
(1999) 01 KL CK 0024

High Court Of Kerala

Case No: Original Petition No. 10564 of 1996

Dr. C. Balakrishnan
Nair and Another

APPELLANT

Vs

Commissioner of
Income Tax and
Another

RESPONDENT

Date of Decision: Jan. 6, 1999

Acts Referred:

- Constitution of India, 1950 - Article 226
- Criminal Procedure Code, 1973 (CrPC) - Section 165
- Income Tax Act, 1961 - Section 132, 132(3), 132(8), 132(9A), 158BC
- Income Tax Rules, 1962 - Rule 112, 112(4C)

Citation: (1999) 154 CTR 523 : (1999) 237 ITR 70

Hon'ble Judges: P. Shanmugam, J

Bench: Single Bench

Advocate: S. Vijayan Nair, for the Appellant; P.K.R. Menon, Senior Advocate and George George, for the Respondent

Judgement

P. Shanmugam, J.

The petitioners, a married couple, are medical practitioners at Calicut. They are assesseees to Income Tax. In this original petition, they challenge exhibits P-1 and P-3 panchnamas and exhibit P-2 statement obtained from the first petitioner. They have also prayed to quash exhibit P-6 notice issued u/s 158BC of the Income Tax Act and for a direction not to invoke the provisions under Chapter XIV-B of the Act and also for a further direction to the respondents to permit them to have a regular assessment.

2. The facts leading to the filing of the original petition are as follows : The petitioners' residential premises were searched by a team of officers headed by the second respondent as per the warrant issued u/s 132 of the Income Tax Act, 1961, hereinafter

referred to as "the Act", on October 27, 1995. The search was provisionally concluded on October 27, 1995, and a panchnama, exhibit P-1, dated October 27, 1995, was prepared on that day with an assurance that the search operation would continue next day. A statement, exhibit P-2, also was obtained from the first petitioner. Before leaving the premises, a prohibitory order in respect of an almirah kept in one of the bed rooms in the first floor of the premises was issued. The second search took place on November 10, 1995, after a gap of nearly two weeks. No incriminating document or unaccounted cash or jewellery were recovered from the premises during the search.

3. Subsequently, the petitioners were served with notice u/s 158BC of the Act, exhibit P-6, dated April 16, 1996, calling upon them to file returns for the block period of 10 years. They have filed the returns in time. According to the petitioners, since nothing was unearthed as a result of search they cannot be dealt with under Chapter XIV-B of the Act. Contending that the whole exercise of search and seizure are illegal and arbitrary and initiation of further proceedings on the basis of the illegal search and seizure are also illegal, the original petition is filed.

4. Counter and additional affidavits were filed by the first and second respondents, respectively. According to the first respondent, the search operations were organised by the ADI (Investigation), Calicut, after conducting independent enquiries and after obtaining necessary warrants of authorisation u/s 132 of the Act. The panchnamas were prepared during the course of the search as per the departmental procedure in the presence of the witnesses. The allegation that the sworn statement was recorded under threat and coercion are denied. According to him, the search could not be completed on October 27, 1995. October 28 and 29, 1995, being closed holidays for the Department, search could be resumed only on November 10, 1995. During the next week of November, 1995, the ADI (Investigation), went twice to the residential premises of the petitioners for resuming the operation. The petitioners were not present on these two occasions. The allegation of mala fides is denied. According to the first respondent, it is a clear case of understatement of the sale consideration of the property sold by the petitioner to the children of Hamza and further they have paid extra money to Dr. N. M. Mathai.

5. In the counter affidavit filed by the second respondent it is stated that during the course of search on October 27, 1995, a preliminary statement and sworn statement u/s 132(4) of the Act were recorded. A sum of Rs. 49,931 and 634 grams of jewellery were found at the residence which were inventorised. As it was not possible to scrutinise the various diaries, letters, pass books, F. D. receipts, etc., the search was temporarily concluded on that day by sealing the almirah in the presence of witnesses. The search operations were resumed and finally concluded on November 10, 1995, when detailed inventories of books of account, pass books, F. D. receipts and other valuables found were prepared. According to him, in the first statement recorded on October 27, 1995, the first petitioner had stated that the residential house at Mavoor Road was sold in July, 1995, to Sri Abdul Razaak and his minor brother for a consideration of Rs. 12 lakhs and the present

residence at Sathram Road was purchased in July, 1995, from Dr. N. M. Mathai for a consideration of Rs. 24 lakhs. When questioned about the source of the funds for the purchase of the property the first petitioner had stated that he had sold his house at Mavoor Road, Calicut, for Rs. 24 lakhs though the recorded price was only Rs. 12 lakhs and that the entire sale proceeds of Rs. 24 lakhs were paid to Dr. Mathai. However, he could not give proper explanations for the source of investments in UTI and fixed deposits amounting to Rs. 2,62,500. In the second statement recorded on November 10, 1995, the first petitioner had retracted the earlier statement. According to the second respondent, all the books, pass books, fixed deposit receipts, etc., found at the premises were put in the almirah which was sealed. It is averred that he was not aware of any statements having been prepared by the first petitioner marked as exhibit P-5 in the petition as none of the members of the search party had any knowledge about the same as it was not prepared during the operation. The allegation of mala fides is denied. According to him, the action taken by him during the course of search operations was in his capacity as authorised officer in good faith and bona fide execution of his work. In the additional affidavit filed by the second respondent he had refuted the allegations made against him in his personal capacity. According to the second respondent, he had not met the petitioners prior to the search operations and that the entire operations were completed in accordance with the guidelines formulated by the Department u/s 132 of the Act. The second respondent has specifically questioned the genuineness of the statement made by the petitioners in exhibit P-5. He also questioned the contemporaneity of the statement setting out the reasons for it. According to him, the first petitioner was under treatment for agitated depressions from October 20, 1995, and, therefore, the petitioner might not have been in his proper frame of mind when the reply affidavit was signed on November 16, 1995, and hence, the contents might lack evidentiary value. The main thrust of the argument of learned counsel for the petitioners is that the whole exercise of the operation of search and seizure is vitiated for failure to follow the guidelines and the safeguards provided u/s 165, of the Criminal Procedure Code, and are in violation of Article 21 of the Constitution of India. The contention of learned counsel for the petitioners can be summarised as follows : There is no valid ground to issue a warrant u/s 132 of the Act. The procedure adopted by the inspecting team headed by the second respondent in collecting and putting documents and papers in one almirah in the bed room of the first floor is not authorised and is illegal. The inspecting team had carried away the documents and papers in a box unauthorisedly without knowledge and getting a receipt on October 27, 1995, and brought them back on November 10, 1995, which is ex facie arbitrary and illegal. The search was completed even on the forenoon on October 27, 1995, but was unnecessarily prolonged till late 5 p.m. on October 27, 1995, and was not continued on the next day as required by the instructions. Instead the operation was kept under suspended animation causing mental agony and hardship and the search commenced only after an unexplained delay of 14 days. This has clearly infringed the guaranteed fundamental rights of the petitioners under article 21 of the Constitution of India. The second respondent in his counter has misled this court by stating that a sum of Rs. 49,931 was found at the residence whereas only Rs. 14,931 was inventorised by the

second respondent himself, thereby the second respondent has committed perjury and committed an offence of contempt of this court giving false information. In the light of the fact that no concealed income was detected there is no scope for block assessment under Chapter XIV-B of the Act. Section 54 of the Act deals with residential property and in lieu of the allegation of receipt of Rs. 24 lakhs and payment of Rs. 22 lakhs, no tax for capital gain is involved and, therefore, there is no authority to continue the proceedings.

6. Learned senior standing counsel for the Income Tax Department in reply to the arguments submitted that the warrant of authorisation dated October 12, 1995, was issued by the Director of Income Tax (Investigation), Bangalore, on the basis of a satisfaction note prepared by the then Assistant Director of Income Tax (Investigation)-1, Calicut. It was in turn based on the enquiries conducted by him and information received regarding the undervaluation of the property deals of the petitioners with Shri K. T. Hamza and Dr. N. M. Mathai. The search was conducted as per law. According to him, the search could not be completed on October 27, 1995, and due to paucity of time the search was temporarily suspended and continued subsequently. This is evident by the panchnama drawn on that date. The almirah in the bed room was ordered to be sealed since the scrutiny of certain other documents found at the premises required time and it was not completed and, therefore, these documents were placed in the almirah and sealed in the presence of the petitioners. There is nothing illegal in the temporary conclusion of search. In view of the intervening holidays on 28 and 29 and the non-availability of the petitioners on subsequent dates the search could continue only on November 10, 1995. It is submitted that there is absolutely no malice on the part of the respondents and particularly there is no motive for the second respondent against the petitioners. In the light of the statements given by the vendor of the petitioners there is a clear understatement of sale consideration and, therefore, block assessment is necessary.

7. I have heard counsel for the petitioners and the respondents in extenso. After hearing counsel and going through the connected records, I am confining only to certain disputed and undisputed facts necessary to dispose of the original petition. The undisputed facts are as follows :

(1) The search of the residential premises at No. 5/2491, Sathram Road, Calicut, commenced in pursuance of a warrant of authorisation dated October 12, 1995, issued u/s 132 of the Act at 8 a.m. on October 27, 1995. In the course of the search on that day "books of account, passbooks, documents, etc., found at the residential house were put in an almirah and sealed in the presence of the petitioners as scrutiny could not be completed during the search operations.

(2) The search was provisionally closed on October 27, 1995, and again commenced on November 10, 1995, after the gap of 14 days, because of the intervening holidays on October 28 and 29.

(3) No incriminating records were recovered.

(4) The documents were entrusted with Shri P. N. Devadasan. There are certain disputed facts which are as follows :

(1) It is alleged that the second respondent had collected and carried away certain documents and papers in a box without issuing a receipt on October 27, 1995, and they were brought back on November 10, 1995, as evidenced by exhibit P-5.

(2) The statement in the counter as to the recovery of the cash is Rs. 49,931 whereas the actual amount is Rs. 14,931.

(3) Statement as to the sale consideration.

8. From exhibit P-3 second panchnama dated November 10, 1995, seven items, books of account and other valuable articles were seized. These articles which were available on October 27, 1995, were put in an almirah, according to the second respondent, and sealed since scrutiny could not be completed during the search and investigation and prohibitory order u/s 132 of the Act was served on the petitioners. Sub-section (3) of Section 132 empowers the authorised officer to pass an order on the owner that he shall not remove, part with or otherwise deal with it except with the previous permission of the officer. But this can be served only if it is not practicable to seize any such books of account, other documents, etc. It is not stated as to why the books of account, documents, etc., was not practicable to be seized on October 27, 1995. The second respondent has collected the listed documents from the premises and has put them in the almirah and sealed it. In the absence of any satisfactory explanation as to why the books of account, passbook and the documents were not practicable to be seized on October 27, 1995, itself, it is a case of contravention of Sub-section (3) of Section 132 of the Act. The number of documents, passbook and the jewellery found and ultimately seized were few in number and the statement that the scrutiny could not be completed and was not practicable to seize, is impossible to accept on the face of it. It is in this context the allegation made against the second respondent that he carried away certain documents in his bag unauthorisedly on October 27, 1995, and brought them back on November 10, 1995, assumes significance. However, the action of the search party headed by the second respondent in collecting the documents and various items from different parts of the premises and again putting them in the almirah in the bed room on the first floor of the residential premises is unreasonable and no provision is relied on for such a course of action. Rule 112(4C) of the Income Tax Rules empowers the authorised officer to serve an order on the owner that he shall not remove, part with or otherwise deal with it except with the previous permission only in cases where the authority is not practicable to seize the article or thing or any books of account or document. Therefore, the action of the second respondent and his members in dumping the documents, etc., seized in the almirah cannot be supported, but violates the mandatory requirement.

9. The second undisputed fact is that the search was discontinued on October 27, 1995, and resumed only on November 10, 1995. The reasons stated for the gap of 14 days is hardly convincing. There is no provision in the Criminal Procedure Code or in the Income Tax Act or the rules for postponing the search for such a long period. N. Subramanian in his book Search and Seizure stated at page 108 that when once the search starts it can go on continuously day or night, rain or shine. To keep the affected parties in a suspended animation about the probable continuation of search would be agonising. In this case considering the nature of the allegations and the materials seized there is no reason why it could not be closed on October 27, 1995, and even if it is provisionally concluded why it could not be continued immediately. There is no bar for the operation to continue on holidays. The absence of the petitioners in the house is nothing but a lame excuse. If the respondents wanted the operation to be continued there are ways to secure the presence of the petitioners and continue the operations. Therefore, unless there is convincing reason for not resuming search immediately the proceedings undertaken by the second respondent for a second search cannot be held to be legal. It is invading the right and freedom of the petitioners for a period more than required or necessary. The averment that the petitioners were not available for two days is denied by them. Instead it is stated that they could not keep the house in order as the search was incomplete and that they had telephoned and required the officers to complete the search. Therefore, search has prolonged unreasonably without justification.

10. Thirdly, the seized documents and records cannot be retained by the authorised officer for more than 15 days. It shall be handed over to the Income Tax Officer within 15 days of the seizure. Sub-section (9A) of Section 132 of the Act is very clear in this aspect. In the additional counter affidavit filed by the second respondent it is submitted that the seized documents and records were handed over by P. N. Devadasan, Assistant Director of Income Tax (Inv.)-1, Calicut, within 15 days. In the counter affidavit filed by the first respondent it is stated that the search operation in this case was planned and executed by the then ADI (Inv.)-i, Calicut, P. N. Devadasan. Therefore, he cannot be the Income Tax Officer having jurisdiction over the petitioners. Sub-section (8) of Section 132 of the Act enables the authorised officer to retain the books of account and other documents for a period exceeding 15 days from the date of seizure. But that power of detention can be exercised only by the Income Tax Officer under Sub-section (9A) of Section 132 of the Act. Therefore, the detention of the documents and records seized by P. N. Devadasan is clearly contrary to the provisions of the Act.

11. Coming to the disputed questions of fact it is seen that the first petitioner had made a statement exhibit P-5 dated November 10, 1995, before the witnesses, P. Radhakrishnan Nair and William Frederic Kunder, who are the witnesses in the panchnamas, exhibits P-1 and P-3. The case of the petitioners is that on October 27, 1995, after preparing panchnamas and inventory, the officer, Ravindran, took away a number of documents from the petitioners' premises without their knowledge and permission. Subsequently, on November 10, 1995, when the search party headed by Ravindran entered the premises

with a box containing several documents, the petitioners required them to open the box and the inventory made before starting the search. But Ravindran refused to open the box in the presence of the panchas who were the same panchas who were present on October 27, 1995. Since the officers refused to list the documents contained in the box brought without the consent or knowledge of the petitioners, the petitioners prepared a statement in the presence of the searching party and got it attested by the pancha witnesses who were present. Exhibit P-5 states as follows ;

"As soon as the Income Tax authorities entered the house on November 10, 1995, with a moderately big sized suit case they got some suspicion of its contents and formally asked them to open. Though at first the officials hesitated to open it and on repeated request it was opened. To their surprise and the surprise of two witnesses the suit case contained several of their documents which included all the records of their recent sale and house purchase and also all the bank passbooks and cheque books, along with many other papers. Obviously, the documents were taken without the petitioners' permission or receipt on October 27, 1995. The petitioners asked the officials for the total list of items taken out on October 27, 1995, and brought on November 10, 1995. However, the officials refused to give the list or to give a statement to the effect that there were taken on October 27, 1995, and returned on November 10, 1995. The officials admitted their mistakes, expressed regret and even tendered apology and also requested not to demand any written statement or receipt of list of documents as that would affect them adversely. Since no statement was given by the said Income Tax Officers, exhibit P-5 was recorded by the petitioners in the presence of the witnesses."

12. These allegations contained in exhibit P-5 are denied by the respondents specifically in the additional counter affidavit. It is stated that no such statement was ever made before the authorised officer on that day nor that he was informed of anything of this statement either by the asses-sees or by the witnesses on that day. Thereafter, the second respondent proceeded to discredit the statement on the basis that the petitioners did not have any complaint when they retracted the earlier statement in reference to the documents or while giving recorded statement before the authorised officer.

13. The petitioners herein took out an application C, M. P. No. 40393 of 1998 for summoning of two panchnama witnesses. Thereafter, the senior standing counsel filed an application, C. M. P. No. 41735 of 1998 seeking for an order of discovery and production of the original of exhibit P-5 statement alleged to have been made by the petitioners on November 10, 1995. The said application was not opposed by the petitioners' counsel and he readily produced the originals of exhibit P-5 and also two search documents, marked A, B and C, respectively. Summoning of the witnesses are unnecessary in the light of my finding on exhibit P-5. The signatures contained in exhibit P-5 tally with the signatures in exhibits P-1 and P-3 panchnamas. There are nearly about 25 signatures of the witnesses, viz. P. Radhakrishnan Nair and William Frederic Kunder, in exhibits P-1 and P-3 and on a perusal of all these 25 signatures it is clear that the signatures found in exhibit P-5 are identical and no doubt is raised about that. As they were departmental

witnesses, in the sense they were brought in by the Department as respectable witnesses to witness the search, unless something is stated to discredit their stand and the signature, there is no ground to reject exhibit P-5. In the absence of any motive alleged against panchas exhibit P-5 is to be accepted. If that be so, the statement made before them is contemporaneous and is genuine. The reasons set out in the additional counter to discredit exhibit P-5 merits no acceptance. The retraction statement and the formal offer of personal search on October 27, 1995, have no relevance to exhibit P-5. Exhibit P-5 taken together with the circumstances including the undisputed facts in this case would lead to an irresistible conclusion, viz., that there were serious lapses and violation of the provisions of the Income Tax Rules, the Act and the constitutional guarantee of the petitioners.

14. The facts and the background support the case of the petitioners, namely, that there is no reason for dumping the documents and passbooks in an almirah without ordering seizure on October 27, 1995. There is no further possible reason for inordinate delay of 14 days for resuming the search operation. There is no reason why the documents should have been retained for more than 15 days by the authorised officers without handing them over to the Income Tax Officer. Coupled with these materials and the clear statement made in exhibit P-5 in the presence of pancha witnesses I have no hesitation to accept that it reflects the true state of events that occurred on November 10, 1995. Therefore, it is clear that the second respondent has seized the documents and the records and took them back privately without consent or knowledge of the petitioners and brought back on November 10, 1995, for reasons best known to him only. Though no personal motive is established against the second respondent for this action it is clearly an arbitrary exercise of power and amounts to malice in law. The conduct of the second respondent is unbecoming, improper and erodes the confidence and the image of the Department. The petitioners are regular assesseees and are persons of standing in the society. They could have been treated in a much more responsible manner.

15. Counsel for the petitioners referred to the decision of the Constitution Bench of the Supreme Court in [Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another](#), wherein it was held that where an executive authority acting without jurisdiction, subjected a person to lengthy proceedings and unnecessary harassment, the High Courts would issue appropriate orders or directions to prevent such consequences. The existence of alternative remedies as appeals and reference to the High Court is not always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action.

16. In [Commissioner of Commercial Taxes and Others Vs. Ramkishan Shrikishan Jhaver and Others](#), the Supreme Court held that if the safeguards provided u/s 165 of the Code of Criminal Procedure have not been followed when the search was made anything recovered on a defective search must be returned. In [Income Tax Officer, Special Investigation Circle-B, Meerut Vs. Seth Brothers and Others etc.](#), the Supreme Court held that in appropriate cases a writ petition might lie challenging the validity of action taken

u/s 132, even before the investigation pursuant to the action taken by the Income Tax Officer is made, on the ground of absence of power or on a plea that the proceedings were taken maliciously or for a collateral purpose. Where serious allegations of improper conduct or made against public servants and the officers assert that they acted in good faith in the discharge of their duties, the High Court should direct oral evidence to be taken. In this case serious allegations of improper conduct against the second respondent in person are made and are pleaded. The petitioners are willing to summon the witnesses in support of the drawing of exhibit P-5. As seen earlier the genuineness of exhibit P-5 is found established and that the proceedings were continued arbitrarily and, therefore, the whole action taken u/s 132 of the Act is vitiated.

17. A Division Bench of the Punjab and Haryana High Court in [H.L. Sibal Vs. Commissioner of Income Tax and Others](#), held that the information u/s 132(1) of the Act received or the basic facts are harnessed in support of the conclusion. Information must be relevant to the enquiry. They must be such that a reasonable and prudent man can come to the requisite belief or conclusion therefrom. If either of the elements is missing, the action of the authority shall be regarded as lying outside the ambit and scope of the law and such an action would be liable to be struck down on the basis of what is commonly known as legal malice. In that case the Division Bench held that if an assessee has been regularly producing his books of account before the assessing authorities who have been accepting those books of account as having been maintained in proper course of business, it would be somewhat unjustified use of power on the part of the Commissioner to issue a search warrant for the production of those books of account unless, of course, there is information to the effect that he has been keeping some secret account books also. He has to arrive at a decision in the background of the mental make up of an individual. A blanket condemnation of persons of diverse activities unconnected with each other on the odd chance that if their premises are searched, some incriminating material may be found is wholly outside the scope of Section 165 of the Code of Criminal Procedure, 1975. The power has to be exercised in an honest manner and search warrants cannot be indiscriminately issued as a matter of policy. Whether the premises of the petitioner were searched on the basis of valid reasons or the action was taken against him on the basis of some policy decision could be determined by considering the totality of the attendant circumstances.

18. A Division Bench of the Madras High Court in [K. Vs. KRISHNASWAMY NAIDU and CO. v. COMMISSIONER OF INCOME TAX AND OTHERS.](#), held that if the Assistant Director of Inspection had retained the seized documents beyond the period of 15 days from the date of seizure, the retention itself would have been illegal and hence he could not also ask for extension of time for holding the documents beyond the period. All these decisions fully support the case of the petitioners.

19. The last point remains to be considered is whether Chapter XIV-B specific procedure can be invoked in this case. Section 158BA deals with and can be invoked for assessing undisclosed income as a result of search.

20. "Undisclosed sincome" is defined u/s 158B(b) of the Act. Though specific grounds Nos. 21 (6) and (7) are raised in the original petition, there is no reply in the counter in this regard. As rightly pleaded on behalf of the petitioners even if all the facts alleged against the petitioners are true there is no violation of the provisions of the Act in view of Section 54 of the Act. Without any violation of the Income Tax Act the respondents have no jurisdiction to invoke Section 158BC of the Act depriving the petitioners of the right of regular assessment. The Division Bench of our High Court in [Commissioner of Wealth Tax Vs. N.C.J. John](#), has taken the view that if there is no detection of concealment at the time of search, the assessee cannot be deprived of the benefit of the Amnesty Scheme. This view also in a way supports the stand of the petitioners.

21. For all these reasons all the proceedings taken u/s 132 of the Act and passed are declared invalid. The notices, exhibits P-6(a) and P-6(b), are quashed and the respondents are prohibited from invoking the provisions of Chapter XIV-B of the Act in the case of the petitioners. The original petition is allowed accordingly with costs.