

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

SATURDAY, THE 20TH DAY OF DECEMBER 2014/29TH AGRAHAYANA, 1936

WP(C).No. 10334 of 2014 (N)

PETITIONER(S):

1. PATTAMBI SERVICE CO-OPERATIVE BANK LTD. NO.P-585,
PATTAMBI.P.O., PALAKKAD DISTRICT,PIN-679 373,
REPRESENTED BY ITS SECRETARY.
2. N. MOHANASUNDARAN,SON OF KALYANI AMMA,
NAZRATH HOUSE, COURT ROAD,
PATTAMBI, PIN-679 303
3. UNNIKRISHNAN.H.K., SON OF GOPALAKRISHNAN,
'SAKTHI', MELEPATTAMBI, PALAKKAD ROAD,
PATTAMBI,PIN-679 306.

BY ADVS.SRI.MARIARPUTHAM (SENIOR ADVOCATE)
SRI.K.T.THOMAS
SRI.V.M.KURIAN

RESPONDENT(S):

1. UNION OF INDIA,
DEPARTMENT OF REVENUE,
MINISTRY OF FINANCE, NORTH BLOCK,
NEW DELHI,PIN-110 001,
REPRESENTED BY SECRETARY TO GOVERNMENT (REVENUE).
2. STATE OF KERALA,
REPRESENTED BY SECRETARY TO GOVERNMENT,
CO-OPERATIVE DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM,PIN-695 001.
3. THE REGISTRAR OF CO-OPERATIVE SOCIETIES,
OFFICE OF THE REGISTRAR OF CO-OPERATIVE SOCIETIES,
STATUE, THIRUVANANTHAPURAM, PIN-695 001.
4. THE DIRECTOR OF INCOME TAX (INTELLIGENCE),
CENTRAL REVENUE BUILDING, I.S. PRESS ROAD,
ERNAKULAM, PIN-682 018.

WP(C).NO.10334/2014

5. THE INCOME TAX OFFICER (INTELLIGENCE),
AYAKAR BHAVAN, SAKTHAN THAMPURAM NAGAR,
THRISSUR, PIN-680 001.

R1 BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL
R2 & R3 BY GOVERNMENT PLEADER SRI.BOBBOY JOHN PULICKAPARAMBIL
R4 & R5 BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 28-11-2014, ALONG WITH WPC.NO.14827 OF 2014 AND CONNECTED
CASES, THE COURT ON 20-12-2014 DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONER'S EXHIBITS:

- P1 COPY OF THE NOTICE DATED 06/09/2013 ISSUED BY THE 5TH RESPONDENT TO THE 1ST PETITIONER.
- P2 COPY OF THE LETTER DATED 23/09/2013 ISSUED BY THE 1ST PETITIONER TO THE 5TH RESPONDENT.
- P3 COPY OF THE NOTICE DATED 27/09/2013 ISSUED BY THE 5TH RESPONDENT TO THE 1ST PETITIONER.
- P4 COPY OF THE NOTICE DATED 22/01/2014 ISSUED BY THE 5TH RESPONDENT TO THE 1ST PETITIONER.

(I.A.NO.7578/2014 & 7579/2014)

- P13 COPY OF THE NEWS REPORT DATED 07/06/2014 PUBLISHED IN THE MATHRUBHOOMI DAILY.
- P13(A) COPY OF THE ENGLISH TRANSLATION OF NEWS REPORT DATED 07/06/2014 PUBLISHED IN THE MATHRUBHOOMI.

RESPONDENT'S EXHIBITS:

- R4(A) COPY OF THE LETTER NO.F NO.PROJ-UCB/DIT/INTELL) KOCHI/13-14 DATED 9/10/2013
- R4(B) COPY OF THE RECORD OF DISCUSSION.
- R4(C) COPY OF THE ORDER IN F.NO.DIT(1& CI)/UCBSS/13-14/175/VOL.1/380 DATED 17/06/2013, OF THE DIRECTOR GENERAL OF INCOME TAX INTELLIGENCE & CRL.INV)
- R4(D) COPY OF THE NOTIFICATION NO.29/2011 DATED 30/05/2011
- R4(E) COPY OF THE NOTIFICATION NO.42/2011 DATED 19/08/2011
- R4(F) COPY OF THE REVISED PROCEDURE FOR THE WORKING OF CIB INSTRUCTION NO.1943 DATED 22/08/1997
- R4(G) COPY OF THE LETTER FOLLOWED BY RATIONALIZATION OF CIB SOURCE CODES FOR COLLECTION OF INFORMATION INSTRUCTION DATED 22/12/2009

/TRUE COPY/

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P.S.TO.JUDGE

P.R. RAMACHANDRA MENON, J.

**W.P.(C)Nos. 10334, 14827,
14922, 14923, 20629,
21579, 25297, 23801,
23802, 23803 & 26114 OF
2014**

Dated this the 20th December, 2014

J U D G M E N T

Constitutional validity of section 133(6) of the Income Tax Act, 1961 to the extent the words "enquiry or" have been added thereto, also incorporating "second proviso", is under challenge in the main case and some of the connected cases. In general, the grievance is against the notices issued by the authorities of the Income Tax Department, asking the petitioners/Co-operative Banks to furnish details of cash deposit in 'Savings Bank Accounts', aggregating to Rs.5 lakhs during the financial years 2010-11, 2011-12, 2012-13 and also to furnish details of payment of interest exceeding Rs.10,000/- to the depositors including in the case of fixed deposits.

2. Petitioners are Co-operative Banks registered under the

W.P.(C)Nos. 10334 OF 2014 & connected cases

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relevant provisions of the Kerala Co-operatives Societies Act/Rules engaged in banking business and in some cases members/depositors have also joined hands with the Bank to raise the challenge. W.P.(C).No. 10334 of 2014 is treated as the lead case, wherein a detailed counter affidavit has been filed from the part of the Department and the petitioners have filed a reply affidavit as well. It is stated that, no factual dispute is involved and the contentions raised in the lead case from both the sides are pressed into service in the other cases as well.

3. Mr. Mariarputham, learned Senior Counsel appearing on behalf of the petitioner in W.P.(C). No. 10334 of 2014 led the arguments on behalf of the petitioners, supported by other learned lawyers concerned. The arguments on behalf of the Department/Revenue were led by Sri. P.K.R Menon, learned Senior Central Government Counsel (Taxes), supported by Mr. Jose Joseph, the learned Standing Counsel.

4. History runs back to the time when steps were taken by the respondent/Income Tax Department (Department in short) to collect particulars of deposits made and interest paid by the

W.P.(C)Nos. 10334 OF 2014 & connected cases

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Co-operative Banks, as part of some project/survey, issuing notice under Section 133 (6) of the Income Tax Act, 1961. Several Co-operative Banks approached this Court earlier, challenging the said proceedings, mainly contending that, the provisions did not enable the Department to have issued notice to the petitioners who were Co-operative Banks governed by the relevant provisions of the Kerala Co-operative Societies Act & Rules and further that, many of them were Primary Agricultural Credit Co-operative Societies having exemption from the operation of the relevant provisions of the Income Tax Act. In some cases, Certificates issued by the authorities under the Kerala Co-operative Societies Act/Rules were produced, as to the nature of the Society, to have the benefit of exemption. In some cases, it was contended that, the term "any person" under Section 133(6) did not relate to the petitioners' Co-operative Banks. It was also contended that, no such notice could have been issued invoking the said power, as it was never part of any 'enquiry' or 'proceeding' under the Act and no specific insinuation was made against any individual or the Society. Yet another

contention was raised to the effect that, notices were issued by the Income Tax officers or such other authorities who did not have the power, jurisdiction or competence to have invoked the said power, in view of the clear stipulation under the '2nd proviso' to Section 133(6), to the effect that, in a case where no proceeding was pending, the power could have been invoked only with 'prior approval' of the Director or Commissioner as the case may be, simultaneously contending that no such prior permission was obtained, to have issued the notice. After detailed examination of the facts and figures, it was held by this Court (as per the judgment delivered by me in **Chala Service Co-operative Bank Ltd. vs. Income Tax Officer** [2010 (1) KLT S.N. 77, Case No.92]) that, the term "any person" included a Co-operative Bank as well. After meeting all the contentions, interference was declined and the writ petitions were dismissed.

5. Thereafter, the matter came to be considered by a Division Bench of this Court in another case, wherein interference was declined and ultimately the matter reached the Apex Court. The Apex Court declined interference, clearly holding that, the

power under Section 133(6) could be invoked against Co-operative Banks as well, and that there was nothing wrong, arbitrary or illegal on the part of the Department in having issued the impugned notices. Accordingly, the cases before the Apex Court were dismissed as per the decision reported in **Kathiroom Service Co-operative Bank Ltd. & Others V. Commissioner of Income Tax & Others** [(2013) 263 CTR (SC) 129]. On attaining finality, by virtue of the verdict passed by the Apex Court, the respondent Department proceeded with further steps in this regard. This made the petitioners herein to challenge the notices, mainly raising challenge against the constitutional validity of the amended provisions incorporating the words 'enquiry or' and the 2nd proviso to Section 133(6), pointing out that, constitutional validity of the provision was never under challenge before the Apex Court and hence that the Court had no need, necessity or occasion to have considered it while passing the judgment in **Kathiroom** case cited supra.

6. Coming back to the case in hand, admittedly, the petitioners are engaged in the field of Banking business,

accepting deposits and extending loan facilities to the members under various heads, which are essentially stated as in relation to agricultural activities. There is a contention that, the petitioner Bank is an Agricultural Credit Society for the purpose of Banking Regulation Act 1949 and by virtue of Section '3', it is excluded from the purview of Banking Regulation Act (which will be dealt with in the due course). By virtue of Section 133(6) of the Income Tax Act, 1961, the Department has power to call for information in relation to such points or matters which would be useful for, or relevant to any proceeding under the Act, from 'any person' including a 'Banking Company' or 'any Officer' thereon. Later, an amendment was introduced as per the Finance Act, 1995 whereby, the words "enquiry or" were inserted before the word "proceeding" in Section 133(6), also adding the '2nd proviso' to the said provision, with effect from 1.7.1995. The effect of the said amendment is that, the power to call for information under the unamended Act, which was confined only in relation to a 'pending proceeding' came to be widened, and even in a case where no proceeding was pending, such information could be

called for as part of the enquiry, subject to the rider that, such power was not to be exercised by any income tax authority below the rank of Director or Commissioner without the prior approval of the Director or the Commissioner, as the case may be. The said amendment was brought about as a measure to tackle tax evasion effectively, as clarified by the Central Board of Direct Taxes (CBDT) vide Circular No. 717 dated 14.8.1995.

7. The main contention is that, it intrudes into 'privacy' of the members of the petitioner Banks and that the right of privacy is an integral part of Article 21 of the Constitution of India, which in turn is violated. The rights and interest of the petitioners to conduct free trade/business as guaranteed under Article 19(1)(g) are also stated as infringed. Unbridled power/discretion is vested with the authorities of the Income Tax Department and that the contents of the notice clearly reveal that, it has no nexus at all, with the object to be achieved under the Act, as no tax liability could be mulcted upon a person having a deposit of Rs.5 lakhs or in respect of a person to whom interest has been paid to an extent of Rs.10,000/-. This in turn, is cited as a clear instance

of arbitrariness and patent violation of Article 14 of the Constitution of India.

8. Learned Senior Counsel for the petitioners submits that, the State cannot have any unrestricted access to seek information about the financial records maintained by the petitioner Banks without any reliable basis to seek such information. Though the right of privacy has not been explicitly incorporated in the Constitution or by way of any specific legislation, it has now been incorporated as part of Article 21, through various judicial precedents, including **Govind v. State of Madhya Pradesh & Another**([1975] 2 SCC 148], **MR.X vs. Hospital 'Z'**.(1998) 8 SCC 296) and **People Union for Civil Liberty v. Union of India & another** (2003) 4 SCC 399). Thus, it is contended that, right to privacy is an integral part of fundamental rights guaranteed under part III of the Constitution of India and as such, the attempt made by the concerned respondent is liable to be intercepted by this Court.

9. Reliance is also sought to be placed on the decision rendered by the Apex Court in **Ramjethmalani v. Union of**

India (2011) 8 SCC 1 pointing out that the fundamental right to privacy cannot be subverted in the attempt to tackle the menace of curbing the problem of black money, which is cited as the motive for the drive. Reference is also made to the observation of the Apex Court in **Ramjethmalani's** case to the effect that, solution for the problem of abrogation of one zone of constitutional values, cannot be the creation of another zone of abrogation of other constitutional values.

10. Referring to the observation of the Apex Court in **Sudheerchandra Sarkar v. Tata Iron and Steel Company Ltd** (1984) 3 SCC 369) holding that, absolute discretion, uncontrolled by guidelines may permit denial of equality before law, which is anti-thesis of rule of law, the learned counsel points out that, there is absolutely no mechanism, as provided under the statute, to examine whether the wide discretion granted is exercised correctly or not. In the absence of any guidelines or criteria for the exercise of powers, the impugned provisions suffer from the vice of arbitrariness, is the crux of the contention. Various other decisions are also cited across the Bar, including

the one rendered by the Apex Court in **Maneka Gandhi v. Union of India (1978) 1 SCC 248 = AIR 1978 SC 597**) which will be dealt with later.

11. The concept of co-operative movement and setting up of Co-operative Societies/Bank play a very important role in providing credit and financial assistance to the marginal section including farmers. It is by virtue of the very nature of operations and object to be achieved, that the petitioners have been kept outside the purview of the Banking Regulation Act, 1949. It is also pointed out that, their activities are governed by the provisions of Kerala Co-operative Societies Act/Rules, which are the 'special statutes' as far as they are concerned, and it separately provides detailed procedure for incorporation, registration, functioning, control and regulation with proper power of superintendence by the concerned authorities, including the power of audit of accounts, besides the power for enquiry and inspection under Section 66A by the Vigilance Officer. When various measures are being taken by the Central/State Government, also in the light of the approval/recommendations

by the Reserve Bank of India/NABARD to strengthen the Co-operative sector, the steps being pursued by the respondent Department on the other hand, virtually contribute to undermine the same; as furnishing of details of deposit to third parties will clearly violate the commercial secrecy that exists between the Bank/financial institution and its customer. While admitting in Ground 'T' of the writ petition that, even though Banks and other financial institutions can be required to share information regarding deposits, it is stated that the same can be done only when the concerned authority shows some reason for suspicion or material based on which they are seeking information.

12. Since Section 133(6) of the Income Tax Act expressly uses the words "for the purpose of this Act.." in the opening paragraph, it is contented that the same must relate to a specific tax payer/assessee; otherwise, it would not serve any purpose and as such, the impugned notices are arbitrary and illegal having no nexus to the scope and object of the Income Tax Act, 1961.

13. The averments and allegations raised by the petitioners

have been rebutted by the 1st respondent by filing a detailed counter affidavit. It is pointed out that, there is absolutely no basis for the challenge raised by the petitioners against validity of the provision. With reference to the challenge against the impugned notice, it is stated that the matter has become final, by virtue of the law declared by the Apex Court in **Kathiroor** case. It is also pointed out that the version of the petitioners that they are not governed by the Banking Regulation Act is not at all correct, and that the position has undergone a substantial change after the amendment brought about in the statute, whereby Co-operative Banks/Co-operative Societies have also been included as coming within the purview of the Banking Regulation Act. As per Section '5A' of the Banking Regulation Act and the 'non-obstante clause' therein, the provisions of the Banking Regulation Act override the provisions of the Bye-laws, Agreements etc. of the Co-operative Societies. Reference is made to various other provisions (amending provisions/amended provisions) as well, including sub section (2) of section 22 of the Banking Regulation Act, whereby it is stipulated that all Co-operative Societies

carrying out Banking business have to apply and procure a licence from the Reserve Bank of India as well, within three months of the commencement of the Banking business. It is also stated that addition of the words "enquiry or" and the 'second proviso' as per the amendment brought about by the Finance Act, 1995 is only incidental to the main provision (which is not under challenge) adding that, the powers under Section 133(6) are in the nature of survey and general enquiry, to identify persons who are likely to have taxable income and to ascertain whether there is compliance by them with regard to payment of tax.

14. With reference to the plea of arbitrariness/alleged harassment, it is stated in paragraph '9' of the counter affidavit that notice to the Co-operative Societies/Banks in Kerala, calling for information under Section 133(6) was issued to implement a 'project' conceived and approved by the Honourable Minister for Finance, to be executed by the Officers of the 'CBDT' - the apex body of tax administration in the country, under the Ministry of Finance, Department of Revenue. As a matter of fact, the project was initiated in the Country on 17.6.2013; but it could not be

initiated in the State, because of intervention of the Court, which came to be cleared only on 27.8.2013, i.e., on finalization of the issue as per the decision rendered by the Apex Court in **Kathiroor** case. It is also pointed out that, there is absolutely no basis for the apprehension expressed from the part of the petitioners with regard to the steps to be conducted to furnish the data in the prescribed form, as the Department, even as per their 1st notice under Section 133(6) issued to the petitioner on 06.09.2013, had conveyed the undertaking to assist the petitioner Co-operative Societies/Banks, also giving the telephone number of the officer concerned, to be contacted, in case any difficulty was experienced; besides undertaking that, the Department was ready to depute the Inspector of Income Tax to the Banks/Societies to render necessary assistance to enable the Banks to comply with the terms of notices issued under Section 133(6) of the Act, a copy of which has been produced as Ext.R4 (A). It is further pointed out that, as many as 44 seminars/awareness campaigns were organized by the Department in various Districts in Kerala, for Co-operative

Societies/Banks, to educate and equip them to comply with the statutory notices issued in this regard, thus asserting that, there was no threat at all from the part of the respondents as alleged by the petitioners. It is stated that, by virtue of the stipulation under the '2nd proviso' to Section 133(6) of the Act, prior approval of the Director/Commissioner is necessary while seeking for information when no proceeding is pending and as such, there is an in-built mechanism/control with regard to the use of power. The objective is to get information for curbing the menace of black money and to stabilize the economic base of the country.

15. Mr. P.K.R Menon, learned Senior Counsel for the respondents submits with reference to the pleadings on record that, the attempt of the petitioners is only to capitalize the passing remarks made by the Apex Court in different decisions rendered at different points of time, dealing with the particular/different set of facts and circumstances, which cannot have any application to the challenge raised by the petitioners with reference to the constitutional validity of the provisions. More so, when the scope of power and authority of the Department in

having issued notice under Section 133(6) stands answered in favour of the Revenue, as per the **Kathiroor** case. It is also pointed out that, there is absolutely no basis for the contention raised by the petitioners that there is no procedure under the scheme to gather information under Section 133(6) of the Income Tax Act, 1961.

16. The information required to be furnished by the petitioners/Co-operative Banks as per the impugned notices issued by the respondent Department, invoking the power under Section 133(6) of the Income Tax Act, 1961 is to the following effect:

<i>SL.No.</i>	<i>INFORMATION REQUIRED</i>
1	Details of cash deposits in Savings Bank Account aggregating to Rs.5 Lakhs during Financial Years 2010-11, 2011-12 &2012-13. (Information regarding cash deposits in SB Account where the aggregate of cash deposit is Rs.5 Lakhs or above for the concerned year. While furnishing the information, all the cash transactions in the account are to be reflected date wise and not merely the aggregate amount.)
2	Details of payment of interest exceeding Rs.10,000/- paid to depositors including interest on fixed Deposits.

17. As mentioned already, the said information was sought to be collected by the Department to implement the project

conceived and approved by the Minister for Finance, to be executed by the officers of the CBDT (Central Board of Direct Taxes)- apex body of the tax administration under the Ministry of Finance, for curbing the menace of black money. The challenge raised from the part of the petitioners and other similarly situated persons stating that they stand on a different footing, being governed by the relevant provisions of the Kerala Co-operative Societies Act and Rules; that they do not come within the purview of the term "**any person**" contemplated under Section 133(6) of the Income Tax Act; that the power under Section 133(6) cannot be invoked in the absence of any pending proceedings ; that there was no prior approval/sanction of the Director/Commissioner , as the case may be (in cases where no proceeding is pending); the scope of calling for such information as beyond the competence of power and jurisdiction of the authorities of the Department etc., no more remain res integra (except the question of constitutional validity of the provisions) by virtue of the law declared by the Apex Court , affirming the decision rendered by this Court, in **Kathiroor Service Co-**

operative Bank Ltd. and others vs. Commissioner of Income Tax and others (2013)263 CTR (SC) 129).

The observation made by the Apex Court in paragraph 17 of the said judgment is relevant in the context of the plea set up by the petitioners referring to the alleged fishing/roving enquiry, which reads as follows:

"The legislative intention was to give wide powers to the officers, of course with the permission of the CIT or the Director of Investigation to gather general particulars in the nature of survey and store those details in the compute so that the data so collected can be made use of for checking evasion of tax effectively. The assessing authorities are now empowered to issue such notice calling for general information for the purpose of any enquiry in both cases:(a) where a proceeding is pending and b) where proceedings is not pending against the assessee. However, in the latter case, the assessing authority must obtain the prior approval of the Director or the Commissioner, as the case may be before issuance of such notice. The word "enquiry" would thus connote a request for information or questions to gather information either

before the initiation of proceedings or during the pendency of proceedings; such information being useful for or relevant to the proceedings under the Act."

From the above, it is very clear that the enquiry, invoking the power under Section 133 (6) of the Act, is in the form of a survey, calling for general information to prepare and maintain sufficient data-base, to be cross checked with further data to be collected in the due course, if any incriminating circumstance is noted and to provide measures to check tax evasion.

18. Coming to the constitutional validity of the provision, it is to be noted at the very outset, that the petitioners have not chosen to challenge the entire provision , i.e. Section 133(6). The grievance is only with regard to incorporation of the words "**enquiry or**"(preceding the word "**proceedings**") and also the 'second proviso', by way of amendment as per the Finance Act, 1995.

19. The prayers raised by the petitioner in W.P(C)10334 of 2014 are extracted for convenience of reference:

"i) issue appropriate writ, order or direction quashing and setting aside the addition of the word "inquiry" in Section 133 (6) of the Income Tax Act 1961 and the two provisos thereto is illegal and unsustainable in law;

ii) issue an appropriate writ, order or direction quashing Exhibits P1, P3 and P4 notices issued by the 5th respondent.

Iii) pass any other order in the interests of justice, equity and good conscience."

20. The provision for calling for information in a 'pending proceedings' was very much there in the Statute even before 1995 and the said power/authority is not under challenge in this writ petition. The inadequacy of the provisions, to meet the need of the hour, was felt by the law makers in the year 1995. It was felt necessary to obtain data by way of enquiry, though no proceeding was pending, so as to take remedial measures to curb the menace of black money and to prevent tax evasion. Even otherwise, if at all effective steps have to be taken against any individual/establishment, collection of preliminary data is very much essential, without which no proceedings can be

pursued, as made clear by the Apex Court on many an occasion. Data collection is an elementary step/course to be completed before proceeding against anybody and such a step will be necessitated only in the case of a person who is not prepared to abide by the provisions of law.

21. The contention of the petitioners that there is absolutely no insinuation against the petitioners to have proceeded against, is not at all relevant, nor is there any significance in this regard. For the time being, it is true that there is no insinuation against the petitioners to the effect that they are accepting clandestine deposits involving black money or that they are effecting payment of interest enabling the petitioners to enjoy the same without meeting the tax burden. The attempt of the Department is to see whether any undue benefit is being enjoyed by any of the depositors without meeting the tax obligation and it is in the said context, that necessary data has been decided to be collected.

22. The version of the petitioners, that the information sought to be collected (i.e. particulars of deposits of Rs. 5

lakhs or more in the years 2010-11, 2011-12 and 2012-13 or payment of interest exceeding Rs.10000/- to the fixed deposits) will not attract any tax liability and as such, there is no purpose or nexus with the object of the Act, is rather puerile. This is for the reason that the petitioners' society may not be aware of the transactions being pursued by the members/depositors, who may be having similar deposits in some or other Scheduled Banks or Co-operative Banks. If such a depositor is having similar deposits and is drawing interest from other Banks/Co-operative Banks, still not satisfying tax on the total receipt of income/interest, is a person to be proceeded against, in terms of the relevant provisions of law. Unless the requisite data is collected from different Banks/institutions, it may not be possible for the respondent /Department to create sufficient data- base to be cross checked, whenever they get sufficient material/information as to the instance of tax evasion. Viewed in the above perspective, there cannot be any genuine heart burn for the petitioners in furnishing the data as required by the respondents and it cannot cause any prejudice in this

regard. Their apprehension that there is a chance for withdrawal of deposits by depositors, draining out the financial base of the Society/Bank, is also devoid of any merit, for the reason that data is being collected by the respondent Banks as part of implementation of the project from all the available sources and no Co-operative Bank is exempted or spared in this attempt.

23. Yet another contention raised by the petitioners is that, for meeting the requirement, the petitioners may have to deploy several employees to furnish the information, virtually for no return, and thus incurring huge expenses. This Court is not much impressed with the above contention, for the reason that the petitioners being establishments doing banking business, are supposed to maintain all the relevant records and there is a 'public duty' cast upon them as well, to see that they are not made instrumental by any unscrupulous individual, who wants to pursue tax evasion, undermining the economic backbone of the country. The plea with regard to hardship in this regard had already come up for consideration before the Apex Court in **Sardar Baldeo vs.CIT [1961 AIR SC 736]**, wherein it has

been categorically held that in the case of any enactment preventing evasion of tax, consideration of hardships is irrelevant for deciding the questions of legislative competence.

24. With regard to the contention of the petitioners that there is **no nexus** for the information to be furnished as per the impugned notices, with the purpose sought to be achieved, the observation made by a Division Bench of this Court in **M.V. Rajendran vs. ITO[(2003) 180 CTR (Kerala) 369= 260 ITR 442]** is very relevant and hence extracted below:

"The Society by itself cannot have any grievance against the notice because the notice does not contemplate any action against the society.. Since, it is a settled position that, authority empowered to do a thing will have auxiliary and necessary power to achieve the objective, none can have a doubt that the Income Tax authority whose duty it is to trace tax evaders and to bring them to book and compel them to pay tax can ask for details on deposit. Therefore, a survey or investigation conducted to trace black money is absolutely within the powers of the income-tax authorities and co-operative societies or banks cannot claim any immunity

for hoarding black money. Even though not specifically conceded by the petitioners , their case is that unless societies enjoy immunity from section 133(6) proceedings and information on deposits and depositors is kept out of reach of the Income-tax Department, they will not get deposits, or the existing depositors will withdraw the deposits leading to liquidity problem for them. I do not think this is a ground to resist a notice under section 133(6). If co-operative banks and co-operative societies are allowed to maintain deposits beyond the scrutiny of the Income-tax Department, then the societies will become safe havens for hoarding black-money in the country which is opposed to public policy. Besides this, the statutory authority vested with the responsibility to levy tax on income will be prevented from achieving their objective and that will defeat the very purpose of the Income Tax Act.”

25. It is contended by the petitioners that 'nexus' is not revealed from the impugned notices and that there cannot be any tax liability in respect of an instance as specified in the notice. But, it is not for the petitioners/Banks to contend that the respondent Department should satisfy the petitioners as to the

requirement in respect of the taxable event. Section **133(6)** does not cast any such obligation, to have the information extracted from the petitioners. On the other hand, it casts an obligation on the part of the petitioners to furnish information sought for, in tune with the requirement of Section 133(6). Even otherwise, the petitioners cannot dictate terms to the Income Tax Department to satisfy them first, whether there is a taxable event, if the information sought for is furnished. Further, there is no basis for the plea set up in **paragraph 12** of the writ petition with reference to the total figure of Rs. 5 lakhs, to be divided by 'three' years and to contend that it will not attract any tax liability. The position has been clarified by the respondents in paragraph '8' of the counter affidavit, that the threshold limit of Rs.5 lakhs has been fixed for each financial year and not for the three financial years added together.

26. What should be the extent of enquiry to be conducted, fixing an appropriate ceiling, is a matter for the IT Department to consider, taking note of the factual scenario in the field of tax evasion. It could be said that, fixation of ceiling as Rs. 5 lakhs

(in the case of deposits) and Rs.10000/- (as interest being paid) while seeking for the particulars in this regard, is as a measure at the first step. After getting particulars in this regard and preparing the database, it is still open for the Income Tax Department to seek for further information to widen the net and to prevent the possible pilferage, if any, reducing the base/ceiling to such appropriate extent. The question to be considered is, whether such exercise being pursued by the Department is having the support of law or not, which cannot but be answered in the positive. It is for the Department to work out the strategy, device the tools and measures and to achieve the goal in a phased manner, which cannot be deprecated by this Court.

27. With regard to the alleged infringement of 'right to privacy', the petitioners place much reliance on the observations made by the Apex Court in **Ram Jethmalani v. Union of India** [(2011) 8 SCC 1]. The following are the extracts sought to be relied on by the petitioners:

*"We understand and appreciate the fact
that the situation with respect to unaccounted*

for monies is extremely grave. Nevertheless, as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values and hasty steps that derogate from fundamental rights, whether urged by Governments or private citizens, howsoever well meaning they may be, have to be necessarily very carefully scrutinised. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone or abrogation of constitutional values. "

"The revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrongdoing, would be a violation of their rights to privacy. Details of bank accounts can be used by those who want to harass, or otherwise cause damage, to individuals. We cannot remain blind to such possibilities, and indeed experience reveals that public dissemination of banking details, or availability to unauthorised persons, has led to abuse. The mere fact that a citizen has a bank account in a bank located in a particular jurisdiction cannot be a ground for revelation of details of his or her account that the State has acquired. Innocent citizens, including those

actively working towards the betterment of the society and the nation, could fall prey to the machinations of those who might wish to damage the prospects of smooth functioning of society. Whether the State itself can access details of citizens' bank accounts is a separate matter. However, the State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public at large, either to receive benefits from the State or to facilitate investigations, and prosecutions of such individuals unless the State itself has, through properly conducted investigations, within the four corners of constitutional permissibility, been able to establish prima facie grounds to accuse the individuals of wrongdoing.

It is only after the State has been able to arrive at a prima facie conclusion of wrongdoing, based on material evidence, would the right of others in the nation to be informed enter the picture."

28. It was a case where, investigation was sought to be made with regard to the unaccounted wealth acquired through unlawful activities by the concerned persons in violation of national/international laws. The Apex Court concurred with the

formation of a 'High Level Committee' to act as a Special Investigation Team under the Chairmanship of an Hon'ble Judge of the Supreme Court and gave specific directions as to the course to be pursued. The portion extracted by the petitioners itself reveals that the Apex Court was considering the request to reveal/divulge the particulars of the persons/individuals and details of their bank account to the public, at large. The necessity to collect necessary materials by the State through properly conducted investigations, to establish prima facie grounds, to accuse the individuals of the wrongdoing was highlighted. This is revealed from the observation : "only after the State has been able to arrive at a prima facie conclusion of wrongdoing, based on material evidence, would the **right of others** in the nation to be informed, enter the picture."

29. Coming to the case in hand, it is only the first stage of the action that is being pursued by the respondent Department, i.e., as to the collection of data/material, before anybody is indicted. In so far as the said power is exercised to identify the culprits if any, it need not cause any headache to the petitioners.

That apart, the information being collected by the Income Tax Department cannot be made use of by them, for any other purpose and the statute itself takes care of such situation, by virtue of the mandate under Section 138 of the Income Tax Act.

The said provision reads as follows:

"S.138.[(1)(a) The Board or any other income-tax authority specified by it by a general or special order in this behalf may furnish or cause to be furnished to-

(i) any officer, authority or body performing any functions under any law relating to the imposition of any tax, duty or cess, or to dealings in foreign exchange as defined in [clause (n) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 199)]; or

(ii) such officer, authority or body performing functions under any other law as the Central Government may, if in its opinion it is necessary so to do in the public interest, specify by notification in the Official Gazette in this behalf, any such information received or obtained by any income-tax authority in the performance of his functions under this Act, as may, in the opinion of the board or other income- tax authority, be necessary for the purpose of enabling the officer, authority or body to perform his or its functions under that law.

(b) Where a person makes an application to the Chief Commissioner or Commissioner in the prescribed form for any information relating to any assessee received or obtained by any income-tax authority in the performance of his functions under this Act, the Chief Commissioner or Commissioner may, if he is satisfied that it is in the public interest so to do, furnish or cause to be furnished the information asked for and his decision in this behalf shall be final and shall not be called in question in any court of law.

(2) Notwithstanding anything contained in sub-section (1) or any other law for the time being in force, the Central Government may, having regard to the practices and usages customary or any other relevant factors, by order notified in the Official Gazette, direct that no information or document shall be furnished or produced by a public servant in respect of such matters relating to such class of assesseees or except to such authorities as may be specified in the order."

30. With regard to the contention of the petitioners that there is absolutely no mechanism in the Statute, nor is there any guideline to govern the proceedings for invoking the power under Section 133(6), it is to be noted that the law makers were vigilant enough to ensure that the power is not misused under

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any circumstance. It was accordingly stipulated that, if no proceeding was pending, the power shall not be exercised by any assessing officer not below the rank of Director/Commissioner unless prior approval of the Director/Commissioner, as the case may be, was obtained. This, of course, acts as a check measure, to provide transparency in the proceedings. It involves various steps for getting 'prior approval' of the Director/Commissioner. The file has to move through different levels, till it reaches the approving authority, who has to be told of the situation under which circumstance, the enquiry is necessitated . After applying the mind, appropriate orders are to be passed by the said authority and if approval is granted, there is a further downward communication, causing the file to be taken through the same levels to reach it back , enabling the concerned officer to proceed with the enquiry. This ensures proper invocation of the power to see that nobody invokes the power based on his own whims and fancies and this acts as an inbuilt mechanism/guideline. Further, procedure in this regard is stipulated as per various notifications/Circulars

issued by the competent authority, copies of which have been produced as Exts.R4 (C), (D) and (E). As it stands so, the challenge raised against the constitutional validity for the alleged absence of guidelines, is not liable to be entertained.

31. The case set up/moulded by the petitioners as above, with reference to the unbridled discretion stated as objectionable by the Apex Court as per the decision in **State of Punjab vs. Khan Chand [(1974) 1 SCC 549]**, is also of no avail for the reason stated above. The decision in **Maneka Gandhi vs. Union of India [(1978) 1 SCC 248]** holding that the 'Triple test' stipulated therein (that it must prescribe a procedure; that the procedure must withstand the test of one or more fundamental rights under Article 19, which may be applicable in a given situation and it must also be liable to be tested with reference to Article 14) with reference to infringement of personal liberty does not come to the rescue of the petitioners. In **Maneka Gandhi's case**, the denial of issuance of passport to the petitioner therein was deprecated, highlighting the golden rule of personal liberty. But at the same time, the enabling

provision, to have the passport impounded, was not intercepted by the Court.

32. The fact that the petitioners' Bank is a society registered under the Kerala Co-operative Societies Act/Rules and that there is a separate procedure for incorporation/registration/functioning/control and regulation including auditing of funds etc., are not at all germane to the course and proceedings to be pursued in terms of Section 133(6) of the Income Tax Act. The provisions of the Co-operative Societies Act/Rules may be relevant in so far as the day-to day activities of the Society are concerned . But scope of the enquiry under the Income Tax Act is entirely different and so also is the object/purpose to be achieved . The said enquiry is not in relation to the particulars of loans given, but in relation to the particulars of the deposits made by the depositors or as to the extent of interest received by them, to the extent it is relevant under the provisions of the Income Tax Act. In so far as 'Explanation (2)' to Section 132 of the Income Tax Act, dealing with search and seizure, categorically states that the word

'**proceeding**' includes a future proceeding as well; the inclusion of the word '**enquiry or**' under Section 133(6) of the Act, by the law makers as per the Finance Act, 1995, is having more significance and it is incidental to the scope and object to be achieved, which cannot be nullified.

33. The petitioners have no dispute with regard to the legislative competence of the Parliament. The dispute is only with regard to the alleged intrusion into the right to privacy. Petitioners have attempted to equate the **right to privacy** with **right to life** guaranteed under the Constitution of India and have sought to picturize the same as part of fundamental right, contending that there is violation of Article 19(1)(g). Article 19 (1) (g) of the Constitution of India stipulates that all citizens shall have the right to practise any profession or to carry on any occupation, trade or business. In what way the impugned notice issued by the respondent Dept. violates the fundamental right of the petitioners to conduct business/trade is not discernible; more so when the provision of law is applicable not only to the petitioners herein, but also to all other banking/non-banking

financial institutions having a bearing on the tax liability of the depositors. That apart, in the words of the Honourable Supreme Court as per the decision in ***Govind vs. State of Madhya Pradesh and another* (AIR 1975 SC 1378= (1975) 2 SCC 148)**, even assuming that the ***right to privacy*** is itself a fundamental right, such fundamental right must be subject to restriction, on the basis of compelling 'public interest'. There is no prohibition on the State in gathering information for preventing tax evasion and curb black money. The petitioners cannot field the wrongdoers, if any, and unless necessary information is furnished, the data collection will become impossible and no proceedings can be pursued against wrongdoers to guard economy of the country.

34. A Constitution Bench of the Apex Court has held in ***Vivian Joseph Ferreira and another vs. Municipal Corporation of Greater Bombay and others* [(1972) 1 SCC 70]** that, taxing statute will become valid, if it is within the legislative competence, if it is for public purpose and further, if it does not violate the fundamental right guaranteed under Part III

of the Constitution of India. All the said three requirements are satisfied in the instant case and as such, the challenge raised by the petitioners cannot be held good; more so when the Apex Court has made it clear in **R.K. Garg vs. Union of India** [(1981) 4 SCC 675], that the laws relating to economic activities should be viewed with greater latitude, than the laws touching civil rights, such as freedom of speech or religion etc. Further, in view of the law declared by the Apex Court in **Punjab Distilling industries Ltd. vs. Commissioner of Income Tax, Punjab** [AIR 1965 SC 1862], constitutional validity of an Act can be supported on the ground that it was enacted to prevent evasion of tax. The amendment brought about as per the Finance Act 1995, adding the words '**enquiry or**' and also the 'second proviso' is quite incidental to the 'main provision' and hence beyond challenge.

35. In testing the validity of a statute, particularly fiscal statute, the Court has to maintain more self-restraint, as held in **Government of Andhra Pradesh vs. Laxmi Devi** [(2008) 4 SCC 720]. The apprehension expressed from the part of the

petitioners that, if the information as sought for is given to the respondent Department, there is a chance for misuse/abuse, is without any basis. The confidentiality of the information gathered by the Income Tax Department is well taken care of by Section 138 of the Income Tax Act, as discussed already.

36. The further contention of the petitioners that conferring of absolute powers on the officers of the Government is rather arbitrary, is not correct as such. With reference to the provisions of the KGST Act, particularly Section 29A, a Division Bench of this Court in **P.K. Aboobacker & other vs. State of Kerala** [1979(44) STC 250 Kerala] has held that a mere possibility of abuse by the official on whom power is conferred is not a ground to strike down the statutory provision.

37. It is well settled that the 'taxation entry' confers powers upon the legislature to legislate for matters 'ancillary or incidental', including the provisions for evasion of tax. This has been made clear by a Constitution Bench of the Apex Court in **Commissioner of Commercial Tax vs. R.S. Jhavar** [(67) 20 STC 453]. This Court finds that the petitioners have not

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succeeded in establishing any constitutional infirmity, to hold the statute/amendment as ultra vires to the Constitution. Accordingly, interference is declined and all the writ petitions are dismissed.

**P.R.RAMACHANDRA MENON
JUDGE**

kp/lk