(1998) 11 KL CK 0050

In the High Court Of Kerala

Case No : O.P. No. 2602 of 1998-I

Abdul Khader APPELLANT

Vs

Sub-Inspector of Police and Others RESPONDENT

Date of Decision : 23-11-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 102, 41(1)
Income Tax Act, 1961 — Section 132A, 278D(1), 278D(2)

Citation : (1999) 240 ITR 489

Hon'ble Judges : P. Shanmugam, J

Bench : Single Bench

Advocate : S.A. Nagendran, Premjit Nagendran and Joy Thattil, for the Appellant; P.K.R. Menon, Senior Advocate and N.R.K. Nair and C.E. Unnikrishnan, Government Pleader, for the Respondent

Judgement

P. Shanmugam, J.—The original petition is filed praying for an order to declare that the warrant issued u/s 132A of the Income Tax Act, 1961, by the Commissioner of Income Tax and the seizure of the gold from the first respondent is without jurisdiction and for a further direction to the fourth respondent--Judicial First Class Magistrate Court-II, Thiru-vananthapuram, to pass an appropriate direction or order directing the third respondent to return the gold seized referred to in exhibit P-4 communication of the Commissioner of Income Tax.

2. The petitioner is a resident of Kallachi, Kozhikode District. He returned from a Gulf country along with his friend one Shri V. Ahmed, who was carrying 5,597 grams of gold. The said Ahmed paid the duty for the gold before the Customs Department and thereupon entrusted the gold to the petitioner to be kept in his custody. While the petitioner was carrying the said gold, the security police on duty arrested him and seized the gold u/s 41(1)(d) and Section 102 of the Code of Criminal Procedure. Thereafter, the petitioner was handed over to Valiyathura Police Station and a crime as Crime No. 104 of 1997 was registered. The

petitioner''s friend Shri V. Ahmed, filed a claim application before the Judicial First Class Magistrate for the release of the gold. In the meanwhile, the Commissioner of Income Tax has taken possession of the seized gold as per the warrant issued u/s 132A on May 1, 1997, for the seizure of 48 gold biscuits. This original petition is filed contending that the issue of warrant and seizure of the gold by the Commissioner of Income Tax is unauthorised and without jurisdiction, since the gold was under the custody of the Judicial First Class Magistrate Court.

3. A counter affidavit has been filed on behalf of the Commissioner. It is stated therein that the petitioner had given a statement on April 30, 1997, wherein he had admitted that he used to accompany carriers from the Gulf to India as instructed by one Sainudeen from Muscat and Ahmed was one of them. He had travelled at least 12 times earlier on the same mission. He had met Ahmed at Muscat Airport for the first time and he was not his close friend as stated in the petition. He said that the gold was handed over to him to be kept in his custody and to take it to Bombay. Shri Ahmed has also confirmed this fact in his statement recorded on May 1, 1997, and May 2, 1997. Based on these submissions, it was ascertained that the gold now in custody of the Valiathura Police represented the income or property which has not been and would not be disclosed for the purpose of the Income Tax Act and therefore, he passed an order under Sections 132A and 132B of the Income Tax Act and authorised the Additional Director of Income Tax to take over the gold from the Sub-Inspector of Valiyathura in whose possession the seized gold was kept. It is stated that though the Government of India has formulated liberalised policy in the import of gold, the provisions were not intended for misuse as has been done by the petitioner. The gold was brought in for a third person. Neither Shri V. Ahmed nor Shri Khader, the petitioner, had any means for purchasing such large quantity of gold. According to the statement, the modus operandi is to get the passport of illiterate and poor people for the use of the import of gold. As soon as the gold reaches India and the customs duty is paid, it is taken over by the actual owner or his agent as in this case the petitioner. The gold is sold in India and the proceeds are taken back to bring in the next consignment on another passport. The Government stands to lose a lot of revenue by way of capital gains and sales tax. According to the third respondent, Section 132A was invoked on the Sub-Inspector of Police, Valiyathura, who was in possession of the gold taken into custody.

4. Learned counsel for the petitioner referred to the judgment in Commissioner of Income Tax and Another Vs. Balbir Singh (Decd.) (through legal representative Mrs. Dilpathi and Others), wherein a Division Bench of the Punjab and Haryana High Court held that the order of requisition in respect of assets in custody of court u/s 132A cannot be sustained. The remedy available to the Income Tax Officer was to apply to the Chief Judicial Magistrate for release and not to issue a requisition u/s 132A of the Act which was clearly without jurisdiction.

5. In K. Choyi Vs. Syed Abdulla Bafakky Thangal and Others, , the Supreme

Court held that where money was seized by the police from a person and was deposited in the criminal court, the Department could not, after passing an assessment order, seek to seize the money lying in the criminal court u/s 132, but the appropriate remedy was for the Income Tax Officer to apply to the court u/s 226(4) for payment to him of the money towards the tax due.

6. Learned standing counsel for the Department referred to a decision of this court in Crl. R. P. No. 571 of 1996 (Ibrahim Othayoth v. Sub-Inspector of Police [1998] 252 ITR 320). In that case, the claim applications were filed by the Income Tax and Sales Tax Departments under Sections 451 and 457 of the Criminal Procedure Code, for release of the articles seized. The learned Magistrate rejected the application filed on behalf of the Income Tax and Sales Tax Departments. The appeal preferred by the Assistant Director of Income Tax was allowed and the order of the Judicial First Class Magistrate was set aside directing to release the gold biscuits to the Income Tax Department. The revision filed by the claimants have been dismissed holding that the conclusion arrived at by the appellate court is legally sustainable. This court did not go into the question of power u/s 132A to order seizure of the assets in the custody of the police. Learned senior standing counsel submitted that the gold in the custody of the Income Tax Department can, be treated to be for and on behalf of the court and submitted that there is no objection for the third prayer being granted, namely, to direct the Magistrate to consider the application filed for the release of the gold.

7. Section 132A empowers the Commissioner to order requisition of assets. If in the opinion of the officer the assets represent either wholly or partly income or property which has not been, or would not have been, disclosed for the purpose of the Income Tax Act, on being satisfied, the officer empowered may authorise any officer under Sub-section (2) of Section 278D to require the officer or authority, to deliver such books of account, other documents or assets to the requisitioning officer. On the arrest of the petitioner and the seizure of the gold under Sections 41(d) and 102 of the Criminal Procedure Code, the gold is brought under the custody of the court, and the first respondent--Sub-Inspector of Police was holding the gold on behalf of the Judicial First Class Magistrate Court. Subsequently, Crime No. 104 of 1997 was registered before the Valiyathra Police Station under exhibit P-2, there is no dispute on the fact that while the warrant u/s 132A was issued, the gold was under the custody of the Judicial Magistrate of First Class-II, Thiruvananthapuram, and the first respondent is holding the property on behalf of the court. Section 132A does not empower the Commissioner to require the court to deliver the assets. The provision is referable only to an "officer" or "authority" referred to under Sub-section (1) and not the court. A similar question has been considered by a Division Bench of the Punjab and Haryana High Court in Commissioner of Income Tax and Another Vs. Balbir Singh (Decd.) (through legal representative Mrs. Dilpathi and Others), referred to earlier wherein the Tax Recovery Officer under whose custody lay the assets recovered, was not holding the assets independently. It was deposited

with him in pursuance of the order of the court. Therefore, a warrant could not have been issued against the court since the officer is holding the assets on behalf of the court. Of course, it is open to the Income tax Officer to apply to the Magistrate for the release of the assets in their favour. In the order referred to by the Income Tax Department in Crl. R. P. No. 571 of 1996 Ibrahim Othayoth Vs. Sub-Inspector of Police and Others, , and connected cases, it is a case where the Department themselves applied for release of the articles seized. The question u/s 132A was not raised or considered in that case.

8. For the above reasons, the warrant issued u/s 132A of the Income Tax Act, 1961, by the Commissioner of Income Tax and the seizure of the gold from the custody of the court is held to be without jurisdiction. Therefore, the third respondent is directed to return the gold seized forthwith to the Judicial First Class Magistrate Court-II, Thiruvananthapuram, and the fourth respondent is directed to consider the applications pending before it along with any application that may be filed by the Income Tax Department for the release of the gold in accordance with law.

9. The original petition is allowed in the above terms.

