel Enclave, New Delhi, he admitted to the undisclosed nature of the foreign assets/entities. It is also a matter of record that in reply to the notice under Section 10(1) of the Black Money Act dated 22.09.2016 and 10.10.2016, by letter dated 03.11.2016, the petitioner stated that he does not own and is not the beneficial owner of any foreign assets, whether in the form of bank accounts or foreign immovable property.

42. The case of the complainant/Income-Tax Department is that the petitioner stated that his association with certain foreign assets was only in the past and that too in the capacity of a trustee, and that he had resigned from all such fiduciary positions in relation to such foreign assets prior to April 2015. It is pertinent to mention that the Black Money Act came into force on 01.07.2015. Additionally, the case of the complainant is that on 07.02.2017, a search was conducted against one Sanjeev Kapur, who was the Chartered Accountant of the petitioner. During the course of the search, it was discovered that the petitioner had attempted to fabricate and back-date documents to show that the foreign assets/offshore entities were held by the petitioner not in his individual capacity but in a fiduciary capacity as a trustee of the Alrahma Trust, purportedly settled in the UAE in 2006 by one Mr.

Hussain Darwish Saleh Alrahma. The documents were also made to show that the petitioner had transferred the sole trusteeship to one Mr. Sumit Chadha in March 2015.

43. It is also pertinent to mention that as per complainant Mr. Sanjeev Kapur stated that the petitioner met him in June-July 2016 along with the petitioner's legal team, and it was decided that a trust structure of the nature described above would be set up, wherein the accused would be appointed as the sole trustee. Thereafter, Alrahma Trust was acquired in Dubai, UAE, and the accused was appointed as the sole trustee, effective from February 2006. Subsequently, it was decided that the accused would resign as the sole trustee effective from March 2015. The complainant alleges that the creation of the Alrahma Trust and changes in the structure of the trust were part of a premeditated scheme to dissociate the accused/petitioner from all his offshore entities/foreign assets by back-dating documents to evade the proceedings under the Black Money Act.

44. At this stage, the complainant is not required to bring the material on record that could prove the guilt of the accused or even be sufficient for framing the charge. This is a very initial stage where the Magistrate has to form an opinion that there are sufficient grounds for issuing the process. Such an opinion is to be formed based on the entire material on record. The objections of the petitioner regarding the assessment are not relevant, and the petitioner is required to seek the appropriate remedies to challenge the assessment order. In regard to the evidence to show that the petitioner owned foreign assets, the complainant shall be obliged to produce the same at an appropriate time. It is relevant to

note that during the course of submissions, learned counsel for the respondent submitted that the petitioner prepared fabricated/back-dated documents to show him holding his foreign assets as a trustee of the Alrahma Trust effective from February 2006 and having resigned as trustee from March 2015. Furthermore, several documents, which form part of the scheme, including trust deeds, resignation letters, and correspondences, were signed by the accused/petitioner and his aides.It was submitted that this constitutes an overt act on the part ofthe Petitioner towards the commission of the offence. In this regard reliance was placed on ***Abhayanand Mishra v. State of Bihar***, (1962) 2 SCR 241, wherein it was held as under:

> *"24. We may summarise our views about the construction of Section 511 IPC, thus: A person commits the offence of attempt to commit a particular offence when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence."*

45. Reliance was also placed on ***Malkiat Singh v. State of Punjab***, (1969) 1 SCC 157 wherein it was held as under:

> *"7. The test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless."*

46. Reliance was also placed on ***Koppula Venkat Rao v. State of A.P.,***(2004) 3 SCC 602 wherein it was held as under:

"10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short consummation/completion."

47. It is also relevant to note that the case of the complainant is that in his reply to the notice under Section 10 of the Black Money Act dated 03.11.2016, the petitioner stated that the foreign assets were held by him the capacity of a trustee. It has been contended that this statement could be substantiated only by means of the fabricated/back dated documents. It has been submitted that petitioner has done everything which he could do to evade tax. However, the conspiracy unearthed as a result of the discovery made pursuant to the search conducted on 07.02.2017 at the premises of Mr.Sanjeev Kapur. It is also pertinent to mention here that whether act of the petitioner amounts to preparation or attempt is a matter of trial. Learned senior counsel has also pointed out that there is wrong mentioning of the provisions in the summoning order. However, I consider that only on this ground, the summoning order cannot be set aside as the court has to see the entire record as a whole some and not in piece-mail.

48. The petitioner had also moved an application for amendment of the present petition to challenge the assessment order dated 23.03.2020. I consider that has no substance as the petitioner has an efficacious

statutory remedy against the assessment order dated 23.02.2020 by way of filing an appeal under Section 16 of the Black Money Act.

49. It is a settled proposition that if there is an adequate efficacious alternative remedy is available and the jurisdiction of the High Court has been invoked without availing the same, except in the exceptional cases, such a writ petition is not required to be entertained. Reference can be made in ***Genpack India Pvt. Ltd. vs. Deputy Commissioner of Income Tax and Anr***. 2019 SCC OnLine SC 1500.

50. Finally, the respondent department has also pointed out towards the conduct of the petitioner. It has been pointed out that the petitioner's affidavit has not been property attested and even he has not disclosed his the address at United Kingdom. It has also been alleged that the petitioner is evading the process of law. The party who approaches the Court must come with clean hands. The Petitioner in the present case as alleged has not disclosed his United Kingdom address. The petitioner is thus has not approached the Court with clean hand. In view of the discussions made herein above, the Court is of the considered view that the petition is liable to be dismissed.

51. In view of the above, the present petition along with pending application stands dismissed.

DINESH KUMAR SHARMA, J

November 8, 2024
*Pallavi/Rb/*NA..