

(2003) 12 KL CK 0040
In the High Court Of Kerala
Case No : Criminal M.C. No. 5289 of 2003

Haneefa

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 08-12-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 102, 41(1)
Foreign Exchange Management Act, 1999 — Section 3

Citation : (2005) 272 ITR 230

Hon'ble Judges : G. Sasidharan, J

Bench : Single Bench

Advocate : P.K. Ravisankar, for the Appellant; Noorji Noushad, for respondent
No. 1, P.S. Sreedharan Pillai and George K. George, for the Respondent

Final Decision : Dismissed

Judgement

G. Sasidharan J.

1. This is a petition filed by the 4th accused in Crime No. 102 of 2003, of Guruvayoor Police Station. The crime was registered against the petitioner and the other accused under sections 41(1)(d) and 102 of the Criminal Procedure Code. On March 20, 2003, the Circle Inspector of Police, Guruvayoor, intercepted an ambassador car in which accused Nos. 1 to 3 were travelling and seized Rs. 52 lakhs which was suspected to have been stolen. Accused Nos. 1 to 3 said that the money belonged to the petitioner and hence he was also made an accused in the crime.

2. On conducting investigation it was found that the currency notes seized were not stolen property and police filed a report to that effect in the court of the Magistrate. According to the petitioner, the money seized is his business income. The Assistant Director of Income Tax (Investigation), Thrissur, filed C. M. P. No. 4056 of 2003 in the court of the Judicial Magistrate of the First Class, Chavakkad, stating that the money seized was the unaccounted income from the business of the petitioner and requesting that the amount may be released to the Income

Tax Department. On April 11, 2003, the learned Magistrate dismissed the petition stating that until a final report is filed by the police the amount could not be released. The Income Tax Department filed Crl. R. P. No. 29 of 2003, in the Sessions Court, Thrissur, and that revision was dismissed.

3. The police filed a report on July 4, 2003, in the court of the Magistrate stating that sections 41(1)(d) and 102 of the Criminal Procedure Code may be deleted and investigation had to be conducted u/s 3 (b) and (c) of the Foreign Exchange Management Act. Annexure D is the report sent to the court stating that the police made a request to the Enforcement Directorate, Kozhikode, to take over the investigation of the crime and one Ananthakrishnan, Chief Enforcement Officer, went to the police station and received from there the copies of the records of the case. In annexure D request is made to the court to hand over the first information report and other connected records to the Enforcement Directorate, Kozhikode. Such a request was made to hand over the records of the case to the Enforcement Directorate because the violation of the provisions of the Foreign Exchange Management Act is not an offence the court can take cognizance of.

4. The Assistant Director, Enforcement Directorate, filed C. M. P. No. 5523 of 2003 in the court of the Magistrate seeking release of the money seized by the police. The petitioner filed an objection contending that the Assistant Director, the second respondent, is not entitled to get the amount from the court. The petitioner filed C. M. P. No. 6184 of 2003 in the court of the Magistrate seeking release of Rs. 36,40,000 out of Rs. 52,00,000 after deducting Rs. 15,60,000 as Income Tax at the rate of 30 per cent. By a common order dated October 15, 2003, the Magistrate allowed the application filed by the second respondent, Assistant Director, Enforcement Directorate, and dismissed the petition filed by the petitioner. That order of the learned Magistrate is under challenge. The prayer in the petition is to quash annexure I order and allow the petition filed by the petitioner and dismiss the application filed by the second respondent.

5. The application filed by the petitioner is u/s 451 of the Criminal Procedure Code for return of a portion of the amount seized by the police. That shows that what the petitioner wants is to get interim custody of the portion of the amount from court. This is a case in which the money was seized on the suspicion that it was stolen money and on conducting investigation the police was convinced that the money was not stolen from anywhere. The Investigating Officer had reason to believe that there was violation of section 3 (b) and (c) of the Foreign Exchange Management Act and since the police was not competent to investigate the violation of the above provisions of the Act, he took a decision for transferring the case to the Enforcement Directorate. That is what is seen from the report filed by the police in the court because in the report it is said that an officer of the Enforcement Directorate took copies of the records kept in the police station and request is made that the first information report and other papers filed in court may be given to the Enforcement Directorate. The question

is, in the above circumstances, whether the learned Magistrate was justified in making an order directing the giving of money to the Enforcement Directorate.

6. The submission made by learned counsel appearing for the petitioner is that the money was seized by the police and a crime was registered and on conducting investigation it was found that the petitioner and the other accused did not commit any offence which the learned Magistrate could take cognizance of and since the proceedings in the court of the Magistrate came to an end the money has to be given back to the person from whom it was seized. Learned counsel points out the provisions in the Foreign Exchange Management Act which give powers of search and seizure to the officers under the Act and submits that they can have possession of the articles seized on making search as provided in the Act. The petitioner would contend that the Enforcement Directorate cannot make a request to court to hand over the money which is kept in the custody of the court since the seizure of money was made by the police on the assumption that cognizable offences were committed by the accused. In this context it is pointed out that the violation of the provisions of the Foreign Exchange Management Act has not been made an offence punishable by the Magistrate. The authorities mentioned in the Act have the power to deal with the violations of the provisions of the Act

7. Learned counsel appearing for the petitioner cited the decision in K. Choyi, Income Tax Officer, Assessment-IV Vs. Syed Abdulla Bafakki Thangal and Another, in support of his argument that the Enforcement Directorate is not entitled to get the money kept in court. That was a case in which the police, on seeing the second respondent in that case walking along the road with a bag, stopped him and searched him and found that the bag contained Rs. 1 lakh. He was arrested and produced before court and he was remanded to judicial custody. The second respondent in that case said that the amount belonged to one Ahammed Thangal and that the money was being taken for being given to Koyappa. The second respondent from whom the money was seized gave an application in court praying that the money may be given to the first respondent. The first respondent filed an application claiming the amount. The Income Tax Department filed a petition stating that the money seized from the second respondent was income which had not been disclosed for the purposes of Income Tax and hence it had to be given to the Department. The Magistrate made an order allowing the first respondent to get the amount from court. A revision was filed before the District Magistrate and the District Magistrate confirmed the order of the Sub-Magistrate directing the giving of the money to the first respondent. Revision was filed before this court. A learned judge of this court said that ordinarily when any property is seized from a person arrested and when the police submits the final report stating that the investigation does not disclose commission of any offence by the accused, the duty of the court is to return the articles to the person from whom the articles were seized. In that case the second respondent from whom the currency notes were seized did not make a claim for the return of the amount to him but he filed a petition stating that the

amount may be given to the first respondent. The learned judge of this court said in the above decision that it is only where the accused denies the seizure from him or contends that the article was planted, the question regarding the person who is entitled to the present possession of the property arises. In the above case, the Income Tax Department filed petition u/s 132 of the Income Tax Act. u/s 132(1)(iii) of the Income Tax Act the authority under the Income Tax Act has the power to seize the amount which is income which had not been disclosed for the purposes of the Income Tax Act. It was on the above ground that the Income Tax Department made the request to get the amount from court. Referring to various decisions which dealt with the powers of the Income Tax Officers to seize money which is income not disclosed for the purposes of the Income Tax Act the learned judge found that the learned Magistrate was correct in giving the money to the person from whom it was seized.

8. In the above case, police after conducting investigation of the crime, filed a final report referring to the case as one of mistake of fact. The referred report was to the effect that the second respondent had not committed any offence and that the money seized from him actually belonged to the first respondent.

9. In *Assainar and Another Vs. Income Tax Officer and Others*, , it was held that when articles have been seized pursuant to a provision in a statute as long as the enquiry is pending the person who seized the articles will be in the position of a bailee and that once the proceedings were over that officer will no longer be a bailee. It was also held that there is a statutory obligation cast on him to return the article to the person from whom it was seized and he would therefore be holding the article on behalf of the person from whom it was seized. The above observations were made by a Division Bench of this court when considering the question whether u/s 132 of the Income Tax Act the Income Tax Department can get the articles from the officer, who seized the articles. In that case seizure was made u/s 110(1) of the Customs Act and it was found on investigation that the money seized was not liable to confiscation. So, the money seized was liable to be returned as provided under sub-section (2) of section 110 of the Customs Act. At that stage, the Income Tax Officer who was empowered by the Commissioner as envisaged by sub-section (1) of section 132 of the Act intervened and issued a notice under rule 112A of the Income Tax Rules requiring the person from whom the money was seized to explain the source of the money. An order u/s 132(5) of the Income Tax Act was passed fixing an amount of Rs. 19,550 as the Income Tax on the sum of Rs. 50,000 seized and saying that the balance amount had to be returned to the person from whom the money was seized. Such an order made u/s 132(5) of the Act was challenged before this court.

10. In the above decision it was held that the Customs authorities, who held the money and the authority under the Foreign Exchange Regulation Act and who held a portion of the money were holding the money on behalf of the persons from whom those amounts were seized by the authorities. There could be a lawful seizure of those amounts, by virtue of sub-section (7) of section 132 of

the Income Tax Act, from those authorities who were keeping the amount.

11. In *Commissioner of Income Tax, Haryana, Himachal Pradesh and Delhi and Others Vs. Tarsem Kumar and Another*, it was held that on a construction of section 132 of the Income Tax Act and the context in which the words, "search", "possession" and "seizure" had been used in the section and the rules there could not be any order in respect of goods or moneys or papers which were in the custody of another Government department under legal authority. It was also held that when physical custody of the moneys and goods was with the Customs authorities and that too by legal sanction and authority to have that custody, it would not be proper to say that possession as contemplated by section 132 was still with the person from whom the moneys and goods were seized by the Customs Department. In the above case the Customs authorities conducted search and seized money and car and took proceedings u/s 110(2) of the Customs Act. The proceedings of the Customs authorities were challenged in the High Court by filing a writ petition and the order made by the Customs authorities was quashed by a learned single judge of the High Court of Punjab and Haryana. An appeal filed before the Division Bench was dismissed. After that, the person from whom seizure was made approached the Customs authorities for return of money and also the car which was taken into custody by the Customs authorities. The Income Tax Officer served a warrant of authorisation issued u/s 132 of the Income Tax Act and rule 112(11) of the Rules on the person to whom the article belonged and on the Customs Department. The Income Tax authorities took possession of the cash. The respondent in the appeal before the Supreme Court filed a petition under articles 226 and 227 of the Constitution before the High Court contending that the authorisation warrant was illegal because the money was not in his possession but was in the possession of the Customs authorities. The High Court, relying on another decision of the High Court in *Commissioner of Income Tax and Others Vs. Ramesh Chander and Others*, held that the search and seizure warrants were liable to be quashed and the money had to be returned to the Customs Department. That decision of the High Court is reported as *Tarsem Kumar Vs. Commissioner of Income Tax and Others*, . It was the validity of the above decision that was challenged in appeal by special leave before the Supreme Court.

12. After referring to the case law on the point, the Supreme Court held that though legal title might have been with the person whose income was sought to be taxed, the physical possession was with the Customs authorities. The Supreme Court did not agree with the Bench decision of the Madras High Court in *Gulab and Company and Another Vs. Superintendent of Central Excise (Preventive) and Others*, . The Supreme Court took note of the decision of the Kerala High Court in *Assainar and Another Vs. Income Tax Officer and Others*, and did not agree with the view taken by the High Court in the above decision. The Supreme Court held that one Government department cannot search another Government department and seize documents.

13. Section 37 of the Foreign Exchange Management Act says that the Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13. Sub-section (2) of section 37 says that the Central Government may, by notification, authorise any officer or class of officers in the Central Government, State Government or the Reserve Bank, not below the rank of an under secretary to the Government of India to investigate any contravention referred to in section 13. In sub-section (3) of section 37 it is said that the officers referred to in sub-section (1) shall exercise the like powers which are conferred on Income Tax authorities under the Income Tax Act and shall exercise such powers, subject to such limitations as laid down under that Act. The officers who are given the powers of investigation regarding the contravention referred to in section 13 of the Act have the powers in respect of search and seizure similar to the powers given to Income Tax authorities under the Income Tax Act.

14. Section 13 of the Foreign Exchange Management Act provides for the penalty for contravention of the provisions of the Act. Section 13 says that adjudication regarding the contravention of the provisions of the Act has to be done by the adjudicating authority. It is u/s 16 that the Government is given the power to appoint adjudicating authority. The contravention of the provisions of the Act is not a matter which a criminal court can take into account and there is no provision in the Act which says that on taking cognizance of the contravention of the provisions of the Act the Magistrate can proceed to take action. The penalty provided in section 13 of the Act has to be imposed by the adjudicating authority after making an adjudication regarding the contravention of the provisions of the Act.

15. The money seized from the petitioner is now in the custody of the court. The money was seized by the police and crime was registered under sections 41(1) (d) and 102 of the Criminal Procedure Code. The Sub-Inspector of Police, Guruvayoor, filed a report stating that during investigation it was found that the currency notes were not counterfeit currency notes and that the money was brought from Gulf countries without any valid documents and after bringing the money to Madras it was brought from there for being distributed in different places in Kerala. After saying so the Sub-Inspector of Police reported that the authorities of the Enforcement Directorate went to the police station and took copies of the records from there. The report filed by the Sub-Inspector in the court says that report was sent to the Director of Enforcement, Kozhikode, regarding what the police could gather on conducting investigation. The Sub-Inspector says that case was registered in the office of the Enforcement Directorate and investigation is being conducted there. The request made by the Sub-Inspector of Police is that for the purpose of continuing with the investigation of the crime the records and the material objects have to be handed over to the Enforcement Directorate.

16. In annexure F application given in court by the Assistant Director,

Enforcement Directorate, it is said that the police authorities on investigation found that money was involved in FEMA violation and therefore, referred the case to the Enforcement Directorate, Calicut, for further necessary action. It is also stated in the application filed by him in court that he recorded the statements of accused Nos. 2 and 4 u/s 37 of the Foreign Exchange Management Act read with section 131 of the Income Tax Act and it was revealed that the amount of Rs. 52 lakhs seized was money received by accused No. 4 through accused Nos. 1, 2 and 3 in contravention of the provisions of section 3(c) of the Foreign Exchange Management Act. This is not a case in which any order was made by the officers of the Enforcement Directorate seizing the money which is in the custody of the court and making a demand that they are entitled to get the custody of the money from the court. On the other hand, the police officer gives a report to the court saying that on conducting investigation it was revealed that the money seized by the police was brought from Gulf countries in violation of the provisions of the Foreign Exchange Management Act and hence the matter was referred to the Enforcement Directorate for further action. Moreover, a request is made by the police to give the entire records to the Enforcement Directorate along with the money seized and produced by the police in court. The officer of the Enforcement Directorate proceeded with the matter as requested by the police and gave an application in court for handing over the money to the Enforcement Directorate. The adjudicating authority has the power to confiscate to the Central Government the money in respect of which contravention has taken place. It is for the adjudicating authority to take a decision in that regard. In the above circumstances, there is no illegality or irregularity in the order made by the Judicial Magistrate of the First Class, Chavakkad, directing handing over the money to the Enforcement Directorate, Kozhikode.

17. In the result, the petition is dismissed.