

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY, THE 25TH DAY OF JUNE 2018 / 4TH ASHADHA, 1940

W.A.No.1180 of 2018

AGAINST THE JUDGMENT IN W.P(C).No.10675/2018-H DATED 11-06-2018
OF HIGH COURT OF KERALA.

APPELLANT(S)/ PETITIONER:-

MAILAKKATTU VARGHESE UTHUP, S/O.THOMAS VARGHESE,
MALIAKKATTU HOUSE, PUTHUPALLY P.O., KOTTAYAM DISTRICT-686011.

BY ADVS.SRI.JOSEPH MARKOS (SENIOR ADVOCATE)
SMT.PREETHA S.NAIR

RESPONDENT(S)/ RESPONDENTS:-

1. THE PRINCIPAL COMMISSIONER OF INCOME TAX,
C.R.BUILDING, I.S.PRESS ROAD, KOCHI-682018.
2. THE ASSISTANT COMMISSIONER OF INCOME TAX,
CENTRAL CIRCLE-2, ERNAKULAM, ALFA LIZA BUILDING,
NEAR AMBADY CHAMBERS, CHITTOOR ROAD, OPP. SRV LP SCHOOL,
KOCHI-682011.
3. DIRECTOR GENERAL OF INCOME TAX (INV), S.A.ROAD, KOCHI-682020.
4. BUREAU OF IMMIGRATION (MINISTRY OF HOME AFFAIRS),
COCHIN INTERNATIONAL AIRPORT LTD., KOCHI-682311.
5. THE REGISTRAR OF COMPANIES,
KOCHI-682037.

R1 TO R3 BY STANDING COUNSEL FOR GOVERNMENT OF INDIA (TAXES)
SRI.JOSE JOSEPH.

R4 & R5 BY ASSISTANT SOLICITOR GENERAL OF INDIA SRI.N.NAGARESH.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 25-06-2018,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. Vinod Chandran & Ashok Menon, JJ.

W.A.No.1180 of 2018

Dated, this the 25th day of June, 2018

JUDGMENT

Vinod Chandran, J:

The appellant is a person against whom a red corner notice was issued through Interpol, upon which he returned to India and was arrested from the Cochin International Airport by the investigating agency. The appellant is on bail in the criminal case booked by the Central Investigation Bureau. The bail conditions provided for surrender of the Passport and restriction in leaving India. Later, the appellant was before the Sessions Court for waiving the conditions, which was allowed. Consequently the Passport was released by the Sessions Court and the appellant had gone abroad and returned within the time stipulated. Again the appellant on alleged renal complaint, which has to be treated in Abu Dhabi (at which place he has a valid insurance), approached the High Court with an application for relaxation of the conditions. This Court by Exhibit P5 granted a relaxation of six months insofar as the restriction was concerned and relegated the appellant to the Sessions Court. The learned Sessions Judge, by Exhibit P7

permitted the appellant to leave the country for 45 days. Exhibit P7 was dated 15.03.2018.

2. The appellant then was confronted with Exhibit P8 order dated 05.03.2018 under Section 230 of the Income Tax Act, 1961 [for brevity "IT Act"]. The appellant had already been issued with an order at Exhibit P13 dated 14.08.2017 under Section 179 of the IT Act. The order at Exhibit P8 was issued in view of the outstanding liability of the appellant in his individual capacity for the assessment years 2009-10 to 2015-16. The total liability came to Rs.22,66,713/-. The appellant submits that the said demand has been stayed, as seen from the endorsements in Exhibit P11 and P19; on payment of 20% of the demand. The tax and penalty as demanded for the assessment years 2009-10 to 2015-16 having been stayed, there is no demand subsisting on the appellant which alone could enable the officer to act under Section 230 of the IT Act, is the submission of the learned Senior Counsel.

3. With respect to Exhibit P13 order, though it was issued on 14.08.2017, it was not served on the appellant. The appellant on coming to India on 29.03.2017, was apprehended from the Airport and was in judicial custody when proceedings under

Section 179 was initiated. The appellant had absolutely no notice of the same. The learned Senior Counsel would point out that the demand under Section 179, as seen from Exhibit P13, is with respect to a Company in which the appellant was a Director. The appellant had resigned from the Directorship in the year 2009 itself and the same is evidenced by the documents before the Registrar of Companies.

4. The learned Standing Counsel for the Department points out that the criminal case also originated from a raid conducted by the Income Tax Department in the premises of the Company. About Rs.4.86 crores was recovered in liquid cash from the premises at the time of raid. Notices were issued to the Directors of the Company and the proceedings were finalized for assessment, on which tax and penalty is due to the Revenue. There has been no challenge made to the assessment or penalty orders passed against the Company. In the case of the Company, as is seen from Exhibit P13 order, after adjustment of the amounts recovered as cash from the premises of the Company, there are still huge amounts due as tax and penalty for the years 2009-10 to 2015-16, coming to almost Rs.400 crores. It is also submitted that

the resignation of the appellant made in the year 2009, is an argument set up to get over the liability as has been imposed on the Company. It is pointed out that the resignation in the year 2009 was intimated to the Registrar of Companies only in the year 2011 by an officer authorized in the year 2011 to file such returns. The same was an afterthought and cannot be relied on to relieve the appellant of the liability as against the Private Limited Company. Yet again, it is pointed out that even assuming for argument sake that the appellant had resigned in the year 2009, even then there is huge liability for the years 2009-10 and 2010-11 when the appellant was admittedly a Director of the Company. There is more than Rs.24 crores due as tax and penalty for the said years after adjustment of the liquid cash recovered from the premises of the Company. With respect to the order under Section 230, the same is sought to be sustained on the basis of the words employed in the Section, which does not necessarily speak of a valid demand existing. An order could be issued even when a tax liability may be imposed on the assessee.

5. The learned Senior Counsel for the appellant relies on the decision in ***I.T.O. v. Mrs.A.Sattler*** [(1973) 92 ITR 576] to

contend that there could be no restrictive orders passed, under Section 230 when there is no subsisting demand for tax from the assessee. It is also contended that the instructions issued by the Central Board of Director Taxes (CBDT), for Tax Clearance Certificate under Section 230, speaks of such certificates being insisted upon only in the context of there being direct tax arrears exceeding Rs.10 lakhs outstanding against an assessee which has not been stayed by any other authority. It is also pointed out that 'tax due' for the purpose of Section 179 includes penalty, since the Explanation under Section 179 was brought in only in the year 2013. For the assessment year prior to that, the provision under Section 179 would have to be taken as it existed then. The learned Senior Counsel also places before us a decision of the High Court of Allahabad in ***Pratibha Garg v. Commissioner of Income Tax [(2014) 264 CTR 520 (All.)]*** to further buttress this point.

6. At the outset, whether the Explanation brought under Section 179 would apply to any recovery, for assessment years prior to its introduction, need not now be looked at, since even otherwise there is due as tax, more than 16 crores for the assessment year 2010-11 as against the Company as seen from

Exhibit P13 order. It is the submission of the learned Senior Counsel that the appellant is a person who was once allowed to go abroad, who has returned promptly within the time stipulated and even now his intention is to get medical assistance from the country in which he has a valid insurance policy. However, we do not see anything produced to substantiate the claim that the insurance as taken out by the appellant from Abu Dhabi restricts indemnification only insofar as the medical treatment carried out within that country. The appellant requires travel abroad for the purpose of availing the benefit as per the insurance policy; the terms of which have not been revealed in the writ petition.

7. ***Mrs.A.Sattler***, according to us has no application looking at the facts of the above case; which are quite distinct. Therein the assessee was the deceased husband of the respondent before the Supreme Court. After the death of the assessee, his wife wanted to go abroad to join her daughter, for which she applied for income-tax clearance certificate. The certificate was refused for reason of the arrears due from her late husband. The respondent moved the High Court which found that there was no valid assessment on the assessee. It was hence the Supreme Court

affirmed the order of the High Court interfering with the order refusing tax clearance certificate.

8. As for the contention regarding the circular of the CBDT, it is to be noticed that one of the circumstances under which section 230 (1A) was found to be possible of invocation, in the circular itself, was:

“where the person is involved in serious financial irregularities and his presence is necessary in investigation of cases under the Income-tax Act or the Wealth-tax Act and it is likely that a tax demand will be raised against him.”

The appellant squarely comes under the said contingency.

9. We would not go into the other issues raised before us, since we find that the learned Single Judge had remanded the matter to the officer who passed the orders under Sections 230 and 179. The learned Single Judge found that the appellant was not heard in both the said proceedings. The Department's argument that notice was issued but none turned up, was also noticed. The fact that the appellant was detained when Section 179 proceedings were initiated and proceeded with, was also taken note of. Considering all these circumstances, the order under Section 179 was quashed and the appellant was directed to be re-heard within a period six weeks. In the meanwhile, the proceedings under Section

230 were also directed to be done afresh. However, Exhibit P8 was not interfered with only to ensure that in the meanwhile the appellant does not go abroad and in the process take flight. The learned Single Judge also directed the officer to consider whether Exhibit P8 has to be sustained or varied on a review.

10. We are of the opinion that there could be no interference caused to the directions passed by the learned Single Judge. However, we notice that a time frame of six weeks has been granted for conclusion of the proceedings under Section 179 and further time of four weeks with respect to an order under Section 230. In such circumstances, we would issue specific orders fixing the time within which a notice has to be served, appearance has to be made and orders passed. We are also of the opinion that Exhibits P13 and P8 orders have to be quashed; but, however, with a restriction that the order not to travel outside India as is seen from Exhibit P8 shall continue till fresh orders are passed. It is so ordered. The appellant is directed to appear before the 2nd respondent on 29.06.2018, on which date he shall be issued with a fresh notice under Section 179 and under Section 230. The appellant shall file written objections, if required, and shall appear

on 06.07.2018 for a hearing. The 2nd respondent would be entitled to fix another date of hearing, within one week itself, if he has any personal inconvenience. The matter shall be heard on the hearing date fixed by this Court or on the date fixed by the officer hearing the matter, and a written order passed within two weeks; both under Sections 179 and 230. We make it clear that by directing an order to be passed, we are not for a moment directing invocation of the provisions ie: of Sections 230 and 179. If the officer feels that the travel of the appellant need not be restricted, the officer would be entitled to say so, but on reasoning given. In passing an order, the officer should take note of the fact that properties of the appellant are attached. The officer would also, in adjudicating the issue of permitting the appellant's travel abroad, verify whether the properties already attached would be sufficient to satisfy the demands made against the appellant. The Registrar of Companies who has been impleaded as the additional respondent in the writ petition and appearing in the party array of the appeal shall provide all necessary assistance to the 2nd respondent and furnish documents if any of the private limited Company in which the appellant is said to be a Director.

With the above observations, the Writ Appeal would stand disposed of. It is made clear that the observations made in the aforesaid judgment need not regulate the adjudication by the 2nd respondent since they are only *prima facie* observations, and the appellant would be entitled to raise all his contentions before the 2nd respondent. Writ Appeal disposed off as above.

Sd/-
K.Vinod Chandran
Judge

Sd/-
Ashok Menon
Judge

vku/-

[true copy]