

Collector of Malabar and Another

Vs

Erimmal Ebrahim Hajee

Criminal Appeal No. 145-A of 1954

(CJI S. R. Dass, S. K. Das, Syed Jafar Imam, P. Govinda Menon, A. K. Sarkar JJ)

11.04.1957

JUDGMENT

JAFER IMAM, J. -

The appellant obtained a certificate from the Madras High Court to the effect that the case involved a substantial question of law as to the interpretation of the Constitution under article 132(1), in consequence of which the present appeal is before us.

The respondent had filed a petition in the High Court under section 491 of the Code of Criminal Procedure praying that directions in the nature of habeas corpus may be issued for his production before that Court to be dealt with according to law and for his release from imprisonment.

The respondent had been arrested on 1st June, 1954, in pursuance of a warrant issued on 10th March, 1954, by the Collector of Malabar under section 48 of the Madras Revenue Recovery Act (Madras Act II of 1864) (hereinafter referred to as the Act). The circumstances, as stated in the affidavits filed by the Collector and the Income-tax Officer of Kozhikhode in the High Court, which led to the respondent's arrest, were, that he had been assessed to income-tax for various assessment years and the total amount of tax remaining outstanding against him, in round figures, was Rs. 70,000. Some amount was recovered by the Collector in pursuance of a certificate issued by the Income-tax Officer under section 46(2) of the Indian Income-tax Act and by the Income-tax Officer himself under section 46(5A) of the said Act. After deducting the amount so realised the arrears of income-tax were about Rs. 61,668 and odd for the assessment years 1943-44, 1945-46 to 1948-49. Meanwhile the Income-tax Officer had made enquiries into the affairs of the respondent and had discovered that he had sold certain properties of his between 18th November, 1947, and 25th March, 1948, to the tune of about Rs. 23,100. Demand notice had been served upon him on 6th November, 1947, and the series of transactions of sale started on 18th November, 1947. Out of the said sum of Rs. 23,100, the respondent paid arrears of tax to the extent of Rs. 10,500 only. Enquiries also revealed that although the respondent had closed his business at Cannanore in August, 1947, he had set up a firm in 1948 at Tellichery carrying on an identical business in the name of V.P. Abdul Azeez & Bros., consisting of his one major and four minor sons. The respondent had alleged that the capital of this firm was mainly supplied from the sale of jewels belonging to his wife, that is Abdul Azeez's mother. He denied that the above mentioned firm belonged to him. In the assessment proceedings before the Income-tax Officer concerning the firm V.P. Abdul Azeez & Bros., the source of these jewels was gone into, but it was found that the same had not been proved and it was held that the business of V.P. Abdul Azeez & Bros., belonged to the respondent. All these facts were communicated to the Collector by the Income-tax Officer who made independent enquiries for himself and had reason to believe that the respondent was wilfully withholding payment of arrears

of tax and had been guilty of fraudulent conduct in evading payment of tax. As a certificate had already been issued to him by the Income-tax Officer under section 46(2) of the Indian Income-tax Act, the Collector proceeded under section 48 of the Act to issue a warrant of arrest against the respondent in consequence of which he was arrested and lodged in Central Jail, Cannanore.

In the High Court, the petition under section 491 of the Criminal Procedure Code was heard by Mack and Krishnaswami Nayudu, JJ., which was allowed and they ordered that the respondent be set at liberty as his arrest was illegal.

Mack, J., thought that section 48 of the Act was ultra vires the Constitution as it offended article 22. He did not deal at length with the argument that section 48 offended article 21 as he was of the opinion that if that section was ultra vires, then the respondent had not been arrested in accordance with the procedure established by law and his arrest and imprisonment had been unlawful. On the other hand, if section 48 was intra vires the Constitution, then the respondent had been lawfully deprived of his personal liberty. He was further of the opinion that section 46(2) of the Indian Income-tax Act was ultra vires as it offended article 14 of the Constitution.

Krishnaswami Nayudu, J., was of the opinion that section 46(2) of the Indian Income-tax Act read with section 48 of the Act offended article 14 of the Constitution. He was of the opinion that section 48 of the Act offended article 21 of the Constitution to the extent that it afforded no opportunity to the arrested person to appear before the Collector by himself or through a legal practitioner of his choice and to urge before him any defence open to him and that it did not provide for the production of the arrested person within 24 hours before a magistrate as required by article 22(2). Relying upon the decision of this Court in *A. K. Gopalan v. State of Madras*, he was of the opinion that the contention that the provisions of article 21 had been infringed did not require serious consideration because in so far as there was a law on the statute book on which the Collector had acted that would be sufficient to support the legality of the action taken by the Collector.

On behalf of the appellant, it was contended that neither section 48 of the Act nor section 46(2) of the Indian Income-tax Act was in violation of articles 14, 19, 21 and 22 of the Constitution. Section 46(2) of the Indian Income-tax Act was a valid piece of legislation and under its provisions the Collector was authorized to recover the arrears of income-tax as land revenue on receipt of a certificate from the Income-tax Officer. On behalf of the respondent it was contended that these sections of the Act and the Indian Income-tax Act did offend articles 14, 19, 21 and 22 of the Constitution. It was further contended that on a proper interpretation of section 46(2) of the Indian Income-tax Act the authority given to the Collector on receipt of the certificate from the Income-tax Officer was to recover the amount of arrears of income-tax, but there was no authority thereunder in the Collector to arrest the defaulting assessee. Even if the said section could be interpreted to give the power of arrest, arrest could only be made under section 48 of the Act. A proper reading of section 48 of the Act would indicate that the defaulter should be given an opportunity to be heard in his defence, previous to a warrant of arrest being issued against him, as the same could only issue if the Collector had reason to believe that the defaulter was wilfully withholding the arrears of tax or had been guilty of fraudulent conduct in order to evade payment. Such a belief could not be entertained by the Collector without first giving the defaulter an opportunity to be heard. The warrant of arrest issued against the respondent without hearing him in his defence was invalid and the arrest of the respondent was illegal. The learned advocate for the respondent further drew our attention to the fact that in section 48 there was no provision for the release of the defaulter if he paid up the arrears of revenue.

What we have to consider in this appeal, at the outset, is whether either section 48 of the Act or section 46(2) of the Indian Income-tax Act or both offend articles 14, 19, 21 and 22 of the Constitution. The decisions of this Court in Gopalan's case, in *State of Punjab v. Ajaib Singh* and in *Purshottam Govindji Halai v. B.M. Desai, Additional Collector of Bombay* are to be borne in mind in deciding this question.

It was held by the majority of the learned Judges in Gopalan's case that the right "to move freely throughout the territory of India" referred to in article 19(1)(d) of the Constitution was but one of the many attributes included in the concept of the right to "personal liberty" and when a person is lawfully deprived of his personal liberty without offending article 21, he cannot claim to exercise any of the rights guaranteed by sub-clauses (a) to (e) and (g) of article 19(1), for those rights can only be exercised by a free man. In that sense, therefore, article 19(1)(d) has to be read as controlled by the provisions of article 21, and the view that article 19 guarantees the substantive right and article 21 prescribes a procedural protection is incorrect. The decision in Gopalan's case has been followed in this Court in a series of cases and that decision must now be taken as having settled once for all that the personal rights guaranteed by sub-clauses (a) to (e) and (g) of article 19(1) are in a way dependent on the provisions of article 21 just as the right guaranteed by sub-clause (f) of article 19(1) is subject to article 31. If the property itself is taken lawfully under article 31, the right to hold or dispose of it perishes with it and article 19(1)(f) cannot be invoked. Likewise, if life or personal liberty is taken away lawfully under article 21, no question of the exercise of fundamental rights under article 19(1)(a) to (e) and (g) can be raised. Under article 21 "Procedure established by law" means procedure enacted by law made by the State, that is to say, the Union Parliament or the Legislatures of the States. In the appeal before us, the principal question, therefore, is whether the respondent was deprived of his personal liberty in accordance with a procedure established by law, i.e., a valid law. If the law is valid then he has been lawfully deprived of his personal liberty and, in that situation, he cannot complain of the infraction of any of the fundamental rights mentioned in article 19(1)(a) to (e) or (g).

In *Ajaib Singh's* case, a person was taken into custody by the police and sent to the officer in charge of the nearest camp under section 4 of the *Abducted Persons (Recovery and Restoration) Act (LXV of 1949)* and it was submitted that the said Act contravened the provisions, inter alia, of article 22 of the Constitution. None of these submissions were found to be valid. It was held, so far as article 22 is concerned, that the taking into custody was not arrest and detention within the meaning of article 22. *Krishnaswami Nayudu, J.*, in his judgment, attempted to distinguish the decision. With respect to the learned Judges, the principle emerging out of the decision in *Ajaib Singh's* case appears to us to be clear enough. The decision did not attempt to lay down in a precise and meticulous manner the scope and ambit of the fundamental rights or to enumerate exhaustively the cases that come within the protection of article 22. What was clearly laid down was that the physical restraint put upon an abducted person in the process of recovering and taking that person into custody without any allegation or accusation of any actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or of any act prejudicial to the State or the public interest, cannot be regarded as an arrest or detention within the meaning of article 22. In the present case, the arrest was not in connection with any allegation or accusation of any actual or suspected or apprehended commission of any offence of a criminal or quasi-criminal nature. It was really an arrest for a civil debt in the process or the mode prescribed by law for recovery of arrears of land revenue.

In *Purshottam Govindji Halai's* case, this Court held that there was no violation of article 21 of the Constitution where a person had been arrested under section 13 of the *Bombay Land Revenue Act*,

1876, in pursuance of a warrant of arrest issued for recovery of the demand certified under section 46(2) of the Indian Income-tax Act, which did not offend article 14 of the Constitution, inasmuch as such arrest was under a procedure established by law, that is to say, section 13 of the said Act constituted a procedure established by law. Mr. Pocker, however, attempted to distinguish the case, because this Court was dealing with section 13 of the Bombay Act. The grounds stated in that case for declaring that section 46(2) of the Indian Income-tax Act was not ultra vires the Constitution, as it did not offend article 14, are equally applicable to the present case and we can find no true principle upon which we can distinguish that case from the present one.

In our opinion, having regard to the previous decisions of this Court referred to above, neither section 48 of the Act nor section 46(2) of the Indian Income-tax Act violates articles 14, 19, 21 and 22 of the Constitution.

We now proceed to consider the interpretation sought to be put by Mr. Pocker on section 46(2) of the Indian Income-tax Act and section 48 of the Act. He contended that section 46(2) of the Indian Income-tax Act merely authorized the Collector to recover the amount of arrears of income-tax, but it did not give him any authority to arrest the respondent. He submitted that the act of arrest was not a mode of recovery of the arrears of tax, but it was a punishment for failure to pay. We are unable to accept this interpretation. The authority given to the Collector by this section is to recover the arrears of tax as if it were an arrear of land revenue. The preamble of the Act clearly states that the laws relating to the collection of the public revenue should be consolidated and simplified and section 5 provides for the manner in which the arrears of revenue may be recovered. It reads, "whenever revenue may be in arrear it shall be lawful for the Collector, or other officer empowered by the Collector in that behalf, to proceed to recover the arrear, together with interest and costs of process, by the sale of the defaulter's movable and immovable property, or by execution against the person of the defaulter in manner hereinafter provided." This section clearly sets out the mode of recovery of arrears of revenue, that is to say, either by the sale of the movable or immovable property of the defaulter, or by execution against his person in the manner provided by the Act. Section 48 provides that when arrears of revenue cannot be liquidated by the sale of the property of the defaulter then the Collector, if he has reason to believe that the defaulter is wilfully withholding payment of the arrears or has been guilty of fraudulent conduct in order to evade payment of tax, can lawfully cause the arrest and imprisonment of the defaulter. This section read with section 5 makes it abundantly clear that the arrest of the defaulter is one of the modes by which the arrears of revenue can be recovered, to be resorted to if the said arrears cannot be liquidated by the sale of the defaulter's property. There is not a suggestion in the entire section that the arrest is by way of punishment for mere default. Before the Collector can proceed to arrest the defaulter, not merely must the condition be satisfied that the arrears cannot be liquidated by the sale of the property of the defaulter but the Collector shall have reason to believe that the defaulter is wilfully withholding payment, or has been guilty of fraudulent conduct in order to evade payment. When dues in the shape of money are to be realised by the process of law and not by voluntary payment, the element of coercion in varying degrees must necessarily be found at all stages in the mode of recovery of the money due. The coercive element, perhaps in its severest form, is the act of arrest in order to make the defaulter pay his dues. When the Collector has reason to believe that withholding of payment is wilful, or that the defaulter has been guilty of fraudulent conduct in order to evade payment, obviously, it is on the supposition that the defaulter can make the payment, but is wilfully withholding it, or is fraudulently evading payment. In the Act there are several sections (e.g., sections 16, 18 and 21) which prescribe, in unambiguous language, punishment to be inflicted for certain acts done. It is clear, therefore, that where the Act intends to impose a punishment or to create an offence, it employs a language entirely different to that to be found in section 48. We are

of the opinion, therefore, that where an arrest is made under section 48 after complying with its provisions, the arrest is not for any offence committed or a punishment for defaulting in any payment. The mode of arrest is no more than a mode for recovery of the amount due.

There is nothing in section 48 of the Act which requires the Collector to give the defaulter an opportunity to be heard before arresting him. It is true that the Collector must have reason to believe that the defaulter is wilfully withholding payment or has been guilty of fraudulent conduct in order to evade payment. The Collector, therefore, must have some material upon which he bases his belief - a belief which must be rational belief - and a Court may look into that material in appropriate cases in order to find out if the conditions laid down in the section have been fulfilled or not. From the affidavits filed in the High Court by the Collector and the Income-tax Officer it is quite clear that there was material upon which the Collector could base his belief that the respondent was wilfully withholding payment of the arrears of tax and had been guilty of fraudulent conduct in order to evade payment. The Collector was, therefore, justified in arresting the respondent.

As pointed out by Mr. Pocker, section 48 of the Act does not in terms provide for the release of the defaulter if he pays up the arrears, but it is to be remembered that in addition to the powers under section 48 of the Act, the Collector has under the proviso to section 46(2) of the Indian Income-tax Act, similar powers to that which a Civil Court has for recovery of an amount due under a decree. It was held in Purshottam Govindji Halai's case that the proviso is not an alternative remedy open to the Collector but only confers additional powers on the Collector for the better and more effective application of the only mode of recovery authorized by sub-section (2) of section 46 of the Indian Income-tax Act. Under section 58 of the Civil Procedure Code a Civil Court must release the judgment-debtor if the amount due is paid. Accordingly, the Collector has the power to release the defaulter if the amount due is paid and there is no substance in the submission of the learned advocate. Moreover, one of the conditions precedent to action under section 48 is the existence of arrears of revenue. On payment of the arrears, that condition no longer exists and the debtor must clearly be entitled to release and freedom from arrest.

It was urged that the respondent was a man of about 70 years at the time of his arrest and a person suffering from serious ill health. Indeed, it is said, he is suffering from paralysis and that he should not be sent back to jail custody. We cannot in the present proceedings make such an order. The respondent may, if he is taken into custody again, approach the Collector for his release who could do so, in the circumstances set out in section 59 of the Code of Civil Procedure, in the exercise of his powers under the proviso to section 46(2) of the Indian Income-tax Act.

The appeal is accordingly allowed with costs and the judgment of the High Court is aside. It will be open to the Income-tax Officer of Kozikhode and the Collector of Malabar to take such steps against the respondent according to law as they may be advised.

Appeal allowed.

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