
(1954) 07 MAD CK 0010
In the Madras High Court

Erimmal Ebrahim Hajee

APPELLANT

Vs

Collector of Malabar at Kozhikode and Another

RESPONDENT

Date of Decision : 23-07-1954

Acts Referred:

British Income Tax Act, 1918 — Section 165
Income Tax Act, 1961 — Section 46(2)
Madras Revenue Recovery Act, 1864 — Section 48

Citation : (1954) CriLJ 1775 : (1954) 2 MLJ 683

Hon'ble Judges : Mack, J;Krishnaswami Nayudu, J

Bench : Division Bench

Judgement

Mack, J.—Petitioner Ebrahim Hajee, admittedly an old man of about seventy, has applied by way of a writ of "habeas corpus" for his

release from the Central Jail, Cannanore, to which he was committed on 1-6-1954 on a warrant of arrest issued by the Collector of Malabar u/s

48, Madras Revenue Recovery Act, in respect of an Income Tax arrear of Rs. 61,668. The warrant under which the petitioner was arrested by

the Tahsildar is in accordance with Section 48 and recites that the Collector had reason to believe that Ebrahim Hajee is wilfully withholding

payment of these arrears and charges and has been guilty of fraudulent conduct to evade payment of them. Ebrahim Hajee was given no hearing or

any opportunity to show cause against the issue of the warrant. Nor does Section 48, Revenue Recovery Act, provide for any procedure by which

a defaulter imprisoned under that section can make any representation or file any appeal.

2. In the affidavit filed on behalf of the Collector, who has been made the first respondent, details are set out of the history of the assessment of

Income Tax on petitioner who had a grocery business in Cannanoro. According to a counter-affidavit by the Commissioner of Income Tax, he was

assessed in 1943-44 to a tax of Rs. 66,227, in 1945-46 to Rs. 10,752, 1946-47 Rs. 5,583, in 1947-48 Rs. 15,002, and 1948-49 Rs. 4,34.1.

He is alleged to have disposed of substantial property and to have diverted assets from his Cannanore business to an identical business in the name

of his sons V. P. Abdul Azeez and Bros., which was started in Tellichery in 1948. We are not of course concerned in the disposal of this petition

with the correctness of the assessment which we must regard as final.

There is no order placed before us by the Collector setting out the material on which he was satisfied that petitioner was wilfully withholding

payment and was guilty of fraudulent conduct. We may presume for the purpose of this petition that certain material was placed before the

Collector by the Income Tax authorities which led the Collector into this belief.

3. Before considering the application of Articles 14, 21 and 22(2) of the Constitution, which Mr. Nambiar contends are contravened by Section

48, Madras Revenue Recovery Act, which is made applicable as a mode of tax recovery of Income Tax by Section 46(2), Income Tax Act, it is

both interesting, relevant and necessary to trace the history of debt recovery by attachment of the body and imprisonment of the debtor from 1864.

Section 46(2), Income Tax Act, applies the very convenient machinery of land revenue to the recovery of Income Tax and reads as follows:

46(2). The Income Tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an

assessee. and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an

arrear of land revenue.

Provided that without prejudice to any other powers of the Collector in this behalf, he shall for the purpose of recovering the said amount have ...

the powers which under the Code of Civil Procedure, 1908 (V of 1908), a civil Court has ... for the purpose of the recovery of an amount due

under a decree.

As the section stands, and read with the proviso, an alternative procedure appears to be provided for the Collector either to proceed under the

Revenue Recovery Act including Section 48 or to exercise the alternative powers

of recovery by arrest or otherwise under the Civil Procedure

Code. The proviso under the Income Tax Act (11 of 1922) reads as follows:

Provided that without prejudice to any other powers of the Collector in this behalf, he shall for the purpose of recovering the said amount have in

respect of the attachment and sale of debts due to the assessee the powers which under the Civil Procedure Code, 1908, a civil court has in

respect of the attachment and sale of debts due to a judgment-debtor for the purpose of the recovery of an amount due under a decree.

It therefore restricted the proviso conferring the powers of recovery under the CPC only to attachment and sale of debts due to a judgment-debtor

and in its inception was only an additional power the Collector was armed with in addition to his power to imprison in accordance with Section 48,

Revenue Recovery Act, and of course his powers of distraint of moveable and Immovable property belonging to the defaulter under other

provisions of the Revenue Recovery Act, 23 of 1941, omitted certain words and gave the Collector all powers under the Code of Civil Procedure,

It is interesting to note that u/s 278 of the then Civil P. C., 8 of 1859, imprisonment for a civil debt shall not be for a longer period than two years

or for a longer period than six months, if the decree does not exceed Rs, 500 or for a longer period than three months if the decree does not

exceed Rs. 50. Under the Civil P. C. of 1882, BO person shall be imprisoned in execution of a decree for a longer period than six months or for

longer than six weeks if the decree did not exceed Rs. 50. That is the legal position today u/s 58, Civil P. C. It is sufficient here to say that since the

Madras Revenue Recovery Act was passed in 1864, at a time when there was much more rigorous enforcement of civil debts by imprisonment in

England, there has been progressive, liberal and ameliorative legislation in the domain of imprisonment for civil debt, a landmark in the history of

which was the Debtors' Protection Act of 1869.

In our own law of execution, Sections 55 to 59, Civil P. C., and the provisions of O. 21, Rr. 37 to 40 now make it mandatory that before a

judgment-debtor is committed to prison for a civil debt, he must be given an opportunity to appear before the Court and show cause why he

should not be committed to a civil prison and the Court will not commit him to prison unless it is shown to its satisfaction that the debtor has the

means to pay and is wilfully defaulting.

4. It is significant in this connection that the British Income Tax Act of 1918, Section 165, authorised the General Commissioners, in the event of a

person neglecting or refusing to pay the tax charged upon him within ten days after demand, and no sufficient distress can be found whereby the

same may be levied, to commit him to prison and there be kept without bail until he made payment or furnished security to their satisfaction. No

limit of time is prescribed for such imprisonment. The learned Advocate General concedes that in the British Income Tax Act of 1952 this section

is omitted. In some respects it corresponded to the very wide powers conferred on the Collector u/s 48, Madras Revenue Recovery Act. The

legal position in England has been considerably modified in favour of the subject by the Crown Proceedings Act, 1947, which was passed to make

the Crown's position in respect of civil rights and liabilities more closely similar to those of private persons.

The learned Advocate General has referred us to the Crown Proceedings Act, 1947, by Bickford Smith who at page 21 refers briefly to the

history of enforcement of judgment by imprisonment of the defendant. In addition to the power to imprison a Crown debtor under a writ of extent

or upon motion under Part V of the Crown Suits Act, 1865, the Crown had a right to enforce a money judgment in its favour by imprisoning a

debtor by a writ of "capias ad satisfaciendum", or, in the case of an information of intrusion, a writ of "capiatur pro fine". The Debtors Act, 1869,

which generally abolished imprisonment for a debt did not bind the Crown which therefore continued to possess the old right to imprison its

debtors.

5. Neither learned advocate has been able to refer us to any Statement of Reasons why the British Income Tax Act of 1952 omitted Section 165

of the old Act of 1918. But we have little doubt that this was due to the new orientation given to recovery of Crown debts and taxes by

imprisoning on executive orders by the Crown Proceedings Act, 1947. This would also appear from Section 26, Clauses (2) and (3) of the Crown

Proceedings Act, 1947. Section 26(2) makes Sections 4 and 5 of the Debtors Act of 1869 applicable to sums of money payable and debts due to

the Crown.

I may reproduce here Mr. Bickford Smith's commentary on this section:

Section 4 abolishes imprisonment for debt, save in respect of debts of certain exceptional kinds of which the most important are penalties ... debts

recoverable summarily before justices (such as rates, Income Tax etc.) ... debts arising from breach of trust To these exceptions the proviso to

this section adds default in payment of death duties and purchase tax, the addition being justified on the ground that the debtor has had the means

of payment and his. default is in the nature of a breach of trust. The maximum period of imprisonment in all the excepted cases is one year

Section 5 of the same Act permits a Judge to commit a debtor for non-payment of a judgment debt if he can be shown to have, or have had, since

judgment, the means of payment.

Under Section 26(2) the power of imposing imprisonment in default of payment of penalties was not affected.

6. If Section 48, Revenue Recovery Act, is examined in this historical background and in the clear light of our own Constitution, it will be apparent

beyond, I think, all possible doubt that Section 48, Madras Revenue Recovery Act, is clearly "ultra vires" and cannot remain on the Statute Book.

In the first place, it clearly offends Article 22(1) and (2) of the Constitution. Under Article 22(1):

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be

denied the right to consult, and to be defended by, a legal practitioner of his choice.

In the present case the petitioner has been denied all right of being heard. He has also been deprived of all right of engaging a legal practitioner to

appear on his behalf before the Collector, the arrest warrant issued by the Collector being final and unappealable.

This is not a case of arrest for preventive detention to preserve public tranquillity which is governed by wholly different considerations and for

which there is separate provision in Article 22(4). Nor is it necessary for us to embark on the principles in which such arrests for preventive

detention have been held to be justified under the Constitution and the provisions adopted to secure for a person detained, the maximum rights

permissible under that Article, This is purely a case of arrest and imprisonment

for punitive purposes in order to recover tax.

Then under Article 22(2)

Every person who is arrested and detained in custody, shall be produced before the nearest Magistrate within a period of twenty-four hours of

such arrest

There can be no doubt that under this Article of the Constitution there can be no detention of any person in custody for punitive purposes except

on the orders of a Magistrate and no sentence of imprisonment except after a court trial.

7. Section 48, Revenue Recovery Act, reads as follows:

When arrears of revenue, with interest and other charges as aforesaid cannot be liquidated by the sale of the property of the defaulter, or of his

surety, and the Collector shall have reason to believe that the defaulter or his surety is wilfully withholding payment of the arrears, or has been guilty

of fraudulent conduct in order to evade payment, it shall be lawful for him to cause the arrest and imprisonment of the defaulter or his surety, not

being a female, as hereinafter mentioned; but no person shall be imprisoned on account of an arrear of revenue for a longer period than two years,

or for a longer period than six months, if the arrear does not exceed Rs. 500, or for a longer period than three months, if the arrear does not

exceed Rs. 50; provided that such imprisonment shall not extinguish the debt due to (the State Government) by the defaulter, or his surety.

If this section is carefully examined, it in fact embodies the ingredients of what is in substance a criminal offence involving wilful evasion of tax

payment and fraudulent conduct, which are matters for enquiry in a court of law, with facilities afforded to the person accused to defend himself.

We have been referred to several constitutional decisions, both in Indian and American law, none of them directly in point, The learned Advocate

General and Mr. Nambiar for the petitioner have not been in a position to place before us the exact statutory position in the United States of

America as regards executive power, if any, to commit to prison on grounds such as those u/s 48, Revenue Recovery Act.

It would, however, appear that in America there was also the same process of evolution though there it was far more rapid in the domain of

imprisonment for debts, as in England. In a decision to which we have been

referred, - Den ex dem Murray v. Hoboken Land and Improvement

Co. (1855) 15 Law Ed 372 (A) of the year 1855, proceedings were taken in the District Court against a Collector who collected rents and did

not pay. He was sentenced to imprisonment and it was held that distress against the body was due process of law within the scope of Amendment

V of the American Constitution which lays down that no one shall be deprived of life, liberty or property except under due process of law. We are

unable to see how that decision referred to by the learned Advocate General can in any way support the legality of the warrant issued by the

Collector u/s 48, Revenue Recovery Act,

8. In - United States v. Ragen (1942) 86 Law Ed 383 (B) three persons were tried with a jury by a District Court for wilfully attempting to evade

or defeat Income Tax. It would appear from this decision that this was an offence punishable with a fine upto \$ 10000 or five years imprisonment.

The Circuit Court of Appeals reversed the judgment and conviction which were restored by the Supreme Court. ""It would appear from this

decision that the grounds on which the Collector in this case before us committed the petitioner to prison, without any hearing, to undergo a

sentence of two years or until he paid the tax due from him have in the United States of America been made a criminal offence triable by the

ordinary courts of the land.

We have not been referred to a single American decision by the learned Advocate General in which executive order has deprived a citizen of his

liberty, by committing him to prison on a warrant for wilful default of payment of taxes or fraudulent evasion. Mr. Nambiar's contention that this

category of cases have been made punishable in the United States of America by trial in the ordinary way through the courts with every

opportunity given to the defaulter to defend himself and to show cause, appears to be correct. I have no hesitation in finding that Section 46(2),

Income Tax Act, is "ultra vires"" in so far as it empowers a Collector to proceed u/s 48, Revenue Recovery Act, which clearly offends Article

22(1) and (2) of the Constitution,

9. The arrest and imprisonment of petitioner u/s 48 of this Act is also challenged as offending Article 21 of the Constitution under which

No person shall be deprived of his life or personal liberty except according to

procedure established by law.

There appears to be no necessity for canvassing this Article at length as there is a law on the Statute Book under which a Collector has acted. If

the law is ultra vires there would be no procedure established by law and the imprisonment becomes unlawful; on the other hand, if it is "intra vires"

the petitioner has been lawfully deprived of his personal liberty.

10. The next Article invoked by Mr. Nambiar is Article 14 under which

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

We have heard lengthy arguments on the applicability of this Article sought to be reinforced by a number of decisions in which this Article has been

considered in relation to various enactments. For instance, it has been sought to be invoked without success, however, in - Kedar Nath Bajoria

Vs. The State of West Bengal, to impugn the West Bengal Criminal Law Amendment (Special Courts) Act, 21 of 1949, on the ground that it

empowered the State Government to single out a particular case for reference to the Special Court for trial by special procedure, which denied to

persons tried under it certain advantages enjoyed by those under ordinary procedure.

The Supreme Court held, Bose J. dissenting, that the West Bengal Criminal Law Amendment Act was "intra vires". Patanjali Sastri C. J.

emphasised what may be called the doctrine of classification and the principle that the equal protection of the laws guaranteed in Article 14 does

not mean that all laws must be general in character and universal in application and that the State no longer has the power of distinguishing or

classifying persons or things for the purpose of legislation. For the purpose of Section 46(2), Income Tax Act, there is no serious dispute by Mr.

Nambiar that it was perfectly legal for the then Central, and now Union Government, to utilise the existing machinery for the collection of land

revenue arrears in the different States for the purpose of collecting the Central or Union taxes. So far as this machinery is generally speaking

uniform and otherwise intra vires" of the Constitution, Article 14 of the Constitution is not offended. The various States are perfectly entitled to

legislate for their own territorial areas in their spheres of legislation and to define the manner in which their own arrears of taxes are to be realised,

keeping their machinery of course within constitutional bounds.

11. Our attention has been drawn to Section 13, Bombay City Revenue Recovery Act, which, as would appear from a pre-constitution decision,

Ali Ahmed Vs. The Collector of Bombay, empowers the Collector to sentence a defaulter to imprisonment not exceeding one day for every rupee

of arrears due if the sale of the defaulter's property does not produce sufficient to satisfy the demand. In that case the Collector after exhausting

the alternative powers under the CPC and sending him to prison under Order 21, Rule 46, ordered his further detention u/s 13. A "habeas corpus"

petition for his release was dismissed by the learned Bombay Bench who held they had no jurisdiction to interfere. If this petitioner was a resident

of Bombay City, he would be liable under the Bombay City Revenue Recovery Act to imprisonment for more than 61000 days if he did not pay

his arrears, whereas u/s 48 of the Madras Revenue Recovery Act, the maximum detention a Collector could pass on him is two years.

In Bombay City the Collector can sentence a defaulter to imprisonment when sale of defaulter's property is insufficient exercising the same wide

powers as the General Commissioners u/s 165 of the British Income Tax Act of 1918 - powers taken away by the Act of 1952. So far as I am

able to follow the doctrine of classification evolved to reconcile conflicts of fundamental rights and freedoms under the Constitution with Article 14,

there is, in the present case, in so far as the Union Government is concerned, one wide class of Income Tax defaulters who wilfully default to pay

Income Tax or by some fraudulent method evade payment. As it appears to me, it offends the equality before the law contemplated by Article 14,

if the assessees in different parts of India are to be exposed to so widely differing sentences which can be imposed by Collectors on different

grounds in different States.

12. This position of inequality of treatment is very easily capable of rectification by the insertion of penal provisions in the Income Tax Act itself

which would make such assessees who wilfully default in payment of Income Tax by secreting their property or by fraudulent conduct evade

payment subject to trials in ordinary courts on clearly defined offences formulated in the Income Tax Act itself. The only penal provisions in the

present Income Tax Act which create offences punishable before Magistrates are

Sections 51 and 52 and are very mild. u/s 51 if a person fails without reasonable cause or excuse "inter alia" to pay tax as required by Section 18, or to comply with other obligations under the Act, he shall on conviction by a Magistrate be punishable with fine which may extend to Rs. 10 for every day during which the default continues. Section 52 makes false verifications under various sections with knowledge that they are false punishable with simple imprisonment which may extend to six months.

The points on which the Collector has to be satisfied u/s 48, Revenue Recovery Act, may well be constituted an offence punishable by a criminal court and also other forms of dishonest evasion of tax by imprisonment which may range upto two and even five years. Sri C. S. Rama Rao Sahib, the standing counsel for the Income Tax department, who appeared in Court assisting the learned Advocate General has frankly conceded that this remedy u/s 48, Revenue Recovery Act, by the issue of a certificate to the Collector was not considered by the Income Tax authorities till very recently and that in fact this is the second case in which the experiment has been made in this State - the other case was considered by Satyanarayana Rao and Rajagopalan JJ. on a "habeas corpus" petition filed in this Court in "Crl. M. P. No. 273 of 1954" recently. That was a case of an Income Tax defaulter who came from Pondicherry to Madurai district to attend a marriage and was there arrested and imprisoned on a warrant issued by the Collector of Trichinopoly countersigned by the Collector of Madurai u/s 48.

In view of a flaw in jurisdiction on the warrant, the release of the petitioner was ordered. The learned Bench did not pronounce any opinion as to whether Section 48, Revenue Recovery Act, was "ultra vires" or "intra vires". In the domain of land revenue arrears, I also think that the procedure of the Collector issuing an arrest warrant u/s 48 without even giving a defaulter an opportunity of being heard has fallen into disuse.

13. I would finally like to comment briefly on some lengthy arguments addressed to us as regards the difference in procedure between Section 48, Revenue Recovery Act, invoked u/s 46(2) and the alternative procedure open to the Collector under the proviso to that section to exercise powers of the CPC in recovering Income Tax arrears. Mr. Nambiar has stressed for instance, the difference between the two procedures. Under

the CPC the debtor must be given an opportunity of being heard and the maximum sentence which can be imposed is six months u/s 58. The state of a debtor's health can be taken into consideration before sending him to prison and also in order to direct his release. We have indicated supra that the proviso in its inception was intended originally to give the Collector only powers to attach and sell debts due to a judgment-debtor, under the Civil Procedure Code, but that the amendment of the year 1941 which took away these words, gave the Collector an alternative procedure which he could follow at his discretion in appropriate cases.

Mr. Nambiar contended that the widely differing alternatives afforded scope for hostile discrimination. I am not much impressed myself by this argument. It is perfectly open to the Legislature to provide alternative courses to be followed by executive authorities to be invoked at their discretion provided of course the alternatives are "intra vires" of the Constitution, Whether the proviso to Section 46(2) in any respect is "ultra vires" does not fall for determination on this petition. Nor do we propose to express an opinion. We have however no hesitation in holding that Section 48, Revenue Recovery Act under which the petitioner has been arrested and committed to prison is "ultra vires" and to this extent Section 46(2) is also "ultra vires."

14. I have not thought it necessary to canvass in detail several decisions on constitutional law placed before us. Some of them are of monumental proportions. As it appears to me, there is no decision in point and the matter we have to decide is "res integra" and a simple one, I have not thought it necessary to refer at length to English and American decisions longer anterior to our Constitution which represents a far greater advance in its declaration of fundamental rights than any other Constitution in world history. It is not necessary in my view to seek to justify judicial decisions interpreting these fundamental rights by delving too deeply into old decisions of other democratic countries in the course of their laboured evolution towards the fundamental rights declared in no uncertain terms in our own Constitution.

15. At the conclusion of the arguments we directed the petitioner to be released from prison on his own bond in a sum of Rs. 2500 to the satisfaction of the Superintendent, Central Jail. As he is presumably now at

liberty, we would in allowing the petition merely direct the cancellation of his bond.

Krishnaswami Nayudu, J.

16. I had the advantage of perusing the judgment of my learned brother and I am in agreement with him in the order proposed to be made. In view

of the constitutional importance of the case, I have preferred to give my own reasons in a separate judgment,

17. The petitioner has been arrested in pursuance of a warrant of arrest issued by the Collector of Malabar for non-payment of Income Tax and

directed to be detained for a period of two years and he has been in detention in the Central Jail, Cannanore. The Collector purported to act u/s

46(2), Income Tax Act, read with Section 48, Madras Revenue Recovery Act, 2 of 1864. I need not reproduce these sections, which are set out

in extenso in my learned brother's judgment. The validity of the warrant of arrest and the subsequent detention is challenged as absolutely illegal

and unconstitutional and totally without jurisdiction as contravening Articles 14, 21 and 22 of the Indian Constitution.

18. It is urged that in so far as arrest and detention are concerned, the two enactments, namely, the Income Tax Act, proviso to Section 46(2), and

Section 46 read with Section 48, Revenue Recovery Act, widely differ in the procedure, the period of detention and the rights of appeal and that

as an unrestricted discretion is vested in the Collector to have recourse to either of these methods, it infringes Article 14 of the Constitution which

ensures to the citizen equality before the law and equal protection of law within the territory of India. In the present case, the warrant for arrest is in

form No. 11 provided under Sections 48 and 49, Revenue Recovery Act, and states that the Collector has reason to believe that the defaulter is

wilfully withholding payment of the arrears and has been guilty of fraudulent conduct to evade payment of the amount and directs the Tahsildar to

arrest the petitioner.

The Collector has, therefore, in issuing the warrant resorted to the procedure laid down in Section 48, Revenue Recovery Act, which does not

provide for any notice to the defaulter for showing cause against his arrest or give him a chance to explain even after the arrest. By issue of the

warrant the Collector must however be deemed to have satisfied himself about

the wilful withholding by the petitioner of the payment of arrears or of the fraudulent conduct on his part in order to evade payment. No opportunity was given to the defaulter to explain his "bona fides" and his inability to pay the amount or prove any other ground of exemption from which he can seek to avoid arrest and detention. It is further in evidence that after the arrest and detention, a petition was presented on his behalf before the Collector by an advocate to give him an opportunity to explain and also pointing out his advanced age, the petitioner being 70 years; but the petition was rejected even without hearing. Of course, there is no provision in Section 48 warranting such a procedure.

19. The other mode of recovery by arrest can be exercised by the Collector acting as a civil Court and applying the provisions of the CPC

governing arrest and detention in civil prison for non-payment of a decree. By Section 51, Civil P. C., arrest and detention in prison is prescribed

as one of the modes of execution of the decree. But if it is to be execution by detention in prison, where a decree is for the payment of money,

arrest should not be ordered unless an opportunity is given to the judgment-debtor as to why he should not be committed to prison and the Court

should be satisfied by reasons recorded in writing:

(a) that the judgment debtor, with the object of obstructing or delaying the execution of the decree,-

(1) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(2) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or

committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part

thereof and refuses or neglects or has refused or neglected to pay the same,

A Court before ordering execution by arrest of the judgment-debtor is bound to give him an opportunity and cannot order arrest unless it is

satisfied that one or other of the conditions prescribed in the proviso to Section 51, Civil P. C., are fulfilled, and even after arrest he must be

produced before the Court before detention, u/s 55 of the Code, and the maximum period of detention provided being six months u/s 58, and if he

had served the term of the imprisonment or released earlier, he could not be re-arrested under the decree in execution of which he was detained.

Order 21, Rule 37 makes it obligatory on the Court, in an application for execution of the decree by arrest and detention, to issue a notice calling

upon the judgment-debtor to show cause why he should not be committed. There is also provision u/s 59 for release of the judgment-debtor, who

has been arrested and detained, on grounds of illness.

20. It is thus seen that the procedure for arrest under the Revenue Recovery Act is fundamentally different from that prescribed in the Civil P. C.

None of the safeguards provided in the Code against improper arrest and detention are found in the Revenue Recovery Act. If the Collector is

satisfied on whatever material that may be placed before him that the assessee has been withholding payment and is otherwise guilty of fraudulent

conduct - such opinion being arrived at without hearing the assessee,- it will be open to him to issue a warrant and have the assessee arrested. The

Collector is empowered u/s 46(2) to either arrest him u/s 48, Revenue Recovery Act, or act as a civil Court thus conferring on him an absolute

discretion to select any of the two modes. Such a power where it is open to the executive authority - in this case the Collector - to select one of the

alternative remedies at his discretion, it is urged, is a glaring violation of the right to equality before the law laid down under Article 14 of the

Constitution.

Section 46(2), Income Tax Act, is challenged as illegal and "ultra vires" only to the extent of empowering the Collector to recover the tax as

arrears of land revenue and thus resorting to Section 48, Revenue Recovery Act. Section 48 by itself does not offend Article 14; but the exercise

of the power u/s 46(2) read with Section 48 is what is urged to be "ultra vires" of the Constitution. Both Section 46(2), Income Tax Act, and

Section 48, Revenue Recovery Act, are in pre-constitution statutes, and, if the contention of the petitioner under Article 14 is accepted they are hit

by Article 13(1) of the Constitution, which renders void all laws in force in the territory of India immediately before the commencement of the

Constitution in so far as they are inconsistent with the provisions of Part III relating to fundamental rights.

21. The scope and extent of the right conferred under Article 14 came to be

considered by the Supreme Court in relation to the West Bengal

Special Courts Act 10 of 1950 in - The State of West Bengal Vs. Anwar Ali Sarkar, , and the majority view was that it infringed the constitutional

prohibition under Article 14 of the Constitution. Fazl Ali J., after referring to the two earlier decisions of the Supreme Court, viz., Chiranjit Lal

Chowdhuri Vs. The Union of India (UOI) and Others, , the State of Bombay v. F. N. Balsara AIR 1951 SC 318(G), observed at p. 83:

The principles laid down in those decisions have to be kept in view in deciding the present case. One of these principles is that Article 14 is

designed to protect all persons placed in similar circumstances against legislative discrimination, and if the Legislature takes care to reasonably

classify persons for legislative purposes and if it deals equally with all persons belonging to a well defined class, it is not open to the charge of denial

of equal protection on the ground that the law does not apply to other persons.

Mahajan J. (as he then was) dealing with the scope of Article 14 observed at p. 85:

It is. designed to prevent any person or class of persons for being singled out as a special subject for discriminatory and hostile legislation.

Democracy implies respect for the elementary rights of man, however suspect or unworthy. Equality of right is a principle of republicanism and

Article 14 enunciates this equality principle in the administration of justice. In its application to legal proceedings, the Article assures to everyone

the same rules of evidence and modes of procedure. In other words, the same rule must exist for all in similar circumstances.

22. Mahajan C. J. in a recent case in Suraj Mall Mohta and Co. Vs. A.V. Visvanatha Sastri and Another, in examining certain sections of the

Taxation on Income (Investigation Commission) Ac?, 30 of 1947, as to whether they have become void by reason of Article 14 of the

Constitution, while referring to the scope of Article 14 observes at p. 552 as follows:

It is well settled that in its application to legal proceedings Article 14 assures to everyone the same rules of evidence and modes of procedure; in

other words, the same rule must exist for all in similar circumstances. It is also well settled that this principle does not mean that every law must

have universal application for all persons who are not by nature, attainment or

circumstance, in the same position. The State can by classification determine who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject, but the classification permissible must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis.

Section 46(2) clothes the Collector, a single individual and an executive authority with power to apply either of the two modes provided for arrest of defaulters, who are placed in similar circumstances. He can issue a warrant of arrest u/s 48, Revenue Recovery Act, in the case of A who has been found to be a defaulter by the Income Tax authorities and act as a civil Court before ordering arrest in the case of B, who has also been found to be a defaulter by the Income Tax authorities under identical circumstances. The power therefore that is conferred on the executive authority is unfettered and the exercise of his discretion is not subject to any limitations imposed against him by the enactment. It is open to him to treat two defaulters placed in similar circumstances differently and there is nothing in the concerned enactments to guide him as to which of these procedures he should adopt. On the face of the impugned provisions, the Collector is the ultimate authority to decide the course he should adopt and, in such circumstances, there is always the scope for discrimination between two defaulters who are placed in the same position to the advantage of one and to the prejudice of another.

23. The learned Advocate General referred us to the later decision of the Supreme Court in Kedar Nath Bajoria Vs. The State of West Bengal, , where Section 4, West Bengal Criminal Law Amendment (Special Courts) Act, 1949, was the subject of consideration as to whether it offended the Constitution, in particular Article 14 and the majority held that the section which provided for allotment by the State Government in its discretion to the Special Courts particular cases for trial was constitutionally valid. In particular, the learned Advocate General relied on the following passage in the judgment of Patanjali Sastri C, J, at p. 409 and contended that the vesting of the discretion in the Collector in the circumstances of the case was not sufficient to hold it as being in contravention of Article 14:

However that may be, the majority decision in the Saurashtra case, - Kathi

Raning Rawat Vs. The State of Saurashtra, , would seem to lay down the principle that if the impugned legislation indicates the policy which inspired it and the object which it seeks to attain, the mere fact that the legislation does not itself make a complete and precise classification of the persons or things to which it is to be applied, but leaves the selective application of the law to be made by the executive authority in accordance with the standard indicated or the underlying policy and object disclosed is not a sufficient ground for condemning it as arbitrary and, therefore, obnoxious to Article 14.

In the case of such a statute it could make no difference in principle whether the discretion which is entrusted to the executive Government is to make a selection of individual cases or of offences, classes of offences or classes of cases. For, in either case, the discretion to make the selection is a guided and controlled discretion and not an absolute or unfettered one and is equally liable to be abused, but, as has been pointed out, if it be shown in any given case that the discretion has been exercised in disregard of the standard or contrary to the declared policy and object of the legislation, such exercise could be challenged and annulled under Article 14 which includes within its purview both executive and legislative acts.

These observations were cited with approval by Rajamannar C. J. in - Globe Theatres Ltd. and Others Vs. State of Madras and Others, . There, the question arose as to whether Section 13, Madras Buildings (Lease and Rent Control) Act, which conferred on the State Government the power to exempt any building or classes of buildings from the provisions of the Act by notification in the Fort St. George Gazette, was inconsistent with the fundamental right conferred by Article 14.

After referring to the decisions of the Supreme Court on the subject, namely Kedar Nath Bajoria Vs. The State of West Bengal, ; The State of West Bengal Vs. Anwar Ali Sarkar, and the Kathi Raning Rawat Vs. The State of Saurashtra, , the learned Chief Justice observed:

The net result of these three decisions of the Supreme Court appears to me to be this. If the policy and object of the Act can be discovered within the four corners of that Act including the preamble, and discretion is vested in the Government to make a selection in furtherance of that policy and object for the application of the Act, then the provision conferring such power is

not void as offending Article 14 of the Constitution. If such power is improperly exercised in any particular case, that is, not in furtherance of the policy and object of the Act, but arbitrarily, then the Court can strike down the exercise of such power on every such occasion.

24. The learned Advocate General argues that because a number of alternative remedies are provided which the executive authority can exercise in the case of persons placed in similar circumstances, it cannot be urged that there is denial of equality, for the Collector has to be satisfied that the assessee has been withholding payment or has fraudulently conducted himself and therefore the legislative provision empowering the executive authority to adopt either of the two modes cannot be challenged, but that, in any particular case, where there has been hostile discrimination. such a case may be brought to the notice of the Court and redress obtained.

25. But the application of these principles does not arise in this case for the simple reason that the discretion given to the executive authority is not a guided and controlled one. There is nothing either in the Income Tax Act or in the Revenue Recovery Act, laying down the principles of selection or the policy underlying the application of the two remedies, which could afford any guidance to the Collector in making his selection of either of the two procedures with reference to particular classes of defaulters. There is no classification made to enable a Court to examine whether that

classification is based on any real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained. The proviso

to Section 46(2) was added by Act 18 of 1933 and the proviso was further amended by Act 23 of 1941. The reason given in the Income Tax

Act 23 of 1941 for the amendment was that the Collector's power of recovering Income Tax demands was found in practice to be inadequate and

it was therefore decided to confer on the Collector, for the purpose of recovering the tax, the powers which under the Civil Procedure Code, a

civil Court has for the purpose of the recovery of an amount due under a decree.

There is no indication in the preamble or in the other portions of the enactment as to on what basis the Collector has to make the selection of either

of the two modes of procedure for arrest. The power vested in the Collector, to use the language of Matthews J. in - *Yick Wo v. Hopkins* (1886)

30 Law Ed 220 (K), is not confided to his discretion in the legal sense of that

term, but is granted to his mere will; it is purely arbitrary, and acknowledges neither guidance nor restraint. The Collector's position is the same as that of the Board of Supervisors in the said American decision in whom the right to grant a licence to maintain and carry on a laundry within the limits of the City and County of San Francisco was vested subject to one condition that the laundry be located in a building either in brick or stone.

26. It is urged that the Collector, a responsible official, could be trusted with the power of making the selection and in appropriate cases he could proceed u/s 48, Revenue Recovery Act after being satisfied that there is a wilful withholding of payment or fraudulent conduct - of which he must be satisfied on proper material placed before him - and that the Collector could be expected to exercise his judicial mind and come to a decision and as such the power conferred on the Collector is not likely to be abused. The test to judge whether a particular provision is discriminatory is not by finding as to whether it has been abused, but to see if, from the face of the enactment, there is a tendency or scope for discrimination in its ultimate operation. If the Collector chooses to proceed in respect of a particular defaulter u/s 48, the fact that there is another provision equally available which renders the issue of a warrant dependent upon certain facts and circumstances to be proved after hearing the assessee, is sufficient to hold that such a legislation is discriminatory, notwithstanding that in its actual exercise it is not shown that the authority acted in a hostile manner and discriminated against a defaulter.

The existence of such a provision giving an unfettered and unhedged discretion to the Collector is enough to make it inoperative and void, as it would come within the inhibition of Article 14. The impugned legislation which confers on the executive authority unfettered power of deciding which of the two modes could be employed to cause the arrest of the assessee for non-payment of the assessment, and which does not contain any clue or guidance as to when and under what condition, "" and circumstances either of the powers may be exercised gives a handle to the authority to discriminate. Such a power is manifestly unreasonable and nakedly arbitrary and is opposed to the doctrine of equality before the law under the Constitution.

27. In view of our holding that the arrest in the present case, being one u/s

46(2), Income Tax Act, read with Section 48, Revenue Recovery Act, is illegal on the ground that the said provisions infringe Article 14 of the Constitution, it will be unnecessary to examine the other grounds on which the legislation is impugned. But the learned Advocate General pressed upon us to pronounce our opinion on the other constitutional questions raised in the case and therefore it becomes necessary to examine the other grounds urged by the petitioner for invalidating the arrest.

28. It is further contended that the legislation on which reliance is placed for supporting the arrest is also inconsistent with Article 22 of the Constitution in particular Clauses (1) and (2). It is not that Section 46(2), Income Tax Act could as a whole be considered to be affected by the said Article but it is only Section 48, Revenue Recovery Act, that is urged as contravening the provisions of Article 22, Clauses (1) and (2). Article 22, Clause (1) provides that:

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

And by Clause (2) it is provided that,

Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest ... and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

A plain reading of Section 48, Revenue Recovery Act, will convince that there is nothing to compel the Collector to inform the assessee of the grounds of his arrest nor allow him to be defended by a legal practitioner of his choice. There is also no provision for his being produced before a Magistrate, The warrant itself would disclose the grounds of arrest, the grounds being that he is withholding payment of the arrears and has been guilty of fraudulent conduct. So the first part of Article 22 (1) may be held to be satisfied. But there was no opportunity given to the assessee to appear before the Collector by himself or by a legal practitioner of his choice and urge before him any defence Open to him. The detention is to be for a period of two years, while the executive authority can under the Article only be entitled to detain him. for 24 hours without further orders from

a Magistrate,

29. In *The State of Punjab Vs. Ajaib Singh and Another*, the taking into custody by the executive authority under the Abducted Persons

(Recovery and Restoration) Act, 65 of 1949, was held to be not an infringement among others of Article 22 of the Constitution on the ground that

the taking of an abducted person into custody and delivery of that person to the officer in charge would not amount to arrest and detention and

Article 22 was of no application to the case arising under that enactment.

Das J. in the course of his judgment observed at p. 15:

The language of Article 22(1) and (2) indicates that the fundamental right conferred by it gives protection against such arrests as are effected

otherwise than under a warrant issued by a court on the allegation or accusation that the arrested person has, or is suspected to have, committed,

or is about or is likely to commit an act of a criminal or quasi-criminal nature or some activity prejudicial to the public or the State interest. In other

words, there is indication in the language of Article 22(1) and (2) that it was designed to give protection against the act of the executive or other

non-judicial authority. The *Blitz* case - *Gunupati Keshavram Reddy v. Nafisul Hasan* Petn. No. 75 of 1952, D/-18-3-1952 (SC) (M) on which Sri

Dadachanji relies, proceeds on this very view, for there the arrest was made on a warrant issued, not by a court, but, by the Speaker of a State

Legislature and the arrest was made on the distinct accusation of the arrested person being guilty of contempt of the Legislature.

30. Relying on these observations the learned Advocate General argues that Article 22 must be confined to cases of arrest of persons who are

suspected to have committed an act of criminal or quasi-criminal nature or to some activity prejudicial to the public or the State interest, and not

to every kind of arrest including arrest for non-payment of public dues. We are however unable to agree, since the language of Article 22 does not

warrant such a limited construction as to the scope of the right granted under the said Article. Further, it is clear from his Lordship's judgment that

no attempt has been made to give an exhaustive exposition as to the scope of Article 22 as the following observations at p. 15 dispel any doubt in

that direction:

It is not, however, our purpose, nor do we consider it desirable, to attempt a

precise and meticulous enunciation of the scope and ambit of this fundamental right or to enumerate exhaustively the cases that come within its protection.

There is undoubtedly, with respect to his Lordship, as observed by him, indication in the language of Article 22(1) and (2) that it was designed to

give protection against the act of the executive or other non-judicial authority, for in the case of a warrant of arrest issued by a Court, one can

expect a judicial mind having been applied to the authority under which the arrest is made and it may be presumed that the proper procedure has

been duly followed. Therefore warrants issued by a Court can ordinarily be excepted from the operation of Article 22(1) and (2) though the

detention and the production before the Magistrate and the other conditions necessary to comply with the said Article have not been followed. In

the present case, however, the warrant is by an executive authority and not by a Court.

The Advocate General endeavoured to show that the Collector while acting u/s 48 must be deemed to be in the position of a Court as he was

obliged to give a finding before issuing the warrant that the defaulter had been withholding payment and had been guilty of fraudulent conduct. The

mere circumstance that the Collector has to take a decision before issuing the warrant would not make him a Court, as he is not under the section

empowered to exercise the other powers of the Court of hearing the assessee before coming to a decision as to his conduct and issuing the

warrant after such an opportunity being given. The Collector, as defined in the General Clauses Act 10 of 1897 is only the Chief Officer of the

revenue administration of a district and in no sense could he be considered to be a court, Apart from it, the conferring on the Collector the powers

of a civil Court under proviso to Section 46(2), is conclusive to show that the Collector is empowered to act as the Chief Officer of the revenue

administration of the district while proceeding u/s 48, and as a civil Court only while acting under the proviso to Section 46(2).

The arrest being in pursuance of a warrant by an executive authority, it directly attracts the application of Article 22(1) and (2) and in such cases,

the procedure prescribed in Article 22(1) and (2) has to be followed before depriving the personal liberty of the citizen. There is, therefore,

obvious inconsistency between Section 48, Revenue Recovery Act, and the provisions of Article 22(1) and (2) of the Constitution, and Section 48

to the extent it is inconsistent with the provisions of Article 22 of Part III of the Constitution must be considered void.

31. The objection that the arrest and imprisonment of the petitioner also offends Article 21 does not require serious consideration, since so long as

there is a law on the statute book under which the Collector has acted, that will be sufficient to support the legality of the action taken by the

Collector in view of the meaning that is given to the words ""procedure established by law"" in Article 21 by the majority decision in - A.K. Gopalan

Vs. The State of Madras, . The other contention of Mr. Nambiar is that it would not be competent for the Income Tax Officer acting under a

Central legislation like the Income Tax Act to invoke Section 48, Madras Revenue Recovery Act, which is not a Central Act. It has to be noted

that the Collector in exercising his power u/s 48 does not purport to act by virtue of the authority conferred in Section 48, but by virtue of the

direction contained in Section 46(2), Income Tax Act, to adopt the procedure laid down in Section 48, though it is part of a provincial statute. The

law under which the Collector has purported to act is really the Income Tax Act.