

VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

Wednesday, the 12th day of June 2024 / 22nd Jyaishta, 1946

CRL.MC NO. 2516 OF 2024

CRIME NO.0/0 OF VALANCHERY POLICE STATION, MALAPPURAM

CMP 2324/2022 OF JUDICIAL MAGISTRATE OF FIRST CLASS, TIRUR

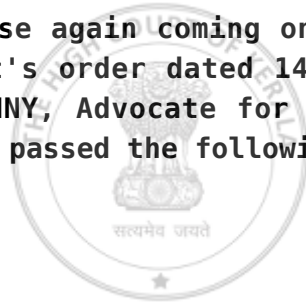
PETITIONER(S)/RESPONDENTS 2 & 3:

1. ANKUSH, AGED 39 YEARS, POTTAKKAL HOUSE, VENGOLA, ALLAPARA(PO), PERUMBAVOOR, ERNAKULAM, PIN-683556
2. DEEPA ANKUSH, AGED 37 YEARS, W/O ANKUSH, POTTAKKAL HOUSE, VENGOLA, ALLAPARA (PO), PERUMBAVOOR, ERNAKULAM, PIN - 683556

RESPONDENT(S)/PETITIONER AND RESPONDENT 1:

1. INCOME TAX DEPARTMENT, REP DEPUTY DIRECTOR OF INCOME TAX(INVESTIGATION), 8 TH FLOOR AAYAKAR BHAVAN, KOZHIKODE, PIN - 673001
2. STATE OF KERALA, REPRESENTED BY INSPECTOR OF POLICE, VALANCHERY POLICE STATION, PIN - 676552

This Criminal Misc. case again coming on for orders, upon persuing the petition and this Court's order dated 14.03.2024, upon hearing the arguments of SRI. BONNY BENNY, Advocate for the petitioners and PUBLIC PROSECUTOR for R2, the court passed the following:



BECHU KURIAN THOMAS, J.

**Crl.M.C Nos.1742, 2495, 2516 of 2024
& 7060 of 2023**

Dated this the 12th day of June, 2024

REFERENCE ORDER

The issue that requires resolution, which is common in all these cases, is about the procedure to be adopted when currency notes, seized by the police are produced before or reported to the Magistrate and divergent claims arise for interim custody under section 451 or 457 of the Code of Criminal Procedure 1973 (for short Cr.P.C). The individual from whom the currency notes are seized, claims interim custody on the basis of ownership while the Income Tax Department claims custody for the purpose of verification and assessment.

2. The facts involved in these four cases are not required to be stated herein since the question to be resolved is legal in nature. However, it has to be mentioned that in Crl.M.C.No.1742/2024 an amount of Rs.140 lakhs was seized from two persons while they were travelling in a train and in Crl.M.C.No.7060/2023 an amount of Rs.19.95 lakhs was seized by the Excise Department. In Crl.M.C.No.2495/2024 and Crl.M.C.

No.2516 of 2024 an amount of Rs.1.85 crores was seized by the police at Valanchery, from under the carpet of a car while it was being transported from Salem. Thus, large amounts of currency notes were seized from individuals by the police and under section 102 of the Cr.P.C, they have been intimated/produced before the jurisdictional Magistrates in accordance with law.

3. I have heard Sri. A.R.L. Sundaresan, the learned Additional Solicitor General of India assisted by Sri.Navaneeth N.Nath, on behalf of the Income Tax Department, Sri. P.Reghunath, the learned counsel for the petitioner and Sri. Renjith T.R., the learned Public Prosecutor. I have also heard Sri. Vishnu Narayanan and Sri. Bony Benny on behalf of some of the petitioners.

4. At the outset itself, it needs to be borne in mind that in a proceeding under Section 451 or Section 457 Cr.P.C, the Court only examines the person who is best entitled to the possession of the property and at that stage, cannot settle any right to ownership. Thus in a petition for interim custody, what must weigh with the court is not just about the ownership but who should be the rightful claimant as a temporary measure. Factors like the safety of the property, and the possibility of retrieving it without damage are all obvious considerations and the arrangement is done only for the preservation of the property until the conclusion of the trial. Reference to the decision in **V.Prakashan v. K.P.**

Pankajakshan and Another 1985 (Cri. LJ 951) is relevant in this context.

5. During the course of arguments, the learned counsel placed for consideration the decision in **Union of India v. State of Kerala and Another** (2022) 443 ITR 117) decided on 10.01.2022. wherein a learned Single Judge of this Court held that the Magistrate has to order release of the currency notes to the Income Tax Department to enable the parties to undergo the procedure contemplated under Sections 132A, 132B or 153A of the Income Tax Act, 1960 (for short the 'IT Act'). It was also observed that even if the amount is released to the income tax department, it is possible for the individual to claim the amount under the IT Act. On the other hand, if the amount is released to the individual it may cause difficulties in implementing the provisions of the Income Tax Act, observed the learned Single Judge. On the above basis the Court directed the currency notes seized by the police to be released to the Income Tax Department on certain conditions.

6. However, another learned Single Judge of this Court in **R.Ravirajan and Others v. State of Kerala** (2023 SCC Online Ker. 8444) took a contrary stance and held, after a detailed analysis, that, Section 132A of the Income Tax Act 1960 would not empower the department to requisition the Magistrate under Section 451 Cr.P.C, since the revenue can apply to the court in whose custody money remains, only for meeting the tax due from an assessee. It was further held that such power can be

exercised only when the tax has already been determined to be due after a completed assessment under the Act. The learned Single Judge also observed that there is no provision in the IT Act that prohibits a person from carrying currency notes. The judgment in **Union of India's** case (supra) was distinguished in **Ravirajan's** case (supra) by observing that the said judgment applied to the facts of the said case alone.

7. Thus there are two conflicting decisions of two learned Single Judges of this Court. Nevertheless, in **Ravirajan's case** (supra) the Department filed a special leave petition before the Supreme Court as SLP No.16409/2023 which was dismissed by order dated 15.12.2023, in the following words.

“Heard the counsel and Mr. Vikramjith Banerjee and Additional Solicitor General appearing for the petitioner at length. We are not inclined to interfere with the impugned judgment and order.

The Special Leave Petition is accordingly dismissed. Pending applications, if any, shall also stand disposed of.”

8. If an order disposing of a special leave petition is by a non-speaking order, the principle of merger, is not attracted. The order refusing leave will not be substituted in place of the order under challenge. Reference to **Kunhayammed and Others v. State of Kerala and Another** [(2000) 6 SCC 359] and **Khoday Distilleries Ltd. and Others v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd., Kollegal** [(2019)

4 SCC 376] are appropriate.

9. In view of the above principle, since the dismissal of SLP preferred against the judgment in **Ravirajan's** case (supra) is not by a speaking order, the doctrine of merger does not apply and the judgment of the learned Single Judge is not substituted by the Supreme Court order. As noted earlier, the decision in **Ravirajan's** case (supra) had not declared the law laid down in **Union of India's** case (supra) as *per incuriam* but had only observed that it was rendered on the facts of that case. Therefore both decisions continue to govern the field, which can lead to confusion, especially before the trial courts where such claims for custody regularly arise.

10. Apart from the above referred two judgments another learned Single Judge of this Court had an occasion to consider a case relating to a notice issued under section 148 of the IT Act in respect of cash seized by the Police and produced before the Magistrate. In **Muhammed v. Assistant Commissioner of Income Tax** [2024 (2) KLT 570], it was observed that the *production of currency notes in court* "does not take away the fact that the department had initiated proceedings under Section 132A of the 1961 Act to requisition the amount from the Station House Officer, Nilambur Police Station." (emphasis supplied). The above observation hints at the availability of the power of requisition under Section 132A of the IT Act to requisition the assets from the custody of the

Station House Officer.

11. Further, in the decision in **Abdul Khader v. Sub Inspector of Police and Others** (1999) 240 ITR 489 (Ker), there is an observation that, though 'the officer or authority' in section 132A of the IT Act will not take in the court, "it is open for the Income Tax Officer to apply to the Magistrate for the release of the assets in their favour." Of course, the aforesaid judgment was noticed by the learned Single Judge in **Ravirajan's** case (supra) but did not follow the aforementioned observation.

12. The issue involved in the cases on hand is of significance, especially since, large amounts of currency notes are being seized from individuals, despite the policy of the legislature to reduce unaccounted money transactions. Of course, the court is mindful that no provision was brought to its knowledge which restricts the right of an individual to hold currency notes. Be that as it may, when the seizure is effected by a police officer, law enjoins upon him a duty to report to the jurisdictional Magistrate as per section 102(3) Cr.P.C. The currency notes need not necessarily be transmitted to the court, but can even be retained and a report of seizure be given to the Magistrate. When the currency notes are not produced but its seizure alone is reported, an application for custody is to be filed under section 457 Cr.P.C, while, when the currency notes are actually produced in court, the application ought to be under section 451 Cr.P.C. The issue thus relates to the entitlement to claim interim custody of

the currency notes from the court. Incidentally, a question also arises whether, if in the meantime, a requisition is issued under section 132A of the IT Act, can it not enable those Officers or even the investigating officer to seek interim custody of the currency notes from the Court.

13. In this context, it is necessary to mention that certainty of law is an essential facet of the rule of law. Certainty renders efficacy for compliance and nurtures continuity. Ambiguity can create confusion and prejudice. Hence the doctrine of precedents has to be followed without dilution. When two co-ordinate Benches have taken differing views, it is not open for another co-ordinate Bench to pick one amongst the two as more appropriate. Such a course will lead to further confusion and ambiguity. In **Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj and Others v. State of Gujarat and Others** [(1975) 1 SCC 11] it was held that even when the strength of two differing Benches consisted of the same number of Judges, it was not open to one Division Bench to decide the correctness or otherwise of the views of the other.

14. Due to the divergent views on the subject it is not proper for this Court to pick and choose one amongst the two and decide the correctness. Law mandates that in such circumstances the issue be considered by a larger Bench. Further, both judgments have not considered the question regarding the power of the income tax department to requisition the money under section 132A of the IT Act from the Police

Officer and thereafter seek custody under section 451 or 457 of Cr.P.C, as the case may be. Thus, this Court is of the view that an authoritative pronouncement is required.

15. Hence, I deem it appropriate to refer to a Division Bench for an authoritative pronouncement on the correctness of the decisions in **Union of India v. State of Kerala and Another** (2022) 443 ITR 117) and that of **R.Ravirajan and Others v. State of Kerala** (2023 SCC Online Ker. 8444). The Division Bench may also consider the question regarding the authority of the income tax department to issue a requisitioning order under section 132A of the IT Act and thereafter to claim custody from the court either under section 451 Cr.P.C or 457 Cr.P.C.

The Registry shall place these cases at the earliest, before the Hon'ble the Chief Justice, for appropriate orders for constituting the Division Bench.

Ordered accordingly.

Sd/-

**BECHU KURIAN THOMAS
JUDGE**

vps