

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

MONDAY, THE 10TH DAY OF JANUARY 2022 / 20TH POUSHA, 1943

CRL.MC NO. 8195 OF 2017

[CRIME NO.126/2017 OF Thirunelli Police Station, Wayanad]

[AGAINST THE COMMON ORDER OF THE COURT OF THE JUDICIAL FIRST CLASS
MAGISTRATE-II, MANANTHAVADY DATED 9.10.2017 IN CRL.MP NO.704/2017 AND
CRL.MP NO.384/2017]

PETITIONER/PETITIONER IN CRL.MP NO.704 OF 2017:

UNION OF INDIA
INCOME TAX DEPARTMENT, REPRESENTED BY THE DEPUTY DIRECTOR
OF INCOME TAX, (INVESTIGATION), INCOME TAX OFFICE,
KOZHIKODE.

BY ADVS.

SRI.P.K.R.MENON, SR.COUNSEL, GOI (TAXES)
SRI.NAVANEETH N. NATH, SC FOR INCOME TAX DEPARTMENT

RESPONDENTS/RESPONDENTS IN CRL.MP NO.704/2017 AND PETITIONER &
RESPONDENT IN CRL.MP NO.384/2017:

1 STATE OF KERALA
REPRESENTED BY THE SUB INSPECTOR OF POLICE, THIRUNELLY.

2 ABDUL RAZAK P.
AGED 44 YEARS
S/O. MOIDHU, PARAKKAL HOUSE, AVILORA, KODUVALLY,
THAMARASSERY.

R1 BY SRI. ARAVIND V. MATHEW

R2 BY ADV SMT.VIJAYAKUMARI

THIS CRIMINAL MISC.CASE HAVING BEEN FINALLY HEARD ON
03.12.2021, THE COURT ON 10.01.2022 PASSED THE FOLLOWING:

O R D E R

This Crl.M.C. is filed by Union of India, Income Tax Department represented by the Deputy Director of Income Tax (Investigation), Income Tax Office, Kozhikod, being aggrieved by Annexure-C common order passed by the Judicial First Class Magistrate Court, Mananthavady in Crl.M.P.No.384/2017 and Crl.M.P.No.704/2017.

2. The facts leading to the said order are as follows:

On 12.03.2017, while conducting vehicle inspection at Tholpetty Check post, Excise Officials found that the 2nd respondent is carrying cash of Rs.50 lakhs without any proper supporting documents. Consequently, the 2nd respondent was produced before the Sub Inspector of Police, Thirunelly and F.I.R. was registered as Crime No.126/2017 of Thirunelly Police Station. The amount was also seized and the same was produced before the Judicial First Class Magistrate Court-II, Mananthavady. Upon getting

information from the Inspector of Police, Thirunelly, Income Tax authorities has issued summons to the 2nd respondent under Section 131 of the Income Tax Act seeking to explain the source of the said amount. He stated that the seized cash was not his money and it was handed over to him by his friends for starting a super market at Bangalore. The details of the said persons were also furnished. After conducting an inquiry, the income tax authorities found that the 2nd respondent failed to explain the source of the same properly and therefore it was decided to initiate proceedings against him. As part of the same, a notice of requisition was issued to the Sub Inspector of Police under Section 132A(1)(c) of Income Tax Act, directing him to deliver the same to the Requisitioning Officer. However, it was informed by the Sub Inspector of Police that the amount is already deposited before the Judicial First Class Magistrate Court, Mananthavady and the same is in the custody of the court.

3. In such circumstances, the petitioner herein submitted Crl.M.P. No.704/2017 before the learned Magistrate under Section 451 of the Code of Criminal Procedure (Cr.PC). At the same time, the 2nd respondent herein submitted Crl.M.P.No. 384/2017 seeking the very same relief. The petitioner herein submitted a detailed objection to Crl.M.P.No.384/2017. After hearing both sides, both the aforesaid claim petitions were disposed of by the learned Magistrate as per order dated 9.10.2017 which is produced in the Crl.M.C. as Annexure-C. As per the said order, Crl.M.P.No.704/2017 filed by the petitioner herein was dismissed. The petition submitted by the 2nd respondent was allowed in part and the release of 70% of the amount was ordered in favour of the 2nd respondent herein upon furnishing a bank guarantee or security of immovable property for the said amount. This Crl.M.C. is filed challenging the aforesaid common order and praying for allowing the Crl.M.P.No.704/2017 submitted by the petitioner herein.

4. Heard Sri. Navaneeth N. Nath, the learned Standing Counsel for the Income Tax Department, the petitioner herein, Sri. Aravind V. Mathew the learned Public Prosecutor for the 1st respondent and Smt.Vijayakumari, the learned counsel for the 2nd respondent.

5. The question arises in this case is as to the entitlement of the petitioner to have the amount released in their favour, under Section 451 of the Cr.PC. The claim was made by the petitioner by relying upon Section 132-A(i)(c) of the Income Tax Act which reads as follows:

"132-A. Powers to requisition books of account, etc.-(1)
Where the [Principal Director General or Director General] or [Principal Director or Director] or the [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner], in consequence of information in his possession, has reason to believe that-

(a).....

(b)....

(c) any assets represent either wholly or partly income or property which has not been, or would not have been, disclosed for the purposes of the Indian Income-tax Act,1922(11 of 1922), or this Act by any person from whose possession or control such assets have been taken into custody by any officer or authority under any other law for the time being in force,
then the [Principal Director General or Director General] or [Principal Director or Director] or the [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner] may authorise any [Additional Director, Additional Commissioner,] [Joint Director],[Joint Commissioner],[Assistant Director or Deputy Director],[Assistant Commissioner or

Deputy Commissioner] or Income-tax Officer (hereafter in this section and in sub-section(2) of section 278-D referred to as the requisitioning officer) to require the officer or authority referred to in clause(a) or clause(b) or clause (c), as the case may be, to deliver such books of account, other documents or assets to the requisitioning officer.

Explanation.- For the removal of doubts, it is hereby declared that the reason to believe, as recorded by the income-tax authority under this sub-section, shall not be disclosed to any person or any authority or the Appellate Tribunal.]”

The aforesaid provision enables the authorized officer of the Department to make a requisition before any authority who is in possession and control of any assets of any person, which has not been disclosed to the Income Tax authorities for the purposes of Income Tax Act. In this case, by invoking the aforesaid powers, the petitioner had already sent a notice to the Sub Inspector of Police, Thirunelly in this regard, but by the time the notice was served upon the Sub Inspector of Police, who has seized the amount from the 2nd respondent, the amount was already deposited before the Judicial First Class Magistrate Court, Mananthavady. A petition under Section 451 of the Cr.PC was submitted in the above circumstance.

6. The scope of Section 451 is with regard to the interim custody of the article or asset produced

before the learned Magistrate during the course of investigation in a crime. It is a well settled position of law that while deciding the question of releasing the said article, proper course open to the Magistrate is to ensure that it is entrusted to a person who can preserve the same and title of the party over the same need not be decided. In **Suresh Serve V vs. State of Kerala [2020(3)KHC 41]**, this Court considered the scope of Section 451 of Cr.PC and observed in the manner as follows.

"18. On a plain reading of S.451 Cr.P.C., it can be seen that the power to order for custody and disposal of property pending trial has to be exercised by the Court by applying judicial discretion and the arrangement once made thereunder is not even final till the conclusion of inquiry or trial. The Court is having a right to terminate the entrustment, get back the property from the person to whom it was given and entrust it to somebody else whom the Court deems fit. In cases of rival claims for interim custody, preference of one person over the other does not settle any right to ownership or possession."

The above observation was made by this Court after referring to large number of judicial precedents in this regard. From the above, it is evident that, it is not necessary that the articles are to be released to the person from whom the same was seized. What is

relevant is the security of the same and whenever it appears to the court that the security of the said article is at stake, the person with whom the aforesaid entrustment was made can be directed to return the said document. The question that arises here is to be considered in the light of the above legal principles.

7. Thus, the question that arises herein is as to the proper person who can be entrusted with the custody of the amount involved in this case. It is evident that even though the amount in question was seized from the possession of the 2nd respondent, apparently, he could not explain the source of the same. Failure to explain the source warrants a proceeding under the Income Tax Act by the appropriate authorities under the said Act. In such circumstances, the petitioner herein is having all the authority to initiate proceedings against the 2nd respondent by issuing a notice under Section 131 of the Income Tax Act. Since the amount was seized by the Sub Inspector of Police, a notice under Section

132A(1)(c) was also a remedy available to the petitioner herein which they have already invoked. However, further proceedings pursuant to Section 132-A could not be continued because of the fact that by that time, the amount was entrusted with the custody of the court.

8. Even though all the aforesaid statutory provisions were brought to the notice of the learned Magistrate, the application submitted by the petitioner was dismissed by holding that the interest of the petitioner can be secured by allowing retention of the 30% of the total amount involved therein.

9. While considering this issue, the procedure to be followed by the Income Tax Authorities after initiating proceedings under Section 132A is very much relevant. Section 132-B of the Income Tax Act provides for the manner in which the assets seized under Section 132-A is to be dealt with. The said provision reads as follows:

"132-B. Application of seized or requisitioned assets.-
(1) The assets seized under section 132 or requisitioned

under section 132-A may be dealt with in the following manner, namely:-

(i) the amount of any existing liability under this Act, the Wealth-tax Act 1957 (27 of 1957), the Expenditure-tax Act, 1987 (35 of 1987), the Gift-tax Act, 1958 (18 of 1958) and the Interest-tax Act, 1974 (45 of 1974), and the amount of the liability determined on completion of the assessment [under section 153-A and the assessment of the year relevant to the previous year in which search is initiated or requisition is made, or the amount of liability determined on completion of the assessment under Chapter XIV-B for the block period, as the case may be] (including any penalty levied or interest payable in connection with such assessment) and in respect of which such person is in default or is [deemed to be in default, or the amount of liability arising on an application made before the Settlement Commission under sub-section (1) of section 245-C, may be recovered out of such assets]:

[Provided that where the person concerned makes an application to the Assessing Officer within thirty days from the end of the month in which the asset was seized, for release of asset and the nature and source of acquisition of any such asset is explained] to the satisfaction of the Assessing Officer, the amount of any existing liability referred to in this clause may be recovered out of such asset and the remaining portion, if any, of the asset may be released, with the prior approval of the [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner], to the person from whose custody the assets were seized:

Provided further that such asset or any portion thereof as is referred to in the first proviso shall be released within a period of one hundred and twenty days from the date on which the last of the authorizations for search under section 132 or for requisition under section 132-A, as the case may be, was executed;

(ii) if the assets consist solely of money, or partly of money and partly of other assets, the Assessing Officer may apply such money in the discharge of the liability referred to in clause (i) and the assessee shall be discharged of such liability to the extent of the money so applied;

(iii) the assets other than money may also be applied for the discharge of any such liability referred to in clause (i) as remains undischarged and for this purpose such assets shall be deemed to be under distraint as if such distraint was effected by the Assessing Officer or, as the case may be, the Tax Recovery Officer under authorisation from the [Principal Chief Commissioner or chief Commissioner] or [Principal Commissioner or Commissioner] under sub-section (5) of section 226 and

the Assessing Officer or, as the case may be, the Tax Recovery Officer may recover the amount of such liabilities by the sale of such assets and such sale shall be effected in the manner laid down in the Third Schedule."

Going by the aforesaid provisions, it can be seen that, any person who has a claim over the aforesaid asset or money can submit an application before the Assessing Authority within 30 days from the end of the month in which the asset was seized. If a person who is claiming the said amount is able to convince the assessing authority as to the source of acquisition of the same, he can get the aforesaid amount back. Apart from the above, Section 153A of the Income Tax Act contemplates for a detailed procedure for assessing the tax payable on the amount. The said procedure contemplates for issuance of notice to the person from whose custody the amounts were seized and after hearing him, an assessment in this regard can be completed. Upon completion of such assessment and after deducting the tax or any other penalty payable by the assessee, the remaining amount can be released to the said person.

10. Thus from all the above statutory provisions, it is evident that, even if the amount which is the subject matter of the dispute in this case is released to the petitioner herein, there is a specific procedure contemplated for getting the amount released in favour of the 2nd respondent, from whose custody the amounts were seized. The only stipulation is that, for getting the aforesaid amount released in favour of the 2nd respondent, he has to convince the authorities as to the source of income and to pay the amount of taxes which is assessed on the said income in accordance with the provisions of the Income Tax Act.

11. On the other hand, if the amount is released to the 2nd respondent herein, it is likely to cause difficulties in initiating proceedings under Section 132-A and the further proceedings thereon. Therefore, the balance of convenience is in favour of the petitioner herein which was not taken into consideration by the learned Magistrate. The question of balance of convenience arises because, as far as

the proceedings under Section 451 of the Cr.PC is concerned, it is relating to the interim custody of the asset alone and it is not intended for taking a decision on the question of the title/right of the parties over the articles. Therefore, the relevant consideration is as to who is the proper person with whom the amount can be entrusted. Since the petitioner herein is a statutory authority armed with various powers including those under Sections 132-A, 132-B and 153A of Income Tax Act, preference should have been given to the petitioner in the facts and circumstances of the case. Thus the learned Magistrate committed a mistake in this regard.

12. The aforesaid view is fortified by the decisions rendered by Gujarat High Court in **Jinkal Dineshbhai Virvadiya v. Assistant Commissioner of Income Tax [2014]367 ITR 713(Guj)**, **Rajiv Agrawal or His successor in office v. State of Gujarat [2007]290 ITR 449 (Guj)** and the decision of Allahabad High Court in **Union of India v. Judicial**

Magistrate (Eastern Railway), Mughalsarai and Another
[(1983)140 ITR All 553]

13. It is true that even while dismissing the application submitted by the petitioner herein, the learned Magistrate ordered to retain 30% of the amount for securing the interest of the Income Tax Department. Apparently, an amount of 30% was fixed under the impression that the same would take care of the amount likely to be payable by the 2nd respondent towards tax element. However, such an exercise is beyond the scope of the jurisdiction under Section 451 of the Cr.PC and was unwarranted. The liability of tax is to be determined by the authorities concerned under the Income Tax Act after completing the proceedings contemplated therein. If it is found that there was an attempt to evade the payment of tax, in addition to the tax liability at higher rates, there are provisions for imposing penalty as well. In such circumstances, the amount actually payable by the 2nd respondent is likely to exceed far beyond 30% of the amount as fixed by the learned

Magistrate. In such circumstances, the order to retain 30% of the amount cannot be treated as an order which takes care of the interest of the petitioner herein. It is evident from the facts that, the petitioner was having in his possession, huge amount of cash, which by itself is a violation of the provisions of Income Tax Act. Apart from the above, so far, he failed to explain the source of the said income to the satisfaction of the competent authorities viz. the income tax authorities. In such circumstances, the proper course which should have been adopted by the learned Magistrate is to order the release the said amount to the petitioner herein so as to enable the parties to undergo the procedure contemplated under Sections 132-A, 132-B or 153A of the Income Tax Act as the case may be. It is true that the amount was seized from the 2nd respondent, but by virtue of the provisions of the Income Tax Act, he was bound to disclose the source of the same before the authorities and to pay the tax, as per the rates applicable. Apparently no such exercise is done

in this case, at the instance of the 2nd respondent and hence proceedings under section 132-A or 153A are necessitated. Even if the said amount is released to the petitioner herein, it is possible for the 2nd respondent to make a claim of the amount, by following the procedure prescribed in the Income Tax Act. But if the amount is released to the 2nd respondent, it may cause difficulties in implementing the provisions of the Income Tax Act.

In such circumstances, I am of the view that Annexure-B order passed by the learned Magistrate is to be set aside. Accordingly, the common order passed in Crl.M.P.No.384/2017 and Crl.M.P.No.704/2017 on 9.10.2017 by the Judicial First Class Magistrate Court-II, Mananthavady is hereby set aside.

In the result;

i) Crl.M.P.No.384/2017 is dismissed.

ii) Crl.M.P.No.704/2017 is allowed and the amounts shall be released to the Income Tax Department for completing the proceedings under Sections 132-B or 153A or any other proceeding under the Income Tax

Act, as the case may be, upon the competent officer of the petitioner executing a bond undertaking to complete such proceedings within a period of six months from the date of such release.

iii) In case of failure on the part of the petitioner in completing the proceedings as mentioned above, within the stipulated time, the amount shall be deposited by the petitioner, with the Judicial First Class Magistrate-II, Mananthavady, thereupon the 2nd respondent shall be entitled to move the Learned Magistrate for getting the same released in his favour, and the same can be released in his favour, subject to such conditions, which the Learned Magistrate may deem fit.

Sd/-

ZIYAD RAHMAN A.A.
JUDGE

pkk

APPENDIX OF CRL.MC 8195/2017

PETITIONER'S ANNEXURES:

ANNEXURE A	TRUE COPY OF THE AFFIDAVIT AND THE PETITION UNDER SECTION 451 OF THE CODE OF CRIMINAL PROCEDURE.
ANNEXURE B	TRUE COPY OF THE OBJECTION IN CRL. M. P. NO.384/2017.
ANNEXURE C	CERTIFIED COPY OF THE COMMON ORDER OF THE COURT OF THE JFCM, MANANTHAVADY IN CRL.M.P. 384/2017 AND CRL. MP 704/2017.
ANNEXURE D	TRUE COPY OF THE INTERIM ORDER DATED 20.05.2015 IN CRL. MC NO.2348/2015.

//TRUE COPY//

SD/- P.S. TO JUDGE