

**(1984) 12 MAD CK 0061**

**In the Madras High Court**

**Case No :** Writ Petition No. 11340 of 1984 and W.M.P. No's. 18181 and 18182 of 1984

VINOD KUMAR DIDWANIA

APPELLANT

Vs

INCOME TAX OFFICER and Others

RESPONDENT

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**Date of Decision :** 03-12-1984

**Acts Referred:**

Income Tax Act, 1961 — Section 271(1)(c)

**Citation :** (1987) 59 CTR 255

**Hon'ble Judges :** Mohan, J

**Bench :** Division Bench

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## **Judgement**

Mohan, J. - The writ petition is for a certiorari filed mandamus to call for the records of the first respondent in assessment order PAN-47/005-PT-5341/81-82 dt. 10-10-1984 and quash the same and direct the respondents to dispose of the case of the petitioner in accordance with law and render justice.

Pending the writ petition, writ miscellaneous petitions were taken up for the stay of the stay of the operation of the said order. Though in an interlocutory proceeding detailed orders are not desirable as it is likely to affect the parties in the final disposal of the writ petition. I have heard very elaborate arguments from Mr. V. P. Raman, Id. counsel appearing for the petitioner and Mrs. Nalini Chidambaram, Id. counsel appearing for the IT Department.

I will briefly set out the following facts as stated by the Id. counsel appearing for the IT Department which according to her are borne out by records. But Mr. V. P. Raman, Id. counsel appearing for the petitioner does not admit the correctness of the statement. However, these are only events leading to the impugned order.

31-7-1981 is the due date for filing the Income Tax return for the asst. yr. 1981-82 under s. 139(1) of the IT Act. But no return was filed. Therefore, on 2-1-1982 a notice under s. 139(2) of the Act was issued to the petitioner calling upon him to file return of income within 30 days from the receipt of notice issued

along with the summons. On 10-1-1982, the notice was served on the assessee's assistant. On 20-1-1982 a letter together with summons was issued to the assessee to produce the account books and documents by 10-2-1982 but the same was returned by the postal authorities with the endorsement not available. Thereafter on 25-3-1982 a fresh notice under s. 139(2) was issued to the assessee calling for return of income. Along with the said notice, summons under s. 131 was also issued to the assessee for personal appearance. The notice under s. 139(2) was served by affixature. On 16-4-1982 a search under s. 132 of the Act was conducted at Madras at the business and residential premises of the petitioner. Summons under s. 131 of the Act was issued to the petitioner calling for books of accounts and keys of the Godown on 21-5-1982 at the Income Tax officer, Madras. This was on 14-5-1982. Again on 22-5-1982, summons under s. 131 was issued fixing 28-5-1982 as the date for compliance. On 13-9-1982 summons under s. 131 was issued to the petitioner calling upon him to produce the keys of the various godowns and books of account and stock on 18-9-1982. On 17-9-1982 the reports of Income Tax Inspector duly supported by reports from two witnesses stating that the petitioner pretended as one Mahendar and even after being identified by two witnesses, he refused to accept the summons were issued by the department. On 10-1-1983 the petitioner was called upon to produce the keys of godowns on 20-1-1983 but the said letter was returned undelivered. On 22-4-1983, an application for extension of time filed in Form No. 6 for the asst. yrs. 1978-79 to 1982-83. On 24-5-1983, a search was made under s. 132 at the business and residential premises of the petitioner at Madras when he posed as his younger brother, Pawan Kumar. On 27-7-1983, search at the residence of the petitioner at Madras was made when again he posed as Pawan Kumar, but his identity was established with the help of C.B.I. Inspector who had taken him into custody early in November, 1982. On 18-8-1983, a letter was sent to the petitioner calling upon him to produce on 25-8-1983 the keys of all the godowns to enable the department to vacate the prohibitory order. This was acknowledged on 23-8-1983. On 26-8-1983 the petitioner sent a letter to the department stating that he is suffering from hypertension and low pressure and therefore he wants the hearing after 20 days. However, in September, 1983 the jurisdiction over the petitioner's case was transferred to the ITO, Central Circle III, Madras. Thereafter, a letter dt. 26-10-1983 to the petitioner again calling upon him to produce on 14-11-1983 all the keys of the godown and to supply details to enable the department to vacate the prohibitory orders was issued. This was acknowledged on 30-10-1983. On 4-2-1984, a letter was issued to the petitioner calling for separate applications for each assessment year to consider the request on merits. On 4-2-1984 again a letter was issued to the assessee calling upon him to file his return. On 15-2-1984, the petitioner was informed of the date on which permission to inspect the seized documents was given, but the petitioner did not avail this opportunity. On 24-2-1984, the assessee informed the department of the filing of an application before the Settlement Commission and requested the department to keep the assessment pending. On 25-2-1984, a reply was sent to the assessee requiring him to file

the return immediately as orders regarding the admissibility of the petition by the Settlement Commission had not been received. On the same date a notice under s. 142(1) was issued to the assessee calling upon him to produce the books of account and posting the case for hearing on 5-3-1984. On 5-3-1984 the assessee filed a "nil" return with a covering letter without any statement, details etc. On the same day the assessee sent a letter requesting for one more opportunity. On 13-3-1984, the assessee was informed that the return filed by him was defective and that he should rectify the defects. The above letter was served by affixture. On 28-3-1984, the department was informed by a letter from Sri A. K. Dey, Advocate, that the Income Tax proceedings have been stayed by the Calcutta High Court. On 20-7-1984, a letter was issued to the petitioner informing him of the materials on which the assessment was proposed to be completed under s. 144 and calling for his objections by 31-7-1984, but this letter was returned as unclaimed and, therefore, served by affixture. On 22-8-1984. The assessee filed his objections to the proposals by his letter dt. 19-8-1984. On 5-9-1984, the High Court issued an injunction order restraining the department from taking further proceedings in pursuance of the letter dt. 20-7-1984. The injunction was vacated by the High Court on 6-10-1984. On 10-10-1984, the assessment proceedings concluded and assessment order was issued. There were certain writ proceedings in the High Court of Calcutta between the petitioner and the department as well, against which special leave petitions have also been preferred by the IT Department. The assessment is questioned on various ground as set out in the writ petition. For the purpose of making a prima facie case to hold that the petitioner is entitled to an injunction as prayed for by way of an interlocutory relief, Mr. V. P. Raman would urge that this is a case in which the writ jurisdiction of the High Court is not barred at all. Prima facie, the Order is barred by limitation in view of s. 153(a)(iii) and as long as the petitioners application before the Settlement Commission is pending which has been given a disposal yet, it would fall under s. 153 which prescribes the limitation for completion of assessment and re-assessment. It cannot be contended that under Explanation I, cl. (v) that there is an extension of the limitation. On the contrary, it is merely as exclusion of the limitation. Therefore, till that application is disposed of either way, the department cannot proceed to assess stating that it was getting time-barred on 31-3-1984. Even then when the petitioner sought inspection of the record on 15-2-1984, the letter addressed by the department reaches him on 18-2-1984. The anxiety of the department that the assessment was getting barred was obvious in view of the letter dt. 25-2-1984 issued to him. That apart, a specific request was made by the petitioner to await the orders of the Settlement Commission on his application. If the departments interpretation were to be accepted, would happen is the assessee would suffer an assessment and will have to pay as per the orders of assessment and ultimately seek refund of the excess after the orders of the Settlement Commission. That certainly is an improper interpretation of the section. The second aspect of this case which requires interference by this Court under art. 226 in the order is clearly mala fide. It was the very ITO who passed

the impugned assessment order who conducted the raid during April, 1982-July 1983. The petitioner was informed of the transfer to which immediately objection was taken. When there are several ITOs, there is absolutely no justification for not conceding the request of the petitioner that the case may not be dealt with by him. Then again, when a stay was asked for against the impugned order, the CIT rejects the said petition. A huge amount is sought to be recovered from the petitioner by way of tax which is nearly Rs. 7 crores. The figure is not only astronomical but also wholly imaginary. No assessee in India could ever have a turnover attracting this huge tax liability of nearly Rs. 8 crores. It cannot be contended on behalf of the department that this is a case to which s. 271(1)(c) would apply because the impugned order clearly shows that those proceedings are to be initiated yet. Besides, by the very letter of the petitioner dt. 5-3-1984 he made it very clear that he was filing the return only to save the period of limitation and not to enable the department to initiate penal proceedings under s. 27(1)(c) of the Act. Where therefore, the anxiety of the petitioner was to help the department it cannot now be contended that he was trying to cancel the particulars of his income. The nil return was to see that the limitation is saved. Beyond that the petitioner cannot be blamed in any manner. The further request of the petitioner is that the earlier proceedings between the parties should not be taken into account for safeguarding the liberty of the petitioner. Of course, every effort must be made to safeguard the interest of the revenue but it will be impossible to comply with the order of assessment because the normal commission that is available in the business is 0.25%. That has now been put at 25% of the commission which is unknown in this particular type of business. Lastly, it is added that without prejudice to the arguments of law the petitioner is prepared to place all his assets at the disposal of the department and is willing to give an undertaking that the properties will not be alienated and the appeal pending before the department may be taken up at an early date.

A part from the facts narrated by her earlier, Mrs. Nalini Chidambaram also took me through the various proceedings between the parties in the Calcutta High Court and the Supreme Court. I may even now say that I am not concerned with those for the purpose of deciding whether I should make the interim injunction absolute or not.

Be that so. The first objection is that this Court should not entertain this petition under art. 226 of the Constitution of India. Even if it is a question of limitation, then there is adequate remedy available to the petitioner under the Act which remedy has not been availed of by the petitioner himself admittedly, it is not open to him to come before this Court under art. 226 of the Constitution. In support of this submission, reliance was placed on C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, , Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, , Gita Devi Agarwal v. CIT West Bengal and Anr. (1970) 76 ITR 495 , Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others, , Singam Chetty Ateendrooloo Chetty Charities Vs. Additional Commissioner of Income Tax,

Madras, and Another, , Isha Beevi on behalf of the Minor Umaiben Beevi and Others Vs. The Tax Recovery Officer and Addl. P.A. to Collector, Quilon and Others, , and Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, . The further submission of the Id. counsel for the department is that this is a case to which s. 153(1)(b) would apply. If that be so there is a period of 8 years for assessment. The impugned order clearly shows that the petitioner concealed income and therefore to such a case cl. (c) of s. 271(1) would apply. At no point of time the petitioner ever co-operated with the assessment proceedings. Merely because he has filed a nil 271(1)(c). This is the interpretation placed by the Madras High Court on the corresponding provisions of the Old IT Act, in T. B. Hanumantharaj (Decd.) (By Legal Representatives) Vs. Commissioner Of Income Tax, Madras-I., . The Allahabad High Court has also taken the same view in MIR SUBA HARI BHAKTA Vs. Income Tax OFFICER, A-WARD, DEHRA DUN., . The ratio of these judgements would squarely apply.

As regards mala fides, the argument is that though an earlier writ petition No. 8915 of 1984 was moved in this Court this was never raised in which event the petitioners request could have been complied with but if he remained obstinate and non-co-operative, he has to blame himself. Merely because an officer who passed the assessment order conducted the raid, it does not disqualify him. Assuming for a moment it is mala fide, that can be set right in the appeal. Just to avoid payment of tax he cannot resort to writ jurisdiction. However, it is added by the Id. counsel for the department that should the Court be inclined to make the interim order absolute, the petitioner may be put on terms which according to her would be Rs. 2 crores worth of goods removed from the godown in pursuance of the interim orders of the Calcutta High Court and by deposit of Rs. 26 lakhs which amount he took away taking advantage of the interim order issued by the Calcutta High Court and the goods worth crores, which according to her would be to put a moderate estimate Rs. 2 crores. I should at this stage that Mr. V. P. Raman, Id. counsel for the petitioner disputes this statement. According to him his client took away only Rs. 1 lakh which he represents he is willing to recompense with the department for making the interim order absolute.

Having regard to the above arguments three questions arise for my determination; (1) Is the Writ Petition maintainable ? (2) What is the period of limitation and (3) Is the order vitiated by mala fides ?

The two substantial points as the arguments would disclose are (1) limitation and (2) mala fides. Admittedly against the impugned order of assessment the petitioner has gone up in appeal to the CIT on 20-10-1984. The prayer for stay was dismissed on 24-10-1984. Thereafter a certificate under s. 222 of the Act for the collection of tax was issued on 26-10-1984. The petitioner moved the Tribunal against the order of the CIT. If this be the position as to whether the impugned order is one which is barred by limitation under s. 153 is a matter which can easily be decided by the Appellate Authority. However, what Mr. V. P. Raman, Id. counsel for the petitioner would say is that error is so apparent on

the face of the record that the writ jurisdiction of this Court is not barred. I am unable to accept this argument. Even if the error is apparent on the face of the record, the Appellate Authority is capable of granting the relief. The Id. counsel for the department is right in relying upon the various rulings to the effect that with regard to points of limitation this Court under art. 226 of the Constitution should not interfere. As a matter of fact in C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, it was held by the Supreme Court that the IT Act provides of any improper orders passed by the income tax authorities, the appellant could not be permitted to abandon as resort to that machinery and to invoke the jurisdiction of the High Court under art. 226 of the Constitution when he had adequate remedy open to him by an appeal to the Tribunal. The same view is reiterated in Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, . It cannot be contended for a moment that the remedy provided under the Act are in any way less efficacious. The other question that is required to be dealt with will be mala fides. Even on this ground, if the appellate Authority can grant the relief, I do not think the court should interfere at all.

As regards the first point of limitation I will set out the relevant portion of s. 153 :

"153. Time limit for completion of assessments and re-assessments : (1) No order of assessment shall be made under s. 143 or s. 144 at any time after .....

(a) ..... the expiry of .....

(iii) two years from the end of the assessment year in which the income was first assessable, where such assessment year is an assessment year commencing on or after the 1-4-1969 or (b) the expiry of eight years from end of the assessment year in which the income was first assessable, in a case falling within cl. (c) of sub-s. (1) of s. 271 or ...."

There are the two provisions which are relied on Mr. V. P. Raman, Id. counsel for the petitioner would contend that in view of cl. (v) of Explanation which reads as follows :

"In a case where an application made before the Income Tax Settlement Commission under s. 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing from the date on which such application is made and ending with the date on which the order under sub-s. (1) of s. 245-D is received by the Commissioner under sub-s. (2) of the section."

There is no extension of limitation but only exclusion. If therefore, according to him admittedly the petitioner had filed an application under s. 245 (1) on 24-10-1983 before the Settlement Commission till the disposal of the appeal the hands of the assessing authorities are stayed. While the contrary contention is urged on behalf of the IT Department. But on a very careful reading of the section extracted above, I am of the view that the jurisdiction of the assessing

authority is not in any way fettered merely because there is an application under s. 245 C. Proceedings under s. 245C are totally different from the assessment proceeding. this is very clear by an contract of the very sections :

"Application for settlement of cases; (1) An assessee may, at any stage of a case relating to him, make an application in such form and in such manner and containing such particulars as may be prescribed to the settlement commission to have the case settled and any such application shall be disposed of in the manner herein after provided".

What actually this section means, is, the event on an assessee wanting to defeat and order of assessment stating that it is time-barred, the IT Department can say that the application of the assessee under s. 245C was pending and, therefore, that period will have to be excluded for the purpose of computation. Therefore, ultimately it boils down to this. Sub-s. (1) talks of the period of limitation while Explanation 1 talks of computation of the period of limitation after exclusion. One such exclusion being an application under s. 245C. There is nothing to indicate in the Act that merely because an assessee files an application before the Settlement Commissioner the jurisdiction of the assessing authority in any way gets arrested or taken away. It still remains there. There is no fetter on the right of the assessing authority in exercise of its power on completing the assessments either in s. 143 or in s. 144 The only restriction or bar is the limitation contained in sub-s. (1). Therefore for my part In an unable to accept the argument of Mr. V. P. Raman, Id. counsel for the petitioner. As a matter of fact in T. B. Hanumantharaj (Decd.) (By Legal Representatives) Vs. Commissioner Of Income Tax, Madras-I., on the corresponding provisions in the old Act what held was as follows :

"In view of the non-disclosure of the share income from the firm in the return and the addition of the cash credit in the assessment, this was a case where the provisions of s. 28(1) (c) would apply.

(2) It was immaterial whether penalty was ultimately leviable or not as the question to be considered for the purpose of s. 34(3) was only whether the provisions of s. 2(1)(c) applied.

(3) The question as to whether any penalty could be levied is different from the question as to whether the assessee is one to whom the provisions of s. 28(1)(c) would apply."

Turning to the question of male fides, the petitioner filed no doubt a nil return. He also statted in his letter dt. 5-3-1984 that he was submitting a return in the absence of the books of account, the income cannot be estimated and that this will not enable the department to initiate penal proceedings under s. 271(c). The mere filing of the nil return without even stating the admitted income would certainly attract penal proceedings one such being s. 271. Under those circumstances, where the petitioner has not been co-operating with the Department in any manner, if the office thinks it is high time the assessment be

completed, I do not think this is a case of mala fides at all. The fact that the Officer who passed the impugned order was in charge of the raid or he also participated in the raid cannot disable him. No doubt the petitioner objected to the transfer of the case but the cannot weight in view of his finding a nil return and he adopting throughout an unhelpful attitude. The petitioner landed himself in this situation buy his own deeds. Even otherwise, as I said above the appellate authority if it finds that the order of assessment has been passed mala fide, without any basis that is a matter which can be rectified. In the absence of materials to nearly 8 crores of rupees will have no bearing as far as questions of law which I have decided purely as the issues arising uninfluenced either by enormity of the tax involved or by the earlier proceedings between the parties. So looked at, in any view I do not see that this is a fit case in which the interim injunction should continue. Accordingly the interim order will stand vacated.

After I pronounced this order, both the learned counsel are agree that this will be the order in the writ petition also. It shall be so. The writ petition is dismissed. No costs.